

2013 PA Super 281

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
JASON C. BARR,		
Appellant		No. 1967 WDA 2012

Appeal from the Judgment of Sentence November 14, 2012,
In the Court of Common Pleas of Clarion County,
Criminal Division at No.: 587 CR 2100

BEFORE: LAZARUS, OLSON and COLVILLE,* JJ.

CONCURRING AND DISSENTING OPINION BY COLVILLE, J.

FILED: October 22, 2013

I concur with the Majority's determination that the trial court wrongly instructed the jurors as to what constitutes a refusal to submit to chemical testing. However, I disagree with the Majority's decision in its Footnote 14 that the improper instruction regarding refusal should not alter Appellant's DUI conviction. Rather, for the following reasons, I would vacate Appellant's sentence and conviction for DUI and remand for a new trial on the DUI charge.

As the Majority rightly acknowledges in its Footnote 13, jurors may weigh and consider the fact of refusal when determining whether a defendant was under the influence of alcohol. Indeed, in the present case, the trial court's final charge to the jurors included the following remarks:

*Retired Senior Judge assigned to the Superior Court.

The Commonwealth argues that the testimony tending to show that [Appellant] refused to give a sample of his blood indicates that he was conscious that he was guilty of driving under the influence. The defense attorney argues that [Appellant] did not refuse to give the sample, or this evidence means no such thing. If you believe that [Appellant] was asked for and refused to give a sample of his blood for testing, you may consider that fact along with all the other relevant evidence when you are deciding whether [Appellant] was under the influence of alcohol. Give [Appellant's] refusal whatever weight and meaning you think it deserves.

N.T., 10/31/12, at 138-39.

Because the jurors in this case were not properly instructed as to what constitutes a refusal, they were not fully equipped to decide whether Appellant was under the influence of alcohol. Therefore, I would vacate Appellant's sentence and conviction for DUI and would remand for a new trial on the DUI count in its entirety. Thus, while I concur in remanding this case for a new trial, I dissent from the decision to limit the new trial to the issue of refusal.