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NO. 69613-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Appellant.

REC'D
SEP 16 2013
King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. FIELD SOBRIETY TESTS ARE A SEARCH BECAUSE THEY REVEAL PRIVATE INFORMATION IN FAR MORE DETAIL THAN WOULD OTHERWISE BE EXPOSED TO PUBLIC VIEW.

In comparing Field Sobriety Tests (FSTs) to handwriting and voice samples, Brief of Respondent at 10-11, the State ignores a crucial point in the analysis: the type of information elicited. By requiring the person to perform precise and detailed tasks which are also unusual, if not non-existent, in the everyday lives of most people, the tests elicit detailed and precise information about the person's balance and coordination that is akin to the health care information obtained from urinalysis or DNA testing.

In contrast to the seizure of voice exemplars and facial characteristics, the taking of blood, urine, or DNA samples is considered a search within the meaning of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S. Ct. 1281, 1287, 149 L. Ed. 2d 205, 215 (2001) (urine samples); Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1966) (blood samples); State v. Garcia–Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010) (DNA samples).

It may be correct that a person's balance and coordination is regularly revealed in public, but not to the level of detail provided by the FTSs. A better analogy is to creeping up to the windows of a home to spy

inside. Activities inside the home may be observable to some degree to a person passing by on the street. But far greater detail can be observed by intruding into the curtilage.

Law enforcement is restricted to the level of detail that can be observed from a lawful viewpoint. See, e.g., Florida v. Jardines, ____ U.S. ____, 133 S. Ct. 1409, 1416, 185 L. Ed. 2d 495 (2013) ("a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'") (quoting Kentucky v. King, 563 U.S. ——, ——, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865 (2011)); State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) ("[P]olice officer's visual surveillance does not constitute a search if the officer observes an object with the unaided eye from a nonintrusive vantage point.") (citing State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986)). Police may not intrude into a person's private affairs in order to increase the level of observable detail. Id. That is what FSTs do.

A handwriting sample, to take the State's analogy, does not provide any more detail about the person's handwriting than do myriad other samples that exist and have been exposed to the public throughout the person's life. A guided sample provided to law enforcement does not provide more information than other, regularly exposed handwriting; it merely compiles that information in one place.

The State stretches the import of Heinemann v. Whitman Co., 105 Wn.2d 796, 718 P.2d 789 (1986), too far in trying to read in a holding that FSTs are not a search. The Heinemann court simply assumed FSTs should be analyzed as a seizure, rather than a search. The court engaged in no analysis whatsoever regarding whether the FSTs were an intrusion into private affairs or violated the reasonable expectation of privacy.

The court held the Sixth Amendment right to counsel did not apply because there was as yet no critical stage of the proceedings. Id. at 800. The court also held the FSTs were not testimonial, so the Fifth Amendment protection provided by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was not triggered. Heinemann, 105 Wn.2d at 801. Next, the court discussed JCrR 2.11(c), which requires that a person who is taken into custody be advised of the right to counsel immediately. Heinemann, 105 Wn.2d at 801-08. The court concluded the FSTs did not amount to custody. Id. at 808.

In the last paragraph of the opinion, with no analysis whatsoever, the court declared the seizure and questioning were reasonable under the Fourth Amendment and Article I, section 7 of the Washington Constitution. Id. at 809. The court's assumption that FSTs are a seizure and questioning is not a rejection of the argument that they amount to a search. On the contrary, the court's conclusion that the conduct of FSTs was not testimonial suggests

they are not statements at all but are more akin to physical evidence revealed through a search. Id. at 801.

2. COMMENTS ON EXERCISING THE RIGHT TO REFUSE CONSENT TO A WARRANTLESS SEARCH VIOLATE THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7.

This Court should reject the State's attempt to import the Fifth Amendment analysis from City of Seattle v. Stalsbroten, 138 Wn.2d 227, 978 P.2d 1059 (1999), into this case. The Fifth Amendment protections of Miranda at issue in that case are utterly distinct from the Fourth Amendment and Article I, Section 7 concerns at issue here. The Fifth Amendment is grounded in part on valid concerns that coerced confessions are inherently untrustworthy as evidence. Jackson v. Denno, 378 U.S. 368, 385-86, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). A violation occurs only when the coerced statement is presented at trial. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990). Stalsbroten held the Fifth Amendment privilege against self-incrimination was not violated because the refusal to engage in FSTs was not a coerced statement. 138 Wn.2d at 230. This holding says nothing about the privacy concerns underlying the Fourth Amendment and Article I, Section 7.[1]

[1] Because FSTs are a search, rather than a seizure, the State's analysis under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is irrelevant. See Brief of Respondent at 12-15. Terry permits a limited seizure for purposes of investigation. But

The Fourth Amendment and Article I, Section 7 both protect an individual's right to privacy. A violation occurs whenever that privacy is unreasonably invaded. Verdugo-Urquidez, 494 U.S. at 264; Young, 123 Wn.2d at 181. The remedy of excluding the evidence at trial is a means to an end, rather than an end in itself. Terry, 392 U.S. at 12. The goal is to protect privacy by deterring law enforcement from unreasonable intrusions into the private sphere. Id.

The refusal to engage in FSTs may not amount to coerced testimony. But the FSTs are an invasion of privacy, and individuals enjoy a constitutional right to refuse consent. Privacy rights are diluted and the ability to refuse consent is chilled when that refusal can be used as evidence of guilt. State v. Gauthier, 174 Wn. App. 257, 264, 298 P.3d 126 (2013) (discussing United States v. Prescott, 581 F.2d 1343 (9th Cir.1978)). To permit use of refusal as evidence of guilt encourages, rather than discourages, unwarranted invasions of privacy by law enforcement. Like the Heinemann court, the Stalsbroten court did not even consider whether FSTs were a search, whether that search was reasonable, whether a person had a right to refuse consent, or whether the goals of constitutional privacy protection would be served by permitting comment.

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the only search of the person it permits is for weapons that might threaten officer safety during the investigative detention. See Terry, 392 U.S. at 27.

The State points out that unlike many searches, the FSTs are virtually impossible to accomplish without the individual's cooperation. Brief of Respondent at 12 n. 6. This merely underscores the magnitude of the intrusion. It involves not just a person's "papers," "effects" or "private affairs," or even a person's home, which is given even more protection than other areas. U.S. Const. Amend IV; Const. Art. I, § 7; see, e.g., Jardines, ____ U.S. at ____, 133 S. Ct. at 1414 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). It involves an invasion via manipulation of the individual's physical body itself.

The fact that there may be another basis for the State to search a person's private sphere does not deprive the person of the right to refuse consent. This is not to say that a person may resist in any way, but search by lawful authority such as a warrant or a warrant exception is different from search by consent. By definition, if there is another basis to search, the individual's consent is not necessary. If the State could compel a person to consent, then that consent would be meaningless. Consent must be voluntary. Schneckloth v. Bustamante, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

The State argues the result in Gauthier, 174 Wn. App. 257, would have been different if the police had had a warrant to take a biological sample for DNA testing. Brief of Respondent at 20. This is far from certain.

After Gauthier's refusal, the police did obtain a warrant and, via that warrant, obtained the sample they sought, and the results of testing were admitted at trial. Gauthier, 174 Wn. App. at 261.

The court in Gauthier repeatedly referred to the fact that the search was a "warrantless" search. Id. at 259, 264; contra State v. Norlund, 113 Wn. App. 171, 53 P.3d 520 (2002) (reasonable to infer guilt from refusal to provide hair sample when presented with a valid court order). The FSTs in this case were also without a warrant. It may be that the intrusion was authorized under an exception to the warrant requirement, but a layperson cannot be expected to be familiar with the intricacies of search and seizure jurisprudence. When law enforcement does not present a warrant, an individual's refusal of consent is not an indication of guilt; it is the exercise of a constitutional right not to provide the police with a basis for searching without a warrant.

3. INSTRUCTING THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY" IMPROPERLY INFRINGED MECHAM'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The State argues Mecham fails to establish this Court's decision in State v. Meggyesy[2] was incorrect. Brief of Respondent at 21-31. Among other claims, the State assails Mecham's failure to address State v. Wilson, 9

[2] State v. Meggyesy 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

Wash. 16, 36 P. 967 (1894). The State maintains that Wilson held the trial court did not err by instructing jurors that "the law made it their duty" to find the accused guilty if they found from the evidence that the accused committed every act necessary to constitute the crime. Brief of Respondent at 28.

What the State fails to note, however, is that the Court also concluded "it would have been better that the word 'may' should have been substituted" for the word "must" in the phrase, "if they [jurors] found that the game was carried on for gain, they must find defendant guilty." Wilson, 9 Wash. at 21. Contrary to the State's position, this portion of Wilson supports Mecham's contention that, at the time the Constitution was adopted,[3] courts instructed juries using the permissive 'may' as opposed to the current practice of requiring the jury to make a finding of guilt. See also State v. Wentworth, 118 N.H. 832, 839, 395 A.2d 858, 863 (N.H. 1978) (in New Hampshire, jurors are instructed in part that "[I] f you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty.") (emphasis added).

For this reason and those contained in the Brief of Appellant, Mecham requests this Court reject the State's argument that Meggyesy and its progeny must continue to be followed.

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[3] See Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978) (referring to "original version of the constitution adopted in 1889").

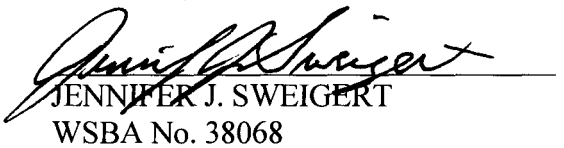
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Mecham asks this Court to reverse his convictions.

DATED this 16th day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69613-1-I
	)	
MARK MECHAM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] MARK MECHAM
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SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF SEPTEMBER 2013.

x Patrick Mayovsky

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