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Pa. Supreme Court Tackles Case Involving DUI Arrestee's Blood Test Refusal

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In Pennsylvania, if you refuse to submit a sample of blood for testing without a search warrant after a lawful DUI arrest the commonwealth may introduce evidence of your refusal against you at trial pursuant to 75 Pa.C.S. Section 1547, commonly referred to as the Implied Consent Law. However, in *Commonwealth v. Bell*, 167 A.3d 744 (Pa. Super. Ct. 2017), allocatur granted April 5, the Pennsylvania Supreme Court is set to decide whether the use of this refusal as evidence should be deemed unconstitutional.

In *Bell*, officers conducted a traffic stop of the defendant's vehicle for failure to have properly illuminated taillights. The officers noticed an odor of alcohol emanating from the defendant's breath and his eyes were bloodshot and glossy. He admitted to recently consuming four beers, was unsteady on his feet, and failed to satisfactorily perform standardized field sobriety testing. Officers administered a preliminary breath test at the scene which revealed a blood alcohol concentration (BAC) of .127 percent. The defendant was placed under arrest for DUI and transported to the county DUI Processing Center located in the Williamsport Hospital for blood testing. After an officer read the DL-26 chemical testing warnings to the defendant he refused to submit a blood sample.

The defendant was charged with DUI–General Impairment, 75 Pa.C.S. Section 3802(a)(1), along with a summary offense for required lighting. During his trial held on April 28, 2016, the commonwealth introduced testimony from a police officer detailing how the defendant refused to submit to a blood draw (the results of the preliminary breath test are inadmissible at trial). At the end of the trial, the defendant was convicted of the DUI charge, as well as the summary traffic violation, and a sentencing date was scheduled.

Prior to sentencing, however, the U.S. Supreme Court issued an opinion on June 23, 2016, in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). In *Birchfield*, the high court held that implied consent laws cannot deem motorists to have given consent to criminal penalties upon their refusal to submit to chemical testing. Motorists in North Dakota who refused to submit a blood draw after a DUI arrest were charged with a separate misdemeanor crime for the refusal itself. In Pennsylvania motorists were not charged with a separate crime for refusal, however, they were subjected to enhanced criminal penalties because they were sentenced to the same punishment as a driver with a BAC of .16 percent or higher which constitutes

the highest range of penalties applicable to DUI offenses.

Pursuant to *Birchfield*, drivers who are convicted of DUI in Pennsylvania and refused to submit to a warrantless blood test are no longer criminally penalized for the refusal, see *Commonwealth v. Giron*, 155 A.3d 635 (Pa. Super. Ct. 2017). This has significantly impacted the mandatory minimum sentencing for DUI offenders who refuse to provide a blood sample without a valid search warrant. For example, prior to *Birchfield*, a defendant convicted of a third DUI in 10 years who refused to provide a blood sample without a warrant would be subject to a mandatory minimum sentence of one-year imprisonment. However, after *Birchfield*, that same defendant is subject to a 10-day mandatory minimum sentence.

Relying on *Birchfield*, the defendant in *Bell* filed a motion with the trial court arguing that evidence of his refusal to submit to a warrantless blood test should have been deemed inadmissible at trial because admission of this evidence penalized him for refusing to waive his *Fourth Amendment* right to be free from warrantless searches. The trial court agreed and entered an order granting the defendant a new trial at which the commonwealth would not be allowed to introduce evidence of defendant's refusal. As a former assistant district attorney who prosecuted the *Bell* case, I filed an appeal of the trial court's order and argued the matter before a panel of the Pennsylvania Superior Court on May 3, 2017. The Superior Court issued a published opinion on July 19, 2017, holding that the trial court erred in granting the defendant a new trial and concluded that it is "constitutionally permissible to deem motorists to have consented to the specific provision of Pennsylvania's Implied Consent Law that sets forth evidentiary consequences for the refusal of chemical testing upon a lawful arrest for DUI …"

The Superior Court reasoned that our courts have established driving is a privilege and not a fundamental right. To hold this driving privilege drivers must meet necessary qualifications and comply with the terms of the Implied Consent Law, which provides as a general rule under Section 1547(a)(1), "Any person who drives … a vehicle in this commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving … in violation of Section 3802 (relating to driving under influence of alcohol or controlled substance) …"

The Implied Consent Law sets forth penalties to be imposed upon a person who is arrested for DUI and refuses to submit to chemical testing. Section 1547(b) provides that the person's driver's license shall be suspended for at least one year. Additionally, Section 1547(e) provides that evidence of the driver's refusal to submit to chemical testing may be introduced in evidence at the criminal trial on DUI charges, "In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of Section 3802 … the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge."

The Superior Court pointed to the United States Supreme Court's decision in *South Dakota v. Neville*, 380 U.S. 609 (1965), which reasoned that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." Rather, the right to refuse a blood or breath test is "simply a matter of grace bestowed by the [state] legislature," and not one of "constitutional dimension." Additionally, in *Commonwealth v. Graham*, 703 A.2d 510 (Pa. Super.

Ct. 1997), the Superior Court held that a driver's "right to refuse the blood test is derived only from Section 1547 itself and not from the Constitution." Therefore, in *Bell*, the Superior Court held that the defendant was not penalized for asserting a constitutional right because the right to refusal is statutory not constitutional.

The Superior Court rejected the defendant's reliance on *Birchfield* and ruled that the U.S. Supreme Court did not create a constitutional right to refuse a warrantless blood test. Instead, *Birchfield* expressed approval of implied consent laws while placing a "limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." Acknowledging the consent exception to the warrant requirement the *Birchfield* decision noted, "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them."

The Pennsylvania Supreme Court granted allowance to appeal to *Bell* on April 5, 2018, on the issue of "Whether Section 1547(e) of the Vehicle Code, 75 Pa.C.S. Section 1547(e), is violative of Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the U.S. Constitution to the extent that it permits evidence of an arrestee's refusal to submit a sample of blood for testing without a search warrant as proof of consciousness of guilt at the arrestee's trial on a charge of DUI."

If the Pennsylvania Supreme Court reverses *Bell* and holds that Section 1547(e) is unconstitutional it would certainly impact the results of a motorist's decision to refuse a warrantless blood draw. For example, in *Commonwealth v. Myers*, 164 A.3d 116 (Pa. 2017), the Pennsylvania Supreme Court noted that a "motorist placed under arrest for DUI has a critical decision to make. The arrestee may submit to a chemical test and provide the police with evidence that may be used in a subsequent criminal prosecution, or the arrestee may invoke the statutory right to refuse testing, which results in a mandatory driver's license suspension under [Section 1547(b)(1)]; renders the fact of refusal admissible as evidence in a subsequent DUI prosecution pursuant to [Section 1547(e)]; and authorizes heightened criminal penalties under 75 Pa.C.S. Section 3804(c) if the arrestee later is convicted of DUI."

However, as noted above pursuant to the *Birchfield* decision, refusals to submit to warrantless blood draws no longer subject a motorist to increased criminal penalties. If Section 1547(e) is deemed unconstitutional motorists who refuse to submit a warrantless blood draw will not have that refusal evidence admitted against them at their criminal DUI trial. Motorists will still be subjected to the civil license suspension, however, two of the three consequences for refusing a warrantless blood draw will be abrogated.