Received 6/13/2018 1:53:50 PM Supreme Court Middle District

Filed 6/13/2018 1:53:00 PM Supreme Court Middle District
11 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAP 2018 NO. 11

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

THOMAS S. BELL,
Appellant

BRIEF OF AMICUS CURIAE DEFENDER ASSOCIATION OF PHILADELPHIA PA. ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal From The Order Of The Superior Court Of Pennsylvania At No. 1490 MDA 2016, Dated July 19, 2017, Reversing The Order Granting A New Trial Of The Common Pleas Court Of Lycoming County, Criminal Division, At CP-41-CR-0001098-2015, Dated August 22, 2016 and Remanding for Sentencing. Reconsideration Denied September 26, 2017 in Superior Court.

BRADLEY WINNICK
Identification No. 78413
Chief Public Defender
Dauphin County Public Defender's Office
2 South Second Street, 2nd Floor
Harrisburg, PA 17101

President, Pennsylvania Association of Criminal Defense Lawyers
Of Counsel
June, 2018

LEONARD N. SOSNOV, Assistant Defender
Identification No. 21090
KARL BAKER, Assistant Defender
Chief, Appeals Division
KEIR BRADFORD-GREY, Defender

Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, Pennsylvania 19102
Identification No. 00001
(215) 568-3190

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATEMENT OF INTEREST OF THE AMICUS CURIAE

Defender Association Of Philadelphia

The Defender Association of Philadelphia is a private, non-profit corporation which represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to insure a high standard of representation and to prevent the abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

Pennsylvania Association of Criminal Defense Lawyers

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As amicus curiae, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for defendants. PACDL includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL's members have a direct interest in the outcome of this appeal because of their concerns for ensuring that the privacy rights of all citizens are protected, that law enforcement respect the boundaries of the Constitution of the United States, and the Constitution of the Commonwealth of Pennsylvania, and that there is clarity in the law as to the scope of citizens' rights, and the obligations of law enforcement with respect to their interactions with citizens of this Commonwealth.

Pursuant to Pa.R.A.P. 531(b), PACDL and the Defender Association of Philadelphia state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

I. Statement Of The Case

The opinion of the Superior Court panel reversing the lower court is attached as Exhibit A. Commonwealth v. Bell, 167 A.3d 744 (Pa. Super. 2017). The opinion of the lower court, granting a new trial, is attached as Exhibit B.

On May 16, 2015, Mr. Bell was arrested in Lycoming County for driving under the influence of alcohol ("DUI"). After his arrest, he refused a request for a blood test. By Information he was charged with DUI (Misdemeanor)(Refusal); 75 Pa.C.S. § 3302; 75 Pa.C.S. § 3804 (enhanced DUI penalties for refusal to consent to chemical testing).

Mr. Bell filed a Motion To Dismiss challenging the charge of DUI, with a refusal to consent to a blood test. Exhibit C (Motion To Dismiss). He contended that Pennsylvania's Implied Consent Law violated due process of law and search and seizure rights under the Pennsylvania and United States Constitutions. Exhibit C. Alternatively, if the charge was not dismissed, Mr. Bell requested that "the refusal to submit to a sample of blood in this case should be suppressed." Exhibit C, paragraph 12. The Honorable Dudley N. Anderson denied the motion, and on April 28, 2016 the case proceeded to trial before Judge Anderson without a jury.

The issue of whether Mr. Bell was driving while impaired was sharply contested. Police did not observe him driving unsafely, stopping him only because

his rear light was not on. N.T. 4/28/16, 12-13, 31-32. Officer Pletz smelled alcohol on Mr. Bell's breath, and ordered him out of the car to perform field sobriety tests. Largely based on his performance on walking and standing on one leg tests, the officer's professional opinion was that Mr. Bell was clearly impaired. N.T. 4/28/16, 16-18. Another experienced officer who observed him later at the DUI Center also concluded that he was under the influence of alcohol. N.T. 4/28/16, 37, 40, 45.

Mr. Bell, 65 years old, testified that because nerves in his left leg had been cut it causes him to limp most of the time, and the judge noted that the left leg "is significantly thinner." N.T. 4/28/16, 59-60, 63. He acknowledged drinking hours earlier, but both him and his passenger, Jeanine Fisk, his longtime partner, testified that he was sober and safely driving the car before police stopped him. See, e.g., N.T. 4/28/16, 51-52, 61-63.

The arresting officer, Pletz, testified that he never considered getting a search warrant to extract blood, and that he took Mr. Bell to the DUI Center. N.T. 4/28/16, 28. Officer Litwhiler testified that at the DUI Center he read the form with the penalties for refusal, and that Mr. Bell refused a blood test, stating that he got hepatitus once in a hospital "and didn't want a needle in his arm" N.T. 4/28/16, 38. The officer did not ask if Mr. Bell would take a urine or breath test because police there choose to give only blood tests. N.T. 4/28/16, 41.

Mr. Bell was vigorously cross-examined by the prosecutor about his alleged reason for refusing the blood test. The judge noted during Mr. Bell's testimony that if he had agreed to take the test it could have proven his innocence, and that if the trial had been with a jury the refusal probably would have warranted a consciousness of guilt charge. N.T. 4/28/16, 67-71.

In closing argument, the prosecutor repeatedly asserted that Mr. Bell refused the blood test because he knew that he was guilty. N.T. 4/28/16, 79-83. "His refusal, its critical." N.T. 4/28/16, 79. In finding Mr. Bell guilty, the judge acknowledged that there were facts favoring an acquittal, but that he was convinced of Mr. Bell's guilt because of the opinions of the two trained officers, and the blood test refusal which showed a consciousness of guilt. N.T. 4/28/16, 84-85.

Post-trial, Mr. Bell filed a motion for reconsideration of the Motion To Dismiss, requesting again that the charge be dismissed, or that a new trial be granted because the evidence of his refusal to consent to the blood test was inadmissible, and critical to the guilty verdict. Exhibit D.

Judge Anderson denied the post-trial motion for dismissal of the charges, but granted a new trial. He ruled that in light of Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), a defendant has a constitutional right to refuse to a warrantless blood test, and that the exercise of that right cannot be penalized by the introduction of the

refusal at trial as evidence of a consciousness of guilt. Exhibit B, 3-5. In granting a new trial, Judge Anderson noted that "the court in explaining its verdict indicated that that evidence (the refusal to consent) was instrumental in the conviction." Exhibit B, 2. A new trial was warranted "in light of this court's consideration at trial of defendant's refusal, and the weight given that evidence by this court as factfinder." Exhibit B, 5.

The Superior Court panel reversed, holding that the implied consent statute in Pennsylvania validly imposes license suspension and evidentiary use of the refusal to consent as evidence of guilt at trial because there is no constitutional right to refuse a blood test. Bell, 167 A.3d at 749-50.

II. Question Presented

This Court granted a petition for allowance of appeal to Mr. Bell on April 5, 2018. The order stated:

> The issue, rephrased for clarity is:
>
> Whether § 1547(e) of the Vehicle Code, 75 Pa.C.S. § 1547(e), is violative of Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States 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?

III. Summary Of Argument

In Missouri v. McNeely, 133 S.Ct. 1552 (2013), the Court rejected a *per se* exigent circumstances exception to the warrant requirement for chemical testing in every drunk driver case. And, in Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), the Court emphasized the Fourth Amendment warrant requirement in rejecting a search incident to arrest exception (unlike breath testing) for blood search DUI cases.

If the Commonwealth seeks to rely on the consent exception to the warrant requirement in a DUI blood draw case, as in any other case, it must show that the defendant freely voluntarily consented without coercion express or implied. It cannot do so where, as here, the defendant exercises his rights under the Fourth Amendment and Article I, § 8, and refuses to consent to a warrantless blood draw.

The exercise of that constitutional right to refuse consent to a blood draw may not be penalized pursuant to the Implied Consent Statute by admitting the refusal as substantive evidence against the defendant in a criminal case. The Court should hold that its decision in Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017), is controlling. In Myers, five members of the Court held that the Fourth Amendment prohibited the Commonwealth from penalizing a defendant by admitting evidence from a warrantless blood draw where he was unconscious and could not exercise his constitutional right to refuse a blood draw. Id., 1172-82 (Wecht, J., plurality opinion

for three Justices); 1182-84 (Saylor, C.J., concurring opinion for three Justices).[1] If the Commonwealth cannot utilize evidence where the defendant is unconscious and denied the opportunity to refuse a blood test, a fortiori an awake defendant cannot be penalized for exercising his constitutional right of refusal.

This Court has held in the past that the exercise of constitutional rights by an accused may not be penalized by admitting the exercise of the constitutional right as substantive evidence of guilt in a criminal case. Commonwealth v. Chapman, 136 A.3d 126, 131 and n.4 (Pa. 2016) (holding that admission of evidence of defendant's refusal to consent to a warrantless blood test was unconstitutional); Commonwealth v. Molina, 104 A.3d 449-52 (Pa. 2014) (defendant had an Article I, § 9 right to pre-arrest silence that was violated by the admission at trial of exercise of that right as substantive evidence).

This Court should reverse the Superior Court, and hold that the Fourth Amendment and Article I, § 8 do not permit the exercise of the constitutional right to refuse a blood draw to be penalized by its admission as evidence of guilt at a criminal trial.

---

[1] Justice Donohue joined in both constitutional rulings suppressing the evidence. Justice Todd concurred, concluding that relief was warranted on statutory grounds, "and so I would not address the constitutional dimensions." Id. at 1184. Justice Mundy dissented, rejecting the statutory and constitutional claims. Id. at 1184.

IV. Argument

1. The Legislative Enactment, 75 Pa.C.S. § 1547(e), That Permits A Refusal To Consent To An Intrusive Bodily Search For Blood To Be Introduced As Substantive Evidence Of Guilt At A Criminal Trial Is Violative Of The Fourth Amendment And Article I § 8 Of The Pennsylvania Constitution Because It Penalizes The Exercise Of Constitutional Search And Seizure Rights.

At Mr. Bells' DUI trial the Commonwealth presented evidence of his refusal to consent to a blood search as substantive evidence of guilt. It did so pursuant to 75 Pa.C.S. § 1547(e), which provides that evidence of a refusal to consent to a blood search "may be introduced in evidence", . . . and "may be considered along with other factors concerning the charge." This statute impermissibly punishes the exercise of a constitutional right.

A. Search And Seizure Rights Guarantee A Right To Refuse Consent To An Intrusive Bodily Blood Search.

1. The Fourth Amendment Guarantees A Right To Refuse A Warrantless Blood Draw.

a. Myers Is Precedential and Binding On The Superior Court.

This Court need look no further than its decision in Myers to hold that the Superior Court erred in Bell in holding that there is no Fourth Amendment right to

refuse to consent to a blood search. In Myers this Court considered the issue of whether a blood sample taken from an unconscious DUI suspect without a warrant was properly ordered suppressed by the lower court. With only Justice Mundy dissenting (164 A.3d at 1184), six members of the Court affirmed, holding that the unconscious defendant was denied his right to refuse consent to the warrantless blood search. Justice Todd concurred, concluding that relief was warranted on statutory grounds, "and so I would not address the constitutional dimensions." Id. at 1184.

Five members of this Court granted relief in Myers because, after examining Birchfield and other authority, they held that the unconscious defendant could not and did not consent to warrantless blood testing. Justice Wecht authored a lead opinion that in Section C addressed the constitutional issue on behalf of a three member plurality of the Court. That opinion concluded that the DUI implied consent scheme of § 1547 could not, as in any other case, diminish Fourth Amendment warrant and voluntary consent requirements. Id. at 1172-82.

Chief Justice Saylor first noted in his concurring opinion that he concluded that statutorily there was valid consent under § 1547. Id. at 1182-83. However, in Section II of his concurring opinion, joined by two Justices (see *supra* n.1)), he resolved that "[a]s pertains to the constitutional aspect, I believe that Birchfield applies and requires suppression in this case." Id. at 1183 (footnote omitted). Chief

Justice Saylor noted that "the Supreme Court (in Birchfield) had stressed its inclination in favor of a categorical rule" (id.), and he agreed with the North Carolina Supreme Court that a blood search is only constitutionally permissible if police have a warrant or they can demonstrate actual voluntary consent. Id. at 1183-84. (citing North Carolina v. Romano, 800 S.E.2d 644, 653-54 n. 9 (N.Car. 2017)).

Myers held that the state cannot prevail on a motion to suppress because it cannot make an affirmative showing of constitutionally required voluntary consent to a warrantless blood search with an unconscious defendant. It is axiomatic that an awake defendant has the constitutional right to refuse to give the requisite voluntary consent to a warrantless blood draw. A blood draw taken after a refusal to consent would obviously be involuntary. Because five members of this Court joined in this constitutional holding in Myers, the Superior Court had no authority to rule contrary to Myers. E.g., Commonwealth v. Randolph, 718 A.2d 1242, 1245 (Pa. 1998) ("It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court"); Commonwealth v. Slaton, 556 A.2d 1343, 1347 n.6 (Pa. Super. 1989) (en banc) ("[I]t is not the function of an intermediate appellate court to overrule the Supreme Court of this Commonwealth.").

b. McNeely And Birchfield Guarantee A Right Of Refusal To Consent

In holding that there was no constitutional right to refuse consent the Superior Court misplaced reliance on decisions that pre-dated McNeely and Birchfield. Bell, 167 A.3d at 147-49. Those decisions have no validity now because McNeely and Birchfield dramatically changed Fourth amendment rights analysis for DUI blood draws, as recognized by this Court in Myers.

The decisions that the Superior Court looked to erroneously had their genesis in Schmerber v. California, 384 U.S. 767 (1966). Schmerber rejected Fourth, Fifth, Sixth and Fourteenth Amendment claims in upholding a blood draw taken in a DUI case over the objections of the defendant. Courts viewed Schmerber as holding that no warrant was ever necessary to take a blood draw or conduct a breath test in a DUI case because of *per se* exigent circumstances given a risk of the loss of evidence in the body. Thus, in a Fifth Amendment case, South Dakota v. Neville, 459 U.S. 553 (1983), the Court stated that "Schmerber, then, clearly allows a state to force a person suspected of driving while intoxicated to submit to a blood test." Id. at 559 (footnote omitted). Accordingly, Pennsylvania Courts held that there was no need for a warrant for a blood search, and no right to refuse a blood search. See, e.g., Commonwealth v. Kohl, 615 A.2d 308, 315 (Pa. 1992) (explaining Schmerber as holding that

probable cause in a DUI case "justified waiving the warrant requirement under the "exigent 'circumstances' exception to the warrant requirement"); Commonwealth v. Graham, 703 A.2d 510, 512 (Pa. Super. 1997) (citing Schmerber for proposition that a defendant cannot refuse a blood test).

Since a warrantless blood draw was viewed as constitutionally permissible in every case, a defendant had no right to refuse to consent. Thus, any legislatively conferred right to refuse consent was held to be a constitutionally unnecessary legislative gift that could be conditioned with adverse consequences if exercised (implied consent laws). Consent now is no longer a legislative gift, but rather an individual's constitutional right to withhold.

In McNeely, the Court rejected the state's argument that there should be a *per se* exigency exception to the warrant requirement. Like any other offense a warrant is required for a blood draw in a DUI case, absent a showing by the government of some exception to the warrant requirement in an individual case. McNeely, 133 S.Ct. at 1560-61.[2] See Birchfield, 136 S.Ct. at 2174 (explaining McNeely holding).

---

[2] The Court vacated a judgment of conviction in a Texas case, and remanded for further consideration in light of McNeely where blood was drawn from the defendant in a DUI case pursuant to the state's implied consent statute without a warrant and he had refused to consent. Aviles v. Texas, 134 S.Ct. 902 (2014), vacating judgment, Aviles v. State, 385 S.W.3d 110, 115-16 (Tex. 2012). On remand the Texas Court of Appeals reversed the conviction, and denial of the motion to suppress evidence. Aviles v. State, 443 S.W.3d 291 (Ct. App. Tex. 2014). The court held that the implied consent statute unconstitutionally created a *per se*

(continued...)

In Birchfield, the state argued that blood and breath tests should still be constitutionally permissible *per se* in every case without a warrant under the search incident to arrest exception to the warrant requirement. The Court held that breath tests are minimally intrusive and can be conducted as a search incident to arrest. However, because blood tests are much more intrusive the Court held that they are not permissible as a search incident to arrest, and the states "have offered no satisfactory justification for demanding the more intrusive alternative without a warrant." Id. at 2184, and 2185.

The Court's disposition of the case of one of the petitioners, Beylund, in the Birchfield case, is significant.

> Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," Schneckloth, supra, at 227, 93 S.Ct. 2041 we leave it to the state court on remand

---

[2](...continued)
exception to the warrant requirement, and the statute could not override the defendant's decision to refuse to consent. Id. at 292-94.

The Superior Court here ignored the holding in McNeely, and instead relied on a non-precedential plurality opinion there that commented favorably about implied consent laws. Bell, 167 A.3d at 749.

> to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.
>
> Id. at 2186 (footnote omitted).

The Constitution requires a showing by the state in the individual case that there was voluntary consent for a blood draw under Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Under McNeely and Birchfield, as concluded by this Court in Myers, a defendant has a Fourth Amendment right to refuse to give consent to a blood search in a DUI or any other case.[3]

c. It Is Constitutionally Irrelevant That DUI Is A Serious Crime And That Driving Is A "Privilege".

Drunk driving is undoubtedly a very serious crime. However, so are murder, drug offenses, and countless other crimes, yet there are no constitutional exceptions based on particular serious offenses under the Fourth Amendment or Article I, § 8. For example, in Mincey v. Arizona, 437 U.S. 385 (1978), the Court rejected the state's argument for a homicide exception to the warrant requirement. Id. at 392-95. See, e.g., Richards v. Wisconsin, 520 U.S. 385, 391-396 (1997) (rejecting *per se* exception for knock and announce requirement for felony drug investigations);

---

[3] The Superior Court ignored the holding of Birchfield, instead heavily relying on dictum. Bell, 167 A.3d at 149. The Court noted in Birchfield that it did not intend in the case "to cast doubt" on other aspects of implied consent laws. Those issues were not before the Court, and were not argued. "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." Birchfield, 136 S.Ct. at 2185.

Commonwealth v. Rodriguez, 614 A.2d 1378, 1383 (Pa. 1992) ("seriousness of the criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime" is not a justification for ignoring constitutional search and seizure rights).

In McNeely, the Court expressly rejected an argument for a *per se* exigency exception to the warrant requirement based on the severity of the crime of drunken driving.

> "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct 2481, 110 L.Ed.2d 412 (1990). Certainly we do not. While some progress has been made, drunk driving, continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).
>
> But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.

McNeely, 133 S.Ct. at 1566.

Likewise, labeling a license to drive as a "privilege," as many cases have, begs the constitutional question of the limits on the state's power. "Decisions of the United States Supreme Court have made it clear that a person's interest in his driver's

license is 'property' which a State may not revoke or suspend without satisfying the due process guarantee of the Fourteenth Amendment." Commonwealth, Department of Transportation v. McCafferty, 758 A.2d 1155, 1163 (Pa. 2000). See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (license revocation violated due process rights); Commonwealth, Department of Transportation v. Clayton, 684 A.2d 1060 (Pa. 1996) (same).

In the Fourth Amendment context the Court refused to carve out an exception to the ususal reasonable suspicion requirement for pedestrian and car stops simply because the government has a right to regulate driving and insure highway safety. In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that the minor intrusion of a brief stop of a vehicle to check driver's license and registration could not be routinely done, enforcing the Fourth Amendment's reasonable suspicion standard. "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." Id. at 662 (footnote omitted).

As Justice Wecht succinctly concluded in his lead opinion on behalf of three Justices in Myers, "[s]imply put statutory implied consent cannot take the place of voluntary consent." Myers, 164 A.3d at 1178 (plurality opinion). The state does not have the statutory authority to withhold or deny any benefit, including a driver's

license, by attaching an unconstitutional condition, such as the denial of the constitutional right to refuse to consent to an intrusive blood search.

> "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.
>
> * * * * * *
>
> Virtually all of our unconstitutional conditions cases invoke a gratuitous governmental benefit of some kind. Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.

Koontz v. St. Johns River Water Management District, 570 U.S. 595. 606-07 (2013).[4]

It would be inconsistent to sustain the "advance implied consent" fiction of § 1547, with its refusal to consent adverse consequences, when this Court has already rejected actual signed advance consent to unreasonable searches as a basis for

---

[4] See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973) (provision which requires independent contractors to waive Fifth Amendment rights in return for having contracts with the government is unconstitutional); Lebron v. Secretary, Florida Department of Children and Families, 710 F.3d 202, 1205, 1214-17 (11th Cir. 2013) (Florida statute requiring consent to searches to receive family assistance invalid because consent not voluntarily and freely given, and was an unconstitutional condition for a discretionary benefit).

Professor LaFave has concluded that "consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing." Wayne R. LaFave, Search and Seizure, § 8.2(b), at 164-65 (Fifth Edition).

sustaining the constitutionality of a search. In Scott v. Pennsylvania Board of Probation and Parole, 698 A.2d 32 (Pa. 1997), rev'd on other grounds, 524 U.S. 357 (1998), this Court rejected as constitutionally irrelevant the explicit in advance consent to search agreement of a parolee. "[W]e hold that appellee has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision." Id. at 36. In Commonwealth v. Arter, 151 A.3d 149 (Pa. 2016), in holding that the exclusionary remedy applied to parole proceedings under Article I, § 8, this Court noted that "we opined that the signed parole agreement was immaterial to Scott's Fourth Amendment right against unreasonable searches and seizures." Id. at 155.

Unlike parolees, automobile drivers with licenses have not been convicted of crimes and do not have diminished Fourth Amendment rights. This Court should hold that the "implied consent" provided by § 1547 is immaterial under the Fourth Amendment when determining the rights of licensed drivers. "Like any other search premised upon the subject's consent, a chemical test conduced under the implied consent statute is exempt from the warrant requirement only if consent is given voluntarily under the totality of the circumstances." Myers, 164 A.3d at 1180 (Wecht, J.,) (plurality opinion). Mr. Bell had a Fourth Amendment right to refuse to give consent to a warrantless intrusion to take his blood.

2. Article I, § 8 Provides An Independent Right To Refuse A Warrantless Blood Draw.

An Edmunds analysis of relevant factors supports an independent finding under Article I, § 8 that police may not bypass the warrant requirement for a blood draw based on notions of "implied consent" and that an individual has a right to refuse consent. See generally Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (stating factors for analysis of rights under the Pennsylvania Constitution.

The texts of the United States and Pennsylvania Constitutions search and seizure provisions are very similar. However, Justice Todd's very thorough historical analysis of the two provisions demonstrates that the adoption of the first Pennsylvania Constitution search and seizure provision "a full 15 years ahead of the adoption of the Fourth Amendment to the United States Constitution - enshrined the requirement of specific warrants issued by a neutral judge as an integral part of our state constitutional framework." Commonwealth v. Gary, 91 A.3d 102, 147 (Pa. 2014) (Todd, J., dissenting). See 91 A.3d at 143-48 (full historical discussion).

Though not uniformly applied (see, e.g., Commonwealth v. Gary, *supra*), this Court has a very strong heritage of holding independently that searches and seizures require valid warrants despite contrary United States Supreme Court Fourth Amendment rulings, while also enforcing Article I, § 8 rights with the exclusionary

remedy. See, e.g., Commonwealth v. Johnson, 86 A.3d 182, 187 (Pa. 2014) (holding that an arrest based on an invalid warrant requires suppression under Article I, § 8); Commonwealth v. Shaw, 770 A.2d 295 (Pa. 2001) (police obtaining hospital results of blood alcohol test without valid warrant violated Article I, Section 8); Commonwealth v. Edmunds, *supra* (suppression of evidence whenever obtained through a search warrant not based on probable cause; refusal to adopt good faith exception under Article I, §8); Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (valid warrant required under Article I, Section 8 for a pen register).

Another Article I, § 8 relevant consideration with an intrusive blood search is that this Court has always viewed as significant that "the search of a person always involves a greater degree of intrusion upon one's privacy interest than the search of a thing." Theodore v. Delaware Valley School District, 836 A.2d 76, 89 (Pa. 2003) (recognizing Article I § 8 rights for urine drug testing of students). Granting more rights under Article I § 8 than the Fourth Amendment in another case, this Court again thought significant that "an invasion of one's person is, in the usual case, [a] more sever intrusion on one's property." Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993) (holding that unlike canine drug sniff of a locker, such a sniff of a satchel an individual is carrying requires probable cause).

The decisions from other states since McNeely have not addressed the state

constitutional issue of whether implied consent laws can override the warrant requirement. This is likely because, as discussed in Myers, the state decisional trend has been to hold under the Fourth Amendment that a warrant or voluntary consent in the individual case is necessary for a DUI blood draw, and that statutory implied consent will not suffice. Myers, 164 A.3d at 1174-1176 (discussing trend and citing state cases) (Wecht, J., plurality opinion). See also, e.g., People v. Eubanks, 2017 WL 6603258 (Ill. App. 2017) (same); State v. Trahan, 870 N.W. 2d 396, 400-04 (Minn. 2015) (same). Contra State v. Brar, 898 N.W. 2d (Wis. 2017) (plurality opinion).

As a matter of policy, as the Court concluded in McNeely, the seriousness of the drunk driving problem, and any practical benefits to the police of being able to do warrantless DUI blood searches in every case should not outweigh constitutional privacy rights. Police may always seek a warrant to obtain blood, and when they can establish that individual exigent circumstances prevented them from obtaining a warrant they can constitutionally obtain a blood sample. They also may proceed without a warrant if they can demonstrate in the individual case that consent was voluntary, a free and unconstrained choice, without any coercion express or implied. See, e.g., Commonwealth v. Strickler, 757 A.2d 884 (Pa. 2000).

Further, police always can conduct a breath test because the Court held in

Birchfield that a breath test may be done in every case pursuant to the search incident to arrest doctrine.[5] Finally, with no testing, the police can prove a DUI case through police testimony and other evidence. This is the usual norm for criminal cases. There is no legitimate societal expectation that a defendant will aid a criminal prosecution through evidence from his own body or words. Cf., Article I, § 9, Pa. Const. (accused "cannot be compelled to give evidence against himself"). This Court should hold that an individual, despite the implied consent statute, 75 Pa. C.S. § 1547, has an independent right under Article I, § 8 to refuse to consent to a warrantless blood draw.

B. The State May Not Penalize The Exercise Of A Constitutional Right By Admitting The Refusal To Consent As Substantive Evidence In A Criminal Case.

In Myers five Justice of this Court held that results of a blood test had to be suppressed because there was no warrant and an unconscious defendant could not and did not give his voluntary consent. See *supra* 9-11. Justice Wecht's plurality opinion further noted that "the ordinary request for consent to a search is not accompanied by

---

[5] Without explanation, the officer in this cases testified that his department always requested only blood tests, and that after the defendant refused, stating that he did not want a needle in his arm (N.T. 4/28/16, 38), he was not asked if he would take a breath or urine test N.T. 4/28/16, 41.

a set of legal repercussions that will follow from a refusal." Myers, 164 A.3d at 1176 n. 18 (Wecht, J., plurality opinion). Chief Justice Saylor, concurring with the suppression order on constitutional grounds based on Birchfield, stated that "I believe that the criminal penalties attached to a refusal to take a blood test render the statutory scheme in violation of the Fourth Amendment." Id. at 1182 (Saylor, C.J. concurring). See *supra* 10-11.

Since the evidence of a warrantless blood draw taken without consent is inadmissible at a criminal trial as a penalty for the exercise of search and seizure rights, it logically follows that the refusal to consent should be inadmissible as substantive evidence of guilt. This Court should hold that Myers and Birchfield are dispositive and controlling here.

Those rulings are also in accord with longstanding constitutional principles barring the penalizing of the exercise of a constitutional right. "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence." A.M. Harman v. Forssenius, 380 U.S. 528, 540 (1965) (residence certificate or poll tax requirement impermissibly punished those who refused to surrender the right to vote in federal

elections) (citations omitted).[6]

This Court, the Superior Court, and other courts have consistently held that the refusal to consent to a search may not be introduced as substantive evidence of guilt at a defendant's criminal trial. See, e.g., Commonwealth v. Chapman, 136 A.3d 126, 131 and n.4 (Pa. 2016) (holding that admission of a defendant's refusal to consent to a warrantless DNA test was unconstitutional and citing cases);[7] Commonwealth v. Tillery, 611 A.2d 1245, 1250 (Pa. Super. 1992); Commonwealth v. Welch, 585 A.2d 517, 519 (Pa. Super. 1991) ("it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it."); United States v. Runyan, 290 F.3d 223, 249 (5th Cir. 2000) ("[T]he Circuit Courts that have directly addressed this question have unanimously

---

[6] This case, like Myers, only involves a criminal penalty for the exercise of the constitutional right, not the issue of a civil penalty, like a license suspension. However, it is noteworthy that the license suspension penalty is, despite its civil label, of questionable constitutional validity. As decisions have emphasized, a drivers license is very important to most people for several reasons. See, e.g., Delaware v. Prouse, *supra*, 440 U.S. at 662; Bell v. Burson, *supra*, 402 U.S. at 539. The length of the suspension for at least a year is a substantial penalty for exercising the constitutional right to refuse a blood draw. This Court in another context has held that a license suspension is a punishment. See Shoul v. Commonwealth, Department of Transportation, 173 A.3d 669, 682-85 and n.15 (Pa. 2017) (holding that a license suspension is a punishment for a claim of a violation of the protection against cruel and unusual punishments).

[7] The Court noted in dictum in Chapman that other courts have recognized an exception to the prohibition against admission of refusal to consent to search evidence for "implied-consent scenarios". 136 A.3d at 131. In light of the more recent United States Supreme Court Fourth Amendment blood draw search and seizure cases, McNeely and Birchfield, as we have shown, this implied consent exception is no longer constitutionally viable.

held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt."); Wayne LaFave, Search and Seizure, § 8.2 at 23 ("cases indicate" that where there is a refusal to consent to a warrantless search "the Fourth Amendment prohibits the admission of that refusal into evidence.") (Fifth Edition, 2017-2018 Pocket Part) (footnote omitted). But see Fitzgerald v. People, 394 P.3d 671 (Co. 2017).

Given this Court's utilization of the suppression remedy under Article I, § 8 to enforce search and seizure rights, beyond that required by the United States Constitution (see *supra* at 21; Commonwealth v. Arter, 151 A.3d 149 (Pa. 2016)), the Court should independently rule that the refusal to consent is inadmissible as evidence under the Pennsylvania Constitution. This Court's opinion in a related context is instructive. In Commonwealth v. Molina, 104 A.3d 430, 449-52 (Pa. 2014), this Court held that the right against self-incrimination under the Pennsylvania Constitution protected pre-arrest silence, and that its admission at trial as substantive evidence of guilt violated that right.

The Court in Molina also noted that "allowing reference to a defendant's silence as substantive evidence endangers the truth-determining process given our recognition that individuals accused of a crime may remain silent for any number of reasons." Id. at 450-51. See, id., at 455-56 (Saylor, C.J., concurring) (agreeing that

admission of silence as substantive evidence violates the Pennsylvania Constitution, and noting that it is so ambiguous and prejudicial that maybe it should not be admissible even for impeachment purposes).

Considering what is at stake with a blood search, penalizing a refusal to consent by admitting that as evidence of guilt is likewise exacerbated by the ambiguity of the reasons for a refusal.

> [T]he type of search at issue in this case, ... involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's most personal and deep-rooted expectations of privacy.

McNeely, *supra*, 569 U.S. at 148 (quoting Winston v. Lee, 470 U.S. 753, 760 (1985)).

Many people, for various innocent reasons, would not want this serious personal intrusion, including fear of needles, possible religious scruples, or just a preference not to give blood (just as many people do not donate blood). These very possible personal innocent reasons make the exercise of the right to refuse consent to a search ambiguous at best as a theory that refusal is an attempt to hide evidence of guilt. Cf., e.g., Commonwealth v. Welsh, *supra*, 585 A.2d at 520 (Fourth Amendment violated; court notes that prejudice outweighed probative value of evidence of refusal of defendant's consent to search of her bedroom because "[t]here

are many personal reasons" why an individual might not consent). Further, as recognized by the trial court in awarding a new trial, the admission of evidence of a refusal to consent to a blood draw can be very prejudicial.[8] Exhibit B, 2, 5.

This Court should reverse the Superior Court, and hold that the exercise of the constitutional right to refuse consent under the Fourth Amendment and Article I, § 8 may not be penalized by the admission of the refusal against the accused at trial.

---

[8] In a recent case where a jury trial involved DUI related charges, but not DUI, thus rendering the implied consent law inapplicable, a trial judge ruled that evidence of a refusal to submit to a blood test was too prejudicial to be admissible under Rule 403. The Commonwealth appealed, and the Superior Court affirmed, holding that there was no abuse of discretion. Commonwealth v. Rich, 167 A.3d 157 (Pa. Super. 2017).

AMENDED CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Superior Court and re-instate the trial court order granting a new trial.

Respectfully submitted,

Bradley A. Winnick

BRADLEY WINNICK
Identification No. 78413
Chief Public Defender
Dauphin County Public Defender=s Office
2 South Second Street, 2nd Floor
Harrisburg, PA 17101

President, Pennsylvania
Association of Criminal
Defense Lawyers
Of Counsel

/S/

LEONARD N. SOSNOV, Assistant Defender
Identification No. 21090
KARL BAKER, Assistant Defender
Chief, Appeals Division
KEIR BRADFORD-GREY, Defender

Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, Pennsylvania 19102
Identification No. 00001
(215) 568-3190