[J-65-2012] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 88 MAP 2011
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court dated 4-6-2011 at No. 944 EDA
	:	2010 which Vacated & Remanded the
v.	:	Order of the Court of Common Pleas of
	:	Bucks County, Criminal Division, dated 3-
	:	29-2010 at No. 09-CR-0003973-2009
DANIEL ROGER SMITH,	:	
	:	
Appellee	:	ARGUED: May 8, 2012
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: September 25, 2013**

I join the Majority Opinion, with the exception of (1) the Majority's apparent approval of the Superior Court's decisions in Danforth[1] and Walsh[2] subject to an inaccurate disclaimer that "neither of these decisions put into place *per se* rules or mandated explicit warnings" regarding a suspect's knowledge of the criminal investigative purpose of a search, see Maj. Slip Op. at 14-15; and (2) the Majority's suggestion, on multiple occasions, that a defendant's knowledge of the possible use of blood test results in a subsequent criminal prosecution against him is a required, rather than merely a relevant, factor in an assessment of voluntary consent. See id. at 17-18

[1] Commonwealth v. Danforth, 576 A.2d 1013 (Pa. Super. 1990) (*en banc*).

[2] Commonwealth v. Walsh, 460 A.2d 767 (Pa. Super. 1983).

(holding that "[o]n the basis of the totality of the evidence, when viewed objectively, we conclude that a reasonable person's consent to this blood draw would have contemplated the potentiality of the results being used for criminal, investigative, or prosecutorial purposes. Thus, Officer Agostino validly obtained from Appellee his consent for the blood alcohol test."); id. at 18 n.12 ("Accordingly, nothing from Danforth or Walsh constrain [sic] our conclusion that 'the reasonable person would have understood from the exchange between' Officer Agostino and Appellee that the purpose of the test was for investigative, criminal, or prosecutorial purposes.") (internal citations omitted).

There is some unresolved tension in the Majority Opinion respecting both points of concern. Taking the second point first, as I understand the law, although a defendant's knowledge of the possible criminal investigative purpose of a search obviously may be relevant to an assessment of the voluntariness of a consent, it is not at all a required element. The Majority indicates a similar understanding in parts of its Opinion. See id. at 15 ("Accordingly, to the extent the Superior Court held that police officers must explicitly inform drivers consenting to blood testing that the results of the test may be used against them in criminal prosecutions in order for the consent to be valid, it went too far."); id. at 18-19 n.13 (" . . . given that we do not view the law as requiring a separate 'knowledge' prong of a consent analysis . . . we do not give our judicial imprimatur to any language from Danforth or Walsh to that effect."). Yet, the Court's holding is framed entirely in terms of the defendant's "objective" knowledge of the possible criminal investigative purposes.

There is a similar discord respecting Danforth and Walsh. On the one hand, as noted in the above paragraph, the Court's concluding footnote emphasizes that it does not put its imprimatur on any language in Walsh and Danforth suggesting a requirement

that the defendant know the criminal investigative purpose of a search in order for a consent to be valid. But, earlier in the Court's opinion, it insists that neither of those decisions "put into place *per se* rules or mandated explicit warnings" concerning the criminal investigative purposes of the requested search. Id. at 15.

In my view, Walsh and Danforth plainly employed a *per se* rule requiring evidence of the defendant's knowledge of the criminal investigative purposes of a search in order for a consent to be valid;[3] we should recognize the fact; and we should specifically disapprove of the decisions to that extent. That approach would provide the best teaching to the bench and bar. I understand the Majority's instinct to harmonize the decisional law, even if it involves law from a lower court, particularly because the parties argue their cases not in terms of what is the better or clearer jurisprudence, but merely in terms of analogy and distinction, accepting the lower court cases as they are. But, in this instance, the attempt to harmonize the atonal has resulted in a Majority Opinion that, for its many flashes of commendable and helpful lucidity, at times only adds to the dissonance.

The Fourth Amendment rule established in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), is that the "voluntariness" of a suspect's consent to a search does not even require proof of knowledge of the elemental right to refuse to consent. In Walsh, however, a three-judge panel decision of the Superior Court joined by two judges (Judge Wieand concurred in the result), rephrased the Fourth Amendment consent to search issue presented and injected a different knowledge requirement – one related to the purpose of the search. Thus, the panel held that, for a consent to be valid, the

[3] The practical and inevitable effect of a court conditioning the validity of a consent upon a defendant's appreciation of a specific fact – as Walsh and Danforth explicitly did – is to require police to issue Miranda style "warnings" respecting that fact. Otherwise, all consent searches are imperiled.

defendant must have "a minimal sense of awareness [that] would undoubtedly include an apprehension of some relatedness to a criminal investigation." Walsh, 460 A.2d at 772. The court claimed that its establishment of this requirement was not in tension with Schneckloth because different knowledge was at issue:

> At this point, it is [sic] to observe that the issue before us is quite distinct from that in Schneckloth. To say, as did Schneckloth, that one need not necessarily know of his right to refuse is not the equivalent of holding that one need not know what is being consented to is a search for criminal prosecution purposes, and not a test for medical treatment purposes. Thus, our decision here is not inconsistent with Schneckloth or other U.S. Supreme Court interpretations of the Fourth Amendment.

Id. at 771. In a coda that immediately followed the offered distinction, however, the panel suggested that, even if its ruling was inconsistent with Schneckloth, it was the court's "prerogative" to deviate from the High Court's precedent:

> However, even if it were [inconsistent], it is always our prerogative to circumscribe governmental action more severely than the Federal Courts. In this precise context, the Ninth Circuit Court of Appeals has said: "Constitutional rights may be protected by a state-court system which has developed its own method of testing the voluntariness of consent." Tremayne v. Nelson, 537 F.2d 359 (9th Cir., 1976). Justice Eagen wrote: "However, the state has the power to impose standards on searches and seizures higher than those required by the Federal Constitution. See Cooper v. State of California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967)." Commonwealth v. Harris, 429 Pa. 215 at 219, n. 2, 239 A.2d 290 at 292 n. 2 (1968).

Id. There is no indication that the defendant in Walsh ever raised or preserved a claim under the Pennsylvania Constitution, or argued for a broader or distinct right under our

charter, such that the Walsh panel was free to improvise a *per se* rule in the consent search arena that might deviate from governing federal law.

Walsh is an odd, even a rogue, precedent: a case presenting a Fourth Amendment issue, leading to a holding that was self-consciously rendered in apparent conflict with governing federal law, then presumably "insulated" from federal correction by a reference to some state court "prerogative" to award greater constitutional rights, and establishing a *per se* requirement of knowledge for consent searches. The jurisprudence only gets worse. Although the panel adopted this prescriptive rule to the detriment of the Commonwealth in a published opinion, the panel ultimately upheld the search, which left the Commonwealth, as the prevailing party, "unaggrieved" and unable to seek further review in the Pennsylvania Supreme Court. Thus, the Court was not called upon to review the decision, and we have never approved of the *per se* rule it established – until today.

The Majority states that Walsh and Danforth do not require "knowledge of the right to refuse consent," see Maj. Slip Op. at 18-19 n.13, but respectfully, the Majority misreads the decisions. The Walsh panel surveyed cases from Superior Court, from this Court, and from other jurisdictions and then plainly held: "Therefore, we conclude that if appellant can establish that he had no notice of the criminal investigative purpose of the blood test, his consent would be invalid." 460 A.2d at 773. The panel unequivocally held that a defendant's knowledge of the criminal investigative purpose was a *per se* requirement of a valid consent.

The Danforth Court certainly understood its precedent in Walsh as **requiring** that the defendant have knowledge of the criminal investigative purpose of the search:

> In Commonwealth v. Walsh, supra, this Court noted that any understanding of investigative procedures would not weigh in favor of a finding of an intelligent and knowing consent in

> the absence of some awareness that the blood test being consented to was part of a criminal investigation. Commonwealth v. Walsh, supra, 314 Pa.Super. at 75-76, 460 A.2d at 772. The Court concluded that if the defendant "can establish that he had no notice of the criminal investigative purpose of the blood test, his consent would be invalid." Id. at 77, 460 A.2d at 773.

576 A.2d at 1023. Indeed, application of this *per se* requirement was the very basis for the decision in Danforth. The court began its analysis by stressing that "[t]he uncontradicted evidence in this case shows that appellant had no notice of the criminal investigative purpose of the blood test," and after explaining why that was so, further explained that "[a]ppellant had no reason to believe that the investigation was any different from a routine accident investigation. Given these facts, we must conclude that appellant was not put on notice of the possible criminal ramifications of the blood test." Id.

The actual governing rule, articulated in Schneckloth and explicitly adopted by this Court in Commonwealth v. Cleckley, 738 A.2d 427 (Pa. 1999), requires only that the totality of the circumstances indicates that the defendant gave voluntary consent, that is, consent free from deceit, misrepresentation, or coercion. The Majority – like the courts in Walsh and Danforth – focuses on appellee's knowledge of the purpose of the search, which bears on the scope of consent and the existence of any deceit or misrepresentation. See Maj. Slip Op. at 17 (citing Cleckley, 738 A.2d at 433). But, the Majority's ultimate conclusion is tied explicitly to the question of whether "a reasonable person's consent to this blood draw would have contemplated the potentiality of the results being used for criminal, investigative, or prosecutorial purposes." See Maj. Slip Op. at 17-18 & n.12. In this regard, the Majority seems to lapse back into the error of the courts in Walsh and Danforth, *i.e.*, applying a knowledge requirement that subsumes the other factors in "the totality of the circumstances" analysis.

At one point, the Majority states that the Superior Court "seemingly established" a *per se* rule here. Maj. Slip Op. at 13. That is a rather gentle way of stating the obvious; as with Walsh and Danforth, I would be more direct and accurate and say, like Hamlet (in explaining to his mother that his grief over his father's sudden and mysterious death/murder was not feigned): "'Seems,' madam? Nay, it is. I know not 'seems.'"[4] Walsh and Danforth did create a *per se* rule requiring "knowing" consent regarding the purpose of the search, and the Superior Court here followed in that vein by requiring an officer to explicitly inform the suspect of that purpose. The panel below erred and its mistake was not that it strayed from Walsh and Danforth; the mistake is contained within those precedents, which this Court should squarely disapprove.

Again, knowledge (whether actual or "objective") of the criminal investigative purposes of a search may certainly be a relevant factor in determining the voluntariness of consent, but it is not a necessary one. The Majority issues conflicting signals on the question. I would be more direct, make clear that such knowledge is not required, and couch the holding in those terms.

[4] Hamlet, Prince of Denmark, Act I, scene 2.