IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	**MC-51-CR-0018424-2016**
RACHEL RODWELLER, *et al.*	:	

AMENDED[1] OPINION

BEFORE: ROMAN, J., TSAI, J. and WRIGHT, J. *en banc*

OPINION BY: ROMAN, J., and TSAI, J.

I. INTRODUCTION AND BACKGROUND

On June 23, 2016, the Supreme Court of the United States issued its decision in *Birchfield v. North Dakota*, ––– U.S. –––, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) that consolidated for appeal three cases involving North Dakota and Minnesota's "implied consent" laws. All fifty states have enacted "implied consent" laws to help fight the scourge of drunk driving, which has killed thousands of people each year and injured many more. Under these laws, a person who drives on the state roads is deemed to have consented to testing to measure alcohol in his or her body. In North Dakota and Minnesota, if a motorist under of suspicion of driving under the influence of alcohol

[1]In light of the Pennsylvania Supreme Court's grant of allocator in the case of *Commonwealth v. Bell*, 167 A.3d 744 (Pa.Super. 2017) on April 5, 2018, cited and relied upon herein, this Opinion has been amended and revised in accordance therewith. Also, we have taken this opportunity to correct typographical errors, remove former Section F, which was improvidently included in the original version of our decision, and provide a more detailed disposition of the cases affected by this decision.

and/or drugs is lawfully arrested and refused to submit to a chemical blood test, the refusal was, at that time, in and of itself a crime. *Id.*, 136 S.Ct. at 2170-71. Some other states, including Pennsylvania, then had on their books similar measures that imposed criminal penalties on suspected drunk drivers who refuse to take a chemical blood test.

As the U.S. Supreme Court explained, under its precedent, alcohol testing is clearly a search for purposes of the Fourth Amendment, for which a warrant generally would be required. A search without a warrant does not violate the Fourth Amendment, however, if it falls within one of certain exceptions, such as voluntary, intelligent, and knowing consent to a search. In *Birchfield,* a majority of the Supreme Court concluded "that motorists cannot be deemed to have consented to submit to a *blood* test on pain of committing a criminal offense." *Id.*, 136 S.Ct. at 2186 (emphasis added). A narrower majority simultaneously held that a breath test, which does not involve a real physical intrusion on the privacy of the person being arrested, could be administered without a warrant as part of a search incident to arrest. *Id.*, 136 S.Ct. at 2180-2185.

The U.S. Supreme Court, however, did not strike down the concept of the implied consent laws, insofar as they imposed civil and/or evidentiary consequences upon motorists who refused to comply. *Birchfield*, 136 S.Ct. at 2185 ("nothing we say here should be read to cast doubt on" implied consent laws limited to civil and/or evidentiary consequences). With respect to Petitioner Steven Michael Beylund, who submitted to a chemical test of his blood after the North Dakota police read to Mr. Beylund implied consent warnings that stated he would be subject to criminal penalties for refusing, the Supreme Court remanded his case to determine if, under the totality of the circumstances, his consent to the blood draw was voluntary. *Id.*, 136 S.Ct. at 2186.

At the time *Birchfield* was decided, Pennsylvania's Implied Consent Law required that the officer administering the test to inform the motorist that if he/she refused to submit to chemical testing "(i) the person's operating privilege will be suspended . . . and (ii) . . . upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c)." 75 Pa.C.S.A. § 1547(b)(2) (Act of Sept. 30, 2003, P.L. 120, No. 24, § 9, as amended). Pennsylvania's DUI law also provided that anyone who refused a chemical test of breath or blood, upon conviction of DUI pursuant to 75 Pa.C.S.A. § 3802(a)(1), would be sentenced to a harsher sentence than if that person had submitted to a chemical test and was subsequently convicted.

These enhanced criminal penalties imposed by section 3804 (c) for refusal were enumerated in the forms that State and Philadelphia police officers had to read to drunk driving suspects in seeking their written consent to chemical testing. *See* Pennsylvania Department of Transportation Form DL-26 (attached hereto as Appendix "B"); the Philadelphia Police Department Consent to Blood Testing (attached hereto as Appendix "C").

After *Birchfield* was issued in June 2016, the Superior Court had to decide a pending appeal in which a DUI defendant, David Evans, had consented to a blood test upon being read implied consent warnings that advised him of the more severe sentence that would be imposed if he refused the test and was found guilty. *Commonwealth v. Evans*, 153 A.3d 323, 325-26 (Pa. Super. 2016). Evans's motion to suppress was denied and he was found guilty of DUI. *Id.* at 326, 328. The Superior Court found that "even though Pennsylvania's implied consent law does not make the refusal to submit to a blood test a crime in and of itself, the law undoubtedly 'impose[s] criminal penalties on the refusal to submit to such a test.'" *Id.* at 331 (quoting *Birchfield*, 136 S.Ct. at 2185–

2186). The Superior Court vacated Evans's conviction and the trial court order denying his motion to suppress, remanded the case for further proceedings, including a reevaluation of Evans's consent based upon the totality of the circumstances including the now partially incorrect implied consent warnings, similar to the disposition of the Beylund case by the U.S. Supreme Court in *Birchfield*. *Id.*

The Superior Court later held that "pursuant to *Birchfield*, in the absence of a warrant or exigent circumstances justifying a search, a defendant who refuses to provide a blood sample when requested by police is not subject to the enhanced penalties provided in 75 Pa.C.S.A. §§ 3803–3804." *Commonwealth v. Giron*, 155 A.3d 635, 640 (Pa. Super. 2017). The General Assembly subsequently amended 75 Pa.C.S.A. § 1547 to clarify that the suspension of a motorist's driving privileges for refusing to submit to chemical testing was a civil penalty. Act of July 20, 2017, P.L. 333, No. 30, § 3. 75 Pa.C.S.A. § 1547(b)(2)(ii), effective January 20, 2018, was amended to refer only to the imposition of enhanced penalties upon the refusal of a request for chemical testing of breath. *Id.* In the same Act, the General Assembly also amended 75 Pa.C.S.A. § 3804(c) to limit the application of enhanced penalties to apply to those defendants convicted of 75 Pa.C.S.A. § 3801(a)(1) who refused chemical testing of their breath. *Id.* at § 4, effective immediately.

In response to *Birchfield*, both the Pennsylvania Department of Transportation, the Pennsylvania State Police and the Philadelphia Police Department issued new implied consent warning forms that removed the language that advised a motorist if he/she refused to comply, he/she would be subject to the enhanced penalties of section 3804(c). *See* Form DL-26B (attached hereto as Appendix "D") and Philadelphia Police Department's Consent to Blood Testing Form (attached hereto as Appendix "E").

II. PROCEDURAL HISTORY

The revised post-*Birchfield* warnings were read to the hundreds of DUI defendants, whose motions for suppression are now before this Court for review. The defendants argue that the references to civil penalties and collateral consequences in criminal proceedings for refusal are misleading, confusing, and coercive and, for these reasons, their consent to chemical blood test was not voluntary. Some defendants also argued to the suppression court that *Birchfield* stood for the proposition that the police had to get a warrant to conduct a blood test.

On March 19, 2017, Hon. James DeLeon of the Philadelphia Municipal Court issued an opinion which stated that the implied consent warning failed to distinguish between civil and criminal proceedings in their description of evidentiary consequences of the refusal in "subsequent legal proceedings", making the new warnings misleading, coercive and/or confusing. Judge DeLeon concluded that DUI defendants who were read the new post-*Birchfield* warnings did not give consent to a warrantless blood test that was knowing, voluntary, and intelligent.

After Judge DeLeon's opinion was issued, the matter came before Hon. Jimmie Moore of the Philadelphia Municipal Court on April 13, 2017. Judge Moore joined 76 other cases with the same issue, motions to suppress due to the coercive nature of the new warnings for purposes of judicial economy. After oral argument, Judge Moore *en masse* granted all motions to suppress based on Judge DeLeon's opinion that the new warnings were coercive, misleading and/or confusing. The Commonwealth objected, stating that Judge DeLeon's opinion held that a case by case analysis and individual hearing was needed on each of the cases.

In response, Judge Moore instructed the Commonwealth that they could file a pleading in the form of a reconsideration if there were any cases where they felt required a case-by-case analysis through a full hearing because there were additional facts, other than the warnings themselves, to show that the consent was voluntary. The Commonwealth appealed Judge Moore's omnibus decision to the Court of Common Pleas.

On October 14, 2017, the Court granted the Commonwealth's petition for *en banc* review of the suppression motions on the issue of consent. The questions before the panel for review are:

> Are the post-*Birchfield* implied consent warnings (city and/or state) inherently misleading and coercive to the average person, because:
>
> 1. they do not expressly distinguish between criminal and civil penalties;
>
> 2. they advise a defendant he has no right to speak to speak to an attorney when considering whether to consent to or refuse a DUI blood draw; and/or
>
> 3. they inform a defendant that refusal to submit a chemical test may be used as evidence in subsequent legal proceedings?

Order of October 4, 2017 Granting Petition for *En Banc* Review. The panel also has elected to address several related issues raised by defendants' counsel in their briefs:

1. whether *Birchfield* created a constitutional right to refuse chemical testing;

2. whether a defendant has a right to consult with counsel before deciding whether or not to submit to a chemical test; and

3. whether the admission of a defendant's refusal to submit to a chemical test may as evidence of consciousness of guilt is improper as it penalizes a defendant for the invocation of his/her a constitutional right to refuse a search.

III. DISCUSSION AND LEGAL ANALYSIS

A. The implied consent warnings need not distinguish between civil and criminal "penalties"

The defendants argue that *Birchfield*, which holds that that "motorists cannot be deemed to have consented to submit to a *blood* test on pain of committing a criminal offense," imposes a corollary requirement that the implied consent warnings indicate whether the penalties for refusing to submit to a blood test are civil or criminal in nature. This failure to distinguish between civil and criminal "penalties", the defendants contend, renders the form "inherently" "misleading" and "coercive" to the person whose consent to blood testing is being sought.

The current DL-26B form states:

> 1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code.
>
> 2. I am requesting that you submit to a chemical test of blood.
>
> 3. If you refuse to submit to the blood test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months.
>
> 4. You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to speak with an attorney or anyone else after being provided these warnings or you remain silent when asked to submit to a blood test, you will have refused the test.

Appendix "D."

The current Philadelphia Police Department Consent to Blood Testing form states:

> 1. You are under arrest for driving under the influence of alcohol or a controlled substance in violation of Section 3802 of the Vehicle Code, and I am requesting that you submit to a chemical test of blood.

> 2. You have the right to refuse to submit to a chemical test of your blood. If you refuse to submit to the blood test, your operating privileges will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, your operating privileges will be suspended for 18 months.
>
> 3. Additionally, the fact that you refused to submit a [*sic*] chemical test of your blood may be admitted into evidence in subsequent legal proceedings.
>
> 4. You have no right to speak with an attorney or anyone else before deciding whether to submit to testing. If you request to speak with an attorney or anyone else after being provided these warnings or you remain silent when asked to submit to a chemical testing, you will have refused the test.

Appendix "E."

The implied consent warning explains to the motorist that he or she is under arrest on suspicion of drunk driving; that the police are asking the motorist to consent to a blood test to measure the alcohol content in his or her body; and that if the defendant refuses that his or her license will be suspended and that the refusal may be used in "subsequent legal proceedings." (Philadelphia Police Department's Consent to Blood Testing Form, attached hereto as Appendix "E").

Police officers are required to inform the arrestee of the specific consequences of a refusal to take the test "so that he can make a knowing and conscious choice." *Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873, 877 (Pa. 1989). *See also, Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Scott*, 684 A.2d 539, 545 (Pa. 1996) ("in order to guarantee that a motorist makes a knowing and conscious decision on whether to submit to testing or refuse . . . the police must advise the motorist . . . he does not have the right to speak with counsel" and remaining silent is considered a refusal).

We find that, to ensure that the motorist is making a free and unconstrained choice, the warnings read and/or explained to the motorist should be plain and clear. The panel acknowledges that the references to use of refusal in "subsequent legal proceedings" may seem confusing and perhaps even coercive to a motorist who is suspected of drunk driving. It is conceivable that a motorist who hears that his or her refusal might be used as evidence in "subsequent legal proceedings" -- while not unconstitutional -- might think, however incorrectly, that the refusal could lead to the imposition of additional criminal penalties. We do not find, however, that the language of the warnings is "inherently" misleading or coercive in a way that is constitutionally defective such that the language of the warning itself is a sufficient basis for granting a motion to suppress.

The *Birchfield* court explicitly stated that "nothing we say here should be read to cast doubt on" implied consent statutes that "impose civil penalties and evidentiary consequences on motorists who refuse to comply" with a request for chemical testing. *Id.* at 2185. And there are no longer criminal penalties imposed for refusal due to the repeal of criminal penalties by the Pennsylvania legislature and the elimination of the criminal penalties from the implied consent warning. More clarity in the Philadelphia warning would be welcome to ensure that a DUI suspect is not under the mistaken impression that a refusal could lead to the imposition of a criminal penalty, but understands that the refusal might be used as evidence of consciousness of guilt in the DUI case itself, or to substantiate an administrative penalty. *Commonwealth v. Smith,* 177 A.3d 915, 921-22, (Pa. Super. 2017) (the Superior Court concluded that *Birchfield* was inapplicable because the revised DL-26 warnings did not contain any reference to the enhanced criminal penalties).

B. No right to counsel

The Defense[2] argues that it is incorrect and misleading for the new warnings to state that the Defendant has no right to speak to an attorney before deciding whether to consent or refuse a blood draw. They reason that with respect to the right of association, and the general right to liberty of action, that a person has the right to consult an attorney at any time regarding legal issues. They do acknowledge, however, that it may be true that, pursuant to the implied consent law, a driver may not consult with an attorney before deciding whether to consent to a chemical test.

While we agree that, after a review of the new warnings overall, a clearer and more accurate description of why there is no right to consult an attorney at this preparatory stage of the arrest would lessen any coercive tone that the new warnings may have, and while we suggest that the new warnings should instead plainly and clearly explain why no attorney is needed at this preparatory stage, the *Birchfield* Court and post-*Birchfield* Pennsylvania law did not create a right to counsel that did not previously exist. Moreover, Defendant has failed to successfully demonstrate through citation to case law, other than generally to *O'Connell, supra*, which does not support the proposition that such a right automatically attaches at the preparatory stage of a DUI arrest.

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[2]While there are over 100 Defendants whose cases are impacted by this Opinion, 101 of them are represented by the Defender Association of Philadelphia, who filed a brief in this matter which the other defendants joined, in the lead case of Commonwealth v. Rodweller, MC-51-CR-0018424-2016; we also note that several Defendants (Miller, Copeland, Davis, Delgado and Arcuri) are represented by private counsel and filed separate briefs. All of those arguments were considered by this panel in coming to its decision, and the reference herein to "Defense" and "Defendants" incorporates all defendants, regardless of who represents them.

To the contrary, Pennsylvania law is quite clear that a defendant has no right to counsel in this context. *See, Commonwealth v. Ciccola,* 894 A.2d 744 (Pa.Super. 2006), where the Superior Court noted that the right to counsel did not extend to "preparatory steps", and specifically to any circumstances which are not considered "critical proceedings" invoking the right to counsel. *See also, Commonwealth v. McCoy,* 975 A.2d 586 (Pa. 2009), where the Pennsylvania Supreme Court stated that there is no right to counsel at chemical testing under either the Sixth Amendment or Art. I sec. 9 of Pa. Constitution.

Further, it has long been recognized that blood samples are not testimonial and therefore do not invoke Fifth Amendment considerations. As the United States Supreme Court noted in *Schmerber v. California,* 86 S.Ct. 1826 (1966):

> "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds".

384 U.S. at 765.

For reasons discussed *infra,* we conclude that neither *Birchfield* nor cases applying it, such as *Commonwealth v. Myers,* 164 A.3d 1162 (Pa. 2017), overturned prior case law holding that there is no right to consult with counsel prior to deciding whether to submit to or refuse to submit to a chemical test of breath and blood. As the implied consent warnings are correct in stating that a motorist under suspicion of DUI

does not have a right to consult with counsel, we find that the warning advising him or her of this fact is not, by itself, "inherently" confusing, misleading or coercive.

With respect to whether this instruction is confusing, misleading or coercive when given in conjunction with or subsequent to *Miranda* warnings,[3] the Pennsylvania Supreme Court addressed this issue in *O'Connell, supra*. After being arrested on suspicion of driving under the influence, O'Connell was transported to the police station and read the *Miranda* warnings. 555 A.2d at 874. O'Connell requested to speak with a lawyer, but before he was given the opportunity to speak with a lawyer, a police officer asked him to submit to a chemical breath test. *Id.* at 874-75. The Supreme Court specifically granted review in *O'Connell*, to clarify the procedures when an individual is arrested and read *Miranda* warnings but then asked to submit to chemical testing where the right to an attorney does not attach. *Id.* at 875. The Court noted that the Department of Transportation treated the request to speak to an attorney as a refusal, but never informed O'Connell of this fact. O'Connell, who had been read the *Miranda* warnings, was confused as to why his right to counsel did not apply to the breath test too. The Supreme Court found that it was not acceptable procedure to treat the refusal of a confused motorist (such as O'Connell) as a refusal when the motorist was never advised that he had no right under the law to speak to an attorney before undergoing a chemical breath test in the first place. *Id.* at 877.

As a remedy, the Supreme Court in *O'Connell* mandated that "in addition to telling an arrestee that his license will be suspended for one year if he refuses to take a breathalyzer test, the police instruct the arrestee that such rights are inapplicable to the

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602; 16 L.Ed.2d 694 (1966).

breathalyzer test and that the arrestee does not have the right to consult with an attorney or anyone else prior to taking the test." *Id.* at 878. The Court reasoned that "[a]n arrestee is entitled to this information so that his choice to take a breathalyzer test can be knowing and conscious and we believe that requiring the police to qualify the extent of the right to counsel is neither onerous nor will it unnecessarily delay the taking of the test." *Id. See also, Commonwealth v. Danforth*, 608 A.2d 1044, 1046 (Pa. 1992) ("The duty of the police to inform an arrestee that the right to counsel is inapplicable to requests for chemical testing is simply *not* contingent upon the arrestee exhibiting confusion concerning his right to speak with an attorney, or actually requesting to speak with an attorney."). Therefore even in situations where an individual under arrest on suspicion of DUI has been reading *Miranda* warnings and is then read the implied consent warnings prior to being asked to submit to a chemical test of breath or blood, we do not find the text of the implied consent warnings to be "inherently" misleading, but rather necessary to comply with the mandate imposed on law enforcement by the Pennsylvania Supreme Court.

C. Use of refusal as evidence in "subsequent legal proceedings"

Next, Defendants point to the following language contained in the warnings as misleading: "the fact that you refused to submit to a chemical test of your blood may be admitted into evidence in subsequent legal proceedings". Defendants contend that the assertion of a constitutional right -- the Fourth Amendment right to be free from a warrantless blood draw -- cannot be used against them adversely in a criminal proceeding. In support thereof, the Defense asserts that the admission into evidence of the refusal to consent to a blood draw violates federal and state due process, free speech rights, separation of powers, and Article V, Section 10(c) of the Pennsylvania

Constitution. In support thereof, Defendants contend that the right to refuse is the assertion of a constitutional right, and its admission in a subsequent criminal proceeding is violation thereof. This assertion is incorrect.

The Pennsylvania Superior Court specifically discussed the arguments raised by Defendants in its recent holding in *Commonwealth v. Bell*, 167 A.3d 744 (Pa.Super. 2017), *allocator granted* (April 5, 2018), clearly finding that a motorist does not have a constitutional right to refuse chemical testing. In its well-reasoned opinion, the Superior Court analyzed the issues raised by Defendants here, including an examination of the United States Supreme Court holdings in *Birchfield*, *Schmerber*, and *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)(admission of evidence of a defendant's refusal of a warrantless blood test did not violate Appellee's Fifth Amendment right against self-incrimination or his Fourteenth Amendment right to due process). The *Bell* court also examined Pennsylvania case law and the evidentiary consequences of §1547(e).

Pennsylvania's Implied Consent Law states:

> In any summary proceeding or *criminal proceeding* in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, 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.

75 Pa.C.S. § 1547(e) (emphasis added).

The *Bell* court concluded that, based on this precedent, Defendant had no constitutional right to refuse a blood test upon his lawful arrest for DUI and thus, it was

constitutionally permissible for the prosecution to introduce evidence of this refusal at his trial on DUI charges. *Bell,* 167 A.3d at 749.

Moreover, recently the Pennsylvania Supreme Court in *Commonwealth v. Chapman,* 136 A.3d 126 (Pa. 2016), a case cited by both parties, discussed some of the concerns raised by Defendants in their arguments, i.e. that the introduction of evidence of refusal in a criminal trial is problematic on a variety of constitutional grounds, yet specifically excludes the implied consent scenario:

> Although Appellant's focus on the Fifth Amendment [in introduction of evidence regarding Defendant's refusal to provide a DNA sample] may be misplaced [since DNA, like blood, is non-testimonial], we find that the circumstances presented implicate a broader due process concern. In this regard, the admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is problematic, as most jurisdictions hold (outside the context of implied-consent scenarios) that such admission unacceptably burdens an accused's right to refuse consent.

Chapman, 136 A.3d at 131. Thus, taking the extensive analysis of the Supreme Court in this context, we conclude that admitting evidence of a refusal to submit to a blood draw in circumstances involving implied consent is not unconstitutional.

We further do not find that the holding of the Pennsylvania Supreme Court in *Commonwealth v. Myers,* 164 A.3d 1162 (Pa. 2017) overrules the holding in *Bell,* as the Myers decision is limited to the discussion regarding the application of the blood test of an unconscious defendant. While we recognize that *Myers* did not invalidate the implied consent law on constitutional grounds, its holding was limited to the narrow issue of the application of the right of refusal under §1547(b)(1), which provides that the statutory right of refusal to "any person placed under arrest" for DUI, and therefore, is applicable to an unconscious defendant.

Defendants argue that *Bell* was decided incorrectly because it shifts its analysis from the Fourth Amendment search at issue here to an analysis involving the Fifth Amendment right against self-incrimination, the assertion of which cannot be used against a defendant as evidence of consciousness of guilt. Here, however, and as discussed at length in *Bell*, the Fourth Amendment refusal to be searched can be used against a defendant as one factor in determining the totality of the circumstances in the crime charged – here, DUI. We further note that this precise argument, framed within the context of a Fourth Amendment search, was raised, discussed and rejected by the Superior Court in *Bell*.

The *Bell* decision is directly on point, and we are bound by its precedent. Accordingly, we hold that, pursuant to present case law from both the United States Supreme Court and in Pennsylvania, Defendants do not have a constitutional right to refuse a blood test, and therefore, the evidence of their refusal may be properly introduced as evidence of guilt in their subsequent trial on the DUI charges.

The Defender Association also posits that *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017) recognizes a constitutional right to refuse chemical testing. However, Section II.C., written by Justice Wecht, was joined only by Justices Donohue and Dougherty.[4] As only three of the seven justices of our Supreme Court joined in Section II.C of *Myers*, it is a plurality decision and therefore not binding precedent. *See, e.g.*, *Interest of O.A.*, 717 A.2d 490, 496 n.4 (Pa. 1998); *Commonwealth v. Price*, 672 A.2d 280, 282 (Pa. 1996). The Defenders have attempted to manufacture a majority opinion

[4] Justice Todd joined the *Myers* opinion with respect to Parts I, II.A, II.B, and II.D, but did not join the opinion with respect to Part II.C. 164 A.3d at 1164, 1172 n.15.

where none exists by citing to Chief Justice Saylor's Concurring Opinion, which was joined in full by Justice Baer and in part by Justice Donahue.

In his concurrence, Justice Saylor wrote that defendant Myers consented to the drawing of his blood by driving on the roads of Pennsylvania. *Myers*, 164 A.3d at 1182-83 (Saylor, C.J., concurring). The plurality did not agree with this interpretation of the implied consent law. *Id.* at 1176 (plurality) ("we reject the Commonwealth's contention that the implied consent provision of 75 Pa.C.S. § 1547(a) serves, in and of itself, as an exception to the warrant requirement."). Further, neither Chief Justice Saylor nor Justice Baer joined Section II.C, they only concurred with the decision.

We also note that Section II.C of *Myers* does not reach as far as the Defender Association suggests. Nowhere in this section of the *Myers* opinion does Justice Wecht state the evidentiary consequences of the implied consent are unconstitutional because the right to refuse is a constitutional right and motorists cannot be penalized for exercising their constitutional right to be free from searches.

To the contrary, in Section II.B. of the *Myers* decision, the Supreme Court held "Myers had an ***absolute right to refuse chemical testing pursuant to the implied consent statute***, that his unconscious state prevented him from making a knowing and conscious choice as to whether to exercise that right, and that the implied consent statute does not authorize a blood test conducted under such circumstances." 164 A.2d at 1172 (emphasis added). *See also, South Dakota v. Neville*, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (a statutory right to refuse chemical testing pursuant to an implied consent law "is simply a matter of grace bestowed by the . . . legislature."). Therefore, the right to refuse consent is indeed a statutory one, not a constitutional one.

The Defender Association also notes that a petition for allowance of appeal was filed with the Pennsylvania Supreme Court was with respect to the *Bell* decision, and while this is true, until such time as allocator is granted and the Pennsylvania Supreme Court reverses *Bell*, it remains binding precedent which we must follow. *See, e.g., Commonwealth v. Reed*, 107 A.3d 137, 143 (Pa. Super. 2014).

D. Necessity for "totality of circumstances analysis on a case-by-case basis

Defendants argue that the Commonwealth waived their right to challenge Judge Moore's omnibus decision granting multiple Motions to Suppress because the Commonwealth did not present any evidence or witnesses at the Municipal Court motion to suppress. They assert that, according to PA.R.Crim.P. 581, in a motion to suppress, the Commonwealth bears the burden of production and persuasion. They further argue that, since the Commonwealth never sought to present evidence on the day of the motions to suppress before Judge Moore, their procedural arguments are therefore deemed waived.

As an initial matter, we note that both the jurisprudence of the United States Supreme Court and the Pennsylvania Supreme Court strongly disfavor *per se* rules governing searches and seizures. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 39–40, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); *Florida v. Bostick*, 501 U.S. 429, 439–40, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *Commonwealth v. Au*, 42 A.3d 1002, 1008–09 (Pa. 2012); *Commonwealth v. Revere*, 888 A.2d 694, 703 (Pa. 2005) (overturning a decision of the Superior Court which misinterpreted a prior Pennsylvania Supreme Court decision as imposing a bright line/per se rule concerning *Terry* stops and an arrests).

Further, the basic principle of fundamental fairness prevents us from upholding the *en masse* disposition of motions to suppress. When Judge Moore batched 77 cases in one day, all with the same perceived issue, it was not possible for the Commonwealth to possibly present evidence through witnesses for each case. The Commonwealth was deprived of the opportunity to do so when Judge Moore granted the omnibus motions to suppress. Each motion for suppression must be decided under the totality of the circumstances test. *Commonwealth v. Evans*, 153 A.2d 323 (Pa. Super. 2016) (post-*Birchfield* decision, setting forth a totality of the circumstances test to determine whether consent was voluntary under Birchfield); *Birchfield*, 136 S.Ct. at 2186. It was improper to require the Commonwealth to identify specific cases for reconsideration when the only viable alternative available to the Commonwealth was to appeal them all, as the Commonwealth was compelled to do.

We can see how an argument that the new warning being deemed unconstitutional on its face might lead to a conclusion, however erroneous, that all the cases where the new warnings were involved must fail, obviating the need for a hearing. However, the Commonwealth and the Defense must be provided the chance to show that additional facts exist in particular cases, e.g., to show that the accused did understand the warnings based on additional evidence, that the officer explained the warnings at length to the accused, that the accused asked questions for clarification before consenting, or additional factual circumstances which tend to prove or disprove the voluntariness of the consent. We therefore hold that an *en masse* granting of the Motions to Suppress was incorrect.

In conclusion, there has been no determination that the new Pennsylvania implied consent warnings were *per se* coercive on constitutional grounds or clearly

obtained upon pain of criminal prosecution. Insofar as the Defendants argue that these warnings are *per se* coercive, confusing, misleading, or any combination thereof, that argument fails for the reasons stated *supra*. *Commonwealth v. Danforth*, 576 A.2d 1013, 1022 (Pa. Super. 1990) (*en banc*) ("[w]hether consent has been voluntarily given is a question of fact [to be] determined in each case from the totality of the circumstances.").

E. PennDOT and the Philadelphia Police Department did not lack the authority to update the DUI warning forms in accordance with *Birchfield*

Defendant Arcuri, through counsel, has argued that the Pennsylvania Department of Transportation ("PennDOT") and the Philadelphia Police Department ("Phila. PD") acted improperly in revising the implied consent warnings to be read to motorists under suspicion of DUI. She argues that neither PennDOT nor the Phila. PD, as executive agencies, had the authority to remove statutorily required language from the implied consent warnings. Therefore, she reasons, so long as 75 Pa.C.S.A. § 1547(b)(2)(ii) remained on the books and was not amended, the police were obligated to read the portion of the warnings relating to enhanced penalties.

This argument was recently considered and rejected by the Commonwealth Court in a license suspension case. In *Garlick v. Commonwealth, Dep't of Trans., Bureau of Driver Licensing*, 176 A.3d 1030 (Pa. Cmwlth. 2018) the Commonwealth Court held that after *Birchfield* was decided even though "Section 1547(b)(2)(ii) still required a warning that a licensee would be subject to enhanced criminal penalties under Section 3804(c) for refusing a test of his blood, a Licensee could not, as a matter of constitutional law, be subject to such penalties." *Id.* at 1036. The Commonwealth Court then held that the criminal penalties for refusing criminal penalties for refusing a blood test unenforceable

and effectively severed Section 1547(b)(2)(ii) from the rest of the Vehicle Code. *Id.* (citing 1 Pa. C.S. § 1925; *Commonwealth v. Batts*, 163 A.3d 410, 441 (Pa. 2017)).

The Commonwealth Court unequivocally rejected the motorist's argument that the warning about no-longer enforceable enhanced criminal penalties must still be read to a motorist, even when doing so would violate the motorist's Fourth Amendment rights. *Id.* at 1037 ("Licensee's argument encourages officers to violate licensees' Fourth Amendment rights . . . in order to comply with Section 1547(b)(2)(ii) even though the criminal penalty in the warning is no longer enforceable . . . . We cannot countenance such an argument."). This argument is also incompatible with the mandate of *Commonwealth, Dept. of Transp., Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873 (Pa. 1989) which requires police to explain the actual consequences of a refusal so that an arrested motorist can make a knowing and conscious choice. *Id.* at p. 878. Post-*Birchfield*, a DUI defendant cannot be sentenced to the enhanced penalties set forth in 75 Pa.C.S.A. § 3804(c) if he/she refuses to submit to a blood test, *Commonwealth v. Giron*, 155 A.3d at p. 640, and so there is no statutory or due process requirement to read a warning about unenforceable penalties for refusal.

We likewise reject the contention that PennDOT and the Philadelphia Police Department usurped the legislative process when they revised their implied consent warnings. The power to enact and amend statutes lies with the legislative branch in the form of General Assembly. Pa. Const. Art. 2, § 1, Art. 3, § 1. The General Assembly "cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority." *Sullivan v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 708 A.2d 481, 485 (Pa. 1998) (citations and quotation marks omitted). At the same time, it is illogical to argue that executive

agencies such as PennDOT, the Pennsylvania State Police, and Philadelphia Police Department should continue reading inaccurate information regarding potential criminal penalties for refusing a chemical test of blood to motorists after said penalties have been declared unconstitutional until the General Assembly amended the portions of the statute which have been found to be unconstitutional.

Indeed, Arcuri is seeking a ruling that the Commonwealth disregard the mandate of the United States Supreme Court where it has found a portion of that statutory scheme to be unconstitutional. Although *Garlick* applies to the civil side of the implied consent law, i.e., license suspensions, its reasoning is equally applicable here. *Birchfield* held that enhanced criminal penalties for refusing to provide blood for chemical testing was unconstitutional and all portions of the Vehicle Code relating to it are unconstitutional and severed until the General Assembly amended the Vehicle Code to bring it into compliance with the holding of *Birchfield*.

Lastly, Arcuri contends that the Commonwealth engaged in malfeasance and/or "obstructed justice" when the Pennsylvania District Attorneys Association and individual county district attorneys requested that PennDOT revise Form DL-26 to comply with the mandate of *Birchfield*. While PennDOT might have consulted with other stakeholders in the criminal justice system prior to issuing the revised DL-26B form, there is no evidence or reason that would lead us to conclude that the various representatives of the Commonwealth acted with any improper motive.

IV. *EN BANC* PANEL DECISION

At a hearing on a motion to suppress, the Commonwealth bears the burden to establish, by a preponderance of the evidence, the evidence at issue was obtained without violating Defendant's rights. *See, e.g., Commonwealth v. Wallace*, 42 A.3d 1040, 1047-48 (Pa. 2012); Pa.R.Crim.P. 581(H). The Fourth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protect citizens from unreasonable searches and seizures at the hands of the government. *Commonwealth v. Chase*, 960 A.2d 108, 112-13, 116 (Pa. 2008). It is undisputed that the administration of a blood test on behalf of the government is a search. *See, e.g., Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *Commonwealth v. Ellis*, 608 A.2d 1090, 1091 (Pa. Super. 1992). A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies. *Commonwealth v. Strickler*, 757 A.2d 884, 888 (Pa. 2000).

One exception is the defendant's voluntary consent to the search. *Commonwealth v. Gillespie*, 821 A.2d 1221, 1225 (Pa. 2003). "To establish a voluntary consensual search, the Commonwealth must prove '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.'" *Commonwealth v. Randolph*, 151 A.3d 170, 179 (Pa. Super. 2016) (quoting *Commonwealth v. Strickler*, 757 A.2d 884, 901 (Pa. 2000)), *appeal denied*, 168 A.3d 1284 (Pa. 2017).

> When evaluating voluntariness of consent, the totality of the circumstances must be evaluated. While there is no hard and fast list of factors evincing voluntariness, some considerations include: 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 to 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.

Gillespie, 821 A.2d at 1225 (citing, *inter alia, Commonwealth v. Cleckley*, 738 A.2d 427, 433 n. 7 (Pa. 1999)) (quotation marks omitted).

However, we sit as "an appellate court and [must] review [] the record of the suppression hearing in the Municipal Court." *Commonwealth v. Neal*, 151 A.3d 1068, 1070 (Pa. Super. 2016) (citations omitted). Therefore,

> [The court of common pleas] is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. . . . Where the suppression court's factual findings are supported by the record, [the court of common pleas is] bound by [those] findings and may reverse only if the court's legal conclusions are erroneous. Where . . . the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on the court [of common pleas], whose duty it is to determine if the suppression court properly applied the law to the facts.

Neal, 151 A.3d at 1070-71 (quoting *Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa. 2010)). *See also In re L.J.*, 79 A.3d 1073, 1087 (Pa. 2013) (the scope of review from a suppression ruling is limited to the evidentiary record created at the suppression hearing.).

Our decision here mirrors that of the *Birchfield* Court, which remanded the case of Petitioner Michael Beylund, to determine if, under the totality of the circumstances, his consent to the blood draw was voluntary. 136 S.Ct. at 2186.

Even in cases involving the pre-*Birchfield* warnings which were subsequently invalidated, the Superior Court's recent ruling in *Commonwealth v. Trahey*, ---A.3d---,

2018 Pa. Super. 72, 2018 WL 1465431 (Mar.26, 2018) supports the conclusion that a case-by-case examination of whether, separate from the warnings, there was an additional basis to allow for a warrantless blood draw. In *Trahey,* the inquiry involved the "exigent circumstances" exception to the warrant requirement and reverses a suppression order based on the "totality of the circumstances" test.

Based on the above, this Panel concludes that the appropriate course of action is to remand the cases under review before us for further proceedings consistent with this opinion, to wit, whether the Commonwealth can meet its burden to prove, by a preponderance of the evidence, that the defendant's consent, or refusal to consent to blood testing was, under the totality of the circumstances, apart from the warnings just themselves, voluntary and un-coerced.

Therefore, all cases where the motions to suppress were granted *en masse* and/or without a hearing on the merits are hereby remanded to Philadelphia Municipal Court for a *de novo* motion to suppress on the issue of whether, apart from the language of the warnings alone, the facts and evidence to be presented demonstrate whether the defendant's consent to, or refusal of, a blood draw was voluntary, knowing and un-coerced.[5]

Those cases in which a motion to suppress hearing on the merits did take place and was granted based on the warning language alone, will be remanded to the Municipal Court, back to the individual judges who heard the Motions to Suppress, for further proceedings consistent with this Opinion. In such cases, the parties will be given the opportunity to supplement the record to determine whether, apart from the

[5] All cases are listed by disposition on Appendix "A".

language of the warnings alone, the facts and evidence to be presented demonstrate if the defendant's consent to, or refusal of, a blood draw was voluntary, knowing and un-coerced.

Finally the cases where the defendants' motions to suppress were denied below[6], and for which writs of certiorari were filed with the Court of Common Pleas shall be scheduled for oral argument before this Panel on the *sole* issue of their disposition consistent with this Opinion.

BY THE COURT:

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Brandeis-Roman, J.

_____

Tsai, J.

Judge Wright files a Concurring Statement.

Filed: April 4, 2018, as amended, April 24, 2018

[6] Commonwealth v. Daymon Tobler, MC-51-CR-0026023-2016
Commonwealth v. David Sanchez, MC-51-CR-0004234-2017
Commonwealth v. Elias Torres, MC-51-CR-0002975-2016
Commonwealth v. Sopounaeit Sa, MC-51-CR-0034566-2016
Commonwealth v. Jason Clair, MC-51-CR-0031286-2016