

IN THE COURT OF COMMON PLEAS OF YORK COUNTY

Criminal Division

CP-67-CR-XXXX-XXXX

COMMONWEALTH of Pennsylvania	:	CP-67-CR-XXXX-XXXX
	:	
v.	:	Charges: XXXXXXXXXXXXXXXX
	:	
XXXXXXXXXXXXXXXXXXXX,	:	Judge: XXXXXXXXXXXXXXXX
Defendant.	:	
	:	

SCHEDULING ORDER -

OMNIBUS PRETRIAL MOTION

AND NOW, this _____ day of _____, 2018, the Court hereby ORDERS that a hearing is scheduled for _____, 2018, at _____ AM/PM, in Court Room # _____ of the York County Judicial Center, 45 North George Street, York, PA 17401 where at such time testimony and argument shall be heard on XXXXXXXXXXXX's Omnibus Pretrial Motion.

BY THE COURT:

The Honorable XXXXXXXXXXXX

Distribution to:

XXXXXXXXXXXX – Assistant Public Defender
XXXXXXXXXXXX – Assistant District Attorney
XXXXXXXXXXXX – Defendant

IN THE COURT OF COMMON PLEAS OF YORK COUNTY

Criminal Division

CP-67-CR-XXXX-XXXX

COMMONWEALTH of Pennsylvania : CP-67-CR-XXXX-XXXX
:
v. : Charges: XXXXXXXXXXXXXXXX
:
XXXXXXXXXXXXXXXXXXXX, : Judge: XXXXXXXXXXXXXXXX
Defendant. :

OMNIBUS PRETRIAL MOTION

AND NOW, comes XXXXXXXXXXXXXXXX, Defendant in the above-captioned matter, by his/her attorney, XXXXXXXXXXXXX, Esquire, Assistant Public Defender, and, in support of his/her Omnibus Pretrial Motion, respectfully represents the following:

Facts and Procedural History

1. On _____, 2018, XXXXXXXXXXXXX was arrested for the above-captioned offenses. The arresting officer did not have a search warrant. Instead, the officer read XXXXXXXXXXXXX a Form DL-26(b) and asked for consent to a blood draw. (See Exhibit “A,” Form DL-26(b), attached.) Pursuant to that form and the recently amended version of 75 Pa. C.S. §1547(b)(2)(i) (eff. Jan. 20, 2018), the officer advised XXXXXXXXXXXXX that refusal to consent would result in certain penalties, including license suspension and, to reinstate the license, “a restoration fee of up to \$2,000.” (Exhibit “A.”) After hearing these penalties for refusal, XXXXXXXXXXXXX consented and the blood draw was performed.

2. XXXXXXXXXXXXX was charged with the above-captioned offenses on _____, 2018.

3. XXXXXXXXXXXXX is not incarcerated and does not require an interpreter.

4. XXXXXXXXXXXXX’s preliminary hearing was held on _____, 2018, at

which time this matter was bound over for court.

5. XXXXXXX's arraignment was scheduled for _____, at which time it was waived.

6. This motion is timely, having been filed within 30 days of the waiver of arraignment.

Analysis

7. The United States and Pennsylvania Constitutions protect against unreasonable searches and seizures. U.S. Const., amends. IV, XIV; Pa. Const., art. I, §8. "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).

8. In *Birchfield v. North Dakota*, 579 U.S. —, 136 S.Ct. 2160, 2184 (2016), the United States Supreme Court held that although breath tests can be conducted without a search warrant, blood tests generally cannot. The Court further found that while consent to a blood test would obviate the need for a warrant, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

9. Based on *Birchfield*, the Pennsylvania Superior Court has held that blood test results obtained through consent must be suppressed where the defendant "only consented to the warrantless blood draw after being informed, by the police, that refusal to submit to the test could result in enhanced criminal penalties." *Commonwealth v. Evans*, 153 A.3d 323, 331 (Pa. Super. 2016).

10. As noted, there was no search warrant in this case. XXXXXXXXXXXX consented to a blood draw only after he/she was read Form DL-26(b) and advised that refusal to consent would result in certain penalties, including "a restoration fee of up to \$2,000." (Exhibit "A.")

11. XXXXXXXXX's consent was invalid under *Birchfield* and *Evans*. Despite the General Assembly's categorizing the \$2,000 assessment as a "civil" penalty and labeling it a "fee," it is actually a fine, *i.e.*, criminal punishment. XXXXXXXXX therefore only consented to a blood draw upon being threatened with criminal punishment.

12. Although the terms "fines, fees, and costs" are often used interchangeably, they have distinct meanings and carry different consequences. The Pennsylvania Superior Court has explained that while " 'costs and restitution are not considered punishment,' " fines constitute criminal punishment. *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. 2014) (quoting *Commonwealth v. Wall*, 867 A.2d 578, 583 (Pa. Super. 2005)). This is because costs and restitution, like fees, are " 'designed to have the defendant make the government and the victim whole,' " while fines are set at an amount " 'equal to the severity of the crime.' " *Id.* (quoting *Wall*, 867 A.2d at 583). *See also* Black's Law Dictionary, Eighth Ed., 647 (2004) (defining "fee" as a "charge for labor or services, esp. professional services").

13. Calling an assessment a "fee" or "cost" does not make it one. In *Wall*, 867 A.2d at 583, the court stated that although the General Assembly had labelled the assessment in question as a cost, this was not dispositive because it was not "a reimbursement to the Commonwealth for the expenses associated with prosecuting a defendant." In fact, because the assessment did not reimburse the government for actual expenses, it was "analogous to a fine" despite its title. *Id.* As such, it constituted criminal punishment and triggered *ex post facto* protections. *Id.*

14. Under this reasoning, the "restoration fee" with which XXXXXXXXXXXX was threatened is actually a fine despite its label. That is because this assessment has nothing to do with any actual costs incurred by the government as a result of the refusal of blood testing or the reinstatement of a driver's license. Indeed, the statute contains no indication that the funds

generated by this assessment are used to reimburse any costs.

15. Further, all available evidence shows the assessment is intended to punish and not to reimburse. Notably, Pennsylvania ordinarily charges only \$70.00 or \$88.00 “to restore a person’s operating privilege or the registration of a vehicle following a suspension or revocation.” 75 Pa. C.S. §1960. It does not make sense to charge a minimum of five times as much to restore a license suspended due to a refusal, unless this is a method of punishment. And there is no reason why prosecuting a refusal case would cost at least \$412.00 more than prosecuting a case where a defendant has consented to blood testing.

16. There is even less reason for the restoration fee to increase based on previous refusals, unless it serves to punish. And yet the assessment is \$500.00 for a first-time refusal, \$1,000.00 for a second-time refusal, and \$2,000.00 for a third or subsequent refusal. 75 Pa. C.S. §1547(b.2)(1). It is clear that this is a recidivist schedule, motivated by the desire to punish repeat offenders more severely. *See A.S. v. Pennsylvania State Police*, 143 A.3d 896, 908 (Pa. 2016) (“[A] statute embodying a recidivist philosophy evinces a legislative intent ‘to punish more severely offenders who have persevered in criminal activity despite the theoretically beneficial effects of penal discipline.’ ”).

17. It is also worth noting the timing of the General Assembly’s enactment of the restoration fee. In light of *Birchfield*, the Pennsylvania Superior Court recognized the impropriety of punishing those who refuse blood tests more severely than those who consent. *Commonwealth v. Giron*, 155 A.3d 635, 639-40 (Pa. Super. 2017). This meant the enhanced penalties of 75 Pa. C.S. §§3803-3804 could no longer be applied. *Id.* It was only at this point that the enhanced restoration fee emerged, a strong indication that this assessment was intended as a stand-in for the criminal punishment that could no longer be imposed more obviously due to

Giron and Birchfield.

18. And finally, commentators have already noted this restoration fee likely functions as criminal punishment despite its designation. *See, e.g., Trib editorial: Pa.'s DUI fee poses potential conflict with Supreme Court ruling*, Pittsburgh Tribune-Review (Jan. 6, 2018) (“[I]t’s not a legal stretch to argue that Pennsylvania’s new fee for refusing a Breathalyzer test is a de facto punishment, and, as such, a means of coercion, rather than simply the reimbursement of administrative costs to the state.”) (available at: <http://triblive.com/opinion/editorials/13139668-74/trib-editorial-pas-dui-fee-poses-potential-conflict-with-supreme-court-ruling>) (last visited January 10, 2018).

19. As such, the restoration fee is a fine despite its label. This means XXXXXXXXXXXX only consented to a blood draw after he/she was threatened with criminal punishment. That is exactly what required suppression in *Birchfield*, 136 S.Ct. at 2186 and *Evans*, 153 A.3d at 331.

Conclusion

20. XXXXXXXXXXXX’s consent to the blood draw was invalid. And there was no other basis for the blood draw to have been performed. There was no search warrant, and no exigent circumstances allowed the draw.

21. The blood draw was therefore an illegal search, and its results must be suppressed.

WHEREFORE, Defendant respectfully requests that this Honorable Court suppress the results of the illegally obtained blood draw.

Respectfully submitted,

YORK COUNTY OFFICE OF
THE PUBLIC DEFENDER

Date: XXXXX, 2018

XXXXXXXXXXXXXXXXXXXXX

Assistant Public Defender

Supreme Court ID No. XXXXXXXXXXXX

York County Office of the Public Defender

45 North George Street

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(717) 771-9217

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties on the date and at the addresses in the manner listed below:

Via Hand Delivery to:

Court Administration
York County Judicial Center
45 North George Street
York, PA 17401

XXXXXXXXXXXXXXXXXX, Esquire
York County District Attorney's Office
York County Judicial Center
45 North George Street
York, PA 17401

Clerk of Courts
York County Judicial Center
45 North George Street
York, PA 17401

Respectfully submitted,

YORK COUNTY OFFICE OF
THE PUBLIC DEFENDER

Date: XXXXXXXX, 2018

XXXXXXXXXXXXXXXXXX
Assistant Public Defender
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Attorney for Defendant