**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | : | |
| v. | : | |
| DAVID H. VENABLE, SR. | : | |
| Appellant | : | No. 2192 EDA 2017 |

Appeal from the Judgment of Sentence June 2, 2017
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003394-2016

BEFORE: GANTMAN, P.J., McLAUGHLIN, J., and RANSOM*, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JUNE 20, 2018**

Appellant, David H. Venable, Sr., appeals from the judgment of sentence entered in the Northampton County Court of Common Pleas, following his bench trial conviction for one count each of driving under the influence of alcohol or a controlled substance ("DUI") (general impairment and high rate of alcohol) and careless driving.[1] We affirm.

In its opinion, the trial court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them. We add only that the court convicted Appellant on May 12, 2017, of all charges and sentenced him on June 2, 2017, to three (3) days to six (6) months' incarceration plus fines. Appellant timely filed a notice of appeal on June 26, 2017. The court ordered Appellant on June 29, 2017, to

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[1] 75 Pa.C.S.A. §§ 3802(a)(1), (c); 3714(a).

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* Retired Senior Judge assigned to the Superior Court.

file a concise statement of errors complained of on appeal per Pa.R.A.P. 1925(b), and Appellant timely complied on July 19, 2017.

Appellant raises the following issues for our review:

> WHETHER THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE RESULTS OF A BLOOD DRAW WHERE APPELLANT WAS READ THE DL-26B WARNINGS WHICH DO NOT ADDRESS ENHANCED CRIMINAL PENALTIES AND UNDER THE TOTALITY OF THE CIRCUMSTANCE[S] APPELLANT DID NOT KNOWINGLY AND VOLUNTARILY GIVE HIS CONSENT TO THE BLOOD DRAW?
>
> WHETHER THE TRIAL COURT ERRED IN FINDING THE ARRESTING OFFICER HAD PROBABLE CAUSE OR REASONABLE SUSPICION TO PERFORM A VALID TRAFFIC STOP?

(Appellant's Brief at 5).

Our standard of review of the denial of a motion to suppress evidence is as follows:

> [An appellate court's] standard of review in addressing a challenge to the denial of a suppression motion 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. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, [the appellate court 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] appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the [trial court are] subject to plenary review.

***Commonwealth v. Hoppert***, 39 A.3d 358, 361-62 (Pa.Super. 2012), *appeal denied*, 618 Pa. 684, 57 A.3d 68 (2012).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Michael J. Koury, Jr., we conclude Appellant's issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed April 25, 2017, at 7-17) (finding: **(1)** at DUI processing center, Officer Molnar read Appellant DL-26B form that contained no reference to enhanced criminal penalties for failure to consent to blood draw; Appellant testified he believed he had no choice but to consent and recalled being told he would be subject to higher penalties if he did not consent; Appellant admitted his knowledge of DUI law stemmed from his prior DUI in 2004 and conversations with acquaintance; court considered Appellant's testimony incredible and concluded these events unlikely influenced decision to consent; further, Appellant wavered in his testimony at suppression hearing regarding his specific knowledge of potential penalties; although Appellant was unclear as to specific penalties associated with refusal to consent, Appellant did not clarify his understanding with DUI processing officer prior to blood draw; Appellant's argument, that citizens are presumed to know law and by extension Appellant is presumed to know Pennsylvania statute imposes enhanced criminal penalties on motorists who refuse to consent to blood draw, fails; if court presumes Appellant knows law, court

must presume Appellant knew that ***Birchfield***[2] decision called into question Pennsylvania's implied consent statute and provision authorizing enhanced criminal penalties for motorists who refuse to consent to blood draw; under totality of circumstances, Appellant voluntarily consented to blood draw; review of video recording from Northampton County DUI Processing Center revealed no police excesses or threats; Officer Molnar calmly read Appellant DL-26B warning; at conclusion of warning, Officer Molnar asked Appellant to consent to blood draw, and Appellant consented; Appellant actively participated in and testified at suppression hearing in English and was capable of understanding DL-26B warning as it was read to him; **(2)** Officer Fischer testified he observed Appellant exceed speed limit and fail to signal right-hand turn; Officer Fischer could "barely keep up" with Appellant; Officer Fischer had probable cause to conduct traffic stop).[3] Accordingly, we affirm based on the trial court's opinion.

Judgment of sentence affirmed.

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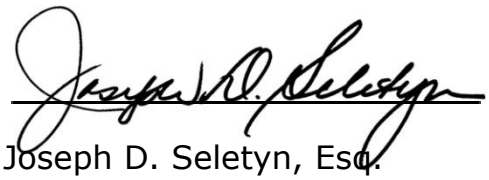
[2] ***Birchfield v. North Dakota***, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

[3] ***See also Commonwealth v. Johnson***, ___ A.3d ___, 2018 PA Super 133 (filed May 21, 2018) (holding defendant's knowledge of law from previous arrest was irrelevant; threat of civil penalties and evidentiary consequences in DL-26 revised warning is permissible; form that did not threaten criminal sanctions for refusal to consent to blood draw accurately reflected post-***Birchfield*** law; police had no duty to provide defendant with update on law or criminal procedure prior to requesting blood-draw).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/18

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY**
**COMMONWEALTH OF PENNSYLVANIA**
**CRIMINAL DIVISION**

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| **COMMONWEALTH OF PENNSYLVANIA** | **No.: C-48-CR-3394-2016** |
| **vs.** | |
| **DAVID VENABLE, SR.,** | |
| **Defendant.** | |



**OPINION OF THE COURT**

This matter is before the court on Defendant David Venable, Sr.'s ("Venable") "Omnibus Pretrial Motions." *See* Omnibus Pre-trial Motions, *Commonwealth v. Venable*, No. C-48-CR-3394-2016 (C.P. Northampton Co. Mar. 6, 2017) ("Omnibus Motion"). Through his motion, Venable seeks to suppress the results of a blood draw obtained by the Hellertown Police Department following his arrest for suspicion of driving under the influence of alcohol. *See generally id.* We held a hearing on Venable's motion on March 10, 2017. *See generally* Transcript of Proceedings of March 10, 2017, *Commonwealth v. Venable*, No. C-48-CR-3394-2016 (C.P. Northampton Co. Mar. 23, 2017) ("N.T. Mar. 10"). Following the hearing, the Commonwealth and Venable each filed legal briefs in support of their respective positions on suppression. *See generally* Commonwealth's Brief in Opposition to Defendant's Motion to Suppress Evidence, *Commonwealth v. Venable*, No. C-

48-CR-3394-2016 (C.P. Northampton Co. Mar. 31, 2017); Defendant's Brief in Support Motion to Suppress Evidence, *Commonwealth v. Venable*, No. C-48-CR-3394-2016 (C.P. Northampton Co. Mar. 30, 2017). For the reasons set forth below, Venable's motion to suppress is denied.

## BACKGROUND

I. Underlying Criminal Charges

Officer Fischer of the Hellertown Police Department initiated a traffic stop of Venable at 1:57 a.m. on August 6, 2016 near the intersection of Diamond Street and Clarke Street in Hellertown, Pennsylvania. *See* Criminal Complaint at 1, *Commonwealth v. Venable*, No. C-48-CR-3394-2016 (C.P. Northampton Co. Aug. 29, 2016). Officer Fischer initially encountered Venable when he heard a loud engine noise and observed Venable in a red 2011 Chevrolet traveling on Route 412 in excess of the posted speed limit of 30 miles per hour. *See id.*; N.T. Mar.10 at 5. Officer Fischer followed Venable in his marked patrol vehicle, further observing Venable turning into an alleyway at a high rate of speed, such that his tires squealed. *See* N.T. Mar. 10 at 5. Officer Fischer then activated his lights to signal Venable to stop his vehicle. *See id.* at 11. Venable pulled into a back lot near his residence and parked the vehicle after making several attempts to pull into a parking space. *See id.* at 6.

Officer Fischer identified himself to Venable and requested his driver's license, insurance card, and vehicle registration. *See id.* at 7. Officer

Fischer noted that Venable had bloodshot, watery eyes; slurred speech; and did not possess fine motor retention skills. *See id.* Additionally, an odor of alcoholic beverages emanated from his person. *See id.*

When Officer Fischer inquired as to whether Venable had any physical limitations that might prevent him from performing a field sobriety test, Venable indicated that he had screws in his ankle. *See id.* Thus, Officer Fischer did not require Venable to perform any physical tests. *See id.* Rather, Officer Fischer asked Venable to perform the Horizontal Gaze Nystagmus test.[1] Officer Fischer concluded, based on his observations, that Venable was incapable of safely operating a motor vehicle. *See id.* at 7-8. Officer Fischer placed Venable under arrest for suspicion of driving under the influence of alcohol and transported him to the Northampton County DUI Center for processing. *See id.* at 8.

Upon Venable's arrival at the Northampton County DUI Center, Officer Stephanie Molnar, in her capacity as a DUI Processor, read Venable the standard warning from Form DL-26B:

> 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.

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[1] While the Horizontal Gaze Nystagmus test may not be used to establish that a defendant is guilty of DUI, the Superior Court has ruled that the results of this test may be used in determining whether an officer has probable cause to arrest the driver of a motor vehicle for suspicion of DUI. *See Commonwealth v. Weaver*, 76 A.3d 562, 568 (Pa. Super. 2013).

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 to 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.

Form DL-26B (revised June 2016). Following this warning, Venable consented to the blood draw. *See* N.T. Mar. 10 at 19. The blood draw indicated that Venable had a blood alcohol concentration of 0.17%. *See* Criminal Complaint at 2.

Venable was charged with violating 75 Pa.C.S.A. § 3802(a)(1), Driving After Imbibing Alcohol; 75 Pa.C.S.A. § 3802(c), DUI: Highest Rate of Alcohol; and 75 Pa.C.S.A. § 3714(a), Careless Driving. *See generally* Criminal Information, *Commonwealth v. Venable*, No. C-48-CR-3394-2016 (C.P. Northampton Co. Nov. 30, 2016).

II. Knowledge of Former Blood Test Refusal Penalties

Venable was previously charged with violating 75 Pa.C.S.A. § 3802(a)(1), Driving After Imbibing Alcohol, and 75 Pa.C.S.A. § 3802(c), DUI: Highest Rate of Alcohol. *See* Criminal Docket, *Commonwealth v. Venable*, No. C-39-CR-1484-2004 (C.P. Lehigh Co. Feb. 13, 2004). That

case was adjudicated prior to the United States Supreme Court decision in *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160 (2016). As such, the warning Venable received in the 2004 Lehigh County case, prior to the request for a blood draw, was different then the warning he received in this case. The warning in the 2004 case read as follows:

> 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 _____. (blood, breath or urine. Officer chooses the chemical test).
> 3. If you refuse to submit to the chemical 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. In addition, if you refuse to submit to the chemical 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 to 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.

Form DL-26 (emphasis in original). Venable consented to a blood draw in the 2004 Lehigh County case as well.

Separately, Venable testified that his acquaintance was charged with a DUI offense several years ago and he had discussed the enhanced criminal penalties with this acquaintance. *See* N.T. Mar. 10 at 25.

III. Venable's Suppression Motion

On March 6, 2017, Venable filed a motion seeking to suppress the results of his blood draw on August 6, 2016. *See generally* Omnibus Motion. Venable argues that, in light of the United States Supreme Court decision in *Birchfield*, the results of his blood draw must be suppressed as an unconstitutional search and seizure. *See id.*

At the March 10, 2017 hearing, Venable testified that he consented to a blood draw at the Northampton County DUI Center on August 6, 2016 following an officer's recital of the DL-26B Form. *See* N.T. Mar. 10 at 24. Initially, Venable testified that he believed he would be subject to enhanced criminal penalties if he did not consent to a blood draw. *See id.* at 26. On cross-examination, however, Venable stated that he was unclear as to whether enhanced criminal penalties applied after he was read the DL-26B Form. *See id.* at 27. His purported knowledge of the potential for enhanced criminal penalties stemmed from his experience in 2004 with similar charges and an acquaintance's DUI. *See id.* at 25, 28.

## DISCUSSION

I. Standard of Review

Where a defendant files a timely motion to suppress, "the Commonwealth shall have the burden of going forward with evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights." Pa.R.Crim.P. 581(H). The Commonwealth must establish that the challenged evidence is admissible by a preponderance of the evidence standard. *See Commonwealth v. Wallace*, 42 A.3d 1040, 1047-48 (Pa. 2012). "If the court determines that the evidence shall not be suppressed, such determination shall be final, conclusive, and binding at trial, except upon a showing of evidence which was theretofore unavailable." Pa.R.Crim.P. 581(J).

II. *Birchfield v. North Dakota* and its Progeny

On June 23, 2016, the United States Supreme Court issued its decision in *Birchfield v. North Dakota*. *See generally* 136 S.Ct. 2160. *Birchfield* examined so-called "implied consent" laws which mandate cooperation with blood alcohol concentration ("BAC") testing as a condition of the privilege of driving on state roads. *See id.* at 2169. Motorists who refuse to comply with such testing have their driving privileges rescinded. *See id.* Some states had enacted legislation making a motorist's refusal to undergo BAC testing a crime. *See id.* The *Birchfield* decision examined challenges to such laws brought under the Fourth Amendment. *See generally id.*

In its analysis, the Supreme Court explored various exceptions to the warrant requirement under the Fourth Amendment. *See id.* at 2173-86. Ultimately, the Court ruled that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered incident to a lawful arrest for drunk driving." *Id.* at 2185. Further, in reviewing the respondents' alternative argument that blood tests were justified based on a motorist's implied consent, the Court spoke approvingly of implied consent laws imposing civil penalties or evidentiary consequences for a motorist's refusal to submit to BAC testing. *See id.* at 2185. The Court, however, drew the line at criminal penalties, ruling "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *See id.* The Court "conclude[d] that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *See id.* at 2186.

When *Birchfield* was decided, Pennsylvania's implied consent statute imposed both civil and criminal penalties upon a motorist who refused to consent to a requested blood draw:

> If any person placed under arrest for a violation of section 3802 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 shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

(ii) For a period of 18 months if any of the following apply:

(A) The person's operating privileges have previously been suspended under this subsection.

(B) The person has, prior to the refusal under this paragraph, been sentenced for:

(I) an offense under section 3802;

(II) an offense under former section 3731;

(III) an offense equivalent to an offense under subclause (I) or (II); or

(IV) a combination of the offenses set forth in this clause.

75 Pa.C.S.A. § 1547(b)(1).

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, to:

(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, to:

(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, to:
(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.

75 Pa.C.S.A. § 3804(c). Unlike the statute at issue in *Birchfield*, Section 3804(c) does not make a driver's refusal to consent to a blood draw itself a criminal offense, but the statute does provide for enhanced criminal penalties in such instances. *See id.*

In response to the *Birchfield* decision, Pennsylvania immediately amended its DL-26 warning to eliminate any reference to the enhanced criminal penalties imposed by Section 3804(c). The amended DL-26 Form only warns motorists that refusal to submit to a blood test will result in a driver's license suspension. *See* Form DL-26B.

Recently, in *Commonwealth v. Evans*, the Superior Court of Pennsylvania ruled that Section 3804(c) imposes criminal penalties upon motorists who refuse to submit to warrantless blood testing, and, thus, is

unconstitutional following the *Birchfield* decision. *See* 153 A.3d 323, 331 (Pa. Super. 2016); *see also Commonwealth v. Giron*, No. 1300 EDA 2016, 2017 WL 410267 (Pa. Super. Jan. 31, 2017). The defendant in *Evans* consented to a warrantless blood draw after he was arrested and was read the old DL-26 Form, which contained references to the enhanced criminal penalties imposed by Section 3804(c). *See Evans*, 153 A.3d at 326. The Superior Court vacated the defendant's sentence and remanded the case to the trial court to reevaluate the defendant's consent based on the totality of the circumstances. *See id.* at 331.

III. Totality of the Circumstances

"[I]t is black-letter, well-established law that examinations of the legality and constitutionality of warrantless, but consented to searches and seizures are examined under a totality of the circumstances test." *Commonwealth v. Smith*, 77 A.3d 562, 568 (Pa. 2013). Specifically, the Commonwealth must establish "that 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. Acosta*, 815 A.2d 1078, 1083 (Pa. Super. 2003).[2] "Under

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[2] In *Commonwealth v. Strickler*, the Pennsylvania Supreme Court identified eight factors relevant to assessing the voluntariness of a consensual search:

(1)the presence or absence of police excesses;
(2)physical contact or police direction of the subject's movements;
(3)the demeanor of the police officer;
(4)the location of the encounter;

**FOOTNOTE CONTINUED ON THE NEXT PAGE**

this maxim, no one fact, circumstance, or element of the examination of a person's consent has talismanic significance." *Smith*, 77 A.3d at 569 (citing *Commonwealth v. Gillespie*, 821 A.2d 1221, 1225 n.1 (Pa. 2003)). "The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent." *Commonwealth v. Reid*, 811 A.2d 530, 549 (Pa. 2002).

IV. Venable's Consent to Blood Draw

Venable argues that his consent to a blood draw following his arrest for suspicion of driving under the influence was involuntary in light of the *Birchfield* decision. *See* Omnibus Motion ¶¶ 6-10. Specifically, Venable asserts that Pennsylvania's statutory scheme, which imposes enhanced criminal penalties for the refusal to submit to chemical testing, creates a coercive environment that negates the voluntariness of his consent. *See id.*

During the suppression hearing, Venable testified that he was unclear whether he would be subject to enhanced criminal penalties if he refused to consent to a blood draw. *See* N.T. Mar. 10 at 27. At the DUI processing

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**FOOTNOTE CONTINUED FROM THE PREVIOUS PAGE**

(5) the manner of expression used by the officer in addressing the subject;
(6) the content of the interrogatories or statements;
(7) whether the subject was told that he or she was free to leave; and
(8) the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will).

*Commonwealth v. LaMonte*, 859 A.2d at 500 n.4 (citing *Strickler*, 757 A.2d at 897-989, 901). This list is nonexclusive. *See id.*

center, Officer Molnar read Venable the DL-26B Form, which contained no reference to enhanced criminal penalties for failure to consent. *See* DL-26B. Rather, the form stated only that failure to consent to a requested blood draw would result in a twelve to eighteen month driver's license suspension. *See id.* Venable testified that he "believed that there was no other choice," but to consent to the requested blood draw. *See* N.T. Mar. 10 at 28. He recalled being told that he would "either need[] to sign [the consent form] or . . . be subject to the higher penalties." *Id.* Venable cites to his past experience to support his belief that refusal to consent to a requested blood draw might result in enhanced criminal penalties.

Credibility issues are left to the trier of fact. The trial court, sitting as fact finder at a suppression hearing, is free to accept all, part, or none of a witness's testimony. *See Commonwealth v. Farquharson*, 354 A.2d 545, 550 (Pa. 1976); *Commonwealth v. Marshall*, 568 A.2d 590, 595 (Pa. 1989). We find that Venable's assertions lack credibility. By his own admission, Venable's knowledge of Pennsylvania's DUI laws stems from his own DUI in 2004 and informal conversations with an acquaintance. *See* N.T. Mar. 10 at 25, 28. We find it unlikely that these distant events influenced Venable's decision to consent in this case. Further, Venable waivered in his own testimony at the suppression hearing regarding his specific knowledge of the potential penalties. *See id.* at 27. Although Venable was unclear as to the particular penalties associated with the refusal to consent, he never sought

to clarify his understanding with the DUI processing officer prior to the blood draw.

Separately, Venable argues that citizens are presumed to know the law, and, by extension, that Venable is presumed to know that 75 Pa.C.S.A. § 3804(c) imposes enhanced criminal penalties on motorists who refuse to consent to a requested blood draw. *See* 18 Pa.C.S.A. § 304, official comment ("Generally speaking, ignorance or mistake of law is no defense."). Venable, however, fails to follow this line of reasoning to its logical end. If we presume Venable's knowledge of the law, we must presume he knew that the June 2016 *Birchfield* decision brought into question Pennsylvania's implied consent statute and, specifically, the provision authorizing enhanced criminal penalties for a motorist's refusal to consent to a blood draw. *See generally* 136 S.Ct. 2160.[3] By imputing such knowledge to Venable, his argument that Pennsylvania's statutory scheme coerced him to consent to a blood draw necessarily fails. Our examination does not end here, however, because Pennsylvania law is clear "that examinations of the legality and constitutionality of warrantless, but consented to searches and seizures are examined under a totality of the circumstances test." *See Smith*, 77 A.3d at 568.

[3] Following *Birchfield*, the Superior Court of Pennsylvania has ruled that a defendant could not be subjected to enhanced criminal penalties for refusing to consent to a blood draw. *See Giron*, 2017 WL 410267 at *4. While the *Giron* decision post-dates Venable's DUI arrest, *Birchfield* was decided prior to Venable's August 2016 arrest.

Venable voluntarily consented to a blood draw following his arrest for suspicion of driving under the influence on August 6, 2016, based on the totality of the circumstances. A review of the video recording from the Northampton County DUI Processing Center reveals no police excesses or threats. *See generally* N.T. Mar. 10, Exhibit 2. Officer Molnar calmly read Venable the warning contained on the DL-26B Form. *See id*. At the conclusion of this warning, she asked Venable if he would consent to a chemical test of blood, to which he responded in the affirmative. *See id*. Any physical contact between the officers and Venable was entirely appropriate, under the circumstances. *See id*. While Venable was not free to leave during this period, the DL-26B warning clearly indicated that the blood draw was merely a request, to which Venable was free to refuse. *See id*. Venable actively participated in the suppression hearing and testified, in English, regarding the facts of his case. *See id*. Thus, we conclude Venable was entirely capable of understanding the DL-26B warning as it was read to him by Officer Molnar on August 6, 2016. Based on the totality of these circumstances, we find that Venable's consent to the requested blood draw was voluntary.

V. Traffic Stop

Where a police officer has reasonable suspicion that a violation of the Motor Vehicle Code has occurred or is occurring, that officer may conduct a traffic stop of the vehicle. *See* 75 Pa.C.S.A. § 6308(b). If, however, the

violation requires no additional investigation, the officer must possess probable cause to initiate the traffic stop. *See Commonwealth v. Salter*, 121 A.3d 987, 993 (Pa. Super. 2015) (finding officer had probable cause to stop motorist when his license plate was not illuminated, as required by Motor Vehicle Code, and, subsequently, for arresting motorist under suspicion of DUI based on officer's observations during traffic stop). For example,

> if a vehicle is stopped for speeding, the officer must possess probable cause to stop the vehicle. This is so because when a vehicle is stopped, nothing more can be determined as to the speed of the vehicle when it was observed while traveling upon a highway. On the other hand, if an officer possesses sufficient knowledge based upon behavior suggestive of DUI, the officer may stop the vehicle upon reasonable suspicion of a Vehicle Code violation, since a stop would provide the officer the needed opportunity to investigate further if the driver was operating under the influence of alcohol or a controlled substance.

*Id.* (citations omitted).

Venable argues that his initial traffic stop was unlawful because the officer lacked probable cause of a Motor Vehicle Code violation. *See* Omnibus Motion ¶¶ 11-14. Officer Fischer, however, testified that he observed Venable driving in excess of the posted 30 miles per hour speed limit and that Venable failed to signal a right-hand turn. *See* N.T. Mar. 10 at 5. Additionally, Officer Fischer noted that Venable had difficulty parking his vehicle upon arriving at his destination. *See id.* at 6. While Officer Fischer did not record the defendant's speed using an approved device, he testified

that he knew Venable to be exceeding the speed limit because he could "barely keep up." *Id.* at 12. It is a violation of the Motor Vehicle Code to exceed the posted speed limit. 75 Pa.C.S.A. § 3362. Officer Fischer had probable cause to conduct the traffic stop. *See Salter*, 121 A.3d at 993.

## CONCLUSION

Venable's constitutional arguments under *Birchfield* are unpersuasive. We do not credit Venable's assertion that his consent was based on his prior knowledge of the enhanced criminal penalties for refusing to submit to a blood draw. Moreover, Venable's arguments regarding his presumed knowledge of the law do not support his claim of coerced consent. Under the totality of the circumstances, Venable's consent to submit to a blood draw following his arrest for suspicion of driving under the influence on August 6, 2016 was voluntary. Additionally, Officer Fischer had probable cause to conduct the traffic stop based on his observation of Venable speeding. Therefore, we conclude that the Commonwealth has established, by a preponderance of the evidence, that the challenged evidence is admissible against Venable. *See Wallace*, 42 A.3d at 1047-48.

**WHEREFORE**, we enter the following:

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY**
**COMMONWEALTH OF PENNSYLVANIA**
**CRIMINAL DIVISION**

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|---|---|
| **COMMONWEALTH OF PENNSYLVANIA** | **No.: C-48-CR-3394-2016** |
| **vs.** | |
| **DAVID VENABLE, SR.,** | |
| **Defendant.** | |

**ORDER OF COURT**

**AND NOW**, this 25th day of April, 2017, upon consideration of Defendant David Venable, Sr.'s "Motion to Suppress Results of Blood Testing" and "Motion to Suppress," the Commonwealth's responses thereto, and the evidence adduced at the March 10, 2017 hearing thereon, it is hereby **ORDERED** and **DECREED** that Venable's motions are **DENIED**.

**BY THE COURT:**

**MICHAEL J. KOURY, JR., J.**