

No. 46000-9-II

COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IGOR SIROTKIN,

Appellant,

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The State acknowledges that a breath-alcohol test is a search entitled to constitutional protection.¹ But the State ignores State constitutional standards and instead argues that a breath-alcohol test is a minimally invasive search and thus reasonable under the Fourth Amendment when compared to the State’s compelling need to combat drunk driving.² No such balancing test exists under Art. I, §7; rendering the State’s argument irrelevant.

In *McNeely*,³ the United States Supreme Court refused to create a “per se” exigency justification for warrantless blood-alcohol testing simply because the quantity of alcohol in the human body dissipates over time. Instead, the Court re-affirmed its decision in *Schmerber*⁴ and held that exigency may not be assumed on this factor alone, but must be established on a case-by-case basis.

The State nonetheless is asking this Court to find that the Implied Consent statute (RCW 46.20.308) represents a codification of exigency and thus creates “per se” exigency in each and every DUI case where law

¹ Brief of Respondent pg. 5.

² Brief of Respondent pg. 20.

³ *Missouri v. McNeely*, --- U.S. ---, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

⁴ *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

enforcement seek to obtain a breath-alcohol test.⁵ The State's argument is flawed because under State constitutional standards, there is no distinction between a breath and blood test; each receives the same constitutional protections.⁶ Thus, there is no basis to distinguish *McNeely's* prohibition against creating "per se" exigency based on the type of test requested.

Finally, the State is correct that absent the existence of exigent circumstances, a warrantless breath-alcohol test may be permitted based on consent.⁷ This is exactly Appellant's point. Mr. Sirotkin refused to consent to a breath-alcohol test. Absent exigent circumstances, his refusal is inadmissible evidence at trial. Thus, his conviction for DUI must be reversed and he must receive a new trial.

⁵ Brief of Respondent pg. 16.

⁶ Brief of Respondent pg. 11-15.

⁷ Brief of Respondent pg. 24.

II. REPLY TO STATE’S ARGUMENTS

1. Under Art. I, §7, breath-alcohol testing receives constitutional protections identical to those protecting warrantless blood-alcohol testing.
2. Under Art. I, §7, *McNeely*’s prohibition against creating “per se” exigency based upon dissipation of alcohol in human body applies to breath-alcohol testing.
3. The Implied Consent Statute fails to satisfy the standards for establishing exigency to permit a warrantless breath-alcohol test because it fails to address whether the law enforcement officer has the ability to obtain a warrant in a reasonable amount of time.
4. The State may seek to admit a warrantless breath-alcohol test at trial by establishing the person’s consent to the test. But a person’s refusal to consent to a warrantless search is not admissible evidence.

III. ARGUMENT

- 1. Under the Washington Constitution, Art. I, §7, a breath-alcohol test invades recognized privacy interests, and the State must obtain a warrant or establish an exception to the warrant requirement to admit test results the same as for a blood-alcohol test.**

The State hardly mentions Art. I, §7 of the Washington Constitution. This provision states, “*No person shall be disturbed in his private affairs, or his home invaded, without authority of law.*”

While the Fourth Amendment establishes a floor beneath which the State may not sink in its investigative activities, it “does not affect the State’s power to impose higher standards on searches and seizures than

required by the Federal Constitution.” *Cooper v. State of Cal.*, 386 U.S. 58, 62, 87 S.Ct. 788 (1967). “[A] State is free as a matter of its own law to impose greater restrictions [upon] police activity than those [found] to be necessary upon federal constitutional standards.” *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215 (1975). As a result, “[I]t is...well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution.” *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980).

Nowhere is this made more clear than with Art. I, §7 of our State Constitution. It is universally recognized that this provision extends greater privacy protections to the citizens of this State than those extended under the federal constitution.

A general theme of the State’s argument is that a breath-alcohol test is a less intrusive invasion of privacy than a blood test. This distinction, according to the State, permits it to not only obtain breath-alcohol evidence without a warrant, but to also fundamentally alter the exigency exception itself. The State’s argument is flawed.

All parties agree that a breath-alcohol test is a search. See *Skinner v. Railway Labor Exec. ’s Ass’n*, 489 U.S. 602, 616-617, 109 S.Ct. 1402

(1989). Under the Fourth Amendment, however, this only commences an evaluation to determine whether the search is “reasonable.” *Skinner*, at 618-619. In *Skinner*, railroad employees were subject to blood, breath, and urine testing based on certain circumstances under the asserted government interest in preserving public safety. The Court balanced the privacy invasion inherent with all three types of testing⁸ against this government interest and found the testing scheme reasonable and not a violation of Fourth Amendment rights. *Skinner*, at 624-625.

Later, in *Maryland v. King*, --- U.S. ---, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013), the Court used the evaluation of breath and blood-alcohol testing in *Skinner* to determine whether Maryland’s law requiring a DNA sample from all persons arrested for certain felony crimes violated the Fourth Amendment.⁹ The Court noted that while “virtually any” intrusion into the human body constitutes an invasion of privacy, for Fourth Amendment purposes the “negligible intrusion” to obtain the DNA sample was of “central relevance” to determine the reasonableness of the search. *King*, 133 S.Ct. at 1969.

⁸ The Court noted that a breath test is “less intrusive” than a blood test because “breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment.” *Skinner*, at 625-626.

⁹ DNA is collected by placing a cotton swab (buccal swab) into a person’s mouth to obtain a sample of skin cells. *Maryland v. King*, 133 S.Ct. at 1967-1968.

When balancing the privacy invasion against the government's interest to obtain the evidence under the Fourth Amendment, "[a] crucial factor in analyzing the magnitude of the intrusion ... is the extent to which the procedure may threaten the safety or health of the individual." At 1979. The Court specifically compared the collection of blood-alcohol evidence to the collection of DNA evidence via buccal swab. Whereas a blood test punctured the skin, the use of a buccal swab amounted to "a gentle rub along the inside of the cheek." *Id.* Thus the warrantless collection of DNA was reasonable.

Appellant's opening brief cited to relevant Washington case law explaining the textual and analytical differences between the Fourth Amendment and Art. I, §7.¹⁰ The fundamental difference is that under Art. I, §7 there is no "reasonableness" test. The sole criteria is whether a recognized privacy interest has been invaded. *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). There is no balance test and no evaluation of the magnitude of the intrusion.

This distinction between the state and federal constitutions is best described in *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009):

¹⁰ Appellant's Opening Brief pg. 8-10.

“Art. I, §7 provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, Art. I, §7 prohibits any disturbance of an individual's private affairs “without authority of law.” See *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305-306, 178 P.3d 995 (2008). This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. *See id.* This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....” *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part by *State v. Stroud*, 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986).”

(Emphasis added)

The application of this analytical difference is best described by reviewing how our State Supreme Court evaluated DNA evidence in *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). The Court held that a buccal swab test to procure DNA evidence was a search under Art. I, §7. *Garcia-Salgado*, at 184. But rather than engage in a reasonableness test and consider the level of intrusiveness involved in the search, the Court wrote;

“Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and Art. I, §7. The United States Supreme Court has recognized “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ ” is a search. *Skinner v. Ry.*

Labor Exec. Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Similarly, the Court found Breathalyzer tests to “implicate[] similar concerns about bodily integrity” and constitute searches as well. *Id.* At 617. We find that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and Art. I, §7.

Because a cheek swab to procure a DNA sample is a search, the search must be supported by a warrant unless the search meets one of the “ ‘jealously and carefully drawn’ ” exceptions to the warrant requirement. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).”

Therefore, the Court in *Garcia-Salgado* has demonstrated that under Art. I, §7, once the privacy invasion has been established, the State is required to meet the warrant requirement or establish an exception.

Garcia-Salgado further establishes the parameters of the privacy interest affected by breath-alcohol testing. As stated in the opening brief, a breath-alcohol test measures alcohol concentration in deep lung air (alveolar) that must be expelled from the human body.¹¹ This is not breath normally expelled from the human body, and most closely resembles alcohol concentration directly in blood.¹² The Court in *Garcia-Salgado* construed the use of a buccal swab placed into the mouth to obtain DNA

¹¹ Appellant’s Opening Brief pg. 13.

¹² *Id.*

to constitute a violation of a person's privacy interests (bodily integrity) based on the same privacy invasion that occurs with a breath-alcohol test. At 184. Thus it is clear that the Court considers a breath-alcohol test to constitute an invasion of a recognized privacy interest in bodily integrity.

The State's insistence that our State Supreme Court must evaluate the level of intrusion involved in a breath test compared to a blood test to determine the reasonableness of the search ignores our State Constitution and years of case law proving this argument simply wrong. However, more than that, it shows that the entirety of the State's arguments suffer from the same flaw.

2. *McNeely's prohibition against creating a "per se" exigency exception for blood-alcohol testing based on dissipation of alcohol in the human body has equal force with breath-alcohol testing.*

The State asks this Court to find that the *McNeely* decision is limited to blood-alcohol test cases.¹³ As stated above, it is true that under the Fourth Amendment the Supreme Court considers the level of intrusiveness involved in a search to determine the level of protection afforded the asserted privacy interest. However, the issue in *McNeely* was not to define privacy interests between breath and blood tests; *McNeely* addressed the issue whether dissipation of alcohol concentration in human

¹³ Brief of Respondent pg. 10

blood created a “per se” exigency to always permit a warrantless blood test. The Court held it does not.

In dicta, a minority of judges briefly addressed the use of Implied Consent laws to obtain evidence in lieu of warrantless blood testing. At 1566. The word “dicta” means observations or remarks made in pronouncing an opinion concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. *State ex. rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954). Statements that constitute “obiter dictum” need not be followed. *DCR, Inc. v. Pierce County*, 92 Wn.2d 660, 683 n. 16, 964 P.2d 380 (1998) (citing *State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992)).

These comments were not necessary to reach the majority decision, and the State is left to speculate whether the Court would apply its decision to breath-alcohol testing. However, this issue is irrelevant because under Washington law a person has a recognized privacy interest in bodily integrity that is violated by both warrantless breath and blood testing.

The State recognizes that Washington case law has historically upheld warrantless blood-alcohol testing based upon the presumption that

alcohol dissipation created “per se” exigent circumstances for a warrantless test.¹⁴ See *State v. Baldwin*, 109 Wn. App. 516, 524, 37 P.3d 1220 (2001); *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). These cases cited *Schmerber* as authority. *McNeely* simply rejects this per se presumption. Thus it is clear that *McNeely*’s analysis of exigency applies to both breath and blood testing in Washington State.

3. This Court must reject the State’s request to define the Implied Consent statute as a codification of “per se” exigency for warrantless breath-alcohol testing.

The State recognizes that the exigency exception to the warrant requirement applies when “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence.”¹⁵ *State v. Tibbles*, 169 Wn.2d 364, 369-370, 236 P.3d 885 (2010). However, The Court in *Tibbles* also held that exigency must be determined looking at the totality of circumstances, and in particular the Court must evaluate the State’s “need for particular haste.” *Tibbles*, at 370-371. The underlying basis for exigency is necessity, not convenience for an officer to forego seeking a warrant. *Tibbles*, at 372-373.

¹⁴ Brief of Respondent pg. 7-8.

¹⁵ Brief of Respondent pg. 16

The State attempts to ignore these latter considerations and argues that the Implied Consent statute meets recognized standards for establishing exigency: (1) probable cause exists to arrest the subject; (2) a breath test is reasonable; and (3) alcohol dissipates from the human body.¹⁶

This argument, however, is nothing more than a re-tread of Missouri's argument in *McNeely*. *McNeely* had been arrested, thus it may be presumed probable cause existed for the arrest. The impetus for the *McNeely* decision was the fact that despite probable cause, and despite reasonable testing methods for blood, the State may not rely on the dissipation of alcohol alone to justify the warrantless search. It is therefore curious how the State believes a statute that considers the identical factors rejected in *McNeely*¹⁷ could nonetheless meet constitutional scrutiny.

Under the State DUI law, the officer has a two hour window to obtain a breath-alcohol test. See RCW 46.61.502. In Mr. Sirotkin's case, the officer showed no "need for particular haste" when he arrested Mr. Sirotkin. An arrest occurred at 11:08 pm, and Mr. Sirotkin refused the

¹⁶ Brief of Respondent pg. 17-18

¹⁷ The Court acknowledged that in certain circumstances exigency may exist for a warrantless blood alcohol test, but clearly the Court would expect facts establishing a delay in seeking a warrant, not the mere existence of probable cause. At 1562-1563.

breath test at 12:05 am, almost an hour later.¹⁸ After the arrest the officer waited for a tow truck to arrive before transporting Mr. Sirotkin to the police station.¹⁹ The Implied Consent statute utterly fails to establish the existence of exigent circumstances in any case, let alone for Mr. Sirotkin's case, to justify a warrantless breath-alcohol test.

4. Absent exigent circumstances, the State must establish consent to admit evidence of a warrantless breath-alcohol test, and may not admit evidence of a person's refusal to consent to a test.

Consent is recognized as an independent basis for a warrantless search. *State v. Tyler*, 177 Wn.2d 690, 707, 302 P.3d 165 (2013). To be valid, consent must be freely and voluntarily given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The factors considered are (1) the education and intelligence of the consenting person; (2) whether *Miranda* warnings, if applicable, were given prior to consent; and (3) whether the consenting person was advised of his right not to consent. *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013); citing *State v. Shoemaker*, 85 Wn.2d 207, 533 P.2d 123 (1975). No single factor is dispositive, but consent granted "only in submission to a claim of lawful authority" is not considered voluntary. *Ruem, Id.*

¹⁸ CP 4; 20

¹⁹ CP 27

A necessary element of “consent” is the ability to limit or revoke it. See *Florida v. Jimeno*, 500 U.S. 248, 252, 111 S.Ct 1801, 114 L.Ed.2d 297 (1991). Consent, once voluntarily given, may be withdrawn at any time. *Ruem*, at 208; citing *Florida v. Jimeno*, supra.

The application of constitutional “consent,” as opposed to a statutorily created right of refusal, has a fundamental effect refusal evidence. The Implied Consent statute provides that a driver’s refusal may be used at trial. RCW 46.20.308(2). Based on the faulty assumption that exigent circumstances operated as the exception permitting a warrantless search, State courts frequently referred to the driver’s right to refuse a breath test as an act of “legislative grace.” *State v. Bostrom*, 127 Wn.2d at 590 citing *State v. Zwicker*, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986).²⁰ In light of *McNeely*, it is clear that the legislature lacks authority to control a driver’s choice to exercise the constitutional right to refuse to submit to a search. The right to refuse is no longer an act of legislative grace, but is a constitutional right.

As a constitutional right, the State is not permitted to comment on a person’s exercise of the right to refuse to consent to a search. This issue

²⁰ *Bostrom* referred to alleged state power to perform compulsory blood alcohol test. *Id.*

was recently addressed by the Court of Appeals in *State v. Gauthier*.²¹

There, a defendant accused of rape initially agreed to provide a voluntary DNA sample, but later refused. *Gauthier*, at 261. At trial, the prosecutor portrayed the refusal as consciousness of guilt evidence. At 262.

The Court in *Gauthier* cited to *United States v. Prescott*,²² a Ninth Circuit case, to hold that the State may not offer a person's refusal to consent to a search as evidence at trial.

“The Ninth Circuit concluded that, because the Fourth Amendment gives individuals a constitutional right to refuse consent to a warrantless search it is privileged conduct that cannot be considered as evidence of criminal wrongdoing. *Id.*, at 1351. This is so, the court explained, regardless of the individual's motivations. *Id.*, at 1351. The right to refuse consent exists for both the innocent and the guilty. *Id.*, at 1352. If the government could use such a refusal against an individual, it would place an unfair and impermissible burden upon the assertion of a constitutional right. *Id.*, at 1351.”

Gauthier, at 264.

Accordingly, the Court held that the State may not comment on a person's refusal to consent to a search.

“The constitutional violation was that Gauthier's lawful exercise of a constitutional right was introduced against him as substantive evidence of his guilt. Whether defendants invoke their Fifth Amendment rights or their

²¹ 174 Wn. App. 275, 298 P.3d 126 (2013).

²² 581 F.2d 1343 (9th Cir. 1978)

Fourth Amendment rights, exercising a constitutional right is not admissible as evidence of guilt. See *Griffin*, 380 U.S. at 614; *Burke*, 163 Wn.2d at 212. Moreover, the Washington Supreme Court has shown no tendency to distinguish between the Fourth and Fifth Amendments in such cases. See *Jones*, 168 Wn.2d at 725. Indeed, the *Burke* court, analyzing the Fifth Amendment, stated that “[c]ourts are appropriately reluctant to penalize anyone for the exercise of *any* constitutional right.” 163 Wn.2d at 221 (emphasis added).

We hold that the prosecutor's use of Gauthier's invocation of his constitutional right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal. The error deprived Gauthier of his right to invoke with impunity the protection of the Fourth Amendment and Art. I, §7. To hold otherwise would improperly penalize defendants for the lawful exercise of a constitutional right.”

Gauthier, at 267.

Application of *Gauthier* under these circumstances supports Mr. Sirotkin’s argument and demonstrates the trial court error. Mr. Sirotkin should have the same protections as Mr. Gauthier and others who are asked to submit to testing without a warrant. Mr. Sirotkin has the right to refuse to consent to a search, and his refusal should not be used as substantive evidence against him.

IV. CONCLUSION

The State impermissibly commented on his constitutional right to refuse to consent to a search. For the foregoing reasons Mr. Sirotkin asks this Court to reverse his conviction for Driving under the Influence.

Respectfully submitted this 25th day of February, 2015.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245
Attorney for Mr. Sirotkin

ROBERTSON LAW PLLC

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**COURT OF APPEALS - DIVISION II
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STATE OF WASHINGTON,

Respondent,

vs.

IGOR SIROTKIN,

Petitioner.

NO. 46000-9-II

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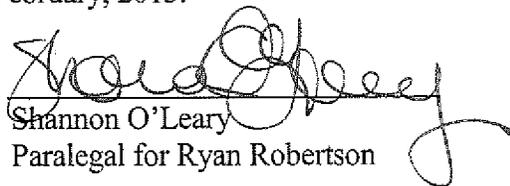
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Signed in Seattle, WA the 26th day of February, 2015.


Shannon O'Leary
Paralegal for Ryan Robertson

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