SUPREME COURT NO. 90598-3

NO. 69613-1-I

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

PETITION FOR REVIEW

JENNIFER J. SWEIGERT
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A. IDENTITY OF PETITIONER/DECISION BELOW

Mark Mecham requests this Court grant review pursuant to RAP 13.4 of the Court of Appeals' published decision in State v. Mecham, No. 69613-1-I. The Court of Appeals denied Mecham's motion for reconsideration but withdrew its opinion and substituted a new opinion filed June 23, 2013.[1] A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A criminal defendant may not be penalized for exercising the constitutional right to refuse consent to a search by having that refusal used as evidence of guilt at trial. Appellant declined voluntary field sobriety testing, and the prosecutor argued that decision was evidence of guilt. Did the use of this refusal evidence at trial violate appellant's constitutional right to refuse consent to a search under the Fourth Amendment and Article I, Section 7 of Washington's constitution?[2]

C. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged petitioner Mark Mecham with one count of felony driving under the influence of intoxicating liquor (DUI),

[1] The original opinion was filed April 21, 2014.

[2] Because Washington's implied consent statute, RCW 46.20.308, does not implicate field sobriety testing, this case does not present a challenge to that statute or to RCW 46.60.517 allowing admission of evidence that a person suspected of DUI refused a breath or blood test.

one count of driving while license suspended/revoked in the first degree, and one count of driving in violation of the ignition interlock device requirement. CP 45.[3] The trial court denied repeated defense motions to suppress Mecham's refusal to engage in field sobriety testing and rejected his argument that the refusal could not be used as evidence of guilt. 1RP[4] 92; 2RP 6-11, 39-45; 4RP 95-98; CP 69. The court ruled that even if the tests amount to a search, the search was justified by probable cause.[5] 2RP 45.

The jury found Mecham guilty of felony DUI, and the court imposed a standard range sentence. CP 87, 130, 135. CP 147-49. On appeal, Mecham again argued his decision not to consent to field sobriety testing could not be used as evidence against him at trial without violating his constitutional privacy rights under the Fourth Amendment and Article I, Section 7 of Washington's constitution.

The Court of Appeals, Division One, assumed field sobriety testing is a search, but held it was constitutionally permissible in the scope of an

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[3] Only the DUI was tried to the jury.

[4] 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.

[5] The initial motion to suppress was based on the Fifth Amendment. CP 25-26; 1RP 39-40. The trial court's written findings of fact and conclusions of law address only this argument. CP 143-46. However, in a motion to reconsider, counsel also argued admitting the refusal evidence violated the Fourth Amendment and Article I, Section 7 of Washington's constitution. CP 51-55; 2RP 39-44. The court rejected this argument in an oral ruling only. 2RP 45; CP 143-46.

investigative detention, a so-called Terry[6] stop. The court then reasoned this case was unlike State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), because Gauthier had a constitutional right to refuse consent to a search of his DNA. Because FSTs were permissible under Terry, the court concluded Mecham had no right to refuse consent and his refusal was properly used as evidence of guilt.

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. Campbell testified Mecham's driving was entirely safe and he committed no infraction. 3RP 15-16. However during the arrest, Campbell smelled intoxicants on Mecham's breath, Mecham's movements were sluggish, his speech was slurred and repetitive, and he appeared intoxicated. 3RP 20.

Campbell asked Mecham to perform voluntary field sobriety tests, namely, 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 Mecham's ability to listen, follow directions, and perform simple tasks involving balance. 3RP 21-22. Campbell testified these tests are a useful tool in investigating DUI. 3RP 22. Mecham did not perform the tests. 3RP 21.

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

When Campbell approached Mecham's car to shut the doors, he noticed an open beer can with a straw in it behind the passenger seat. 3RP 23. Campbell brought Mecham to the police station, read him the implied consent warnings, and requested he submit to a breath test for alcohol. 3RP 27-29. Mecham was advised he had the right to refuse, but if he refused, his license would be suspended and his refusal could be used against him in a criminal trial. 3RP 29-31. Campbell asked Mecham to take the breath test three times. 3RP 31-32. One time, Mecham did not answer, and twice he stated his attorney advised him not to answer any more questions. 3RP 32, 99.

Officer Darrell Moore applied for a search warrant to take Mecham's blood. 3RP 33. Moore also testified Mecham appeared intoxicated based on the odor of intoxicants, slurred speech, and glazed, bloodshot eyes. 4RP 16.

At trial, 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 at the scene." 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. McArthur and Moore testified Mecham

was unhappy about the blood test and angry at the officers, but his mood improved with McArthur's gentle ribbing. 3RP 135, 145; 4RP 66. Moore testified, based on the change in Mecham's demeanor, that "he was impaired and limiting my ability to take sobriety tests." 4RP 39.

The forensic toxicologist testified Mecham's blood ethanol content was .050 grams per 100 milliliters. 5RP 19. Taking into account the margin of error, this could have been as low as .04. 5RP 58. She testified that, while alcohol affects people differently, most people cannot safely drive with a blood alcohol content of .05. 5RP 25-27. Mecham's blood was taken roughly three hours after he was arrested, and the toxicologist extrapolated backwards for one hour. 3RP 35; 5RP 33. Taking the highest rate of burn off, she testified Mecham's blood alcohol level 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 officers' testimony about slurred speech, sluggish movements, and the odor of intoxicants and his blood alcohol content. 5RP 88. The State also argued Mecham's refusal to participate in field sobriety testing was an attempt to frustrate and delay the investigation. 5RP 84. Repeatedly, both in the initial closing argument and again in rebuttal, the prosecutor argued Mecham refused the sobriety tests because he knew they would reveal his guilt. 5RP 84, 89, 113, 115.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

Mecham urges this Court to grant review because the application of Terry v. Ohio to field sobriety testing and the permissibility of comment on the refusal of consent are significant constitutional issues of first impression in Washington. RAP 13.4(b)(3). Given the prevalence of DUI prosecutions, these are also issues of significant public interest. RAP 13.4(b)(4).

Finally, review is warranted because the Court of Appeals' decision is in conflict with established Washington and United States case law including Terry, Ybarra v. Illinois, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), State v. Setterstrom, 163 Wn. 2d 621, 626, 183 P.3d 1075 (2008), and Gauthier, 174 Wn. App. 257. RAP 13.4(b)(1), (2). Field sobriety testing is a warrantless search for evidence that does not fall under Terry. Second, even if the testing could be compelled without a warrant, the right to refuse one's voluntary consent remains inviolate.

1. TERRY V. OHIO DOES NOT AUTHORIZE A SEARCH FOR EVIDENCE.

"[A] warrantless search of the person is reasonable only if it falls within a recognized exception." Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013). Terry created a narrow exception to the probable cause and warrant requirement by permitting a

pat down for weapons to protect officer safety during an investigative detention. Ybarra, 444 U.S. at 93. Washington courts also apply the Terry exception under Article I, Section 7 of the Washington Constitution:

> Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search. An officer may, though, frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons.

Setterstrom, 163 Wn.2d at 626 (emphasis added, internal citations omitted).

The Terry exception is grounded in the extraordinary need to protect police officers in the course of their lawful duties. Terry, 392 U.S. at 23-27. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry." Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); see also State v. Russell, ___ Wn.2d ___, ___ P.3d ___, slip op. at 10 (No. 89253-9, filed July 10, 2014) ("[W]arrantless searches of small containers found during protective frisks are generally unconstitutional. The container itself was not a weapon, and the officer had no authority to search through it after realizing that it posed no threat."). "Nothing in Terry can be understood to allow a generalized

'cursory search for weapons' *or, indeed, any search whatever for anything but weapons*." Ybarra, 444 U.S. at 93-94 (emphasis added).

Field sobriety testing is not a search for weapons and is not warranted by officer safety concerns. The Court of Appeals reasoned field sobriety tests were an "appropriate technique to measure the suspects' intoxication." Mecham, slip op. at 10. But officer safety does not require measuring intoxication. Suspicion is sufficient to put an officer on alert, and there is nothing more an officer can do if that suspicion is confirmed. Drunkenness cannot be removed like a weapon from a waistband. The only reason to administer the tests is to obtain evidence for use at trial.

Moreover, as the Court of Appeals noted, Mecham's intoxication was already evident. Mecham, slip op. at 10. The officer would gain no additional information by testing him. And because Mecham was being arrested, there was no risk he would continue driving and pose a danger on the road. Field sobriety testing is an invasion of privacy with no corresponding benefit to officer safety.

In 2008, a federal court summarized the limited expansions of Terry authorized by the Supreme Court. United States v. Askew, 529 F.3d 1119, 1134, (D.C. Cir. 2008). Courts have extended Terry based on a balancing analysis in three limited types of cases. First, procedures other than a frisk have been authorized when officer safety demands, such as the

protective sweep in Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), or asking a driver to step out of the car during a traffic stop in Pennsylvania v. Mimms, 434 U.S. 106, 110-11, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)). Askew, 529 F.3d at 1134-35.

Second, searches have been permitted of persons with diminished expectations of privacy due to status as a probationer, government employees at work, or children in school. Askew, 529 F.3d at 1135 (discussing United States v. Knights, 534 U.S. 112, 119-22, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), O'Connor v. Ortega, 480 U.S. 709, 725-26, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), and New Jersey v. T.L.O., 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)). Finally, in a third category, brief detentions have been permitted so long as they do *not* include a search for evidence. Askew, 529 F.3d at 1135 (discussing Illinois v. Lidster, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), and United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)).

None of these cases permits a search for evidence based solely on reasonable suspicion under Terry. Moreover, if the mere suspicion of intoxication warrants a search to determine if the person is intoxicated, Terry's "'narrow scope'" will widen immeasurably. Ybarra, 344 U.S. at

93 (quoting Dunaway v. New York, 442 U.S. 200, 210, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)). Under such a rule, officers could search a person and any associated automobile for illegal narcotics as well, since that would also be relevant to determining the nature and scope of intoxication. This would be a massive and unprecedented expansion of Terry.

The Court of Appeals attempted to ground its decision in officer safety by declaring, in a footnote, that "[T]he threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun." Mecham, slip op. at 9, n. 4 (citing State v. Superior Court. 149 Ariz. 269, 275, 718 P.2d 171 (1986); Blasi v. State. 167 Md. App. 483, 510, 893 A.2d 1152 (2006)). But this attempted justification is inherently flawed. A limited search for weapons is reasonable under Terry because of the *actual threat posed to the officer*, not a vague threat to the public as a whole. Once the driver has been removed from the car, there is no threat; the driver no longer has access to the alleged weapon. See Russell, slip op. at 10 ("Furthermore, once the officer took control of the container the risk of danger ended.").

Colorado has recognized field sobriety testing is a substantial intrusion "not far removed from chemical testing . . . of . . . blood or breath for alcoholic content" and possibly even more invasive because it is performed in public on the side of the road. People v. Carlson, 677 P.2d

310, 317 (Colo. 1984). The court concluded field sobriety testing is a search, not a Terry stop, because "[t]he sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct on the part of the suspect." Id. The court reasoned that, "Intrusions into privacy for the exclusive purpose of gathering evidence of criminal activity have traditionally required, at the outset of the intrusion, probable cause. Id. (citing, inter alia, Michigan v. Clifford, 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984)). Because there was no probable cause, the court reversed Carlson's conviction and remanded the case to determine whether he had voluntarily consented to the testing.[7] Id. at 318.

The Court of Appeals decision cites Alaska as one of 12 states holding field sobriety tests are permissible under Terry. Mecham, slip op. at 11. But the Alaska court stopped short of actually reaching that conclusion. McCormick v. Municipality of Anchorage, 999 P.2d 155 (Alaska Ct. App. 2000). McCormick states field sobriety testing may be compelled upon reasonable suspicion under Terry. Id. at 161. But the court backed away from this conclusion stating, "this issue is complex and . . . the resolution we have indicated here may not be entirely free from

[7] The Oregon Supreme Court has also held field sobriety testing is a search requiring probable cause but found the tests reasonable under the circumstances due to the existence of probable cause and exigent circumstances. State v. Nagel, 320 Or. 24, 31-35, 37, 880 P.2d 451 (1994).

doubt." Id. at 162. Ultimately, the court refused to decide the issue and held it was waived due to inadequate briefing.[8] Id.

The McCormick court was right to hesitate. Field sobriety testing is a search for evidence, not a protective measure to ensure officer safety. The Court of Appeals in this case began its opinion by assuming this to be true. Mecham, slip op. at 8. Searches for evidence are generally unreasonable without probable cause and a warrant or an exception to the warrant requirement. McNeely, ___ U.S. at ___, 133 S. Ct. at 1558; Russell, ___ Wn.2d at ___, slip op. at 5-6. Outside of the DUI realm, counsel has been unable to find even a single case applying Terry to permit a full search for evidence of a person with full privacy rights without probable cause and a warrant.

Federal courts have also hesitated to expand on Terry. In Askew, the government sought to expand Terry to include unzipping a suspect's jacket to permit better identification by an eyewitness at a show-up. 529 F.3d at 1126. But the three concurring judges concluded, "[a]s a court of appeals we are in no position to create a new exception that would have far-reaching effects on how the police may properly investigate crime.

[8] The following year, the Alaska Court of Appeals concluded field sobriety testing was permissible on less than probable cause under Terry because it is not a search. Galimba v. Municipality of Anchorage, 19 P.3d 609, 612 (Alaska Ct. App. 2001) ("Thus, while breath tests are generally considered searches for constitutional purposes, typical field sobriety tests, including the HGN, are not.").

Rather, we are bound by Supreme Court precedent, which in this case requires probable cause." Askew, 529 F.3d at 1149 (Griffith, J., concurring).

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . .But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical." McNeely, ___ U.S. at ___, 133 S. Ct. at 1565 (internal citations omitted). By holding that field sobriety testing is a search, but a permissible one under Terry, the Court of Appeals decision is in direct conflict with the United States Supreme Court's holdings in Dickerson, Ybarra, and Terry as well as Washington's application of the Terry exception in Setterstrom and other cases.[9] This Court should grant review and reverse because the Court of Appeals' opinion essentially creates a new, freestanding exception to the warrant requirement for field sobriety testing, unhinged from the principles that undergird Terry and its progeny.

[9] See, e.g., State v. Xiong, 164 Wn.2d 506, 511, 191 P.3d 1278 (2008) (Terry permits narrow search for weapons without a warrant and upon reasonable suspicion); State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007) ("While *Terry* does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful *Terry* stop, 'a reasonable safety concern exists to justify the protective frisk for weapons' so long as the search goes no further than necessary for protective purposes.") (quoting State v. Duncan, 146 Wn.2d 166, 171–72, 43 P.3d 513 (2002)).

2. EVEN IF MECHAM COULD BE COMPELLED TO COMPLY WITH FIELD SOBRIETY TESTING, HE WAS ENTITLED TO WITHHOLD HIS VOLUNTARY CONSENT WITHOUT PENALTY.

Freely given consent to a search is a waiver of privacy rights. See, e.g., State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832, 836 (2005) ("In the context of a search, consent is a form of waiver."). To be valid, that waiver must be voluntary and free of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973); State v. Tagas, 121 Wn. App. 872, 876, 90 P.3d 1088 (2004). Therefore, when police ask for consent to search, a person has the unequivocal right to say "No" "with impunity." Gauthier, 174 Wn. App. at 267. To penalize refusal is to introduce an element of coercion that vitiates any consent. Even if field sobriety tests are permissible under Terry, the holding that Mecham had no right to refuse his consent conflicts with the Court of Appeals' holding in Gauthier, 174 Wn. App. at 267.

The law should not "penalize individuals 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). But the Court of Appeals holding in this case does exactly that. Mecham had no way to know he could be compelled to participate in the field sobriety tests under

Terry.[10] And Officer Campbell did not claim lawful authority to compel the tests. He *asked* Mecham if he would comply and expressly told him the tests were voluntary.[11] 1RP 54; 3RP 21. Mecham exercised the same privacy rights in the same way as Gauthier: when police asked for his voluntary consent to a search, he said, "No." Gauthier, 174 Wn. App. at 261.

The Court of Appeals attempted to distinguish Gauthier on the grounds that police needed Gauthier's consent or a warrant to search his DNA, whereas police could test Mecham's sobriety regardless of his consent. Mecham, slip op. at 11 (citing Gauthier, 174 Wn. App. at 263). The Court of Appeals relied instead on State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002), where the defendant defied a court order to take a sample of his hair, and the court held he had "no constitutional right to refuse consent because the search was reasonable pursuant to the court order." Mecham, slip op. at 11-12 (citing Nordlund, 113 Wn. App. at 189).

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[10] Indeed, based on the case law discussed in section D.1. supra, he could reasonably suppose he could not be so compelled.

[11] This is not a case of a mere failure to warn of the consequences of refusal, as in South Dakota v. Neville, 459 U.S. 553, 564-66, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983). If indeed field sobriety tests may legitimately be compelled, then Officer Campbell affirmatively misled Mecham that the tests were voluntary.

But Nordlund is inapposite because the court order made clear the hair sample was not voluntary.[12] 113 Wn. App. at 187. By contrast, as discussed above, Campbell expressly told Mecham the field sobriety tests were voluntary. 1RP 54; 3RP 21. Nordlund might dictate the outcome of this case if Campbell had said, "You are required to participate in field sobriety testing." But he did not.

The issue before the Nordlund court was not refusal of consent. It was "refusal to submit." Nordlund, 113 Wn. App. at 188. The State was permitted to comment on Nordlund's refusal to comply with a lawful court order. Id. at 187-90. Under Nordlund, a refusal to comply with lawful authority may properly be used as evidence of guilt. Id. But under Gauthier, the mere withholding of voluntary consent may not. Gauthier, 174 Wn. App. at 267.

Assuming the police had constitutional authority for the search other than Mecham's consent, they did not so advise Mecham. Campbell did not claim any lawful authority, and Mecham did not refuse to comply. Mecham's decision to withhold his consent to a voluntary search is controlled by Gauthier, not Nordlund.

[12] The court order also clearly provided the "authority of law" required for a search under Article I, Section 7 of Washington's Constitution. In essence, the court order was a warrant, and Nordlund is also inapposite because it does not pertain to cases involving searches without a warrant or similar authority of law.

In addition to the conflict with Gauthier, this case presents a significant issue of Fourth Amendment and Article I, Section 7 law that is of substantial public interest. RAP 13.4(b)(3), (4). If allowed to stand, the Court of Appeals opinion will create a chilling effect on the right to refuse consent to any search, thereby tainting all such supposedly consensual searches with an aura of coercion.

When a person is told there is no right to refuse, a search is no longer voluntary. See State v. Edgar, 296 Kan. 513, 530, 294 P.3d 251, 262 (2013) ("Telling Edgar he had no right to refuse the test transformed the test into an involuntary search."). The Court of Appeals opinion tells the citizens of Washington they only have the right to say no if a search would be constitutionally invalid without their consent. The problem is that the average person cannot even begin to predict whether that is true. If right to say "No" to a search depends on the vagaries of search and seizure law, which even attorneys find difficult to predict, rational persons will err on the side of consent.[13] By permitting a search, an innocent person permits "only" an invasion of privacy. But by saying no to protect that privacy, even an innocent person creates incriminating evidence.

[13] Alternatively, a rational person might conclude it is safe to refuse because police would not ask for voluntary consent if they did not need it. Unfortunately, under the facts and the Court of Appeals' opinion in this case, that turns out to be a false assumption.

The Court of Appeals' opinion attaches a penalty to refusing consent to search. The risk of that penalty, and the inability to predict when it will apply, adds a strong measure of coercion to all supposedly consensual searches. Future decisions to consent will no longer be free and voluntary. They will be coerced by the knowledge that, if a person guesses wrong about the exigency of the circumstances or the scope of a Terry stop, a "no" will become evidence of guilt.

The Nordlund court's focus on "refusal to submit" to a lawful court order avoids this problem. 113 Wn. App. at 188. While the vagaries of search and seizure law are impenetrable even to many lawyers, even small children can easily tell the difference between being *asked* to do something and being *ordered* to do it. There is no right to resist a lawful search or even to refuse to submit. But the right always exists to decline to waive the protections of the Fourth Amendment and Article I, Section 7 by voluntarily consenting to a search. Gauthier, 174 Wn. App. at 267.

Review is warranted in this case because the Court of Appeals' opinion is in conflict with established Washington and United States case law. RAP 13.4(b)(1), (2). Terry does not authorize warrantless field sobriety testing because the testing is a search unrelated to officer safety. Ybarra, 444 U.S. at 93-94; Setterstrom, 163 Wn. 2d at 626. And Mecham may not be penalized for withholding consent to a voluntary search.

Gauthier, 174 Wn. App. at 267. Review is also warranted because these issues are questions of first impression that impact the scope of constitutional privacy protections for all Washingtonians. RAP 13.4(b)(3), (4). Therefore, Mecham requests this Court grant review and reverse his conviction.

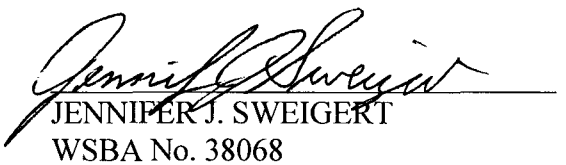
E. CONCLUSION

The Court of Appeals' decision is in conflict with decisions of this Court and the Court of Appeals, and this case presents significant constitutional issues of great public interest. RAP 13.4(b). Therefore, Mecham asks this Court to grant review and reverse his conviction.

DATED this 22nd day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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CASE #: 69613-1-I
State of Washington, Respondent v. Mark Tracy Mecham, Appellant
King County No. 11-1-07517-2 SEA

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration, Withdrawing Opinion, and Substituting Opinion entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

enclosure

c: The Hon. Palmer Robinson
Reporter of Decisions

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

STATE OF WASHINGTON, Respondent, v. MARK TRACY MECHAM, Appellant.	)	No. 69613-1-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

The appellant, Mark Mecham, has filed a motion for reconsideration of the published opinion filed on April 21, 2014. The State has filed a response. The court has determined that said motion should be denied and that the opinion filed on April 21, 2014 shall be withdrawn and a substitute published opinion be filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; it is further

ORDERED that the opinion filed on April 21, 2014, is withdrawn and a substitute published opinion shall be filed.

DATED this 23rd day of June, 2014.

Cuppelwick, J.

Leach, J.

Becker, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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CASE #: 69613-1-I
State of Washington, Respondent v. Mark Tracy Mecham, Appellant
King County, Cause No. 11-1-07517-2 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable Palmer Robinson
Mark Tracy Mecham

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARK TRACY MECHAM, Appellant.	)	No. 69613-1-I DIVISION ONE PUBLISHED OPINION FILED: June 23, 2014

APPELWICK, J. — At Mecham's trial for felony driving under the influence, the State introduced Mecham's refusal to perform a field sobriety test as substantive evidence of his guilt. Mecham argues that the State impermissibly penalized him for exercising his constitutional right to refuse consent to a field sobriety test. Mecham also makes a confrontation clause challenge to the admission of a certification of mailing on his license revocation order. We affirm.

FACTS

On May 15, 2011, Officer Scott Campbell observed Mark Mecham driving in Bellevue, Washington. Campbell pulled Mecham over after he ran a random license check and discovered an outstanding warrant. He did not see Mecham drive unsafely or commit any traffic infractions.

While arresting Mecham, Officer Campbell noticed that Mecham appeared intoxicated. Campbell observed that Mecham's breath smelled of alcohol, his movements were sluggish, and his speech was slurred and repetitive.

Campbell asked Mecham to perform a voluntary field sobriety test. The standard field sobriety test has three components. First, it involves the horizontal gaze nystagmus test, in which the person must follow a moving object with the eyes while the officer looks for involuntary jerking movements. Second, it includes the "walk and turn," where the person must take several heel-to-toe steps on a line. And, finally, it involves standing on one leg while counting out loud.

Mecham declined to perform the field sobriety test.

Campbell noticed that Mecham's car doors were open and unlocked, with the keys still in the ignition, so he offered to secure Mecham's car. Mecham told Campbell just to shut the doors, but not to go in his car. When Campbell approached to shut the doors, he noticed an open beer can with a straw in it behind the passenger seat.

Campbell transported Mecham to the Bellevue booking facility. Once there, he read Mecham the implied consent warnings and asked Mecham to submit to a breath test. Mecham refused.

At the police station, Officer Darrell Moore helped Campbell draft an application for a search warrant to test Mecham's blood alcohol content. Officer Moore also smelled intoxicants on Mecham's breath. He noticed that Mecham's speech was slurred, his eyes were glazed and bloodshot, and his pupils were dilated despite the bright room. Based on these observations, Moore also believed Mecham to be impaired.

Once they obtained a warrant, the officers took Mecham to Overlake Hospital for a blood draw. A lab assistant drew Mecham's blood approximately three hours after his arrest.

A forensic toxicologist, Rebecca Flaherty, analyzed Mecham's blood. She reported that his blood alcohol content was 0.05 grams per 100 milliliters (g/100 ml). She testified that, based on the rate alcohol is metabolized in the body, Mecham likely had a blood alcohol level of 0.065 g/100 ml within two hours after he stopped driving, and possibly as high as 0.08 g/100 ml.[1] While alcohol affects people differently, Flaherty explained, most people cannot safely drive with a blood alcohol content of 0.05 g/100 ml.

On August 25, 2011, the State charged Mecham with one count of felony driving under the influence (DUI). On October 23, 2012, the State amended the information to add two misdemeanor charges: driving while license suspended/revoked in the first degree (DWLS) and violation of ignition interlock. RCW 46.20.342(1)(a), .740. Mecham requested a bench trial on the two misdemeanors. The felony DUI charge was tried by a jury.

Mecham stipulated that Officer Campbell made a lawful stop and arrest. Mecham also stipulated that, at the time of his arrest, he had previously been convicted of four or more prior offenses within 10 years, pursuant to RCW 46.61.5055(14)(a).

The trial court denied repeated defense motions to suppress Mecham's refusal to perform a field sobriety test. The court ruled that even if the field sobriety test amounted

[1] RCW 46.61.502(1) specifies that a person is driving under the influence of alcohol when "within two hours after driving," the individual has "an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood."

to a search, it was justified by probable cause. The court likewise rejected Mecham's proposed jury instruction that his refusal could not be used as evidence of guilt.

Mecham also proposed an alternative "to convict" jury instruction for the felony DUI, which stated, "In order to return a verdict of guilty, you must unanimously find from the evidence that each of [the felony DUI] elements has been proven beyond a reasonable doubt." The trial court declined to give Mecham's proposed instruction. Instead, the court gave a to convict instruction consistent with the Washington Pattern Jury Instructions:

> If you find from the evidence that [the felony DUI elements] have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of [these elements], then it will be your duty to return a verdict of not guilty.

See 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 92.02, at 274 (3d ed. 2008).

In closing, the State argued that Mecham refused to participate in field sobriety testing in order to frustrate and delay the investigation. Several other times in closing the State argued that Mecham refused the field sobriety test, because he knew it would reveal his guilt.

At the bench trial on the misdemeanors, the trial court admitted an order from the Washington State Department of Licensing (DOL) revoking Mecham's driver's license

from October 29, 2010 until August 11, 2013. The revocation order contains a certification of mailing in the bottom right corner, which reads:

> I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown which is the last address of record. Postage prepaid on September 14, 2010 in Olympia, WA.
>
> [/s/] Elizabeth A. L[illegible]
>
> Agent for the Department of Licensing

The court admitted the revocation order as a DOL business record pursuant to testimony from Abdul Qaasim, a DOL custodian of records. Qaasim explained that he searched the DOL records for information on Mecham and determined that Mecham was a habitual traffic offender. Qaasim also found the revocation order in his research and testified to the date of revocation. However, the person who signed the certification of mailing did not testify. Mecham objected on confrontation clause grounds. The trial court ruled that Mecham did not have a right to confront the person who signed the certification of mailing.

The jury found Mecham guilty of felony DUI. The trial court found Mecham guilty of first degree DWLS and violation of ignition interlock. Mecham timely appealed.

DISCUSSION

Mecham makes three arguments on appeal. First, he asserts that a field sobriety test constitutes an unreasonable search under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. As a result, he argues, the State improperly penalized him for exercising his constitutional right to refuse consent to a field sobriety test by commenting on his refusal at trial. Second, he

argues that the to convict instruction given at his felony DUI trial violated his constitutional right to a jury trial. And, third, he argues that the certification of mailing on the license revocation order constitutes testimonial hearsay and its admission violated his right to confront the witnesses against him.

I. Field Sobriety Test

Mecham argues that the trial court erred in admitting evidence that he refused to perform to a field sobriety test.[2] The State then used this as evidence of Mecham's guilt at trial. Mecham argues that a field sobriety test constitutes a search under the Fourth Amendment and article I, section 7. Therefore, he argues, the State's comment on his refusal to perform a field sobriety test unfairly penalized him for exercising his constitutional right to refuse consent to a warrantless search. When a trial court denies a motion to suppress, we review the trial court's conclusions of law de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

Field sobriety tests are not governed by Washington's implied consent statute, RCW 46.20.308. Nevertheless, in Washington, there is "no legal obligation to perform a field sobriety test." City of Seattle v. Personeus, 63 Wn. App. 461, 465-66, 819 P.2d

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[2] Mecham also assigns error to the trial court's admission of evidence that he declined Officer Campbell's offer to secure his car. However, Mecham does not devote argument as to why this constituted an unconstitutional search that must be suppressed. Herring v. Dep't of Soc. & Health Servs., 81 Wn. App. 1, 13, 914 P.2d 67 (1996) ("Assignments of error not supported by legal argument are not considered on appeal."). Even if Campbell noticing the beer can in Mecham's backseat constituted a search, it clearly falls within the plain view exception to the warrant requirement. See State v. Rose, 128 Wn.2d 388, 399, 401, 909 P.2d 280 (1996) (no constitutional violation when police officer looked through an unobstructed window of a home while standing on the front porch). Furthermore, Mecham did not object to the evidence on Fourth Amendment or article I, section 7 grounds. We therefore review it for manifest constitutional error, which Mecham fails to demonstrate. RAP 2.5(a)(3).

821 (1991). Unlike blood and breath alcohol tests, however, a suspect's right to refuse a field sobriety test is based in common law and not specifically protected by statute. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 236-37, 978 P.2d 1059 (1999).

The Washington Supreme Court held in Stalsbroten that admitting evidence of a suspect's refusal to perform a field sobriety test does not violate the Fifth Amendment, because refusal is neither testimonial nor compelled. Id. at 238-39. The question here is whether admitting refusal as evidence of guilt violates article I, section 7 and the Fourth Amendment.[3] This turns on whether a field sobriety test constitutes an unreasonable search.

A. Reasonableness of a Field Sobriety Test

Mecham argues that a field sobriety test constitutes a search under article I, section 7 and the Fourth Amendment, because it reveals private information that is not voluntarily exposed to public view, it affords the police an intrusive method for viewing that private information, and it is designed to elicit evidence.

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The provision safeguards "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). The Fourth Amendment protects "[t]he right of the people to be secure in

[3] The Washington Supreme Court previously stated that a field sobriety test need not be suppressed, because "the seizure and questioning were reasonable under the Fourth Amendment and Wash. Const. art. I, § 7." Heinemann v. Whitman County, 105 Wn.2d 796, 809, 718 P.2d 789 (1986). However, the Heinemann court did not devote any analysis to the Fourth Amendment or article I, section 7 before concluding there was no need to suppress on that basis.

their persons, houses, papers, and effects, against unreasonable searches and seizures." Distinct from article I, section 7, the Fourth Amendment focuses on whether an individual has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). It is well established that article I, section 7 qualitatively differs from the Fourth Amendment, because it places a greater emphasis on privacy. State v. Surge, 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007).

For the purposes of this opinion, we assume that a field sobriety test constitutes a search under both article I, section 7 and the Fourth Amendment. See State v. Nagel, 320 Or. 24, 31, 36, 880 P.2d 451 (1994) (holding that a field sobriety test constitutes a search under the Oregon Constitution and the Fourth Amendment).

As a general rule, we presume that warrantless searches are unreasonable and violate both constitutions. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). However, the State may rebut this presumption by showing that a search falls within one of the narrow exceptions to the warrant requirement. State v. Day, 161 Wn.2d 889, 893-94, 168 P.3d 1265 (2007).

One such exception is an investigative detention, or Terry stop. Id. at 895. Officers may briefly, without a warrant, detain a person to investigate whether a crime has been committed. Id. A Terry stop is lawful if the State can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

Whether the officer's suspicion is reasonable is determined by the totality of the circumstances known to the officer at the inception of the stop. Gatewood, 163 Wn.2d

at 539; State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). This includes factors such as the officer's training and experience, the location of the stop, the conduct of the suspect, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). The degree of intrusion must also be appropriate to the type of crime under investigation and the probable dangerousness of the suspect. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

Here, the totality of the circumstances justified Officer Campbell's reasonable suspicion that Mecham was driving while intoxicated. Mecham's probable dangerousness is obvious: a drunk driver presents a grave danger to the public.[4] See South Dakota v. Neville, 459 U.S. 553, 558, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (recognizing the carnage and tragedy caused by drunk drivers); see also RCW 46.55.350(1)(a).

Mecham showed clear signs of intoxication. Officer Campbell testified that Mecham's movements were sluggish and his speech was slurred and repetitive. Campbell also noticed that Mecham's breath smelled of alcohol and "overall he appeared intoxicated." Campbell based this conclusion on his DUI training and his five years of experience as a police officer. He explained that he had made around 50 DUI arrests and conducted 50 to 100 field sobriety tests during his career.

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[4] "[T]he threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun." State v. Superior Court, 149 Ariz. 269, 275, 718 P.2d 171 (1986); see also Blasi v. State, 167 Md. App. 483, 510, 893 A.2d 1152 (2006).

There is some physical intrusion with a field sobriety test. The tests involve unusual physical maneuvers that require balance and coordination. They have the potential to reveal information about the suspect's medical conditions or physical disabilities. Nagel, 320 Or. at 36.

However, the degree of intrusion is not excessive and a field sobriety test is an appropriate technique to measure the suspect's intoxication. Officer Campbell explained that he uses a standardized field sobriety test promulgated by the National Highway Traffic Safety Administration. The three main components of this test are the horizontal gaze nystagmus test, the heel-to-toe "walk and turn," and balancing on one foot while counting.

The horizontal gaze nystagmus test looks for involuntarily jerking of the eyes that occurs only when someone has been drinking or using certain drugs. The other two components gauge the suspect's ability to listen, comprehend instructions, and perform simple tasks involving balance. Officer Campbell agreed that these tests are very useful tools for investigating DUI. Officer Moore likewise testified that a field sobriety test is useful in determining whether a person is driving impaired. Moore explained that field sobriety tests are psychophysical tests, which means they test the body and mind simultaneously. Such divided attention is necessary to effectively operate a vehicle, and being intoxicated impairs that ability.

Given these facts, we conclude that the field sobriety test is a brief and reasonable method for determining whether an individual is intoxicated. The attendant intrusion was therefore appropriate given Campbell's training and Mecham's evident intoxication. We hold that Campbell's request for Mecham to perform a field sobriety

test was justified under the Terry stop exception to the warrant requirement.[5] Thus, even if the field sobriety test constituted a search, it was reasonable based on the totality of the circumstances.

B. State's Comment on Mecham's Refusal

Our final determination is whether the State impermissibly commented on Mecham's refusal to perform a field sobriety test. Mecham argues that under this court's decision in State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), an individual's refusal to consent to a warrantless search may not be admitted as evidence of guilt without violating article I, section 7 and the Fourth Amendment.

In Gauthier, a detective asked the defendant for a cheek swab of his DNA (deoxyribonucleic acid) before obtaining a warrant or court order. Id. at 261. The defendant refused. Id. The State argued at trial that this refusal indicated the defendant's consciousness of guilt. Id. at 262. We held that the State's argument impermissibly burdened the defendant's constitutional right to refuse consent to a warrantless search and seizure of his DNA. Id. at 267.

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[5] At least 12 other states have held that a field sobriety test is permissible under Terry when the officer has reasonable suspicion that the driver is intoxicated. See, e.g., Superior Court, 149 Ariz. at 274; State v. Lamme, 216 Conn. 172, 176-77, 184, 579 A.2d 484 (1990); State v. Taylor, 648 So. 2d 701, 703-04 (Fla. 1995); State v. Golden, 171 Ga. App. 27, 30, 318 S.E.2d 693 (1984); State v. Wyatt, 67 Haw. 293, 687 P.2d 544, 552-53 (1984); State v. Pick, 124 Idaho 601, 605. 861 P.2d 1266 (1993); State v. Stevens, 394 N.W.2d 388, 391-92 (Iowa 1986); Blasi, 167 Md. App. at 509-10; State v. Little, 468 A.2d 615, 617-18 (Me. 1983); Commonwealth v. Blais, 428 Mass. 294, 297-98, 701 N.E.2d 314 (1998); Columbus v. Anderson, 74 Ohio App. 3d 768, 771-72, 600 N.E.2d 712 (1991); see also McCormick v. Mun. of Anchorage, 999 P.2d 155, 160 (Alaska Ct. App. 2000).

Distinct from Mecham's case, the reasonableness of the search in Gauthier was premised on the defendant's consent. See id. at 263. Without consent and without a warrant, the detective had no authority to search the defendant's DNA and any search would have been unreasonable. See id. The Gauthier court made clear that "[t]he constitutional violation was that Gauthier's lawful exercise of a constitutional right was introduced against him as substantive evidence of his guilt." Id. at 267. In other words, the State may not penalize someone for exercising a constitutional right. Id.

By contrast, in State v. Nordlund, the defendant refused to provide a body hair sample even though the State had a court order to collect hair samples from him. 113 Wn. App. 171, 187, 53 P.3d 520 (2002). The State argued at trial that this refusal showed the defendant's consciousness of guilt. Id. The appellate court held that it was reasonable to infer guilt from the defendant's refusal when there was a valid court order allowing body hair sampling. Id. at 189. In sum, the defendant had no constitutional right to refuse consent, because the search was reasonable pursuant to the court order. See id. Reading Gauthier and Nordlund together indicate that the State's comment on refusal is impermissible only when there is a constitutional right to refuse consent.

Mecham did not have a constitutional right to refuse consent to the field sobriety test, because the test was reasonable pursuant to a Terry stop. Mecham had only a common law right to refuse consent to the field sobriety test. Stalsbroten, 138 Wn.2d at 237. Such refusal is not testimonial under Stalsbroten, but "'is best described as conduct indicating a consciousness of guilt.'" Id. at 234 (quoting Newhouse v. Misterly, 415 F.2d 514, 518 (9th cir. 1969)).

We hold that the State did not impermissibly comment on Mecham's refusal to perform the field sobriety test, because there was no constitutional right for Mecham to refuse the test.[6]

II. To Convict Jury Instruction

Mecham argues that his constitutional right to a jury trial was violated when the trial court instructed the jury that it had a duty to convict if it found each element of felony DUI proved beyond a reasonable doubt. Mecham asserts that the instruction misstates the law, because the jury always has the power to acquit and the court cannot direct a verdict. Therefore, he argues, no such duty to return a guilty verdict exists.

Each division of this court has rejected similar challenges to the same to convict instruction that Mecham contests here. See, e.g., State v. Meggyesy, 90 Wn. App. 693, 706, 958 P.2d 319 (1998) (Division One); State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005) (Division Two); State v. Wilson, 176 Wn. App. 147, 151, 307 P.3d 823 (2013) (Division Three), review denied 179 Wn.2d 1012, 316 P.3d 495 (2014).

Most recently, we rejected the same issue in State v. Moore, __Wn.2d__, 318 P.3d 296, 299 (2014). There, the jury was instructed, "'If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.'" Id. at 297 (emphasis in original). We held,

> This is a correct statement of the law. Jurors have a duty to apply the law given to them. This instruction does not invade the province of the jury nor otherwise violate a defendant's right to a jury trial. The trial court does not err in giving the instruction when requested.

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[6] See also Neville, 459 U.S. at 566 (holding that due process is not violated when the government commented on the defendant's refusal to submit to a blood alcohol test, because the government did not mislead the defendant into believing his refusal could not be used against him in a later trial).

Id. at 299. Moore reaffirms and upholds the "duty to convict" language. Id. Therefore, we affirm the to convict instruction given at Mecham's trial, because it is substantively identical to the one given in Moore.

III. Certification of Mailing

Mecham argues that the certification of mailing on the license revocation order is testimonial hearsay that violates the confrontation clause for two reasons. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. First, he argues that it contains an ex parte statement made for the purpose of establishing the essential fact that the revocation order was mailed to him. Second, a reasonable person would anticipate the certification to be used in a legal proceeding, because it was sworn under penalty of perjury. As a result, Mecham argues, his DWLS conviction must be reversed.

We review alleged confrontation clause violations de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). When there is a violation, we review for harmless error. Id. The State must show beyond a reasonable doubt that the error did not contribute to the verdict. Id. at 117.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Thus, a witness may not testify against a defendant unless that witness appears at trial or the defendant has a prior opportunity for cross-examination. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Testimony is typically a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF

THE ENGLISH LANGUAGE (1828)). Testimonial statements subject to confrontation include ex parte in-court testimony or its functional equivalent, such as affidavits, depositions, prior testimony, or confessions. Id. at 51-52. Put another way, a testimonial statement is "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Id. at 52 (quoting Br. for National Association of Criminal Defense Lawyers et al. as Amicus Curiae 3).

The Washington Supreme Court recently considered whether certifications attesting to the existence or nonexistence of DOL records are testimonial. Jasper, 174 Wn.2d at 102, 104, 108. Two defendants were charged with DWLS. Id. at 101, 103. In both cases, the State introduced into evidence an affidavit from a DOL records custodian. Id. at 101, 104. Both affidavits stated that, after a diligent search, the official DOL records indicated that the defendants' licenses were suspended or revoked on the date of their offenses. Id. On appeal, the defendants argued that these affidavits constituted testimonial certifications, subject to the confrontation clause. Id. at 100. The Washington Supreme Court agreed. Id. at 116.

The Jasper court based its holding on the United States Supreme Court's decision in Melendez-Diaz. Id. at 111. The Melendez-Diaz Court considered whether certificates of analysis were testimonial statements. 557 U.S. at 308. The certificates reported results of a forensic analysis establishing that a seized substance was cocaine. Id. The Court held that the certificates were "quite plainly affidavits," falling squarely within the core class of testimonial statements described in Crawford. Id. at 310. The certifications were "functionally identical to live, in-court testimony" and used for the sole purpose of establishing a fact at trial. Id. at 310-11.

In light of Melendez-Diaz, the Jasper court held that the affidavits from the DOL records custodians were clearly testimonial statements. 174 Wn.2d at 115. The affidavits were created and used for the sole purpose of establishing critical facts at trial. Id. They served as substantive evidence against the defendants, whose guilt depended on the nonexistence of the DOL record for which the clerk searched. Id. Because the defendants were not given the opportunity to cross-examine the officials who authored the affidavits, their admission violated the confrontation clause. Id. at 116.

Here, the certification of mailing is a sworn statement, made under penalty of perjury. This would lead an objective witness to reasonably believe that the certification would be used at a later trial. And, it is difficult to say that such a sworn statement does not meet the definition of testimony in Crawford: a solemn declaration or affirmation made for the purpose of establishing or proving some fact. 541 U.S. at 51.

However, the certification of mailing was not created or used for the sole purpose of establishing an essential fact at trial. The elements of first degree DWLS are: (1) the defendant was driving in Washington; (2) his privilege to drive was revoked at the time; and (3) the revocation was based on his status as a habitual traffic offender. RCW 46.20.342(1)(a). In Jasper, the affidavits were offered to prove the essential fact that the defendants' licenses were suspended at the time of their offenses. 174 Wn.2d at 117-19. By contrast, the fact of mailing is not an element of the crime to be proved at trial. Rather, mailing goes to whether the license revocation complied with due process.

In a DWLS prosecution, the State must prove that a license revocation order complied with due process.[7] City of Redmond v. Arroyo-Murillo, 149 Wn.2d 607, 612, 70 P.3d 947 (2003). However, the validity of the revocation order is a legal question for the court, not an element of the crime. See State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). The court, not the trier of fact, must make this threshold determination of validity. Id. The right to confrontation is a trial right and is not implicated in such pretrial proceedings. State v. Fortun-Cebada, 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010). Therefore, the fact of mailing is neither subject to the confrontation clause, nor an essential fact to be proven at a DWLS trial.

By the same token, the certification of mailing is not hearsay, because it was not introduced for the truth of the matter asserted. Crawford, 541 U.S. at 59-60 n.9 (recognizing that the confrontation clause does not bar admission of testimonial statements not introduced for the truth of the matter asserted). The revocation order was admitted at trial to show that Mecham's license was revoked on the date of his offense. It was not admitted to show the fact of mailing. The DOL records custodian, Qaasim, did not discuss the certification, and it was not relevant to his testimony.

For the same reasons, even if the certification of mailing was testimonial hearsay subject to the confrontation clause, its admission was harmless. Qaasim testified that he researched Mecham's DOL records. He explained that the order revoking Mecham's license was in effect on May 15, 2011, the date of Mecham's offense. Qaasim further

[7] Indeed, Mecham moved to dismiss the DWLS charge on due process grounds before trial. He argued that the State failed to take additional steps to notify him of the revocation, even though the DOL knew of another address for him prior to the revocation taking effect. Mecham does not renew any due process challenge on appeal.

testified that the DOL records showed Mecham was a habitual traffic offender. This testimony established the second and third elements of first degree DWLS. Mecham had the opportunity to cross-examine Qaasim, though he declined to do so. The certification of mailing did not go to fact to be proved at trial. As such, its admission was harmless.

We hold that the certification of mailing was properly admitted.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, J.

Becker, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 69613-1-I
	)	
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 22ND DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL 22 AM 4:27

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JULY 2014.

X Patrick Mayovsky