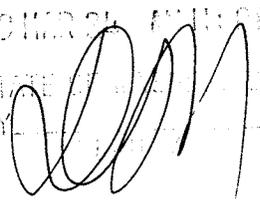


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY: 

No. 38502-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Geoffrey McClure,**

Appellant.

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Clallam County Superior Court Cause No. 08-1-00252-6

The Honorable Judges George L. Wood and Kenneth Williams

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. McClure's rights under the implied consent statute by admitting blood test results obtained in the absence of voluntary consent.
2. The trial court erred by adopting Finding of Fact No. 10.
3. The trial court erred by adopting Finding of Fact No. 15.
4. The trial court erred by adopting Finding of Fact No. 16.
5. The trial court erred by adopting Finding of Fact No. 17.
6. The trial court erred by adopting Conclusion of Law No. 3.
7. The trial court erred by adopting Conclusion of Law No. 4.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

To be valid, consent to a blood draw must be freely and voluntarily given. Here, Mr. McClure consented to a blood draw after the arresting officer implied that a search warrant was inevitable. Was Mr. McClure's consent to the blood draw involuntary?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

A state patrol officer pulled over a vehicle driven by Geoffrey McClure for expired tabs. CP 4. The trooper noticed a smell of alcohol, and asked Mr. McClure to get out of the car. CP 4. Noting that the smell was associated with Mr. McClure, the officer had Mr. McClure perform some tests. CP 4. Mr. McClure refused a portable breath test, and told the officer he was taking prescription medications. CP 4. The officer arrested him for Driving While Intoxicated. RP (9/25/08) 5-6, 8.

The trooper told Mr. McClure that he was going to ask for a Drug Recognition Expert to evaluate Mr. McClure. RP (9/25/08) 9. The trooper said that if no DRE were available, then they would go to the hospital for a blood draw. RP (9/25/08) 9. He said Mr. McClure could take or refuse the blood draw. RP (9/25/08) 10. The trooper told him that if he did not consent, then "I had the ability to request a search warrant since it was a felony DUI." RP (9/25/08) 15. When Mr. McClure commented that it seemed he could do "this either the hard way or the easy way," the trooper replied "you can think which ever way you want, you just do what you need to do for yourself." RP (9/25/08) 11, 17-18. Mr. McClure consented to a blood draw. RP (9/25/08) 12.

The state charged Mr. McClure with Felony DUI, and he moved to suppress the result of the blood test, arguing his consent was not voluntary. CP 27; Supp. CP, Motion to Suppress Blood Test, filed 8/5/08. At a suppression hearing, Mr. McClure testified that the trooper told him the test was mandatory, and that he would be restrained and forced to give a sample if he refused to give one voluntarily. RP (9/25/08) 29-30. He said he agreed to take the test because he felt threatened and didn't want a confrontation. RP (9/25/08) 30, 33. Mr. McClure's passenger confirmed that Mr. McClure was told he'd have to get his blood drawn. RP (9/25/08) 39-40.

The court denied the motion to suppress, and entered Findings of Fact which included the following:

10. Trooper Tilton told the defendant that he had the ability to request a search warrant for the defendant's blood if the defendant refused the blood draw.
15. The defendant told Trooper Tilton that they could either do this "the easy way, or the hard way."
16. Trooper Tilton responded that if that was how the defendant wanted to view it, then he was correct.
17. The defendant ultimately consented to the blood draw. CP 4-5.

The court found Mr. McClure guilty as charged after a stipulated bench trial. CP 22-25. After sentencing, Mr. McClure filed this timely appeal. CP 9-21.

### ARGUMENT

**MR. MCCLURE WAS CONVICTED BASED ON EVIDENCE OBTAINED IN VIOLATION OF HIS RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7 AND IN VIOLATION OF THE IMPLIED CONSENT STATUTE, RCW 46.20.308.**

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>1</sup> *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I,

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<sup>1</sup> The Fourth Amendment provides “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Evidence seized without a warrant is inadmissible at trial, subject to a few well-guarded exceptions. *State v. Eisfeldt*, 163 Wn.2d 628, 584, 185 P.3d 580 (2008). Exceptions to the warrant requirement are narrowly drawn, and the state bears the heavy burden of showing that an exception applies. *Eisfeldt*, at 584. Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *State v. Kypreos*, 110 Wn.App. 612, 616, 39 P.3d 371 (2002).

One exception to the warrant requirement is where a search is performed pursuant to lawfully obtained consent. *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005). Courts evaluate the voluntariness of consent under a ‘totality of the circumstances’ test. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). As part of the analysis, the court may weigh “any express or implied claims of police authority to search...” *Reichenbach*, at 132. Consent is involuntary when “granted ‘only in submission to a claim of lawful authority.’” *State v. O’Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003) (quoting *Schneckloth v. Bustamante*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

Under RCW 46.20.308, a driver in Washington “is deemed to have given consent...to a test or tests of 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...”<sup>2</sup> Prior to administration of a breath or blood test, the officer must have “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...” RCW 46.61.308(2). The officer is required to “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...” RCW 46.61.308(2).

Under the implied consent statute, the arrestee must be provided an opportunity to make a knowing and intelligent decision to refuse or to consent to a blood draw. *See State v. Whitman County Dist. Court*, 105 Wn.2d 278, 714 P.2d 1183 (1986). Inaccurate warnings require

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<sup>2</sup> The provision also makes clear that officers are not precluded “from obtaining a search warrant for a person's breath or blood.” RCW 46.20.308(1).

suppression. *Whitman County, supra*; see also *State v. Anderson*, 80 Wn. App. 384, 909 P.2d 945 (1996).

In this case, the trooper obtained Mr. McClure's consent to the blood draw by implying that a search warrant was inevitable. The trooper told Mr. McClure that he could seek a warrant if Mr. McClure refused to provide a blood sample "since it was a felony DUI." RP (9/25/08) 15, 17. When Mr. McClure said "we're gonna do this [the easy] or the hard the way [sic]?" Tilton (in essence) agreed. RP (9/25/08) 11, 14, 18. Although Tilton reiterated that Mr. McClure had a choice, the result of the conversation was that Mr. McClure believed his choice was between consenting to a blood draw or having blood drawn "the hard way"—pursuant to a search warrant. Tilton's response "effectively stated that the individual asked to consent [McClure] had no right to resist the search." *O'Neill*, at 589-590.

Under these circumstances, Mr. McClure's purported consent to the blood draw was not voluntary. *O'Neill, supra*. His blood sample was obtained in violation of both RCW 46.61.308 and his right to privacy under Wash. Const. Article I, Section 7. Accordingly, the conviction must be reversed, the blood test results suppressed, and the case dismissed with prejudice. *Whitman County, supra*; *O'Neill, supra*.

**CONCLUSION**

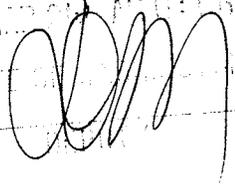
For the foregoing reasons, Mr. McClure's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on March 23, 2009.

**BACKLUND AND MISTRY**

  
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COURT OF APPEALS  
MARCH 23 2009  
STATE OF WASHINGTON  
BY: 

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Geoffrey McClure, DOC #756867  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
Port Angeles, WA 98362-0149

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 23, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 23, 2009.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
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