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No. 90598-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MARK TRACY MECHAM,
Appellant.

ON APPEAL FROM DIVISION ONE OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

AMICUS BRIEF OF THE
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS

WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

II. ISSUES PRESENTED

1. Because there does not appear to be a consensus of exactly what types of FSTs have evidentiary value, how many should be permitted and how far the “intrusion” may proceed, should this Court approve an unlimited holding that the administration of any and all field sobriety testing at the roadside is within the permissible scope of an investigative detention for impaired driving?

2. Does a *Terry* stop permit officers to require affirmative actions by a suspected drunk driver other than providing his or her name and complying with the requirements of the implied consent statute?

III. ARGUMENT

1. THE STATE FAILS TO DEMONSTRATE THAT FIELD SOBRIETY TESTING IS ALWAYS REASONABLE AND MINIMALLY INTRUSIVE

The State's argument that Washington's Field Sobriety Tests (FSTs) consist of only a few minimally intrusive tests that are specifically targeted to the purpose of an investigative detention for impaired driving is not entirely correct. It is true that the National Highway Traffic Safety Administration (NHTSA) has sanctioned three field sobriety tests: the horizontal gaze nystagmus, the one-leg stand and the walk-and-turn tests. *See* http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm. The Washington State Patrol, however, has standardized testing forms for two additional tests, the "Romberg/Balance" test and the "Modified Finger to Nose." *See* www.wsp.wa.gov/breathtest/docs/webdms/DRE_Forms/Forms/Standardized. There is no indication that the NHTSA has sanctioned these two additional tests.

Additionally, other Washington cases describe iterations of other FSTs. For example in *State v. Smith*, 130 Wn.2d 215, 219, 922 P.2d 811, 813-14 (1996), the State presented evidence that Smith "failed" FSTs "which included reciting the alphabet from a to z, walking a straight line, and standing on one leg with his arms at his sides while counting to 30 as fast as possible." Similarly in *State v. Cissne*, 72 Wn. App. 677, 678, 865 P.2d 564 (1994), the defendant was asked to perform six FSTs - "the one foot balance test, the finger-to-nose test, the alphabet test, the walk-and-turn test, the finger counting test, and the horizontal gaze nystagmus

(HGN) test.” *See also State v. Baity*, 140 Wn.2d 1, 6, 991 P.2d 1151, 1155 (2000) (discussing the 12-steps of the Drug Recognition protocol, which includes an “eye examination;” “divided attention tests;” “vital signs examination;” “darkroom examination of pupil size;” “examination of muscle tone;” and “examination of injection sites”). Absent some standardization and limitation regarding FSTs, this Court cannot be confident that the intrusion will remain minimal and yield reasonably reliable evidence. All the more reason for permitting defendants to refuse these purportedly voluntary tests without later, adverse consequences at trial.

Because there does not appear to be a consensus of exactly what types of FSTs have evidentiary value, how many should be permitted and how far the “intrusion” may proceed, this Court must reject the State’s request for the unlimited holding that the administration of any and all field sobriety testing at the roadside is within the permissible scope of an investigative detention for impaired driving.

2. ROADSIDE FIELD SOBRIETY TESTS ARE SEARCHES

As Mecham argued in the Court of Appeals and in his briefing to this Court, the administration of a FST is a search. Indeed, the overwhelming majority of states that have had opportunity to address this question agree. *See State v. Superior Court*, 149 Ariz. 269, 274, 718 P.2d

171, 176 (1986) (“Any examination of a person with a view to discovering evidence of guilt to be used in a prosecution of a criminal action is a search.”); *People v. Carlson*, 677 P.2d 310, 317 (Colo. 1984) (“Roadside sobriety testing constitutes a full ‘search’ in the constitutional sense of that term and therefore must be supported by probable cause.”); *State v. Lamme*, 19 Conn. App. 594, 599-600, 563 A.2d 1372, 1375 (1989); *State v. Taylor*, 648 So.2d 701, 703 (Fla.1995); *State v. Wyatt*, 67 Haw. 293, 302, 687 P.2d 544, 553 (1984) (“We cannot deny they (field sobriety tests) have a purpose of gathering evidence of the driver's criminal conduct.”); *State v. Stevens*, 394 N.W.2d 388, 390-391 (Iowa 1986); *Blasi v. State*, 167 Md. App. 483, 504, 893 A.2d 1152, 1167 (2006) (“we hold that the administration of field sobriety tests by a police officer during a valid traffic stop constitutes a search within the meaning of the Fourth Amendment to the U.S. Constitution.”); *Commonwealth v. Eckert*, 431 Mass. 591, 595-6, 728 N.E.2d 312 (2000) (“[T]he point at which the trooper's conduct intruded on the defendant's Fourth Amendment . . . rights was when . . . the trooper . . . asked the defendant to get out of his vehicle to perform field sobriety tests.”); *Hulse v. State. Dep't of Justice, Motor Vehicle Div.*, 289 Mont. 1, 18, 961 P.2d 75, 87 (1997) (“[W]e hold that field sobriety tests are not ‘merely observations’ of a person's physical

behavior, but, rather, constitute a search under the Fourth Amendment to the United States Constitution. . . .”).

Additionally, the State’s characterization of FSTs as seizures does not change what a detainee is subject to, the purpose of the tests, nor the protections which should be afforded under article 1, section 7 and the Fourth Amendment. As the designers of the FSTs proclaim: “The Standardized Field Sobriety Test (SFST) is a battery of three tests administered and evaluated in a standardized manner to obtain validated indicators of impairment and *establish probable cause for arrest.*” (emphasis added)

http://www.nhtsa.gov/people/injury/alcohol/sfst/appendix_a.htm. Field sobriety testing is designed to provide information to law enforcement that is inculpatory to the suspect. As the Arizona Supreme Court has observed in regard to FSTs: “Any examination of a person with a view to discovering evidence of guilt to be used in a prosecution of a criminal action is a search.” *Superior Court*, 149 Ariz. at 274.

For the foregoing reasons, including those argued by Mr. Mecham, the Court should hold that the administration of Field Sobriety Tests constitute a search under article 1, section 7 and the Fourth Amendment.

3. *TERRY V. OHIO* DOES NOT REQUIRE DETAINED SUSPECTS TO AFFIRMATIVELY ACT IN ANY WAY

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 1872, 20 L. Ed. 2d 889 (1968), authorizes law enforcement to make limited investigatory stops on only a showing of reasonable suspicion. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). The stop must be limited in scope so as to address “whatever reasonable suspicions legally justified the stop in the first place.” *State v. Arreola*, 176 Wn.2d 284, 293-294, 290 P.3d 983 (2012) (citing *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). While *Terry* empowers law enforcement to use force to detain and question a suspect, it puts no new affirmative duties upon the detained suspect.

While stopped pursuant to *Terry*, a suspect is not under an obligation to affirmatively do anything. All infringements on the suspect’s liberty pursuant to a lawful *Terry* stop are powers granted to law enforcement, not affirmative duties imposed upon the suspects. Law enforcement may use force to detain a suspect. *See Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 209 (1979) . They may conduct a limited search of the suspect’s outer garments if the officer reasonably believes that the “suspect is armed and presently dangerous.” *State v. Xlong*, 164 Wn.2d 506, 513-514, 191 P.3d 1278 (2008). Law enforcement may ask a moderate number of questions regarding the

suspect's identity and the purpose of the stop. *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004).

In contrast, a suspect is only under one affirmative duty when they are subject to a *Terry* stop: to provide his or her identity. See *Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177, 190-191, 124 S. Ct. 2451, 2454, 159 L. Ed. 2d 292 (2004); *State v. Steen*, 164 Wn. App. 789, 811, 265 P.3d 901 (2011); *State v. Stratton*, 139 Wn. App. 511, 515-516, 161 P.3d 448 (2007). After a valid *Terry* stop has begun,

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. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Berkemer v. McCarty, 468 U.S. 420, 439-440, 104 S. Ct. 3138, 3141, 82 L. Ed. 2d 317 (1984) (internal footnotes omitted); see also *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). All other infringements upon a suspect's liberty authorized under *Terry* are to ensure officer safety or to facilitate the gathering of information from another source. Significantly, a suspect is not obliged in any other way to assist law enforcement in his own inculcation.

Under certain circumstances Washington law allows the police to demand a detainee's participation in examinations that could tend to

inculcate the detainee. This occurs either when authorized by statute, *see* RCW 46.20 *et. seq.*, or when ordered by the court, *see* CrR 4.7(b). Precedent requiring a detainee to aid in an investigation of their own alleged criminal conduct under *Terry* does not exist.

In short, the State provides no precedent that would permit a law enforcement agent to compel a detainee to actively participate in an investigation into their own alleged illegal conduct on reasonable suspicion alone and without a court order.

4. EXAMINATIONS SIMILAR TO FIELD SOBRIETY TESTS MAY ONLY BE DEMANDED OF A DETAINEE AFTER THE STATE HAS OBTAINED A COURT ORDER SUPPORTED BY PROBABLE CAUSE

The State argued to the Court of Appeals, and to this Court in its opposition to review, that FSTs are in some ways similar in nature to fingerprinting, providing a voice exemplar, providing a handwriting exemplar, and examining the defendant's belongings. Indeed, some similarities are apparent: the examinations cannot be achieved without the participation of the detainee, the examinations document qualities of the detainee that are routinely exposed to the public, and the analysis of the examinations could result in either exculpatory or inculpatory evidence.

These tests share another quality: after charging they may only be authorized after a showing of probable cause. Criminal Rule 4.7(b)(2) allows either party to ask the court to allow or require the defendant to:

- (i) appear in a lineup;
- (ii) speak for identification by a witness to an offense;
- (iii) be fingerprinted;
- * * *
- (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;
- (vii) provide specimens of the defendant's handwriting;
- (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination....

Subpart (viii) of the rule would authorize the administration of FSTs. But, an order for these items would be entered only after a finding of probable cause to believe the detainee has committed a crime. Without such a finding, the State would be unable to secure an order for any form of discovery under CrR 4.7(b)(2).

A finding of probable cause is required to secure a suspect's participation in the kinds of examinations listed under CrR 4.7(b)(2) regardless of whether charges against a suspect have been filed. *See State v. Garcia-Salgado*, 170 Wn.2d 176, 185, 240 P.3d 153, 157 (2010) (forcibly obtaining a DNA sample from a detainee requires a warrant

supported by probable cause); *State v. Kalakosky*, 121 Wn.2d 525, 534, 852 P.2d 1064, 1069 (1993) (forcibly drawing a blood sample from a detainee requires a warrant supported by probable cause); *In re Armed Robbery*, 99 Wn.2d 106, 112, 659 P.2d 1092, 1096 (1983) (“We conclude, therefore, that an individual may not be ordered to participate in a lineup where no probable cause exists to believe that the individual has committed the offense under investigation.”). *But see Hayes v. Florida*, 470 U.S. 811, 817, 105 S. Ct. 1643, 1645, 84 L. Ed. 2d 705 (1985) (The Court acknowledged in dicta that “[t]here is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.”).

In sum, while the State argues that requiring the defendant to engage in the affirmative conduct that comprise FSTs is a “brief and minimal intrusion,” the State fails to provide a reasoned distinction between requiring a defendant to perform the FSTs and requiring the defendant to provide a handwriting sample or participate in a lineup. Because no principled distinction exists, an order to comply with such

testing should only issue from a neutral and detached magistrate after a finding of probable cause.

Similarly, no rationale can justify the application of the search incident to arrest doctrine to FSTs at the time of arrest when CrR 4.7(b)(2) requires the State to secure an order for such an examination at any point later in the prosecution. The rationale underpinning the search incident to arrest exception to the warrant requirement is to ensure officer safety and to prevent the concealment or destruction of evidence. *State v. MacDicken*, 171 Wn. App. 169, 174-175, 286 P.3d 413 (2012). The administration of FSTs serves neither of these purposes. *See Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1563, ___ L. Ed.2d ___ (2013) (observing that “BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and predictable manner” and rejecting the characterization that “BAC evidence is actively being destroyed with every minute that passes” after an arrest). A search incident to arrest, while supported by probable cause, should not logically afford the State with greater investigatory power than CrR 4.7(b)(2), which requires a court order.

Like the other forms of examination governed by CrR 4.7(b)(2), a lawful order to perform an FST, which constitutes compelled participation

in a suspect's own inculcation, should require probable cause and a court order.

DATED this 30th day of January, 2015.

Respectfully submitted,

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Dear Sir/Madame:

Enclosed for filing with the Washington State Supreme Court in *State of Washington v. Mark Tracy Mecham*, Supreme Court No. 90598-3, is the **Motion of Washington Association of Criminal Defense Lawyers to File *Amicus Curiae* Brief** along with the ***Amicus* Brief**.

Feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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