



Widener Commonwealth Law Review Symposium

Life After *Birchfield v. North Dakota*

Commonwealth DUI Law Prior to *Birchfield v. North Dakota*

Commonwealth's Implied Consent Statute – 75 Pa.C.S.A. § 1547

(a) General rule. — Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth *shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood* or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock).

4



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2

Commonwealth DUI Law Prior to *Birchfield v. North Dakota*

Commonwealth's Implied Consent Statute – Penalties – 75 Pa.C.S.A. § 1547(b)

**** You CAN REFUSE.** (*Commonwealth v. Eisenhart*, 531 Pa. 103, 611 A.2d 681 (Pa. 1992)).
“Civil Penalties” for Refusing to Submit to Chemical Testing

1. 12 month license suspension (18 month suspension if previous suspension or “sentenced” for other enumerated offenses)
2. License Restoration Fees up to \$2,000.00

Law Enforcement must give “O’Connell Warnings” – DL 26 – advising of license suspension and restoration fees.

5



Commonwealth DUI Law Prior to *Birchfield v. North Dakota*

Upon reasonable suspicion of driving under the influence of alcohol, law enforcement can request that an individual consent to a blood draw and/or breath test to determine blood alcohol content (BAC). *Commonwealth v. Feczko*, 10 A.3d 1285 (Pa. Super. 2010).

A blood draw performed by or at the direction of a government official is a search. *Commonwealth v. Kohl*, 615 A.2d 308, 315 (Pa. 1992).

The Fourth Amendment protects citizens from unreasonable searches and seizures. *Commonwealth v. McAdoo*, 46 A.3d 781, 784 (Pa. Super. 2012).

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). Consent, exigent circumstances, and search incident to arrest are exceptions to this rule. *Commonwealth v. Durnavant*, 63 A.3d 1252, 1257 n.3 (Pa. Super. 2013).

3



Commonwealth DUI Law Prior to *Birchfield v. North Dakota*

75 Pa. C.S.A. § 3804(c) (prior to July 20, 2017). Incapacity; highest blood alcohol; controlled substances. — An individual who violates section 3802(a)(1) and *refused testing of blood or breath* or an individual who violates section 3802(c) or (d) shall be sentenced as follows:

- (1) For a first offense, test(i) undergo imprisonment of not less than 72 consecutive hours; (ii) pay a fine of not less than \$ 1,000 nor more than \$ 5,000; (iii) attend an alcohol highway safety school approved by the department; and (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.
- (2) For a second offense, test(i) undergo imprisonment of not less than 90 days; (ii) pay a fine of not less than \$ 1,500; (iii) attend an alcohol highway safety school approved by the department; and (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.
- (3) For a third or subsequent offense, test(i) undergo imprisonment of not less than one year; (ii) pay a fine of not less than \$ 2,500; and (iii) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

6



Commonwealth DUI Law Prior to *Birchfield v. North Dakota*
Commonwealth v. Carley, 141 A.3d 1287 (Pa. Super. 2016)

1. Decided and filed in the Superior Court on June 16, 2016, decided seven days prior to *Birchfield*.
2. Held – an individual does NOT have the right to refuse to consent to a blood test and that refusal may constitutionally lead to increased criminal penalties.

7



After *Birchfield*: Legislative Changes

Act 30 of 2017 (S.B. 553), P.L. 333, § 4, approved July 20, 2017, eff. July 20, 2017 --

Amends 75 Pa. C.S.A. § 3804 – refusing a **breath test** or refusing a **blood test pursuant to a valid search warrant** results in increased penalties.

10



***Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)**

Birchfield v. North Dakota (refusal to submit to **blood** test resulted in prosecution under North Dakota law which made refusal a criminal act.)

Bernard v. Minnesota (refusal to submit to **breath** test resulted in prosecution under Minnesota law criminalizing refusal.)

Beylund v. North Dakota (consented to blood draw after having been informed that refusal would lead to additional criminal penalties.)

8



DL-26 Warnings – Pre-*Birchfield*

1. Please be advised that you are under arrest for driving under the influence of alcohol or controlled substance in violation of Section 3802 of the Vehicle Code.
2. I am requesting that you submit to a chemical test of _____ (blood, breath or urine. Officer chooses the chemical test).
3. It is my duty as a police officer to inform you that if you refuse to submit to the chemical test, your **operating privilege will be suspended for at least one year**. In addition, if you refuse to submit to the chemical test, and you are convicted of, plead to, or adjudicated delinquent with respect to violating Section 3802(a) of the Vehicle Code, because of your refusal, you will be subject to the **more severe penalties** set forth in Section 3804(c) of the Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of \$1,000.00.
4. It is also my duty as a police officer to inform you that you have no right to speak with an attorney or anyone else before deciding whether to submit to testing and any request to speak with an attorney or anyone else after being provided these warnings or remaining silent when asked to submit to chemical testing will constitute a refusal, resulting in the suspension of your operating privilege and other enhanced criminal sanctions if you are convicted of violating Section 3802(a) of the Vehicle Code.

11



***Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)**

HOLDING:

1. Taking a **blood** sample or a **breath** test is a search governed by the Fourth Amendment.
2. The Fourth Amendment permits warrantless **breath tests** incident to arrests for drunk driving but not warrantless **blood tests**. Motorists may not be **criminally** punished for refusing to submit to a blood test based upon legally implied consent.

9



DL-26A Warnings – Post-*Birchfield* (REV. PSP 8/2018)

- It is my duty as a police officer to inform you of the following:
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 breath**. You must successfully complete two consecutive breath samples in order to complete a chemical test of breath.
 3. If you refuse to submit to the **breath 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, your operating privilege will be suspended for up to 18 months. If your operating privilege is suspended for refusing chemical testing, you will have to pay a reinstatement fee of up to \$2,000 in order to have your operating privilege restored. In addition, if you refuse to submit to the **breath test**, and you are convicted of violating Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) (relating to penalties) of the Vehicle Code. These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of \$1,000.00, up to a maximum of five years in jail and a maximum fine of \$10,000.
 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 breath test, you will have refused the test.

12



After *Birchfield*

Application of *Birchfield*

Commonwealth v. Evans, 153 A.3d 323 (Pa. Super. 2016)

13



After *Birchfield* : Some Appellate Issues

1. **Failure to raise *Birchfield* issue in lower court.** *Commonwealth v. Torres*, 176 A.3d 292 (Pa. Super. 2017).
2. ***Birchfield* is not retroactive where the defendant's conviction was final and where defendant did not preserve the issue at all stages of the litigation including on direct appeal.** *Commonwealth v. Wilcox*, 174 A.3d 670 (Pa. Super. 2017).
3. ***Birchfield* does not apply retroactively in Pennsylvania to cases pending on collateral review.** *Commonwealth v. Olson*, 179 A.3d 1134 (Pa. Super. 2018).
4. **The *Birchfield* decision did not warrant subsequent withdrawal of guilty plea because the decision did not render pleas involuntary or unknowing.** *Commonwealth v. Kehr*, 180 A.3d 754 (Pa. Super. 2018).

16



After *Birchfield* : Some Issues

1. **Defendant unconscious at the time of the blood draw.** *Commonwealth v. Myers*, 640 Pa. 653, 164 A.3d 1162 (2017).
2. **Defendant was read the wrong DL-26.** *Commonwealth v. Kurtz*, 172 A.3d 1153 (Pa. Super. 2017); *Commonwealth v. Updike*, 172 A.3d 621 (Pa. Super. 2017).
3. **"Civil Penalties" and evidentiary consequences.** *Commonwealth v. Bell*, 167 A.3d 744 (Pa. Super. 2017); *Boseman v. PennDOT*, 157 A.3d 10 (Pa. Cmwlth. 2017).

14



17

Thank you!!

Questions?

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After *Birchfield* : Some Issues

4. **Search Warrant Issues --**
 - a. **Exigent circumstances and the "two hour rule":** *Commonwealth v. Redman*, 185 A.3d 1106 (2018) (unpublished) (*allocatur granted*); *Missouri v. McNeely*, 569 U.S. 141 (2013).
 - b. **Out-of-State Medical Treatment / Draws**
5. **Effect on "medical blood draws" per 75 Pa. C.S.A. § 3755 –** *Commonwealth v. Reidel*, 539 Pa. 172, 651 A.2d 135 (1993); *Commonwealth v. Myers*, 640 Pa. 653, 164 A.3d 1162 (2016) (In 14).

15