

It is well established that “an exception to the issue-preservation requirement exists where the challenge is one implicating the legality of the appellant’s sentence.” **Commonwealth v. Barnes**, 151 A.3d 121, 124 (Pa. 2016). Here, Pippen was arrested for suspected DUI and taken to the police station. When he arrived at the station, he was read his implied consent/**O’Connell**² warnings prior to having his blood drawn. **See** N.T. Suppression Motion Hearing, 5/2/14, at 30. Pursuant to **Birchfield**, the voluntariness of Pippen’s consent was potentially compromised and, thus, a violation of his constitutional rights against unlawful searches and seizures. Accordingly, I would vacate Pippen’s judgment of sentence and remand the case for a re-evaluation of Pippen’s purported consent. **See Commonwealth v. Evans**, 153 A.3d 323 (Pa. Super 2016); **see also Commonwealth v. Giron**, 155 A.3d 635 (Pa. Super. 2017) (where defendant refused to read and sign DL-26/**O’Connell** warnings or give consent to have blood drawn, and was subjected to enhanced DUI penalties, court *sua sponte* deemed sentence illegal despite fact that defendant never raised **Birchfield**).³

actually suppressed the defendant’s post-arrest BAC from blood drawn at the arresting officer’s request. Thus, any discussion regarding **Birchfield** and waiver under the instant circumstances is inapplicable to Pippen’s case.

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

³ I also take issue with the unreasonable expectation placed on criminal defense attorneys in cases finding waiver under these circumstances. “[T]rial counsel cannot be held ineffective for failing to anticipate a change in the law.” **Commonwealth v. Cox**, 983 A.2d 666, 702 (Pa. 2009). Here, the issue of

blood draws in DUI cases was not granted review by the United States Supreme Court in ***Birchfield*** until December 11, 2015 – more than two years *after* Pippen was arrested and his blood was drawn, nineteen months *after* Pippen’s motion to suppress was decided and he was found guilty of section 3802(d)(3) in the Municipal Court, and almost four months *after* Pippen filed an appeal for a trial *de novo* in the Court of Common Pleas.

* Retired Senior Judge assigned to the Superior Court.