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COURT OF APPEALS,
DIVISION II

STATE OF WASHINGTON

Respondent

V

STEVEN WHITMIRE

Appellant

No. 35743-7-II

BRIEF OF APPELLANT

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A. ASSIGNMENTS OR ERROR

1. Appellant assigns as error the trial court's finding of probable cause to support the appellant's arrest under the disregard for safety of others prong as well as the DUI prong of the vehicular assault statute, and holding the resulting blood draw and blood test results to be admissible. Assignment is specifically made to the assertion and finding of fact number one that the defendant drove his vehicle into the west bound lane, the assertion in finding of fact number four that the defendant was lethargic beyond what would be expected from the narcotic analgesic administered to him at the hospital, and that a nurse told Trooper Black that the defendant appeared lethargic prior to being given the Fentanyl at the hospital. Error is also assigned to finding of fact number five, which indicates that each trooper attempted to question the defendant separately and that the defendant was ever conscious. These findings are set forth in CP-26.

2. Appellant assigns error to the trial court's decision to admit a statement attributed to Appellant by Trooper Moon supposedly acknowledging drug usage, elicited by the trooper without first providing Miranda warnings to appellant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. On November 16, 2006, a suppression hearing was conducted before Judge Stephen Warning in the Superior

Court of Cowlitz County, Washington. At issue was whether the results of a blood draw conducted at St. John's Medical Center pursuant to the arrest of appellant on a charge of vehicular assault on November 13, 2005 were admissible. The record reflects that on that date, Trooper Black and Trooper Moon of the Washington State Patrol, together with other law enforcement officers, responded to the scene of an accident which had occurred at approximately 9:45 .a.m., near the intersection of SR 42 and Oregon Way in Longview, Washington. The investigation reflected that the accident had occurred on a straight stretch of road, when the appellant's vehicle began to gradually drift over the center line, causing a number of oncoming vehicles to take more and more evasive action, until the appellant's vehicle, traveling according to witnesses at approximately the speed limit, struck a vehicle in the oncoming lane operated by Shara Petrick. Both individuals were injured and both were transported to St. John's Medical Center. Trooper Moon testified that based on how the accident had apparently occurred, he and other officers at the scene actually discussed the possibility that the accident had occurred due to the appellant falling asleep behind the wheel. Troopers Black and Moon went to the hospital to observe Ms. Petrick and to also make contact with the appellant based on assertions by a witness that the witness was aware that the

appellant had used drugs some time in the past. Trooper Black, a DRE, arrived first and was informed by the hospital personnel that the appellant had been administered a dose of Fentanyl, a strong narcotic analgesic for purposes of reducing his pain. He was also informed by someone at the hospital that the appellant was lethargic before he was brought into the hospital. He was not able to rouse the appellant into consciousness or engage him in any conversation, and was initially of the opinion that the appellant was under the influence of a narcotic analgesic. In the course of the hearing, Trooper Black announced that he really couldn't determine whether Whitmire might have been exhibiting the symptoms of a narcotic analgesic, or perhaps the after effects of use of methamphetamine, or that he simply could have been fatigued due to lack of rest; he simply wasn't able to make that determination. Trooper Moon testified that when he arrived, he was able to engage the appellant in a conversation and elicited that the appellant had used methamphetamine the previous evening and into the early morning hours of that day. The Troopers testified that they determined that there was probable cause to arrest Mr. Whitmire under the DUI prong of the vehicular assault charge, placed him under arrest and arranged for a blood draw pursuant to the arrest. Based on the conflicts between the trooper's description of the appellant's condition at

the time of their contact with him at the hospital, the trial court refused to find that the appellant had actually made the statement attributed to him by Trooper Moon, for purposes of ruling on the suppression motion. However, the trial court did decide that based on the manner in which the accident had occurred, the officers had probable cause to arrest the appellant based on a violation of the disregard for safety of others prong of the vehicular assault statute, although in so ruling, the court acknowledged that the manner in which the accident occurred was consistent with someone falling asleep behind the wheel. Did the trial court err in finding probable cause for the arrest of the appellant based on evidence which did not establish anything more than ordinary negligence on the part of the appellant in the operation of his vehicle?

2. Based on the fact pattern outlined above, did the trial court err in finding that there was probable cause to arrest the appellant for violation of the DUI prong of the vehicular assault statute, where the court did not accept that the appellant had made the statement attributed to him by Trooper Moon regarding drug usage, and the DRE could only opine that the appellant's appearance and condition was as consistent with non-criminal activity as with criminal activity?

3. Even in the event that the evidence could properly be construed as providing probable cause for the appellant's arrest

under the disregard for safety of others prong of the vehicular assault statute, would the appellant's arrest on that basis provide a sufficient legal basis for the subsequent blood draw and the admissibility of the resulting blood test under the implied consent statute?

4. Trooper Moon could not ascertain anything about the appellant's appearance which would indicate to him whether the appellant was under the influence of drugs or alcohol, and Trooper Moon could only conclude that his appearance was as consistent with non-criminal activity with potential criminal activity. Under these facts, did the trial court err in finding that the blood draw from the appellant was authorized under the implied consent statute due to a violation of the DUI prong of the vehicular assault statute?

5. Trooper Moon testified that when he encountered the appellant in the treatment room at the Medical Center, he did not advise the appellant of his Miranda warnings before conducting the interrogation of the appellant in the treatment room. Did the trial court err in concluding that the state was entitled to introduce the statement attributed to the appellant by Trooper Moon in the course of the state's case in chief should the matter proceed to trial?

C. STATEMENT OF THE CASE

On November 16, 2006, a combined CrR3.5 hearing and CrR6 suppression hearing was conducted before Judge Stephen M Warning in the Cowlitz County Superior Court in the above-entitled matter. The first witness called by the state was Trooper Black, who identified himself as a drug recognition expert, a drug recognition expert instructor, an emergency medical technician and an emergency medical technician evaluator. (RP 3). He indicated that he had been a DRE for approximately five years and had performed approximately 180 full DRE evaluations in the field. He indicated his training and experience in the field include a wide variety of drugs, including methamphetamine, anti-depressants, central nervous system depressants, narcotic analgesics (RP 5, Lines 5-18).

He indicated that on November 13, 2005, he was called out on duty to the scene of a vehicle collision at approximately 10:00 a.m. (RP 6). He went directly to the scene at SR 432 near Oregon Way and observed what was obviously a head-on collision (RP 7, Lines 2-8). He indicated it was obvious that it looked as though one vehicle had crossed the centerline and struck another vehicle, because of the way the vehicles were positioned and it seemed to him that there was a gray or silver pickup truck that was in the oncoming lane (RP 7, Lines 13-19). At the scene he spoke with Trooper Moon, Sgt. Sweet and

Trooper McBride and learned that there had been a head-on collision, that the drivers had been transported to the hospital and since they didn't know exactly why the person had crossed the centerline, they wanted Trooper Black to go and check out the drivers. (RP 7, Lines 20-25, RP 8, Lines 1-9). He testified that he contacted the defendant, Steven Whitmire, briefly at the hospital. He indicated that he arrived at the accident scene at 11:48 and arrived at St. John's Hospital at 12:14 so his contact with the defendant was approximately half an hour later. (RP 8, Lines 16-25). He indicated when he contacted Mr. Whitmire, he was the only patient in a hospital room in the Emergency Department and there were a couple of nurses in the room, but no other police officers. At that time, Whitmire was unconscious or sleeping, according to Trooper Black. (RP 9, Lines 1-16). He indicated that first he spoke with one of the nurses and he began trying to rouse Mr. Whitmire. (RP 9, Lines 18-20). He indicated that he had been advised by dispatch that Whitmire was known to be a drug user or a drug addict; he indicated that was something that was taken into consideration but that it doesn't mean that the person is impaired at the particular time when he was observing him. (RP 10, Lines 7-14). He was asked whether he had any reason to believe that Whitmire was under the influence of anything when he was driving, the trooper responded that besides him crossing the centerline for

an unknown reason, no. (RP 10, Lines 20-25). He indicated that when he talked to the nurse, she advised him that Whitmire had been given a dose of Fentanyl, a narcotic analgesic, used for pain. He indicated that there are different sizes of dose but normally one dose is enough to knock the pain of the top. When he was asked what sort of effect he'd expect Fentanyl to have on someone, he indicated that it depends on the person but that normally a single dose of Fentanyl he is going to observe constricted pupils, lower blood pressure, pulse rate, can cause the face to be pale, someone to be lethargic. The nurse also advised him of Whitmire's injuries, which were a fractured spine, a fractured right patella, and a pulmonary contusion. (RP 11, Lines 20-25, RP 12, Lines 1-9). He indicated that the effect of the Fentanyl was typically going to take the edge off the pain but not take it away completely. He also indicated that it depends on the person and it depends on the dose. (RP 12, Lines 14-22). He indicated that he tried to rouse Whitmire by speaking louder. He indicated that he spoke loud enough that Whitmire obviously heard him and was awakened. It was enough for him to moan and groan and go right back to being unconscious. He indicated that he spent approximately 5 to 10 minutes with him and that Whitmire never said anything coherent to him. He indicated that Whitmire was not acting like anything that he had observed; he indicated that

Fentanyl was not going to make somebody completely incoherent and unconscious unless they were given a huge dose. (RP 14, Lines 5-11). He also said there was no odor, and he was unable to check his eyes but with his level of consciousness that was pretty much all he had to go on. (RP14, Lines 18-24). He indicated that for the most part that concluded his contact with Mr. Whitmire. (RP 15, Line 1). After 5 or 10 minutes he went to Ms. Petrick's room to speak with her and she was alert and oriented; she was injured but he couldn't recall the extent of her injuries. (RP 16, Lines 7-15). She told Trooper Black that she was following another car along State Route 432 which swerved out of the way, and that she then noticed there was a vehicle head-on in her lane and she had no time to do anything. Trooper Black testified that the stretch or road where the accident occurred was a straight stretch of road with no hills or obstructions. (RP 17, Lines 1-23). After spending about 10 to 15 minutes with Ms. Petrick he went back into Whitmire's room and he was still in the same condition; Trooper Moon was speaking with him but Whitmire was still pretty much incoherent. He was there in time for Trooper Moon to read special evidence warnings to do a blood draw and he was there for the blood draw. Trooper Black testified that after he contacted Whitmire for the first time Trooper Moon had shown up and he had advised Trooper Moon about what he

had seen of Mr. Whitmire's condition was not consistent with his injuries nor was it consistent with a single dose of Fentanyl. (RP 18, Lines 22-25, RP 19, Lines 1-5). He thought that the ultimate decision regarding probable cause for anything was either made by Sgt. Sweet or Trooper Moon. He indicated that when he went back into Whitmire's room the second time and after Moon had read the evidence warnings and before the blood draw, Moon spoke with him right outside the room (RP 19, Lines 20-25, RP 20, Lines 1-3). He indicated that at that time Trooper Moon advised him that Whitmire was telling him that Whitmire had used methamphetamine. (RP 20, Lines 4-7). Trooper Black testified that prior to the special evidence warnings being read by Trooper Moon, Trooper Black thought that he had probable cause to arrest Mr. Whitmire for vehicular assault under the DUI prong. (RP 20, Lines 14-23). When he was asked if he felt he had probable cause under the reckless driving prong, he indicated that possibly in addition to the DUI, but once he figured out that there was DUI that is normally the prong he goes with. He indicated it was one of those things that could have been either/or. "I am not exactly sure why he would have crossed the centerline, because he didn't answer me in any way, shape or form." (RP 20, Lines 20-25, RP 21, Lines 1-6). When he was asked whether he had probable cause under the disregard for safety of others prong, he said

yes, more than likely. (RP 21, Lines 7 & 8). He also indicated that the nurse informed him that Whitmire was lethargic when he first came in and that he shouldn't be affected the way he was by the dose of Fentanyl. (RP 21, Lines 13-23).

On cross-examination, defense counsel drew Trooper Black's attention to a conversation that they had had on August 14, 2006 in the Prosecutor's office which had been transcribed; the original transcript was provided to Trooper Black for his review and he indicated that it seemed to be a true and accurate transcript of that discussion. (RP 22, Lines 4-19). He indicated that Fentanyl was a very strong narcotic and that he indicated in the interview that it was used for severe pain and that a good sized dose is normally used to knock the pain down quite a bit. (RP 23, Lines 22-25, RP 24, Lines 1-6). He also acknowledged that the symptoms or signs displayed by a person administered this dose of Fentanyl depends on the person; normally they may act in a somewhat lethargic, sleepy and may in fact fall asleep, each person displays the symptoms in various degrees. (RP 24, Lines 7-22). He also indicated that he could not identify the nurse that he had talked to when he came in to observe Whitmire and that the information that he said that she had provided to him would not indicate to him that Whitmire was under the influence of a drug. He acknowledged that he had told defense counsel previously that if that evidence

was sufficient to indicate that the person was under the influence, he could have stopped right there and went home, but that had not been the case. (RP 25, Lines 1-18). He also acknowledged that the information from the unidentified nurse could signify a lot of things regarding Whitmire's condition, ranging anywhere from possible no prior drug usage to possible drug usage; he acknowledged that would be fair to say. (RP 25, Lines 19-25). He also acknowledged that the information regarding Whitmire's injuries that he had been provided may not have been complete, and he did not know if that was the full extent of the injuries that Whitmire had sustained in the accident. (RP 26, Lines 1-9). He acknowledged that he had earlier indicated to defense counsel that "my conclusion was that his driving may have very well been affected by something other than a normal every day person driving-by some kind of substance prior to his arrival at the hospital, even though he had been given a dose of Fentanyl at the hospital." He also acknowledged that he couldn't ascertain what the substance might have been but that Whitmire was showing signs and symptoms of one category, which was narcotic analgesics. (RP 26, Lines 21-25). He then acknowledged that Fentanyl, which he knew had been administered to Whitmire prior to his contact with Whitmire, fit into the category of narcotic analgesic. (RP 27, Lines 1-5). He also acknowledged that not only is Fentanyl

a very strong narcotic designed to mitigate severe pain but that there are situations where one person is more affected by that narcotic than another person. (RP 27, Lines 16-24). When he was asked whether he was yelling at Whitmire during the 5 to 10 minutes when he was attempting to rouse him Trooper Black indicated that yes, his voice was elevated so Whitmire would hear him. He acknowledged that it was obvious that in view of his condition, Whitmire was simply physically unable to verbally respond in any meaningful fashion. He also acknowledged that he had made the same acknowledgment in the prior interview. (RP 28, Lines 8-23). When the question was put to the trooper "I mean despite your best efforts that he was just out of it?" answer "Completely, yes." (RP 28, Lines 24-25, RP 29, Line 1). He also acknowledged that it was possible that after he had spent time with Whitmire trying to rouse him and he had discontinued those efforts, Trooper Moon showed up about 15 to 20 minutes later. When he refreshed his recollection from looking at the transcript of the previous interview, he agreed that some time had passed prior to Trooper Moon's arrival and that it was about 15 to 20 minutes. (RP 29, Lines 9-22). When he was asked whether he had indicated in the prior interview that Trooper Moon had never conveyed information to him that Whitmire was on drugs or using drugs, he indicated that was probably true, at that point.

(RP 29, Lines 23-25, RP 30, Lines 1-2). Trooper Black acknowledged that he was standing around waiting in the ER when Trooper Moon showed up and that he engaged Moon in conversation, relating his observations of Mr. Whitmire and after conversing with Moon, a decision was made to call Sgt. Sweet to convey Black's information; Moon made the call and he was standing right next to Trooper Moon when the call was made during which Trooper Moon conveyed to Sgt. Sweet the information that he had provided to Trooper Moon regarding his observations of Mr. Whitmire. (RP 30, Lines 18-25, RP 31, RP 32, Lines 1-8). He also acknowledged that it was after the phone call that Trooper Moon talked to him and told him that the Sgt. had authorized a special evidence blood draw, right after he got off the phone. (RP 32, Lines 9-18). He indicated that it had taken him a few minutes to convey his observations to Trooper Moon about Whitmire, then Moon made the call to Trooper Sweet and then Moon turned around after making the phone call and told Black that they had authority of the special evidence blood draw, that was the chain of events." (RP 32, Lines 20-25, RP 33, Lines 1-4). Trooper Black's attention was also drawn to the portion of the prior interview and a question was put to Black as to whether Moon, before the blood draw, had had any contact with Whitmire at all, and Trooper Black acknowledged that his response to that question had been that

"I believe he stood at the doorway and looked at him." He also indicated that he couldn't recall for 100%, that Moon may also have gone and tried to rouse Whitmire at one point. (RP 34, Lines 15-25, RP 35, Lines 1-3). He also acknowledged that at the point when he saw Moon trying to rouse the defendant the defendant made no responses whatsoever. (RP 35, Lines 9-12). Trooper Black also indicated it was correct that he was never present at any time with Trooper Moon when Moon had any kind of conversation with Whitmire. (RP 36, Lines 12-15). He also reiterated that despite his own best efforts, he was absolutely unable to rouse Whitmire and that although Whitmire had been trying to say something his words had been completely unintelligible, and at the time between when he made those observations of Whitmire, and the time of Trooper Moon's arrival was about 15 to 20 minutes. (RP 36, Lines 16-25). He also confirmed that he did not note any appreciable change in Whitmire's condition in that total period of 20 to 30 minutes. (RP 37, Lines 1-4). He also indicated that even when the blood was being drawn, Whitmire was just as out of it and unintelligible as he had been during the earlier 5-minute period when Black had been attempting to rouse him. (RP 37, Lines 5-9).

The state then called Trooper Moon to the stand. He indicated that he had been commissioned in March 2004 and

indicated that he was not a DRE. (RP 38, Lines 7-21). He indicated that he arrived at the scene of the accident on November 13, 2005 around 10:00 a.m. There were two cars, one was blocking the road and one was on the shoulder of the road and aid crews were actually already treating the drivers of both vehicles. (RP 39, Lines 12-24). Mr. Whitmire was being placed on a gurney stretcher along side the pickup before being taken to an ambulance. (RP 41, Lines 10-19). Longview Police at the scene pointed out two eyewitnesses to the collision. He indicated the stretch of road where the accident happened was a straight, flat stretch of road with no obstructions. (RP 42, Lines 18-22). One of the eyewitnesses, Peter Gecho, stated that he saw the pickup truck drift over the centerline eastbound into oncoming traffic; there was a truck pulling a horse trailer westbound in front of Ms. Petrick's vehicle, which took evasive action to avoid the truck and that Whitmire's truck struck Ms. Petrick's white Subaru which was behind the horse trailer, westbound. (RP 43, Lines 5-22). Mr. Keeney confirmed Mr. Gecho's information; they had been following the truck and they noted that the pickup truck's brakes never activated and the vehicle never slowed down. (RP 44, Lines 1-8). He also spoke with Robin Geissler at the scene who said she was familiar with Mr. Whitmire. She indicated that she had been a half-mile behind Whitmire at the time of the

crash, that Whitmire had been hauling a refrigerator in the bed of his truck for her. She stated that she knew that Whitmire used drugs, but did not know if he had used any recently. (RP 44, Lines 14-25, RP 45, Lines 1-8). He noted that Whitmire was bleeding quite a bit from his head and his hands at the scene, was moaning and in a lot of pain. (RP 46, Lines 4-10). He notified communications that they needed a collision tech and eventually Trooper Black was also called to the scene. He also noted that there were no tire marks leading to the crash from Mr. Whitmire's vehicle. (RP 47, Lines 1-13). He indicated that he arrived at the hospital at 12:30 p.m. He went in to see where Petrick and Whitmire were at and he believed he made first contact with Ms. Petrick; referring to the cad log camera, Trooper Black had arrived at the hospital approximately 10 minutes before him. (RP 48, Lines 12-25). Before speaking with Ms. Petrick, he looked in to Mr. Whitmire's room and observed about 7 or 8 people working on him and did not recall if Trooper Black was in there at that time. He made no effort to talk to Mr. Whitmire at that point. (RP 49, Lines 2-19). Ms. Petrick described her injuries and indicated that at the moment of the collision the defendant was looking at her through his windshield, she had seen him sitting erect and had no time to avoid the collision after the horse trailer and the truck that was pulling it in front of her swerved out of the way.

(RP 50, Lines 12-25, RP 51, Lines 1-4). He then went into the next trauma room next door and contacted Mr. Whitmire who seemed like he was in quite a bit of pain and kind of muttering and mumbling, painful sounds, not very coherent at first. (RP 51, Lines 18 –22). He indicated that Trooper Black did come in during part of it but he forgot when he was there and when he left. (RP 52, Lines 1-2). He could not recall if the defendant had been administered Fentanyl before or after the blood draw. (RP 52, Lines 13-16). He indicated that Mr. Whitmire inquired as to the condition of the other driver and that he had been speaking with Mr. Whitmire for about 3 or 4 minutes. (RP 52, Lines 20-25, RP 53). Trooper Moon then testified that after talking for a little bit, he started getting into whether Whitmire had been drinking or taking any drugs and that Whitmire stated that he had used methamphetamine the previous evening into the morning, and when he asked Whitmire how much methamphetamine he had used, Whitmire's response was "a 20". He indicates that Mr. Whitmire did not respond to any other questions, that he stayed in the room for a couple of minutes filling out some paperwork and then stepped out to confer with Trooper Black and make a telephone call to his supervisor. (RP 55, Lines 14-22). He then said that Trooper Black had come into the room and he asked Trooper Black if they could step out and talk. (RP 56, Lines 23-25, RP 56, Lines

1-2). He indicated that when they conferred, Black indicated that he hadn't been able to talk very much to him, and Moon had told Black what Whitmire had said to him and that was when Moon made the phone call to the supervisor; he testified that he had told Trooper Black that Mr. Whitmire had admitted using methamphetamine. (RP 56, Lines 8-18). He indicated that based on Whitmire crossing the center line and his admission of use of drugs, he believed he had probable cause for the DUI prong of vehicular assault. (RP 57, Lines 7-14). When he was asked if they felt that he had probable cause under the reckless driving prong, he indicated that he didn't know if they had considered that at the time and that without a statement, not necessarily. He indicated that according to witnesses, Whitmire had been going approximately the speed limit but had crossed the centerline; he didn't know. (RP 57, Lines 21-25, RP 58, Lines 1-3). When the prosecutor asked if he felt they had probable cause under the disregard of safety of others prong, he indicated yes, based on his driving and making the choice to drive in the condition that he was in. (RP 58, Lines 8-15). He indicated that when he read the special evidence warnings to Mr. Whitmire, he took a deep breath and closed his eyes and made no response to anything that Moon read to him. After that he was non-responsive. (RP 59). He indicated that he had not read Miranda warnings to Whitmire

before questioning him about any drug use and that at that time Whitmire was not under arrest. (RP 60, Lines 18-25).

On cross-examination, Trooper Moon acknowledged that the witnesses Gecho and Keenan had told him that from their vantage point directly behind the pickup truck, they had observed the truck make a slow, gradual move across the lane of traffic into oncoming traffic. (RP 62, Lines 14-25, RP 63, Lines 1-2). He also acknowledged that they had told him that the speed of the defendant's pickup truck was about the same speed as their own vehicle, about 50 – 55 MPH, and that this was a straight stretch of road. (RP 63, Lines 1-16). He acknowledged that these were circumstances and would have indicated to him and his fellow troopers when investigating the accident that perhaps this collision occurred because the operator of the pickup truck had fallen asleep; he acknowledged that was possible and in fact acknowledged that was one of the possibilities that he and his fellow trooper were discussing at the scene. (RP 63, Lines 17-25). He acknowledged that he had no knowledge of Ms. Geissler and had no knowledge of her credibility whatsoever. (RP 64, Lines 5-14). He also acknowledged that she did not specify as to what kind of drugs Whitmire may have used in the past, nor did she specify when he might have used these drugs. (RP 65, Lines 7-14). He also acknowledged that when I had previously

asked Trooper Moon if Geissler had provided a basis for any knowledge that she made that Whitmire used drugs, he had indicated not at the time. (RP 67, Lines 19-22). He was not able to ascertain from Geissler when Whitmire might have used drugs, what kind of drugs were used or how long ago this might have happened. (RP 68, lines 17-23).

Trooper Moon also acknowledged that in the course of an interview on June 10, he had indicated that Trooper Black may not have been present when he talked to Ms. Petrick but to the best of his recollection, Black was in there the whole time that Moon had talked to Mr. Whitmire. (RP 70, Lines 5-19). He also indicated elsewhere in the course of that interview that Black had been present during the conversation that he had with Whitmire and confirmed that whenever he had been talking to Mr. Whitmire, Trooper Black was right there all the time. (RP 71, Lines 4-13). He also acknowledged that he had conferred with Trooper Black about their recollections of what had happened before coming into court to testify in the course of the motion hearing. (RP 73, Lines 13-19). He also acknowledged that in the course of the prior interview he had been asked whether there was anything about his own actual observation of Whitmire at the scene or at the hospital that would have indicated to Moon that it was likely that this person had used methamphetamine and was under the influence of

methamphetamine; his answer was that he would have to say no, because he wasn't able to observe Whitmire other than just lying there on the table. (RP 74, Lines 16-24). He also acknowledged that he had written on the paperwork regarding the implied consent warnings that Whitmire had been administered 75mg of Fentanyl Citrate and that this is information that he had received from Trooper Black. (RP 75, lines 4-13). He confirmed that after he and Trooper Black conferred, he called Sgt. Sweet to convey what they had and make a determination regarding a special evidence blood draw, then he went back in and read the defendant his Constitutional Rights, notified him he was under arrest for vehicular assault and then read him the implied consent warnings. He indicated that it was the admission of the use of methamphetamine that took them down that path. (RP 75, Lines 22-25, RP 76). He indicated that he had not considered recklessness; they had talked about vehicular assault if they did not have that but did not continue to pursue it after they had Whitmire's admission of methamphetamine use. (RP 77, Lines 1-4). He stated that probable cause to arrest for vehicular assault was based on the fact of the accident and also his alleged admission of use of methamphetamine. (RP 77, Lines 5-9). He also stated that he did not recall Trooper Black ever saying that he thought Whitmire was under the influence of a drug. (RP 77, Lines 10-

13). He also indicated that he did not recall relaying any such information from Trooper Black to Sgt. Sweet. (RP 77, Lines 14-18).

Trooper Moon also acknowledged that at the time of his contact with Whitmire at the hospital, Whitmire was flat on his back, in extreme pain and obviously unable to move. (RP 77, Lines 21-25, RP 78, Lines 1-2). He also acknowledged that he was not qualified to say whether Whitmire was floating in and out of consciousness. (RP 78, lines 12-14). He testified that he was talking to Whitmire, conducting an investigation of criminal activity when he was asking questions, based on the statement made by Ms. Geissler. (RP 78, Lines 16-20). He also acknowledged that the criminal activity that was being investigated was whether he was under the influence of a drug at the time he was operating the vehicle, thereby committing the crime of vehicular assault. (RP 78, Lines 21-25, RP 79, Lines 1-7). He also acknowledged by virtue of his own observations of Whitmire, there was no way he could personally form an opinion as to whether or not Whitmire was under the influence of drugs. (RP 79, Lines 8-13). When Trooper Moon was asked if he was interrogating a person who was most likely physically unable due to his injuries to get up and ambulate out of the hospital if he wanted to, he indicated he wasn't qualified to say that. (RP 79, Lines 20-25, RP 80,

Lines 1). When Trooper Moon was later asked if in the course of that interrogation, before Whitmire had allegedly made those statements, he had been feeling pretty good and decided to get up and go home, the trooper would not have allowed him to do so; the trooper first indicated that the defendant hadn't done that, and then he indicated that he would have crossed that bridge when he came to it but eventually acknowledged that "probably not at that time, sir, no, sir." (RP 81, Lines 4-25, RP 82, Lines 1-2).

The state then called Trooper Black to testify again, by telephone. He was asked based on his training and experience as a DRE what affect methamphetamine had on the body. He indicated it had multiple effects and normally there are two cycles an up side and a down side and that the effects are totally dependent on the person as well as which cycle they are on. He was asked what effect \$20 dollars worth of methamphetamine would have on a person's driving and he indicated it could cause a plethora of different types of effects; "what exactly their driving is going to be like, I couldn't tell you. I mean it could be very fast, it could be very slow, it could be extremely erratic." (RP 87, RP 88, Lines 1-16). He indicated that Whitmire's level of lethargy would have been consistent with the down side of possible methamphetamine use. (RP 89, Lines 2-5). The prosecutor asked Trooper Black if he had

learned from Trooper Moon that he had stated that he had used methamphetamine during the night and into the morning, Trooper Black indicated that he recalled Moon telling him that Whitmire had used methamphetamine. (RP 89, Lines 6-10). On cross-examination Trooper Black was asked based on his training and experience whether meth was a fairly long lasting drug and he indicated that it is and that with a single dose of methamphetamine the maximum you are probably going to see of the high side was normally 12 hours; he used the word tweaking to describe the high side, which he acknowledged hyperactive, hyper vigilant behavior, energetic, extremely nervous and agitated. (RP 90, Lines 1-18). He also indicated that he had been called to the accident a little after 10:00 a.m., so that if the defendant had been using methamphetamine into the early morning hours, he would have been about 8 hours into his upward cycle. (RP 91, Lines 1-9). He also acknowledged however that when he saw Whitmire in the hospital, he showed no signs of any tweaking or agitation. Then he changed his testimony to say that after 8 or 9 hours the drug user could be up side, down side or somewhere in the middle, but that he could not say exactly what he'd expect to see after 8 hours. (RP 91, Lines 20-25). He also indicated that lethargy can be consistent with a great many other things other than drug use, such working long hours and not getting

enough sleep. (RP 92, Lines 17-25). He again confirmed that based on his observations of Whitmire, he was showing signs of being under the influence of narcotic analgesic, and also indicated that a narcotic analgesic is almost the exact opposite of the up side of methamphetamine. (RP 93, Lines 1-16). He indicated that methamphetamine was a central nervous system stimulant and the symptoms are going to be the exact opposite of a narcotic analgesic. (RP 94, Lines 18-23). He then said that the signs were consistent with a narcotic analgesic, which is exactly the same as the down side of a central nervous system stimulant. When asked, so Whitmire could have been using meth, he could have been tired from missing a night's sleep, he could have been using a narcotic analgesic, it could have been any one of the above, Black answered "well, that is exactly it. Unfortunately, I can't – that is what the evaluation is for is to determine exactly what sort of drugs, what drug category he would be under the influence of, but – question. All right. Answer- I wasn't able to do that." (RP 95, Lines 2-13).

Trooper Black's attention was then drawn to the question the question the prosecutor had asked him previously regarding Trooper Moon had made a statement to him that Whitmire had acknowledged using methamphetamine earlier the previous evening into the early morning hours and that he had answered that question indicating that Moon had made a statement that

Mr. Whitmire had acknowledged using that drug. (RP 95, Lines 14-25). Trooper Black's attention was then drawn to the copy of the transcript of his previous interview, toward the end of the interview where he had been asked the following question: "By the time you left the hospital, had anybody conveyed any additional information to you about possible drug usage by Mr. Whitmire, and your answer was, not that I recall". The trooper asked for it to be repeated again and it was repeated for him after which he said okay. When he was asked whether he would have to admit that this was quite a bit different than his testimony regarding that issue in the course of the motion, he indicated "from the sound of it, yes". (RP 96, Lines 5-25, RP 97, Lines 1-11). On further re-direct when Trooper Black was asked if he currently had any memory whether Moon had told him that Mr. Whitmire had acknowledged methamphetamine use and he indicated that he was pretty sure that at one point Moon told me the subject said something about methamphetamine. (RP 97, Lines 23-25, RP 98, Lines 1-3). On further re-cross Trooper Black was asked why, when he was asked if anybody had given him any additional information about possible drug usage by Mr. Whitmire by the time he left the hospital why did he say "not that I recall"? He indicated "I don't remember why I would tell you that". When he was asked whether he was contesting that that was the question that had

been put to him and that was his response, he indicated "no, not at all." (RP 98, Lines 10-23).

After listening to the arguments of counsel, the court indicated that we have a head-on injury, vehicle associated with the defendant which according to witnesses was going the wrong way in the on-coming lane of traffic and certainly consistent with one possible explanation being that he fell asleep at the wheel. The court indicated that these facts in and of themselves are probable cause to arrest somebody and the presence of injuries were vehicular assault under the option of disregard for the safety of others, without need for any more information. The court then held that under the terms of the implied consent statute, that therefore is probable cause for a blood draw. In addition, there was a medical reaction inconsistent with the defendant's presentation, he was more impacted than would be expected from the medication he had on board. He indicated that Trooper Black as a DRE was qualified to make that judgment and it appears to have been confirmed to some extent by a statement he attributed to a nurse at the scene.

In regard to the 3.5 hearing, at the point the defendant was questioned about if he had any thing to drink or ingest by way of drugs, there was probable cause to arrest him even in the absence of any responsive statement from the defendant.

He was not in custody because the officers didn't need to place him in custody, they knew he wasn't going any place so Miranda was not necessary for purposes of the 3.5 hearing, the court concluded that the statement was admissible in the state's case in chief. (RP 110, 111). It should be noted that in the findings of fact and conclusions of law pertaining to the 3.6 hearing, the court refused to find for purposes of determining probable cause to arrest and the legality of the blood draw, that the statements attributed to Whitmire by Trooper Moon had actually been made, by crossing out any assertions to that effect in the proposed findings and conclusions (CP-26). Also, the trial court denied the appellant's motion for reconsideration (CP-25) based on a statement from Ms. Petrick that when Whitmire was brought into the emergency department he was yelling and screaming in pain, not lethargic.

D. ARGUMENT

I. THERE WAS NO PROBABLE CAUSE TO ARREST APPELLANT UNDER THE DISREGARD FOR SAFETY OF OTHERS PRONG OF VEHICULAR ASSAULT STATUTE.

The record reflects that based on the manner in which this accident had occurred, the vehicle of appellant Whitmire traveling at approximately the speed limit, on a straight stretch of road, and his vehicle slowly edging over into the oncoming

lane, that one possible explanation for the accident was that Mr. Whitmire had simply fallen asleep behind the wheel. In fact, in rendering its oral ruling, the trial court acknowledged that the manner in which the accident occurred was certainly consistent with the possible explanation that Whitmire had fallen asleep behind the wheel. Cases in the State of Washington have held that falling asleep while operating a motor vehicle constitutes ordinary negligence. In Presley v Lewis, 13 Wash. App. 212, 534 P2d 606 (1975), the defendant had been prescribed a medication and was warned that it might cause drowsiness. On the way home, he either blacked out or went to sleep while driving and the issue was whether this constituted negligent driving. The court held that the defendant was negligent as a matter of law, in reliance on the decisions in Kaiser v Suburban Transportation System, 65 W2d 461, 398 P2d 14, 401 P2d 350 (1965) and Theisen v Milwaukee Automobile Mutual Insurance Company, 18 Wis. 2d 91, 118 N.W. 2d 140, 143-144 (1962); in the latter case, the court had indicated that drivers have a duty to stay awake while driving, and permitting oneself to fall asleep while driving an automobile must be deemed negligence as a matter of law.

However, ordinary negligence is not a sufficient basis upon which to charge someone with the felony offense of vehicular assault. In State v Eike, 72 W2d 760, 435 P2d 680

(1967), the court held that under Washington's negligent homicide statute, driving a motor vehicle on public highways with disregard for the safety of others implies an aggravated kind of negligence or carelessness, falling short of recklessness, but constituting a more serious dereliction than ordinary negligence. In that case, the court made reference to the decision in State v Partridge, 47 W2d 640, 289 P2d 702 (1955), wherein the court had held that "we are satisfied that a finding of ordinary negligence is not sufficient to support a conviction under the act", 47 W2d at 645.

In State v Lopez, 93 Wash. App. 619, 623, 970 P2d 765 (1999), the court cited the ruling of the court in State v Eike, supra, for the proposition that disregard for the safety of others is an aggravated kind of negligence "falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term "negligence". In that case, the state had alleged that the defendant was guilty of vehicular homicide under the disregard for the safety of others prong of the statute based on some poor driving, which they allege was the result of the defendant's failure to acquire a license or obtain appropriate driver's training. On appeal, the court acknowledged that her failure to acquire a license of driver's training constituted more than a minor inadvertence or

oversight, but that failure without more was insufficient to show disregard for the safety of others. The court indicated that the state was required to show evidence of the defendant's conscious disregard for the safety of others, in order to support the charge, and held the evidence did not reflect such a conscious disregard on the part of the defendant.

In State v Vreen, 99 Wash. App. 662, 994 P2d 905 (2000), one of the issues on appeal was whether the court should have allowed evidence of Mr. Vreen's personal relationship with the passengers in his vehicle in a case where he was charged with vehicular homicide. In ruling on this issue, the court held as follows: "disregard for the safety of others" has been defined to mean "an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term "negligence"... some evidence of a defendant's conscious disregard of the danger to others is necessary to support a charge of vehicular homicide. State v Lopez, 93 Wash. App., 619, 623, 970 P2d 765 (1999). There is a mental element to "carelessness" or "conscious disregard". A person can choose to be careless and is less likely to be careless with a loved one in the car. Evidence of Mr. Vreen's relationship to the victims

was relevant and the court did not abuse its discretion by admitting it.” 99 Wash. App. at 672.

In the present case, it is clear that the only evidence that the troopers had available to them at the time that they decided to arrest Whitmire for vehicular assault was evidence that his vehicle had gradually crossed over the centerline, at the speed limit, consistent with driving that they believed could have resulted from a person simply falling asleep behind the wheel, and also a statement attributed to the defendant regarding drug usage. Trooper Moon’s testimony indicated that probable cause to arrest Whitmire on the charge of vehicular assault was based on the manner in which the accident had occurred combined with Whitmire’s alleged admission of drug usage. However, due to the conflicting testimony of the troopers in regard to the issue of that statement, which will be discussed in more detail *infra*, the trial court refused to find that any such statement had been made by Whitmire, which leaves only the circumstances of the accident as a possible basis for probable cause to arrest Whitmire on the charge of vehicular assault for disregard for the safety of others, as was held by the trial court.

In State v Presley, 64 Wash. App. 591, 596, the court indicated that the circumstances justifying an investigative stop must be more consistent with criminal conduct than innocent

conduct, citing State v Mercer, 45 Wash. App. 769, 774, 727 P2d 676 (1986). Certainly the same thing could be said regarding the evidence sufficient to support a finding of probable cause. However, in this case, the evidence which the court accepted as being available to the officers at the time of the arrest established nothing more than that while the accident could have been caused by evidence consistent with criminal activity, it was also just as consistent with non-criminal activity. In that regard, it should be noted that while negligent driving is a violation of the law, as proscribed in RCW 46.61.525, it is an infraction, not a criminal violation which would have supported Whitmire's arrest. Therefore, based on the record and the above authorities, the officers lacked probable cause to arrest Whitmire for violation of the disregard for safety of others prong of the vehicular assault statute.

II. THE OFFICERS LACKED PROBABLE CAUSE TO ARREST WHITMIRE FOR VIOLATION OF THE DUI PRONG OF THE VEHICULAR ASSAULT STATUTE.

In its oral ruling, the trial court appeared to base its finding of probable cause justifying the blood draw much more heavily upon its determination that the officers had probable cause to arrest Whitmire under the disregard for safety of others prong of the statute, but did seem to add on some

observations that Trooper Black, due to his special training and observations of Whitmire at the hospital, together with a statement that Black attributed to some unknown healthcare provider at the hospital, would somehow support probable cause to arrest Whitmire under the DUI prong of the statute.

In the course of his testimony, Trooper Black did indicate that he had been trained as a Drug Recognition Expert and had been directed to contact Whitmire at the hospital, apparently on the basis of some information provided by an acquaintance of Mr. Whitmire, Robin Geisler, to the effect that although she did not know whether Mr. Whitmire had been using drugs prior to the accident, she was aware, somehow, that Mr. Whitmire had supposedly used drugs on prior occasions. Although neither trooper considered this information to be a basis for arrest, this information had been provided by Geisler to Trooper Moon with the result that both troopers went to the hospital to see what they could find out about whether drugs played a role in the accident. Trooper Black arrived first, and his testimony was that he had been informed by hospital personnel that Whitmire had been prescribed 75mg of Fentanyl Citrate, a very strong narcotic analgesic. He later conveyed this information to Trooper Moon. Despite his strenuous attempts to rouse Mr. Whitmire and engage him in a conversation, Trooper Black acknowledged that he was never able to do so, and that

throughout the period of his contact with Mr. Whitmire, from the time he arrived until the time he departed, Mr. Whitmire was unintelligible, and incapable of any communication. His opinion was that while no tests could be performed on Mr. Whitmire, his appearance was consistent with one who was under the influence of a narcotic analgesic. Under these circumstances, this is obviously an instance where the behavior of Mr. Whitmire appearing to be under the influence of a narcotic analgesic was as consistent with innocent, non-criminal conduct as with criminal conduct, inasmuch as he had been administered just such a drug by the hospital to kill the pain resulting from his considerable injuries sustained in the accident, prior to the time that he was observed by the trooper.

With regard to Trooper Moon, he testified that when he arrived at the hospital, with Trooper Black present at the scene, he was able to engage Mr. Whitmire in a conversation wherein Whitmire acknowledged the use of methamphetamine in the course of the previous evening and into the early morning hours preceding the accident, which had occurred at approximately 9:45 a.m. At the time that it rendered its oral ruling, and later when the state proposed written findings of fact and conclusions of law in support of the courts denial of the suppression motion, the trial court indicated that its ruling was not based on Trooper Moon's testimony regarding this alleged

statement, and the court specifically declined to find that any such statement as attributed by Moon to Whitmire had actually been made. The court's refusal to find that the statement had been made by Whitmire was clearly supported by the gross inconsistencies between the testimony of the two troopers on that point. According to the court in State v Ward, 125 Wash. App. 137, 104 P3d 61 (2005), the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue. Since in our case, the issue is the validity of Whitmire's warrantless arrest and the warrantless seizure of his blood, the trial court's refusal to find that any such statement is equivalent to a finding that the statement was not made, for purposes of the suppression motion hearing. The question then becomes whether the officers had probable cause to arrest Whitmire under the DUI prong of the vehicular assault statute, absent the statement attributed by Moon to Whitmire.

Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officers knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. State v Fricks, 91 W2d 391, 588 P2d 1328 (1979), citing State v Gluck, 83 Wd 424, 426-27, 518 P2d 703 (1974). In regard to Trooper Moon's testimony, he acknowledged that there was nothing about his

observations of Mr. Whitmire that would have indicated to him that alcohol or drug usage by Whitmire was a factor in this accident. In regard to Trooper Black's testimony, as indicated above, his opinion was that Whitmire appeared to be under the influence of a narcotic analgesic, acknowledging that a very strong narcotic analgesic had been administered to Whitmire at the hospital prior to his own arrival. He also indicated that some unidentified nurse had informed him that Whitmire appeared to be unusually lethargic when he was brought into the hospital. Counsel for Mr. Whitmire had argued that this information from an unknown source lacked sufficient credibility or basis of knowledge to justify the court relying upon such hearsay in making its determination regarding probable cause. When the court did reference this allusion by Black to this unknown source in rendering its decision regarding probable cause, defense counsel moved for reconsideration on that point, submitting an affidavit to which was attached a transcript of the description of Ms. Petrick, the alleged victim, of Whitmire's behavior when he was initially brought into the hospital, wherein she described him as yelling and screaming, obviously in great pain from his injuries. The obvious conclusion would be that either this unknown worker at the hospital was either a figment of someone's imagination, or someone who was clearly unreliable and had undoubtedly

provided erroneous information about Whitmire's condition when he was initially brought into the hospital. Consequently, it is clear that the statement supposedly attributed to this unknown hospital worker should not have played any role in the courts determination regarding probable cause. However, it should be emphasized that Black acknowledged that this information from that person would not indicate to him that Whitmire was under the influence of a drug.

Consequently, what is left are the observations of Whitmire by Trooper Black. He was called as a witness by the prosecutor, subject to cross-examination, and then later on in the course of the hearing was recalled by the prosecutor, and again subject to cross-examination. Essentially, what he brought to the proceedings was his conclusion that actually, Whitmire's apparent condition could have been the result of being under the influence of a drug such as a narcotic analgesic, or on the other hand he could have been under the influence of a drug such as methamphetamine, which he acknowledged was at the other end of the drug spectrum from narcotic analgesics, or his appearance and condition could be just as consistent with fatigue resulting from not having sufficient sleep. This colloquy is contained in pages 94 and 95 of the report of proceedings, specifically, where he was asked whether Whitmire could have been using meth, he could have

been tired from missing a night's sleep, or could have been under the influence of a narcotic analgesic, it could have been any one of the above, Black answered "well, that is exactly it. Unfortunately, I can't-that is what the evaluation is for is to determine exactly what sort of drugs, what drug category he would be under the influence of, but ...I wasn't able to do that." Consequently, what we are left with is the conclusion that at the point in time when the officers were making a determination as to whether they had probable cause to arrest Mr. Whitmire under the DUI prong of the vehicular assault statute, the available information indicated only that his appearance was just as consistent with non-criminal activity as with criminal activity, which clearly did not support the determination that there was probable cause to arrest Whitmire under the DUI prong of the vehicular assault statute. Consequently, his arrest was invalid as not being supported by probable cause, and the evidence seized as a result of this invalid arrest should have been suppressed.

III. THE BLOOD DRAW WAS NOT CONDUCTED PURSUANT TO A VALID ARREST AND THE RESULTS SHOULD HAVE BEEN SUPPRESSED.

It is clear under the facts of this case and pursuant to the authorities cited above, that there is insufficient evidence to

provide probable cause to support Whitmire's arrest under any prong of the vehicular assault statute.

Taking a blood sample is a search and seizure within the meaning of the Fourth Amendment and Article One, Section Seven. State v Judge, 100 W2d 706, 711, 675 P2d 219 (1984). In State v Kern, 116 W2d 174, 804 P2d 558 (1991), the court indicated that the blood test in that case was reasonable only if there was a clear indication that it would reveal evidence of the defendant's intoxication at that time of the accident, and it was a reasonable test performed in a reasonable manner, citing Schmerber v California, 384 US 757, 86 S.Ct. 1826, 16 L.Ed,2d 908 (1966). In State v Dunivin, 65 Wash. App. 501, 828 P2d 1150 (1992), the court cited State v Judge, supra, and State v Rangitsch, 40 Wash. App. 771, 775, 700 P2d 382 (1985), for the proposition that an officer has authority to seize a sample of the defendant's blood if he or she has probable cause to believe that the defendant was driving while intoxicated and thereby committed the crime of vehicular homicide. In this case, while probable cause to arrest Whitmire under the disregard for safety of others prong of the statute was clearly lacking pursuant to the authorities cited above, even if there was probable cause under that prong of the statute, it would not justify the blood draw, since the police would have had to have a clear indication that the blood test would reveal evidence of

Whitmire's intoxication at the time of his operation of the vehicle when the accident occurred; evidence of his operation of the vehicle in a manner consistent with him falling asleep behind the wheel simply would not provide the necessary evidentiary underpinning to support the blood draw. Also, as indicated above, the most that can be gleaned from Trooper Black's testimony is that while based on his observations, Whitmire might have been coming down from methamphetamine use, or he might be under the influence of narcotic analgesic, he also might have been simply experiencing the effects of fatigue due to not having sufficient rest; this simply does not rise to the level of a clear indication of evidence of his intoxication at the time of the accident, which would render the blood draw invalid pursuant to the authorities cited above. In State v Avery 103 Wash. App. 527, 13 P3d 226 (2000), the court held that since the findings in that case did not support the conclusion that at the time of the blood test, either the arresting officer or the officer administering that test had reasonable grounds to believe that at the time of his driving, Avery was under the influence, the implied consent statute, RCW 46.20.308, did not authorize the blood test. Similarly, in the present case, where the drug recognition expert called in by the state to make observations of Mr. Whitmire at the hospital could not assess whether he was under the influence of any particular drug, or

simply fatigued, the implied consent statute does not authorize the blood draw conducted by the officers in this case, and so for all of the reasons set forth above, the results of that blood draw should have been suppressed.

IV. A STATEMENT ATTRIBUTED BY TROOPER MOON TO MR. WHITMIRE SHOULD NOT HAVE BEEN RULED ADMISSIBLE AT TRIAL.

As stated above, the trial court refused to give any credibility to Trooper Moon's assertion that he had actually been able to engage Whitmire in a conversation, and had elicited from Whitmire that he had been using methamphetamine in the early morning hours of the day of the accident, for purposes of the suppression hearing. However, for purposes of the CrR 3.5 hearing, the court held that this was not a custodial interrogation, and therefore the state was entitled to provide that evidence to a jury in the course of a trial on this matter.

Miranda warnings must be given before custodial interrogations by agents of the state; otherwise, statements obtained are presumed to be involuntary. State v Lewis, 64 Wash. App. 634, 636, 825 P2d 357 (1992). The term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police... that the police should know or are reasonably likely to

elicited an incriminating response from the suspect. State v Sergeant, 111 W2d 641, 650, 762 P2d 1127 (1988). The record reflects that prior to his supposed conversation with Whitmire, Trooper Moon had not provided any Miranda warnings to Whitmire. However, the trial court held that at that point, during Moon's contact with Whitmire in the treatment cubical inside the Emergency Department of St. John's Medical Center, Moon was not required to provide Miranda warnings before questioning Whitmire. The court reasoned that Whitmire was not in custody because the officers didn't need to place him in custody, since they knew he wasn't going anyplace due to his injuries, so Miranda was not necessary and the statement was admissible in the state's case in chief.

In Thomas v Keohane, 516 US 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), whether Miranda warnings are required prior to interrogation is a mixed question of law and fact; the first inquiry is what circumstances surrounded the interrogation, which is a factual determination. The second inquiry is whether a reasonable person in the suspect's position would have felt that he was not at liberty to terminate the interrogation and leave, which presents a mixed question of law and fact. In State v Watkins, 53 Wash. App.264, 766 P2d 484 (1989), the court held that Miranda warnings are necessary as soon as a suspect's freedom of action is curtailed to a degree associated

with formal arrest and that the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. In the present case, the evidence reflected that at the time Moon contacted Whitmire at the hospital, there was evidence that Whitmire had sustained significant injuries in the accident and was laying flat on his back, apparently in extreme pain and not physically able to move. However, when Trooper Moon was asked if Whitmire had been physically able to get up and leave and had expressed a desire to do so, Moon first indicated that the defendant hadn't done that, and that he would have made a decision whether to detain Whitmire if necessary, but eventually acknowledged that he probably would not have let him go..."probably not at that time, sir, no, sir." (RP 81).

Although we must keep in mind that according to Trooper Black's description of Whitmire's condition, the interrogation described by Moon, as well as Whitmire's responses, can only be described as a complete and utter fiction, the trial court nevertheless allowed the state to present this evidence should the matter go to trial, and so the issue must be addressed. The appellant would submit that under these circumstances, had he actually been conscious and engaged in this interrogation as described by Trooper Moon, due to circumstances and the type of interrogation being

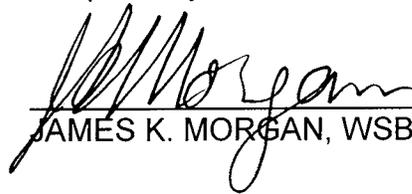
conducted by Trooper Moon, a reasonable person in the appellant's position would not have felt that he could have terminated the conversation and departed, even if he was physically able to do so. This is certainly born out by Trooper Moon's statement that even in the event that Whitmire had been physically able to leave and had decided to do so, Trooper Moon would not have allowed him to depart. Under these circumstances, Miranda warnings should have been administered by Trooper Moon before he conducted his supposed interrogation of Mr. Whitmire. His failure to do so should render any statements made by Mr. Whitmire inadmissible.

D. CONCLUSION

Based on the arguments and authorities cited above, the appellant requests that this court hold that the officers lacked probable cause to arrest the appellant under any prong of the vehicular assault statute, the blood draw was not done pursuant to a valid arrest of the appellant for vehicular assault, the blood draw was consequently not authorized pursuant to RCW 46.20.308, and therefore the results of the blood test result should have been suppressed. In addition, since the officer was required to provide Miranda warnings to Whitmire before any interrogation, his failure to do so renders any

statements allegedly made by the appellant inadmissible at trial, and the appellant requests that this court remand the matter to Superior Court for disposition in accordance with these requested rulings.

Respectfully Submitted,



JAMES K. MORGAN, WSB #9127

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COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent,)	No. 35743-7-II
)	Cowlitz County No. 06-1-00184-0
)	
v)	CERTIFICATE OF
STEVEN WHITMIRE,)	MAILING
Appellant)	

I, Jeanne Struthers, certify and declare:

That on the 28th day of March 2007, I deposited in the mails of the United Parcel Service, next day delivery a properly stamped and addressed envelope containing an original and one copy of brief of appellant, addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

and in the mails of the United States Postal Service a properly stamped and addressed envelope containing brief of appellant, addressed to the following parties:

Prosecuting Attorney
Hall of Justice
312 SW First
Kelso, WA 98626

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

DATED this 28th day of March 2007.

Jeanne Struthers

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COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent,) No. 35743-7-II
) Cowlitz County No. 06-1-00184-0
)
)
v) CERTIFICATE OF
STEVEN WHITMIRE,) MAILING
Appellant)

I, Jeanne Struthers, certify and declare:

That on the 30th day of March 2007, I deposited in the mails of the United Parcel Service properly stamped and addressed envelope containing one copy of brief of appellant, addressed to the following parties:

Steven Whitmire, DOC #834514
R7-F8
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

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

DATED this 30th day of March 2007.

Jeanne Struthers
Jeanne Struthers