

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

CRANSTON, RITT

RHODE ISLAND TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND

v.

DAVID W. GERVASINI

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C.A. No.  
16504500719

BENCH DECISION

GUGLIETTA, C.M. Before this Court is David Gervasini’s (Defendant), Motion to Dismiss the charged violation, G.L. 1956 § 31-27-2.1, “Refusal to submit to chemical test.” The Defendant challenges the constitutionality of the implied consent to a blood test provision of § 31-27-2.1, in light of the United States Supreme Court’s recent decision in Birchfield v. North Dakota, 579 U. S. \_\_\_\_ (2016). Jurisdiction is pursuant to Traffic Trib. R. P. 8(a).

I

**Facts and Travel**

The facts of this case are not in dispute. On May 16, 2016, Officer Matthew John of the Westerly Police Department (Officer John) was on patrol at a motor vehicle collision on Granite Street in Westerly. Officer John was inside his marked vehicle, with its emergency lights activated, in the right-hand travel lane, when he was struck from behind by another vehicle. Officer John observed a Chrysler PT Cruiser directly behind his vehicle. The front end of the Chrysler was resting against the rear bumper of Officer John’s vehicle. A male, later identified as the Defendant, was in the driver’s seat of the Chrysler.

Officer John approached the Defendant to ensure that he was not injured. The Defendant stated that he was not injured, and declined medical attention. However, the Defendant appeared very drowsy, and his chin repeatedly fell towards his chest. Officer John requested that the

Defendant exit his vehicle, and the Defendant obliged. Officer John observed that the Defendant was unsteady on his feet, displayed poor motor skills, and spoke with a slurred speech. As the Defendant spoke, Officer John detected a faint odor of an alcoholic beverage emanating from his breath. The Defendant spoke softly and had difficulty standing up straight on the sidewalk. The Defendant's eyes were bloodshot, watery, and his pupils appeared slightly constricted. When asked whether he had consumed any alcohol, the Defendant answered that he had not been drinking.

Officer John conducted a series of standardized field sobriety tests on the Defendant. The Defendant displayed signs of intoxication in each test, and as a result, was placed under arrest for suspicion of driving under the influence of alcohol. Pursuant to the arrest, the Defendant was searched, leading to the discovery of four "nips" of alcohol, one of which was empty, and a clear plastic bag of marijuana. The Defendant was read his "Rights for Use at the Scene" and transported to the station where he was read his "Rights for Use at the Station."

At the station, Officer John requested that the Defendant submit to a chemical test, and the Defendant agreed. While filling out the chemical test form, the Defendant admitted to drinking one "nip" of alcohol earlier that day. Based on his observations, Officer John believed that the Defendant was under the influence of a substance other than alcohol. Officer John advised the supervising sergeant of his observations and indicated his intent to take the Defendant to the hospital for a blood test. The Defendant stated that he would refuse to have his blood drawn. Officer John edited the chemical test form according to the Defendant's refusal and charged the Defendant with § 31-27-2.1, "Refusal to submit to a chemical test."

The Defendant was arraigned on May 24, 2016. At arraignment, the Defendant pleaded not guilty to the charged violation, and a preliminary order of license suspension was issued. On

June 28, 2016, the Defendant filed the instant Motion to Dismiss. On July 13, 2016, a hearing was held on the Motion and this Court reserved its ruling pending this decision.

## II

### Analysis

In his Motion, the Defendant relies solely on the recent decision of Birchfield v. North Dakota, 579 U. S. \_\_\_\_ (2016), arguing that the implied consent to a blood test provision of § 31-27-2.1—which authorizes blood tests without the necessity of a warrant for the purpose of determining the alcohol concentration or presence of other drugs in a motorist’s blood after a lawful arrest—is unconstitutional. This Motion presents a question of first impression to this Court; namely, whether Birchfield renders invalid the implied consent to a blood test provision of § 31-27-2.1. For the reasons set forth herein, Defendant’s Motion is denied.

### Birchfield v. North Dakota

In Birchfield, the Supreme Court held, *inter alia*, that motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent. Here, the Defendant relies on Birchfield in arguing that he faced criminal penalties in refusing to submit to a blood test pursuant to § 31-27-2.1, Rhode Island’s implied consent law. This reliance is misplaced as § 31-27-2.1 imposes civil penalties for first offense violations, and the facts in Birchfield are readily distinguishable from those in the Defendant’s case.<sup>1</sup>

In Birchfield, Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway. See Birchfield, at 8. A state trooper arrived at the scene, approached Birchfield, and detected a “strong whiff” of alcohol. Id. The Trooper observed that Birchfield’s eyes were bloodshot and watery, that he spoke in slurred speech, and that he struggled to stay steady on his

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<sup>1</sup> In Birchfield, three separate and independent suits were consolidated for the purpose of appeal. The facts in each of the three cases are analogous.

feet. Id. The Trooper performed a series of field sobriety tests on which Appellant performed poorly. Id. Believing Birchfield to be intoxicated, the Trooper informed Birchfield of his obligation under state law to agree to a preliminary breath test. Id. Birchfield obliged, was determined to be intoxicated, and was arrested for driving while impaired. Id. The Trooper informed Birchfield that pursuant to North Dakota's implied consent law, he was obligated to undergo blood alcohol content (BAC) testing, and refusal to do so would result in criminal penalties. Id. at 9; see also N.D. Cent. Code. Ann. § 39-08-01(3) (“[a]n individual violating this section or equivalent ordinance is guilty of a ‘class B’ misdemeanor for the first or second offense in a seven-year period . . .”). Despite the prospect of criminal prosecution, Birchfield refused to let his blood be drawn. Id. As a result of this refusal, Birchfield was criminally charged, pled guilty, and was sentenced to thirty days in jail and one year of probation, among other penalties. Id. at 10.

In Bernard v. Minnesota, Petitioner William Robert Bernard, Jr. was approached by police after witnesses reportedly saw him drive his vehicle into a river. Id. Bernard admitted that he had been drinking, but denied driving the truck despite being in possession of the keys. Id. After observing that Bernard's breath smelled of alcohol and that his eyes were bloodshot and watery, officers arrested Bernard for driving while impaired. Id. At the station, officers read Bernard Minnesota's implied consent law. Id. Like North Dakota's, Minnesota's implied consent law informs motorists that it is a crime to refuse to submit to a legally required BAC test. Id.; see also Minn. Stat. § 169A.51, subd. 2 (2014) (“at the time a test is requested, the person must be informed: (2) that refusal to take a test is a crime”). Bernard refused to submit to the breathalyzer test and faced the prospect of noncriminal penalties, such as license suspension, as well as criminal penalties ranging from ninety days in prison for first offenders to seven years

imprisonment for a repeat offender. Id.; see also Minn. Stat. §§ 169A.03, subd.12; 169A.20, subds. 2-3; 169A.24, subd. 2; 169A.27, subd.2.

In Beylund v. North Dakota, an officer observed Petitioner Steve Michael Beylund, driving erratically. Id. at 11. The officer approached Beylund's vehicle and saw that Beylund had an empty wine glass in the center console beside him. Id. The officer smelled the scent of alcohol emanating from Beylund and asked him to exit the vehicle; as Beylund proceeded to do so, he struggled to keep his balance. Id. Beylund was arrested for driving while impaired and was taken to a nearby hospital. Id. At the hospital, the officer read Beylund North Dakota's implied consent law and informed Beylund that refusal to submit to a BAC test is a crime. Id. at 12; see also N.D. Cent. Code Ann. §§ 39-08-01(3), 39-20-01(3)(a). Facing criminal penalties, Beylund agreed to have his blood drawn. Id.

The United States Supreme Court granted certiorari in all three cases to answer the pointed question: "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." Id. The key language being "convicted of a crime or otherwise penalized." Id. In all three cases the Petitioners faced criminal charges and criminal punishments for refusing to submit to a blood or breath test. Id.

Here, the Defendant faces a civil charge and civil punishment. See § 31-27-2.1 (b)(1) ("for the first violation, a fine in the amount of two hundred dollars (\$200) to five hundred dollars (\$500) and . . . ten (10) to sixty (60) hours of public community restitution. The person's driving license in this state shall be suspended for a period of six (6) months to one year. . ."); see also State v. Kane, 44 A.2d 707 (R.I. 1985) ("[d]efendant was charged with refusal to take a

breathalyzer test pursuant to § 31-27-2.1 in respect to which civil penalties were eventually imposed”).

Unlike the Petitioners, the Defendant here does not face imprisonment, nor does he face the stigmatic repercussions of a criminal conviction. See Taylor v. Howard, 111 R.I. 527, 530, 304 A.2d 891, 893 (1973) (recognizing the “civil disabilities and the social and economic stigma which accompany a criminal conviction”). Rather, he faces license suspension, community service, and monetary fines. See § 31-27-2.1. Where the Petitioners in Birchfield faced imprisonment and the severity of a criminal conviction and the Defendant here faces, at most, a license suspension, this Court cannot equate the facts at hand to those in Birchfield.

Defendant maintains that the “Rights for Use at the Station” form, recited to him by Officer John, warned of potential criminal charges. This Court concedes that repeat offenders of § 31-27-2.1 face criminal charges. See §31-27-2.1 (2)(3). Still, despite the potential for criminal results to flow from § 31-27-2.1, our Supreme Court has consistently held that the statute is civil in nature. See Dunn v. Petit, 120 R.I. 486, 490, 388 A.2d 809, 811 (1978) (“[d]espite the possibility that civil and criminal results might flow from the refusal to submit to a chemical test under an implied-consent statute, courts have been unanimous in their perception that . . . proceedings under implied-consent laws, including license revocation or suspension, are civil in nature”).

Likewise, our Supreme Court has repeatedly upheld the penalty of license forfeiture as a non-criminal, civil consequence of exacting consent to the intrusion necessary to obtain evidence of intoxication. See State v. Locke, 418 A.2d 843, 850 (R.I. 1980) (“[t]he penalty of license forfeiture is a nonviolent method of exacting consent to the minimal intrusion necessary to obtain evidence of intoxication”). The Court in Locke reasoned that the statutory suspension provision

of § 31-27-2.1 “effectuates the state’s vital interest [in highway safety] and does not impermissibly impose an element of coercion on the actual consent that defendant must have first given.” Id. at 850. The same cannot be said of the inherently coercive criminal penalties that stemmed from the implied consent laws in Birchfield. The Birchfield Court stated, “[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.” Birchfield, at 36. Criminal penalties exceed this limit. Id.

Conversely, the civil penalties contained in § 31-27-2.1, are not reasonably likely to elicit coerced consent, but rather afford motorists “a choice.” See DiSalvo v. Williamson, 106 R.I. 303, 306, 259 A.2d 671, 673 (R.I. 1969) (“[t]he drinking driver who is arrested has a choice. He may take the test and hope for the best. On the other hand, he may refuse. Once he refuses, he takes a calculated risk that he will have a six-month vacation from his driving chores. The choice is his”). This choice, offered to motorists through the phrase “none shall be given,” strips the statute of any latent coercion while effectuating the State’s goal of making the highways safe by removing drivers who are under the influence. See State v. DiStefano, 764 A.2d 1156 (R.I. 2000) (stating “[a]fter a suspect refuses a chemical test . . . a test shall not be given, with or without a warrant, to ‘[a]ny person who operates a motor vehicle within this state,’ pursuant to § 31-27-2.1”).

Notably, in both Locke and Dunn, the defendants contested their refusal charges under § 31-27-2.1. The defendants’ arguments were analogous to those at hand: that consent to a chemical test is the product of coercion built into the statutory scheme of § 31-27-2.1; that criminal charges stem from a refusal of § 31-27-2.1; and that in the absence of a warrant, a search pursuant to § 31-27-2.1 is inconsistent with the Fourth Amendment. See Locke, 418 A.2d

at 848; see also Dunn, 388 A.2d at 811. In both cases, our Supreme Court rejected the defendants' arguments and upheld the implied consent statute as a civil, critical deterrent to drunk driving. Id. This Court is inclined to take a similar approach. Where our State's civil approach to legally implied consent is devoid of compulsion, this Court cannot liken § 31-27-2.1 to the inherently coercive implied consent laws in Birchfield.

Besides, prosecutions pursuant to § 31-27-2.1 are conducted in this Court, which sits as a civil body. See State v. O'Connor, 2003 WL 1878726 (R.I. 2006) ("the traffic tribunal retains jurisdiction over civil violations"); see also State v. DelBonis, 862 A.2d 760, 763 (R.I. 2004) (quoting § 31-27-2(h)) (stating "[j]urisdiction for civil violations of this section shall be with the [T]raffic [T]ribunal"). As this Court's jurisdiction is limited to civil violations, and as § 31-27-2.1 is for all purposes a civil statute, the warning of potential criminal charges is irrelevant and does not correlate to the definitive criminal charges encountered by the Petitioners in Birchfield.

This Court would err in concluding that the civil penalties imposed for first violations of § 31-27-2.1 are abrogated by Birchfield, especially considering the Supreme Court's distinguishing of implied consent laws that impose civil penalties and those that impose criminal penalties. The Court stated: "[i]t is one thing to approve implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit." See Birchfield, at 4. The Court elaborated on this statement, concluding, "[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." Id. at 36. Based on these pronouncements, it is clear that the Supreme Court did not intend for implied

consent laws that impose civil penalties, such as § 31-27-2.1, to be impaired due to its decision in Birchfield. See id.

### **The Warrant Requirement: Blood Tests v. Breath Tests**

The Court in Birchfield held that the Fourth Amendment permits warrantless breath tests incident to lawful arrests for drunk driving but not warrantless blood tests. The Court determined that absent a warrant or exigent circumstances, a blood test may not be administered as a search incident to a lawful arrest for drunk driving. See Birchfield, at 34-35 (“[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not”).

The Defendant argues that in his case, exigent circumstances did not exist, and therefore, Officer John should have obtained a warrant. The Defendant maintains that Officer John’s failure to procure a warrant necessitates dismissal of the charged violation, § 31-27-2.1. This argument is unavailing.

In Birchfield, the warrant requirement was specifically limited to searches incident to lawful arrests. Id. at 32, 35 (stating “a blood test may [not] be administered as a search incident to a lawful arrest for drunk driving” and “[h]ere . . . we are concerned with the search-incident-to-arrest exception”). The case at hand does not concern a search incident to a lawful arrest. Rather, it concerns a search pursuant to the State’s implied consent law, § 31-27-2.1.

The Court in Birchfield analyzed whether implied consent laws, such as § 31-27-2.1, justify the warrantless taking of the blood. Id. at 36 (“[h]aving concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address [whether] . . . such tests are justified based on the driver’s legally implied consent to submit to

them”). In its analysis, the Court again distinguished between implied consent laws that impose civil penalties and those that impose criminal penalties. *Id.* (“[i]t is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties”) (emphasis added). The Court concluded, “[m]otorists cannot be deemed to have consented to a blood test on pain of committing a criminal offense.” *Id.* at 37 (emphasis added). However, the Court clarified, “nothing we say here should be read to cast doubt on [implied consent laws that impose civil penalties].” *Id.* at 36.

Therefore, the Court imposed a warrant requirement for blood tests justified by implied consent laws only where the implied consent laws carry criminal penalties. *Id.* Based on the Court’s clear intent that the warrant requirement not apply to implied consent laws that carry civil penalties, this Court cannot conclude that Officer John was required to procure a warrant prior to subjecting the Defendant to a blood test pursuant to § 31-27-2.1. *See id.* (“[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply [with the warrantless taking of a blood sample]”); *c.f. DiStefano*, 764 A.2d at 1156 (“nothing in § 31-27-2.1 or in the case law of this state suggests in any way that a driver who has refused to submit to a chemical test can be compelled to submit against his or her will, whether or not the officer is armed with a search warrant. The words ‘none shall be given’ are plain and unambiguous, and evince the intent of the General Assembly of this state that consent to a test is the lynch pin to admissibility”).

Aside from the foregoing analysis, this Court recognizes Defendant’s argument that there were “less intrusive options” than requiring a blood test. However, this argument, in itself, does not invalidate § 31-27-2.1, especially where the Supreme Court accounted for less intrusive

means in its analysis. The Court acknowledged that blood tests are intrusive, stating “[b]lood tests are a different matter. They ‘require piercing the skin’ and extract a part of the subject’s body.” *Id.* at 22 (citing Skinner v. Railway Labor Executives’ Assn., 489 U.S. 602, 616-17 (1989)). The Court contrasted this inherently invasive test to the minimal intrusiveness of a breath test, which does not “implicate significant privacy concerns.” *Id.* (citing Skinner, 489 U.S. at 626). Still, the Court upheld the availability of the more intrusive option of a blood test as a “measure at [police] disposal when they have reason to believe that a motorist may be under the influence of some other substance.” *Id.* at 34. Besides, the Court made clear that blood tests, and laws that make it a crime to refuse them, serve important government interests unlikely to be achieved by other alternatives. *Id.* at 25 (“the laws at issue in the present case—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function”).

While this Court shares in the Supreme Court’s dismay at the frequent “carnage” and “slaughter” caused by drunk drivers, the Court’s holding in Birchfield has no place in the civil context of § 31-27-2.1.<sup>2</sup> Consequently, this Court determines that the implied consent to a warrantless blood test provision of § 31-27-2.1 is not rendered invalid by Birchfield.

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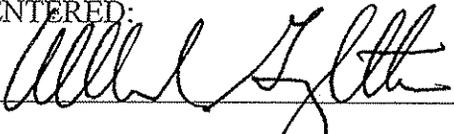
<sup>2</sup> Even though the Court’s holding in Birchfield is inapplicable to a first violation of § 31-27-2.1, this Court’s decision should not be interpreted as extending to subsequent violations of § 31-27-2.1. A second offense chemical test refusal within five years, pursuant to § 31-27-2.1(b)(2), is a criminal misdemeanor, jurisdiction of which lies in the District Court. This opinion concentrates only on first violations of § 31-27-2.1, with jurisdiction at the Rhode Island Traffic Tribunal. Therefore, we leave the applicability of Birchfield in second offense refusal cases to our colleagues in the District Court.

III

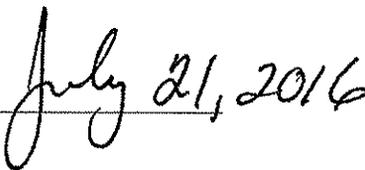
**Conclusion**

Accordingly, the Defendant's Motion to Dismiss the charged violation, § 31-27-2.1, is denied. The case will be remanded back to the pretrial calendar for proceedings consistent with this decision.

ENTERED:

  
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Chief Magistrate William R. Guglietta

DATE:

  
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July 21, 2016