IN THE PHILADELPHIA MUNICIPAL COURT

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	MC 0503-2151
BETH ANN SCHNEIDER	:	

OPINION

MOSS, J. December 20, 2005

Defendant Beth Ann Schneider was charged with driving under the influence of alcohol in violation of Section 3802 of the Vehicle Code, 75 Pa. C.S. § 3802. The parties have stipulated to the facts in this case. The defendant filed an oral motion challenging the Commonwealth's use at trial of evidence of the defendant's refusal to submit to chemical testing. The defendant argues that the warnings given to her prior to her refusal were constitutionally defective and inconsistent with the General Assembly's intent. The defendant contends that the General Assembly's intent was to require more explicit and detailed warnings than what she received. The Commonwealth contends that the warnings are consistent with what is required by the General Assembly and do not violate the defendant's constitutional rights.

I. Factual Background

On March 19, 2005, the defendant was the operator of a motor vehicle that was involved in a two-car accident in the area of 2425 N. Richmond Street at approximately 5:57 p.m. Officer McCarthy smelled a strong odor of alcohol coming from the defendant and observed her stumbling. The defendant told Officer McCarthy that she had had a couple of drinks. Based on these observations, Officer McCarthy believed that the

defendant may have imbibed a sufficient amount of alcohol such that she was incapable of safely operating a car.

The defendant was arrested and transported to the Police Detention Unit ("PDU") at 8th and Race Streets for chemical testing. At the PDU, Officer Kennedy read the following four paragraphs to the defendant from the Department of Transportation's Revised Form DL-26:

1. Please be advised that you are under arrest for driving under the influence of alcohol or [a] controlled substance in violation of Section 3802(a) of the Vehicle Code.

2. I am requesting that you submit to a chemical test of breath.

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 seventy-two hours in jail and a minimum fine of $1,000.

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.

After reading these four paragraphs to the defendant, Officer Kennedy asked her if she understood what had been read to her. The defendant responded that she understood, but refused to sign the form.

Officer Kennedy also read three paragraphs from a City of Philadelphia form entitled "Warnings to be given by police." The Pennsylvania Supreme Court in

Department of Transportation v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989), mandated the following three paragraphs:[1]

1. The Constitutional rights you have as a criminal defendant, commonly known as the **Miranda** rights, including the right to speak with a lawyer and the right to remain silent, apply only to criminal prosecutions and do not apply to the chemical testing procedure under Pennsylvania's Implied Consent Law, which is a civil, not a criminal proceeding.

2. You have no right to speak to a lawyer, or anyone else, before taking the chemical test requested by the police officer nor do you have a right to remain silent when asked by the police officer to submit to the chemical test. Unless you agree to submit to the test requested by the police officer your conduct will be deemed to be a **refusal** and your operating privilege will be suspended for at least one year. In addition, if you refuse to submit to a chemical test and you are convicted of, plead to, or are adjudicated delinquent with respect to violating Section 3802(a) of the Pennsylvania Vehicle Code, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c) of the Pennsylvania Vehicle Code, which include a minimum of 72 hours in jail and a minimum fine of $1,000.00.

3. Your refusal to submit to chemical testing under the Implied Consent Law may be introduced into evidence in a criminal prosecution for driving under the influence of alcohol or a controlled substance.

Although the defendant had refused to sign the Department of Transportation form, she signed the City of Philadelphia form. Officer Kennedy then began to administer a breathalyzer test to the defendant. She instructed the defendant to blow into the breathalyzer tube at a steady, even rate until told to stop. The defendant, however, gave a strong blow of air into the tube. The machine was unable to provide a result. After the defendant complained that the machine was not operating properly, Officer Kennedy conducted a test on herself which demonstrated that the machine was

[1] In O'Connell, the Supreme Court directed that a police officer who requests that a motorist submit to chemical testing under the Implied Consent Law has a duty to explain to the motorist that Miranda rights are inapplicable to such a request.

operational. Officer Kennedy next asked the defendant to submit to a blood test. The defendant refused and was processed at the PDU as a DUI refusal.

The defendant has two prior offenses under Section 3802(a) of the Vehicle Code. Therefore, if convicted, the defendant will receive at least a mandatory minimum sentence of one year of imprisonment and a mandatory minimum fine of $2,500.

II. The Implied Consent and DUI Laws

Operating a motor vehicle upon the highways is not a civil or property right. Rather, it is a privilege, the enjoyment of which is subject to such regulations and control as the Commonwealth sees fit to impose. Department of Transportation v.Scott, 546 Pa. 241, 684 A.2d 539 (1996); Maurer v. Boardman, 336 Pa. 17, 7 A.2d 466 (1939), aff'd sub nom., Maurer v. Hamilton, 309 U.S. 598 (1940).

One of the conditions imposed by the Commonwealth on those privileged to operate motor vehicles on its highways is conformance with the Implied Consent Law, 75 Pa. C.S. § 1547. It expressly conditions the operation of a motor vehicle within the Commonwealth upon the motorist's consent, upon a proper request by a police officer, to take one or more chemical tests of breath, blood or urine to determine the alcoholic content of blood or the presence of a controlled substance.[2]

The Implied Consent Law is not penal in nature. Rather, it is designed to protect the public from alcohol-related traffic fatalities and injuries by providing an effective means of denying intoxicated motorists the privilege of using the highway. Sheakley v. Department of Transportation, 99 Pa. Commonwealth Ct. 328, 513 A.2d 551 (1986);

[2] Section 1547(a) of the Implied Consent Law provides that "[a]ny 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, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance."

Hando v. Department of Transportation, 84 Pa. Commonwealth Ct. 63, 478 A.2d 932 (1984).

Although Section 1547(a) provides that motorists are "deemed to have given [their] consent" to chemical testing, such tests are not administered if a motorist refuses to be tested. There are, however, consequences to refusing to consent to chemical testing and, pursuant to Section 1547, police are required to provide certain information to motorists about the consequences of refusing to submit to a chemical test. In Commonwealth v. Hunsinger, 379 Pa. Super. 196, 200, 549 A.2d 973, 975 (1988), the Superior Court recognized that the Implied Consent Law was "designed to induce drivers to take a breath test." Such inducement is important because of the volatile nature of the blood, breath or urine that is collected and tested in order to determine the motorist's blood alcohol content. In Hunsinger, the court also noted that the Commonwealth should be able to record the blood alcohol level at the earliest possible moment.

Section 1547 provides that it is "the duty of the police officer to inform the person that the person's operating privilege will be suspended upon refusal to submit to chemical testing."[3] Pursuant to legislation enacted on September 30, 2003,[4] a police officer, as of February 1, 2004, is also required to inform a motorist that "if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the

[3] The length of the suspension varies from twelve to eighteen months. A police officer, however, is not required to provide the possible length of the suspension.

[4] The September 2003 legislation repealed the prior Implied Consent Law and replaced it with a new Implied Consent Law that was identical in many respects to the statute that was repealed. For purposes of this Opinion, the only notable difference between the two Implied Consent Laws is the inclusion of the duty noted above. In September of 2003, the General Assembly also repealed the prior DUI Law and enacted a significantly different DUI Law that included new offenses as well as different criminal penalties.

person will be subject to the penalties provided in section 3804(c) (relating to penalties)." See Section 1547(b)(2)(ii).

The Implied Consent Law provides for two consequences for refusing to submit to chemical testing. The first consequence, as noted above, is that Section 1547(b)(1) provides for the suspension of a motorist's driver's license in the event of a refusal.[5] The second consequence is set forth in Section 1547(e), which permits the admission into evidence of the fact that a motorist refused to submit to chemical testing as well as any testimony concerning the circumstances of the refusal.[6]

Another potential consequence of refusing to submit to chemical testing and the one at issue in this case is set forth in Section 3804(c) of the Driving After Imbibing Alcohol or Utilizing Drugs Law ("DUI Law"), 75 Pa. C.S. § 3804(c). Pursuant to Section 3804(c), a motorist who violates the general impairment section, Section 3802(a)(1) of the DUI Law[7] faces an enhanced penalty if the motorist also refused to submit to chemical testing.[8] Although the refusal itself is not a violation of the DUI

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[5] Section 1547(b)(1) provides that if any person placed under arrest for driving under the influence of alcohol or a controlled substance "is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department [of transportation] shall suspend the operating privilege of the person."

[6] Section 1547(e) provides that:

> 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) my 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.

[7] Section 3802(a)(1) provides that "[a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle."

[8] Although chemical test results have the potential of revealing evidence that links a motorist to violating the DUI Law, the obligation to submit to chemical testing is related specifically to a motorist's continued enjoyment of the privilege of maintaining an operator's license. Scott, 546 Pa. at 250, 684 A.2d at 544.

Law,[9] the Commonwealth would have to prove at trial that the defendant refused to submit to chemical treating if it sought the enhanced penalty.[10] In Hunsinger, 379 Pa. Super. 196, 549 A.2d 973 (1988), the Superior Court held that, in a civil license revocation matter or in a criminal DUI matter, anything less than an unqualified, unequivocal assent to a chemical test is sufficient to constitute a refusal.

Section 3804 specifies the criminal penalties for persons who violate the DUI Law. The applicable penalty is determined based on the number of times that a motorist has violated the current DUI Law or its predecessor within a ten-year period and the section of the present DUI Law that is violated. In order to understand the statutory

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Additionally, the Supreme Court in Scott noted that the sanctions imposed by the Implied Consent Law are separate and unrelated to the consequences of a criminal DUI prosecution. Id.

In Witmer v. Department of Transportation, 880 A.2d 716 (Pa. Commonwealth Ct. 2005), the Commonwealth Court held that the September 2003 legislation did not change the fundamental precept outlined in Scott that the sanctions imposed by the Implied Consent Law are civil in nature and unrelated to the consequences of a criminal DUI prosecution. The court also reasoned that the DUI and Implied Consent Laws "retain this distinction by requiring that a licensee must first be convicted in a *criminal* proceeding of a violation of the DUI Law before any enhanced criminal penalties are applicable." Id. at 719.

[9] In Pennsylvania, the refusal alone to submit to a chemical test does not subject an individual to criminal sanctions. In Alaska, however, the legislature has legislated that a refusal to submit to a chemical test is a criminal act if the person refusing is under arrest for operating a motor vehicle under the influence of an alcoholic beverage, inhalant or controlled substance or is involved in a motor vehicle accident that causes death or serious physical injury to another person. See Section 28.35.032 of the Alaska Motor Vehicle Code. The minimum sentence is 72 hours of imprisonment and a $1,500 fine.

[10] In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Supreme Court exempted prior convictions because it reasoned that they involve proceedings equipped with procedural safeguards. Id. Thus, although it is not an element of Section 3802(a)(1), the Commonwealth would have to prove at trial that the defendant refused to submit to chemical testing.

scheme of criminal penalties for violation of the DUI Law, the following table shows the minimum and maximum terms of imprisonment and fine:[11]

	First Violation	Second Violation	Three or More Violations
Tier One	Up to 6 months probation[12] $300	5 days to 6 months $300 to $2,500	10 days to 2 years $500 to $5,000
Tier Two	48 hours to 6 months $500 to $5,000	30 days to 6 months $750 to $5,000	90 days to 5 years[13] $1,500 to $10,000
Tier Three	72 hours to 6 months $1,000 to $5,000	90 days to 5 years $1,500 to $10,000	1 year to 5 years $2,500 to $10,000

The applicable Tier is determined by which section of the DUI Law is violated. The following table shows the different violations that fall into each Tier and the applicable section of the DUI Law:

Tier One	Tier Two	Tier Three
Section 3802(a)(1) -General impairment without refusal or accident	Section 3802(a)(1) -General impairment with accident	Section 3802(a)(1) - General impairment with refusal
Section 3802(a)(2) - General impairment with BAC[14] of .08% to < .10%	Section 3802(b) -BAC of .10% to < .16%	Section 3802(c) - BAC of .16% or higher
	Section 3802(e) -Minors	Section 3802(d) - Controlled Substances
	Section 3802(f) -Commercial and school vehicles	

[11] The table does not show the differences in the treatment that may and must be ordered, whether or not a license suspension must be ordered and, if so, the length of that suspension, and whether or not an ignition interlock device must be ordered.

[12] A Tier One, first violation is the only instance in which a repeat offender is not required to serve a mandatory minimum sentence of imprisonment.

[13] Only under Tier Two is there a penalty provision for a third violation and a separate penalty provision when there are four or more prior violations. Shown in the box is the penalty for three violations. The minimum and maximum period of incarceration and fine for four or more violations under Tier Two is one to five years and $1,500 to $10,000.

[14] BAC is an abbreviation for Blood Alcohol Content. The DUI Law provides for three levels of BAC.

The above tables illustrate the significant differences between the sentence and fine that an individual faces as a result of a refusal to submit to chemical testing if convicted of Section 3802(a)(1).

In this case, the defendant will receive a minimum sentence of one year of imprisonment and a minimum fine of $2,500 (Tier Three, three or more violations), if she is convicted of having violated Section 3802(a)(1). The defendant's BAC level is unknown because she refused to submit to chemical testing. If the defendant had submitted to chemical testing, her BAC level may have placed her in Tier One, Two or Three. Therefore, if she had submitted to chemical testing and was convicted of violating Section 3802(a)(1), the minimum sentence and fine that the defendant would have received would be one of the following: (1) a minimum sentence of ten days of imprisonment and a minimum fine of $500 if her BAC level had placed her in Tier One; (2) a minimum sentence of ninety days and a minimum fine of $1,500 if her BAC level had placed her in Tier Two; or (3) the same sentence and fine that she faces with her refusal if her BAC level had placed her in Tier Three.

III. The warnings provided to the defendant are consistent with the General Assembly's intent.

The defendant contends that the warnings that she received are inconsistent with the intent of the General Assembly when it enacted Section 1547(b)(2)(ii).[15] In this case, the defendant received two sets of written warnings. The Revised Form DL-26 and the City of Philadelphia form both provided that "if you refuse to submit to the chemical test, and you are convicted of, plead to, or adjudicated delinquent with respect to violating

[15] As previously noted, Section 1547(b)(2)(ii) provides that a police officer has a duty to inform a motorist, who is requested to submit to chemical testing, that "if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties)."

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 seventy-two hours in jail and a minimum fine of $1,000."

The Commonwealth Court has addressed the issue of the intent of the General Assembly in enacting Section 1547(b)(2)(ii). In Weaver v. Department of Transportation, 873 A.2d 1 (Pa. Commonwealth Ct. 2005), cert. granted, 145 MAP 2005 (Dec. 14, 2005), a panel of the Commonwealth Court considered the issue of whether the implied consent warnings contained in the Revised Form DL-26 satisfy the requirements of Section 1547(b)(2). The appellant, whose license was suspended as a result of refusing to submit to chemical testing, contended that the warnings contained in the form were inadequate because they "only inform the arrestees of the minimum jail sentence and fines for a first offense, greatly minimizing, in the eyes of a repeat offender arrestee the consequences of refusing the test, thereby defeating the purpose of the statute." Id. at 3. The Commonwealth Court rejected the appellant's argument and wrote that:

> It is not the duty of the police to explain the various sanctions available under a given law to an arrestee to give that individual an opportunity to decide whether it is worth it to violate the law. It is sufficient for the police to inform a motorist that he or she will be in violation if he or she should fail to accede to the officer's request for a chemical test. The verbiage on [Revised] [F]orm DL-26 informs a motorist that he or she will be in violation of the law and will be penalized for that violation if he or she should fail to accede to the officer's request for a chemical test; that is sufficient information upon which to base a decision as to whether or not to submit to chemical testing.

Id. at 3-4.

In Garner v. Department of Transportation, 879 A.2d 327 (Pa. Commonwealth Ct. 2005), another panel of the Commonwealth Court addressed the issue of whether the warnings in the Revised Form DL-26 were consistent with the warnings to be given

pursuant to Section 1547(b)(2). The court again rejected the argument that the warnings in the form were deficient. It relied on the Weaver decision and explained that:

> The statute requires only that police provide notice that refusal will result in license suspension and, that if the licensee is convicted of driving under the influence, refusal will result in additional penalties. Garner received this information.
>
> We believe [that the] common pleas [court] erred in imposing an additional requirement that the information regarding potential suspensions and criminal penalties be specifically tailored to the circumstances of individual licensees. Aside from the fact that the Act does not require such specificity, it would be unrealistic to assume that at the time warnings must be given, arresting officers have sufficient accurate information to know what potential penalties the arrestee faces.

Id. at 330-331. See also Witmer v. Department of Transportation, 880 A.2d 716, (Commonwealth Ct. 2005) (Relying on Weaver for its holding that the warnings read to the appellant from Revised Form DL-26 were sufficient.). [16]

In support of her argument, the defendant suggests that this court disregard the Commonwealth Court opinions in favor of two courts of common pleas. On December 30, 2004, Judge John C. Reed of the Court of Common Pleas of Mercer County issued an opinion in Commonwealth v. Jaggers, No. 224 Criminal 2004 (Dec. 30, 2004),[17] in which he excluded chemical test results from being introduced into evidence. In the cases[18] before him, as in this case, the defendants had received warnings from the Department of Transportation's Revised Form DL-26.

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[16] President Judge James Gardner Colins was a member of both panels and the author of the opinion in Weaver. In Garner, 879 A.2d at 329, the Commonwealth Court noted that the Court of Common Pleas of Cumberland County had concluded that the motorist received "an inadequate warning of the consequences" of his refusal because the Revised Form DL-26 did not satisfy the "informational requirements" of Section 1547. In Weaver, the Court of Common Pleas of Chester County had rejected the motorist's argument and in Witmer, the Court of Common Pleas of Bradford County had also rejected the motorist's argument.

[17] Commonwealth v. Jaggers is currently on appeal before the Superior Court where it is docketed at 227 WDA 2005.

[18] There were seven consolidated cases addressed in Judge Reed's Jagger opinion.

The cornerstone of Judge Reed's decision was his belief that "[a] plain reading of subsection 1547(b)(2) indicates that the Legislature obviously intended that this provision inform a defendant of the penal repercussions in the event that they persist in their refusal." Id. at 18. Judge Reed also believed that "the Defendants were provided with virtually no information, and the information that was provided was misleading and virtually meaningless." Id. at 29. He concluded that "the Department of Transportation…failed to comply with the clear mandate of the Legislature and the Department's Form DL-26 warnings…[were] deficient." Id.

Judge Reed held that it was "fundamentally unfair" to provide the warnings included in the DL-26 form since "the criminal ramifications explained to the defendant are inaccurate because they fail to describe ***all*** of the criminal ramifications under subsection 3804(c), only the minimum penalties for a first-time offender." Id. at 22 (emphasis in original). He also held that the warnings "substantially prejudiced" the defendants because they only described the minimum penalties for a first time offender. Id. at 23-25. Judge Reed wrote that "the accused may remember whether this was his or her first, second, or third DUI offense…[and,] [t]herefore, providing this information to the accused permits the accused to knowingly and intelligently exercise their statutory right of refusal." Id. at 26.

The second common pleas court decision that the defendant relies on is from the Court of Common Pleas of Delaware County. In Commonwealth v. O'Neill, No. 654-05 (June 30, 2005), a three-judge panel issued an Order excluding from trial all evidence concerning the defendant's refusal to submit to chemical testing. The three-judge panel did not cite any authority. Rather, it merely wrote that the "DL-26 [form] is deficient and

does not comply with the statute (See 75 Pa. C.S.A. §1547(B)(2)(ii))" because it does not set forth all of the penalties in Section 3804. Id. at 6.[19]

This court is bound by the decisions of the Commonwealth Court.[20] Even if it were not bound by the Commonwealth Court's decisions, this court finds them compelling.

The rules concerning statutory interpretation are codified at 1 Pa. C.S. §§ 1921-1939. Section 1921 provides that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." It further provides that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." When the words of a statute are ambiguous, however, Section 1921 provides that the intention of the General Assembly may be ascertained by considering the following: (1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other statutes upon the same or similar subject; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such statute.

Section 1547(b)(2)(ii) appears to be ambiguous because it is capable of two reasonable and conflicting interpretations. The first interpretation is that the General Assembly intended that the police explain all of the potential penalties found in Section

[19] The three previously discussed Commonwealth Court decisions were filed on March 11, June 2, and August 10, 2005. Therefore, Judge Reed did not have the benefit of any of the decisions. It is unknown if the three-judge Delaware County court was aware of the Weaver and Garner decisions, which were issued prior to the court's issuance of its Order.

[20] Ironically, if the case before this court proceeds on appeal, it will be reviewed by the Superior Court, which is not bound by the Commonwealth Court's decisions and has not yet addressed the issue. As previously noted, however, the Jaggers case is presently before the Superior Court.

3804(c). The second interpretation is that the police need only to explain that a motorist may face more severe penalties in the event that he refuses to submit to chemical testing.

While the legislative history does not specifically address the issue of what warnings are required by Section 1547(b)(2)(ii),[21] it is full of references to the need for revising the DUI Law in order to make it tougher. One such example is Senator Williams' explanation that:

> Over the past 5 years, drunken driving fatalities nationwide have decreased 11 percent; Pennsylvania saw a 5 percent increase. Just as startling, one-third of drunk driving arrests involve repeat offenders. What that reveals is an ineffective law, a law that does not change behavior and does not go far enough to keep drunks from getting back behind the wheel.

Legislative Journal - Senate, September 24, 2003, at 981.

The purpose of the Implied Consent Law is not to allow motorists suspected of driving under the influence to make an informed choice about whether or not to submit to chemical testing. Rather, its purpose is to protect the public by providing an effective means of denying intoxicated motorists the privilege of using the highway. In furtherance of this objective, the Implied Consent Law is intended to enable the Commonwealth to obtain blood, breath or urine from motorists who have consented to such bodily material being taken from them as a condition of being afforded the privilege of driving in the Commonwealth.

It is not this court's role to rewrite legislation to make it arguably better. If the General Assembly had wanted to require the police to provide a full and complete explanation of all of the penalties set forth in Section 3804, it could and would have done

[21] Judge Reed noted that "[a] review of the legislative history offers no insight into the Legislature's intent on this issue." Jaggers at 18, n. 16.

so by drafting Section 1547(b)(2)(ii) to require such an explanation.[22]

The items set forth at 1 Pa. C.S. § 1921(c) that are to be considered in ascertaining the intention of the General Assembly support an interpretation of Section 1547(b)(2)(ii) that does not require more than advising a motorist that there is the potential of harsher criminal penalties if the motorist refuses to consent to chemical testing. As noted above, the object of the September 2003 amendments was to assist the Commonwealth in preventing intoxicated motorists from enjoying the privilege of driving in the Commonwealth. It was not to provide expansive warnings to motorists or to provide motorists with means of avoiding responsibility for their actions.

Revised Form DL-26 provides the information required by Section 1547(b)(2)(ii). Revised Form DL-26 provides that "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 seventy-two hours in jail and a minimum fine of $1,000." Although this warning might have been written in a clearer fashion, it provides valuable information

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[22] Likewise, although it could have done so, the General Assembly does not require the police to advise a motorist of whether a twelve or eighteen month license suspension will result from a refusal to submit to chemical testing. Section 1547(b)(2)(i) provides that the police are required only to inform a motorist that his "operating privilege will be suspended upon refusal to submit to chemical testing."

The General Assembly may have been advisedly wary of putting the police in the position of having to decide whether a twelve or eighteen month suspension is at stake or which of the various criminal penalties are at issue. In Wisconsin v. Geraldson, 176 Wis. 2d 487, 497, 500 N.W. 2d 415, 419 (1993), the Court of Appeals of Wisconsin made the following appropriate observation in a case involving implied consent warnings:

> We do not pretend that the implied consent warnings are easily understood by suspects, police officers, lawyers or judges. But under the statutory scheme, the police officer's role is simply to recite the warnings. The officer is not required to interpret the warnings for the suspect or to decide which portions should or should not be delivered.

and is neither misleading nor meaningless. The warning advises a motorist that he "will be subject to more severe penalties" if he refuses to submit to chemical testing and is found to have violated the general impairment section of the DUI Law. It does not purport to set forth all of the potential penalties. Rather, it provides only the "minimum" of the potential more severe penalties. Therefore, a motorist is on notice that there are more severe penalties if he refuses to submit to chemical testing and that the minimum of those more severe penalties includes seventy-two hours in jail and a $1,000 fine.

The warning contained in Revised Form DL-26 also meets the goal of providing a motorist with an incentive to submit to chemical testing by letting the motorist know that refusing to submit to chemical testing may result in more severe penalties. Providing more information about the panoply of potential terms of imprisonment, such as that the maximum of the more severe penalties includes a year or more in jail, as well as of fines, treatment options, periods of license suspension, and the possibility of an ignition interlock may be a more successful method of convincing motorists to submit to chemical testing. The General Assembly, however, has not required such information and it is not this court's role to order that more information be provided.

IV. The defendant's state and federal Constitutional rights were not violated.

The defendant has also advanced state and federal constitutional arguments.[23]

[23] In his decision, Judge Reed discussed and dismissed various federal and state constitutional arguments advanced by the defendants. See Jaggers at 6-13. This court agrees with Judge Reed's analysis. Interestingly, however, Judge Reed held that the warnings in the Revised Form DL-26 were inconsistent with what was required by Section 1547(b)(2)(ii) and fundamentally unfair and, therefore, violated the constitutional requirement of due process. This court does not agree with Judge Reed's conclusion because, as noted above, it does not believe that the warnings are inconsistent with Section 1547(b)(2)(ii), are inaccurate, or misleading..

The United States Supreme Court's decision in Schmerber v. California, 384 U.S. 757 (1966), disposes of the defendant's federal constitutional claims. In Schmerber, a defendant's blood was provided to the police without his consent while he was at a hospital where he was being treated for injuries that he had suffered from a motor vehicle accident. The United States Supreme Court rejected the defendant's Fourteenth Amendment due process claim, his Fourth Amendment claim against unlawful search and seizure, his Fifth Amendment claim against being compelled to be a witness against himself, and his Sixth Amendment claim against being denied assistance of counsel.

Likewise, a series of state appellate decisions dispose of the defendant's state constitutional claims. See Department of Transportation v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989) (Miranda rights do not apply to chemical testing under the Implied Consent Law.); Commonwealth v. Gordon, 431 Pa. 512, 246 A.2d 325 (1968) (Blood samples taken for medical purposes and later provided to the police did not violate a defendant's right not to be compelled to give evidence against himself.); Commonwealth v. Lindenmuth, 381 Pa. Super. 398, 554 A.2d 62 (1989) (The Pennsylvania Constitution affords no greater due process protection than the United States Constitution.); Commonwealth v. Barton, 456 Pa. Super. 290, 690 A.2d 293 (1997) (The obtaining of a blood sample without a warrant pursuant to the Implied Consent Law did not violate the defendant's right to be free of unreasonable searches and seizures.); King v. Department of Transportation, 81 Pa. Commonwealth Ct.177, 472 A.2d 1196 (1984) (Appellant conceded that there is no right to counsel when deciding whether or not to submit to a breathalyzer test.).

There is one constitutional issue that this court will address in more detail. That issue is whether a motorist has a right under the Sixth Amendment of the United States Constitution or under Article 1, Section 9 of the Pennsylvania Constitution to consult with counsel prior to deciding whether or not to submit to chemical testing.[24]

There are good arguments why speaking with an attorney may be important to a motorist who is requested to submit to chemical testing. Excerpts from two decisions from state appellate courts outside of the Commonwealth provide explanations that are equally applicable to Pennsylvania motorists. In Copelin v. State, 659 P.2d 1206, 1213 (Alaska 1983), the court wrote that:

> The decision as to whether to comply with an arresting officer's request to take a sobriety test is not a simple one. Clearly, an attorney's advice at this stage would not only be ethical and lawful, but helpful. The choice which an individual driver must make is a meaningful and binding one that will affect him in subsequent proceedings. Where the important chemical testing procedures are not unreasonably delayed, the driver should, upon request, have the benefit of the advice of his own counsel, with whom he has a statutory right to communicate. Given the conclusive nature of the evidence which the accused is asked to provide, this decisive point may be the *only* occasion when this statutory right is of any use.

Likewise, in Kansas v. Bristor, 236 Kan. 313, 318, 691 P.2d 1, 5 (1984) (citations omitted), the court observed that:

> The decision whether to take or refuse a BAT [Blood Alcohol Test] is "critical" in the sense that it can have major consequences for a suspect. To a driver whose livelihood does not depend on his license, the decreased possibility of criminal conviction may be worth the temporary revocation that will result from refusal. If a driver is involved in a serious or fatal accident, he may face more serious civil or criminal proceedings in which the test results may be important evidence against him. Furthermore, at the time the decision is to be made, the advice of counsel can be useful because a driver may be dazed as a result of the alcohol, an accident, or both.

[24] In Jaggers, at 22, Judge Reed noted that it offended his sense of justice that "a defendant is being forced to make a decision having criminal ramifications without the advice of counsel."

Some states and municipalities have passed legislation to provide motorists with a limited right to speak with counsel prior to having to submit to a chemical test. In Alaska, a state statute provides every arrestee with the right to telephone or otherwise communicate with his attorney immediately after his arrest. See AS 12.25.150. In Copelin, the court held that this statute required that an individual be permitted to exercise this statutory right during the fifteen minute observation period required by Alaska's DUI Law prior to testing.

In Kansas, the legislature enacted legislation to provide a limited right to an attorney following a decision from its state supreme court that there was no such constitutional right. The Kansas statute provides a motorist with a right to consult with an attorney after the motorist has undergone chemical testing by the state. K.S.A. 1987 Supp. 8-1001(f)(1)(E) provides that "after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians."

The General Assembly may wish to consider enacting such legislation, but it has not done so at this time and it is not this court's role to legislate. Therefore, a motorist would have the right to consult with counsel prior to deciding whether or not to submit to chemical testing only if there is a constitutional right to such a consultation.

In order for there to be a right to counsel prior to submitting or refusing to undergo chemical testing, chemical testing would have to be deemed to be a critical stage. The United States Supreme Court recognized that a Sixth Amendment right to counsel exists as a pretrial event if that event constitutes a critical stage. United States v.

Wade, 388 U.S. 218 (1967).[25] A critical stage arises when an accused requires aid in coping with legal problems or help in meeting a professional adversary. United States v. Ash, 413 U.S. 300 (1973).

In determining whether a pretrial confrontation is a critical stage, the Supreme Court has focused upon two factors. First, the Court has considered whether the presence of counsel is "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." Wade, 388 at 227. Second, the Court examined whether "potential substantial prejudice" to the defendant's right inheres in a particular confrontation and whether the presence of counsel would help avoid such prejudice. Id.[26]

The Supreme Court of Minnesota in Friedman v. Commissioner, 473 N.W. 2d 828 (1991), held that, under its state constitution, the right to counsel attaches at the chemical testing stage. This court, however, is persuaded by the Supreme Court of Kansas' analysis in Bristor that chemical testing is not a critical stage.

In reaching its conclusion in Bristor, 236 Kan. at 318-323, 691 P.2d at 5-7, the court noted that not every evidence gathering pretrial stage is a critical stage and recognized the purpose of an implied consent law. It wrote that:

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[25] In Commonwealth v. Arroyo, 555 Pa. 125, 141, 723 A.2d 162, 170 (1999), the Pennsylvania Supreme Court held that the right to counsel guaranteed by Article I, Section 9 of the Pennsylvania Constitution is coterminous with the Sixth Amendment right to counsel for purposes of determining when the right attaches.

[26] Using this analysis the Supreme Court has held that certain pretrial proceedings were critical stages and others were not. See Moore v. Illinois, 434 U.S. 220 (1977) (Identification of the defendant at a preliminary hearing is a critical stage.); United States v. Ash, 413 U.S. 300 (1973) (Presentation of a photographic display is not a critical stage.); Coleman v. Alabama, 399 U.S. 1 (1970) (Preliminary hearing is a critical stage.); Gilbert v. California, 388 U.S. 263 (1967) (The taking of defendant's handwriting exemplar is not a critical stage); United States v. Wade, 388 U.S. 218 (1967) (Pretrial lineup is a critical stage.); Hamilton v. Alabama, 368 U.S. 52 (Arraignment is a critical stage).

> While the decision is "critical" to each individual who is arrested for DUI, we do not believe it is "critical" in the constitutional sense. The United States Supreme Court has not found a right to counsel attaches when there is merely an important decision to be made. Nor has the court found a right to counsel for every person from whom evidence is sought during the course of an investigation. Not every evidence-gathering procedure is a critical stage.
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> The very purpose of the implied consent law (K.S.A. 8-1001) is to coerce a motorist suspected of driving under the influence to "consent" to chemical testing, thereby allowing scientific evidence of his blood alcohol content to be used against him in a subsequent prosecution for that offense.

Id., 236 Kan. at 319, 691 P.2d at 5-6.

The court also based its conclusion on its observation that prosecution for driving under the influence does not begin when a motorist is requested to submit to chemical testing. Rather, the court observed that it is not until the results of the chemical testing are obtained or the defendant refuses to submit to chemical testing that prosecution for driving under the influence may begin. The court wrote that:

> The United States Supreme Court set a limit on the critical stage concept in the Kirby [v. Illinois, 406 U.S. 682 (1972)] decision. In a plurality opinion written by Justice Stewart it was held that the Sixth Amendment right to counsel may attach to pretrial confrontations or proceedings, but only after the State commits itself to the prosecution of the accused. The court found that the State commits itself to a criminal prosecution at the initiation of adversary judicial proceedings, at which point the suspect is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." 406 U.S. at 689. The court emphasized this point "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." 406 U.S. at 690.
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> The Supreme Court has not defined precisely when a prosecution begins. The plurality in Kirby indicated that adversary judicial criminal proceedings are initiated by way of "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. In Brewer v. Williams, 430 U.S. 387, reh. denied, 431 U.S. 925 (1977), the court found a criminal prosecution had begun when an arrest warrant had been issued, the accused had been arraigned on that warrant before a judge, and the

> accused had been committed by the court to confinement in jail. 430 U.S. at 399. However, Brewer did not answer when a criminal prosecution begins, because the court did not say whether one of these factors would have been sufficient or whether the combination of several or all of them triggered the right to counsel. Relying on Kirby, an Indiana court found that a driver had no right to consult with an attorney before deciding whether to take a breathalyzer test because the Sixth Amendment right to counsel did not attach "until a judicial adversary proceeding had been initiated against him, that is, after the filing of an affidavit or indictment charging him with a crime." Davis v. State, 174 Ind. App. 433, 435-36, 367 N.E. 2d 1163 (1977). Accord State ex rel. Webb v. City Court of City of Tucson, 25 Ariz. App. 214, 542 P.2d 407 (1975); State v. Petkus, 110 N.H. 394, 269 A.2d 123 (1970), cert. denied, 402 U.S. 932 (1971); State v. Flynt, 507 P.2d 586 (Okla. Crim. 1973); State v. Newton, 291 Or. 788, 636 P.2d 393 (1981).
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> It is not until after the test has been administered that the State commits itself to the criminal prosecution. Therefore, we conclude that the criminal prosecution had not begun when Bristor was asked to submit to a BAT. Since the criminal prosecution had not begun, and since it was not a "critical stage," it necessarily follows he had no Sixth Amendment right to consult counsel before taking the BAT. Accordingly, we hold that when a suspect is arrested for DUI, there is no Sixth Amendment right to consult with counsel before submitting to or refusing a BAT.

Id., 236 Kan. at 319-322, 691 P.2d at 6-7.

Thus, while it may be critical and useful for a motorist to consult with an attorney prior to deciding whether or not to submit to chemical testing, there is neither a constitutional nor a statutory right to do so in Pennsylvania.

V. Conclusion

For all of the foregoing reasons, defendant's motion to suppress evidence concerning her refusal to submit to chemical testing is denied.

BY THE COURT:

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BRADLEY K. MOSS, J.