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Feb 26, 2015

Court of Appeals

Division III

State of Washington

Supreme Ct No. 91363-3

COA No. 31776-5-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ELOY A. GARZA, Petitioner

FILED

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STATE OF WASHINGTON
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PETITION FOR REVIEW

Jill Reuter
Attorney for Respondent

Janet Gemberling
Attorney for Respondent

JANET GEMBERLING, P.S.
PO Box 8754
Spokane WA 99203
(509) 838-8585

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A. IDENTITY OF PETITIONER

Eloy A. Garza asks this Court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Garza seeks review of the unpublished opinion filed on January 27, 2015, affirming his conviction. A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court should have suppressed the statements made by Mr. Garza to Trooper Berghoff inside his patrol car.
2. Whether the trial court should have suppressed the fruits of the warrantless search of Mr. Garza.

D. STATEMENT OF THE CASE

On February 19, 2011¹, officers were dispatched to a one-car accident, where a car collided with a tree. (RP 36, 37, 190-191, 330-332). No one was inside of the car, and two of the four doors were open. (RP 193, 332). The vehicle airbags were deployed. (RP 203-204, 334, 367). There was blood on the driver's side airbag. (RP 70-71, 205, 232, 252, 367).

¹ The Report of Proceedings consists of five consecutively paginated volumes, and one separate volume containing *voir dire*. Reference to "RP" herein refers to the five consecutively paginated volumes.

After learning that an individual was seen walking near the accident scene, State Trooper Seth Berghoff attempted to locate this individual. (RP 333). He located the individual, who was identified as Eloy Garza. (RP 335-337). Trooper Berghoff smelled an odor of intoxicants coming from his person, and noticed that Mr. Garza had bloodshot and watery eyes. (RP 342, 350-351). Trooper Berghoff placed Mr. Garza in the back of his patrol car. (RP 336-337). After questioning Mr. Garza regarding his involvement in the accident, Trooper Berghoff drove Mr. Garza to the hospital. (RP 338-340, 342, 351-352).

At the hospital, State Trooper Todd Haddorff contacted Mr. Garza. (RP 219). Mr. Garza was unresponsive. (RP 219, 238). Trooper Haddorff read Mr. Garza his *Miranda*² rights and the DUI packet constitutional rights, including the special evidence warning for blood draws. (CP 102: RP 238-239, 242). When Trooper Haddorff asked Mr. Garza if he understood his rights, Mr. Garza did not respond. (CP 102: RP 239). Mr. Garza did not sign the constitutional rights page from the DUI packet, because he was unresponsive. (RP 239-240, 242-243). Mr. Garza also did not sign the special evidence warning for blood draws from the DUI packet, because he was unresponsive. (RP 240, 242-243). Trooper Haddorff wrote

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

“unresponsive” on both forms. (RP 240, 242-243). He did not articulate a specific reason why Mr. Garza was unresponsive. (RP 229-244). According to Trooper Haddorff, Mr. Garza was aware he was a suspect in the case. (RP 245).

Blood samples were then taken from Mr. Garza without his consent. (RP 228, 243). Mr. Garza’s blood alcohol level was .17 grams per hundred milliliters. (RP 149; State’s Ex. 11).

Victoria Gil, who was a passenger in the car at the time of the accident, was at the hospital at the same time as Mr. Garza. (RP 44-45, 217-218, 344). Ms. Gil had a broken arm. (RP 158-159, 163-164, 166, 401-402, 405, 407-408).

Mr. Garza was not placed under arrest. (RP 245, 295-296, 619). On March 18, 2011, when the lead detective in the case spoke with Mr. Garza, he did not suspect Mr. Garza of being the driver of the car, but rather, suspected the driver was Mr. Garza’s first cousin, Michael Garza. (RP 82, 126, 131, 370, 376, 430).

The State later charged Mr. Garza with one count of Vehicular Assault, with the date of offense as February 19, 2011. (CP 1).

The trial court held a 3.5 hearing to determine the admissibility of the statements Mr. Garza made to Trooper Berghoff in his patrol car. (CP 96-99; RP 268-309). At the hearing, Trooper Berghoff was the only witness.

(RP 268-298). Trooper Berghoff found Mr. Garza walking down the road, and Mr. Garza was soaking wet. (CP 97; RP 272, 279-280). He pulled his patrol car behind Mr. Garza, and got out to speak to him. (RP 281-282). Trooper Berghoff asked Mr. Garza what happened, and Mr. Garza said he wanted to sit in the patrol car and warm up. (CP 97; RP 272-275, 282-283, 297-298).

Trooper Berghoff did not handcuff Mr. Garza. (RP 285). He patted Mr. Garza down to make sure he did not have any weapons, and put him in the patrol car. (CP 97; RP 285, 294, 297). He gave Mr. Garza a blanket and turned up the heater. (CP 97-98; RP 272-273, 274, 284-285, 294).

Trooper Berghoff then asked Mr. Garza some questions. (CP 97-98; RP 274-275, 286-287). He asked Mr. Garza if he was involved in the crash, and Mr. Garza told him “[h]e was just trying to get home, and then he stated that he’d missed his turn to get onto Higgins road.” (RP 275, 286, 291).

Trooper Berghoff did not read Mr. Garza his *Miranda* rights. (CP 97-98; RP 274). Mr. Garza was unable to open the door of the patrol car and get out. (CP 97; RP 287). Trooper Berghoff testified that Mr. Garza was not a suspect, and that he was free to leave, until the point when Mr. Garza answered his question by stating that he missed his turn onto Higgins Road. (CP 97; RP 273, 288-292, 295). Trooper Berghoff testified that Mr. Garza

did not ask to leave. (RP 294). He also testified that he never told Mr. Garza that he was under arrest. (RP 295-296).

The trial court ruled the statements made by Mr. Garza to Trooper Berghoff in his patrol car were admissible. (CP 96-99; RP 306-309). The trial court concluded that Mr. Garza was not in custody when the statements were made. (CP 98; RP 308-309). The trial court entered findings of fact and conclusions of law following the 3.5 hearing. (CP 96-99).

Mr. Garza moved to suppress the blood draw, arguing that a search warrant was required in order to conduct the blood draw. (CP 30-34). Mr. Garza relied on the case of *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), for his argument. (CP 30-34; RP 6-7, 309-314).

After hearing argument from the parties, the trial court denied Mr. Garza's motion to suppress. (CP 100-103; RP 309-314; RP 608-609). The trial court concluded that the blood draw was justified under the implied consent statute, RCW 46.20.308, and that *Missouri v. McNeely* did not address the validity of implied consent statutes. (CP 103; RP 309-314, 608-609). The trial court entered findings of fact and conclusions of law on the motion. (CP 100-103; RP 602-609). While entering the findings of fact and conclusions of law, the trial court stated that there were not any exigent circumstances. (RP 606-607, 609).

At trial, Trooper Berghoff testified regarding the statements made by Mr. Garza inside his patrol car. (RP 337-340, 351-352). The results of Mr. Garza's blood draw were admitted into evidence. (RP 134-152; State's Ex. 11). The State also admitted evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car. (RP 246-262; State's Ex. 10). And, the State admitted evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car. (RP 258-262; State's Ex. 25).

Mr. Garza testified in his own defense. (RP 518-536). He told the court he had no recollection of the accident, or of talking to Trooper Berghoff. (RP 523-525). Mr. Garza testified he remembers drinking alcohol at a party at Ms. Gil's house, and then remembers waking up in the hospital. (RP 522-525, 531, 534, 536).

Ms. Gil testified that Mr. Garza was seated in the backseat of the car. (RP 181-182, 184). Trooper Haddorff testified that while talking with Ms. Gil at the hospital, she told him that Mr. Garza was seated in the right rear passenger side of the car. (RP 237).

Mr. Garza's mother testified that on the night of the accident, Michael Garza told her that Mr. Garza was not driving the car. (RP 412, 466-467). Ms. Gil's father testified that he saw someone put Mr. Garza in

the backseat of the car, when leaving the party at Ms. Gil's house. (RP 484, 488, 490, 500).

The jury found Mr. Garza guilty of Vehicular Assault. (CP 79, 104-112; RP 594). Mr. Garza appealed. (CP 123, 129-138).

On appeal, Mr. Garza argued the trial court erred in admitting both the statements he made to Trooper Berghoff inside his patrol car and the fruits of the warrantless search of his person, the taking of blood samples from him without his consent.

In an unpublished decision filed on January 27, 2015, the Court of Appeals affirmed Mr. Garza's conviction, holding the trial court did not err in admitting the statements made by Mr. Garza to Trooper Berghoff inside his patrol car; the trial court did not err in admitting the blood alcohol content (BAC) result under the applicable implied consent statute, RCW 46.20.308(3) (2011)³; and that even if RCW 46.20.308 (2011) is unconstitutional, any error in admitting the BAC result is harmless beyond a reasonable doubt. *See* Appendix A. The Court of Appeals found that "Mr. Garza moved solely to suppress the BAC results and not the DNA results.

³ This version of the implied consent statute is no longer in effect. Effective September 28, 2013, the Legislature amended RCW 46.20.308 to permit blood tests only for specified crimes, and "pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist." RCW 46.20.308(3); Laws of 2013, 2nd Special Session ch. 35, § 36.

No issue is raised here concerning DNA evidence admissibility.” Appendix A, pg. 12 n. 5. Mr. Garza now seeks review of this unpublished decision.

E. ARGUMENT AS TO WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS’ DECISION – THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS MADE BY MR. GARZA TO TROOPER BERGHOFF INSIDE HIS PATROL CAR – CONFLICTS WITH CASE LAW, POSES A SIGNIFICANT CONSTITUTIONAL ISSUE, AND WARRANTS REVIEW AS A MATTER OF PUBLIC INTEREST.

The Court of Appeals decision that the trial court did not err in admitting the statements made by Mr. Garza to Trooper Berghoff inside his patrol car conflicts with decisions of this Court, involves a significant question of law under the Constitution of the State of Washington and of the United States, and involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b).

Miranda warnings must be given whenever a suspect is subject to custodial interrogation by police. *Miranda v. Arizona*, 384 U.S. 436, 467-68, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). This protects a defendant's Fifth Amendment privilege against self-incrimination. *Id.* at 467. “Thus, [w]hether an officer should have given *Miranda* warnings to a defendant depends on whether the examination or questioning constituted (1) a custodial (2) interrogation (3) by a state agent.” *State v. Grogan*, 147 Wn.

App. 511, 517, 195 P.3d 1017 (2008) (citations omitted) (alteration in original). If police conduct a custodial interrogation without *Miranda* warnings, statements made by the suspect during the interrogation may not be introduced trial. *Miranda*, 384 U.S. at 479.

Trooper Berghoff's question to Mr. Garza, asking whether he was involved in the crash, was interrogation. (RP 275, 286, 291).

Interrogation is questioning that is reasonably likely to elicit an incriminating response. *State v. Walton*, 64 Wn. App. 410, 414, 824 P.2d 533 (1992); *see also State v. Wilson*, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). Asking Mr. Garza whether he was involved in the accident meets this standard.

The disputed issue at the 3.5 hearing was whether the statements made by Mr. Garza to Trooper Berghoff inside his patrol car were custodial. (CP 98; RP 268-309).

A formal arrest is not required to entitle a suspect to *Miranda* warnings. *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007). Custody is defined as "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). "Custody is a mixed question of fact and law." *Grogan*, 147 Wn. App. at 517 (quoting *State v. Solomon*, 114 Wn. App.

781, 787, 60 P.3d 1215 (2002)). “The legal inquiry determines, given the factual circumstances, whether a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” *Id.*

(alteration in original) (internal quotation marks omitted)

(quoting *Solomon*, 114 Wn. App. at 787-88). “[T]he reviewing court applies an objective test to determine the ultimate inquiry: whether there was a formal arrest or restraint of the defendant to a degree consistent with formal arrest.” *Id.* (alteration in original) (quoting *State v. Rehn*, 117 Wn. App. 142, 153, 69 P.3d 379 (2003)).

Mr. Garza was in custody once Trooper Berghoff placed him in his patrol car. Although Mr. Garza requested to sit in the patrol car, Trooper Berghoff physically placed him there. (RP 294). Prior to doing so, Trooper Berghoff patted Mr. Garza down for weapons. (CP 97; RP 285, 297). Once in the patrol car, Mr. Garza could not get out of the car on his own. (CP 97; RP 287).

After being patted down and placed in a patrol car by a police officer, with doors he could not open himself, a reasonable person would have felt his freedom “was curtailed to the degree associated with a formal arrest.” *Heritage*, 152 Wn.2d at 218. Under these circumstances, a reasonable person would have felt he was not at liberty to terminate the

interrogation and leave. *See Grogan*, 147 Wn. App. at 517 (*quoting Solomon*, 114 Wn. App. at 787-88).

The trial court erred in concluding that Mr. Garza was not in custody when he made statements to Trooper Berghoff inside his patrol car, and in admitting these statements at trial. (CP 98: RP 306-309, 337-340, 351-352). Because Mr. Garza was in custody, *Miranda* warnings were required. *See Miranda*, 84 U.S. at 467-68; *Grogan*, 147 Wn. App. at 516-517. Trooper Berghoff did not give Mr. Garza *Miranda* warnings. (CP 97-98: RP 274). Therefore, the trial court should have suppressed the statements made by Mr. Garza to Trooper Berghoff inside his patrol car. *See Miranda*, 384 U.S. at 479. The Court of Appeal's decision should be reversed and the case remanded for a new trial.

2. THE COURT OF APPEALS' DECISION – THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE BAC AND LIMITING ITS DECISION TO THE BAC RESULT ONLY – CONFLICTS WITH CASE LAW, POSES A SIGNIFICANT CONSTITUTIONAL ISSUE, AND WARRANTS REVIEW AS A MATTER OF PUBLIC INTEREST.

The Court of Appeals decision that the trial court did not err in admitting the BAC and limiting its decision to the BAC result only conflicts with decisions of this Court, involves a significant question of law under the Constitution of the State of Washington and of the United States, and

involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b).

In the Court of Appeals, Mr. Garza argued the fruits of the warrantless search of his person, the taking of blood samples from him without his consent, should have been suppressed. The fruits of the warrantless search are the blood samples and related testimony, including the BAC result; evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car; and evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car.

However, the Court of Appeals limited its decision to the BAC result only. *See* Appendix A, pgs. 8-12. The Court of Appeals stated: "The State aptly notes Mr. Garza moved solely to suppress the BAC results and not the DNA results. No issue is raised here concerning DNA evidence admissibility." Appendix A, pg. 12 n. 5.

To the contrary, in his motion to suppress, Mr. Garza moved to suppress "the blood draw[,]" not just the BAC. (CP 30). Therefore, the Court of Appeals erred in limiting its decision to the BAC only and in not considering Mr. Garza's arguments that the trial court erred in failing to suppress the fruits of the warrantless search of his person, the blood draw and related testimony, including DNA evidence admissibility.

The law enforcement officers violated the provisions prohibiting unreasonable searches and seizures, under the Fourth Amendment and Article I, § 7 of the Washington State Constitution, by taking blood samples from Mr. Garza without a warrant. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556, 1558, 1563, 1568, 185 L. Ed. 2d 696 (2013). “[T]he taking of blood samples constitutes a ‘search and seizure’ within the meaning of U.S. Const. amend. 4 and Const. art. 1, § 7.” *State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984) (citing *State v. Meacham*, 93 Wn.2d 735, 738, 612 P.2d 795 (1980); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)); see also *McNeely*, 133 S. Ct. at 1558 (acknowledging that a warrantless, non-consensual blood test is a search under the Fourth Amendment, and it is reasonable only if it falls within a recognized exception). Therefore, in order for a warrantless blood draw to withstand a constitutional challenge, it must fall under an exception to the warrant requirement. See *State v. Garvin*, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009).

In *McNeely*, the Court held that a *per se* exigency does not exist for nonconsensual blood testing in all drunk-driving cases, and that “consistent with Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances.” *McNeely*, 133 S. Ct. at 1556, 1563, 1568.

Mr. Garza did not consent to the blood draw. (CP 102; RP 219, 228, 238-240, 242-243). Also, as the trial court concluded, there were no exigent circumstances that prevented the officers from obtaining a search warrant before taking blood samples from Mr. Garza. (RP 606-607, 609). Therefore, the law enforcement officers violated the provisions prohibiting unreasonable searches and seizures, under the Fourth Amendment and Article I, § 7 of the Washington State Constitution, by taking blood samples from Mr. Garza without a warrant. *See McNeely*, 133 S. Ct. at 1556, 1558, 1563, 1568.

The blood samples obtained from Mr. Garza without his consent did not fall under the exigent circumstances exception, or any other exception to the warrant requirement. Therefore, the trial court should have suppressed the fruits of the warrantless search of Mr. Garza, the blood samples and related testimony, including evidence that the DNA in Mr. Garza's blood, taken in the blood draw, matched the DNA in blood found on the driver's side airbag of the car, and evidence regarding the probability that a first cousin of Mr. Garza would match the DNA in blood found on the driver's side airbag of the car. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (stating that "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

The error is admitting the fruits of the warrantless search of Mr. Garza was not harmless beyond a reasonable doubt. *See State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004) (stating “constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error.”). Although there was some evidence presented at trial that Mr. Garza was the driver on the night in question, this evidence was not overwhelming, considering the evidence presented that Mr. Garza was not the driver. (RP 181-182, 184, 225-226, 237, 284, 353, 368, 412, 466-67, 484, 488, 490, 500, 526). Ms. Gil testified that Mr. Garza was seated in the backseat of the car. (RP 181-182, 184). Trooper Haddorff testified that while talking with Ms. Gil at the hospital, she told him that Mr. Garza was seated in the right rear passenger side of the car. (RP 237). Mr. Garza’s mother testified that on the night of the accident, Michael Garza told her that Mr. Garza was not driving the car. (RP 412, 466-467). Ms. Gil’s father testified that he saw someone put Mr. Garza in the backseat of the car, when leaving the party at Ms. Gil’s house. (RP 484, 488, 490, 500).

In addition, the blood draw was not authorized under the applicable implied consent statute. RCW 46.20.308 (2011). *Missouri v. McNeely* overrules sections of the implied consent statute where consent is not required, and an individual cannot refuse a blood draw. *See RCW*

46.20.308(3), (4), (5) (2011). *McNeely* requires a search warrant, or an exception to the warrant requirement in order to allow a non-consensual, warrantless blood draw. *See McNeely*, 133 S. Ct. at 1556-1558, 1563, 1568.

Second, the blood draw done here was not authorized under RCW 46.20.308, because the applicable implied consent statute required, under sections (1), (4), and (5), that a person be under arrest. RCW 46.20.308 (2011). However, Mr. Garza was not placed under arrest in this case. (RP 245, 295-296, 619). Substantial evidence does not support the trial court's finding of fact that while at the hospital, "[a]fter speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault." (CP 102); *see also State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (defining substantial evidence). According to Trooper Haddorff, Mr. Garza was aware he was a suspect in the case. (RP 245). However, Trooper Haddorff did not testify that he arrested Mr. Garza. (RP 188-246). Trooper Berghoff testified that he never told Mr. Garza that he was under arrest. (RP 295-296). Almost one month after the accident, the lead detective suspected the driver was Mr. Garza's first cousin Michael Garza, not Mr. Garza himself. (RP 82, 126, 131, 370, 376, 430).

Further, section (3) of the statute allowed a non-consensual blood draw when "an individual is unconscious or is under arrest for the crime of . . . vehicular assault . . ." RCW 46.20.308(3) (2011). As stated above, Mr.

Garza was not under arrest in this case. (RP 245, 295-296, 619). Further, there was no evidence that Mr. Garza was unconscious. Trooper Haddorff testified that Mr. Garza was unresponsive, but not that he was unconscious. (CP 102; RP 239-240, 242-243).

Accordingly, the implied consent statute applicable at the time of the accident did not authorize the blood draw on Mr. Garza, where he was not placed under arrest, nor determined to be unconscious. *See* RCW 46.20.308 (2011). The blood draw was not authorized under RCW 46.20.308 (2011), Washington's implied consent statute.

The Court of Appeal's decision should be reversed and the case remanded for a new trial.

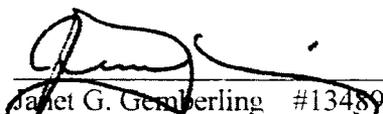
F. CONCLUSION

For the reasons stated above, Mr. Garza asks this Court to grant the petition for review of the Court of Appeals decision.

Dated this 26th day of February, 2015.

JANET GEMBERLING, P.S.


Jill S. Reuter #38374
Attorney for Respondent


Janet G. Gemberling #13489
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) No. 31776-5-III
)
 vs.) CERTIFICATE
) OF MAILING
ELOY A. GARZA,)
)
 Petitioner.)

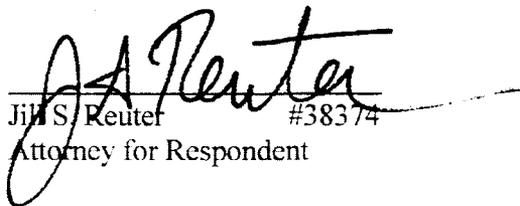
I certify under penalty of perjury under the laws of the State of Washington that on February 26, 2015, I mailed copies of the Petition for Review in this matter to:

Tamara Ann Hanlon
Attorney at Law
128 N. 2nd Street, Room 329
Yakima, WA 98901

and

Eloy Garza
31 Home Acres Road
Wapato, WA 98951

Signed at Spokane, Washington on February 26, 2015.


Jill S. Reuter #38374
Attorney for Respondent

APPENDIX A

FILED
JAN 27, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	No. 31776-5-III
)	
Respondent,)	
)	
v.)	
)	
ELOY A. GARZA,)	UNPUBLISHED OPINION
)	
Appellant.)	

BROWN, A.C.J. – Eloy Anthony Garza appeals his conviction for vehicular assault. He contends the trial court erred in (1) admitting his alleged custodial statements made in the back of a patrol car without necessary warnings, and (2) admitting warrantless, alleged unconstitutional blood alcohol content (BAC) implied consent results under RCW 46.20.308. We conclude Mr. Garza’s statements were not custodial or coerced, and any error in admitting the BAC results was harmless without reaching Mr. Garza’s constitutional concerns. Accordingly, we affirm.

FACTS

On February 19, 2011, Mr. Garza and his cousin Michael Garza attended an evening party at Victoria Gil’s house where Mr. Garza admitted drinking beer and vodka. According to Ms. Gil, after Mr. Garza argued with his ex-girlfriend, she, Michael,

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Mr. Garza, and an unnamed fourth person left the party in a car. According to the defense, Michael helped an intoxicated Mr. Garza into the right rear passenger seat, an intoxicated Ms. Gil sat behind the driver in the left rear seat, Michael sat in the back as well, and the fourth person was most likely the driver.

Later that evening, Washington State patrol troopers responded to the scene of a one-car collision. The car, belonging to Ms. Gil, had crashed into a tree. Upon arrival, Troopers Todd Haddorff and Seth Berghoff found the car abandoned with the right front passenger door and left rear passenger door ajar. The driver's door was jammed shut. The troopers noticed the airbags had recently been deployed and saw what appeared to be blood on the driver's airbag. Motorists advised the troopers a man was seen walking in the area. Trooper Berghoff went to find the man and found Mr. Garza.

Mr. Garza was soaking wet and shivering in the freezing conditions. After Trooper Berghoff contacted him, Mr. Garza asked if he could sit in the patrol car. Trooper Berghoff patted Mr. Garza down for safety purposes, wrapped a blanket around him, helped him, unhandcuffed, into the backseat of the patrol car, shut the door, and turned up the heat. Trooper Berghoff asked Mr. Garza if he had been involved in the car accident. In his now contested statement, Mr. Garza said he was just trying to get home and had missed his turn to Higgins Road. When Trooper Berghoff asked if he had been driving, Mr. Garza replied he did not know who the driver was. Trooper Berghoff could smell "an obvious odor of intoxicants coming from [Mr. Garza's] person"

and noticed Mr. Garza's bloodshot, watery eyes. Report of Proceedings (RP) at 342. Trooper Berghoff took Mr. Garza to the hospital after he complained of shoulder pain.

At the hospital, Trooper Haddorff saw both Ms. Gil and Mr. Garza. Ms. Gil was slurring her words, had watery eyes, smelled of alcohol, and had broken her arm. Mr. Garza had watery, bloodshot eyes, smelled of alcohol, was soaking wet, and had dirt on his face. His movements were lethargic and slow, and he was unresponsive. When Gloria Garza, Mr. Garza's mother, saw him in the hospital, she similarly observed Mr. Garza was "drunker than I've ever seen him in my life," was "not really conscious of where he was or who we were talking to," and was generally not responding well. RP at 421-22.

While in the hospital, Trooper Haddorff read Mr. Garza his rights twice as well as the special evidence warning for blood draws. When asked if he understood his rights, Mr. Garza did not respond. In reading Mr. Garza the special evidence warning, Trooper Haddorff advised Mr. Garza he was under arrest. Subsequently, Mr. Garza's blood was drawn to determine his BAC, which was determined to be 0.17 grams per hundred milliliters, well above the legal limit.

Detective William Bryan, a technical collision investigator, investigated the accident and found blood on the driver's airbag and stretching of the driver's seatbelt. Detective Bryan opined the driver would strike the driver's airbag, and, as the driver's door did not open, it was unlikely the other passengers were the source of the blood because they would have no reason to be in the driver's area. Deoxyribonucleic acid

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(DNA) testing of the blood stain and the blood obtained from Mr. Garza at the hospital later showed the blood on the airbag was Mr. Garza's. The stretching of the seatbelt indicated someone wore it at the time of the collision. According to Detective Bryan, a violent collision could leave marks on the person wearing the seatbelt. Had they been wearing seatbelts, the driver and the passenger behind the driver would have marks on their left collarbone/shoulder. Mr. Garza had marks on his left shoulder, and he fractured his left collarbone in the accident. Before the DNA results were returned, Detective Bryan believed Michael Garza was the probable driver; when he spoke with Mr. Garza by phone on March 18, 2011, he did not suspect Mr. Garza was the driver.

In April 2012, the State charged Mr. Garza with one count of vehicular assault. The trial court held a combined 3.5/3.6 hearing to determine whether the statements Mr. Garza made to Trooper Berghoff while inside the patrol car were admissible and whether the blood draw should be suppressed. The trial court concluded Mr. Garza was not in custody when he made his statements, *Miranda* warnings were not needed, and the statements were admissible. The trial court denied Mr. Garza's motion to suppress the blood draw, finding the blood draw was justified under the implied consent statute, RCW 46.20.308. Mr. Garza was convicted as charged. He appealed.

ANALYSIS

A. Statement Admissibility

The issue is whether the trial court erred in admitting Mr. Garza's admissions made while he was in Trooper Berghoff's patrol car as noncustodial statements. Mr. Garza contends the setting was custodial, thus requiring *Miranda*¹ warnings.

Although Mr. Garza argues his statements were custodial, he does not challenge the trial court's CrR 3.5 findings of fact. "Unchallenged findings of facts are verities on appeal." *State v. Lorenz*, 152 Wn. 2d 22, 36, 93 P.3d 133 (2004). We review a trial court's custodial determination de novo. *Id.* *Miranda* warnings "protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). If a state agent interrogates a suspect in custody without giving *Miranda* warnings, any testimonial evidence elicited cannot be used against the suspect at trial. *Heinemann v. Whitman County Dist. Court*, 105 Wn.2d 796, 801, 718 P.2d 789 (1986). Thus, *Miranda* warnings are required when a suspect is subjected to (1) custodial (2) interrogation (3) by a state agent. *Heritage*, 152 Wn.2d at 214. Here, the sole disputed element is whether the questioning was custodial.

"A defendant is in custody for purposes of *Miranda* when his or her freedom of action is curtailed to a degree associated with formal arrest." *State v. Grogan*, 147 Wn.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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App. 511, 517, 195 P.3d 1017 (2008) (internal quotation marks omitted) (citation omitted). We use an objective test to ascertain "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *Lorenz*, 152 Wn.2d at 37. Not all police encounters are custodial. For example, in a *Terry*² stop situation, the police are allowed to ask questions without rendering a suspect "in custody." See *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); see also *Heritage*, 152 Wn.2d at 218 (Washington courts agree questioning during "a routine *Terry* stop is not custodial for the purposes of *Miranda*"). In a *Terry* stop, the police can "ask a moderate number of questions . . . to determine the identity of the suspect and to confirm or dispel the officer's suspicions" without providing a person with *Miranda* warnings. *Heritage*, 152 Wn.2d at 218.

We must determine if a reasonable person in Mr. Garza's position would have believed his freedom was curtailed to a degree associated with arrest when Trooper Berghoff asked him if he was involved in an accident. The facts as found by the trial court show Trooper Berghoff saw Mr. Garza walking along a road soaking wet, shivering, and trailing water behind him. The trooper exited his patrol car without activating his lights and contacted Mr. Garza. Mr. Garza voluntarily asked to sit in the patrol car to warm up. Trooper Berghoff patted down Mr. Garza to ensure officer safety as a normal practice. Then, the trooper wrapped Mr. Garza in a blanket, allowed him to

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

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sit in the back seat of his patrol car without handcuffs, and shut the doors to maintain the heat. At no time while Mr. Garza was seated in the patrol car did the trooper tell Mr. Garza he was under arrest or was not allowed to leave. Trooper Berghoff then generally asked whether Mr. Garza was involved in the car accident and if he was the driver. Mr. Garza voluntarily responded, saying he had been trying to get home, had missed his turn, and did not know who was driving. The trial court found no evidence of coercion, concluded the statements were made voluntarily in a noncustodial situation, and allowed the statements into the trial evidence.

When Trooper Berghoff asked if Mr. Garza was involved in the accident and if he had been driving, Trooper Berghoff was making general inquiries in an attempt to get information about the abandoned accident scene. Mr. Garza's custody arguments fail. First, a quick pat down before being allowed in a police car is a reasonable action to ensure an officer's safety and would not lead a reasonable person to believe they were not free to leave. Second, while Trooper Berghoff placed Mr. Garza in the car, he did so at Mr. Garza's request. And lastly, while Mr. Garza could not open the patrol car doors without Trooper Berghoff's assistance, Trooper Berghoff gave no indication he would not open the doors had he been asked to do so. Furthermore, the doors had been shut not to keep Mr. Garza from leaving but instead to warm up a man who had been soaking wet and walking around outside in freezing temperatures.

Given this record, we conclude the statements were voluntarily made in a noncustodial environment without coercion. Mr. Garza's freedom was not curtailed to a

degree associated with arrest. This encounter was more similar to a *Terry* stop when Mr. Garza stated he was trying to get home, he had missed his turn, and he did not know who was driving. As such, no *Miranda* warnings were needed, and the statements were admissible. In sum, the trial court did not err in allowing the challenged statements.³

B. Warrantless Blood Draw

The issue is whether the trial court erred in denying Mr. Garza's suppression motion for the warrantless blood draw. Mr. Garza first contends a warrant was required under the Supreme Court's recent holding in *Missouri v. McNeely* deciding "the natural dissipation of alcohol in the blood" is not a per se exigency justifying a warrantless blood draw. *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1563, 185 L. Ed. 2d 696 (2013). Second, he contends the blood draw was not authorized under Washington's implied consent statute, RCW 46.20.308, because *McNeely* vitiates the law's sections permitting warrantless blood draws in cases of persons arrested for vehicular assault or

³ While we conclude the statements were admissible, even if they were obtained while Mr. Garza was in custody, admission of the statements was harmless error. See *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) (erroneous admission is harmless error if the untainted evidence is so overwhelming a reasonable jury would have reached the same result absent the admission). Mr. Garza's statement that "he just wanted to get home" does not imply whether he was the driver or not. RP at 338. His admission he did not know who the driver was helps his case and is consistent with his testimony. And his statement he missed his turn implies he was the driver, but other evidence corroborates this implication: the blood on the airbag was Mr. Garza's; the driver's seatbelt had been worn, and Mr. Garza had injuries consistent with being the driver; and the driver's door was stuck, making it unlikely a person other than the driver got blood on the airbag. Additionally, because we conclude Mr. Garza was not in custody while in the back of Trooper Berghoff's patrol car, we do not address the State's alternative community caretaking arguments.

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who are unconscious when the blood draw was performed. Mr. Garza's second contention is discussed first, and because it is dispositive based on harmless error we do not reach Mr. Garza's first contention or his constitutional concerns.

In reviewing the denial of a suppression motion, we "determine[] whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists when it is enough "to persuade a fair-minded person of the truth of the stated premise." *Id.* (citation omitted). Conclusions of law from an order on a suppression motion are reviewed de novo. *Id.*

"[T]he taking of blood samples constitutes a 'search and seizure' within the meaning of U.S. CONST. amend. 4 and CONST. art. 1, § 7." *State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984). "[A] warrantless search of the person is reasonable only if it falls within a recognized exception," such as consent or exigent circumstances. *McNeely*, 133 S. Ct. at 1558, 1566; see *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). RCW 46.20.308⁴ "creates a statutory presumption that anyone

⁴ On the date of the accident, February 19, 2011, RCW 46.20.308(3) read:

Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of felony driving under the influence of intoxicating liquor or drugs under RCW 46.61.502(6), felony physical control of a motor vehicle while under the influence of intoxicating liquor or drugs under RCW 46.61.504(6), vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or

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arrested for driving under the influence of alcohol has consented to a . . . blood test for purposes of determining [BAC]." *State v. Morales*, 173 Wn.2d 560, 568, 269 P.3d 263 (2012); RCW 46.20.308(1). Unless a driver is arrested for vehicular assault or is unconscious, the driver may withdraw his consent. *Id.*; see also *State v. Steinbrunn*, 54 Wn. App. 506, 509-10, 774 P.2d 55 (1989) (holding an unconscious driver must also be arrested before police can lawfully take a warrantless blood sample). Thus, "[a] lawful arrest is a prerequisite to the application of the implied consent statute." *O'Neill v. Dep't of Licensing*, 62 Wn. App. 112, 116, 813 P.2d 166 (1991).

On appeal, a party may assign evidentiary error only on a specific ground made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Requiring such objections at trial gives the trial court the chance to prevent or cure the error. *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

The State contends appellate review is precluded because (1) Mr. Garza failed to preserve his error claims regarding whether he was arrested or unconscious for the purpose of RCW 46.20.308, as he did not object at trial on those grounds, and (2) at trial, no discussion by the trial court or either party occurred concerning whether Mr. Garza was unconscious for purposes of RCW 46.20.308.

Mr. Garza did raise the arrest issue: thus, it is properly before us. While his suppression motion focused primarily on his *McNeely* warrant-requirement argument, he did briefly argue no statutory exception existed to the warrant requirement. The trial

blood test may be administered without the consent of the individual so arrested.

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court presumably inferred this meant RCW 46.20.308 was not applicable, as it based its conclusions of law from the 3.6 motion on that statute. Furthermore, both the State and Mr. Garza questioned the troopers about whether Mr. Garza was under arrest when the blood was drawn.

Mr. Garza challenges two of the trial court's findings of fact regarding arrest. The court found (1) "After speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault" and (2) "At approximately 0048 hours, the Trooper . . . advised [Mr. Garza] he was placed under arrest for Vehicular Assault." Clerk's Papers at 102. These findings are supported by substantial evidence. The special evidence warning informs a suspect that he is under arrest. By reading this warning to Mr. Garza, Trooper Haddorff placed Mr. Garza under arrest. The trial court did not err in admitting the BAC result under RCW 46.20.308(3).

However, even if former RCW 46.20.308 (2011) is unconstitutional, we conclude any error in admitting the BAC result is harmless beyond a reasonable doubt. Any error in admitting unconstitutionally obtained evidence is subject to the constitutional harmless error test. *See State v. Peele*, 10 Wn. App. 58, 66, 516 P.2d 788 (1973). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Guloy*, 104 Wn.2d at 425-26 (applying the "'overwhelming untainted evidence' test" in which an appellate court "determine[s] if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt"). In light of the untainted

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evidence, Mr. Garza was without doubt intoxicated that night. First, troopers noticed Mr. Garza had watery, bloodshot eyes and smelled “an obvious odor of intoxicants coming from [Mr. Garza’s] person.” RP at 219, 342. Second, Mr. Garza admitted to Detective Bryan he was drunk that night and could not remember much. Third, Ms. Gil, Mr. Garza’s mother, and Mr. Garza himself testified at trial that Mr. Garza was drunk. A reasonable jury would have reached the same result—that Mr. Garza was intoxicated—even in the absence of the BAC.⁵

Given our reasoning, we do not reach Mr. Garza’s first contention concerning the constitutionality of RCW 46.20.308. When a case can be decided on nonconstitutional grounds, appellate courts should refrain from deciding constitutional issues. See *State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992). Additionally, the Washington Supreme Court will be hearing a case on whether, notwithstanding RCW 46.20.308, a search warrant or actual consent is needed to obtain a breath test from a person stopped on suspicion of driving under the influence.⁶

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

⁵ The State aptly notes Mr. Garza moved solely to suppress the BAC results and not the DNA results. No issue is raised here concerning DNA evidence admissibility. The jury answered the fact question of whether Mr. Garza was the driver against him based on strong evidence, including the DNA results.

⁶ The case number is 90419-7 (*State v. Baird and Adams*). The date for oral argument is not yet set.

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2,06.040.

WE CONCUR:

Fearing, J.
Fearing, J.

Brown, A.C.J.
Brown, A.C.J.

Lawrence-Berrey, J.
Lawrence-Berrey, J.