IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. 978-CR-2015
	:	
SCOTT BARRY RHODES,	:	
	:	
Defendant	:	

Seth E. Miller, Esquire — Counsel for the Commonwealth
Asst. District Attorney

Matthew J. Rapa, Esquire — Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. - June 27, 2017

Defendant, Scott Barry Rhodes, (hereinafter "Defendant") brings before this Court a "Suppression Motion" seeking to suppress his blood, and the toxicology analysis thereof, as the fruit of a poisonous tree. Because we find that Defendant gave voluntary and knowing consent to have his blood drawn, we will deny Defendant's motion.

FACTUAL AND PROCEDURAL HISTORY

On May 22, 2015, Defendant was travelling on Bridge Street south of State Route 209 in the borough of Weissport in Carbon County when he encountered a regulatory checkpoint operated by the Pennsylvania State Police. After he entered the checkpoint, Defendant was ordered by Trooper Matthew Borger to pull over to the side of the road. After complying with this directive, Trooper

Borger ordered Defendant to exit his vehicle and asked him to perform several field sobriety tests. While Defendant was performing these tests, the trooper observed several signs of impairment. Trooper Borger then asked Defendant if he was taking any medications. Defendant replied that he was taking oxycodone due to back pain, and that he had a prescription for the medication. At that time, the trooper took Defendant into custody and escorted him to Gnaden Huetten Memorial Hospital for a blood draw. Defendant was read the PennDOT DL-26 form advising him of his implied consent and O'Connell warnings. Defendant then consented to the blood draw.

Defendant was ultimately charged with the follow offenses:

1. DUI: Controlled Substance - Impaired Ability - 1st Offense, 75 Pa. C.S.A. §3802(d)(2)(ii);
2. Careless Driving, 75 Pa. C.S.A. §3714(a); and
3. Reckless Driving, 75 Pa. C.S.A. §3736(a).

A preliminary hearing was held before Magisterial District Judge Edward M. Lewis on September 2, 2015. Judge Lewis dismissed count one while counts two, three, and four were bound over to this Court.

On July 7, 2016, Defendant filed a "Suppression Motion" averring that the Commonwealth's search and seizure of Defendant's blood was unconstitutional pursuant to the Fourth Amendment of the United States Constitution as interpreted by the United States

Supreme Court decision in Birchfield v. North Dakota, -- U.S. --, 136 S.Ct. 2160 (2016). Defendant therefore seeks to suppress his blood and the toxicological analysis thereof.

A hearing on Defendant's motion was scheduled for September 9, 2016. When called for hearing on that date, counsel stipulated to the facts of the case as recited hereinabove and entered Trooper Borger's affidavit into evidence as a joint exhibit. It was agreed that no additional testimony would be presented for the Court's consideration. Defendant's counsel filed a post-hearing brief in support of the suppression motion. No response brief was filed on behalf of the Commonwealth.

DISCUSSION

The sole issue before this Court is whether Defendant's consent to the blood draw was voluntary or coerced by the threat of enhanced criminal penalties included in the DL-26 form.

The Fourth Amendment of the United States Constitution prohibits the government from performing unreasonable searches and seizures. U.S. Const. amend. IV; Pa. Const. art. I, §8. A blood draw is considered a search pursuant to the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution. Birchfield v. North Dakota, 136 S.Ct. 2160, 2173 (2016); Commonwealth v. Smith, 77 A.3d 562, 566 (Pa. 2013).

Generally, a search and/or seizure is deemed unreasonable unless a valid search warrant is obtained from an independent

judicial officer based on a sufficient showing of probable cause. Commonwealth v. Gary, 91 A.3d 102, 107 (Pa. 2014). However, a warrantless search or seizure may still be constitutional if an established exception applies. Commonwealth v. Evans, 153 A.3d 323, 327 (Pa. Super. 2016). The exception at issue here is actual or implied consent.

The Commonwealth bears the burden of proving that Defendant voluntarily consented to the warrantless blood draw by a preponderance of the evidence. Pa.R.Crim.P. 581(H); Commonwealth v. Wallace, 42 A.3d 1040, 1047-48 (2012). To prove voluntary consent, the Commonwealth must show that Defendant's consent was free of coercion, duress, stealth, deceit, or misrepresentation. Commonwealth v. Smith, 77 A.3d 562, 573 (2013). Whether Defendant's consent was voluntary is an objective, totality of the circumstances analysis. Id.

At this juncture, it is important to note that the facts of the case at bar are substantially similar to those of Commonwealth v. Banavage, No. 509-CR-2014 (C.P. Carbon 2017), a case decided earlier this year by the Honorable Roger N. Nanovic, President Judge of this Court. In Banavage, the defendant was stopped by police, field sobriety tests were administered, and the defendant was taken to a local hospital for a blood draw. The defendant was then read the PennDOT DL-26 form, she consented to the blood draw, and the analysis of her blood revealed the presence of a metabolite

of a controlled substance. Since the DL-26 warning provided that the defendant would only be exposed to the enhanced criminal penalties set forth in section 3804(c) of the Vehicle Code if she refused the blood draw and was later convicted of violating 72 Pa.C.S.A. §3802(a)(1), President Judge Nanovic reasoned that the enhanced criminal penalties did not apply to the defendant because she could not be convicted under section 3802(a)(1) as the enhanced penalties apply only to motorists convicted of driving under the influence of alcohol, general impairment, and there was no indication she had been drinking. Motorists, such as Defendant, whose violation consists of having any amount of a metabolite of a prohibited controlled substance in their blood or whose impairment is caused by any drug or combination of drugs, are automatically subject to the penalties described in section 3804(c). As a result, the enhanced criminal penalties provision included in the DL-26 form was found to be harmless error which likely did not impact the defendant's decision-making process.

Since the enhanced penalties provision of the DL-26 form cannot be said to apply to Defendant, we must now determine whether Defendant's consent was coerced based on the remainder of the DL-26 form. To do so, we must take an objective view of the totality of the circumstances. Specifically, we must consider:

> 1. The presence or absence of police excesses; 2. Whether there was physical contact; 3. Whether police directed the citizen's movements; 4. Police demeanor and manner

> of expression; 5. The location of the interdiction; 6. The content of the questions and statements; 7. The existence and character of the initial investigative detention, including its degree of coerciveness; 8. Whether the person has been told that he is free to leave; and 9. Whether the citizen has been informed that he is not required to consent to the search.

Commonwealth v. Kemp, 961 A.2d 1247, 1261 (Pa. Super. 2008).

Initially, we note that no testimony was taken at the suppression hearing in this case and, as a result, we do not have any evidence to make a determination regarding the presence of police excesses and police demeanor, however there is sufficient evidence of record to analyze each of the remaining factors. As noted hereinabove, the initial interaction between Defendant and Trooper Borger took place at a DUI checkpoint where Defendant was asked to pull over to the side of the road and perform a series of field sobriety tests. Subsequently, Defendant was taken into custody and escorted to Gnaden Huetten Memorial Hospital. At the hospital, Defendant was read the DL-26 form, he consented, and his blood was drawn. Based upon these facts, we are able to determine that there was physical contact between Trooper Borger and Defendant, and that the trooper directed Defendant's movements once he was in custody. Additionally, we know that while the initial stop took place on a public roadway, the search and seizure took place at the hospital while Defendant was in custody and not readily free to leave.

He did, however, have the right to refuse the blood draw. Moreover, there is no evidence of duress, or that Defendant's blood was drawn for medical purposes. Based on these circumstances, we find that a reasonable person in Defendant's place could give voluntary consent to a blood draw.

It is also important to note that consent must be knowing as well as voluntary. Smith, 77 A.3d at 578. To be knowing, the defendant must be aware that the evidence seized may be used against him in a subsequent criminal prosecution. Id. While no such warning was ever expressly relayed to Defendant, we are satisfied that Defendant knew, or should have known, that his blood would be used in a subsequent criminal proceeding since he was under arrest at the time of the blood draw.

In sum, it is the opinion of this Court that Defendant made a mindful choice to consent to having his blood drawn and face a mandatory term of imprisonment of not less than seventy-two (72) consecutive hours, pay a fine of not less than one-thousand dollars ($1,000) nor more than five-thousand dollars ($5,000), attend an alcohol highway safety school, and comply with all drug and alcohol treatment requirements rather than potentially have his driver's license suspended for up to one year. Since Defendant knew,

or should have known, that the enhanced criminal penalties included in the DL-26 form did not apply to him because he could not be convicted of violating 75 Pa. C.S.A. §3802(a)(1), the fact that it was included in his warning represented harmless error. Under the totality of the circumstances of this case, there is no evidence that the partial inaccuracy of the DL-26 warning influenced Defendant's decision to submit to a warrantless blood test. Likewise, with regard to due process issues, we find no violation because Defendant was under arrest at the time of the blood draw and must have known that his blood, and an analysis thereof, would be used against him in a subsequent criminal proceeding.

CONCLUSION

For the foregoing reasons, Defendant's "Suppression Motion" will be denied and we will enter the following

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ORDER OF COURT

AND NOW, to wit, this 27th day of June, 2017, upon consideration of Defendant's "Suppression Motion" and the brief in support thereof, and following our review of the evidence of record as jointly submitted by the above referenced counsel, and in accordance with our Memorandum Opinion bearing even date herewith, it is hereby

ORDERED and DECREED that Defendant's "Suppression Motion" is **DENIED** and that this matter shall proceed to a non-jury trial before the undersigned on August 4, 2017 at 1:15 p.m., in Courtroom No. 3 of the Carbon County Courthouse at Jim Thorpe, Pennsylvania.

BY THE COURT:

Steven R. Serfass, J.

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