No. 969370

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS J. NELSON, PETITIONER

STATE'S ANSWER IN OPPOSITION TO THE PETITION FOR REVIEW TO THE SUPREME COURT

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TABLE OF AUTHORITIES

Federal Authority

Washington State Authority

I. IDENTITY OF RESPONDENT

The State of Washington, acting through the office of the Douglas County Prosecuting Attorney, is the Respondent in the case before This Court.

II. STATEMENT OF ISSUE PRESENTED

1. Did the Court of Appeals properly apply State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016) and related case law in its determination that the administration of a warrantless breath test is lawful pursuant to the search incident to arrest exception to the warrant requirement under Article I, Section 7 of the Washington State Constitution?

III. STATEMENT OF THE CASE

On January 20, 2014 at approximately 5:39 P.M., Trooper Mark Ward of the Washington State Patrol was on duty. He was parked on the east side of the Odabashian Bridge, which separates Chelan County on the west from Douglas County to the east. He noticed a vehicle that appeared to be moving faster than the flow of traffic. Clerk's Papers (CP[1]) at 183-

[1] Clerks Papers referenced herein are those filed in the Court of Appeals, consistent with those cited by the Petitioner.

184. He ultimately determined that Mr. Nelson's vehicle was traveling seventy nine (79) miles per hour in a fifty (50) mile per hour zone. *Id.*

Trooper Ward initiated a stop and upon contacting Mr. Nelson, the Trooper noticed an odor of alcohol coming from the vehicle. *Id* at 186. Trooper Ward testified that Mr. Nelson's speech was slow. *Id.* at 189. He testified that even after Mr. Nelson stepped out of the vehicle, he could smell the odor of alcohol. CP at 195-196. He testified that Mr. Nelson told him that he had two sixteen ounce beers earlier in the day while golfing. *Id.* Trooper Ward, who was trained in administering the Standardized Field Sobriety Tests, administered both the Horizontal Gaze Nystagmus (HGN) test, and the Walk and Turn. Mr. Nelson expressed concern about performing the One Leg Stand test, due to a sore back from golfing earlier in the day, but did not express any concern about his ability to perform the HGN or Walk and Turn. *Id* at 198-199. Mr. Nelson displayed six out of six possible clues on the HGN test, and five out of eight on the Walk and Turn. *Id.* at 199, 213.

Trooper Ward testified that he believed Mr. Nelson was impaired and that he didn't believe it was safe for Mr. Nelson to operate a motor vehicle. As a result, he placed him under arrest for driving under the influence. *Id.* at 213. Trooper Ward read to Mr. Nelson the standard Implied Consent Warnings, and agreed to provide a sample of his breath.

Id. at 221. Mr. Nelson provided two breath samples, and the Datamaster produced an accurate and reliable breath ticket, which indicated levels of .078 and .079, the latter of which was taken at 7:14 PM, or approximately 95 minutes after initially being stopped on the Odabashian Bridge. The jury ultimately convicted Mr. Nelson of Driving Under the Influence and Negligent Driving in the First Degree.

On appeal pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), the Douglas County Superior Court affirmed the conviction, ruling that State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016) controls the question of the constitutionality of the breath test, and that it did not find independent State Constitutional grounds compelling a different result. CP at 737.

Mr. Nelson moved for discretionary review, which was granted. CP at 741.

The Court of Appeals affirmed the District Court's judgment[2], specifically determining that: (1) a breath sample may be taken incident to arrest of an impaired driver because the Implied Consent statute provides authority of law; (2) a breath test conducted under the implied consent law is a valid search incident to arrest under Article I, Section 7 of the

[2] State v. Nelson (No. 35273-1-III), Filed February 14, 2019; Amended February 19, 2019.

Washington Constitution; and (3) Washington does not have a history of recognizing expanded privacy protections for an arrested driver's breath alcohol level.

IV. ARGUMENT

Petitioner appears to be relying on RAP 13.4(b)(3) to argue that This Court should accept review due to a "significant question of law under the Constitution of the State of Washington." A fleeting reference has been made as to an appellate court split, but the Court of Appeals' decision below is the only published decision on point, notwithstanding, of course, This Court's decision in Baird. Petitioner also contends that review is appropriate under RAP 13.4(b)(4) due to an issue of continuing and significant public interest. Petitioner has not satisfied any of the requirements of RAP 13.4(b) because, fundamentally, the admission into evidence of warrantless breath tests and the implicit Article I, Section 7 question is now well settled. The issue has been resolved by both This Court and the United States Supreme Court in determining that breath testing is an appropriate warrantless search incident to arrest. Birchfield v. North Dakota, 136 S. Ct. 2160, 2184, 195 L. Ed. 2d 560 (2016); State v. Baird, 187 Wn.2d 210, 229, 386 P.3d 239 (2016). Indeed, This Court began its discussion specifically referencing that "[a] breath test is a search under the Fourth Amendment *and under article I, section 7*." Baird,

187 Wn.2d at 218 (emphasis added). This Court further noted that if there were no warrant exception, then a refusal would not be admissible "under the Fourth Amendment *and article I, section 7* . . . ." Id. at 221-22 (emphasis added). This Court then stated "[t]hat breath tests fall under the search incident to arrest exception to the warrant requirement." Id. at 222.

Here, Mr. Nelson was arrested under suspicion of driving under the influence, was read the Implied Consent Warnings, and then agreed to provide a breath sample. Accordingly, Mr. Nelson's breath test was lawfully acquired as a search incident to arrest under Baird.

A. The Breath Test Was Properly Admitted into Evidence Because a Breath Test in a DUI Case is a Search Incident to Arrest Under Article I, Section 7 of the Washington Constitution.

This Court, in a case where all of the relevant facts are consistent with the present case, determined that the breath test was properly admitted into evidence because it was gathered as a search incident to arrest, and did not require a warrant. State v. Baird, 187 Wn.2d 210, 214, 386 P.3d 239 (2016). "Because the search falls under an exception … there is no constitutional right to refuse the breath test." Id. at 222. Because there is no constitutional right to refuse a breath test that is incident to arrest, evidence of a refusal to submit to the test is not a

comment on the driver's exercise of a constitutional right. Id. This Court further noted "[t]hat breath tests fall under the search incident to arrest exception to the warrant requirement is what makes this case distinct from Gauthier[3], the primary case relied upon by the defendants." Id. This Court concluded that "[h]ere, the search falls under such an exception; therefore, the principle from Gauthier, while still generally meritorious, does not apply to this case." Id. at 223. Despite there being a concurring opinion to the plurality which emphasized[4] the point, it is clear that this is the proposition for which the decision in Baird stands. Six justices agreed that the breath test was admissible, despite the countervailing arguments presented by the respondents/defendants in that case.

Under *Gunwall*, A Separate Analysis Under Article 1, Section 7 of the Washington State Constitution is Not Necessary

Privacy protections under the State constitution *potentially* differ in scope and quality from Fourth Amendment protections under the federal constitution. Article I, Section 7 of the Washington Constitution protects an individual from the disturbance of his private affairs without authority of law. Whether this provides greater protection from the Fourth

[3] State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013).

[4] "...I write separately to emphasize that a breath test, after reasonable suspicion of driving under the influence (DUI) has been established, is a limited and reasonable search; therefore, admitting evidence of a person's refusal has no constitutional implications." Baird, 187 Wn.2d at 229 (Gonzalez, J., concurring).

Amendment depends on six nonexclusive criteria: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. State v. Gunwall, 106 Wn.2d 54, 58-59 720 P.2d 808 (1986). Factors 1, 2, 3, and 5 are uniform in any analysis of article 1, section 7, and *generally* support analyzing our State constitution independently from the Fourth Amendment. State v. Boland, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990) (emphasis added).

Although it is "generally" the case that the State Constitution will be analyzed independently of the federal Constitution in cases implicating the Fourth Amendment, the legal background of searches incident to arrest and the treatment of issues related to driving under the influence in Washington is historically in lockstep with that of the federal courts. As a result, This Court need not adopt any rationale beyond that of the United States Supreme Court's Fourth Amendment reasoning in Birchfield v. North Dakota, 136 S. Ct. 2160, 2184, 195 L. Ed. 2d 560 (2016).

This Court has held that a search of an arrestee's person includes "those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." State v. Byrd, 178 Wn.2d 611, 618, 310 P.3d 793 (2013). In Byrd, This Court upheld the search of a purse that was on the defendant's lap at the time of the arrest. Id. at 615.

Before removing Byrd from the car, the officer took the purse and set it on the ground, then securing Byrd in the patrol car and returning to the purse "moments" later to search it for weapons or contraband. Id. The officer found methamphetamine inside. Id.

In upholding the search, This Court cited to United States v. Robinson, 414 U.S. 218, 253, 94 S.Ct. 467 (1973). Robinson largely stands for the proposition that the legality of the arrest in a particular case establishes the authority to conduct the search incident to arrest. In other words, Robinson established a categorical approach to reviewing searches of an arrestee's person; if an arrest is lawful, a search of the arrestee's person incident to that arrest requires no additional justification. Id. at 235. Of course, the rationale in Robinson was not applied by the U.S. Supreme Court in its more recent decision of Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed. 430, (2014). However, the Court did not overrule Robinson; it essentially determined that the particular item searched in that case, the content of a modern cellular phone, can't be treated the same as a pack of cigarettes (as in Robinson).

But just as Washington courts continue to apply the categorical rule in search incident to arrest situations where it is merited, we apply the Riley rationale when *that* approach is appropriate. See State v. VanNess, 186 Wn. App. 148, 344 P.3d 713 (2015). VanNess (which is discussed in

more detail *infra*) adopted the Riley court's non-categorical approach, and required a warrant for the locked box that the officer forcibly pried open with a screwdriver. Id. at 153, 164. Just as Byrd can be analogized to the categorical treatment in Robinson, so too can State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014), where the Court upheld the search incident to arrest of a backpack even though the suspect had been removed from access to the item for at least ten minutes.

These examples all strengthen the point: Washington state courts and the United States Supreme Court reach consistent results when analyzing the search incident to arrest exception to the warrant requirement under both article I, section 7 and the Fourth Amendment. The language This Court used in Baird makes it clear that it was, in fact, acknowledging our state courts' consistencies with the United States Supreme Court: "The Supreme Court of the United States has recently decided this question for us: breath tests conducted subsequent to an arrest for DUI fall under the search incident to arrest exception..." 187 Wn.2d at 222. As a result, the Birchfield reasoning that a breath test is a search incident to arrest under the Fourth Amendment leads us to the same result in Baird under Article I, Section 7, and indeed, in Mr. Nelson's case.

Further, as to the specific privacy interest that Mr. Nelson is claiming is being infringed upon, the Birchfield court characterizes

exhalation as "not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test." 136 S. Ct. at 2177.

Turning to the sixth factor, traffic crimes are committed on the streets and highways, and so there is substantially greater interstate potential for driving under the influence as compared to other criminal charges. Many individuals arrested for traffic crimes are from out of state, Washington being closely bordered by Idaho, Oregon and Canada; similarly, other nearby jurisdictions are also likely to encounter Washington residents committing traffic crimes within their borders.

Driving under the influence is far from a Washington-specific, local concern. As a result, in this context of searches incident to arrest and particularly under the umbrella of driving under the influence, Article I, Section 7 of the Washington State Constitution provides no greater protection than the Fourth Amendment.

Administration of a Warrantless Breath Test is Lawful Pursuant to the Search Incident to Arrest Exception to the Warrant Requirement

Mr. Nelson, who submitted to the breath test, contends that the results of the test must be suppressed because breath alcohol testing is

outside the scope of the search incident to arrest exception to the warrant requirement. Mr. Nelson's position is contrary to existing law.

Article I, Section 7 permits warrantless searches under certain "'jealously and carefully drawn' exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 817 P.2d 563 (1996).

The search incident to arrest exception to the warrant requirement when applied to the person and/or items in the person's immediate possession is a longstanding tenet of Washington law. "This court has, from the earliest times, followed the rule that articles, personal effects, or money, taken from the person of a defendant lawfully arrested may be used in evidence against him." Olympia v. Culp, 136 Wn. 374, 377-78, 240 P. 360 (1925). See also: State v. MacDicken, 179 Wn.2d 936, 940-41, 319 P.3d 31 (2014) ("A warrantless search of the arrestee's person is considered a reasonable search as part of the arrest of a person. Such a search presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation.")

This Court, in modern times, has followed the rule that officers may search an arrestee's person and articles closely associated with his or her person at the time of arrest without violating either the Fourth Amendment to the United States Constitution or Article I, Section 7 of the

Washington State Constitution. Id. at 938; State v. Byrd, 178 Wn.2d 611, 625, 310 P.3d 793 (2013).

Both in early statehood and in modern times, a warrantless search of the arrestee's person is presumed to be justified by the arrest itself. Byrd, 178 Wn.2d at 618. It is further presumed that the search is necessary for officer safety and evidence preservation. Id. With regards to alcohol, which is rapidly absorbed within the human body, the necessity to preserve evidence that supports the search incident to arrest doctrine clearly exists. If a breath sample is not collected in a timely manner, the evidence will be lost.

This is not to say that the search incident to arrest doctrine has no limits. Such searches must be reasonable in "scope and manner of execution." Maryland v. King, 569 U.S. 435, 448 133 S. Ct. 1958, 1970, 186 L. Ed. 2d 1 (2013). An exception to the warrant requirement does not give the arresting officer carte blanche; it merely changes the applicable standard from a rule of per se unreasonableness to a test balancing privacy interests against law enforcement interests. Id. The more intrusive the search, the greater likelihood that a warrantless intrusion will be found unreasonable. King, 569 U.S. at 448.

When the search involves nudity or a surgical intrusion beneath the skin, a warrant will generally be required. King, 569 U.S. at 446. Though

even warrantless searches that involve nudity or a surgical entry into the body can be lawfully conducted. These searches require arrest plus some other exigency. See, e.g., Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (warrantless venipuncture requires arrest and an exigency other than mere alcohol dissipation).

Mr. Nelson cites to State v. VanNess, 186 Wn. App. 148, 344 P.3d 713 (2015) for the proposition that the locked container at issue in that case is akin to the air being blown into the BAC instrument following a DUI arrest. This analogy is inapt. In VanNess, the officer used a flathead screwdriver to forcibly pry open a locked box which had been found in the defendant's backpack and then look inside the box, where he found evidence of controlled substances. Id. at 153. The considerations of a court during a search incident to arrest analysis include the privacy interests at stake in a particular search. Id. at 159. The VanNess court cited extensively to the United States Supreme Court's opinion in Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014). Riley involved the search of data contained within cellular phones. As the Court stated in that case:

> "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person ... The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information –

> an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions ... Third, the data on a phone can date back to the purchase of the phone, or even earlier."

Id. at 2489.

The alcohol content of one's breath is not even comparable to the data that can be gathered from the search of an individual's modern cell phone. Mr. Nelson can claim no privacy violation in his case. He admitted to consuming alcohol prior to driving. CP at 195-196. The arresting officer could smell the odor of the alcohol emanating from Mr. Nelson's person. Id. He admitted to consuming the alcohol earlier in the day while golfing. Id. Presumably, this took place in a public sphere where there were others who observed his consumption. He voluntarily performed field sobriety tests that indicated to the officer that he had been consuming alcohol. Id. at 199, 213. The officer knew that Mr. Nelson had alcohol in his breath; he could smell it, and Mr. Nelson admitted it. The only information the officer then sought was *how much* alcohol was in his breath. Mr. Nelson agreed to divulge that information. The information was not forcibly obtained by physically breaking a lock as it was in VanNess; nor was it

gathered from an intimately private location such as the cell phone in Riley.

The search incident to arrest is the logical exception to the warrant requirement in this area, particularly as RCW 46.20.308 is by necessity triggered by an arrest. See RCW 46.20.308(1); RCW 46.20.308(7) (unlawfulness of arrest will prevent administrative action against person's license).

While Mr. Nelson compares breath testing to a search of a cellular phone or a locked container, upon scrutiny of the important distinctions, the analogy is strained at best. First, the contents of a locked container or smartphone are not subject to destruction. In contrast, as the forensic scientist from the Washington State Patrol Toxicology Laboratory stated at trial in the present case, breath alcohol concentration is regularly destroyed by the body at a rate of approximately .01 to .02 per hour depending upon the subject. CP at 398. When the 'per se' prong of RCW 46.61.502 requires the breath test to be administered within two hours of driving, and over a .08[5], every loss in value is significant. Second, unlike locked containers and smartphones, which one keeps the contents of hidden away from the public, a person's breath is regularly exhaled and

[5] RCW 46.61.502(1)(a).

exposed to the public. As the Supreme Court has noted:

> Humans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test.

Birchfield, 136 S. Ct. at 2177 (emphasis in original).

In sharp contrast, humans do not walk about the streets of society showing every passerby the contents of their entire smartphone. Accordingly, the two are simply not comparable.

Finally, a driver's expectation of privacy is diminished at the time of the test because the procedures necessarily follow a lawful arrest for DUI. See State v. White, 44 Wn. App. 276, 278, 722 P.2d 118 (1986) (holding that arrested persons have a diminished expectation of privacy). Thus, the State's interest in enforcing DUI laws through the implied consent statute is even more compelling because both the federal and state constitutions contemplate a balancing test between the level of intrusion and the justifications for its performance. See Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (holding that the Fourth Amendment requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails."); see State

v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002) (holding that article I, section 7 permits a higher level of police intrusion for higher risk crimes).

B. Washington's Implied Consent Statute is Constitutional Under Article I, Section 7.

This Court has previously upheld Washington's implied consent law as constitutional. In State v. Moore, 79 Wn. 2d 51, 483 P.2d 630 (1971), the Court held that the statute (1) was a valid exercise of police power; (2) did not violate the Fifth Amendment privilege against self-incrimination; and (3) was not rendered unconstitutional by purporting to impliedly waive a constitutional right (against self-incrimination). Id. at 54-58. This Court also held that "[w]hether an accused's consent to the [breath] test be voluntary or involuntary, the law ... is constitutionally sustainable ..." Id. at 57-58.

At trial, the court admitted the breath test result. Whether Mr. Nelson's breath test was admissible under RCW 46.20.308, the implied consent statute, is a legal issue. Below, Nelson argued that his consent to the breath test was not actual consent as applied to these facts. CP at 148-149. As Petitioner points out, it is true that at the suppression hearing, the prosecutor acknowledged that advising a suspect like Mr. Nelson about the administrative penalties for refusing a breath test was inherently

coercive, and that actual consent was not possible. CP at 154. But of course, an appellate court is not bound by an erroneous concession of law. State v. Lewis, 62 Wn. App. 350, 351, 814 P.2d 232 (1991).

Washington has long recognized the Implied Consent Statute as a constitutional means for gathering breath test evidence from suspected impaired drivers. As stated previously, the most recent case finding our implied consent statute constitutional is State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016). A six-justice majority in Baird agreed our implied consent was constitutional—reversing the trial court's suppression order, which, importantly, was based on Article 1, Section 7. The Baird plurality wrote, "In exchange for the privilege of driving on Washington's roadways, drivers agree and have notice that their refusal to consent to a statutorily requested breath test may be used as evidence of guilt at a criminal trial." Baird at 226, citing State v. Long, 113 Wn.2d 266, 272-73, 778 P.2d 1027 (1989). Any right to refuse exists only as a statutory right by virtue of the implied consent statute. Baird at 229.

Drivers impliedly consent to breath testing by driving on the roadway and by driving under circumstances that amount to probable cause to believe they are intoxicated. In short, Mr. Nelson's consent occurred when the conditions in the statute were met—not at the later time when the officer asked whether he would cooperate with the test by providing a breath

sample. Whether Mr. Nelson felt coerced to take the test after being reminded of the implied consent law is irrelevant. Mr. Nelson's *earlier* choice to drive impaired triggered his consent under the statute.

In addition to a majority of This Court in Baird upholding the Implied Consent Statute, neither the Baird plurality or concurrence question, much less overrule, prior cases finding Washington's implied consent statute constitutional.

The facts of Baird and the facts of the present case are functionally the same. Baird involved a stop on SR 167 in south King County for a combination of lane travel issues and speeding. 187 Wn.2d at 215. Mr. Nelson was stopped on SR 2 after crossing the Columbia River into Douglas County. CP at 186-187. While on the bridge, he was traveling nearly eighty miles per hour in a fifty mile per hour zone and flashing his high beams. CP at 183-184. Both Baird and Nelson exhibited the odors of intoxicants. 187 Wn.2d at 215; CP at 188. Both Baird and Mr. Nelson admitted to consuming alcohol prior to driving. 187 Wn.2d at 215; CP at 196. Both Baird and Mr. Nelson performed voluntary field sobriety tests. 187 Wn.2d at 215; CP at 199. Both Baird and Mr. Nelson were read the statutory implied consent warnings and were given the option to take the breath test. 187 Wn.2d at 215; CP at 220-221. Both Baird and Mr. Nelson provided breath samples. 187 Wn.2d at 216; CP at 222.

V. CONCLUSION

Fundamentally, Mr. Nelson is asking this Court to reverse decades of precedent in the State of Washington, and effectively ban the use of breath test evidence absent a warrant. Such is the exact *opposite* of what This Court declared in Baird. Instead, it determined that breath testing is a search incident to arrest – under both the Washington and United States Constitutions. Mr. Nelson has not made a sufficient showing under RAP 13.4(b) that this determination must be reevaluated.

For the foregoing reasons, the State respectfully requests this Honorable Court to deny the Petition for Review.

Dated this 10th day of April, 2019.

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April 10, 2019 - 12:32 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Thomas J. Nelson
Superior Court Case Number:	16-1-00073-1

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