

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

NO. 38502-3-II

STATE OF WASHINGTON,

Respondent,

vs.

GEOFFREY McCLURE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 08-1-00252-6

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**BRIEF OF RESPONDENT**

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## **I. Counter-Statement of the Issues**

1. Whether the Defendant voluntarily consented to a blood draw to determine his blood alcohol concentration after his arrest for DUI.

## **II. Statement of the Case**

On June 30, 2008, Trooper Eric Tilton (Tilton) patrolled State Route (SR) 113 when he observed the Defendant, Geoffrey McClure (McClure), drive pass. Report of Proceedings (RP) (9/25/2008) 6-7. Tilton decided to stop the vehicle when he saw that the passenger was not wearing a seat belt. RP (9/25/2008) 7. As Tilton pursued the vehicle, he noticed that the vehicle's license tabs had expired. RP (9/25/2008) 7. Tilton activated his emergency lights, signaling the vehicle to pull over.

When Tilton contacted the driver, McClure, he smelled the odor of intoxicants coming from the vehicle. RP (9/25/2008) 7. Tilton asked if anybody in the vehicle had been drinking, and McClure's passenger admitted that she had one drink earlier that day. RP (9/25/2008) 7. McClure denied that he had anything to drink, but admitted taking prescribed medication sometime that morning.<sup>1</sup> RP (9/25/2008) 7, 9.

McClure handed Tilton an expired driver's license with a hole punched through it. RP (9/25/2008) 8. Tilton performed a driver's check

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<sup>1</sup> The traffic stop occurred about 12:30 p.m. RP (9/25/2008) 5-6.

and learned that McClure's license was suspended. RP (9/25/2008) 8. When Tilton returned to the vehicle, he could still smell the obvious odor of intoxicants. RP (9/25/2008) 8. Tilton asked McClure to step out of the car and perform some voluntary tests. RP (9/25/2008) 8, 21, 26. McClure refused to take a portable breath test (PBT), but consented to the standard field sobriety tests (FST). RP (9/25/2008) 14, 16, 26-27, 39. At the conclusion of the tests, Tilton arrested McClure for driving under the influence (DUI).<sup>2</sup> RP (9/25/2008) 8. Tilton read McClure his constitutional rights and placed him in the back of his patrol car.<sup>3</sup> RP (9/25/2008) 8, 14-15.

As Tilton searched the vehicle, he discovered additional containers of prescribed medication. RP (9/25/2008) 9, 16. After the search, McClure's passenger gave Tilton a phone number and asked the trooper to call her friend to see if she could give her a ride from the scene. RP (9/25/2008) 9, 16. Tilton returned to his patrol vehicle and asked the dispatch officer to make the call. RP (9/25/2008) 9.

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<sup>2</sup> After McClure admitted to taking prescribed medications, and the resulting search of the vehicle revealed additional prescriptive medications, Trooper Tilton had reasonable grounds to believe that he was under the influence of a drug. RP (9/25/2008) 14.

<sup>3</sup> McClure testified that after Tilton had placed him in the patrol vehicle, his passenger yelled that he was not "to blow on the test." RP (9/25/2008) 29.

Inside the patrol car, McClure asked what was going to happen to him. RP (9/25/2008) 9. Tilton explained that because the matter involved a “felony DUI,” he was going to request that a drug recognition expert (DRE) examine McClure due to the fact that he had admitted taking prescribed medication before driving his vehicle.<sup>4</sup> RP (9/25/2008) 9, 14, 16-17. Tilton explained that if the DRE was not available he would have to take McClure to the Forks Community Hospital for the purpose of a blood draw. RP (9/25/2008) 9-10, 14-15, 17.

Tilton informed McClure that he would have the opportunity to refuse the test. RP (9/25/2008) 10, 17. McClure asked, “What if I refuse [the blood draw]?” RP (9/25/2008) 17. Tilton responded that because the case involved a felony DUI, he had the ability to request a search warrant to conduct the necessary draw.<sup>5</sup> RP (9/25/2008) 15, 17.

After Tilton explained that McClure had the right to accept or refuse the blood draw, McClure sat quietly in the back of the patrol vehicle. RP (9/25/2008) 11, 17. McClure then stated, “I’m in a lot of trouble, and I can probably do this either the hard way or the easy way.” RP (9/25/2008) 11, 14, 17-18. Tilton stated that “you can think which

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<sup>4</sup> McClure testified that he did not remember a conversation about a DRE. RP (9/25/2008) 29.

<sup>5</sup> McClure testified that he did not remember any discussion about a search warrant. RP (9/25/2008) 31.

every way you want, you just do what you need to do for yourself, Mr. McClure.” RP (9/25/2008) 11, 14-15, 18. After this exchange, McClure stated that he had messed up and that he wanted to do what was easiest for the officer.<sup>6,7</sup> RP (9/25/2008) 18.

After McClure’s passenger departed the scene, Tilton drove McClure to the Forks Community Hospital. RP (9/25/2008) 12. At the hospital, Tilton, again, read McClure his constitutional rights from a DUI packet. RP (9/25/2008) 12, 18-19. Tilton then gave McClure the packet so that he could review his rights for himself. RP (9/25/2008) 12, 19.

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<sup>6</sup> McClure gave a different account of his conversation regarding the blood draw and his right to refuse. According to McClure:

Officer [Tilton] came over and he opened up one of the doors in the back, backseat where I was seated in the back of his patrol car and he said, “Geoff, I – we are going to have to take a mandatory blood test from you and this will be done at Forks Hospital and you can either take it voluntary – voluntarily or it will be mandatory that you take one, one way or the other. We do have to take a blood test from you,” and I said, “What happens if I don’t volunteer?” and he goes, “you’ll be put into restraints and no many – how many restraints it takes, we will take blood from you” and I – you know, I didn’t want any confrontation and I said, “I’ll volunteer to do that” and he had the [release] paper [work] with him right there. RP (9/25/2008) 29-30, 34.

<sup>7</sup> While the location of McClure’s passenger, a close family friend, at the time of the arrest was disputed, the passenger testified as follows:

I could hear Geoff telling him, “Well, do what you got to do then, cuz I’m not going to blow.” I could just – I just kept – I kept hearing the officer tell him he’s gonna have to take him to the hospital or he’s forced to take him to the hospital and draw blood because he’s not going to blow. RP (9/25/2008) 42.

McClure then signed the form, stating that the officer had read him his rights and that he had reviewed the document. RP (9/25/2008) 19.

Once McClure had reviewed his rights, Tilton read him an implied consent form for the blood draw.<sup>8</sup> RP (9/25/2008) 12 18-19. Again, Tilton gave McClure the implied consent form for his review. RP (9/25/2008) 12, 19. McClure then signed the document, stating that the officer had read him the form and that he had reviewed it. RP (9/25/2008) 19. Once he signed the document, McClure said that “he didn’t want to be a hassle and he just wanted to get this over.” RP (9/25/2008) 12, 19, 22-23. McClure consented to the blood draw, and there was no further discussion between him and Tilton. RP (9/25/2008) 12, 19, 22-23. The resulting blood draw produced a blood alcohol level of .13 (nearly two times the legal limit). RP (10/21/08) 19.

At a stipulated bench trial, the trial court found there was probable cause for the traffic stop, and that there was a reasonable suspicion based upon the odor of intoxicants to investigate whether McClure was driving under the influence. RP (10/21/08) 20. Because the resulting blood draw revealed a blood alcohol content of .13, the trial

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<sup>8</sup> McClure originally testified that he signed the implied consent form in the back of the patrol vehicle. RP 30-31. However, McClure later equivocated and said he signed the form at the community hospital. RP 35-36. McClure admitted that he had consumed alcohol and was heavily medicated at the time of his arrest and that his impairment may have affected his ability to recall events. RP (9/25/2008) 35.

court found McClure guilty of DUI.<sup>9</sup> RP (10/21/08) 20-21; CP 10. The trial court sentenced McClure to 36 months confinement and 24 months of community custody.<sup>10</sup> RP (10/31/08) 15-16. McClure filed the present appeal.

### III. Argument

#### A. THE EVIDENCE THAT SUPPORTS THE DEFENDANT'S CONVICTION WAS NOT OBTAINED IN VIOLATION OF ART. 1 § 7 OR RCW 46.20.308.

Washington appellate courts review findings of fact on a motion to suppress under the substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed. 2d 132 (2007). Substantial evidence is evidence that is sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* The appellate courts review the conclusions of law that pertain to the suppression of evidence de novo. *State v. Xiong*, 164 Wn.2d 506, 510, 191 P.3d 1278 (2008).

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<sup>9</sup> The trial court also sentenced McClure to 365 for the charge of driving while license suspended. CP 10.

<sup>10</sup> The trial court subsequently amended the period of community custody to 9-18 months. CP TBD (State. Supp., filed 12/19/2008).

Article I, section 7 of the Washington State Constitution provides greater protection to individual privacy rights than does the Fourth Amendment to the United State’s Constitution. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); *State v. Rose*, 146 Wn. App. 439, 455, 191 P.3d 83 (Div. 2, 2008). “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” CONST. art. I, § 7. In light of this protection, a warrantless search is per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. *State v. Eisfeldt*, 163 Wn.2d 628, 635, 185 P.3d 580 (2008); *Rose*, 146 Wn. App. at 455. The validity of a warrantless search is subject to de novo review. *State v. Kypreos*, 110 Wn. App. 612, 616, 39 P.3d 371 (Div. 1, 2002) (citing *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir. 1996)).

One exception to the warrant requirement occurs when law enforcement conducts a search pursuant to lawfully obtained consent. *State v. Reichenbach*, 153 Wn.2d 126, 131-32, 101 P.3d 80 (2004). To show valid consent to a search, the State must show that the defendant freely and voluntarily gave his or her consent. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Whether consent is voluntary is a question of fact and depends upon the

totality of the circumstances, including (1) whether *Miranda*<sup>11</sup> warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent. *Reichenbach*, 153 Wn.2d at 132 (citing *State v. Bustamante-Davila*, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999)). In addition, the appellate courts may weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose. *Id.* at 132 (citing *State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333 (1990)). The Washington Supreme Court has noted that "consent" granted "only in submission to a claim of lawful authority" is not given voluntarily. *State v. O'Neill*, 148 Wn.2d 564, 589, 62 P.3d 489, 503 (2003) (citing *Schneckloth v. Bustamante*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L.Ed. 2d 854 (1973)) (emphasis added).

Under RCW 46.20.308<sup>12</sup>, a person that operates a motor vehicle in Washington State consents to a test of his breath or blood if arrested

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<sup>11</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

<sup>12</sup> RCW 46.20.308(1) provides:

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

for an offense where the arresting officer has reasonable belief that the person driving was under the influence of an intoxicating liquor or drug. This implied consent statute requires that the arresting officer inform the person of his or her right to refuse a breath or blood test. RCW 46.20.308(2).<sup>13</sup> Under the statute, law enforcement must offer the arrestee the opportunity to make a knowing and intelligent decision to refuse, or consent to, a blood draw. *See State v. Whitman County Dist. Court*, 105 Wn.2d 278, 282, 714 P.2d 1183 (1986).

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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.

<sup>13</sup> RCW 46.20.308(2) provides:

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.

In the present case, this Court should find that McClure's appeal is without merit because there are substantial facts to show he freely and voluntarily consented to the blood draw after his arrest for DUI. This Court should affirm the conviction and sentence.

McClure relies on *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 503 (2003), to support his argument that Trooper Tilton obtained his consent improperly. See Appellant's Brief at 7. Specifically, McClure argues that Trooper Tilton obtained his consent via coercion when he *allegedly* implied that a "search warrant was inevitable." See Appellant's Brief at 7.

In *State v. O'Neill*, the Defendant was parked in the parking lot of a closed business that had been recently burglarized. 148 Wn.2d at 571-72. A police officer approached and asked him for identification. *Id.* The Defendant admitted that he had been driving while his license was revoked. *Id.* at 572. The officer asked the Defendant to step out of the vehicle. *Id.* When the Defendant complied, the officer saw what he believed was drug paraphernalia on the floorboard of the vehicle. *Id.* The officer asked the Defendant for his consent to search the vehicle, to which the Defendant said "no" and that the officer needed a search warrant. *Id.* at 573. The arresting officer responded that he did not need a warrant, but could simply arrest the Defendant for the drug paraphernalia

he had observed and then search the vehicle incident to arrest. *Id.* The arresting officer again asked for consent. *Id.* The discussion went back and forth several times. *Id.* Eventually, the Defendant consented to the search after the officer made repeated requests, emphasizing his authority to conduct the search incident to an arrest. *Id.* The officer discovered drugs and additional paraphernalia after searching the vehicle. *Id.* The officer then arrested the Defendant for unlawful possession of a controlled substance. *Id.* The Defendant successfully moved to suppress the evidence. *Id.* The State appealed to the Court of Appeals – Division I, which reversed. *Id.* The Defendant then appealed to the Supreme Court, which affirmed the trial court’s determination that there was no valid consent to the search of the vehicle. *Id.* at 571.

The Supreme Court in *O’Neill* noted “consent” granted “*only* in submission to a claim of lawful authority” is not given voluntarily. *Id.* at 589 (emphasis added). The Supreme Court highlighted the fact that the arresting officer’s conduct showed that he had no intention of arresting the Defendant and conducting a search incident to arrest – he merely claimed that he could and would do so. *Id.* The only reason behind the officer’s repeated representations of authority, that he could and would arrest the Defendant, was to obtain the Defendant’s consent. *Id.* This was coercive and improper.

The *O'Neill* Court did review the reasoning in *Commonwealth v. Mack*, 568 Pa. 329, 796 A.2d 967 (2002). See *O'Neill*, 148 Wn. At 590. In *Mack*, the officers informed the Defendant that they did not possess a warrant; that she was free to decline the officers permission to search; and that if she refused permission, the officers would have to get a search warrant. *Mack*, 796 A.2d at 970-71. While the *Mack* Court noted that the officers statement - that they would have to get a search warrant if the Defendant refused to consent to the search - was a factor it had to consider to evaluate whether consent was voluntarily given, it concluded that the officers simply advised the Defendant, truthfully, of the consequences of denying permission. 797 A.2d 971.

The *O'Neill* Court refused to find the same outcome because the arresting officer did not merely advise the Defendant of the consequence of refusal. 148 Wn.2d at 590. Instead, the arresting officer repeatedly stressed that he could and would arrest the Defendant in order to pressure him into granting consent – i.e. because it was futile not to consent. *Id.* at 591. Furthermore, *O'Neill* recognized that the officer's repeated statements were not merely informative, but indicia of coercion. *Id.*

The present case can be distinguished from *O'Neill*, and it more closely resembles *Mack*, because Trooper Tilton never pressured McClure to obtain his consent for the blood draw. The fact that Trooper

Tilton said he *had the ability* get a warrant did not make the statement coercive. See RP (9/25/2008) 15, 17. First, the officer stated that McClure, himself, needed to do what he believed to be the right course of action. RP (9/25/2008) 11, 14-15, 18. Second, the trooper never spoke to McClure in an intimidating manner. RP (9/25/2008) 40-41. Third, unlike *O'Neill*, Tilton made the challenged statement only once. RP (9/25/2008) 17. Finally, as in *Mack*, the challenged statement was informative, and the trooper provided it at the behest of McClure. RP (9/25/2008) 17. Under the totality of the circumstances, Trooper Tilton's statement that he had the ability to obtain a search warrant was not coercive.

Furthermore, pursuant to the factors identified in *Reichenbach*, 153 Wn.2d at 132, Trooper Tilton read McClure his *Miranda* rights on two separate occasions: immediately upon arrest and at the hospital. RP (9/25/2008) 8, 12, 14-15, 18-19. The officer twice informed McClure of his implied consent warnings and that he had the opportunity to refuse the blood draw. RP (9/25/2008) 11-12, 17-19. McClure reviewed both his *Miranda* and implied consent warnings on printed forms at the hospital. RP (9/25/2008) 12, 18-19. While there is nothing in the record to show McClure's level of education, there was never any testimony to show that he did not understand his rights and that he was not able to

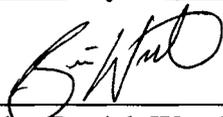
issue consent. As a result, this Court should find that McClure freely and voluntarily consented to the blood draw.

#### **IV. Conclusion**

In the present case, Trooper Tilton gave McClure ample opportunity to consider his rights, and make a knowing, intelligent, and voluntary waiver. There was no actual or implied threat or coercion in the single, challenged statement. Because Trooper Tilton did his best to explain the DUI process in a non-threatening way, and he even read the defendant his implied consent warnings on two separate occasions, reminding him that he had the right to refuse the blood draw. McClure had the ability, and the opportunity to choose whether or not he wanted to voluntarily submit to the blood draw.

Furthermore, it would be folly to suggest that an officer who answers a defendant's direct request for information, with a response that identifies an action that the officer is legally entitled to perform, actually threatens that individual. For the foregoing reasons, this Court should affirm the conviction and sentence.

DATED this 23rd day of May, 2009.

  
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