NO. 90598-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK TRACY MECHAM,

Appellant.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Mecham, No. 69613-1-I, reported at __ Wn. App. __, 2014 WL 3842911 (June 23, 2014).

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks review of additional issues that the State raised in the Court of Appeals, but were not reached by the court. RAP 13.4(d).

1. The Court of Appeals assumed without deciding that the administration of field sobriety tests constitute a search for purposes of the Fourth Amendment and Article I, section 7. As an alternative ground to affirm, the State renews its argument that field sobriety tests are not a search.

2. Because the Court of Appeals held that the administration of field sobriety tests was within the scope of a valid Terry[1] stop, it did not reach the State's arguments that the tests, if a search, were also warranted either by exigent circumstances or as a search incident to arrest. As alternative grounds to affirm, the State renews these arguments.

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

D. STATEMENT OF THE CASE

The facts of this case are set forth in more detail in the Brief of Respondent filed in the Court of Appeals. In brief, Bellevue Police Department Officer Scott Campbell observed Mark Mecham driving, then stopped and arrested him for driving without a license and for a bench warrant. 1RP 49-52; 3RP 19-20. Upon observing that Mecham was intoxicated, Officer Campbell asked him to perform field sobriety tests. 3RP 20-21, 69. Mecham refused. 3RP 21. His refusal, along with Officer Campbell's and another officer's observations of Mecham's sobriety, his refusal to submit to a breath test, and the results of a blood alcohol test of his blood, were admitted into evidence at his trial for Felony Driving Under the Influence. 3RP 20-21, 27-36, 69; 4RP 16, 36, 42; 5RP 7-10, 19, 28-35. Mecham was convicted as charged. CP 87.

On appeal, Mecham complained that the trial court erred by admitting into evidence the fact that he refused to perform field sobriety tests. Specifically, he claimed that such tests constituted a search, that there was neither a warrant nor a valid exception to the warrant requirement justifying the search, and admission of his refusal to consent was an improper comment on his exercise of a constitutional right. Brief of Appellant at 9-21. The Court of Appeals rejected these arguments and

affirmed Mecham's convictions. State v. Mecham, __ Wn. App. __, 2014 WL 3842911 (June 23, 2014).

E. ARGUMENT

1. THIS COURT SHOULD DENY MECHAM'S PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mecham's petition does not meet this standard.

In his petition, Mecham claims that "[a] criminal defendant may not be penalized for exercising the constitutional right to refuse consent to a search by having that refusal used as evidence of guilt at trial." Petition at 1. But Mecham's argument rests on two unsupportable premises: first, that he had a constitutional right to refuse the field sobriety tests, and second, that the performance of field sobriety tests constitutes a search

within the meaning of the Fourth Amendment and Article I, section 7. Neither is correct.

First, this Court has already determined that the right to refuse to perform field sobriety tests is not of constitutional dimension. Instead, as Mecham conceded at oral argument, it is only a common law right. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 233, 978 P.2d 1059 (1999); Oral Argument in State v. Mecham (Feb. 25, 2014), http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20140225, at 4:17-5:01 ("It's not a constitutional right to refuse to comply."). Washington law does not shield a person from the consequences of the exercise of non-constitutional rights. For instance, the refusal of a driver arrested for Driving Under the Influence to submit to a breath test to determine his level of intoxication may be used as evidence at trial, as it was here. RCW 46.61.517; State v. Baldwin, 109 Wn. App. 516, 37 P.3d 1220 (2001). And, this Court has already stated that "[a]ttaching consequences to the exercise of the common law right to refuse to submit to [a field sobriety test] is no different from attaching consequences to the exercise of a statutory right of refusal [of Breathalyzer tests]." Stalsbroten, 138 Wn.2d at 237. Because Mecham had no constitutional right to refuse to perform field sobriety tests, the State's comment on his refusal could not violate a

constitutional right.[2] Accordingly, Mecham's appeal raises no question of constitutional law. RAP 13.4(b)(3).

Second, as argued more extensively in the State's briefing below, the administration of field sobriety tests is not a search at all. The only Washington case to mention the issue characterized the administration of field sobriety tests as a seizure, not a search. Heinemann v. Whitman Cnty., Dist. Ct., 105 Wn.2d 796, 809, 718 P.2d 789 (1986). This Court has analogized such tests to a defendant's appearance at a police lineup or other physical actions, such as providing fingerprints or voice or writing samples, none of which constitutes a search. Stalsbroten, 138 Wn.2d at 233; United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (voice exemplar); United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973) (handwriting exemplar); Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) (fingerprints); State v. Collins, 152 Wn. App. 429, 438-40, 216 P.3d 463 (2009) (voice exemplar); State v. Selvidge, 30 Wn. App. 406, 635 P.2d 736 (1981) (examination of suspect's shoes). Field sobriety tests are similar to each of these in that they merely expose to the investigating officer

[2] For these reasons, Mecham's reliance on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), for the proposition that the State may not comment on his withholding of consent to perform field sobriety tests, is misplaced. Gauthier involved the State's use of the defendant's exercise of a constitutional right to infer guilt. Id. at 267. Mecham does not conflict with Gauthier. See RAP 13.4(b)(2).

characteristics of the suspect, such as balance and coordination, that are not intimate details of a person's life, but are routinely exposed to the public whenever one ventures outside the home. The administration of field sobriety tests does not constitute a search.[3]

Even if Mecham overcomes these hurdles, however, the petition should still be denied. For the reasons fully set forth in the State's briefing at the Court of Appeals, the decision of the Court of Appeals was correct and consistent with applicable Washington and federal law. The State's briefing below, including its Answer to Mecham's Motion for Reconsideration, adequately addresses the issues raised by Mecham in his petition for review.

2. IF THIS COURT GRANTS REVIEW, IT SHOULD ALSO CONSIDER ALTERNATIVE ARGUMENTS RAISED BY THE STATE THAT WERE NOT ADDRESSED BY THE COURT OF APPEALS.

If this Court determines that review is warranted, the State seeks review of issues it raised in the Court of Appeals that that court's opinion did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review and contends that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court

[3] The Court of Appeals assumed without deciding that the administration of field sobriety tests constitutes a search. Slip op. at 8. If this Court grants Mecham's petition for review, it should also grant review on this issue. See section E.2, infra.

should also grant review of the alternative arguments raised by the State in the Court of Appeals, which are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

First, the Court of Appeals assumed without deciding that the administration of field sobriety tests constitutes a search for purposes of the Fourth Amendment and Article I, section 7.[4] This Court should hold otherwise. For the reasons set forth above in section E.1, and more extensively in the State's briefing below, the administration of field sobriety tests is a reasonable investigation incident to a valid seizure, not a search.

Second, when Officer Campbell asked Mecham to perform field sobriety tests, Mecham was already under arrest, so he had a diminished expectation of privacy. State v. White, 44 Wn. App. 276, 278, 722 P.2d 118 (1986). Arrestees are subject to broad searches of their person and their immediate effects. Id.; State v. Jordan, 92 Wn. App. 25, 960 P.2d 949 (1998). Thus, because Mecham was already under arrest at the time

[4] In his petition, Mecham claims that the Court of Appeals assumed that the field sobriety tests are a "search for evidence, not a protective measure to ensure officer safety." Petition at 12. In fact, the Court said, "For purposes of this opinion, we assume that a field sobriety test constitutes a search under both Article I, section 7 and the Fourth Amendment." Slip op. at 8. The Court also held that "Mecham's probable dangerousness is obvious: a drunk driver presents a grave danger to the public." Slip op. at 9.

that Officer Campbell asked him to perform field sobriety tests, if those tests constitute a search, their administration was justified as a search incident to arrest.

Third, exigent circumstances present another exception to the warrant requirement applicable here. Illinois v. McArthur, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The exigent circumstances exception applies where, among other things, obtaining a warrant is not practical because the delay in obtaining it would permit the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). It is well established that the dissipation of alcohol in a suspect's blood may constitute exigent circumstances justifying a warrantless search. Schmerber v. California, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); see also 4RP 18.

Here, even if the administration of field sobriety tests is a search, there was inadequate time to obtain a warrant. The police in fact sought and obtained a warrant for Mecham's blood; it took more than two hours to obtain. 3RP 18 (stop at 6:20 p.m.); CP 169 (warrant issued after 8:30 p.m.). While Mecham's blood alcohol level at the time of his driving could be reasonably calculated after the fact, 5RP 28-35, the level of a person's impairment—which is the gravamen of the charged offense—

cannot. RCW 46.61.502(1)(c), (d). Thus, exigent circumstances provide a basis for the administration of field sobriety tests, if a search, in the absence of a warrant. See State v. Nagel, 320 Or. 24, 33, 880 P.2d 451 (1994).

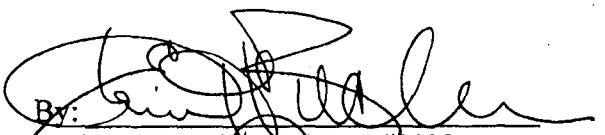
F. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied. If this Court grants review, it should also review the three alternative arguments made by the State that the Court of Appeals did not decide.

DATED this 25th day of August, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert with Nielsen Broman & Koch P.L.L.C., containing a copy of the ANSWER TO PETITION FOR REVIEW, in STATE V. MARK MECHAM, Cause No. 90598-3, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

CBrame — 8/20/14

Name — Date 8/20/14

Done in Seattle, Washington

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Please accept for filing the attached documents (Answer to Petition for Review) in State of Washington v. Mark Tracy Mecham, No. 90598-3.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Erin Becker's direction.