

NO. 35743-7-II  
Cowlitz Co. Cause NO. 06-1-00184-0

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

STEVEN JOSEPH WHITMIRE,

Appellant.

BY: *WJ*  
STATE OF WASHINGTON  
07 JUN -6 PM 1:56  
COURT OF APPEALS  
DIVISION II

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**BRIEF OF RESPONDENT**

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### **A. ANSWERS TO ASSIGNMENTS OF ERROR**

1. Findings of fact #1, 4 and 5 regarding Whitmire's motion to suppress are supported by substantial evidence.
2. The trial court properly denied Whitmire's motion to suppress the blood test results.
3. The trial court properly ruled that Whitmire's statements were voluntary and therefore admissible at trial.
4. Even if *Miranda* warnings were required, the admission of the statements was harmless error.

### **B. STATEMENT OF THE CASE**

Just before 10:00 a.m. on November 13, 2005, the victim Shara Petrick was driving her car west on Industrial Way at approximately 50 miles per hour. The appellant Steven Joseph Whitmire was driving his truck eastward on the same road when he drove the truck into the westbound lane. The victim was following a truck and horse trailer. When Whitmire crossed into oncoming traffic, a vehicle in front of the truck and horse trailer had to make evasive maneuvers to avoid being struck by Whitmire's truck. When the truck and horse trailer also moved over to the shoulder to avoid being struck by Whitmire's truck, the victim did not have time to react and was struck head-on by Whitmire's truck.

This driving occurred in Cowlitz County, Washington, on a flat, straight stretch of road with no visual obstructions. The victim told police that she could see Whitmire's face just before he struck her and that his eyes were open and he was looking right at her. CP 74.

The victim was taken to the hospital, where it was learned she sustained the following injuries from the collision: a punctured lung, a broken left collarbone, three broken ribs, a lacerated knee, a sprained ankle and dark spots in her eye. CP 75.

Whitmire was also taken to the hospital and was given a dose of fentanyl, a narcotic analgesic. Troopers Frank Black and Bradford Moon were not able to notice any physical signs of drug or alcohol use other than Trooper Black's observation that the defendant was lethargic beyond what would be expected from the fentanyl given to him at the hospital. A nurse told Trooper Black that the defendant appeared lethargic prior to being given the fentanyl at the hospital. According to Trooper Black, a certified drug recognition expert with the Washington State Patrol, lethargy is a common symptom of someone coming down from methamphetamine use. Each trooper attempted to question the defendant separately. The

troopers describe the defendant as slipping in and out of consciousness.

CP 75.

The defendant admitted to Trooper Moon that he used methamphetamine the night before into that morning. The defendant then became unresponsive. RP 54.

Trooper Moon read the defendant the special evidence warnings, placing the defendant under arrest for vehicular assault. The medical staff at the hospital then administered a blood draw, approximately three hours after the collision. The blood was tested by Melissa Pemberton, an analyst at the Washington State Patrol Crime Laboratory and was determined to contain 1.52 milligrams of methamphetamine per liter of the defendant's blood and 0.08 milligrams of amphetamine per liter of the defendant's blood. CP 75.

Whitmire was charged by information with vehicular assault under each prong of that statute. CP 1-2. Whitmire filed a motion to suppress the results of the blood test. CP 9. A hearing was conducted on that motion and pursuant to CrR 3.5. RP 1-112. The trial court ruled any admissions by Whitmire were admissible and denied his motion to suppress. *Id.*; CP 69-73. Whitmire was tried before the court on

stipulated facts and was found guilty of vehicular assault under the DUI prong of the statute. CP 74-88. Whitmire filed a timely notice of appeal. CP 91.

### C. ARGUMENT

#### **1. THE FINDINGS OF FACT REGARDING WHITMIRE'S MOTION TO SUPPRESS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Whitmire's list of assignments of error states that he is assigning error to findings of fact numbers one, four and five as "set forth in CP-26." BRIEF OF APPELLANT 1. Clerk's Paper 26 is actually one page of Whitmire's 31-page Memorandum of Authorities in support of his motion to suppress. *See* CP 10-40. The State assumes that Whitmire, through counsel, mistakenly read the Superior Court Clerk's Index of Clerk's Papers transmitted on January 29, 2007, as having designated the court's Findings of Facts and Conclusions of Law on the motion to suppress as Clerk's Paper 26, rather than its actual designation as Clerk's Papers 69-71. As such, the State will respond to Whitmire's assignments of error regarding the findings under that assumption.

When a finding of fact is challenged, the reviewing court determines whether substantial evidence supports the challenged finding of fact. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

**(a) Finding of fact #1**

There is substantial evidence to support the trial court's first finding of fact regarding Whitmire's motion to suppress. That finding reads as follows:

Just before 10:00 a.m. on November 13, 2005, Shara Petrick was driving her car west on Industrial Way at approximately 50 miles per hour. The defendant was driving his truck eastward on the same road when he drove the truck into the westbound lane. Petrick was following a truck and horse trailer.

CP 70. Whitmire specifically challenges the court's finding that Whitmire drove his vehicle into the westbound lane. BRIEF OF APPELLANT 1.

At the hearing on Whitmire's motion to suppress, Trooper Black testified that he reported to the scene of a head-on vehicle collision. RP 6-8. According to him, "... it was obvious that it looked as though one

vehicle had crossed the center line and struck another vehicle ....” RP 7. According to Trooper Black, it seemed to him “[t]here was a gray or silver pickup truck that was in the oncoming lane ....” *Id.* According to Trooper Black, three other troopers at the scene also observed that a vehicle had crossed the centerline. RP 8. Trooper Black testified that he interviewed the victim Shari Petrick at the hospital. RP 16. She told him that while she was driving down the road the car in front of her swerved out of the way and “... at that point she noticed that there was a vehicle head-on in her lane, and she had no time to do anything.” RP 17.

At the same hearing, Trooper Moon testified that he was called to the same collision scene. RP 39. When he arrived, one of the vehicles (the victim’s Subaru) was blocking the road (which ran east to west) and one (the truck) was on the westbound shoulder. RP 39-40. According to witnesses at the scene, Whitmire was the driver of the pickup truck. RP 41. One witness told Trooper Moon he had seen “the pickup truck drift over the centerline directly into oncoming traffic.” RP 43. According to that witness, Whitmire’s truck was going eastbound and crossed the centerline. *Id.* Whitmire’s truck then struck the victim’s westbound Subaru after the vehicle traveling in front of the Subaru swerved to miss

Whitmire. *Id.* One of the witnesses told Trooper Moon that Whitmire's brake lights were never activated and that his truck never slowed down. RP 44. Trooper Moon also spoke with the victim at the hospital who told him that the collision seemed intentional to her. RP 50. When Whitmire crossed into her lane he was erect and "was looking at her through his windshield." *Id.*

Based upon the testimony of Troopers Black and Moon, there is substantial evidence supporting the trial court's first finding of fact regarding the hearing on Whitmire's motion to suppress.

**(b) Finding of fact #4**

There is substantial evidence to support the trial court's fourth finding of fact regarding Whitmire's motion to suppress. That finding reads as follows:

The defendant was also taken to the hospital and was given a dose of fentanyl, a narcotic analgesic. Troopers Frank Black and Bradford Moon were not able to notice any physical signs of drug or alcohol use other than Trooper Black's observation that the defendant was lethargic beyond what would be expected from the fentanyl given to him at the hospital. A nurse told Trooper Black that the defendant appeared lethargic prior to being given the fentanyl at the hospital. According to Trooper Black, a certified drug recognition expert with the Washington State Patrol, lethargy

is a common symptom of someone coming down from methamphetamine use.

CP 70. Whitmire specifically challenges the court's findings that Whitmire was lethargic beyond what would be expected from the narcotic analgesic administered to him at the hospital and that a nurse told Trooper Black that Whitmire appeared lethargic prior to being given fentanyl at the hospital. BRIEF OF APPELLANT 1.

Trooper Black testified at the hearing on Whitmire's motion to suppress that the nurse told him that Whitmire had been given a dose of fentanyl, a narcotic analgesic. RP 11. Trooper Black testified that normally one dose of fentanyl would be enough to "... knock the pain off the top..." *Id.* Trooper Black expected the effect of the medication on someone with Whitmire's injuries would be to "... to take the edge off, but not take the pain away completely." RP 12. According to Trooper Black, Whitmire "... was not acting like anybody that [he had] observed or expect[ed] to observe after receiving a single dose of fentanyl." RP 14. Trooper Black and Trooper Moon testified regarding Whitmire's level of consciousness as described in the following subsection regarding the court's fifth finding of fact. The nurse told Trooper Black that Whitmire was lethargic when Whitmire arrived at the hospital and that Whitmire

should not have been affected the way he was by the dose of fentanyl. RP 21.

Trooper Black notified Trooper Moon that what he observed was not consistent with Whitmire's injuries, nor was it consistent with a single dose of fentanyl. RP 19. Trooper Moon testified that Trooper Black told him that Whitmire had been given fentanyl. RP 52.

Based upon the testimony of Troopers Black and Moon, there is substantial evidence supporting the trial court's fourth finding of fact regarding the hearing on Whitmire's motion to suppress.

**(c) Finding of fact #5**

There is substantial evidence to support the trial court's fifth finding of fact regarding Whitmire's motion to suppress. That finding reads as follows:

Each trooper attempted to question the defendant separately. The troopers describe the defendant as slipping in and out of consciousness.

CP 70. Whitmire challenges the assertions that Troopers Black and Moon attempted to question Whitmire separately and that Whitmire was ever conscious. BRIEF OF APPELLANT 1.

Trooper Black testified at the hearing on Whitmire's motion to suppress that he attempted to speak with Whitmire at the hospital. RP 8-9. Trooper Black was the only officer present at the time and described Whitmire's demeanor as "[u]nconscious or sleeping." RP 9. Trooper Black spoke with the nurse then "... began trying to rouse [Whitmire]."

*Id.* Trooper Black described it as follows:

I spoke louder. He was not really – I wasn't getting anywhere with him, and when I finally was asking him several questions – after several questions, I spoke loud enough to where he obviously heard me, and was awakened, but it was enough for him to kind of moan and groan and go right back to unconscious again.

RP 13. When asked whether Whitmire then opened his eyes, Trooper Black responded, "If he did open his eyes, it was kind of one of those things where he would open them for a split second, and they would close up again." *Id.*

Trooper Black said he spent five to ten minutes with Whitmire, and during that time Whitmire did not say anything coherent to him. *Id.* Whitmire would "groan and moan" and made "mumbled statements that were just completely incoherent." RP 15-16. According to Trooper Black, Whitmire "would seem to be awake for that split second, and he was right back out of it again...." RP 15.

Trooper Black also observed Trooper Moon trying to speak with Whitmire. RP 18. During that time, Whitmire "... was still pretty much incoherent." *Id.* Trooper Moon described Whitmire's demeanor as "... kind of muttering, mumbling, just kind of painful sounds – not very coherent at first." RP 51. At one point, Whitmire asked Trooper Moon how the victim was doing. RP 52. When Trooper Moon told him that her injuries did not appear to be life threatening, Whitmire appeared relieved. RP 52-53. Trooper Moon later read Whitmire special evidence warnings. RP 59. By then, Whitmire "... had quieted down... He actually had – took a deep breath and closed his eyes." *Id.* Whitmire did not respond to Trooper Moon after that point. *Id.* Trooper Moon tried to see if Whitmire was awake and was not sure if Whitmire had "passed out or fallen asleep, but either way, he was nonresponsive." RP 59.

Based upon the testimony of Troopers Black and Moon, there is substantial evidence supporting the trial court's fifth finding of fact regarding the hearing on Whitmire's motion to suppress.

## **2. THE TRIAL COURT PROPERLY DENIED WHITMIRE'S MOTION TO SUPPRESS THE BLOOD TEST RESULTS.**

Under the implied consent statute, any person who operates a motor vehicle within this state is deemed to have given consent to a test of his blood for the purpose of determining the alcohol concentration or presence of any drug in his system if he is arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving the motor vehicle while under the influence of intoxicating liquor or any drug. RCW 46.20.308(1).

Typically, such a test may only be of the driver's breath. RCW

46.20.308(3). However, the statute provides the following exception:

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 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.

RCW 46.20.308(3).

Therefore, based upon this statute, a police officer is permitted to have a driver's blood drawn without the driver's consent in the following circumstances:

- (1) Where the driver is unconscious and under arrest and the officer has reasonable grounds to believe the driver was driving under the influence;

- (2) Where the driver is under arrest for the crime of vehicular homicide or vehicular assault; and
- (3) Where the driver is under arrest or DUI and the arrest results from an accident in which another person was seriously injured.

The blood draw administered in Whitmire's case was proper under each of these circumstances.

**(a) Whitmire was unconscious and under arrest, and the troopers had reasonable grounds to believe he had been driving under the influence.**

As stated, above, there are three circumstances in which an officer may direct the administration of a blood draw under the implied consent statute. The first is where the driver is unconscious and under arrest and the officer has reasonable grounds to believe he had been driving under the influence. As discussed below, each of these three criteria is met.

**(i) At the time of the blood draw, Whitmire was unconscious.**

In the time before the administration of the blood draw, Trooper Black learned that the hospital staff had administered fentanyl, a narcotic analgesic, to Whitmire. Trooper Black attempted to rouse Whitmire who then spoke in a lethargic manner and slipped in and out of consciousness.

Trooper Moon also had a difficult time speaking with Whitmire due to Whitmire's varying levels of consciousness. When Trooper Moon read Whitmire special evidence warnings, Whitmire took a deep breath with his eyes closed, and it was unclear whether he had passed out or fallen asleep.

The implied consent statute does not define the term "unconscious". The Court of Appeals has defined unconscious as follows: "To be 'unconscious' within the meaning of the statute, a motorist must manifest symptoms of such a lack of self-awareness or inability to perceive as to render him completely unable to exercise judgment. Physical incapacity, such as an ability to walk, talk or observe, is the strongest evidence." *Steffen v. Department of Licensing*, 61 Wn.App. 839, 843, 812 P.2d 516 (1991) (citing *Oaks v. Department of Licensing*, 31 Wn.App. 892, 896, 645 P.2d 708 (1982)). Based on this definition and the troopers' observations at the hospital, Whitmire was unconscious; therefore, a blood draw was proper so long as he was under arrest and the troopers had reasonable grounds to believe he had been driving under the influence.

(ii) Whitmire was under arrest at the time of the blood draw.

After conferring with Trooper Black and his sergeant and before instructing the nurse to administer the blood draw, Trooper Moon read Whitmire the special evidence warnings for blood. RP 59. The special evidence warning read as follows:

Warning! You are under arrest for: vehicular assault[.] A test of your blood or breath will be administered to determine the concentration of alcohol and/or any drug in your blood; however, I must advise you that because of the nature of the arrest, according to the law, a blood or breath test may be administered without your consent, and that you have the right to additional tests administered by a qualified person of your own choosing

(uppercase omitted). RP 60.

(iii)At the time of the blood draw, the troopers had reasonable grounds to believe Whitmire had been driving under the influence.

The troopers were aware of a number of factors which, when combined, served as reasonable grounds to believe Whitmire had been driving under the influence – the first of which was Whitmire’s driving. According to witnesses at the scene of the collision, Whitmire drove his vehicle into the lane of oncoming traffic. The drivers of the vehicles in front of the victim’s had to pull off to the shoulder to avoid being struck by Whitmire. The victim told the troopers that Whitmire was staring

straight ahead at her with his eyes open just prior to the collision.

Whitmire struck the victim's vehicle head-on.

Second, Whitmire's condition upon his arrival at the hospital indicated that he might have been driving under the influence. According to Trooper Black, one of Whitmire's nurses stated that Whitmire had been administered the fentanyl upon his arrival at the hospital but had been acting lethargic prior to being given the medication. Whitmire was unable to answer almost all of the troopers' questions, was unintelligible and drifted in and out of consciousness. Finally, Whitmire told Trooper Moon that he had used a "twenty" of methamphetamine the previous night, continuing on until the morning.

"Reasonable grounds" within the meaning of the implied consent statute is the equivalent of probable cause to arrest. *State v. Avery*, 103 Wn.App. 527, 539, 13 P.3d 226 (2000). Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of the arrest would warrant a reasonably cautious person to believe an offense had been committed. *State v. Gillenwater*, 96 Wn.App. 667, 670, 980 P.2d 318 (1999). When officers are acting in concert, it is proper to determine probable cause from the information

available to all of them. *State v. Dunivin*, 65 Wn.App. 501, 507, 828 P.2d 1150 (1992). Probable cause to arrest requires more than a bare suspicion of criminal activity but does not require facts that would establish guilty beyond a reasonable doubt. *Gillenwater*, 96 Wn.App. at 670. The question of probable cause to arrest should not be viewed in a hypertechnical manner. *Id.* Probable cause to arrest must be judged on the facts known to the arresting officers before or at the time of the arrest. *Id.*

In Whitmire's case, he was driving in the lane of oncoming traffic and caused a collision, he was acting lethargic after the collision but before being administered any medication, and he admitted to using a significant amount of methamphetamine in the hours prior to the collision. While none of the factors alone may have established probable cause that Whitmire was driving under the influence, and while these factors may not prove beyond a reasonable doubt that Whitmire was driving under the influence, when considered together they do raise a reasonable ground of suspicion to warrant a cautious man in believing that he was driving under the influence at the time of the collision. Therefore, the troopers had probable cause or reasonable grounds to arrest Whitmire for driving under

the influence. Because Whitmire was also unconscious and under arrest at the time of the blood draw, the blood draw was proper under the implied consent statute.

Whitmire also asks the reviewing court to give weight to the fact that the trial court did not make a specific finding during the hearing on Whitmire's motion to suppress the blood test results and CrR 3.5 that Whitmire said to Trooper Moon that he had used methamphetamine. BRIEF OF APPELLANT 37. Whitmire cites *State v. Ward*, 125 Wn.App. 138, 104 P.3d 61 (2005), for the proposition that "the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue." However, whether Whitmire made that statement was not at issue in either the CrR 3.5 or the suppression portion of the hearing. The issues were (1) whether any statements made to Trooper Moon were voluntary and (2) whether the blood draw was legal.

Furthermore, according to *Ward*, "[i]n the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue." *Ward*, 125 Wn.App. at 145, 104 P.3d 61. If no inconsistency exists,

appellate courts may use “the trial court's oral ruling to interpret written findings and conclusions.” *Id.* In Whitmire’s case, when making its oral findings, the trial court stated as follows:

My gate keeping function on the 3.5 is not to determine whether or not the statement is to be believed by the officer. That is up to the trier of fact to determine. My gate keeping function is to determine if the statements are made as alleged – are they made under circumstances under which they are admissible? At the point in time the defendant was questioned about what he had had, if anything, to drink or ingest by way of drugs – there was probable cause to arrest him, as I said, even in the absence of that statement.

RP 110-11. The trial court was clear that its finding was that even absent the statement, the troopers had probable cause to arrest Whitmire under the DUI prong.

**(b) Whitmire was under arrest for the crime of vehicular assault.**

Again, there are three circumstances in which an officer may direct the administration of a blood draw under the implied consent statute. The first is discussed above. The second is where the driver is under arrest for the crime of vehicular assault. A person commits the crime of vehicular assault when (1) he drives a motor vehicle under the influence, in a reckless manner or with disregard for the safety of others and (2) the driving is a proximate cause of serious bodily injury to another person.

RCW 46.61.522. Again, as discussed above, Trooper Moon placed Whitmire under arrest prior to directing the nurse to administer the blood draw.

The trial court concluded that the troopers had probable cause to arrest Whitmire for vehicular assault under the “disregard for the safety of others” prong of the statute. CP 69-71. As such, the involuntary blood draw was proper under the implied consent statute. In his opening brief, Whitmire cites *Presley v. Lewis*, 13 Wn.App. 212, 534 P.2d 606 (1975), for the assertion that “falling asleep while operating a motor vehicle constitutes ordinary negligence.” While that court did hold that the defendant’s driving after having been told he might be affected by medication was “negligent as a matter of law”, that court did not hold that falling asleep while driving a motor vehicle rose to only mere negligence in all cases. Nor do the two other cases cited in support of that assertion state that falling asleep can only be mere negligence. See *Kaiser v. Suburban transportation System*, 65 Wn.2d 461, 398 P.2d 14, 401 P.2d 350 (1965); and *Theisen v. Milwaukee Automobile Mutual Insurance Company*, 18 Wis. 2d 91, 118 N.W. 2d 140, 143-44 (1962).

Also, while a defendant may later have another explanation for his “bad” driving that is not criminal, that possibility does not obviate probable cause to believe a defendant was driving with disregard for the safety of others.

Furthermore, Whitmire cites *State v. Elke*, 72 Wn.2d 760, 435 P.2d 680 (1967), in support of his assertion that “ordinary negligence is not a sufficient basis upon which to charge someone with the felony offense of vehicular assault.” However, that case actually supports the trial court’s finding in Whitmire’s case and the State’s argument. In *Elke*, the defendant was driving an automobile at 45 to 50 miles per hour on a dark, wet, but well-marked highway when he rounded a sweeping curve on wrong side of road at night and collided head-on with an oncoming car. *Elke*, 72 Wn.2d at 760-62, 435 P.2d 680. The Washington Supreme Court upheld the jury’s verdict of guilty on the charge of negligent homicide (by operation of a motor vehicle with disregard for the safety of others), finding that the evidence was sufficient to warrant the guilty verdict. *Id.* at 760-65.

As the jury did in *Elke*, the trial court had sufficient evidence to find Whitmire guilty of vehicular assault by driving with disregard for the

safety of others for driving on the wrong side of the road. As discussed above, the standard for a probable cause determination is even lower. As such, the troopers had probable cause to arrest Whitmire for vehicular assault by driving with disregard for the safety of others, even absent any further evidence that Whitmire was under the influence.

Whitmire also argues that an involuntary blood test can only be taken if there is probable cause to arrest under the DUI prong, rather than the disregard for the safety of others prong or the reckless driving prong. BRIEF OF APPELLANT 41. Whitmire ignores the plain language of the implied consent statute, allowing such a blood test of a driver is under arrest for “vehicular assault as provided in RCW 46.61.522” (meaning, necessarily, any prong of that statute). RCW 46.20.308(3); *see also State v. Mee Hui Kim*, 134 Wn.App 27, 34 139 P.3d 354 (2006) (an arrest for vehicular assault is, in and of itself, a proper basis to obtain a blood draw for testing, absent proof of DUI).

**(c) Whitmire was under arrest for DUI, and the arrest resulted from an accident in which another person was seriously injured.**

Again, there are three circumstances in which an officer may direct the administration of a blood draw under the implied consent statute. The

first two circumstances are discussed above. The third is where the driver is under arrest for DUI and the arrest resulted from an accident in which another person was seriously injured. Again, the victim sustained serious injuries from the collision. At issue under this basis for the blood draw is whether Whitmire was under arrest for DUI. DUI is a lesser-included offense of the crime of vehicular assault under the DUI prong of the vehicular assault statute. *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004) (for lesser offense to be included within charged offense, each of the elements of the lesser offense must be a necessary element of the offense charged). It is arguable that Whitmire was necessarily placed under arrest for DUI when he was placed under arrest for vehicular assault. If so, because the arrest also resulted from an accident in which another person was seriously injured, the involuntary blood draw was proper in this third type of circumstance under the implied consent statute.

**3. THE TRIAL COURT PROPERLY RULED THAT  
WHITMIRE'S STATEMENTS WERE VOLUNTARY AND  
THEREFORE ADMISSIBLE AT TRIAL.**

Whitmire argues that he was in custody at the time Trooper Moon questioned him regarding possible drug use and that *Miranda*<sup>1</sup> warnings were therefore required. Whitmire assigns error to the trial court's ruling that Whitmire was not in custody during the interrogation and that any statements made to Trooper Moon were therefore voluntary and admissible at trial. The State agrees *Miranda* warnings are required before custodial interrogation. A defendant is in custody for *Miranda* purposes if his freedom of movement is restricted to the degree associated with a formal arrest. *State v. Rotko*, 116 Wn.App. 230, 240-41, 67 P.3d 1098 (2003). Thus, not all police interviews are custodial for purposes of *Miranda*. *Rotko*, 116 Wn.App. at 241, 67 P.3d 1098. A trial court's determination of custodial interrogation is reviewed de novo. *State v. France*, 121 Wn.App. 394, 399, 88 P.3d 1003 (2004).

In *Rotko*, Division 2 held that a defendant who was subsequently arrested for criminal impersonation was not in police custody, for purposes of *Miranda*, when interviewed by an officer in a "family quiet room" at a hospital, noting the defendant was not handcuffed or physically restrained in any way, that the defendant was not told that he could not

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

leave, and that the officer testified that the case was in the investigation stage and that she had not yet decided whether to arrest the defendant. *Rotko*, 116 Wn.App. at 241, 67 P.3d 1098.

In *State v. Ferguson*, 76 Wn.App. 560, 886 P.2d 1164 (1995), a defendant appealed his conviction for vehicular homicide, arguing that the trial court erred in failing to suppress his inculpatory statements made to police officers before he was given *Miranda* warnings. When officers arrived at the scene of the collision, Ferguson was out of his car, sitting on a grassy knoll. *Ferguson*, 76 Wn.App. at 563, 886 P.2d 1164. An officer asked Ferguson several questions, which yielded several inculpatory admissions. *Id.* The officer then assisted with traffic control but kept an eye on Ferguson because a bystander had said Ferguson had been trying to leave the area. *Id.* Another officer arrived at the scene and also asked Ferguson whether he had been drinking, and Ferguson admitted he had. *Id.* By this time, an aid crew was assisting Ferguson. *Id.* The second officer told the crew not to transport Ferguson to the hospital just yet and went to check on the people in the other vehicle and to get his accident report forms out of his patrol car. *Id.* The officer returned to Ferguson, who by then had been strapped to a backboard and placed in an

ambulance. *Id.* at 564. The officer told Ferguson he was under arrest for vehicular homicide and read him his *Miranda* rights. *Id.*

The first officer testified at the suppression hearing that Ferguson had not been free to leave the scene at the time he questioned him. *Id.* He stated that if Ferguson had tried to leave, he would have restrained him. *Id.* The reviewing court found that the statements were properly obtained without the need for *Miranda* warnings. *Ferguson*, 76 Wn.App. at 568, 886 P.2d 1164.

“Custody” for the purposes of *Miranda* is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest. *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Sargent*, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). The inquiry into restraint is an objective one: how would a reasonable person in the suspect’s position have understood the situation? *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151 (1984). The issue is not whether a reasonable person would believe he was not free to leave, but rather “[w]hether such a person would believe he was in police custody of the degree associated with formal arrest”. 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.6, at 105 (Supp. 1991).

In *Berkemer*, the United States Supreme Court said:

[T]he usual traffic stop is more analogous to a so-called “Terry stop”, see *Terry v. Ohio*, 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 889] (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed ... a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. [T]he stop and inquiry must be reasonably related in scope to the justification for their initiation. Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond .... The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*.

*Berkemer*, 468 U.S. at 439-40, 104 S.Ct. at 3150 (footnotes, citations and some quotation marks omitted). *Accord*, *Heinemann v. Whitman Cy.*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986) (request for performance of field sobriety tests during routine traffic stop does not amount to custody so as to require *Miranda* warnings).

Whitmire may argue that this portion of the *Berkemer* opinion does not apply because there is nothing “ordinary” or “routine” about the investigation of a vehicular assault. However, the seriousness of the

potential traffic charge does not alter the analysis. Certainly, a driver who is involved in a serious collision is likely to be detained longer than a driver who is pulled over for committing a relatively minor traffic infraction. However, as the Supreme Court noted in *Berkemer*, “[t]he stop and inquiry must be reasonably related in scope to the justification for their initiation.” *Berkemer*, 468 U.S. at 439, 104 S.Ct. at 3150 (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

In Whitmire’s case, the fact that Trooper Moon testified (and the trial court then found) that Whitmire would not have been free to leave the hospital if he attempted to is not controlling of the issue under this case law. Whitmire was not subjected to the restraints commonly associated with being in custody such as being told he was not free to leave or being placed in handcuffs. He was receiving medical treatment just after the collision and was asked minimal questions in the presence of the medical staff treating him. Because he was not in custody at the time of questioning, the statements were voluntary and should be admissible at trial. Therefore, the trial court’s conclusions of law regarding the CrR 3.5 hearing were proper.

**4. EVEN IF *MIRANDA* WARNINGS WERE REQUIRED, THE ADMISSION OF THE STATEMENTS WAS HARMLESS ERROR.**

Admitting a confession elicited in violation of *Miranda* may be harmless error. *State v. France*, 121 Wn.App. 394, 400, 88 P.3d 1003 (2004), reconsidered on other grounds in *State v. France*, 129 Wn.App. 907, 120 P.3d 654 (2005). To find an error affecting a constitutional right harmless, the error must be harmless beyond a reasonable doubt. *France*, 121 Wn.App. at 400-01, 88 P.3d 1003. Harmless error requires evidence overwhelming enough to necessarily lead to a guilty verdict. *Id.* In Whitmire's case, although the trial court ruled that Whitmire's admission that he used methamphetamine would have been admissible at trial, it is evident from the stipulated facts at Whitmire's trial before the court that the court did not consider Whitmire's statement to Trooper Moon, as it was not listed among the exclusive facts to which the parties had stipulated. CP 74-76.

Furthermore, although the trial court did not consider Whitmire's statements in arriving at its guilty verdict, the statements still serve as a valid basis for establishing probable cause: evidence that would be inadmissible at trial may nevertheless be relied upon in making a probable

cause determination. *Bokor v. Dep't of Licensing*, 74 Wn.App. 523, 526, 874 P.2d 168 (1994).

#### **D. CONCLUSION**

The trial court made proper findings of fact. The trial court also properly denied Whitmire's motion to suppress. Finally, the trial court properly ruled that Whitmire's statements were voluntary. Therefore, Whitmire's conviction should be affirmed.

Respectfully submitted this May 25, 2007.

SUSAN I. BAUR  
Prosecuting Attorney

By:



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Chief Criminal Deputy Prosecuting Attorney  
Representing Respondent

## APPENDIX A

### **RCW 46.20.308. Implied consent--Test refusal--Procedures**

(1) 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.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

(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.

(5) 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.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the

person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol

concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of two hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required two hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required two hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the

department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a

declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the

suspension, revocation, or denial it may impose conditions on such stay.

(10)(a) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, or notifies the department of licensing of the intent to seek such a deferred prosecution, then the license suspension or revocation shall be stayed pending entry of the deferred prosecution. The stay shall not be longer than one hundred fifty days after the date charges are filed, or two years after the date of the arrest, whichever time period is shorter. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

(b) A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(c) The provisions of (b) of this subsection relating to a stay of a suspension, revocation, or denial and the cancellation of any suspension, revocation, or denial do not apply to the suspension, revocation, denial, or

disqualification of a person's commercial driver's license or privilege to operate a commercial motor vehicle.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

## APPENDIX C

### CRIMINAL RULE 3.5 CONFESSION PROCEDURE

**(a) Requirement for and Time of Hearing.** When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

**(b) Duty of Court to Inform Defendant.** It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

**(c) Duty of Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

**(d) Rights of Defendant When Statement Is Ruled Admissible.** If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such

weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 STEVEN WHITMIRE, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

NO. 35743-7-II  
Cowlitz County No.  
06-1-00184-0

CERTIFICATE OF  
MAILING

07 JUN 25 PM 1:35  
STATE OF WASHINGTON  
JMG

I, Audrey J. Gilliam, certify and declare:

That on the 4 day of ~~May~~<sup>June</sup>, 2007, I deposited in the mails of  
the United States Postal Service, first class mail, a properly stamped and  
address envelope, containing Brief of Respondent addressed to the  
following parties:

Court of Appeals  
950 Broadway, Suite 300  
Tacoma, WA 98402

James K. Morgan  
Attorney at Law  
1555 Third Ave, Suite A  
Longview, WA 98632

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

Dated this 4 day of ~~May~~<sup>June</sup>, 2007.

  
\_\_\_\_\_  
Audrey J. Gilliam