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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

EAP 2020 NO. 10

COMMONWEALTH OF PENNSYLVANIA

V.

KHALID EID,
Appellant

BRIEF FOR APPELLANT

Appeal From The August 28, 2019, Order Of The Superior Court Denying Reargument/Reconsideration Of The July 11, 2019, Memorandum Opinion Of A Superior Court Panel, At No. 1670 EDA 2017, Affirming The April 2016 Judgment Of Sentence Of Philadelphia County, Court Of Common Pleas, Criminal Trial Division At CP-51-CR-0003605-2016.

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this matter pursuant to 42 Pa.C.S. § 724(a), which provides that orders of the Superior Court may be reviewed by this Court upon allowance of appeal. On March 3, 2020, this Court granted Khalid Eid's Petition for Allowance of Appeal. Pa.R.A.P. 1112(a).

II. ORDER IN QUESTION

The order in question is the order of the Superior Court in its memorandum opinion issued July 11, 2019: "Since the addition of two years' probation exceeds the six-month statutory maximum, Appellant's DUS [driving under suspension] sentence is illegal." "In sum, we affirm Appellant's DUI [driving under the influence] and DUS convictions. We vacate the judgments of sentence for the DUI and DUS, and remand for resentencing. Convictions affirmed; Judgments of Sentence vacated. Case remanded for resentencing." Commonwealth v. Eid, 1670 EDA 2019, 2019 WL 3046587, *15 (Pa. Super., July 11, 2019), reargument denied, 220 A.3d 643 (Pa. Super., Aug. 28, 2019) (table); petition for allowance of appeal granted, 2019 WL 3046587 (Pa., March 3, 2020) (table).

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

This appeal asserts that Appellant's sentence on his DUS offense, even as modified by the Superior Court, is illegal for multiple reasons. A challenge to the legality of the sentence is a pure question of law. Commonwealth v. Taylor, 104 A.3d 479, 489 (Pa. 2014), citing Commonwealth v. Eisenberg, 98 A.3d 1268, 1276 (Pa. 2014). In determining whether a sentence is illegal, this Court's "scope of review is plenary and [] standard of review is *de novo*." Commonwealth v. McClintic, 909 A.2d 1241, 1245 (Pa. 2006).

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Is Appellant's sentence under 75 Pa.C.S. § 1543(b)(1.1)(i) illegal because the statute is unconstitutional under Birchfield v. North Dakota, __ U.S. __, 136 S.Ct. 2160 (2016), Article I, Section 8, due process, and this Court's precedents because it increases punishment for a criminal offense based upon the refusal to submit to a warrantless blood test?

(*The question granted by this Court above was not answered or answered in the negative by the courts below*).

B. Is Appellant's sentence ordered by a three judge Panel of the Superior Court under 75 Pa.C.S. § 1543(b)(1.1)(i) illegal because the statute is unconstitutionally vague in that it fails to provide for a maximum penalty, and therefore, any sentence above a 90 day flat sentence violates the state and federal Due Process Clauses?

(*The question granted by this Court above was not answered or answered in the negative by the courts below*).[1]

[1] Upon closer review, as the current illegal sentencing claim was first raised after the Superior Court issued its opinion, Appellant believes that a 90 day flat sentence is not warranted, despite using that phasing in the question granted for review by the Court. Instead, Appellant will show that no sentence above a 90 day maximum sentence is currently permitted.

V. STATEMENT OF THE CASE

Three different courts, the Philadelphia Municipal Court, the Philadelphia Court of Common Pleas, and the Superior Court, have each imposed a different sentence on Appellant, Khalid Eid, for his conviction on one count of driving while operating privilege is suspended or revoked (hereinafter "DUS" or "Driving Under Suspension"), 75 Pa.C.S. § 1543(b)(1.1)(i). Every one of those sentences violated the law. The Municipal Court's sentence of 1-2 years' incarceration was above the statutory maximum. The Court of Common Pleas' sentence of 90 days to 6 months' incarceration plus 2 years' probation, imposed after a *de novo* trial, was similarly flawed. Although the Superior Court recognized these errors, it attempted to correct the problem by removing the consecutive probation term, leaving in place a sentence of 3 to 6 months. Eid contends this sentence also violates the law for multiple reasons. Because Eid appeals only his sentence for DUS, the statement of facts is limited to those relevant to that issue.

On February 25, 2015, around 11:30 p.m., Philadelphia Police Officer Stephen Nagy arrested Eid for a suspected driving under the influence (N.T. 12/05/2016 at 9-19).[2] At 1:40 a.m., he transported Eid to the police department's

[2] "N.T." followed by a date refers to the notes of testimony taken on that date at one of the following hearings: sentencing on April 26, 2017 before the Honorable Pamela Pryor Dembe of the Court of Common Pleas of Philadelphia; *de novo* trial on December 5, 2016 before the Honorable Paul Penepinto of the Court of Common Pleas of Philadelphia; and the trial and

Accident Investigation Division (AID), where chemical testing is performed. Upon entering the room, Eid was met by Officer Gary Harrison. Eid immediately stated "no test," and Officer Harrison offered Eid a choice to take either a breath or blood test, stating that "it's his decision" (N.T. 12/05/2016, 22-23, Exhibit C-5 at 16-19).[3] While observing Eid, (as is required under Department of Transportation regulations when an officer intends to conduct a breath test, 67 Pa. Code § 77.24(a)), Officer Harrison noticed "marijuana debris in his [Eid's] mouth . . . ." (N.T. 12/05/2016, 22-23; Exhibit C-5, 18-19).[4] After making these observations, Officer Harrison read Eid the "O'Connell warnings," Com., Dept. of Transp., Bureau of Traffic Safety v. O'Connell, 555 A.2d 873 (Pa. 1989), the DL-26 (the implied consent form), and the "75-439," and showed him each form (N.T. 12/05/2016, 22-23; Exhibit C-5, 16-17). Eid signed each form declining a blood test (N.T. 12/05/2016, 22-23; Exhibit C-5, 19).

sentencing on March 2, 2016 and April 12, 2016 before the Honorable Henry Lewandowski III of the Philadelphia Municipal Court.

[3] At Appellant's *de novo* trial on December 5, 2016, the Commonwealth, without objection, entered the notes of testimony with respect to Officer Gary Harrison taken on March 2, 2016 at Appellant's trial before the Municipal Court. Appellant cites testimony taken in the Municipal Court and entered into evidence as (N.T.12/05/16, 22, Exhibit C-5).

[4] Appellant ponders what "marijuana debris" would look like around a conscious person's mouth, and how one identifies such a thing. Unfortunately, the record does not clarify the issue. The record is clear, however, that Officer Harrison saw what he knew to be marijuana residue which prompted the request for a blood draw.

Officer Harrison further explained the precise type and timing of his requests and Eid's refusal. "At 2:03 a.m., . . . based on him repeatedly saying no to the test, I deemed him to be a refusal. And I did offer him – initially, I offered him a breath or a blood. Then after I noticed the marijuana, **it was a blood test that he refused**." (N.T. 12/05/2016, 22-23; Exhibit C-5, 19) (emphasis added).[5] There is no evidence to suggest that police secured or attempted to secure a warrant.[6]

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[5] Eid's arrest occurred before the United States Supreme Court's decision in Birchfield. The DL-26 and Pennsylvania statutes were subsequently amended to comply with the law. Act No. 33 of 2016, P.L. 236, § 2 (May 25, 2016); 75 Pa.C.S. § 1547(b)(2); Commonwealth v. Hayes, 218 A.3d 1260, 1262 n.2 (Pa. 2019) ("The DL-26 form has subsequently been replaced by a warning compliant with Birchfield.").

[6] Despite Officer Harrison's clear articulation that "it was a blood test that he refused," the Commonwealth in its Superior Court brief, and the sentencing court in its opinion, opine that the refusal at issue was for breath, not blood. Eid, 1670 EDA 2019, Commonwealth's Brief for Appellee, 11 (Sept. 28, 2018) ("he was subject to enhanced penalties for refusing a breath test."); Tr. Ct. Op. at 5. Which test was in fact refused, of course, implicates the Birchfield issue before this Court because the Constitution treats breath tests and blood tests differently. The sentencing court's opinion states, similar to the Commonwealth's assertion to the Superior Court, that "Birchfield does not control in this case because Appellant was initially offered a breathalyzer test and refused." Tr. Ct. Op. at 5.

This conclusion is **not** controlling for three reasons: (1) Judge Dembe's lower court opinion cannot make binding findings of fact with respect to the judgment of guilt because Judge Dembe did not preside over the trial, but only imposed sentence; (2) the conclusion is contradicted by the record and Officer Harrison's express statement indicating "it was a blood test that he refused"; and most importantly (3) as a matter of law, where the defendant does not otherwise implicitly refuse by obstructing the process, a declination is not a legal refusal unless and until the police provide a complete reading of the necessary warnings.

To criminally punish a refusal, "the police must tell the arrestee of the consequences of a refusal to take the test so that he can make a knowing and conscious choice." O'Connell, 555 A.2d 873, 877 (Pa. 1989). See also Commonwealth v. Xander, 14 A.3d 174, 178-79 (Pa. Super. 2011) (stating that the statute is clear that police must read the required warnings before a penalty may be enhanced based on a refusal); Commonwealth v. Myers, 164 A.3d 1162, 1181 n.21 (Pa. 2017) (the same). The record here is clear that Officer Harrison made only one request after reading Eid the required warnings—that he submit to a blood draw. [Continued ……..]

The Commonwealth charged Eid with three different counts relating to DUI: general impairment, and one count of DUS. 75 Pa.C.S. § 1543(b)(1.1)(i). Eid's license was suspended at the time of the incident (N.T. 12/05/2016, 22).

On March 2, 2016, after an earlier motion to suppress was denied, Eid proceeded to trial before the Honorable Henry Lewandowski III in the Municipal Court of Philadelphia. The Municipal Court found Eid guilty of all four offenses, and deferred sentencing until April 16, 2016, at which time it imposed a concurrent sentence of one to two years' incarceration followed by twelve months of probation on each offense (N.T. 4/12/2016, 16). Eid filed a *de novo* appeal, which automatically vacated the sentences. On April 26, 2017, Eid waived his right to a jury and proceeded to a bench trial before the Honorable Paul Panepinto of the Court of Common Pleas of Philadelphia. Judge Panepinto heard testimony and took evidence consistent with the facts as described above. Eid was again found guilty of all charges and the court deferred sentencing (N.T. 4/12/2017, 31).

The trial court's factual conclusion to the contrary cannot control and this Court must instead independently review the record with proper deference given to the Commonwealth as verdict winner. See Commonwealth v. Newman, 598 A.2d 275, 276 n.1 (Pa. 1991) (explaining where the trial court did not write an opinion and the Superior Court did not address the dispute, this Court reviews the facts in light most favorable to the verdict winner). The verdict at the time, however, did not depend upon whether the refusal was for breath or blood because the trial predated Birchfield. At the time of the trial court's verdict, Pennsylvania courts were not making a distinction between the taking of breath or blood. Thus, neither conclusion is entitled to deference because that fact was simply not an element of the offense. Instead, the record speaks for itself. Under the facts and the law, Eid refused a blood test.

On April 26, 2017, Eid proceeded to sentencing before a different judge, as the trial judge retired. The Honorable Pamela Dembe imposed an aggregate sentence of ninety days to six months' incarceration, to be served on weekends followed by two years' probation on both the DUI and DUS offenses to run concurrently (N.T. 4/12/2017, 8-9).

On May 24, 2017, Eid filed a timely notice of appeal challenging both his DUI and DUS convictions and sentences. He filed a timely Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925 on July 17, 2017 along with a Request for Extension of Time to File a Supplemental 1925 upon Completion of the Notes of Testimony.[7] Eid filed a timely Supplemental Statement of Errors on October 19, 2017.[8] Judge Dembe issued an Opinion on December 27, 2017 addressing the sentencing claims only as she did not preside over the trial.[9]

On July 11, 2019, the Superior Court issued its unreported memorandum decision,[10] in which it affirmed Eid's conviction with respect to the DUI and DUS charges, but it found both sentences illegal. With respect to the DUI, the Superior Court noted correctly that a second conviction for DUI with accident (Eid had

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7 The Statement of Errors is attached at Exhibit 1.

8 The Supplemental Statement of Errors is attached at Exhibit 2.

9 The trial court's opinion is attached at Exhibit 3.

10 The Superior Court's memorandum decision in this matter is attached as Exhibit 4.

previously been convicted of a DUI) carries a maximum penalty of "not more than six months," which meant the consecutive probation tail resulted in a sentence above the statutory maximum. 75 Pa.C.S. § 3803(b)(1). It vacated the DUI sentence and remanded for resentencing on the charge. Eid, 2019 WL 3046587, *6.

The Superior Court's resolution of the DUS sentence, however, is why this Court took review. First, the Panel ignored Eid's illegal sentence argument that Section 1543(b)(1.1)(i) unconstitutionally enhances a sentence based on refusal to submit to a warrantless chemical test. Instead, it considered the claim as one challenging the sufficiency of the evidence, and rightly concluded a Birchfield claim does not implicate evidentiary sufficiency. Eid, 2019 WL 3046587, *4. But, Eid additionally spent six pages of his Superior Court brief addressing the Birchfield illegal sentence claim. See Eid, 2019 WL 3046587, Brief For Appellant, at 24-30. The Superior Court simply failed to address Eid's contention.

Second, the Superior Court held that Section 1543(b)(1.1)(i) carried a maximum sentence term of six months, and therefore the trial court's addition of a two year probation tail was also illegal. Eid, 2019 WL 3046587, at *6. Eid then filed a Petition for Reargument En Banc, in which he claimed that Superior Court not only ignored his Birchfield claim, but that it improperly interpreted the DUS statute and relied upon inapplicable provisions in the Motor Vehicle Code to conclude that

Section 1543(b)(1.1)(i) carries a six month maximum sentence. The Superior Court denied reargument on August 28, 2019. Appellant requested allowance of appeal to this Court, and it granted review to address both illegal DUS sentencing claims.

VI. SUMMARY OF THE ARGUMENT

Every court which imposed a sentence on Appellant, Khalid Eid for the offense of DUS, 75 Pa.C.S. § 1543(b)(1.1)(i), got it wrong. Most recently, the Superior Court erred in applying a maximum six-month penalty for Appellant's conviction under the law. The most likely reasons for this parade of errors is the statute is fatally flawed in more ways than one. First, Section 1543(b)(1.1)(i) provides for enhanced criminal penalties for the crime when the person has refused a request for a warrantless blood draw; and second, the crime lacks any reasonably discernable statutory maximum penalty, but merely states that punishment shall be "not less than 90 days." This provision is unconstitutionally vague and lends no aid to any person trying to understand the consequences of their acts.

It is well-settled law that under Birchfield v. North Dakota, ___U.S.___, 136 S.Ct. 2160 (2016) and its progeny, no person may be subjected to increased criminal penalties for the refusal to consent to a warrantless blood draw when no exigency exists. Section 1543(b)(1.1)(i), however, requires precisely this, and Appellant was subjected to those increased penalties. His sentence under that statute should be vacated and a new sentence under the generic DUS (DUI related) provision of Section 1543(b)(1)(i) should be imposed.

If this Court does not vacate the sentence under Section 1543(b)(1.1)(i) for reasons consistent with Birchfield, it should still do so because the Legislature failed to set a statutory maximum penalty for the crime. Due process requires that both the proscribed conduct and the possible sentence be clear so that the public knows not only how to comport themselves, but the penalties they might face for breaking the rules. The statute here, however, is completely silent with respect to what maximum sentence a court may legally impose for a violation. All it provides is that the crime shall be classified as an undefined "summary" and carries a sentence of a $1000 fine and a penalty of "not less than 90 days." It is clear that the General Assembly wanted there to be a custodial penalty for the crime, but it failed to clearly state what the parameters and limits of that penalty should be.

The Superior Court believed "not less than 90 days" somehow creates a maximum penalty of six months. This conclusion, however, has no basis in either the text of the law or any other statute. Upon close review, the statute is vague, and can be fixed only upon legislative action. In the interim, because it does provide for "not less than 90 days" the maximum penalty any person could face until the Legislature amends the law is a maximum period of 90 days incarceration. The minimum term, however, remains unclear.

VII. ARGUMENT

A. APPELLANT'S SENTENCE FOR DUS WITH REFUSAL UNDER 75 PA.C.S. § 1543(b)(1.1)(i) IS ILLEGAL BECAUSE AN ENHANCED CRIMINAL PENALTY CANNOT BE BASED ON A REFUSAL TO CONSENT TO A BLOOD DRAW.[11]

"[S]tates cannot impose criminal penalties upon individuals who refuse to submit to a warrantless blood test because such penalties violate an individual's Fourth Amendment [] right to be free from unreasonable searches and seizures." Commonwealth v. Giron, 155 A.3d 635, 639 (Pa. Super. 2017) *(*citing Birchfield v. North Dakota, ___U.S.___, 136 S.Ct. 2160 (2016)); Pa. Const. Art. 1, § 8. A heightened sentence is unconstitutional if is based upon the refusal to submit to a warrantless blood draw. Id. (citing Commonwealth v. Evans, 153 A.3d 323, 331 (Pa. Super. 2016)); see also Commonwealth v. Monarch, 200 A.3d 51 (Pa. 2019) (reiterating that "enhanced mandatory minimum sentences authorized by the [DUI] statute are unconstitutional when based on a refusal to submit to a warrantless blood test."); Commonwealth v. Hays, 218 A.3d 1260, 1261 n.1 (Pa. 2019) ("This Court has held that the analysis in Birchfield applied equally to Pennsylvania's imposition

[11] Appellant proceeds upon this argument presuming favorable resolution of the factual dispute that his refusal was based upon the rejection of a request to submit to a blood test. See supra, note 5 (discussing why the record and the law dictate this determination).

of enhanced penalties for any conviction [. . . on DUI charges] based on a defendant's refusal to consent to a blood test."); Commonwealth v. Myers, 164 A.3d 1162, 1182 (Pa. 2017) (Saylor, C.J., concurring) (the same).

A Birchfield claim relating to enhanced penalties applied to refusing a blood draw without a warrant in a criminal case "implicates the legality of a sentence, [and] it is nonwaivable." Monarch, 200 A.3d at 57 (citing Commonwealth v. Holmes, 933 A.2d 57, 60 (Pa. 2007)); see also Giron, 155 A.3d at 640 (stating the same). Only where a defendant challenges the legality of his sentence under Birchfield in the context of a collateral attack is relief precluded. Commonwealth v. Olson, 218 A.3d 863 (Pa. 2019) (barring relief because Birchfield claims do not receive retroactive effect to sentences already final under Teague v. Lane, 489 U.S. 288 (1989)). As the instant case is on direct appeal, and the claim implicates the legality of Mr. Eid's sentence, it is not waived. Commonwealth v. Barnes, 151 A.3d 121, 124 (Pa. 2016) ("an exception to the issue-preservation requirement exists where the challenge is one implicating the legality of the appellant's sentence."); see contra, Hayes, 218 A.3d 1260 (Pa. 2019) (not implicating a sentencing issue, and finding failure to seek suppression of blood results based on the voluntariness of the appellant's consent to a blood draw under Birchfield waived the claim because it was not preserved at the earliest date).

These decisions addressing blood draw refusals under Birchfield, and even those addressing waiver, applied only to challenges relating to the DUI enhancement provision under 75 Pa.C.S. § 3804(c). Surprisingly, no court in a published opinion has addressed the same problems in the DUS context. Regardless, the principle announced in Birchfield applies identically. "Under Birchfield, it is clear the enhanced mandatory minimum sentences authorized by the statute are unconstitutional when based on a refusal to submit to a warrantless blood test." Monarch, 200 A.3d at 57.

The obvious illegality of criminal sentencing enhancements based on a refusal to draw blood is evident in the Legislature's response to Birchfield. It amended the DUI law in 2017. The old version of the law provided: "[a]n 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 [providing for the enhanced penalty]." 75 Pa.C.S. § 3804(c) (2016).

Act 30 of 2017, (S.B. 553) amended the law to distinguish between a lawful enhancement for breath test refusals and the unlawful enhancement for warrantless blood refusals. The current law provides: "An individual who violates section 3802(a)(1) and refused testing of breath under section 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) or testing of blood

pursuant to a valid search warrant or an individual who violates section 3802(c) or (d) shall be sentenced as follows:" 75 Pa.C.S. § 3804(c) (effective July 20, 2017). Unfortunately, the Legislature did not make similar changes to language in the DUS statute.

Subsection 1543(b)(1.1)(i)[12] retains the unconstitutional equal treatment of breath and blood refusals. The law enhances the DUS penalty to $1000 and a sentence of "not less than 90 days" for a first offense DUS where the driver "refuses testing of **blood** or breath" or is under the influence of alcohol or drugs. 75 Pa.C.S. § 1543(b)(1.1)(i) (emphasis added). This structure is no different than the enhancement under Section 3804 found impermissible in Giron.

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[12] The provision at issue reads as follows:

> A person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing or who at the time of testing has in his blood any amount of a Schedule I or nonprescribed Schedule II or III controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or its metabolite or who refuses testing of blood or breath and who drives a motor vehicle on any highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition for a violation of section 3802 or former section 3731 or because of a violation of section 1547(b)(1) or 3802 or former section 3731 or is suspended under section 1581 for an offense substantially similar to a violation of section 3802 or former section 3731 shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of $1,000 and to undergo imprisonment for a period of not less than 90 days.

75 Pa.C.S. § 1543(b)(1.1)(i).

Where no refusal is at issue, the baseline DUS offense under Section 1543(b)(1)(i) provides for a penalty on a first conviction of "a fine of $500 and to undergo imprisonment for a period of not less than 60 days nor more than 90 days." 75 Pa.C.S. § 1543(b)(1)(i).[13] Both the fine and period of imprisonment are lower.

Although this was Eid's first offense, because of the refusal, he received a $1000 fine and the Panel authorized a sentence of 90 days to 6 months, a sentence two times greater than that permitted by Section 1543(b)(1). Because Eid's penalty was enhanced based upon his refusal to consent to a warrantless blood draw, this Court should vacate the DUS sentence and remand for imposition of a sentence consistent with 75 Pa.C.S. § 1543(b)(1)(i) as a lesser included offense.

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[13] The provision reads as follows:

> A person who drives a motor vehicle on a highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition for a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) or the former section 3731, because of a violation of section 1547(b)(1) (relating to suspension for refusal) or 3802 or former section 3731 or is suspended under section 1581 (relating to Driver's License Compact) for an offense substantially similar to a violation of section 3802 or former section 3731 shall, upon a first conviction, be guilty of a summary offense and **shall be sentenced to pay a fine of $500 and to undergo imprisonment for a period of not less than 60 days nor more than 90 days.**

75 Pa.C.S. § 1543(b)(1)(i) (emphasis added).

B. THE SENTENCING PROVISION OF SECTION 1543(b)(1.1)(i) IS ILLEGAL, VAGUE, LACKS A STATUTORY MAXIMUM PENALTY, AND DEPRIVES FAIR NOTICE AND DUE PROCESS.[14]

The Superior Court's *sua sponte* acceptance of a sentence of 3 to 6 months' incarceration for a violation of DUS, 75 Pa.C.S. § 1543(b)(1.1)(i), is illegal because the Legislature failed to provide a clear statutory maximum penalty applicable to the crime rendering the permissible range of sentences unconstitutionally vague in violation of due process under both the Pennsylvania and Federal Constitutions. U.S. Const. Amends. V, XIV; Pa. Const. Art. 1, Secs. 1, 9. This Court should vacate the Superior Court's Order and remand for resentencing.

1. **Due Process Requires the Legislature to Impose a Statutory Maximum Penalty for Offenses.**

"As generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage

[14] This Court does not need to reach this issue if it finds in Eid's favor with respect to his Birchfield claim as the sentencing provision of § 1543(b)(1.1)(i) would no longer apply. Further, this Court does not necessarily need to decide now what is meant by "not less than 60 days nor more than 90 days" under 75 Pa.C.S. § 1543(b)(1)(i), the provision which would apply if Eid succeeds on his Birchfield claim because that sentence has not yet been imposed.

arbitrary and discriminatory enforcement." Commonwealth v. Barud, 681 A.2d 162, 165 (Pa. 1996) (quotations omitted). This Court and the United States Supreme Court have declared, independently, that vague sentencing provisions in addition to vague proscriptive statutes violate due process because they deprive a person of liberty without fair notice of the consequences. This Court in Commonwealth v. Bell, 645 A.2d 211 (Pa. 1994) stated "[w]e believe that fairness [under the independent tenets of "the Commonwealth's due process clause"] requires that a defendant be notified of the maximum sentence he could face for committing a particular offense." Id. at 215 n.9 (citing Michigan v. Long, 463 U.S. 1032 (1983)) (finding an express statutory minimum penalty of three years did not repeal the maximum penalty of five years, and because the maximum penalty remained, the law survived constitutional challenge).

Likewise, under federal law, "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, 442 U.S. 114, 123 (1979) (finding a challenge to two provisions punishing similar conduct with different maximum sentences constitutionally sound because Congress "unambiguously specif[ied] the . . . penalties available upon conviction [for each

crime]" and the existence competing statutes merely gave prosecutors discretion to choose which offense to charge).

More recently, in Johnson v. United States, 576 U.S.__, 135 S.Ct. 2551 (2015), the Supreme Court unequivocally applied the Fifth Amendment's vagueness rule to sentencing statutes to invalidate a sentencing enhancement provision within the federal Armed Career Criminals Act. Id. at 2556-57 ("The prohibition of vagueness . . . appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.") (citations and internal quotations omitted).

The General Assembly has codified these principles in the criminal code. It states the purpose of the Crimes Code is "[t]o give fair warning to of the nature of the conduct declared to constitute an offense, and of the sentences that may be imposed on conviction of an offense." 18 Pa.C.S. § 104(4). While not applicable to the Vehicle Code, there should be no doubt about the constitutional foundation upon which Mr. Eid's argument rests.

Nor may a court, consistent with due process, enlarge the penalty to which a defendant can be exposed after the time of committing the crime. Bouie v. Columbia, 378 U.S. 347, 353 (1964) (holding judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause); see also Rogers v. Tennessee, 532 U.S. 451, 468 (2001) (holding the Due Process Clause, like the *Ex Post Facto*

Clause, bars retroactive judicial enlargement of statutory prohibitions or penalties). Although not couched under the *Ex Post Facto* Clause, as that provision applies to legislative enactments only, due process and fairness prohibit the retroactive judicial interpretation of an ambiguous law to enhance a penalty beyond the legislatively express term—precisely what the Superior Court did here.

Under both Constitutions, where the Legislature has abdicated its duty to define the maximum range of a penalty, due process is violated, and a court cannot retroactively fill that gap. See Commonwealth v. Derhammer, 173 A.3d 723, 733 (Pa. 2017) (Wecht, J., concurring) (explaining that the judiciary is not empowered to rewrite the law by guessing what the Legislature might do).

2. **Section 1543(b)(1.1.)(i) Lacks An Express Statutory Maximum.**

Whether a sentencing statute is unconstitutionally vague requires first, interpreting the statute. Any interpretation of the DUS refusal sentencing statute demonstrates that a sentence which imposes a maximum term of more than 90 days is constitutionally infirm. The statute provides that a person:

> shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of $1,000 **and to undergo imprisonment for a period of not less than 90 days**.

75 Pa.C.S. § 1543(b)(1.1)(i) (emphasis added).

"A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution." Commonwealth v. Mayfield, 832 A.2d 418, 421 (Pa. 2003); see also Commonwealth v. Hopkins, 117 A.3d 247, 252 (Pa. 2015) (with respect to sentencing statutes).

It is exceptionally rare that the Legislature fails to provide for a statutory maximum penalty, see, e.g., cf., 18 Pa.C.S. §§ 1101, 1103-05 (providing for criminal penalties generally), but neither the DUS statute itself, nor any other law in this Commonwealth, provides clarity with respect to the maximum jail term allowed. While the fine required is unambiguous—"$1000", the two other phrases from which one could seek guidance, "summary" and "not less than 90 days," fail to provide assistance.

i. **"Summary" In § 1543(b)(1.1)(i) Is Not Defined.**

First, Section 1543(b)(1.1)(i)'s declaration that the crime is a "summary" is oddly meaningless here. The Superior Court correctly noted that Section 6502 of the Vehicle Code "specifically states that the provisions of the Crimes Code relating to fines and imprisonment for convictions of summary offenses are not applicable to violations of the Vehicle Code." 75 Pa.C.S. § 6502(c). Eid, 1670 EDA 2019 at *14 n.12. Thus, the Crimes Code declaration in Title 18, Section 1105, that the maximum

penalty for a "summary" offense is "90 days" has no effect on the Vehicle Code and does not limit the maximum here.

The Vehicle Code instead independently defines "Summary offenses", but in this specific case, that definition offers no assistance. Section 6502(a) defines all "violations of this title" that are not otherwise misdemeanors or felonies as a "summary offense" and prescribes a mandatory penalty of $25 "for a violation of any of the provisions of this title **for which another penalty is not provided**." 75 Pa.C.S. § 6502(a) (emphasis added). Because Section 1543(b)(1.1)(i) includes "another penalty"—a $1000 fine and a mandatory period of imprisonment—Section 6502 is expressly inapplicable.

The Superior Court agreed, but believed Section 6503 provides the answer. It declared "Section 6503 provides that the maximum punishment for a summary offense DUS is no more than six months' imprisonment." Eid, 2019 WL 3046587, *6 (citing 75 Pa.C.S. §§ 6503(a), (a.1)). While this is correct as a general principle, the Panel too quickly assumed that Section 6503 covers all DUS offenses. The statute is expressly applicable to DUS offenses arising under § 1543(a) only, not § 1543(b) crimes—the one at issue here.

Section 6503 provides:

> **(a) General offenses.--**Every person convicted of a second or subsequent violation of any of the following provisions shall be

> sentenced to pay a fine of not less than $200 nor more than $1,000 or to imprisonment for not more than six months, or both:
>
> **Section 1543(a)** (relating to driving while operating privilege is suspended or revoked) except as set forth in subsection (a.1).
> Section 3367 (relating to racing on highways).
> Section 3734 (relating to driving without lights to avoid identification or arrest).
> Section 3748 (relating to false reports).

75 Pa.C.S. § 6503(a) (emphasis added). This provision is a recidivist statute for non-new DUI violations, and not meant to address the maximum penalties for all DUS crimes. It specifies certain statutes and subsections explicitly. Section 1543(b) is not included. Moreover, subsection (a.1) addresses only intractable repeat offenders who commit a sixth or subsequent offense under § 1543(a), and says nothing about § 1543(b). Nor does any other portion of § 6503 address the penalties applicable to Section 1543(b) either. There is simply no statute that sets forth an unequivocal maximum penalty for § 1543(b)(1.1)(i).

ii. **"Not Less Than 90 Days" Does Not Provide For A Statutory Maximum Penalty.**

Looking to Section 1543(b)(1.1)(i) itself for the answer does not aid the quest. The phrase "not less than 90 days," is not a paragon of clarity. Initially, this Court should remember that it is "obliged to construe legislative enactments, where possible, in compliance with the federal and state constitutions . . . ." Harrington v. Com., Dep't of Transp., Bureau of Driver Licensing, (Pa. 2000) (citing 1 Pa.C.S. §

1922). In that light, if "not less than 90 days" can be plausibly interpreted to provide for a statutory maximum term, then this Court should construe the statute to that effect. After review, no matter how it is sliced, there is no reasonable way to interpret the instant DUS provision to include a statutory maximum.

To begin the analysis, it might be helpful to establish some terminology. The Sentencing Code requires generally, that when constructing a sentence on a given defendant, courts must impose a "minimum sentence" and a "maximum sentence." 42 Pa.C.S. § 9756(a)-(b). The "maximum sentence," however, is different than the "the limit authorized by law", otherwise known as the "statutory maximum." 42 Pa.C.S. § 9756(a), see, e.g., 18 Pa.C.S. § 106 (setting forth the statutory maximum for criminal offenses).

In some cases, the Legislature requires courts to impose mandatory terms when sentencing defendants convicted of certain crimes, for which the trial judge has no discretion to deviate. Those mandatory terms can be either mandatory minimum sentences or mandatory maximum sentences. See, e.g., 18 Pa.C.S. § 1102.1 (providing "mandatory minimum" sentences for juveniles convicted of murder and a mandatory maximum term of life); Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017) (Batts II) (describing the life term as a "mandatory maximum").

While the mandatory maximum sentence could be the same as the statutory maximum, as it is in the juvenile homicide context, it does not have to be.

Looking to § 1543(b)(1.1)(i), the phrase "not less than 90 days" could be interpreted in one of three ways: to require a flat sentence of 90 days, a mandatory minimum sentence, or a mandatory maximum sentence. Under no stretch of the imagination, however, could it clearly require a maximum sentence of 6 months or refer to the statutory maximum—which is what matters for the purposes of this appeal.

a. "Not Less Than 90 Days" Does Not Authorize a Flat 90 Day Sentence Only.

First, there is some basis to conclude that "not less than 90 days" authorizes a 90 day flat sentence exclusively, but upon close scrutiny, that interpretation fairs relatively poorly. In Commonwealth v. Klingensmith, 650 A.2d 444 (Pa. Super. 1994), the Superior Court approved of a 90 day flat sentence imposed on the appellant's conviction for DUS under an older version of § 1543(b) (1992). The Klingensmith Court ruled that "75 Pa.C.S. § 1543(b) implicitly creates an exception to 42 Pa.C.S. § 9756(b) [requiring that the minimum sentence imposed be no more than one half of the maximum sentence imposed] by specifically authorizing a trial court to impose a flat minimum mandatory sentence of ninety days for driving with

a suspended license when the license was suspended as a result of a prior DUI conviction." Id. at 447. The court, though, did not delve deeply into this reading, and the decision is largely conclusory.

Nonetheless, the Superior Court approved of Klingensmith's resolution in Commonwealth v. Postie, 110 A.3d 1034 (Pa. Super. 2015), but again did not analyze the words deeply. There, the appellant was sentenced to a flat 4-month term of incarceration under 75 Pa.C.S. § 1543(a). Section 1543(a), as complimented by 75 Pa.C.S. § 6503 provided that a conviction for general DUS required a court to impose a sentence of "imprisonment for not less than 30 days but not more than six months." 75 Pa.C.S. § 6503(a.1). Postie accepted Klingensmith's resolution by noting its distinction from Section 1543(a) because the "not less than 90 days" language in § 1543(b) did not provide for a range of sentences and therefore, operated as an exception to 42 Pa.C.S. § 9756, which Postie assumed permitted a flat sentence as stated in Klingensmith. Postie, 110 A.3d at 1045. If Postie were accepted here, it means that Section 1543(b)(1.1)(i) requires a 90 day flat sentence exclusively.

The Superior Court Panel below, concludes that although Klingensmith, "noted that the mandatory minimum was 90 days, [it] did not address whether there was a statutory maximum." Eid, 2019 WL 3046587, at *6 (citing Klingensmith, 650

A.2d at 447). Eid agrees with the Panel that Section 1543(b) does not create a statutory maximum. But, it is also at odds with the text to read the provision as establishing a mandatory 90 day flat sentence. "While we strive to interpret statutes in a manner which avoids constitutional questions, we will not ignore the plain meaning of the statute to do so." Hous. Auth. of Cty. of Chester v. Pennsylvania State Civil Serv. Comm'n, 730 A.2d 935, 948 (Pa. 1999) (citing Boettger v. Loverro, 587 A.2d 712, 716 (Pa. 1991)).

When properly examined, the plain text of Section 1543(b)(1.1)(i) does not mandate a 90 day flat sentence, and therefore, certainly does not create a statutory maximum. If "not less than 90 days" were intended to create a flat sentence, there would be no reason to include the words "not less than." They become superfluous, and a statute should not be interpreted to make certain words meaningless. 1 Pa.C.S. § 1921(a), ("[e]very statute shall be construed, if possible, to give effect to all its provisions"); 1 Pa.C.S. § 1922(2) (the Legislature "intends the entire statute to be effective and certain"). If the Legislature wanted courts to impose a mandatory 90 day flat sentence, it would have said so directly.

In fact, it did just that in exact same sentence. Prior to setting the period of incarceration as "not less than 90 days" the Legislature stated the person "shall be sentenced to pay a fine of $1,000." § 1543(b)(1.1)(i). It does not say "not less than

$1,000," which it would if "not less than" were meant to be read as establishing a mandated flat amount. If the legislature had wanted a single penalty, the statute would read "shall be sentenced to pay of fine of $1,000 and to undergo imprisonment for a period **of 90 days**."

This is clear and explicit. The "not less than" language must have independent meaning, and obviously suggests a floor, not a ceiling. The Panel below was correct in this regard. Moreover, because a plain language reading of "not less than" necessarily implies that a greater penalty is permissible up to the statutory maximum (whatever that is), it suggests that there is no reason to presume that the Legislature intended for Section 1543(b)(1.1)(i) to carve out an exception to 42 Pa.C.S. § 9756 (mandating that the minimum sentence can be no greater than half the maximum sentence). Maybe it meant to, maybe it didn't, but any decision reaching one conclusion over the other would require this Court to guess. That would be unconstitutional.

Postie and Klingensmith, never addressed any of these concerns, and just assumed that the statute mandates a flat sentence. Those decisions are wrong. Ultimately, the Legislature may decide a 90 day flat sentence is what it wants, but where the statute cannot reasonably be interpreted as such, that decision cannot be made by this Court. Instead, the statute's current phrasing appears to create either a

mandatory minimum or a mandatory maximum of 90 days. While either of those interpretations square with the text, in neither instance would the law create a statutory maximum, leaving the maximum penalty allowed by law uncertain and vague.

b. If "Not Less Than 90 Days" Creates a Mandatory Minimum Or A Mandatory Maximum Sentence, Neither Interpretation Establishes a Statutory Maximum.

"[N]ot less than 90 days" could also be interpreted as a mandatory minimum or a mandatory maximum sentence. The Panel below believed that the phrase created a mandatory minimum. Eid, 2019 WL 3046587 at *6. Still, the Panel noted correctly that this interpretation leaves the statutory maximum undefined. This reading is consistent with several published Superior Court decisions in which the court stated, "[t]he words 'not less than' used in the statute unambiguously connote a minimum term of imprisonment" Commonwealth. v. Madeira, 982 A.2d 81, 84 (Pa. Super. 2009) (quoting Commonwealth v. O'Brien, 514 A.2d 618 (Pa. Super. 1986), appeal denied, 527 A.2d 537 (Pa. 1987)).[15]

[15] "Not less than" in other statutes has been construed to reflect a mandatory minimum sentence. However, when the General Assembly wishes to require a mandatory **minimum** sentence, it usually says so explicitly.

For example, 42 Pa.C.S. § 9714 [Sentences for second and subsequent offenses] provides as follows:

(a) **Mandatory Sentence.—**

Although there is good reason to believe that these cases are wrong and "not less than" might in fact create a mandatory maximum sentence, see Commonwealth v. Glover, 156 A.2d 114 (Pa. 1959) (holding that a statute providing for a sentencing range of "not less than five (5) years and not exceeding ten (10) years" reflects a structure of a mandatory **maximum** sentence of at least five, but not more than ten, but leaves the minimum sentence subject to the discretion of the sentencing court), adjudicating that conflict here does not resolve the core of the current dispute—lack of a prescribed statutory maximum sentence.[16]

> (1) Any person who is convicted ..... shall ..... be sentenced to a **minimum** sentence of at least ten years of total confinement.

42 Pa.C.S. § 9714 (emphasis supplied). See also 42 Pa.C.S. § 9712 (Sentences for offenses committed with firearms); 42 Pa.C.S. § 9712.1 (Sentences for certain drug offenses committed with firearms); 42 Pa.C.S. § 9713 (Sentences for offenses committed on public transportation); 42 Pa.C.S. § 9718.2 (Sentences for sexual offenders); 42 Pa.C.S. § 9719 (Sentences for offenses committed while impersonating a law enforcement officer); 18 Pa.C.S. § 6314 (Sentencing and penalties for trafficking drugs to minors); 18 Pa.C.S. § 6317 (Drug-free school zones); 18 Pa.C.S. § 7508 (Drug trafficking sentencing and penalties).

It is true that in O'Brien and Madeira, the Superior Court interpreted the phrase to require a mandatory minimum sentence, but these cases do not compel the same conclusion here for two reasons. First, the statute at issue there had a distinct difference from the one currently under consideration. The sentencing statute in O'Brien not only required a "mandatory term of imprisonment" of "not less than" a term of years well below the statutory maximum, it also contained an "eligibility for parole" provision: "Parole shall not be granted until the minimum term of imprisonment has been served." 42 Pa.C.S.§ 9718(b). Moreover, § 9718(c) could not be more explicit. It reads "application of mandatory minimum penalty," expressly indicating the intent of the phrasing.

Nothing in the instant provision or surrounding statutes reflects the Legislature's desire to have "not less than" refer to a mandatory minimum as opposed to some other framing.

[16] Under Glover, it is possible that "not less than 90 days" could be construed to set forth a mandatory maximum sentence, not a mandatory minimum, *i.e.*, that a court must sentence a defendant to at least a maximum period of "not less than 90 days" (*e.g.*, a sentence of 30 to 90

A comparison with Section 1543(b)(1)(i) illustrates both the lack of clarity in the phrase "not less than" and, that the Legislature knows how to create a statutory maximum in the DUS context when it intends to. The general DUS provision provides that a violator "shall be sentenced to pay a fine of $500 and to undergo imprisonment for a period of not less than 60 days **nor more than 90 days**." 75 Pa.C.S. § 1543(b)(1)(i) (emphasis added). Regardless of whether "not less than" refers to a mandatory maximum sentence, as suggested by Glover, or a mandatory

---

days could be appropriate). In Glover, the Commonwealth contended that a sentencing law requiring a convicted defendant to "undergo imprisonment . . . of not less than five (5) years and not exceeding ten (10) years" required a court to impose a sentence of 5 to 10 years' incarceration, exclusively. Glover contended, conversely, that there was no mandatory minimum sentence, but only a mandatory maximum sentence of between five and ten years (*e.g.* a permissible sentence could be 3 to 8 years). This Court recognized that both interpretations of the statutory language were "reasonable," but under the doctrine of strict construction of penal statutes, it is not the construction that is supported by the greater reason that is to prevail, but the one which, if reasonable, operates in favor of life and liberty. Id. at 116.

This Court further stated, "[t]he word 'sentence' when unmodified by the words 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence. The minimum sentence is merely an administrative notice by the court to the parole board that the question of parole might, at its expiration, properly be considered." Id. at 117. Like the provision in Glover, Section 1543(b)(1.1)(i) does not designate whether the required mandatory sentence relates to the minimum sentence or the maximum sentence, and therefore, the unadorned word 'sentence' must be interpreted to mean the maximum sentence.

To repeat, however, despite the logic of this interpretation, it does not resolve the ambiguity with respect to a statutory maximum in Section 1543(b)(1.1)(i). Even if "not less than 90 days" refers to a mandatory maximum, there is no reason to presume that a maximum sentence above that term is impermissible. In other words, even if a court were required to impose a mandatory maximum sentence at least 90 days (with a flexible bottom term), nothing in the law would expressly prevent a court from imposing a maximum sentence above that term. It just wouldn't be mandatory. For example, a sentence of 45 days to 120 days would be proper if the statutory maximum allowed a greater sentence. The maximum sentence the court imposed in this example is not less than 90 days. This interpretation, therefore, does not remedy the vagueness problem because the DUS statute still lacks a statutory limit.

minimum sentence, as suggested by the Superior Court below, the Legislature's inclusion of the phrase "nor more than 90 days" sets an absolute limit on the amount of time a court can require a defendant to remain in custody as part of their sentence. Placing this limiting phrase at the end of the provision creates a statutory maximum.

To illustrate, presume "not less than" refers to a mandatory minimum term, consistent with the Superior Court's reading. Then, with respect to Section 1543(b)(1)(i), the trial court must impose a mandatory minimum sentence of at least 60 days' incarceration. While it is unclear if the "nor more than 90 days" provision operates to modify the mandatory minimum requirement (meaning that the statute operates to require a court to select between a range of mandatory minimums of between 60 and 90 days, but leaves the maximum sentence undefined), or whether it operates separately to create a statutory maximum, application of the constitutional avoidance cannon, 1 Pa.C.S. § 1922, easily resolves this dispute.

If the "nor more than 90 days" modified the mandatory minimum term only (permitting, for example, a sentence of 75 to 150 days) then § 1543(b)(1)(i) would lack a statutory maximum, which would invalidate the law as vague. To avoid this unconstitutional result, the "nor more than 90 days" must be read to independently operate as a statutory maximum. Therefore, under the mandatory minimum interpretation, upon conviction, the statute would require a court to impose a

mandatory minimum sentence of at least 60 days with a maximum sentence of at most 90 days.[17]

If, conversely, this Court were to apply Glover, and interpret "not less than," as creating a mandatory maximum sentence, then "nor more than 90 days" would logically modify the maximum range. Under this reading, the trial court would be authorized to impose a sentence with no required minimum sentence, but the maximum must be between the range of 60 to 90 days. For example, the following would be legal sentences: 1 to 60 days, 10 to 75 days, or 45 to 90 days. This would make sense as it would harmonize the statute with 42 Pa.C.S. § 9756(b)(1) (requiring that a minimum sentence of confinement "shall not exceed one-half of the maximum sentence imposed").

Again, despite this reading having this Court's imprimatur in Glover, and would link the statutes with Section 9756, the proper reading of Section 1543(b)(1)(i) is not before this Court, and does not necessarily need to be decided now. The key, however, is that the structure of § 1543(b)(1)(i) illustrates that no matter the interpretation, the General Assembly knew that including the phrase "nor

[17] It is unclear whether this means that the court could legally impose a flat sentence of 75 days for instance, or whether a sentence of "60 to 80 days" would be legal. That, however, is a question for another day.

more than" sets a clear statutory maximum sentence. Simply put, the Legislature knew how to create a statutory maximum in DUS statutes. It just didn't do so here.

iii. **The Rule of Lenity Requires that Until The Legislature Clarifies the Law, the Maximum Lawful Sentence Cannot Be More than a 90 day Mandatory Maximum.**

The above discussion shows that no statute sets forth a DUS statutory maximum term. It also shows that interpreting Section 1543(b)(1.1)(i) to independently create a statutory maximum would be contrary to a plain reading of the text. Nor can it be reasonably read to mandate the imposition of a flat sentence. Finally, if "not less than 90 days" is interpreted to create either a mandatory minimum term or a mandatory maximum term, the statute once again fails to set a statutory maximum. This failure is fatal.

So where does that leave this Court? If the statute is unconstitutional because it does not create a flat sentence and fails to provide for a statutory maximum, what would be a constitutionally permissible sentence upon vacating the Superior Court's order retaining the sentence of 90 days to 6 months? The answer is vacating the sentence, remanding to the trial court for resentencing, and ordering that the sentencing court impose a sentence within its discretion that sets the maximum at 90 days, *i.e.*, any sentence with a minimum of 1 to 45 days and maximum of 90 days.

Any maximum sentence imposed above 90 days would result in a due process violation because it would result in a retroactive application of increased penalties. Under the current law, no person could reasonably anticipate what sentence if any could be imposed beyond a 90 day term. Any sentence above that line cannot stand. Unfortunately, that does not fully resolve the problem because the trial court will still lack direction regarding what sentence to impose. Assuming this Court rejects that the statute provides expressly for a 90 day flat sentence, the trial court has two options: impose a 90 day mandatory minimum, but because the maximum is unknown and unstated, this will result in a 90 day flat sentence by default as that is the only term a violator could possibly anticipate; or, the trial court must impose a sentence applying 90 days of incarceration as the mandatory maximum, with the minimum subject to the trial court's discretion.

One thing should by now be obvious, that the meaning of "not less than 90 days" is ambiguous at best. It is a long-standing tenet of statutory construction "that, if an ambiguity exists in the verbiage of a penal statute, such language should be interpreted in the light most favorable to the accused." Commonwealth v. Fithian, 961 A.2d 66, 74 (Pa. 2008); 1 Pa.C.S. § 1928(b)(1) (penal statutes "shall be strictly construed").

The interpretation most favorable to the accused in this case is the one already approved by this Court in Glover. See supra, n.14-15. It requires interpreting Section 1543(b)(1.1)(i) to impose a mandatory maximum sentence. If the General Assembly intends a different result, it has a remedy at its disposal—amending the law. For now, Eid's suggested resolution allows trial courts to punish violators in a certain and consistent manner, without asking this Court to rewrite the law, and while permitting the General Assembly an opportunity to cure the statute's lack of a statutory maximum and otherwise unclear terms.

VIII. CONCLUSION

This Court should find that 75 Pa.C.S. § 1543(b)(1.1.)(i) unconstitutionally enhances penalties for refusing to consent to a warrantless blood draw and remand for imposition of a sentence under 75 Pa.C.S. § 1543(b)(1). In the alternative, this Court should conclude that Section 1543(b)(1.1)(i)'s maximum penalty provision is vague, and therefore unconstitutional as enacted. This makes Appellant's DUS sentence illegal, even under the remedial holding of the Superior Court Panel's opinion. This Court should vacate the DUS sentence and remand to the trial court for imposing a new sentence on his DUS conviction consistent with the interpretation that the statute requires treating 90 days as the mandatory maximum.

Respectfully Submitted,

/S/

AARON MARCUS, Assistant Defender
Chief, Appeals Division
Attorney ID No. 93929
KEIR BRADFORD-GREY
Defender

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	10 EAP 2020
VS.	:	
KHALID EID, Appellant	:	

CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 18th day of May, 2020, that the principal brief filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 9,115 as counted using Microsoft Word.

Respectfully submitted,

/S/

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	10 EAP 2020
VS.	:	
KHALID EID, Appellant	:	

CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/S/

AARON MARCUS, Assistant Defender
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KEIR BRADFORD-GREY, Defender

EXHIBIT 1

DEFENDER ASSOCIATION OF PHILADELPHIA
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Aaron Marcus, ASSISTANT DEFENDER

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COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
	:	
	:	CP-51-CR-0003605-2016
V.	:	
	:	
KHALID EID	:	1670 EDA 2017

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

TO THE HONORABLE PAMELA PRYOR DEMBE, JUDGE OF THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION:

Appellant, Khlaid Eid, by counsel, Aaron Marcus Assistant Defender, Appeals Division, Owen Larrabee, Assistant Defender, Deputy Chief, Appeals Division, Karl Baker, Assistant Defender, Chief, Appeals Division, and Keir Bradford-Grey, Defender, represents:

1. On May 24, 2017, appellant filed a notice of appeal from his April 26, 2017 bench trial and judgment of sentence on three counts of driving under the influence pursuant to 75 Pa.C.S. §§ 3802(a)(1), 3802(a)(1) with accident, 3802(a)(1) with refusal, and once count of driving while operation privileges suspended, 75 Pa.C.S. § 1543(b)(1.1)(i). Appellant received a sentence of 90 days to six months incarceration to be followed by two years of reporting probation along with other conditions and a $2,500 fine on the three DUI offenses, with the sentences merging. This Court also imposed 90 days to six months of incarceration followed by two years of probation on the suspended license offense along with a $1,000 fine.

2. On June 28, 2017, Your Honor ordered appellant to file a concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) within 21 days, of June 28, 2017, or July 18, 2017.

3. Counsel has not yet received the notes of testimony from appellant's *de novo* trial in the Philadelphia Court of Common Pleas. A request for notes was filed along with Appellant's Notice of Appeal. Without complete notes of testimony, counsel is unable, at this time, to identify all issues preserved for appellate review. Along with the instant Statement of Errors, appellant is filing a Petition For an Extension of Time To File a Supplemental Statement of Errors upon receipt of completed notes.

4. Yet, based upon counsel's current vague understanding of the trial and sentencing, the following issue will likely be raised on appeal.

a. Was the evidence insufficient to sustain Appellant's conviction for driving under the influence, general impairment, under 75 Pa.C.S. §§ 3802(a)(1), 3802(a)(1) with accident, and 3802(a)(1) with refusal because the evidence failed to prove that appellant was rendered incapable of safely doing so due exclusively to the consumption of alcohol where only a moderate odor of alcohol was noticed and he likely ingested other controlled substances?;

b. Was the evidence insufficient to sustain Appellant's conviction for driving under a suspended license under 75 Pa.C.S. § 1543(b)(1.1)(I) because Appellant was not given a chemical test, and thus, there was no evidence that he had any amount of schedule I, II, or III controlled substances in his blood "at the time of testing"; and the Commonwealth did not move on the portion of the statute relating to refusals, and even if it had, the statute is unconstitutional under Birchfield v. North Dakota, ––U.S. ––––, 136 S.Ct. 2160 (2016) and Article 1, Section 8, because it penalizes the refusal to submit to blood test?;

c. Was the sentence imposed for a conviction upon 3802(a)(1) with refusal under 75 Pa.C.S. §§ 3803(b)(4) and 3804(c)(3) illegal under Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) because he cannot be sentenced to an enhanced penalty for refusing to submit to a blood test upon threat of punishment?;

d. Did the lower court impose an illegal sentence for a conviction of 75 Pa.C.S. § 1543(b)(1.1)(i) because (1) under Birchfield v. North Dakota, ——U.S. ——, 136 S.Ct. 2160 (2016), and Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) Appellant could not be subject to a penalty greater than that called for under 75 Pa.C.S. § 1543(b)(1) based upon a refusal to submit to a blood test; and (2) because the lower court imposed a sentence beyond the 90 day statutory maximum.

Respectfully Submitted,

/S/

Aaron Marcus, Asst. Defender
Appeals Division
Owen W. Larrabee, Asst. Defender
Deputy Chief, Appeals Division
Karl Baker, Asst. Defender
Chief, Appeals Division
Keir Bradford-Grey, Defender

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief and are verified subject to the penalties for unsworn falsification to authorities under Title 18, § 4904 of the Pennsylvania Crimes Code.

/S/
Aaron Marcus, Assistant Defender

July 17, 2017

DEFENDER ASSOCIATION OF PHILADELPHIA
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V.	:	
	:	
KHALID EID	:	1670 EDA 2017

PROOF OF SERVICE

Aaron Marcus, being duly sworn according to law, avers that he is counsel for appellant, Khalid Eid, in the above-captioned matter and that he has, by e-file, served upon the following a copy of the Statement of Errors Complained of on Appeal filed on behalf of appellant:

Hugh Burns, Esq.
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The Hon. Pamela Pryor Dembe
City Hall, room 392
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/S/
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Date: July 17, 2017

Note: Under 18 Pa. C.S.A. §4904 (Unsworn Falsification to Authorities), a knowingly false proof of service constitutes a misdemeanor of the second degree.

EXHIBIT 2

DEFENDER ASSOCIATION OF PHILADELPHIA
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COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
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	:	CP-51-CR-0003605-2016
V.	:	
	:	
KHALID EID	:	1670 EDA 2017

SUPPLEMENTAL STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

TO THE HONORABLE PAMELA PRYOR DEMBE, JUDGE OF THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION:

Appellant, Khlaid Eid, by counsel, Aaron Marcus Assistant Defender, Appeals Division, Owen Larrabee, Assistant Defender, Deputy Chief, Appeals Division, Karl Baker, Assistant Defender, Chief, Appeals Division, and Keir Bradford-Grey, Defender, represents:

1. On May 24, 2017, appellant filed a notice of appeal from his April 26, 2017 bench trial and judgment of sentence on three counts of driving under the influence ("DUI") pursuant to 75 Pa.C.S. §§ 3802(a)(1), 3802(a)(1) with accident, 3802(a)(1) with refusal, and once count of driving while operation privileges suspended, 75 Pa.C.S. § 1543(b)(1.1)(i). Appellant received a sentence of 90 days to six months incarceration to be followed by two years of reporting probation along with other conditions and a $2,500 fine on the three DUI offenses, with the sentences merging. This Court also imposed 90 days to six months of incarceration followed by two years of probation on the suspended license offense along with a $1,000 fine.

2. On June 28, 2017, Your Honor ordered appellant to file a concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) within 21 days, of June 28, 2017.

3. Appellant filed a timely 1925 Statement on July 17, 2017 along with a Request for Extension of Time to File a Supplemental 1925 upon Completion of the Notes of Testimony. Counsel received completed notes on October 12, 2017. The following issues will be raised on appeal.

a. Was the evidence insufficient to sustain Appellant's conviction for driving under the influence, general impairment, under 75 Pa.C.S. §§ 3802(a)(1), 3802(a)(1) with accident, and 3802(a)(1) with refusal because the evidence failed to prove that appellant was rendered incapable of safely driving due exclusively to the consumption of alcohol where only a moderate odor of alcohol was noticed and he likely ingested other controlled substances?;

b. Was the evidence insufficient to sustain Appellant's conviction for driving under a suspended license under 75 Pa.C.S. § 1543(b)(1.1)(i) because Appellant was not given a chemical test, and thus, there was no evidence that he had an "amount of alcohol by weight in his blood that is equal to or greater than .02%" or that he had any amount of schedule I, II, or III controlled substances in his blood "at the time of testing"; and the Commonwealth did not move on the portion of the statute relating to refusals, and even if it had, the statute is unconstitutional under Birchfield v. North Dakota, ––U.S. ––––, 136 S.Ct. 2160 (2016) and Article 1, Section 8, because it penalizes the refusal to submit to a warrantless blood test?;

c. Was the sentence imposed for a conviction upon 3802(a)(1) with refusal under 75 Pa.C.S. §§ 3803(b)(4) and 3804(c)(3) illegal under Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) because he cannot be sentenced to an enhanced penalty for refusing to submit to a warrantless blood test upon threat of punishment?;

d. If Appellant was convicted under 75 Pa.C.S. § 1543(b)(1.1)(i) for the refusal to take a chemical test, did the lower court impose an illegal sentence because (1) under Birchfield v. North Dakota, ––U.S. ––––, 136 S.Ct. 2160 (2016), and Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) Appellant could not be subject to a penalty greater than that called for under 75 Pa.C.S. § 1543(b)(1) based upon a refusal to submit to a chemical test; and (2) because the lower court imposed a sentence beyond the 90 day statutory maximum.

Respectfully Submitted,

/S/

Aaron Marcus, Asst. Defender
Appeals Division
Owen W. Larrabee, Asst. Defender
Deputy Chief, Appeals Division
Karl Baker, Asst. Defender
Chief, Appeals Division
Keir Bradford-Grey, Defender

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief and are verified subject to the penalties for unsworn falsification to authorities under Title 18, § 4904 of the Pennsylvania Crimes Code.

/S/
Aaron Marcus, Assistant Defender

October 19, 2017

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: KEIR BRADFORD-GREY, DEFENDER, and
Aaron Marcus, ASSISTANT DEFENDER

Identification No. 00001
1441 Sansom Street
Philadelphia, Pa. 19102
(215) 568-3190

Attorney for Khalid Eid

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
	:	
	:	CP-51-CR-0003605-2016
V.	:	
	:	
KHALID EID	:	1670 EDA 2017

PROOF OF SERVICE

Aaron Marcus, being duly sworn according to law, avers that he is counsel for appellant, Khalid Eid, in the above-captioned matter and that he has, by e-file, served upon the following a copy of the Statement of Errors Complained of on Appeal filed on behalf of appellant:

Hugh Burns, Esq.
Chief, Appeals Unit
Philadelphia DA's Office
3 South Penn Square
Philadelphia, PA 19107

The Hon. Pamela Pryor Dembe
City Hall, Room 392
Philadelphia, PA 19107

/S/
Aaron Marcus
Defender Assn. of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102
215 568-3190

Date: October 19, 2017

Note: Under 18 Pa. C.S.A. §4904 (Unsworn Falsification to Authorities), a knowingly false proof of service constitutes a misdemeanor of the second degree.

EXHIBIT 3

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
v.
CP-51-CR-0003605-2016

KHALID EID

PAMELA PRYOR DEMBE, JUDGE, ~~November~~ December 27, 2017

Defendant/Appellant, Khalid Eid, (hereinafter referred to as Appellant) appeals this Court's Order of May 31, 2017, which denied Appellant's Post Sentence Motion where Defendant had sought a New Trial, or in the alternative vacating the finding of guilt and granting a Judgment of Acquittal.

I. Factual and Procedural Background

The Appellant was arrested on February 25, 2015, after Philadelphia Police Officer Stephen Nagy observed Appellant's car stopped and facing eastbound on a westbound street after it appeared that the vehicle had just been in an accident. The officer smelled alcohol on Appellant's breath, and Appellant was unstable on his feet.

Appellant was charged with one count of driving while under a suspended or revoked license, and three counts of driving under the influence A(1), Driving under the influence with accident (A)1, and Driving under the influence with refusal (A)1.

This matter was first tried in Municipal Court on March 2, 2016, and Appellant was found guilty of all charges. Appellant appealed the Municipal Court's findings and the appeal proceeded to trial in the Court of Common Pleas on December 5, 2016.

Appellant was found guilty of all charges. Appellant was sentenced by this trial court on April 26, 2017. Appellant received a sentence of ninety (90) days to six (6) months incarceration to be followed by two (2) years of reporting probation and a $2,500.00 fine on the three DUI offenses, with the sentences running concurrant. This court also imposed ninety (90) days to six (6) months of incarceration followed by two (2) years of probation on the suspended license offense along with a $1,000.00 fine.

Appellant filed a timely Notice of Appeal of this Court's decision to the PA Superior Court. Thereafter, in response to this Court's Pa. R.A.P. 1925(b) Order, Appellant timely filed his statement of Errors Complained of on Appeal on July 117, 2017, along with a Request for Extension of Time to File a Supplemental 1925 upon Completion of the Notes of Testimony. Counsel received completed notes on October 12, 2017, and Appellant's Supplemental Statement of Errors Complained of on Appeal was filed October 19, 2017.

II. Matters Complained of on Appeal

Issues (a) and (b) cannot be addressed by this court because the Honorable Judge Paul Panepinto, who presided over this case, has since retired. This court will only address Issues (c) and (d) pertaining to Appellant's sentencing.

Issue (c): Was the sentence imposed for a conviction upon 3802(a)(1) with refusal under 75 Pa.C.S. § 3803(b)(4) and 3804(c)(3) illegal under Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) because he cannot be sentenced to an enhanced penalty for refusing to submit to a warrantless blood test upon threat of punishment?

Issue (d): If Appellant was convicted under 75 Pa.C.S. §1543(b)(1.1)(i) for the refusal to take a chemical test, did the lower court impose an illegal sentence because (1) under Birchfield v. North Dakota, -- U.S. --, 136 S.Ct. 2160 (2016), and Commonwealth v. Giron, 155 A.3d 635 (Pa. Super. 2017) Appellant could not be subject to a penalty greater than that called for under 75 Pa.C.S. §1543(b)(1) based upon a refusal to submit to a chemical test; and (2) because the lower court imposed a sentence beyond the 90 day statutory maximum.

III. Discussion

The testimony provided at trial by Officer Nagy was as follows: On February 25, 2015 at about 11:30 p.m. he crossed the intersection at Castor Avenue and Levick Street when he noticed a black Nissan that was facing eastbound on the 1400 block of Levick, which is a one way going west only. Officer Nagy noticed that the vehicle had hit a parked car. N.T. 12/5/16, pp. 9. Appellant was in the driver's seat of the running vehicle. Appellant appeared to be disheveled, and his eyes were glassy and red. Officer Nagy noticed a moderate odor of an alcoholic beverage emitted from Appellant and from inside the vehicle. Officer Nagy asked Appellant for his license and insurance, and Appellant had a hard time getting it out of his pocket. N.T. 12/5/16, pp. 10-12.

No alcoholic beverages were found in Appellant's car. Officer Nagy called for a police wagon to come pick up Appellant, and while they waited for the wagon Appellant urinated on himself. N.T. 12/5/16, pp. 17-20. A Certified Penndot Driving Record was entered into evidence to show that Appellant's driver's license was suspended on

February 2, 2015, and had not been reinstated at the time Appellant was arrested on February 25, 2015. N.T. 12/5/16, pp. 29.

On appeal, Appellant argues that the sentence imposed for a conviction upon 3802(a)(1) with a refusal under 75 Pa.C.S. § 3803(b)(4) and 3804(c)(3) is illegal because he cannot be sentenced to an enhanced penalty for refusing to submit to a warrantless blood test upon threat of punishment. To support this, Appellant points to Commonwealth v. Giron, where the Pennsylvania Superior Court vacated defendant's judgment of sentencing because it was illegal to subject him to enhanced penalties for refusing to submit to a warrantless blood test.

However, the present case is distinguished from Giron because Appellant was initially offered a breathalyzer test and a blood test. Appellant immediately refused both tests, and it wasn't until Officer Harrison noticed what he thought to be marijuana debris in Appellant's mouth did he offer Appellant only a blood test. N.T. 3/2/16 pp. 18-19. Appellant had repeatedly refused to submit to a breathalyzer test prior to Officer Harrison's discovery of the debris in Appellant's mouth, and his argument that he was only asked to submit to a warrantless blood test is without merit because he was initially offered both and repeatedly refused to comply.

Furthermore, as a condition of maintaining a driver's license in Pennsylvania, all drivers are subject to the implied consent requirements of the Motor Vehicle Code and must submit to blood and breath tests under appropriate circumstances. Commonwealth

v. O'Connell, 521 Pa. 242, 555 A.2d 873, 877 (Pa. 1989). Where an officer has reasonable grounds to believe that a motorist is driving while under the influence of alcohol, the driver may properly be requested to submit to a chemical test of blood, breath or urine to determine the alcoholic content of the blood. Commonwealth v. McFarren, 514 Pa. 411, 525 A.2d 1185 (Pa. 1987). Neither the Fourth Amendment bar against unreasonable searches and seizures nor Fifth Amendment privilege against self-incrimination prevents the Commonwealth from requiring a driver to submit to a breathalyzer test. Commonwealth v. Hipp, 380 Pa. Super. 345, 551 A.2d 1086 (Pa. Super. 1988). Commonwealth v. Foster, 136 A.3d 1028 (Pa. Super. Ct. 2016). When a motorist drives on a road in Pennsylvania, the motorist is "deemed to have given consent" to chemical testing to determine whether he or she is driving under the influence of alcohol or a controlled substance ("DUI"), provided that a police officer first develops "reasonable grounds" to suspect such impairment. 75 Pa.C.S. § 1547(a). Nonetheless, this "implied consent" statute also grants DUI arrestees the right to refuse chemical testing. Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017).

In the instant case, Officer Nagy had reasonable suspicion that Appellant was operating his vehicle while under the influence, accordingly, his request for a breathalyzer test and blood analysis were appropriate as a matter of law. Ultimately, Appellant was initially offered a breathalyzer test, refused to comply, and then refused to submit to a blood test. Birchfield does not control in this case because Appellant was initially offered a breathalyzer test and refused.

IV. Conclusion

For all the above reasons, this Court's findings should be affirmed.

BY THE COURT:

HONORABLE PAMELA PRYOR DEMBE

EXHIBIT 4

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KHALID EID	:	
Appellant	:	No. 1670 EDA 2017

Appeal from the Judgment of Sentence April 26, 2017
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0003605-2016

BEFORE: OTT, J., DUBOW, J., and STEVENS*, P.J.E.

MEMORANDUM BY DUBOW, J.: **FILED JULY 11, 2019**

Appellant, Khalid Eid, appeals from the Judgment of Sentence entered by the Philadelphia County Court of Common Pleas following his convictions after a bench trial of three counts of Driving Under the Influence ("DUI") and one count of Driving While Operating Privilege Suspended ("DUS").[1] Appellant challenges the sufficiency of evidence and the legality of his sentence. After careful review, we affirm the convictions, vacate the sentence, and remand for resentencing.

We glean the following factual and procedural history from the certified record. On February 25, 2015, around 11:30 PM, Police Officer Stephen Nagy observed a black Nissan with its engine running and facing the wrong direction on a one-way street on the 1400 block of Levick Street, in Philadelphia. The

[1] 75 Pa.C.S. § 3802(a)(1) and 75 Pa.C.S. § 1543(b)(1.1), respectively.

* Former Justice specially assigned to the Superior Court.

Nissan had hit a parked car, which forced the parked car into the front of another car.

Officer Nagy approached the Nissan, and asked the driver, Appellant, for his license, registration, and insurance. Appellant was disheveled, his eyes were glassy and red, and there was a moderate odor of alcohol omitting from his person and inside the vehicle. Appellant had a difficult time retrieving the items from his back pocket; therefore, Officer Nagy asked him to step out of his vehicle.

Once Appellant was outside the vehicle, Officer Nagy noticed that he was unsteady on his feet, and called for a wagon to transport Appellant to the Accident Investigation Division ("AID") for testing. As they were waiting for the wagon, Appellant urinated on himself.

Appellant arrived at the AID around 1:40 AM and was met by Police Officer Harrison. Officer Harrison administered ***O'Connell***[2] warnings to Appellant and instructed him about the ramifications of a chemical test refusal. Appellant refused to take a breath or blood test. Later, Officer Harrison noticed that Appellant had marijuana debris in his mouth, and requested that Appellant take a blood test. Appellant refused.

The Commonwealth charged Appellant with DUI-General Impairment, DUI-Accident Resulting in Damage to a Vehicle ("DUI-Accident"), DUI-Refusal

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[2] ***Commonwealth v. O'Connell***, 555 A.2d 873 (Pa. 1989).

to Testing of Blood or Breath ("DUI-Refusal"), citing 75 Pa.C.S. § 3802(a)(1) as the applicable statute for each DUI. The Information charged DUS with reference to 75 Pa.C.S. § 1543(a).[3]

On March 2, 2016, a hearing was held in municipal court. Officers Nagy and Harrison testified; the municipal court found Appellant guilty of all the charges and sentenced him to, *inter alia*, an aggregate term of one to two years' imprisonment and a $2,500 fine. Appellant appealed to the Court of Common Pleas.

A *de novo* bench trial was held on December 5, 2016. At the beginning of trial, the Commonwealth stated, in relevant part, that with respect to the DUS offense, it would be proceeding under "1543B, driving while under a suspended or revoked license." N.T. Trial, 12/5/16, at 6. The court then heard testimony from Officer Nagy, and admitted Officer Harrison's testimony from the municipal court hearing.[4] The trial court found Appellant guilty of all charges.

At sentencing, the court merged the DUI convictions and imposed a term of 90 days to six months' imprisonment, plus two years of probation and a fine of $2,500. For the DUS conviction, the court imposed the same term of

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[3] The trial court docket indicates, and Appellant does not challenge, that the Commonwealth later amended the Information. Docket, at 14 (unpaginated). ***See*** Appellant's Reply Br. at 5.

[4] Officer Harrison had passed away prior to the trial *de novo*.

incarceration and probation to run concurrent to the DUI sentence, and a fine of $1,000.

Appellant filed a timely Notice of Appeal. Appellant complied with Pa.R.A.P. 1925, and the trial court issued a Rule 1925(a) Opinion.

Appellant presents the following Statement of Questions Involved:

1. Was not the evidence insufficient to sustain Appellant's conviction for driving under the influence, general impairment, under 75 Pa.C.S. §§ 3802(a)(1), 3802(a)(1)-with accident, and 3802(a)(1)-with refusal, because the evidence failed to prove that Appellant was rendered incapable of safely driving due exclusively to the consumption of alcohol?

2. Was not the evidence insufficient to sustain Appellant's conviction for driving under a suspended license under 75 Pa.C.S. § 1543(b)(1.1)(i) because Appellant was not given a chemical test, and thus, there was no evidence that he had an "amount of alcohol by weight in his blood that is equal to or greater than .02%" or that he had any amount of schedule I, II, or III controlled substances in his blood "at the time of testing"; and the Commonwealth did not move on the portion of the statute relating to refusals, and even if it had, the statute is unconstitutional and sentence is illegal under ***Birchfield v. North Dakota***, ___ U.S. ___, 136 S.Ct. 2160 (2016) and Article 1, Section 8, because it penalizes the refusal to submit to a warrantless blood test?

3. Was not the sentence imposed for a conviction upon 75 Pa.C.S. § 3802(a)(1)-with accident and with refusal, illegal because it exceeded the maximum sentence allowed by law and, because Appellant cannot be sentenced to an enhanced penalty for refusing to submit to a warrantless blood test upon threat of punishment under ***Birchfield*** and ***Commonwealth v. Giron***, 155 A.3d 635 (Pa. Super. 2017)?

4. If Appellant was properly convicted under 75 Pa.C.S. § 1543(b)(1.1)(i) for the refusal to take a chemical test, did

> not the lower court impose an illegal sentence because it imposed a sentence beyond the 90 day statutory maximum?

Appellant's Br. at 3-4.

Sufficiency of the Evidence - DUI Convictions

In the first issue, Appellant challenges the sufficiency of evidence regarding his three DUI convictions. He asserts that 75 Pa.C.S. § 3802(a)(1) requires that the Commonwealth prove that alcohol alone rendered him incapable of safely driving. Appellant's Br. at 13-16. Appellant notes that because the Commonwealth presented evidence of his marijuana use, the cause of his driving impairment is unclear and his DUI convictions should be reversed. ***Id.*** Appellant's argument is without merit.

"A claim challenging the sufficiency of the evidence is a question of law." ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000). "[O]ur standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Hutchinson***, 164 A.3d 494, 497 (Pa. Super. 2017) (citation omitted). In reviewing a sufficiency challenge, we determine "whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all elements of the offense beyond a reasonable doubt." ***Commonwealth v. May***, 887 A.2d 750, 753 (Pa. 2005) (citation omitted).

"Further, a conviction may be sustained wholly on circumstantial evidence, and the trier of fact—while passing on the credibility of the witnesses and the weight of the evidence—is free to believe all, part, or none of the

evidence." ***Commonwealth v. Miller***, 172 A.3d 632, 640 (Pa. Super. 2017). "In conducting this review, the appellate court may not weigh the evidence and substitute its judgment for the fact-finder." ***Id.***

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." 75 Pa.C.S. § 3802(a)(1). The types of evidence that the Commonwealth may proffer in a subsection 3802(a)(1) prosecution include the offender's actions and behavior; demeanor; physical appearance, particularly bloodshot eyes and other physical signs of intoxication; odor of alcohol; and slurred speech."[5] ***Commonwealth v. Segida***, 985 A.2d 871, 879 (Pa. 2009).

Following our review of the record, in the light most favorable to the Commonwealth as the verdict winner, we conclude that the evidence was sufficient to support the trial court's determination that Appellant was incapable of safely operating his vehicle after imbibing a sufficient amount of

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[5] While Appellant cites to cases that reiterate that Section 3802 prohibits driving when the vehicle operator is incapable of safely operating an automobile because of drinking alcohol, he does not cite to any case that holds that evidence that a defendant may have been under the influence of marijuana precludes a finding that a defendant was incapable of safely operating a vehicle because of alcohol consumption under Section 3802(a). ***See*** Appellant's Br. at 13-16.

alcohol. Officer Nagy testified that on the evening of the incident, he observed Appellant in a vehicle pointing the wrong direction on a one-way street. N.T. Trial, 12/5/16, at 14. He described Appellant as disheveled, with glassy and red eyes, and having a moderate odor of alcohol emitting from his person and inside the vehicle. ***Id.*** at 12. Officer Nagy also noted that Appellant had a difficult time retrieving his license and registration, was wobbly on his feet, and urinated on himself while waiting for a vehicle to transport him to AID. ***Id.*** at 12-13. Appellant's challenge to the sufficiency of evidence supporting his DUI convictions lacks merit, and he is, thus, not entitled to relief.

Sufficiency of the Evidence – DUS Conviction

In his second issue, Appellant avers that the evidence was insufficient to sustain the conviction for DUS under Section 1543(b)(1.1). Appellant first challenges the sufficiency of the evidence on the grounds that the Criminal Information only quotes a portion of Section 1543(b)(1.1) and not the portion on which the Commonwealth based its case. Appellant's Br. at 16-17, 21.

In particular, Appellant argues that the Criminal Information only quotes from the provision that addresses a defendant who has a blood alcohol level above .02% and not a defendant who refuses blood testing. Appellant concludes that since the Commonwealth only presented evidence of Appellant's refusal and not his blood alcohol level, the evidence does not support the conviction for driving with a suspended license. ***Id.***

Section 1543(b)(1.1) provides for three situations in which a defendant, who is driving with a suspended or revoked license, can be convicted: driving

with blood alcohol level above .02%, driving with certain controlled substances in his blood, or refusing blood or breath testing:

> A person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing or who at the time of testing has in his blood any amount of a Schedule I or nonprescribed Schedule II or III controlled substance,. . . or who refuses testing of blood or breath and who drives a motor vehicle on any highway or trafficway of this Commonwealth at a time when the person's operating privilege is suspended or revoked . . . shall, upon a first conviction, be guilty of a summary offense[.]

75 Pa.C.S. § 1543(b)(1.1). In this case, the original Criminal Information only quoted the portion of this section that addresses a defendant who drives with a suspended license and has alcohol or drugs in his blood. The original Criminal Information did not quote from the portion of this section that addresses a defendant who drives with a suspended license and refuses blood or breath testing.

The Commonwealth, however, amended the Criminal Information at the start of the trial to include the entire section of 1543(b)(1.1). In particular, the Assistant District Attorney informed the court at the beginning of the trial that the Commonwealth would be proceeding under "1543[b], driving while under a suspended or revoked license." N.T. Trial, 12/5/16 at 6. Appellant's counsel did not object to the amendment to the Criminal Information. ***Id.***[6]

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[6] Moreover, to the extent that Appellant challenges the amended Criminal Information, that challenge is waived. "A party may not remain silent and

The trial court permitted the Commonwealth to amend the Criminal Information. ***See*** Trial Ct. Docket, at 14 (unpaginated). Thus, the amended Criminal Information encompassed all possibilities under 1543(b), including refusal to take a blood test. Since the Commonwealth's evidence included evidence of the Appellant's refusal to take a blood test, the evidence was consistent with the amended Criminal Information.

Appellant also argues that his DUS conviction cannot be sustained based on ***Birchfield v. North Dakota***, ___ U.S. ___, 136 S.Ct. 2160 (2016). Appellant's Br. at 24-27. Appellant's sufficiency argument does not implicate ***Birchfield*** because ***Birchfield*** addresses suppression issues and sentencing issues, but not challenges to the sufficiency of the evidence. In ***Birchfield***, "the Supreme Court of the United States held that a state cannot impose criminal penalties upon an individual who refuses to submit to a warrantless blood test because such penalties violate an individual's Fourth Amendment . . . right to be free from unreasonable searches[.]" ***Giron***, 155 A.3d at 639

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afterwards complain of matters which, if erroneous, the court would have corrected." ***Commonwealth v. Strunk***, 953 A.2d 577, 579 (Pa. Super. 2008) (citations omitted). ***See United States v. Olano***, 507 U.S. 725, 731 (1993) (acknowledging that "a constitutional right or a right of any other sort may be forfeited in criminal . . . cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"); Pa.R.A.P. 302 ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Accordingly, because Appellant did not object to the amendment nor requested clarification of the amendment at trial, he waived this issue for purposes of appeal.

(citing ***Birchfield***, 136 S.Ct. at 2185-86). Thus, ***Birchfield*** is not relevant in evaluating the sufficiency of the evidence in this case.

Appellant's final argument is that the trial court erred in finding sufficient evidence to convict Appellant of Section 1543(b)(1.1). In order to convict Appellant, the trial court had to find that Appellant "refused testing of blood or breath; **and** (2) drove a motor vehicle on any highway or trafficway of this Commonwealth at a time when his operating privilege was suspended or revoked." 75 Pa.C.S. § 1543(b)(1.1).

Following our review of the record in the light most favorable to the Commonwealth as the verdict winner, we conclude that the record supports the trial court's determination that Appellant refused testing of blood and drove a motor vehicle at a time when his license was suspended. Appellant's Certified Driving Record demonstrates that on the date of the police arrested Appellant, February 25, 2015, Appellant's license had been suspended. N.T. Trial, 12/5/16, at 25-26. Additionally, Officer Harrison testified that when Appellant arrived at the AID around 1:40 AM on February 26, 2015, he requested that Appellant take a breath or blood test, but Appellant refused. N.T. Trial, 3/2/16 at 17-19. Thus, we conclude that Appellant's challenge to the sufficiency of evidence supporting his DUS conviction lacks merit, and he is, therefore, not entitled to relief.

Illegal Sentencing – DUI Convictions

In his third issue, Appellant asserts that his DUI sentence of 90 days to six months of incarceration followed by two years of probation is illegal. He contends that the maximum sentence that could be imposed is six months; therefore, the probation period of his sentence is illegal.[7] Appellant's Br. at 27-30; Appellant's Reply Br. at 8-9.

Our standard of review over challenges to the legality of sentence is *de novo* and our scope of review is plenary. ***Commonwealth v. Aikens***, 139 A.3d 244, 245 (Pa. Super. 2014). "If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction." ***Commonwealth v. Rivera***, 95 A.3d 913, 915 (Pa. Super. 2014) (citations omitted).

The trial court merged Appellant's DUI-General and DUI-Refusal convictions with the DUI-Accident conviction for purposes of sentencing.[8] Sentencing Order, dated 4/26/17. Thus, the court elected to sentence

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[7] Appellant does not contest the merging of his DUI convictions for sentencing purposes.

[8] In its 1925(a) Opinion, the trial court asserts that it sentenced Appellant to 90 days to 6 months of imprisonment, followed by two years of probation "on [all] three DUI offenses, with the sentences running concurr[e]nt[ly]." Trial Ct. Op., filed 12/28/17, at 2. However, the Sentencing Order indicates that the DUI convictions were merged for purposes of sentencing. Sentencing Order, dated 4/26/17.

Appellant on the DUI-Accident conviction.[9] ***See Commonwealth v. Everett***, 705 A.2d 837, 839 (Pa. 1998) (concluding that when imposing one sentence on merged convictions, the trial court has discretion to sentence defendant on either offense); ***see also*** 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, [a] court may sentence the defendant . . . on the higher graded offense.").

Pursuant to Section 3803(b)(1), an individual convicted of DUI-Accident and who has one prior offense[10] commits a misdemeanor for which "the

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[9] In two footnotes, Appellee acknowledges that the trial court found that Appellant violated three separate subsections of the DUI statute. However, it asserts that they were not separate crimes, but factual findings necessary to establish different gradings of the same offense under 75 Pa.C.S. § 3802. Appellee's Br. at 5 n.2, 16 n.6.

We have noted that to avoid possible double jeopardy implications, "where a single DUI offense is subject to [sentencing] enhancements, the Commonwealth should file a criminal information that sets forth a single count under § 3802[, and e]nhancements under § 3804 may be added as subparts or subparagraphs, as appropriate." ***Commonwealth v. Farrow***, 168 A.3d 207, 218 (Pa. Super. 2017). Nevertheless, "the Commonwealth . . . routinely files criminal informations that include [multiple] general impairment counts" with one count alleging DUI-general and the other counts alleging enhancements. ***Commonwealth v. Mobley***, 14 A.3d 887, 894 (Pa. Super. 2011).

Here, the Commonwealth filed a Criminal Information that included three general impairment counts with one count alleging DUI-general and the other counts alleging sentencing enhancements, accident and refusal. Information, printed 4/22/16. Appellant was convicted of all three separate DUI counts, and the trial court merged the counts for sentencing purposes. To the extent the Commonwealth contests the Information or convictions, it cannot raise this issue for the first time on appeal. Pa.R.A.P. 302.

[10] There is no dispute that Appellant had a prior offense.

individual may be sentenced to a term of imprisonment of **not more than six months**[.]" 75 Pa.C.S. § 3803(b)(1) (emphasis added). A court may impose a split sentence, a sentence that includes a period of incarceration as well as a period of probation. ***Commonwealth v. Johnson***, 967 A.2d 1001, 1004 n.3 (Pa. Super. 2009). However, the total amount of time imposed in a split sentence cannot exceed the statutory maximum. ***Commonwealth v. Crump***, 995 A.2d 1280, 1283-84. For example, "where the maximum is ten years, a defendant cannot received a term of incarceration of three to six years follow by five years [of] probation." ***Id.*** at 1284.

Here, the court imposed a sentence of, *inter alia*, 90 days to 6 months of imprisonment, followed by two years of probation. Consequently, Appellant faces the potential of serving up to 2 years and six months' punishment for his DUI offenses, thereby exceeding the statutory maximum punishment of six months for DUI-Accident. Therefore, we agree with Appellant that his sentence for DUI is illegal. Accordingly, we vacate the sentence and remand for resentencing.

Illegal Sentence – DUS Conviction

In his fourth issue, Appellant asserts that his DUS sentence was illegal because the statutory maximum for a first time violation of Section 1543(b)(1.1), a summary offense, is 90 days. Appellant's Br. at 31-32.

Sections 1543 and 6503 provide the penalties for summary offense DUS violations. Subsection 1543(b) provides, in relevant part, that a court shall

impose a term of "imprisonment for a period of **not less than** 90 days." 75 Pa.C.S. § 1543(b)(1.1) (emphasis added). Thus, contrary to Appellant's contention, 90 days' incarceration is the statutory **minimum**, not the statutory maximum.[11, 12] Accordingly, Appellant's issue as stated warrants no relief.

However, our analysis of the legality of Appellant's DUS sentence does not end there. This Court may review issues regarding the legality of sentence *sua sponte*, including whether a term of punishment exceeds the statutory maximum. ***Commonwealth v. Watley***, 81 A.3d 108, 118 (Pa. Super. 2013).

Section 6503 provides that the maximum punishment for a summary offense DUS is no more than six months' imprisonment. 75 Pa.C.S. §§ 6503(a), (a.1). As noted above, the total amount of time imposed in a split

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[11] No part of Subsection 1543(b) provides a maximum penalty for a violation of Subsection 1543(b)(1.1).

[12] Appellant's reliance on 18 Pa.C.S. § 106(c) and ***Commonwealth v. Klingensmith***, 650 A.2d 444 (Pa. Super. 1994) is misplaced. We note that 18 Pa.C.S. § 106(c) provides that the maximum penalty for a summary offense is 90 days. However, Section 6502 of the Vehicle Code specifically states that the provisions of the Crimes Code relating to fines and imprisonment for convictions of summary offenses are not applicable to violations of the Vehicle Code. 75 Pa.C.S. § 6502(c); ***Commonwealth v. Lyons***, 576 A.2d 1105, 1106 (Pa. Super. 1990). Further, this Court in ***Klingensmith*** determined that Section 1543(b) permitted a court to impose a flat sentence of 90 days for driving with a suspended license in violation of Section 1543(b). 650 A.2d at 447. We noted that the mandatory minimum was 90 days, but did not address whether there was a statutory maximum. ***Id.***

sentence cannot exceed the statutory maximum. ***Crump***, 995 A.2d at 1283-84.

Here, the court imposed a sentence of 90 days to 6 months' imprisonment plus two years' probation for Appellant's DUS conviction. Since the addition of two years' probation exceeds the six-month statutory maximum, Appellant's DUS sentence is illegal. Accordingly, we vacate the DUS sentence and remand for resentencing.

Conclusion

In sum, we affirm Appellant's DUI and DUS convictions. We vacate the judgments of sentence for the DUI and DUS, and remand for resentencing.

Convictions affirmed; Judgments of Sentence vacated. Case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/11/19