The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2018
PHILADELPHIA, THURSDAY, AUGUST 9, 2018
An ALM Publication

Pa. Supreme Court to Decide Retroactivity of 'Birchfield v. North Dakota'

BY ANTHONY L. CIUCA

ANTHONY L. CIUCA, *is an associate at Hladik, Onorato & Federman. His primary practice areas include DUI and criminal defense in which he represents individuals in Montgomery, Philadelphia and surrounding counties. Contact him at* ***aciuca@hoflawgroup.com****.*

The Pennsylvania Supreme Court granted allocatur in *Commonwealth v. Hays*, 2018 Pa. Super. Unpub. LEXIS 176 (Jan. 19, 2018), on July 24, to decide the following: Should *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), apply to all cases not yet final when the decision was rendered? This is the second *Birchfield*-related case involving warrantless blood draw evidence accepted by the Pennsylvania Supreme Court this year. In the other case, *Commonwealth v. Bell*, 167 A.3d 744 (Pa. Super. Ct. 2017), allocatur granted April 5, the Pennsylvania Supreme Court is set to decide whether a driver's refusal to submit a warrantless blood sample may be used as evidence against the driver at trial. Ironically, I prosecuted both the *Bell* and *Hays* cases during my tenure as an assistant district attorney in Lycoming County. **I recently wrote an article about the *Bell* case published here on June 21**, and now discuss the *Hays* case below.

General Introduction to 'Birchfield v. North Dakota'

On June 23, 2016 the U.S. Supreme Court issued a decision significantly impacting DUI laws in connection with the chemical testing of a motorist's blood. In *Birchfield v. North Dakota*, the high court held that implied consent laws cannot deem motorists to have given consent to criminal penalties upon their refusal to submit a warrantless blood sample. Prior to *Birchfield*, if a motorist lawfully arrested in Pennsylvania for suspicion of driving under the influence of alcohol or drugs refused to submit a warrantless blood sample that motorist was subject to the same punishment as a driver with a BAC of 0.16 percent or higher which constitutes the highest range of penalties applicable to DUI offenses. However, post-*Birchfield*, a motorist who refuses to provide a warrantless blood sample and is subsequently convicted of DUI will no longer be subjected to these enhanced criminal penalties.

Birchfield also reasoned that a motorist's consent to submit a warrantless blood sample, provided after a warning of increased criminal penalties should they refuse, may be invalid due to coercion and the warning's partial inaccuracy of prohibited criminal penalties for the refusal. Prior to *Birchfield*, a police officer in Pennsylvania utilized PennDOT's DL-26 form which advised a motorist that they would be subject to more severe criminal penalties if they refused to provide a warrantless blood sample. These warnings derived directly from 75 Pa. C.S. Section 1547, commonly referred to as the Implied Consent Law, providing that "it shall be the duty of the police officer to inform the person that … if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1) [General Impairment], the person will be subject to" the same penalties as a person with the highest rate of alcohol. PennDOT revised this form for warrantless blood draws (now DL-26B) to comply with *Birchfield* by removing any reference to criminal penalties for a motorist's refusal to submit a warrantless blood sample (drivers are still advised of a license suspension because it is a civil, not criminal, penalty).

Pursuant to *Birchfield*, the Pennsylvania Superior Court vacated a defendant's DUI conviction along with the suppression court's order and remanded the case to reevaluate the defendant's consent. In *Commonwealth v. Evans*, 153 A.3d 323 (Pa. Super. Ct. 2016), Evans filed a suppression motion, prior to *Birchfield,* challenging his consent to the warrantless blood draw as a product of coercion due to the threat of increased penalties if he refused the test. The suppression court denied his motion and he was subsequently convicted of DUI. Relying on *Birchfield's* holding that a state may not "impose criminal penalties on the

refusal to submit to a warrantless blood test," the Superior Court ordered the trial court to "reevaluate Mr. Evans' consent …, based on, the totality of all the circumstances … and given the partial inaccuracy of the officer's advisory."

'Commonwealth v. Hays'

The Pennsylvania State Police arrested Kirk Hays on April 11, 2014, for driving under the influence of alcohol. On that date Hays operated a motor vehicle at approximately 2 a.m. and completed a right-hand turn without utilizing a turn signal. The troopers conducted a traffic stop and noticed a strong odor of alcohol emanating from the vehicle. The troopers asked him to perform standard field sobriety tests and he exhibited indicators that he was under the influence of alcohol. He was taken into custody and transported to the county's DUI Center where an officer read him the DL-26 warnings including the notice of increased criminal penalties if he refused to submit a warrantless blood sample. He submitted a blood sample and the laboratory results indicated a BAC of 0.192 percent.

Hays was charged with Driving Under the Influence of Alcohol—Highest Rate (2nd in 10), a misdemeanor of the first degree and related violations. He filed a motion to suppress evidence arguing that the troopers did not have reasonable suspicion to conduct a traffic stop. However, unlike the defendant in *Evans*, he did not challenge the voluntariness of his consent to the warrantless blood draw. The suppression court denied his motion on May 22, 2015, and he was convicted at jury trial on June 22, 2016. The *Birchfield* decision was issued by the U.S. Supreme Court the following day on June 23, 2016.

Hays was sentenced on Aug. 23, 2016, to a term of imprisonment of five days to six months in the county prison. He timely filed a post-sentence motion arguing, among other things, for a new trial based on the premise that his consent to the blood draw was involuntary pursuant to *Birchfield*. The commonwealth argued that Hays failed to preserve any issue regarding the validity of his consent to a blood draw and waived his right to challenge it on appeal. On Oct. 14, 2016, the trial court rejected the commonwealth's argument and granted the defendant's post-sentence motion seeking a new trial reasoning that preservation of the issue was not required because *Birchfield* "is so broad in its constitutional proportions and pronouncement that no other result seems possible to the court …"

The commonwealth appealed and its brief cited to the proposition that "it is well-settled that in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at all stages of adjudication, including at trial and on direct appeal," as in *Commonwealth v. Sneed*, 899 A.2d. 1067, 1075 (Pa. 2006). On Jan. 19, in an unpublished memorandum opinion, a panel of the Superior Court vacated the trial court's order granting a new trial. The Superior Court reasoned, "We agree with the commonwealth and conclude that, since the defendant did not raise any claim at, or before, trial that his consent to the blood draw was involuntary, the trial court erred in granting the defendant's post-sentence motion. Indeed, our recent opinion in *Commonwealth v. Moyer*, 171 A.3d 849 (Pa. Super. 2017) requires that we vacate the trial court's order in this case."

In *Moyer*, decided Oct. 2, 2017, the defendant was convicted of DUI and other charges and sentenced on June 21, 2016, (two days before the *Birchfield* decision). Moyer filed a nunc pro tunc post-sentence motion seeking a new trial based on the argument that her consent to the blood draw was involuntary pursuant to *Birchfield*. The trial court denied the motion concluding that she was "not entitled to retroactive application of *Birchfield* because she did not preserve a challenge to the warrantless blood draw during trial." The Superior Court affirmed the denial, explaining that "the U.S. Supreme Court handed down *Birchfield* two days after Moyer's sentence. Moyer never challenged the warrantless blood draw during trial, and did not raise any issue under *Birchfield* until her nunc pro tunc post-sentence motion. In Pennsylvania, it has long been the rule that criminal defendants are not entitled to retroactive application of a new constitutional rule unless they raise and preserve the issue during trial." See *Commonwealth v. Newman*, 99 A.3d 86, 90 (Pa. Super. Ct. 2014)(en banc).

Moyer argued that she should not have been required to anticipate the *Birchfield* decision. In rejecting her argument, the Superior Court reasoned that "the same could be said, however, in nearly every case in which a defendant is denied retroactive application of a new constitutional principle. The rule permitting retroactive application was created for the benefit of defendants who raised and preserved the issue in question and in whose case the issue remained pending while a higher court decided the issue in a similar case." The Superior Court added that "absent further development of the law of retroactivity from the Pennsylvania Supreme Court, Moyer is not entitled to rely on *Birchfield*." It appears that the Pennsylvania Supreme Court may now further develop the law of retroactivity and possibly eliminate the preservation requirement.