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COMMONWEALTH OF PENNSYLVANIA V. AUSTIN LINE

This opinion is continued from the last issue (September 9, 2016).



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INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, for the purposes of obtaining a Certificate of Incorporation of a proposed business corporation to be organized under the provisions of the Pennsylvania Business Corporation Law of 1988, approved December 21, 1988, P.L. 1444, No. 177, as amended.

The name of the corporation is INDIAN ACRES FARM MANAGEMENT, INC.

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9/16

*Continued from last issue (9/9/2016)*DISCUSSION: EXCLUSIONARY RULE

“The exclusionary rule originated to deter unlawful police practices by depriving law enforcement officials of the benefits derived from using unlawfully obtained information.” **Commonwealth v. Brown**, 368 A.2d 626, 630 (Pa. 1976) (citing **Mapp v. Ohio**, 367 U.S. 643 (1961)). The Commonwealth argues the exclusionary rule is inapplicable to the current case because the police officer was acting in accordance with a then valid statute.⁵ See Commonwealth’s Supplemental Brief/Response to Motions Pursuant to *Birchfield v. North Dakota* and *Beylund v. Levi*, Director, North Dakota Department of Transportation at 1, 3-7. In making this argument the Commonwealth relies heavily on **Illinois v. Krull**, 480 U.S. 340, 345-46, 360 (1987), which found the police officer acted “in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search” and reversed the lower court’s holding that the evidence had to be suppressed. However, the Supreme Court resolved the **Krull** case using **United States v. Leon**’s⁶ analysis of the exclusionary rule and the desire to deter police misconduct. See **Krull**, 480 U.S. at 349-60.

Prior to **Birchfield**, police officers were not required to obtain a search warrant before asking a defendant to submit to a blood test. Instantly, since police officers were acting in compliance with the statute as it was then enacted, and not in bad faith, **Leon**’s aim of deterring police misconduct is inapplicable in the current case.

Furthermore, Pennsylvania has explicitly held **Leon**’s good faith exception to the exclusionary rule inapplicable because of the strong privacy rights guaranteed by the Pennsylvania Constitution. See **Commonwealth v. Edmunds**, 586 A.2d 887, 897-99, 905 (Pa. 1991). As **Birchfield** mentioned, a blood draw implicates significant privacy concerns.⁷ Pennsylvania places a greater emphasis on an individual’s privacy rights and less on police deterrence; thus, extending the good faith exception to the exclusionary rule in this

⁵ Prior to **Birchfield**, under 75 Pa. C.S.A. § 1547(a), a police officer was not required to obtain a search warrant before asking an individual suspected of committing a DUI offense to submit to a chemical test. By driving on a Pennsylvania roadway an individual was considered to have impliedly consented to the test. § 1547(a)

⁶ 468 U.S. 897 (1984).

⁷ **Birchfield**, 136 S. Ct. at 2178

instance fails to further the aims of Article I, Section 8 of the Pennsylvania Constitution.

Nothing in this Court's analysis is meant to suggest or imply that law enforcement officers acted inappropriately in securing the blood tests pursuant to the Implied Consent statute. To the contrary, law enforcement officers were diligently fulfilling their duty to follow and apply the law. However, the **Birchfield** decision has redefined the parameters within which blood tests may be obtained.

DISCUSSION: EXIGENT CIRCUMSTANCES

Directly relevant to this case is **Birchfield's** analysis and holding on implied consent laws.⁸ The United States Supreme Court found the criminal penalties imposed by the implied consent laws vitiated a person's ability to consent to a blood draw, thus violating the Fourth Amendment. **Id.** at 2186. The Court explained "[i]t is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." **Id.** at 2185. While the Court struck down the criminal penalties, the Court explained its opinion should not "be read to cast doubt [on the civil penalties and evidentiary consequences]" for declining the blood test. **Id.** Finally, in situations such as those of Petitioner Beylund where "consent [to a blood test] was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests[.]" the Court has left state courts with the task of determining if the defendant's consent to the blood test was actually voluntary. **Id.** at 2186.

Unlike North Dakota and Minnesota, Pennsylvania does not have a separate refusal statute. However, **75 Pa. C.S.A. § 1547(b)** allows the Commonwealth to impose criminal penalties, such as a mandatory sentencing enhancement, on a person who refuses to undergo a chemical test.⁹ In essence, a person charged under the general impairment subsection of the DUI statute who refuses the chemical test receives the same punishment as a person found guilty of DUI

⁸ Both North Dakota's and Minnesota's statutes made refusing to submit to a BAC test a criminal offense. **Id.** at 2170-72.

⁹ "[I]f the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties)." **§ 1547(b)(2)(ii).**

highest blood alcohol level.¹⁰ The statute also provides for civil penalties such as a license suspension and presentation of evidence at trial of the Defendant's refusal.¹¹ The aforementioned civil and criminal penalties, contained in the Pennsylvania Department of Transportation's DL 26 form,¹² must be provided by a police officer to each defendant arrested for a DUI offense.¹³

Post-**Birchfield**, the sentencing enhancements contained in **75 Pa. C.S.A. § 3804(c)**, and the reference to the criminal penalties in **75 Pa. C.S.A. § 1547(b)(2)(ii)**, are facially unconstitutional. Now, when police officers arrest an individual for a DUI offense, they must procure a search warrant before a defendant's blood is drawn, unless the individual voluntarily consents or an exigent circumstance is present.

For police officers to rely on the exigent circumstance exception they must show an "urgent need" for the evidence such that they cannot wait for a search warrant. **Birchfield**, 136 S. Ct. at 2173.¹⁴ **See also Commonwealth v. Roland**, 637 A.2d 269, 271 (Pa. 1994). "[T]he Commonwealth must show by clear and convincing evidence that the circumstances surrounding the opportunity to search were truly exigent. . . ." **Commonwealth v. Lee**, 972 A.2d 1, 4 (Pa. Super. 2009) (quoting **Commonwealth v. Rispo**, 487 A.2d 937, 940 (Pa. 1985)).

When the situation is a warrantless blood draw, a case by case totality of the circumstances analysis is appropriate. **See Missouri v. McNeely**, 133 S. Ct. 1552, 1556 (2013); **Birchfield**, 136 S. Ct. at 2174. The "likelihood that evidence will be destroyed if police take the time to obtain a warrant. . . ." is a factor courts can consider. **Roland**, 637 A.2d at 271. However, the evanescent nature of alcohol

¹⁰ **Id.** at § 1547(b)(2)(ii). Punishment for the highest offense ranges from at least "72 consecutive hours" of jail time all the way to a maximum sentence "of not less than five years in jail." **Id.** at § 3803, § 3804(c)(1)(i), (2)(i), (3)(i).

¹¹ **Id.** at § 1547(b)(1), (b.1), (c), (e). Since **Birchfield** upholds the use of these consequences and the Defendant does not challenge them, this Court will not address them further.

¹² Pennsylvania Department of Transportation, Chemical Testing Warnings and Report of Refusal to Submit to Chemical Testing as Authorized by Section 1547 of the Vehicle Code in Violation Section 3802 (March 2012).

¹³ **§ 1547(b)(2)**.

¹⁴ "The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence." **Id.** (internal citations omitted).

is no longer sufficient by itself to provide police officers with an exigent circumstance. **McNeely**, 133 S. Ct. at 1556.¹⁵ The Commonwealth insinuates that **75 Pa. C.S.A. § 3802(a)(2)**'s two hour requirement will suffice to meet the urgency needed for an exigent circumstance.¹⁶ Interestingly, section **3802(g)**'s "good cause" exception appears to obviate the need to show an exigent circumstance.¹⁷ Therefore, in a routine DUI stop where the only exigency is evanescent blood evidence, the Commonwealth will have a difficult time establishing an exigent circumstance. In this case the Commonwealth has presented no evidence to support an exigent circumstance.

In regards to the cases currently pending before this Court, the Commonwealth cannot retrospectively argue an exigency existed at the time of the blood draw. See **Commonwealth v. Arnold**, 932 A.2d 143, 147-48 (Pa. Super. 2007); **Commonwealth v. Demshock**, 854 A.2d 553, 557 (Pa. Super. 2004). Under these cases, an exigency must have existed at the time the search occurred. Prior to **Birchfield**, Pennsylvania's implied consent law allowed police officers to obtain warrantless blood draws from an individual arrested for a DUI offense.¹⁸ Thus, there was no need in most situations to first obtain a search warrant. The Commonwealth cannot now impart an exigency when none existed at the time the blood was drawn.

¹⁵ The Supreme Court declined to adopt a per se rule allowing for an exigent circumstance based on "the natural metabolism of alcohol in the bloodstream." **McNeely**, 133 S. Ct. at 1556.

¹⁶ "An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% *within two hours* after the individual has driven, operated or been in actual physical control of the movement of the vehicle." **§ 3802(a)(2)** (emphasis added).

¹⁷ "Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:

- (1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours; and
- (2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained."

75 Pa. C.S.A. § 3802(g).

¹⁸ See **§ 1547(a)**.

DISCUSSION: KNOWING AND VOLUNTARY CONSENT

Here, the trooper did not obtain a search warrant prior to the blood draw. As the Commonwealth has not established an exigent circumstance, the Defendant's blood test results must be suppressed as an unreasonable search and seizure in violation of Article I, Section 8 of the Pennsylvania Constitution unless the Commonwealth establishes he provided knowing and voluntary consent.¹⁹

The stain of an unconstitutional search may be erased when an individual has validly consented to the search. See **Commonwealth v. Cleckley**, 738 A.2d 427, 429 (Pa. 1999) (citing **Commonwealth v. Slaton**, 608 A.2d 5, 8-9 (Pa. 1992)). Pennsylvania courts have employed an objective, totality of the circumstances approach in deciding whether an individual provided the necessary consent to search. **Smith**, 77 A.3d at 573. "In order for consent to be valid, it must be 'unequivocal, specific, and voluntary.' The appellant must have intentionally relinquished or abandoned a known right or privilege." **Commonwealth v. Dunne**, 690 A.2d 1233, 1236 (Pa. Super. 1997) (citing **Commonwealth v. Gibson**, 638 A.2d 203, 207 (Pa. 1994)).

The **Smith** Court aptly stated:

In determining the validity of a given consent [to provide a blood sample], 'the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice-not the result of duress or coercion, express or implied, or a will overborne-under the totality of the circumstances.' 'The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent.' Such evaluation includes an objective examination of 'the maturity, sophistication and mental or emotional state of the defendant. . . .' Gauging the scope of a defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented,

¹⁹ The Commonwealth bears the burden of establishing Defendant knowingly and voluntarily consented to the search. **Commonwealth v. Smith**, 77 A.3d 562, 573 (Pa. 2013)

whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Smith, 77 A.3d at 573. (internal citations omitted).

The Pennsylvania Supreme Court has also explained:

[e]valuation of the voluntariness of a defendant's consent necessarily entails consideration of a variety of factors, factors which, of course, may vary depending on the circumstances. Accordingly, no hard and fast rule can be gleaned that would dictate what factors must be considered in each instance. We find instructive, however, the following factors considered by the Supreme Court of Appeals of West Virginia when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel.

Cleckley, 738 A.2d at 433 n. 7 (Pa. 1999) (adopting the factors espoused by the Supreme Court of Appeals of West Virginia).

The Defendant claims, as did Petitioner Beylund in **Birchfield**, that the threat of a criminal penalty coerced him into consenting to the blood draw. At the point Defendant consented to the blood draw he was under arrest and in custody. Given the inherently coercive atmosphere of custodial arrest, this factor leans against a finding of voluntariness. Defendant was also never advised he had a right to refuse consent. **See Commonwealth v. Strickler**, 757 A.2d 884, 901 (Pa. 2000). In fact, Defendant was told via the DL-26 form that if he refused the blood draw he would receive harsher criminal penalties than if he consented. Under the required objective standard, a reasonable person would have consented to the search because a refusal would have automatically meant a harsher punishment. With no real choice, the criminal penalties coerced Defendant into consenting to what was otherwise an unconstitutional search. This Court finds the threat of the now unconstitutional criminal penalties for refusal amounted to coercion.

Considering the above factors under the totality of the circumstances, this Court finds that Defendant did not provide knowing and voluntary consent. Since the officer did not obtain a search warrant prior to the blood draw and no exigent circumstances were present, the search violated both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

Accordingly, the blood test results must be suppressed, and the attached Order is entered.

ORDER

AND NOW, this 16th day of August, 2016, for the reasons set forth in the attached Opinion, Defendant's Omnibus Pre-Trial Motions, filed June 17, 2016 and July 11, 2016 are **granted** and any and all evidence obtained as a result of the traffic stop is hereby suppressed. Furthermore, because the Defendant's consent to the blood draw was not knowing and voluntary the results of the blood test are also suppressed.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary or of administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF DONALD W. FAIR, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Executrix: C. Dee Wells, 995 Red Rock Road, Gettysburg, PA 17325

Attorney: Robert E. Campbell, Esq., Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF DOLORES M. KUHN, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executrix: Patricia A. Smith, 98 Cheetah Drive, Hanover, Pennsylvania 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

ESTATE OF NADINE C. MILLER, DEC'D

Late of Berwick Township, Adams County, Pennsylvania

Executor: Marlin Croft, 1762 Sinsheim Road, Spring Grove, PA 17362

Attorney: Clayton A. Lingg, Esq., Mooney & Associates, 230 York Street, Hanover, PA 17331

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Late of Straban Township, Adams County, Pennsylvania

Executrix: Crystal Dawn Matthews, 65 Ju Dan Court, York Springs, Pennsylvania 17372

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SECOND PUBLICATION**ESTATE OF JILL L. BECKER, DEC'D**

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Executor: Bobby E. Wolfe Jr., 330 Lincoln Way East, New Oxford, PA 17350

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Late of Straban Township, Adams County, Pennsylvania

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THIRD PUBLICATION**ESTATE OF MILDRED G. CLEVELAND, DEC'D**

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THIRD PUBLICATION CONTINUED

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