NO. 31776-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ELOY GARZA, Appellant.

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

On February 19, 2011, Washington State Patrol Trooper Berghoff was advised of a one-car collision on State Route 97. (RP 190-91). A motorist

reported that a male was walking down the road and appeared to be injured. (RP 236). It was freezing outside, with temperatures in the 30's. (RP 192-3, 336, 349). The trooper observed a vehicle that had gone off an embankment and struck a tree. (RP 331). He also saw a male, Garza, walking slowly in the area. (RP 351). Garza was obviously cold, shivering and soaking wet from head to toe. (RP 349). The trooper asked him "what happened?" (RP 274, 282). Instead of answering, Garza asked to sit inside the patrol car. (RP 272, 275, 283, 298, 336). He complained of his shoulder hurting. (RP 284, 353).

Trooper Berghoff was concerned for Garza's health. (RP 284). He patted down Garza for his safety and put a blanket around him. (RP 284-5, 297). The trooper then helped him into the patrol car. (RP 294). The trooper asked Garza if he was in the car that crashed. (RR 286). Garza said he was just trying to get home. (RP 280, 352). Garza said he "missed his turn to Higgins Road." (RP 280, 338). The trooper's then asked him who was driving. (RP 287). Garza claimed he did not know who was driving. (RP 352). There was an obvious and strong odor of intoxicants coming from Garza and he had bloodshot and watery eyes. (RP 342, 350-1).

Garza was transported to the hospital. There, he was described as unresponsive, lethargic, and slow. (RP 219-220). It was noted that Garza also had a red mark on his left shoulder that was consistent with wearing a seatbelt while on the driver's side of the car. (RP 225-6, 343). Trooper Haddorff, who

has in-depth training in DUI detection and investigation, testified that Garza appeared very intoxicated and was slurring his words. (RP 238, 244). He was read his rights twice. (Id.) Both times, when asked if he understood, he did not respond. (RP 239). Trooper Haddorff testified that Garza was fully advised that he may have been under arrest or facing charges. (RP 245). Garza's blood was then drawn to determine the alcohol content. (RP 107, 111, 228). It was placed into evidence. (RP 112-113). From this draw, the lab concluded that Garza had a blood-alcohol level of .17. (RP 149).

Passenger Virginia Gil stated that she was sitting in the rear passenger seat behind the driver. (RP 237). She testified that she was not driving the vehicle when it crashed. (RP 163). She broke her arm as a result of the collision. (RP 405).

Detectives and troopers evaluated the crime scene. Trooper Kingman analyzed the tire marks and concluded that the vehicle had been airborne when it went off the road. (RP 324). It appeared that the vehicle had been steered hard to the right when it went off the road. (RP 326-7). The vehicle then crashed head-on into a tree. (RP 97). Based on the crash dynamics, the driver would have struck the driver's side airbag. (RP 95). Trooper Berghoff also concluded that due to the scent from the airbags, it appeared that the airbags had been recently deployed. (RP 360-1).

Detectives also evaluated the vehicle. There was blood on the driver's side air bag, which had deployed. (RP 78, 205). The blood was sent to the crime lab and was found to be Garza's blood. (RP 107). The driver's side door was stuck shut after the collision. (RP 110). In addition, the driver's seatbelt was elongated, a sign it was in use during the collision. (RP 368). Further, the driver's side door panel had signs that something had rubbed across it. (Id.). The driver's headrest also had an indentation in the back of it. (RP 369).

On March 18, 2011, about a month after the collision, Detective Bryan spoke to Garza on the phone. Garza indicated that he had a lot of alcohol that evening and did not remember a lot. (RP 126).

Garza was charged by information with one count of vehicular assault and one count of no valid operator's license. (CP 1). Pre-trial hearings were heard on May 14 and 15, 2011. On May 14, 2011, Garza filed a written motion to suppress only the BAC result based solely on Missouri v. McNeely. (CP 30-34; RP 6-7, 309-314; Appellant's brief at 7). No motion was filed to suppress the DNA results. (CP 34). On May 14, a Criminal Rule 3.5 hearing was conducted regarding statements made over the phone to Detective Bryan. The trial court found that Miranda did not apply because the statements did not stem from a custodial interrogation. (RP 24). Garza agreed. (RP 24).

On May 15, 2011, the trial commenced with the State calling witnesses to testify, including Asa Law, from the Washington State Patrol Crime Laboratory.

(RP 134). During her testimony, the prosecutor moved for admission of the blood alcohol test. (RP 138). Garza's attorney replied, "No objection, your honor." (Id.) The court asked, "subject to your pending motion?" (Id.) Garza's attorney replied, "yes." (Id.). There were no objections when the State moved to have the DNA results admitted. (RP 254-58).

The next day, mid-trial, on May 16, 2011, a Criminal Rule 3.5 hearing was held regarding the statements made to Trooper Berghoff. (RP 266-309). The trial court found that Garza was not in custody and therefore, Miranda warnings were not needed. (RP 309).

At the same time, the parties argued the suppression motion that was filed May 14, 2011. The court denied the motion to suppress. (CP 100-103; RP 309-314, 608-609). The court found that McNeely did not decide the issue of implied consent laws. (RP 313). There was no claim or motion that Washington's implied consent law was not complied with in Garza's case. (RP 310-312). Findings of fact and conclusions of law were subsequently filed. (CP 100-103; RP 602-609).

Trial continued. Gloria Garza, Appellant's mother, testified that when she saw her son at the hospital shortly after the collision, "he was drunker than I've ever seen him in my life." (RP 421). She added, "He was just not, not really, conscious of where he was or who we were." (Id.) When asked if he was responding very well, she indicated "not anything that made sense." (RP 422).

She testified that Garza's cousin told her that they were at a party and "Eloy was arguing with his girlfriend, he was really drunk, so we had to leave." (RP 465).

The party was at the home of Filiberto Gil. (RP 483). Mr. Gil testified that he didn't see who was driving but saw Garza being pushed in the backseat of a car when they left the party. (RP 485). Jesse Garza, Sr., the appellant's father, testified that when he saw his son at the hospital, his son was passed out and bleeding. (RP 512, 516).

Garza testified that on the night of the collision, he was at a party drinking beer and vodka. (RP 522). He did not know how much he had to drink but had two beers and then straight shots of vodka out of the bottle. (RP 522, 524, 529). He said that he had nothing to eat. (RP 532). He testified he did not remember too much of the party or getting in the car and leaving. (RP 523). After the collision, he said "At first I thought I wrecked my van...." (RP 525-26). He indicated that his injuries included a fractured collarbone on his left side, a cut behind his ear, stiff knees, and a chipped tooth. (RP 526.)

The jury found Garza guilty beyond a reasonable doubt of vehicular assault. (CP 74, 104-1112; RP 594). This appeal followed.

III. ARGUMENT

A. The trial court properly admitted statements made to Trooper Berghoff after Garza stated he was cold and wanted to sit inside the trooper's car.

Courts review whether a defendant was in custody for Miranda purposes de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Under the federal and state constitutions, a defendant possesses rights against self-incrimination. U.S. Const. amend. V; Wash. Const. art. I, § 9. Miranda warnings protect these rights in custodial interrogation situations. Lorenz, 152 Wn.2d at 36. But Miranda does not apply outside the context of custodial interrogation. Roberts v. United States, 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980).

In determining whether the defendant was subject to a custodial interrogation, courts apply an objective test—whether a reasonable person in the suspect's position would have felt that state agents had curtailed his freedom to the degree associated with a formal arrest. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 421-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Berkemer rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone. State v. Short, 113 Wn.2d 35, 40-1, 775 P.2d 458 (1989). The sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed. Id. at 41.

In Berkemer, a single police officer asked a motorist a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. The Court found this was not the functional

equivalent of formal arrest. Accordingly, the motorist was not taken into custody for purposes of Miranda until he was arrested.

Here, Garza indicated he wanted to sit in the patrol car to stay warm. (RP 272, 275,283, 298, 336). He was not handcuffed. (RP 285). A reasonable person in Garza's position would have felt free to leave the patrol car. Thus, the trial court did not err by admitting the statements Garza made prior to his arrest, because they were not given in response to a "custodial interrogation." Applying the rationale of Berkemer, Trooper Berghoff's brief questioning of Garza did not constitute a custodial interrogation triggering Miranda warnings.

The fact that Garza was patted down before being put in the patrol car does not change the analysis. As held in State v. Walker, given the legitimate concern for police safety when a suspect is being transported in a police car, frisking and handcuffing are consistent with good police practice and common sense. 24 Wn. App. 823, 828, 604 P.2d 514 (1979).

The initial encounter with Garza was also justified under the community caretaking function. It is clear the initial contact was, by any definition, a community caretaking act on the part of the officer. A concerned citizen contacted the police department with a report that Garza was walking down the road and looked hurt. (RP 236). Garza then asked the trooper for help—specifically, a place to get warm. (RP 272, 275, 283, 298, 336). Trooper Berghoff provided him that help. (RP 284-5, 297)

The Washington State Supreme Court addressed the issue of community caretaking in State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000):

> The community caretaking function exception was first announced in Cady v. Dombrowski, which observed with respect to the Fourth Amendment of the United States Constitution that Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as *community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*
>
> As noted in Cady, the community caretaking function exception is totally divorced from a criminal investigation.
>
> This Court first cited Cady in State v. Houser, a 1980 case involving impoundment of an automobile. Subsequent Washington cases have expanded the community caretaking function exception to encompass not only the "search and seizure" of automobiles, but also situations involving either emergency aid or routine checks on health and safety. Both situations may require police officers to render aid or assistance. But compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion. It applies when "(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to

> associate the need for assistance with the place searched."

Kinzy, 141 Wn.2d at 386-87 (footnotes omitted, emphasis in original).

It is clear that the actions of Trooper Berghoff would fall within the guidelines set forth in Kinzy. Rendering aid or assistance is a hallmark of the community caretaking function exception. Otherwise a police officer could be considered derelict by *not* acting promptly to ascertain if someone needs help. Here, the encounter was reasonable and justified under the community caretaking function exception. As such, the brief statements made in the patrol car were not the result of a "custodial interrogation." Miranda warnings were, therefore, not required, and the trial court properly admitted the statements.

B. Assuming *arguendo* that the court should have suppressed statements made to Trooper Berghoff, any error was harmless.

Erroneous admission of a statement in violation of Miranda is harmless if the untainted evidence is so overwhelming that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Here, such error was clearly harmless given the other evidence presented at trial.

The statements in the patrol car included the following: 1) "he was just trying to get home," 2) he "missed his turn to Higgins Road," and 3) that he did not know who was driving. (RP 338, 352). The first statement is vague. It doesn't imply whether he was the driver or not. The second statement, that Garza missed *his* turn, implies that he was driving. The third statement was consistent

with his trial testimony and did not prejudice him. The admission of this last statement, if anything, *helped* his case.

If admission of any statement was in error, the error was clearly harmless given the overwhelming untainted evidence of identity. That evidence included the defendant's own testimony at trial that he thought he wrecked his van. (RP 525-26). It included a DNA match showing his blood was on driver's side air bag, (RP 107), combined with evidence that he was bleeding after the crash, (RP 516, 526). Other evidence included the fact that the driver's side door was stuck shut, (RP 110), indicating the unlikelihood that someone other than the driver got blood on the driver's side air bag. On top of this evidence, there was a seatbelt mark on Garza's person indicating he was seated on the driver's side of the vehicle, combined with an elongated driver's seatbelt, showing use at the time of the collision. (RP 220, 225, 343, 368). Furthermore, there was testimony from the backseat passenger sitting behind the driver that she was not the driver. (RP 237). Finally, there was Garza's fractured collarbone on his left side, (RP 526, 535), an injury consistent with him being in the driver's seat at the time of impact. From this overwhelming evidence presented at trial, particularly the DNA evidence, Garza's testimony, and his injuries, any reasonable jury could have easily found that Garza was the driver. Thus, the admission of Garza's brief statements in the patrol car was harmless beyond a reasonable doubt.

C. The trial court properly denied Garza's motion to suppress BAC results based on Missouri v. McNeely.

1. Garza has failed to prove that there is no reasonable doubt that Washington's implied consent statute is unconstitutional.

A statute is presumed to be constitutional. The party asserting that a statute is unconstitutional must persuade the court that there is no reasonable doubt that the statute violates the constitution. Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

In Washington state, "a person under arrest for vehicular assault [or for vehicular homicide] is subject to a mandatory blood alcohol test" pursuant to RCW 46.20.308. State v. Morales, 173 Wn.2d 560, 563, 269 P.3d 263, 265 (2012). While the non-consensual drawing of blood for testing is a search and seizure under the Fourth Amendment and under article I, § 7 of the Washington Constitution, State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991), the Washington Supreme Court has held that in situations where a police officer has probable cause to believe that a driver is under the influence of alcohol, and has committed vehicular assault, the warrantless extraction of blood pursuant to the implied consent statute does not violate article I, §7. State v. Curran, 116 Wn.2d at 185; see also, State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984).

In the recent case of Missouri v. McNeely, 133 S. Ct. 1552, 1563, 185 L. Ed. 2d 696, 709 (2013), the United States Supreme Court held that there was no per se rule of exigency in every drunk-driving cases. McNeely involved a "routine" DUI stop with no special circumstances such as an injury or death.

McNeely was stopped for speeding and repeatedly crossing the centerline. Id. at 1556. He exhibited several signs of intoxication and admitted to consuming a couple of beers. Id. He declined a portable BAC test. Id. He was then taken to a hospital for a blood draw. Id. The State argued for a per se rule for blood testing in all drunk-driving cases. Id. at 1560.

The Supreme Court's holding in McNeely does not, however, alter the application of Washington's implied consent statute to the facts of this case. McNeely only addressed the narrow question of "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." Id. at 1556.

The McNeely Court reiterated many times how narrow the question before it was: "Because this case was argued on the broad proposition that drunk-driving cases present a per se exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant." Id. at 1568. In a concurring opinion, Justice Kennedy stated that the case "does not provide a framework where it is prudent to hold any more than that always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment." Id. at 1569.

McNeely also did not address the validity of implied consent statutes, such as RCW 46.20.308, or tests conducted pursuant to such statutes. Nor did McNeely address other potential exceptions to the warrant requirement. The Court also did not make any specific rulings about Washington's implied consent statute.

To the contrary, the Court acknowledged that implied consent statutes are among the "broad range of legal tools [States have] to enforce their drunk-driving laws and to secure BAC evidence without undertaking nonconsensual blood draws." Id. at 1566. The Court noted that all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drink-driving offense." Id. (citing Washington's implied consent statute, RCW 46.20.308(2)-(3), (5)).

The Court went on to state that "[i]t is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether." Id. The Court used the example of implied consent laws as support that its ruling "will not 'severely hamper effective law enforcement.'" Id. (citing Tenn. v. Garner, 471 U.S. 1, 19, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

Indeed, Justice Sotomayor and three other justices appear to endorse implied consent statutes, and their use of "significant consequences" to discourage a driver from refusing to submit to testing, as a preferred alternative to "nonconsensual blood draws." See McNeely, 133 S. Ct. at 1566 (plurality opinion). Neither McNeely's holding nor its reasoning compels the conclusion that RCW 46.20.308 is unconstitutional.

It is notable that McNeely's factual background differs starkly from Garza's case . McNeely was subject to a blood draw for a DUI despite his refusal. Under Washington's law, McNeely's blood test could not have taken place at that point because there were no special facts which would have allowed a test under subsections (3) or (4) or RCW 46.20.308. RCW 46.20.308(5) indicates that if a person refuses to submit to a test, no test shall be given except as authorized under sections (3) or (4). In Washington, a vehicular assault arrest is an exception allowed under subsection (3). A routine DUI is not an exception.

The McNeely case and holding are limited to non-consensual blood draws. Id. at 1556. Garza's blood draw was consensual. Pursuant to Washington's implied consent statute, the Legislature has imposed conditions on its grant of the privilege to drive on public roads. As a matter of law, a person who exercises the privilege to drive and operates a vehicle on a public road is deemed to have given his or her consent to submit to a blood test for alcohol under certain situations outlined in the implied consent statute. In this limited context, implied consent is

deemed the functional equivalent of actual consent. Thus, under Washington's implied consent statute and the facts of this case, Garza is deemed to have consented to the testing of his blood.

Consent to search is an exception to the search warrant requirement under the Fourth Amendment and article I, § 7. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). As such, Garza's blood test was properly obtained pursuant to the implied consent statute and his rights under the Fourth Amendment and article I, § 7 were not violated. Under the circumstances presented, the police were not required to obtain a search warrant before conducting Garza's blood test.

Obtaining a driver's blood test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment and article I, § 7. The governmental interest in protecting lives, securing the safety of our public roads, and deterring drivers from operating vehicles while intoxicated is strong and compelling. On the other hand, the intrusion on personal privacy effected by a blood-test under the statutory scheme is quite limited. Therefore, Garza's statutory implied consent exempted his blood draw from the warrant requirement. McNeely does not alter this conclusion.

2. Assuming *arguendo* that Garza has proven that there is no reasonable doubt that Washington's implied consent statute is unconstitutional, the good faith exception applies in this case.

Here, there was no mistake by the police, good faith or otherwise. At the time of the blood draw, the trooper's conduct was lawful under well-established case law in this State. At the time of Garza's collision in 2011, Washington law permitted officers to obtain a blood sample without first obtaining a warrant, so long as they had probable cause to believe that the driver was intoxicated. Here, the trooper was not acting pursuant to an invalidly-issued warrant that he mistakenly thought was valid. Nor was there any unreasonable or improper conduct by another State law enforcement employee involved in the search. At the time the trooper obtained the blood sample in this case, he was conducting himself in a manner sanctioned by decades of precedent from our Supreme Court. No amount of additional police training would have deterred the search in this case, because the trooper was following the law as it existed at the time. Suppressing the evidence would not serve the purpose of the exclusionary rule to prevent illegal police conduct.

In this case, the State did not seek to admit the fruits of unlawful police conduct since the police fully complied with the law in effect at the time they acted. Consequently, application of the exclusionary rule here would not serve the rule's principal purposes articulated by our Court. It would not deter unlawful police conduct, and it would not meaningfully safeguard the integrity of our judicial process. It is one thing for our courts to eschew involvement in admitting evidence seized unlawfully. It is another thing entirely to exclude evidence seized in conformity with the law as it existed at the time of the seizure.

The United States Supreme Court adopted a good faith exception to the exclusionary rule for evidence seized in violation of the Fourth Amendment in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The exception that court recognizes is based on the view that the exclusionary rule is intended simply to deter unlawful police action. Because the exclusionary rule "cannot be expected ... to deter objectively reasonable law enforcement activity," the United States Supreme Court has held that it should not be applied when police have acted in "good faith." Id. at 919. By "good faith," the Court means "objectively reasonable reliance" on something that appeared to justify a search or seizure when it was made. Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Thus, the federal "good faith" exception is applicable when a search or seizure was unconstitutional but the police officer's belief that it was constitutional was objectively reasonable at the time.

In McNeely, the United States Supreme Court announced a narrower construction of exigent circumstances for blood draws than police officers and many courts believed to be the law prior to April 17, 2013. See McNeely, 128 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (identifying three states that had ruled that the natural dissipation of blood-alcohol evidence alone did not constitute a per se exigency). The Court's pronouncement was based solely upon the Fourth Amendment. Police officers, who secured blood without a warrant prior to April 17, 2013, were acting in good faith under the common understanding of

Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The results of tests performed upon such blood samples will be admissible in subsequent prosecutions in the vast majority of courts. When applied in the federal courts, McNeely would not result in suppression of the blood evidence obtained here, because the United States Supreme Court will not apply the exclusionary rule as a remedy where the police conducted a search in good faith reliance on binding legal precedent in the jurisdiction where the search occurred. See Davis v. United States, 131 S. Ct. 2419, 2434, 180 L. Ed. 2d 285, 302 (2011).

The Washington Supreme Court rejected the good faith exception to the exclusionary rule under article I, § 7 grounds when the officer's conduct violated article I, § 7. See generally State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010). The Washington Supreme Court, however, has not stated whether the good faith exception to the exclusionary rule may be applied by Washington courts when the evidence's seizure only violated the Fourth Amendment.

In the instant case, pre-McNeely article I, § 7 case law treated the natural dissipation of alcohol as sufficient exigent circumstances for a warrantless blood draw. See State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) ("Both the United States Supreme Court and this court have held that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test."). In York v. Wahkiakum Sch. Dist. No. 200, Justice Madsen, in a concurring opinion, noted "we have recognized that warrantless searches may be

permissible under article I, § 7 when certain exigent circumstances require immediate action to avoid the destruction of evidence or the flight of a suspect," 163 Wn.2d 297, 317-18, 178 P.3d 995 (2008). As an example, the court pointed to State v. Baldwin, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001), which held that exigent circumstances may justify warrantless blood drug test of DUI suspect. The rationale in Baldwin was that a blood test can be taken without consent and without a warrant because "[w]ithout knowing what drugs have been ingested or how long a particular drug stays in the system of a particular person, the arresting officer faces an emergency situation when the facts and circumstances indicate that a suspect has been driving under the influence of drugs or drugs and alcohol." 109 Wn. App. at 523, 525. Thus, even assuming a constitutional violation occurred, an officer's pre-McNeely warrantless collection of a blood sample only violated the Fourth Amendment, and not article I, § 7.

While the more refined Fourth Amendment rule contained in McNeely applies to officers in Washington pursuant to both Wash. Const. article I, § 2, and Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), McNeely does not alter the interpretation of article I, § 7. The Washington Supreme Court is the final arbiter of the Washington constitution. See, e.g., Florida v. Powell, 559 U.S. 50, 130 S. Ct. 1195, 1201-02, 175 L. Ed. 2d 1009 (2010) (the United States Supreme Court will not interfere with state court interpretations of state constitutions). The fact that an officer's pre-McNeely warrantless collection of a blood sample only violated a suspect's Fourth Amendment rights argues for

application of the Fourth Amendment good faith exception to the exclusionary rule.

D. Assuming *arguendo* that the motion to suppress should have been granted, the error was harmless.

1. There was overwhelming untainted evidence of intoxication.

Assuming that the BAC result was admitted in error, such error was clearly harmless given the other evidence presented at trial. There was ample evidence that Garza was intoxicated when he crashed the car and injured his passenger. First, the troopers smelled an obvious odor of intoxicants on him, (RP 342, 350), and noted that he had bloodshot, watery eyes. (RP 342). Garza told a detective that he had drank a lot of alcohol that evening and didn't remember a lot. (RP 125). At trial, the Defendant's testified he was drinking beer and liquor -- specifically, two beers and straight shots of Vodka from a bottle. (RP 522, 524, 529). He said he had nothing to eat beforehand. (RP 532). He said that he didn't remember exactly how much he had to drink and couldn't remember much of the party. (RP 523).

There was also testimony that he appeared very intoxicated and was slurring his words. (RP 244, 328). Others observed that he was unresponsive, lethargic, and slow moving. (RP 219-20, 239, 240-42, 351). His father testified that he was "passed out." (RP 512). And his own mother testified that, "He was drunker than I've ever seen him in my life." (RP 421). She added, "he was just

not, not really conscious of where he was or who we were" and was not responding in a way that makes sense. (RP 422). She testified that another relative, Michael Garza, said that Eloy was "really drunk." (RP 465).

In addition, there was evidence of his driving that indicated that he was impaired. He drove over the fog line, causing his vehicle to become airborne over an embankment and collide head-on with a tree. (RP 95, 324, 331).

In sum, given Defendant's numerous admissions of intoxication, and the testimony that was presented at trial, any error in admitted the BAC in this case was clearly harmless. Any reasonable jury would have reached the same result absent the error.

2. There was overwhelming untainted evidence of identity.

The State would note that at trial Garza only moved to suppress the BAC results in this case. (CP 34). "A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). When the DNA results were admitted at trial, Garza did not make any objections. (RP 254-58). As such, this issue is not reviewable. Even if there had been a timely and proper objection, the evidence would have been properly admitted at trial.

And assuming *arguendo* that the DNA test was properly objected to and admitted in error, such error was clearly harmless given the other evidence presented at trial. There was ample evidence that Garza was the driver. First are

his statements. His initial statement at the scene was that "he missed his turn," a statement that clearly implies that he was driving. (RP 338, 351-2). The aerial map presented at trial shows that the only way he could miss Higgins Road is if he was driving from Ashley Road to Higgins Road. In addition, at trial, he states, "[a]t first I thought I wrecked...my van." (RP 525-26). From this statement, one can also infer that he was driving at the time of the collision.

Second, Garza's father testified that Garza was bleeding and there was blood on the driver's side airbag. (RP 516). Garza also admitted that he cut his ear in the collision. (RP 526).

Third, Garza had a seatbelt mark on his left shoulder, consistent with sitting on the driver's side of the car. (RP 220, 225, 343). The driver's side seatbelt was elongated, indicating use during the collision. (RP 368). Victoria Gil admitted that she was sitting in the left side rear passenger seat, (RP 237), which would mean Garza was in the driver's seat due to the seatbelt mark. The physical evidence also indicated that Gil was not wearing a seatbelt, as the back of the driver's seat was indented. (RP 369). In addition, Garza testified that he had fractured collarbone on his left side, (RP 526, 535), an injury consistent with him being in the driver's seat at the time of impact.

E. Garza's claims that there was no "arrest" and that he was not "unconscious" for purposes of Washington's implied consent statute are time-barred because he did not raise any objections at trial on those grounds.

"A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). This objection gives a trial court the opportunity to prevent or cure error. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). For example, a trial court may strike testimony or provide a curative instruction to the jury. In State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), the defendants failed to object or move to strike allegedly erroneous evidence and did not give the trial courts such an opportunity. Thus, the Supreme Court held that "neither defendant preserved the issue for appellate review." Id.

In State v. Lemons, the defendant made no objection to the admission in evidence of seven packets of heroin. 53 Wn.2d 138, 140-41, 331 P.2d 862 (1958). However, at the conclusion of her case, she made alternative motions for dismissal or for a directed verdict. Id. at 139. The court relied on a prior decision, State v. Gunkel, 188 Wash. 528, 63 P. 2d 376 (1936), in which the Supreme Court held that an objection to evidence must be timely made: "While the constitutional rights of the individual are to be preserved, those rights are dependent, for their recognition, upon a timely assertion." Id. at 141. The defendant in Lemons, however, made no objection when the evidence was offered at trial and made no motion to suppress until after the State had rested its case. Id. The Supreme Court held that under these circumstances, her motion to suppress was not timely made and the trial judge did not err in denying it. Id. at 140-141.

This is similar to Garza's case. Garza did not object to the blood draw evidence on the basis that there was no "arrest" under RCW 46.20.308. And he did not object on the basis that he was not "unconscious" under that statute. As such, these issues, being raised on appeal for the first time, are not reviewable. The issues was never raised during pre-trial motions, or in any other part of the trial. It did not allow the State any opportunity to cure any problems or have an evidentiary hearing on the subject. It also did not allow the trial court an opportunity to strike testimony or evidence. It also did not preserve any issues for appeal.

Pursuant to Evidence Rule 103(a)(1), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike is made, stating the **specific** ground of objection." ER 103(a)(1) (emphasis added). This rule protects the integrity of judicial proceedings by denying a defendant the opportunity to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal.

By raising the issue of compliance with the implied consent statute now for the first time on appeal, there was no chance for the State to make a record. As pointed out in State v. O'Cain, defense counsel will often decline to raise a objection to proffered evidence due to "strategic considerations." 169 Wn. App. 228, 245, 279 P.3d 926 (2012) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 328, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)). Counsel's decision to forego an objection will often benefit the defendant:

> For instance, an adverse declarant's testimony may have a more persuasive effect in person than it would when relayed by a third party. Or, a defendant may not contest the testimony of the declarant, and, in that circumstance, defense counsel may wish to avoid the time and attention that in-person testimony would entail.

Id. (citing State v. Steen, 346 Or. 143, 155, 206 P.3d 614 (2009)). Because the failure to raise an objection, if error, must be defense counsel's error alone, it is appropriate that the burden of making the objection is placed squarely upon the defendant. Id.

Here, the tactical decision as to how to object to blood draw evidence is one for trial counsel to make. The State would note that there were also pretrial motions and no mention was made regarding Garza not being under "arrest" or not being "unconscious." In addition, when there were discussions about McNeely, no objections were made in this regard. But it is easy to see why. Counsel's decision was to move to suppress based on McNeely, not on the grounds now asserted on appeal. As such, this Court had nothing to review in terms of whether Garza was under arrest or unconscious at the time. There was no hearing on these issues and no findings on these issues.

Even if there had been a proper objection and hearing, the evidence from the blood draw would have been admitted at trial. After speaking with the victim, troopers decided to arrest Garza for vehicular assault. (CP 102). He was read his

Constitutional rights from the DUI packet, and placed under arrest. (CP 102). Trooper Haddorff testified that Garza was fully advised that he may have been under arrest or facing charges. (RP 245).

In addition, numerous witnesses described Garza as "unresponsive" and "passed out." (RP 219, 239, 240-42, 512). His mother indicated that "[h]e was just not, not really conscious of where he was or who we were." (RP 422). Based on this, it is clear that Garza was also unconscious for purposes of the implied consent statute.

IV. CONCLUSION

The trial court properly admitted statements made by Garza because there was no custodial interrogation. Furthermore, the trial court properly denied Garza's motion to suppress the BAC results. If there were any errors, the untainted evidence admitted at trial was overwhelming. The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 26th day of June, 2014,

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