31776-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELOY GARZA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law II:

> The defendant was not in custody during this encounter with the trooper. His request to get in the patrol vehicle was voluntary on his part.

(CP 98).

2. The trial court erred in entering Conclusion of Law III:

> The statements given were not custodial in nature; therefore, his statements to Trooper Berghoff were admissible.

(CP 98).

3. The trial court should have suppressed the statements made by Mr. Garza to Trooper Berghoff inside his patrol car.

4. The trial court erred in entering the following portion of Finding of Fact III:

> On cross examination, the trooper testified that in his opinion the defendant's unresponsiveness was due to the defendant's high level of intoxication.

(CP 102).

5. The trial court erred in entering the following portion of Finding of Fact IV:

> After speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault.

(CP 102).

6. The trial court erred in entering the following portion of Finding of Fact IV:

> At approximately 0048 hours, the Trooper . . . advised he was placed under arrest for Vehicular Assault.

(CP 102).

7. The trial court erred in entering Conclusion of Law II:

> There was probable cause to believe the defendant had committed the crime of Vehicular Assault. Consequently, RCW 46.20.308 authorized a blood draw regardless of the defendant's consent. Missouri v. McNeely, Docket #-11-1425 did not address the issue posed by Implied Consent statutes, such as RCW 46.20.308, since the State of Missouri's argument was focused solely on the exigent circumstance of the natural dissipation of blood alcohol.

(CP 103).

8. The trial court erred in entering Conclusion of Law III:

> The defendant's suppression motion is denied.

(CP 103).

9. The trial court should have suppressed the blood samples obtained from Mr. Garza without a warrant.

10. The trial court should have suppressed evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car.

11. The trial court should have suppressed evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car.

B. ISSUES

1. Trooper Berghoff found Mr. Garza walking near the accident scene. Mr. Garza requested to sit in his patrol car to warm up. Trooper Berghoff patted Mr. Garza down for weapons, and then physically placed Mr. Garza in his patrol car. Once in the patrol car, Mr. Garza could not get out of the car on his own. Under these circumstances, was Mr. Garza in custody, requiring Trooper Berghoff to give him *Miranda*[1] warnings before statements made by Mr. Garza could be introduced at trial?

2. After he was found walking near the accident scene, Mr. Garza was transported to the hospital. He was not placed under arrest. Trooper Haddorff read Mr. Garza his constitutional rights, but Mr. Garza was unresponsive. Blood samples were taken from Mr. Garza without his consent. Did law enforcement officers violate provisions prohibiting unreasonable searches and seizures, under the Fourth Amendment and Article I, § 7 of the Washington State

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Constitution, by taking blood samples from Mr. Garza without a warrant?

C. STATEMENT OF THE CASE

On February 19, 2011[2], officers were dispatched to a one-car accident, where a car collided with a tree. (RP 36, 37, 190-191, 330-332). No one was inside of the car, and two of the four doors were open. (RP 193, 332). The vehicle airbags were deployed. (RP 203-204, 334, 367). There was blood on the driver's side airbag. (RP 70-71, 205, 232, 252, 367).

After learning that an individual was seen walking near the accident scene, State Trooper Seth Berghoff attempted to locate this individual. (RP 333). He located the individual, who was identified as Eloy Garza. (RP 335-337). Trooper Berghoff smelled an odor of intoxicants coming from his person, and noticed that Mr. Garza had bloodshot and watery eyes. (RP 342, 350-351). Trooper Berghoff placed Mr. Garza in the back of his patrol car. (RP 336-337). After questioning Mr. Garza regarding his involvement in the accident, Trooper Berghoff drove Mr. Garza to the hospital. (RP 338-340, 342, 351-352).

[2] The Report of Proceedings consists of five consecutively paginated volumes, and one separate volume containing *voir dire*. Reference to "RP" herein refers to the five consecutively paginated volumes.

At the hospital, State Trooper Todd Haddorff contacted Mr. Garza. (RP 219). Mr. Garza was unresponsive. (RP 219, 238). Trooper Haddorff read Mr. Garza his *Miranda*[3] rights and the DUI packet constitutional rights, including the special evidence warning for blood draws. (CP 102; RP 238-239, 242). When Trooper Haddorff asked Mr. Garza if he understood his rights, Mr. Garza did not respond. (CP 102; RP 239). Mr. Garza did not sign the constitutional rights page from the DUI packet, because he was unresponsive. (RP 239-240, 242-243). Mr. Garza also did not sign the special evidence warning for blood draws from the DUI packet, because he was unresponsive. (RP 240, 242-243). Trooper Haddorff wrote "unresponsive" on both forms. (RP 240, 242-243). He did not articulate a specific reason why Mr. Garza was unresponsive. (RP 229-244). According to Trooper Haddorff, Mr. Garza was aware he was a suspect in the case. (RP 245).

Blood samples were then taken from Mr. Garza without his consent. (RP 228, 243). Mr. Garza's blood alcohol level was .17 grams per hundred milliliters. (RP 149; State's Ex. 11).

Victoria Gil, who was a passenger in the car at the time of the accident, was at the hospital at the same time as Mr. Garza. (RP 44-45, 217-218, 344). Ms. Gil had a broken arm. (RP 158-159, 163-164, 166, 401-402, 405, 407-408).

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[3] *Miranda v. Arizona, supra*.

Mr. Garza was not placed under arrest. (RP 245, 295-296, 619). On March 18, 2011, when the lead detective in the case spoke with Mr. Garza, he did not suspect Mr. Garza of being the driver of the car, but rather, suspected the driver was Mr. Garza's first cousin, Michael Garza. (RP 82, 126, 131, 370, 376, 430).

The State later charged Mr. Garza with one count of Vehicular Assault, with the date of offense as February 19, 2011.[4] (CP 1).

The trial court held a 3.5 hearing to determine the admissibility of the statements Mr. Garza made to Trooper Berghoff in his patrol car. (CP 96-99; RP 268-309). At the hearing, Trooper Berghoff was the only witness. (RP 268-298). Trooper Berghoff found Mr. Garza walking down the road, and Mr. Garza was soaking wet. (CP 97; RP 272, 279-280). He pulled his patrol car behind Mr. Garza, and got out to speak to him. (RP 281-282). Trooper Berghoff asked Mr. Garza what happened, and Mr. Garza said he wanted to sit in the patrol car and warm up. (CP 97; RP 272-275, 282-283, 297-298).

Trooper Berghoff did not handcuff Mr. Garza. (RP 285). He patted Mr. Garza down to make sure he did not have any weapons, and put him in the patrol car. (CP 97; RP 285, 294, 297). He gave Mr. Garza a blanket and turned up the heater. (CP 97-98; RP 272-273, 274, 284-285, 294).

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[4] The State also charged Mr. Garza with one count of No Valid Operator's License. (CP 1). The trial court dismissed the count with prejudice following the State's case in chief. (CP 105; RP 409). Therefore, this count is not at issue here.

Trooper Berghoff then asked Mr. Garza some questions. (CP 97-98; RP 274-275, 286-287). He asked Mr. Garza if he was involved in the crash, and Mr. Garza told him "[h]e was just trying to get home, and then he stated that he'd missed his turn to get onto Higgins road." (RP 275, 286, 291).

Trooper Berghoff did not read Mr. Garza his *Miranda* rights. (CP 97-98; RP 274). Mr. Garza was unable to open the door of the patrol car and get out. (CP 97; RP 287). Trooper Berghoff testified that Mr. Garza was not a suspect, and that he was free to leave, until the point when Mr. Garza answered his question by stating that he missed his turn onto Higgins Road. (CP 97; RP 273, 288-292, 295). Trooper Berghoff testified that Mr. Garza did not ask to leave. (RP 294). He also testified that he never told Mr. Garza that he was under arrest. (RP 295-296).

The trial court ruled the statements made by Mr. Garza to Trooper Berghoff in his patrol car were admissible. (CP 96-99; RP 306-309). The trial court concluded that Mr. Garza was not in custody when the statements were made. (CP 98; RP 308-309). The trial court entered findings of fact and conclusions of law following the 3.5 hearing. (CP 96-99).

Mr. Garza moved to suppress the blood draw, arguing that a search warrant was required in order to conduct the blood draw. (CP 30-34). Mr. Garza relied on the case of *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), for his argument. (CP 30-34; RP 6-7, 309-314).

After hearing argument from the parties, the trial court denied Mr. Garza's motion to suppress. (CP 100-103; RP 309-314; RP 608-609). The trial court concluded that the blood draw was justified under the implied consent statute, RCW 46.20.308, and that *Missouri v. McNeely* did not address the validity of implied consent statutes. (CP 103; RP 309-314, 608-609). The trial court entered findings of fact and conclusions of law on the motion. (CP 100-103; RP 602-609). While entering the findings of fact and conclusions of law, the trial court stated that there were not any exigent circumstances. (RP 606-607, 609).

At trial, Trooper Berghoff testified regarding the statements made by Mr. Garza inside his patrol car. (RP 337-340, 351-352). The results of Mr. Garza's blood draw were admitted into evidence. (RP 134-152; State's Ex. 11). The State also admitted evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car. (RP 246-262; State's Ex. 10). And, the State admitted evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car. (RP 258-262; State's Ex. 25).

Mr. Garza testified in his own defense. (RP 518-536). He told the court he had no recollection of the accident, or of talking to Trooper Berghoff. (RP 523-525). Mr. Garza testified he remembers drinking alcohol at a party at Ms. Gil's house, and then remembers waking up in the hospital. (RP 522-525, 531, 534, 536).

Ms. Gil testified that Mr. Garza was seated in the backseat of the car. (RP 181-182, 184). Trooper Haddorff testified that while talking with Ms. Gil at the hospital, she told him that Mr. Garza was seated in the right rear passenger side of the car. (RP 237).

Mr. Garza's mother testified that on the night of the accident, Michael Garza told her that Mr. Garza was not driving the car. (RP 412, 466-467). Ms. Gil's father testified that he saw someone put Mr. Garza in the backseat of the car, when leaving the party at Ms. Gil's house. (RP 484, 488, 490, 500).

The jury found Mr. Garza guilty of Vehicular Assault. (CP 79, 104-112; RP 594). Mr. Garza appealed. (CP 123, 129-138).

D. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE STATEMENTS MADE BY MR. GARZA TO TROOPER BERGHOFF INSIDE HIS PATROL CAR.

The appellate court reviews a trial court's decision following a 3.5 hearing "by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law." *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008) (*citing State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.3d 363 (1997)). Unchallenged findings of fact are verities on appeal. *Broadaway*, 133 Wn.2d at 131. When the findings of fact are not challenged, appellate review "is limited to

a de novo determination of whether the trial court derived proper conclusions of law from those findings." *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Miranda warnings must be given whenever a suspect is subject to custodial interrogation by police. *Miranda v. Arizona*, 384 U.S. at 467-68. This protects a defendant's Fifth Amendment privilege against self-incrimination. *Id.* at 467. "Thus, [w]hether an officer should have given *Miranda* warnings to a defendant depends on whether the examination or questioning constituted (1) a custodial (2) interrogation (3) by a state agent." *Grogan*, 147 Wn. App. at 517 (citations omitted) (alteration in original). If police conduct a custodial interrogation without *Miranda* warnings, statements made by the suspect during the interrogation may not be introduced trial. *Miranda*, 384 U.S. at 479.

Trooper Berghoff's question to Mr. Garza, asking whether he was involved in the crash, was interrogation. (RP 275, 286, 291). Interrogation is questioning that is reasonably likely to elicit an incriminating response. *State v. Walton*, 64 Wn. App. 410, 414, 824 P.2d 533 (1992); *see also State v. Wilson*, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). Asking Mr. Garza whether he was involved in the accident meets this standard.

The disputed issue at the 3.5 hearing was whether the statements made by Mr. Garza to Trooper Berghoff inside his patrol car were custodial. (CP 98; RP 268-309).

A formal arrest is not required to entitle a suspect to *Miranda* warnings. *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007). Custody is defined as "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). "'Custody is a mixed question of fact and law.'" *Grogan*, 147 Wn. App. at 517 (*quoting State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002)). "'The legal inquiry determines, given the factual circumstances, whether a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id*. (alteration in original) (internal quotation marks omitted) (*quoting Solomon*, 114 Wn. App. at 787-88). "'[T]he reviewing court applies an objective test to determine the ultimate inquiry: whether there was a formal arrest or restraint of the defendant to a degree consistent with formal arrest.'" *Id*. (alteration in original) (*quoting State v. Rehn*, 117 Wn. App. 142, 153, 69 P.3d 379 (2003)).

Mr. Garza was in custody once Trooper Berghoff placed him in his patrol car. Although Mr. Garza requested to sit in the patrol car, Trooper Berghoff physically placed him there. (RP 294). Prior to doing so, Trooper Berghoff patted Mr. Garza down for weapons. (CP 97; RP 285, 297). Once in the patrol car, Mr. Garza could not get out of the car on his own. (CP 97; RP 287).

After being patted down and placed in a patrol car by a police officer, with doors he could not open himself, a reasonable person would have felt his freedom "was curtailed to the degree associated with a formal arrest." *Heritage*, 152 Wn.2d at 218. Under these circumstances, a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. *See Grogan*, 147 Wn. App. at 517 (*quoting Solomon*, 114 Wn. App. at 787-88).

The trial court erred in concluding that Mr. Garza was not in custody when he made statements to Trooper Berghoff inside his patrol car, and in admitting these statements at trial. (CP 98; RP 306-309, 337-340, 351-352). Because Mr. Garza was in custody, *Miranda* warnings were required. *See Miranda*, 384 U.S. at 467-68; *Grogan*, 147 Wn. App. at 516-517. Trooper Berghoff did not give Mr. Garza *Miranda* warnings. (CP 97-98; RP 274). Therefore, the trial court should have suppressed the statements made by Mr. Garza to Trooper Berghoff inside his patrol car. *See Miranda*, 384 U.S. at 479.

2. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE WARRANTLESS SEARCH OF MR. GARZA.

In reviewing the denial of a suppression motion, the appellate court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by*

Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

a. The Search Of Mr. Garza Did Not Fall Under An Exception To The Warrant Requirement.

As a general rule, warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and Article I, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general rule is subject to a few jealously and carefully drawn exceptions, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The State bears the heavy burden of showing the search falls under the exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. It must establish an exception to the warrant requirement by clear and convincing evidence. *Id.*

"[T]he taking of blood samples constitutes a 'search and seizure' within the meaning of U.S. Const. amend. 4 and Const. art. 1, § 7." *State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984) (*citing State v. Meacham*,

93 Wn.2d 735, 738, 612 P.2d 795 (1980); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)); *see also Missouri v. McNeely*, 133 S. Ct. at 1558 (acknowledging that a warrantless, non-consensual blood test is a search under the Fourth Amendment, and it is reasonable only if it falls within a recognized exception). Therefore, in order for a warrantless blood draw to withstand a constitutional challenge, it must fall under an exception to the warrant requirement. *See Garvin*, 166 Wn.2d at 249-50.

In *Schmerber*, the United States Supreme Court upheld a warrantless, non-consensual blood test in a drunk-driving case, concluding the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Schmerber*, 384 U.S. at 759, 770 (internal quotation marks omitted).

In *McNeely*, the Court clarified the scope of *Schmerber*, considering the issue of "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, 133 S. Ct. at 1556. The Court held that such a *per se* exigency does not exists, and that "consistent with Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances." *Id*. at 1556, 1563, 1568.

Mr. Garza did not consent to the blood draw. (CP 102; RP 219, 228, 238-240, 242-243). Also, as the trial court concluded, there were no exigent circumstances that prevented the officers from obtaining a search warrant before taking blood samples from Mr. Garza. (RP 606-607, 609). Therefore, the law enforcement officers violated the provisions prohibiting unreasonable searches and seizures, under the Fourth Amendment and Article I, § 7 of the Washington State Constitution, by taking blood samples from Mr. Garza without a warrant. *See McNeely*, 133 S. Ct. at 1556, 1558, 1563, 1568.

The blood samples obtained from Mr. Garza without his consent did not fall under the exigent circumstances exception, or any other exception to the warrant requirement. Therefore, the trial court should have suppressed the fruits of the warrantless search of Mr. Garza, the blood samples and related testimony, including evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car, and evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (stating that "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

b. The Blood Draw Was Not Authorized Under RCW 46.20.308, Washington's Implied Consent Statute.

The trial court erred in concluding that the blood draw was authorized under Washington's implied consent statute, RCW 46.20.308, and that *McNeely* did not address the validity of this statute. (CP 103; RP 309-314, 608-609).

On the date of the accident, February 19, 2011, the statute provided[5]:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

RCW 46.20.308(1) (2011).

The statute further provided:

> If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

RCW 46.20.308(5) (2011).

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[5] Effective September 28, 2013, the Legislature amended RCW 46.20.308 to permit blood tests only for specified crimes, and "pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist." RCW 46.20.308(3); Laws of 2013, 2nd Special Session ch. 35, § 36.

Section (3) and (4) of the statute provided:

> (3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.
>
> (4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

RCW 46.20.308(3), (4) (2011).

The blood draw done here was not authorized under RCW 46.20.308, Washington's implied consent statute, for two reasons.

First, *Missouri v. McNeely* overrules sections of the implied consent statute where consent is not required, and an individual cannot refuse a blood draw. *See* RCW 46.20.308(3), (4), (5) (2011). *McNeely* requires a search warrant, or an exception to the warrant requirement in order to allow a non-consensual, warrantless blood draw. *See McNeely*, 133 S. Ct. at 1556-1558, 1563, 1568.

Our Supreme Court has upheld the implied consent statute against a challenge under the Fourth Amendment and Article I, § 7 of the Washington State Constitution. *See Judge*, 100 Wn.2d at 711-12. In *Judge*, the defendant's blood was drawn, without her consent, under a provision of the implied consent statute in effect at the time, allowing a warrantless, non-consensual blood draw of a defendant arrested for negligent homicide. *Id*. at 708, 710. Our Supreme Court rejected her constitutional challenge to this statute, based upon the exigent circumstances recognized in *Schmerber*. *Id*. at 712 (*citing Schmerber*, 384 U.S. at 770-71); *see also State v. Garcia-Salgado*, 170 Wn.2d 176, 185, 240 P.3d 153 (2010) (stating that "[i]n holding that a warrant was not required, the *Judge* court relied on the fact that it was impracticable to seek a warrant for a blood draw where the defendant's body was constantly eliminating the evidence of alcohol in his blood."). Our Supreme Court interpreted *Schmerber* to hold that metabolization of alcohol in the bloodstream presents a *per se* exigency. *See id.* at 711-12; *see also Garcia-Salgado*, 170 Wn.2d at 185.

However, as acknowledge above, subsequent to *Judge*, the United States Supreme Court clarified the scope of *Schmerber* in *McNeely*, holding that exigent circumstances do not exist *per se* in every case of a warrantless, non-consensual blood draw. *See McNeely*, 133 S. Ct. at 1556, 1563, 1568. Therefore, the reasoning used in *Judge* to uphold the provision of the implied consent statute

allowing a warrantless, non-consensual blood draw, is no longer valid. *See Judge*, 100 Wn.2d at 711-12; *Garcia-Salgado*, 170 Wn.2d at 185.

Missouri v. McNeely overrules sections of the implied consent statute where consent is not required, and an individual cannot refuse a blood draw. *See* RCW 46.20.308(3), (4), (5) (2011); *McNeely*, 133 S. Ct. at 1556-1558, 1563, 1568. Mr. Garza's blood draw was not authorized under RCW 46.20.308.

Second, the blood draw done here was not authorized under RCW 46.20.308, because the applicable implied consent statute required, under sections (1), (4), and (5), that a person be under arrest. RCW 46.20.308 (2011). However, Mr. Garza was not placed under arrest in this case. (RP 245, 295-296, 619). Substantial evidence does not support the trial court's finding of fact that while at the hospital, "[a]fter speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault." (CP 102); *see also Hill*, 123 Wn.2d at 644 (defining substantial evidence). According to Trooper Haddorff, Mr. Garza was aware he was a suspect in the case. (RP 245). However, Trooper Haddorff did not testify that he arrested Mr. Garza. (RP 188-246). Trooper Berghoff testified that he never told Mr. Garza that he was under arrest. (RP 295-296). Almost one month after the accident, the lead detective suspected the driver was Mr. Garza's first cousin Michael Garza, not Mr. Garza himself. (RP 82, 126, 131, 370, 376, 430).

Further, section (3) of the statute allowed a non-consensual blood draw when "an individual is unconscious or is under arrest for the crime of . . . vehicular assault . . . ." RCW 46.20.308(3) (2011). As stated above, Mr. Garza was not under arrest in this case. (RP 245, 295-296, 619). Further, there was no evidence that Mr. Garza was unconscious. Trooper Haddorff testified that Mr. Garza was unresponsive, but not that he was unconscious. (CP 102; RP 239-240, 242-243).

Accordingly, the implied consent statute applicable at the time of the accident did not authorize the blood draw on Mr. Garza, where he was not placed under arrest, nor determined to be unconscious. *See* RCW 46.20.308 (2011). The blood draw was not authorized under RCW 46.20.308, Washington's implied consent statute.[6]

E. CONCLUSION

The trial court should have suppressed the statements made by Mr. Garza to Trooper Berghoff inside his patrol car. The trial court also should have suppressed the fruits of the warrantless search of Mr. Garza, the blood samples and related testimony, including evidence that the DNA in Mr. Garza's blood,

[6] The *McNeely* opinion does discuss State implied consent laws. *See McNeely*, 133 S. Ct. at 1566-1567. However, this portion of the opinion is not joined by a majority of the Court. *Id.* at 1556. Therefore, it lacks precedential value and is not binding here. *See Texas v. Brown*, 460 U.S. 730, 737, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (stating that a position not adopted by a majority of the deciding justices is not binding precedent); *see also State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) ("A plurality has little precedential value and is not binding.").

taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car, and evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car. The blood draw was not authorized under RCW 46.20.308, Washington's implied consent statute. Mr. Garza's conviction for vehicular assault should be dismissed.

Dated this 26th day of March, 2014.

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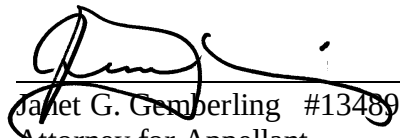

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