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SUPREME COURT NO. 90598-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Petitioner.

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

The Honorable Palmer Robinson, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

JENNIFER J. SWEIGERT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ISSUES

1. Did the State violate the Fourth Amendment and Article I, Section 7 when it used petitioner's refusal to consent to voluntary warrantless field sobriety testing as evidence of guilt?

2. Because it manipulates the body to reveal private information, is field sobriety testing a search under the Fourth Amendment and Article I, Section 7?

3. Did the field sobriety testing in this case fail to meet the requirements of Terry v. Ohio¹ or any other exception to the general rule that warrantless searches are per se unreasonable?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Mecham with felony driving under the influence of intoxicating liquor (DUI), driving while license suspended/revoked in the first degree, and driving in violation of the ignition interlock device requirement. CP 45.² The trial court denied motions to suppress Mecham's refusal to consent to field sobriety testing and ruled that,

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

² Only the DUI was tried to the jury.

even if the tests are a search, there was probable cause. 1RP³ 92; 2RP 6-11, 39-45; 4RP 95-98; CP 69.⁴ The jury found Mecham guilty of felony DUI. CP 87, 130, 135. CP 147-49.

On appeal, Mecham relied on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), and again argued comment on his decision not to consent to field sobriety testing violated the Fourth Amendment and Article I, Section 7. The Court of Appeals assumed field sobriety testing is a search but held Mecham's refusal was properly used as evidence of guilt because the officer had a right to require the testing without a warrant under Terry.

2. Substantive Facts

Mecham was pulled over after Officer Scott Campbell ran a random license check on his car and noticed an outstanding warrant. 1RP 49. During the arrest, Campbell noticed Mecham's breath smelled of intoxicants, his movements were sluggish, his speech was slurred and repetitive, and he appeared intoxicated. 3RP 20. Campbell asked Mecham,

³ There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 23, 24, 2012; 2RP – Oct. 25, 29, 2012; 3RP – Oct. 30, 2012; 4RP – Oct. 31, 2012; 5RP – Nov. 1, 8, 19, 2012.

⁴ The initial motion to suppress and written ruling address only the Fifth Amendment. CP 25-26, 143-46; 1RP 39-40. However, the motion to reconsider and subsequent oral ruling addressed challenges under the Fourth Amendment and Article I, Section 7. CP 51-55; 2RP 39-45.

“Would you mind doing voluntary field sobriety tests?”⁵ 2RP 45; 3RP 21-22. Mecham declined. 3RP 21.

When Campbell approached Mecham’s car to shut the doors, he saw an open beer can with a straw in it behind the passenger seat. 3RP 23. At the police station, Mecham refused an alcohol breath test despite being advised his license would be suspended and his refusal could be used against him at trial. 3RP 27-31.

Officer Darrell Moore applied for a search warrant to test Mecham’s blood. 3RP 33. Moore testified Mecham appeared intoxicated based on the odor of intoxicants, slurred speech, and glazed, bloodshot eyes. 4RP 16. Regarding the field sobriety tests, Moore testified, “I would always like to see someone take sobriety tests, see what they’re going to perform like so I have a better picture of . . . what could be happening.” 4RP 32-33. He explained, “When you look at a situation where someone refuses a sobriety test, that person has limited my ability to obtain more evidence.” 4RP 32.

Debra McArthur drew Mecham’s blood at Overlake Hospital approximately three hours after his arrest. 3RP 124, 134. She noticed no signs of impairment. 3RP 135-38. Mecham appeared angry at the officers, but his mood improved with McArthur’s gentle ribbing. 3RP 135, 145; 4RP

⁵ The tests include the horizontal gaze nystagmus (a test for involuntary jerking of the eye), the one-leg stand, and the turn-and-walk test, in order to gauge the ability to listen, follow directions, and perform simple tasks involving balance. 3RP 21-22.

66. From this change, Moore concluded Mecham was “impaired and limiting my ability to take sobriety tests.” 4RP 39.

The forensic toxicologist testified Mecham’s blood ethanol content three hours after driving was .050 grams per 100 milliliters, a level at which most people cannot safely drive. 5RP 19, 25-27. Taking the highest rate of burn-off, it could have been as high as .08 or as low as .065 within two hours of his driving. 5RP 35.

In closing, the State argued Mecham was impaired based on the evidence of slurred speech, sluggish movements, the odor of intoxicants, and his blood alcohol content. 5RP 88. The State also argued Mecham’s refusal to participate in field sobriety tests was an attempt to frustrate and delay the investigation. 5RP 84. The prosecutor repeatedly argued Mecham refused because he knew the tests would reveal his guilt. 5RP 84, 89, 113, 115.

C. ARGUMENT

1. COMMENTS ON MECHAM’S RIGHT NOT TO CONSENT TO A WARRANTLESS SEARCH VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7.

The question before this Court is: when may the State comment on an individual’s decision not to consent to a warrantless search?⁶ The Court of Appeals held the answer turns on whether the search is otherwise

⁶ The Court of Appeals assumed field sobriety testing is a search. Mecham, 181 Wn. App. at 942. Section C.2. of this brief argues in greater detail why field sobriety testing is a search under both the Fourth Amendment and Article I, Section 7.

constitutional. State v. Mecham, 181 Wn. App. 932, 942, 331 P.3d 80, 85 (2014) rev. granted, ___ Wn.2d ___ (Nov. 5, 2014). Mecham urges this Court to reject this approach and hold that an individual may say “No,” whenever the government asks for consent to search.

First, the right to refuse consent is implicit in the concept of voluntary consent as an exception to the warrant requirement. Second, given the intricacies of search and seizure law, it is illogical to make that right contingent on whether another exception to the warrant requirement applies. A better distinction is to penalize only a person who obstructs justice or creates a risk of violence by refusing to comply with an officer’s claim of lawful authority. This distinction is consistent with state and federal cases discussing consensual searches. Finally, Mecham did not refuse to comply. He was expressly told the tests were voluntary, and he opted not to consent, which he should be permitted to do without penalty under the Fourth Amendment and Article I, Section 7.

- a. When an Officer Requests Consent to Search, the State May Not Comment on an Individual’s Exercise of the Right to Refuse.

Washingtonians enjoy the right to refuse consent to a warrantless search without penalty. U.S. Const. amend. IV; Const. art. I, § 7; State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010); Gauthier, 174 Wn. App. at

267.⁷ Comments on the exercise of the right to refuse consent to a warrantless search violate the Fourth Amendment and Article I, Section 7. United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978); Jones, 168 Wn.2d at 725; Gauthier, 174 Wn. App. at 267. The Court of Appeals distinguished these cases and held Mecham had no right to refuse because the search was valid under Terry. Mecham, 181 Wn. App. at 942. But the Court of Appeals erred. The right to refuse consent to a warrantless search does not vanish merely because an appellate court later concludes another exception to the warrant requirement applied.

The right to refuse exists whenever consent is requested. See State v. Ferrier, 136 Wn.2d 103, 117, 960 P.2d 927, 933 (1998) (right to refuse is implicit in request). The fact that an officer asks for consent tells us there is no lawful claim of authority and, therefore, the search is voluntary and we have the right to refuse. Id. The right to refuse consent “is implicit in the request made by the police.” Id. Saying “No” is nothing more than a decision to exercise one’s privacy rights and insist that the government follow the requirements of the law. Whenever police ask for consent, the right must exist to say “No.”

⁷ See also State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997) (written consent to search contained “a clear statement that the Defendant had ‘the lawful right to refuse to consent to such a search.’”) cert. denied, 523 U.S. 1008 (1998); State v. Smith, 115 Wn.2d 775, 790, 801 P.2d 975 (1990) (written consent to search included “specific language that documented his right to refuse consent.”).

The right to refuse is part and parcel of the consent exception to the warrant requirement. “No matter how subtly,” consent may not be coerced “by explicit or implicit means, by implied threat or covert force.” Schneckloth v. Bustamonte, 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The very idea of consent necessarily implies as a corollary, the ability to say “No” without the coercion of a penalty such as an inference of guilt at trial.

Although no statute specifically establishes a right to refuse field sobriety testing, the Court of Appeals erred in concluding Mecham had no right to withhold his consent. Mecham, 181 Wn. App. at 941. Field sobriety testing is a search. See Argument Section C.2., infra; Mecham, 181 Wn. App. at 942. A request for consent to search (be it field sobriety testing or any other search) implicates the right to invoke constitutional privacy rights by withholding consent. Ferrier, 136 Wn.2d at 117.

b. The Right to Refuse Consent Does Not Depend on Whether Another Exception to the Warrant Requirement Applies.

If Mecham had consented to field sobriety tests, it would not matter whether there was probable cause or reasonable suspicion or a warrant. See Bustamonte, 412 U.S. at 222 (“search authorized by consent is wholly valid”). The only relevant fact would be whether his consent was voluntary. See id. (when State relies on consent to justify search, it must prove consent

was freely and voluntarily given). Because the constitutionality of the search is irrelevant to his ability to consent, it is also irrelevant to his ability to refuse that consent.

Moreover, even lawyers and judges find it difficult to predict which warrantless searches will be upheld under the Fourth Amendment or Article I, Section 7. A person facing a police officer's request for voluntary consent to search should not be expected to do so. The Alaska Supreme Court agreed individuals should not be penalized "for their ignorance of the arcane intricacies of search and seizure law by allowing mistaken assertions of perceived fourth amendment rights to be used as evidence of guilt." Elson v. State, 659 P.2d 1195, 1199 (Alaska 1983). The court recognized, "the crucial question is not whether a search is illegal, but rather whether the admission of a refusal to consent to a search, legal or illegal, will inhibit the exercise of fourth amendment rights." Id. at 1198.

Permitting comment on refusals will do precisely that. If the State can use refusal as evidence of guilt on this unpredictable basis (the ultimate legality of the search), then "future consents would not be freely and voluntarily given." Prescott, 581 F.2d at 1351 (internal quotes omitted). An individual facing a police request to search would have to decide, without advice of counsel, whether to consent to evidence that might otherwise be inadmissible, or risk that refusal will be used as evidence of guilt. Elson, 659

P.2d at 1198-99. The inability to predict when the right to say “No” might apply will work as government coercion to consent. Because the validity of consent does not depend on the existence of another exception to the warrant requirement, neither should the right to withhold that consent.

By contrast, the distinction between voluntary consent and a lawful claim of authority is easy to grasp. Penalizing only a refusal to comply with a claim of lawful authority protects the voluntariness of consensual searches while still appropriately attaching penalties to conduct that obstructs justice or increases the risk of violence. See Prescott, 581 F.2d at 1350-51.

In Prescott, the Ninth Circuit explained that, while there is certainly no right to forcibly resist or refuse to comply with an officer’s claim of lawful authority, the situation is markedly different when the officer does not claim such authority. Id. When an officer demands entry but presents no warrant, a person may presume the officer has no right to enter the home and refuse admission. Id. “He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer.” Id. Regardless of the person’s motivation, the “passive” exercise of the right to refuse consent to a search cannot be evidence of a crime. Id. at 1351.

c. Mecham's Refusal May Not Be Penalized Because He Was Expressly Told the Tests Were Voluntary.

Officer Campbell did not claim lawful authority to compel field sobriety tests. 2RP 45; 3RP 21-22. He presented Mecham with a voluntary choice. 2RP 45; 3RP 21-22. Only after Mecham made that choice, in reliance on Campbell's representation that it was a voluntary one, did the State claim there was lawful authority and Mecham could be penalized for failing to comply with it. This was in the nature of a bait and switch. A request for consent to search should not be used as a trick to obtain a refusal that can be used as substantive evidence of guilt.

The Court of Appeals held the State could argue Mecham's refusal was evidence of guilt because Mecham had no right to refuse consent, and analogized to State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002). Mecham, 181 Wn. App. at 946. Nordlund's refusal to give a hair sample pursuant to a court order was used as evidence of his guilt at trial. 113 Wn. App. at 189. As discussed above, the right to refuse consent should not hinge on whether there was a lawful basis (such as a court order) for the search other than consent. Moreover, the analogy to Nordlund fails because Nordlund did not withhold consent to a voluntary search. The hair sample at issue was court ordered, not voluntary. Id. at 187. The issue in Nordlund was not refusal of consent, but "refusal to submit." Id. at 188. The State was

permitted to comment on the refusal to comply with a lawful court order. Id. at 187-90. But Mecham did not refuse to comply with an order. He said “No” when asked if he would consent.

Although there is no practical way to force a noncompliant person to engage in field sobriety testing, Mecham agrees there is no right to refuse to *comply* with an officer claiming a lawful right to search, just as there is no right to resist arrest. Comment on refusal to comply with lawful authority would be permitted. Nordlund, 113 Wn. App. at 188.

But that is not this case. Campbell asked for Mecham’s voluntary consent. When Mecham declined to give it, his decision was protected under the Fourth Amendment and Article I, Section 7. The State cannot penalize the exercise of that constitutional right by asking the jury to use it to infer Mecham’s guilt. Prescott, 581 F.2d at 1351; Jones, 168 Wn.2d at 725; Gauthier, 174 Wn. App. at 267.

Permitting comment on the passive refusal of consent violates the individual’s constitutional privacy rights and chills the future exercise of those rights. Prescott, 581 F.2d 1350-51; Elson, 659 P.2d at 1198-99. This is true regardless of whether the search was legal under Terry or otherwise. Id. Mecham’s conviction should be reversed because the comments on his refusal to consent to warrantless field sobriety testing violated his

constitutional rights. Prescott, 581 F.2d at 1351; Jones, 168 Wn.2d at 725; Gauthier, 174 Wn. App. at 267.

2. FIELD SOBRIETY TESTS ARE A SEARCH BECAUSE THEY REVEAL PRIVATE INFORMATION THAT IS NOT VOLUNTARILY EXPOSED TO PUBLIC VIEW.

The Fourth Amendment protects “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. It generally applies to areas in which a person has a reasonable expectation of privacy. Kyllo v. United States, 533 U.S. 27, 32-33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). But regardless of expectation, a search occurs whenever “the Government obtains information by physically intruding’ on persons.” Florida v. Jardines, ____ U.S. ____, 133 S. Ct. 1409, 1417, ____ L. Ed. 2d ____ (2013) (quoting United States v. Jones, 565 U.S. ____, ____, n. 3, 132 S. Ct. 945, 950-951, n. 3, 181 L. Ed. 2d 911 (2012)).

Similarly, article I, section 7 of Washington’s constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. This provision applies when the state “intrudes upon ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.’” City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994) (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)).

This Court should follow the lead of the Oregon Supreme Court and the other states holding that field sobriety testing is a search. See State v. Nagel, 320 Or. 24, 31-35, 880 P.2d 451 (1994).⁸ Because the only Washington case on point fails to provide any reasoned analysis, this Court should treat this issue as a question of first impression. See Heinemann v. Whitman Co., 105 Wn.2d 796, 809, 718 P.2d 789 (1986) (“[T]he seizure and questioning were reasonable under the Fourth Amendment and Const. art. 1, § 7.”).

a. Field Sobriety Tests Are a Search Under Article I, Section 7 Because They Reveal Private Affairs.

There is “no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass.” Robinson v. City of Seattle, 102 Wn. App. 795, 819, 822 n. 105, 10 P.3d 452 (2000) (pre-employment urine testing was a search partly because it would disclose medical conditions). Sobriety checkpoints – where drivers were not even required to get out of the car – have been deemed highly intrusive searches under

⁸ See also People v. Carlson, 677 P.2d 310, 316–17 (Colo. 1984); State v. Orr, 157 Idaho 206, 335 P.3d 51, 54 (Ct. App. 2014), rev. denied (Oct. 14, 2014) (field sobriety tests are searches); Ackerman v. State, 774 N.E.2d 970, 980 (Ind. Ct. App. 2002); Blasi v. State, 167 Md. App. 483, 505, 893 A.2d 1152, 1164 (2006) (field sobriety tests are a search because they expose private facts about an individual’s physical or psychological condition not otherwise observable by the public); Hulse v. State, Dep’t of Justice, Motor Vehicle Div., 289 Mont. 1, 18-19, 961 P.2d 75, 85 (1998) (field sobriety tests are search under Fourth Amendment and Montana Constitution because tests implicate protected privacy interests). But see Tiller v. State, 2014 Ark. App. 431, 5, 439 S.W.3d 705, 708 (2014) (command to perform field sobriety tests was seizure).

both the Fourth Amendment and Article I, Section 7. City of Seattle v. Mesiani, 110 Wn.2d 454, 457-49, 755 P.2d 775 (1988).

Robinson and Mesiani are consistent with the Oregon court's determination that field sobriety tests are a search because they reveal intimate, private information about a person's bodily function. Nagel, 320 Or. at 30. "By requiring defendant to perform a series of unusual maneuvers and acts, the officer was able to detect certain aspects of defendant's physical and psychological condition that were not detectable through simple observation." Id.

The information revealed by field sobriety testing is unlike that revealed by fingerprints, a voice sample or a handwriting sample. Cf. State v. Collins, 152 Wn. App. 429, 439-40, 216 P.3d 463 (2009) (voice sample not a search). Field sobriety testing is not a sample of information already regularly exposed to the public. It is a test, like DNA testing or urinalysis, designed to reveal hidden information. Both DNA testing and urinalysis testing are searches under Article I, Section 7. State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010); Robinson, 102 Wn. App. at 819, 822 n. 105.

Even if some information about balance, coordination, etc., is regularly exposed to the public, the depth of information revealed by field sobriety testing is not. The distinction is illustrated in People v. Carlson, 677

P.2d 310, 316 (Colo. 1984), where the court held it was not a search to order a person out and to walk to the rear of the car. Getting out of the car and walking a short distance is a sampling of information voluntarily exposed by being out in a public place. Id.

But field sobriety tests go much further. The tests are “designed to elicit information that defendant would not have exposed to the public without the officer’s direction.” Nagel, 320 Or. at 31. Drivers do not regularly “stand alongside a public road reciting the alphabet, count backward from 107, stand upon one leg while counting from 1001 to 1030, or walk a line, forward and back, counting steps and touching heel to toe.” Id. at 34-35.

The use of a field sobriety test is analogous to the use of technology not generally available to the public. Without a search warrant, police are limited to the types of technology generally in public use. For example, use of a flashlight does not transform a plain view observation into a search. State v. Rose, 128 Wn.2d 388, 398-99, 909 P.2d 280 (1996). On the other hand, use of infrared imaging or vehicle tracking devices does. State v. Jackson, 150 Wn.2d 251, 256, 76 P.3d 217 (2003); State v. Young, 123 Wn.2d 173, 182-83, 867 P.2d 593 (1994).

Field sobriety tests are more analogous to a tracking device or infrared imaging than a flashlight. To obtain detailed information about the

person's physical condition, the tests require a person to manipulate his or her body in ways they would not otherwise do, and in ways a member of the general public could not require. A layperson on the street could observe some aspects of a person's balance and coordination by watching a person walk or go about her business. But a layperson could not require a person to stand on one leg, walk heel to toe on a straight line, or touch the nose. Like the devices in Young and Jackson, these tests are invasive procedures designed to expose information officers could not obtain using their senses. Nagel, 320 Or. at 30.

b. Field Sobriety Tests Are a Search Under the Fourth Amendment Because They Physically Intrude on the Person to Reveal Private Information.

The Nagel court illustrated the physical intrusion of field sobriety tests by reference to Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), where the court found a Fourth Amendment search when police lifted up a piece of stereo equipment to reveal the serial number underneath. Nagel, 320 Or. at 35. The physical manipulation of the individual's property to reveal information that was not freely exposed was held to be a search. Hicks, 480 U.S. at 323-25. It did not matter that turning over the stereo was a small intrusion: "the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few

inches” is much more than trivial for purposes of the Fourth Amendment.”

Id. at 325.

Rather than manipulating property, field sobriety tests manipulate an individual’s body by requiring specific and unusual movements. There is no de minimis exception for a small intrusion. Id. Even if some might feel the intrusion of field sobriety testing is slight, “[a] search is a search.”

Id.

Field sobriety testing reveals, via a physical intrusion, information police could not otherwise access. The type of information gained also demonstrates that the testing constitutes a search. The Nagel court held the tests were a Fourth Amendment search because they reveal information about a person’s “coordination, psychological condition, and physical capabilities,” in which individuals have a reasonable expectation of privacy. 320 Or. at 36 (discussing Skinner v. Railway Labor Executives’ Assn., 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)).

While some information about a person’s balance and coordination is regularly exposed to the public, the level of detail revealed by field sobriety testing is not. Law enforcement is restricted to the level of detail that can be observed from a lawful viewpoint. See, e.g., Jardines, ____ U.S. at ____, 133 S. Ct. at 1416 (“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)). When police require field sobriety tests, however, they intrude into a person’s private affairs in order to increase the amount and kind of observable information. Therefore, a search has occurred. Id.

3. NEITHER TERRY V. OHIO NOR ANY OTHER EXCEPTION TO THE WARRANT REQUIREMENT APPLIED TO THE WARRANTLESS SEARCH.

Warrantless searches are *per se* unreasonable. Bustamonte, 412 U.S. at 219. The reasonableness of a search is generally demonstrated in part by the fact that the decision to search is made by a neutral magistrate, rather than a law enforcement officer engaged in the “often competitive enterprise of ferreting out crime.” State v. Reep, 161 Wn.2d 808, 818, 167 P.3d 1156 (2007) (quoting Johnson v. United States, 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)).

Nevertheless, exceptions are made when “the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate.” State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). These exceptions are few and carefully drawn. Id. at 384. They are “specifically established” and “well-delineated.” Bustamonte, 412 U.S. at 219. The State

bears the burden of establishing that an exception applies. State v. Snapp, 174 Wn.2d 177, 188, 275 P.3d 289, 297 (2012).

This case does not fit any specifically established and well-delineated exception to the warrant requirement. Field sobriety testing is a search for evidence, not a Terry stop. Because Mecham was already under arrest, no exigent circumstance required that his intoxication level be established. Nor does the search incident to arrest permit this type of intrusion into the body.

a. Field Sobriety Tests Are an Evidentiary Search Not Permissible Under Terry.

By holding that warrantless field sobriety testing is permissible under Terry, the Court of Appeals has tried to force the square peg of field sobriety testing into the round hole of a Terry stop. But Terry is limited to a brief investigative detention and a frisk for weapons that may harm the officer. It cannot be stretched to encompass field sobriety testing which is a search for evidence unrelated to officer safety: “Nothing in Terry can be understood to allow a generalized ‘cursory search for weapons’ *or, indeed, any search whatever for anything but weapons.*” Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (emphasis added).

Courts have rejected prior attempts to justify evidentiary searches under Terry. For example, in United States v. Askew, 529 F.3d 1119, 1126 (D.C. Cir. 2008), the government sought to expand Terry to include

unzipping a suspect's jacket to permit better identification by an eyewitness at a show-up. The court concluded, "There is no Supreme Court or federal appellate case law supporting the search of an individual stopped only on reasonable articulable suspicion after a pat down of that individual has produced no evidence of a weapon." Id. at 1134. Three concurring judges added, "we are in no position to create a new exception that would have far-reaching effects on how the police may properly investigate crime." Id. at 1149 (Griffith, J., concurring).

The only search Terry permits is a frisk for weapons. Ybarra, 444 U.S. at 93-94; State v. Russell, 180 Wn.2d 860, 869, 330 P.3d 151 (2014). This is grounded in the extraordinary need to protect officers investigating in the course of their lawful duties. Terry, 392 U.S. at 23-27. But field sobriety testing is not warranted by concerns for officer safety. Even assuming some inebriated persons may be more dangerous to a police officer than sober ones, officer safety does not require sobriety testing. Suspicion of intoxication is enough to put an officer on alert, and there is nothing more an officer can do. An officer cannot remove drunkenness like a weapon from a waistband. Field sobriety testing is an invasion of privacy with no corresponding benefit to officer safety.

Concern for the danger intoxicated drivers pose to the public does not dictate a different outcome. Mecham, 181 Wn. App. at 943-44. First,

Mecham was already under arrest, so there was no danger he would continue to drive. 1RP 62. Second, even if Mecham were not already under arrest, Campbell had several options other than simply releasing him. If Campbell concluded there was probable cause, he could have continued to detain Mecham under Terry while he requested a telephonic search warrant for field sobriety testing. See State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (If officer's initial suspicions are confirmed or further aroused, scope of Terry stop may be extended and its duration prolonged.) (citing State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)). Or he could have directed Mecham to comply with field sobriety testing immediately if there were exigent circumstances.⁹ But in this case, the requested field sobriety testing was a mere warrantless search unaccompanied by circumstances justifying any exception to the warrant requirement.

b. The Search Was Not Justified by an Exigent Circumstance Nor Incident to Arrest.

Exigent circumstances may exist based on concerns for officer safety, the possibility of escape, or the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). There is no "per se" exigent circumstance in driving under the influence cases based solely on the fact that intoxication decreases with time:

⁹ If the person then refused to comply with a direct order, the refusal could then be used as evidence of guilt at trial. Nordlund, 113 Wn. App. at 189.

[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, ____ U.S. ____, 133 S. Ct. 1552, 1563, ____ L. Ed. 2d ____ (2013). In this case, the circumstances were not exigent because Mecham was being arrested and a warrant for blood testing was obtained. 1RP 62; 3RP 33-34.

Warrantless searches incident to arrest are generally reasonable because courts presume a certain amount of exigency during an arrest. State v. Byrd, 178 Wn.2d 611, 620, 310 P.3d 793 (2013). The presumption “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” Arizona v. Gant, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (citing Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914); United States v. Robinson, 414 U.S. 218, 230–34, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). Recent decisions have returned the search incident to arrest to its original, narrow intent “to protect against frustration of the arrest itself or destruction of evidence by the arrestee.” Snapp, 174 Wn.2d at 188-89; State v. Ringer, 100 Wn.2d 686, 692, 674 P.2d 1240 (1983). The fact of an arrest no longer permits all searches of the person and his or her vehicle. Id. at 189-90.

Moreover, the scope of such searches has long been limited. For example, strip searches of arrestees constitute, “a significant intrusion into a person’s privacy interest in his or her body that goes far beyond the scope of an officer’s authority to conduct a warrantless search pursuant to arrest.” State v. Audley, 77 Wn. App. 897, 905, 894 P.2d 1359 (1995). Similarly, body cavity searches, even of arrestees, are unlawful absent a warrant. RCW 10.79.080. The fact of arrest may justify seizure of the arrestee’s phone, but not a search of the phone’s content. Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014); State v. Valdez, 167 Wn.2d 761, 776, 224 P.3d 751 (2009). Field sobriety testing should be added to this list of significant intrusions revealing personal information that cannot be justified merely by the fact of arrest. Nagel, 320 Or. at 31-35; Audley, 77 Wn. App. at 905.

D. CONCLUSION

Field sobriety testing is a search for evidence not permitted under Terry and not warranted by exigent circumstance or incident to arrest. But regardless of any other legal basis for the search, Mecham had a constitutional right to withhold his voluntary consent. Mecham asks this Court to reverse because comments on his right not to consent to a warrantless search violated the Fourth Amendment and Article I, Section 7.

DATED this 5th day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

 28239 En

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	NO. 90598-3
v.)	
)	
MARK MECHAM,)	
)	
Petitioner.)	

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 24TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER 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
NO. 964862
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF DECEMBER 2014.

x Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

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Attached for filing today is a supplemental brief of petitioner for the case referenced below.

State v. Mark Mecham

No. 90598-3

Supplemental Brief of Petitioner

Filed By:
Jennifer Sweigert
206.623.2373
WSBA No. 38068
sweigertj@nwattorney.net