

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 04, 2015, 11:10 am
BY RONALD R. CARPENTER
CLERK

NO. 90598-3

RECEIVED BY E-MAIL *bj*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Petitioner.

**STATE'S ANSWER TO BRIEFS OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON,
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND WASHINGTON
FOUNDATION FOR CRIMINAL JUSTICE**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ARGUMENT IN RESPONSE TO AMICI'S ARGUMENTS</u>	1
1. FIELD SOBRIETY TESTS DO NOT REVEAL "INTIMATE DETAILS REGARDING A PERSON'S LIFE"	1
2. FIELD SOBRIETY TESTS ARE WITHIN THE PERMISSIBLE SCOPE OF AN INVESTIGATIVE DETENTION FOR IMPAIRED DRIVING	4
3. A REFUSAL TO COMPLY WITH AN OFFICER'S LAWFUL REQUEST THAT IS WITHIN THE SCOPE OF AN EXCEPTION TO THE WARRANT REQUIREMENT MAY BE USED AS EVIDENCE OF CONSCIOUSNESS OF GUILT	7
C. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Berkemer v. McCarty, 468 U.S. 420,
104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) 4, 5, 6

Camara v. Municipal Court, 387 U.S. 523,
87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) 8

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694,
10 A.L.R.3d 974 (1966) 5

South Dakota v. Neville, 459 U.S. 553,
103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) 7

Washington State:

Heinemann v. Whitman County, 105 Wn.2d 796,
718 P.2d 789 (1986) 6, 8, 10

State v. Baity, 140 Wn.2d 1,
99 P.2d 1151 (2000) 2, 4

State v. Baker, 56 Wn.2d 846,
355 P.2d 806 (1960) 4

State v. Boland, 115 Wn.2d 571,
800 P.2d 1112 (1990) 3

State v. Cissne, 72 Wn. App. 677,
865 P.2d 564 (1994) 2

State v. Gauthier, 174 Wn. App. 257,
298 P.3d 126 (2013) 8

State v. Hinton, 179 Wn.2d 862,
319 P.3d 9 (2014) 4

<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	3
<u>State v. Nordlund</u> , 113 Wn. App. 171, 53 P.3d 520 (2002).....	9
<u>State v. Quaale</u> , ___ Wn.2d ___, 340 P.3d 213 (2014).....	10
<u>State v. Staalsbrotten</u> , 138 Wn.2d 227, 978 P.2d 1059 (1999).....	7

Constitutional Provisions

Federal:

U.S. Const. amend. IV	8, 9
U.S. Const. amend. V	7

A. INTRODUCTION

In this case, Mecham argues that his refusal to perform field sobriety tests during an investigative detention based on reasonable suspicion of impaired driving cannot be used against him regardless of whether the officer has constitutional authority to administer field sobriety tests. The State argues that the administration of field sobriety tests is within the reasonable scope of an investigative detention based on reasonable suspicion of impaired driving. Because the administration of field sobriety tests falls within an exception to the warrant requirement under these facts, Mecham's refusal to cooperate with the officer's request is not a valid assertion of a constitutional right to refuse a warrantless search. It does not offend the constitution to use evidence of refusal against him.

B. ARGUMENT IN RESPONSE TO AMICI'S ARGUMENTS

1. FIELD SOBRIETY TESTS DO NOT REVEAL
"INTIMATE DETAILS REGARDING A PERSON'S
LIFE."

Washington Foundation for Criminal Justice (WFCJ) appears to argue that this Court should hold that a search warrant should be obtained before an officer may administer field sobriety tests.

Significantly, they do not cite to a single case from any jurisdiction that has so held.

WFCJ asserts that the horizontal gaze nystagmus portion of the field sobriety tests reveals “intimate details regarding a person’s life.” This is simply not true.

As detailed by this Court in State v. Baity, 140 Wn.2d 1, 4, 99 P.2d 1151 (2000), the drug recognition protocol incorporating horizontal gaze nystagmus was first developed in the 1970s and was standardized by the National Highway Traffic Safety Administration in 1989. In unanimously concluding that horizontal gaze nystagmus is admissible in court, this Court observed that the underlying scientific basis for it—that an intoxicated person will exhibit nystagmus¹—is “undisputed” and has been for decades. Id. at 12-13. While there is a possibility that nystagmus will occur without intoxication, that possibility goes to the weight of the evidence, not its admissibility. Id. at 14.

WFCJ argues that nystagmus may be caused by something other than alcohol intoxication or drug impairment. That appears to

¹ A helpful explanation of nystagmus is contained in State v. Cissne, 72 Wn. App. 677, 865 P.2d 564 (1994). Nystagmus can be characterized as “oscillation of the eyeballs, either pendular or jerky.” The frequency and amplitude of any nystagmus is affected by alcohol consumption, and increases as blood alcohol levels increase. Id.

be true. Likewise, a lack of balance, slurred speech and bloodshot and watery eyes may be caused by something other than alcohol intoxication or drug impairment. Officers use these observations to inform their judgment as to whether a driver who has been stopped is safe to continue driving, or is impaired. But when an officer observes nystagmus (or slurred speech or balance problems) that might be caused by an underlying medical condition, the officer does not obtain knowledge of the nature or the scope of the condition. Thus, the observation of nystagmus does not reveal to the officer in any appreciable way a brain tumor, or a neurological disorder, as WFCJ argues.

The involuntary jerking of the eye is nothing at all like the contents of one's garbage, the tracking of one's vehicle, or the text messages contained in one's cell phone. It does not reveal "a person's activities, associations, and beliefs." State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (holding a warrant required to search garbage). It does not provide a "detailed picture of one's life." State v. Jackson, 150 Wn.2d 251, 262, 76 P.3d 217 (2003) (holding that warrant required to install GPS device on suspect's vehicle). It does not expose a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations."

State v. Hinton, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (holding a warrant required to search text messages). This Court should reject WFCJ's unsupported contention that intimate details of a person's life are intruded upon when field sobriety tests are administered, such that a warrant should be required.

2. FIELD SOBRIETY TESTS ARE WITHIN THE PERMISSIBLE SCOPE OF AN INVESTIGATIVE DETENTION FOR IMPAIRED DRIVING.

Washington Association of Criminal Defense Lawyers (WACDL) argues that field sobriety tests are a search outside the scope of a valid investigative detention.² WACDL cites Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), as support for this proposition. However, the holding of Berkemer supports the State's position, and bears further explanation. In Berkemer, the defendant's vehicle was stopped for weaving in and out of its lane. Id. at 423. The officer stopped the vehicle and asked Berkemer to step out. Id. The officer noticed Berkemer had

² WACDL attempts to challenge the evidentiary value of field sobriety tests. However, this issue was not raised or litigated below. In State v. Baity, supra, 140 Wn.2d at 6, this Court unanimously approved the admissibility of a drug recognition protocol that included an examination of the suspect's eyes and the divided attention tests that are commonly referred to as field sobriety tests. And indeed, field sobriety tests have been used as evidence in Washington for decades. See State v. Baker, 56 Wn.2d 846, 850, 355 P.2d 806 (1960). There is nothing in the record of this case that would cast doubt on the continuing validity of Baity's holding.

difficulty standing. Id. The officer concluded that he would place Berkemer under arrest, but did not advise him of that. Id. The officer asked Berkemer to perform a field sobriety test, which he failed. Id. The officer asked Berkemer whether he had been using intoxicants, and he replied that he had drunk two beers and smoked several joints of marijuana. Id. The officer then placed Berkemer under arrest and transported him to jail. Id. After arrest, Berkemer was questioned further and made additional incriminating statements. Id. at 423-24. He was never advised of his Miranda³ rights. Id. at 424.

The Court issued several holdings in Berkemer. First, the Court held that Miranda warnings apply to all arrests, including those for misdemeanor traffic offenses. Thus, Berkemer's custodial statements made after his arrest and without proper warnings were inadmissible. Id. at 434. But the Court held that Miranda warnings were not required before Berkemer was placed under formal arrest, because the officer's actions prior to that point were consistent with an investigative detention. Id. at 439.

In reaching this conclusion, the Court noted that a police officer may detain a person he believes has committed a crime as

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

long as the scope of inquiry is reasonably related to the reason for the detention. Id. at 440. In finding that the roadside inquiry of Berkemer was an investigative detention, not an arrest, the Court stated, "From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest." Id. at 442. *In other words*, the Court held that a field sobriety test was within the reasonable scope of an investigative detention for impaired driving, and did not convert the stop into an arrest.

This Court relied on Berkemer in Heinemann v. Whitman County, 105 Wn.2d 796, 718 P.2d 789 (1986), stating, "We, too, hold that a request for the performance of field sobriety tests during a routine traffic stop does not *alone* indicate that the motorist would feel subjected to coercive restraints comparable to those associated with a formal arrest." Id. (emphasis in original). Both the United States Supreme Court and this Court have approved field sobriety tests as being within the permissible scope of an investigative detention for impaired driving.

3. A REFUSAL TO COMPLY WITH AN OFFICER'S
LAWFUL REQUEST THAT IS WITHIN THE SCOPE
OF AN EXCEPTION TO THE WARRANT
REQUIREMENT MAY BE USED AS EVIDENCE OF
CONSCIOUSNESS OF GUILT.

The American Civil Liberties Union (ACLU) argues that in all circumstances a suspect's consent "must be without unknown adverse consequences" in order for refusal to be admissible. However, the ACLU fails to identify any constitutional underpinning for such a holding. In South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), the United States Supreme Court held otherwise. The South Dakota statute at issue permitted drivers suspected of impaired driving to refuse to submit to a blood-alcohol test, but permitted the refusal to be used as evidence at trial. Id. at 560. The Court held that such a refusal is not protected by the Fifth Amendment, a holding that this Court followed in State v. Staalsbrotten, 138 Wn.2d 227, 978 P.2d 1059 (1999). The Court *a/so* held that it did not violate the Due Process Clause to use evidence of refusal against the defendant even though he was "not fully warned of the consequences of refusal." Neville, 459 U.S. at 565-66. The Court held that "we do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his

refusal could be used against him at trial.” Id. at 565. A failure to warn is not an implicit promise to forgo use of evidence. Id. at 566. The use of the evidence of refusal comports with the “fundamental fairness required by Due Process.” Id.⁴

The ACLU's argument confuses the right to refuse to consent to a search with no constitutional basis with a refusal to cooperate with a lawful request made within the scope of a valid investigatory detention. For example, it is undisputed that a suspect can refuse to consent to a warrantless search of his home as long as that search does not fall within any exceptions to the warrant requirement. That refusal cannot be used against him as consciousness of guilt evidence without placing an impermissible burden on his rights under the Fourth Amendment. See State v. Gauthier, 174 Wn. App. 257, 264, 298 P.3d 126 (2013); Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (homeowner cannot be criminally prosecuted for refusing to consent to warrantless search of home). But a defendant cannot refuse to cooperate with the execution of a warrant. And if the defendant does so, his refusal to cooperate is admissible as

⁴ The right to be informed of the consequence of refusing a breath test in Washington is purely statutory, and is contained in the implied consent statute. Heinemann, 105 Wn.2d at 281-83.

evidence of guilt. State v. Nordlund, 113 Wn. App. 171, 188, 53 P.3d 520 (2002). Using the refusal as evidence does not impermissibly burden a constitutional right, because there was no constitutional right to refuse. The defendant does not need to be warned of the possible consequences of refusal in order for that evidence to be admissible. Refusal evidence only burdens Fourth Amendment rights when the search or seizure would violate the Fourth Amendment without the consent of the suspect. When the search or seizure has a valid constitutional basis, the use of refusal evidence as consciousness of guilt does not burden the Fourth Amendment.

The holding urged by the ACLU would have broad and unsupportable application. In the course of a Terry stop, an officer can lawfully request that a suspect remove his hands from his pockets. If the suspect refuses to do so, is the suspect's refusal to remove his hands inadmissible? If the suspect refuses a lawful request to step out of a vehicle during a traffic stop, is that refusal inadmissible?

The holding urged by the ACLU would be harmful and counterproductive from a public policy standpoint. Under their reasoning, if the officer orders a suspect to do an act during an

investigative detention, refusal to cooperate is admissible. But if the officer instead politely requests a suspect to do an act, as in this case, then refusal to cooperate would be inadmissible. Such a holding would require officers to use more force and compulsion than is necessary in investigative detentions, and would make for bad public policy.

Likewise, there are important public policy reasons why evidence of refusal to perform field sobriety tests should be admissible. As Justice Owens noted in her dissent in State v. Quale, ___ Wn.2d ___, 340 P.3d 213, 223 (2014), this Court must be careful not to “incentivize[] drunk drivers to be uncooperative.” As this Court recognized in Heinemann:

The in-the-field investigation of a suspected driver under the influence creates a difficult situation. The officer attempts to remove the driver under the influence from the roads as quickly as possible according to set guidelines. The driver may attempt to cooperate with the police as much as necessary while trying to protect his or her right to privacy and right against self-incrimination. The remaining driving public wants both their roads free from drunk or drugged drivers *and* their individual right of privacy protected. We are given the task of setting guidelines for the officer that must be realistic and effective in dealing with suspected drivers under the influence while maintaining constitutional privacy rights for the individual on Washington roads.

Heinemann, 105 Wn.2d at 799 (emphasis in original). While the practicalities of field sobriety tests prevent an investigating officer

from compelling a suspect to perform these tests, those practicalities do not confer any constitutionally protected status on refusal. A refusal to comply with a lawful request to perform field sobriety tests made during an investigative detention for impaired driving is admissible as evidence of consciousness of guilt.

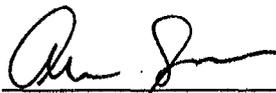
C. CONCLUSION

In this case, evidence of Mecham's refusal to perform field sobriety tests was not constitutionally protected. His refusal was properly admitted as consciousness of guilt without inferring guilt from the exercise of a constitutional right or violating due process. The conviction should be affirmed.

DATED this 4th day of March, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner, Jennifer Sweigert, containing a copy of the State's Answer to Briefs of Amicus Curiae, in STATE V. MECHAM, Cause No. 90598-3, in the Supreme Court, for the State of Washington.

Today I directed electronic mail addressed to the attorney for the amicus curiae ACLU of Washington, Cynthia Jones, Sarah Dunne, Nancy Talner, and Douglas Klunder, containing a copy of the State's Answer to Briefs of Amicus Curiae, in STATE V. MECHAM, Cause No. 90598-3, in the Supreme Court, for the State of Washington.

Today I directed electronic mail addressed to the attorney for the amicus curiae WACDL, D. Jack Guthrie and Suzanne Elliott, containing a copy of the State's Answer to Briefs of Amicus Curiae, in STATE V. MECHAM, Cause No. 90598-3, in the Supreme Court, for the State of Washington.

Today I directed electronic mail addressed to the attorney for the amicus curiae Washington Foundation for Criminal Justice, Ryan Boyd Robertson, containing a copy of the State's Answer to Briefs of Amicus Curiae, in STATE V. MECHAM, Cause No. 90598-3, in the Supreme Court, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

3/4/15
Date

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Cc: Summers, Ann; cjones@joneslegalgroup.net; dunne@aclu-wa.org; talner@aclu-wa.org; klunder@comcast.net; djg@mckay-chadwell.com; suzanne-elliott@msn.com; ryan@robertsonlawseattle.com
Subject: RE: State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Received 3-4-15

From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
Sent: Wednesday, March 04, 2015 11:09 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Summers, Ann; cjones@joneslegalgroup.net; dunne@aclu-wa.org; talner@aclu-wa.org; klunder@comcast.net; djg@mckay-chadwell.com; suzanne-elliott@msn.com; ryan@robertsonlawseattle.com
Subject: State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Please accept for filing the attached document (State's Answer to Briefs of Amici Curiae American Civil Liberties Union of Washington, Washington Association of Criminal Defense Lawyers and Washington Foundation for Criminal Justice) in State of Washington v. Mark Tracy Mecham, Supreme Court No. 90598-3.

Thank you.

Ann Summers
Senior Deputy Prosecuting Attorney
WSBA #21509
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-477-1909
E-mail: Ann.Summers@kingcounty.gov
E-mail: PAOAppellateUnitMail@kingcounty.gov
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at Ann Summer's direction.

CONFIDENTIALITY NOTICE

This e-mail message and files transmitted with it may be protected by the attorney / client privilege, work product doctrine or other confidentiality protection. If you believe that it may have been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, and then delete it. Thank you.