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SUPREME COURT NO. 90419-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

DOMINIC BAIRD,

Respondent,

ON DIRECT REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas, Judge

BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

Respondent Dominic Baird requests this Court affirm the District Court's ruling suppressing his breath test. The State failed to meet its burden to show exigent circumstances or any other exception to the general rule that warrantless searches are per se unreasonable.

According to the State's brief at least 30,000 Washingtonians per year are subjected to warrantless breath tests when arrested on suspicion of driving under the influence of alcohol or other drugs (DUI). The State argues this practice should continue even though the premise on which it was justified – that the dissipation of alcohol in the bloodstream constitutes a per se exigency in every DUI case regardless of the actual facts – has been debunked by the United States Supreme Court in Missouri v. McNeely.¹

In McNeely, the Court acknowledged the natural and predictable dissipation of alcohol in the bloodstream, but refused to depart from the long-standing rule that exigent circumstances exist only when the totality of the circumstances shows the delay to obtain a warrant would actually risk destruction of the evidence. No evidence of actual exigency was presented in this case.

¹ Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

Nor does any other exception to the warrant requirement apply. Because the breath test implicates concerns for bodily integrity (beyond a mere search of the person) and is not justified by exigency or officer safety, it is not permissible as a search incident to arrest. Because the implied consent warnings warned Baird a refusal would result in more severe licensing penalties as well as use of the evidence against him at trial, the State cannot show his consent was not coerced.

The State asks this Court to do what the Court refused to do in McNeely: create an exception to the totality of the circumstances rule and, instead, declare a per se exigency in every DUI case regardless of the facts. The protection of the warrant process would continue to be denied to the tens of thousands of individuals arrested on suspicion of DUI every year in Washington. This Court should follow McNeely and decline to create what amounts to a “DUI breath test” exception to the warrant requirement.

B. ISSUES

Under the Fourth Amendment and Article I, Section 7 of Washington’s Constitution, breath testing is a search, an intrusion on privacy rights that is permissible only when the State can show both probable cause and a warrant issued by a neutral magistrate or one of the few, narrow exceptions to the warrant requirement.

a. Did the District Court correctly determine that probable cause to arrest for driving under the influence and the natural and predictable dissipation of alcohol in the bloodstream does not amount to exigent circumstances in light of Missouri v. McNeely?

b. Did the District Court correctly conclude breath alcohol testing is not constitutionally permissible as an incident to arrest?

c. Did the District Court correctly conclude warrantless breath alcohol testing is not permissible under Maryland v. King?²

d. Did the District Court correctly conclude Baird's consent was invalidated by the coercive nature of the implied consent warnings?

e. Should this Court decline the State's implicit suggestion that it create a new exception to the warrant requirement to be applied in each and every DUI case?

C. STATEMENT OF THE CASE

Respondent Dominic Baird was charged with driving under the influence. CP 159. After being pulled over, he was arrested and taken to the Kent police department. 2RP 30, 32-33. Trooper Christopher Poague read him the implied consent warnings form. 2RP 34. He was told that if he refused to take the breath test, his driver's license would be revoked for at least one year and his refusal "may be used in a criminal trial." CP 166.

² Maryland v. King, ___ U.S. ___, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

After these warnings, Baird agreed to have his breath tested for alcohol content. 2RP 35.

The District Court granted Baird's motion to suppress the breath test as an unconstitutional warrantless search, determining that 1) the State is not relieved of its obligation to show either a warrant or a valid exception to the warrant requirement merely on the grounds that a search is arguably reasonable, 2) the breath test did not meet the standard for a search incident to arrest, 3), dissipation of alcohol in the blood, without more, did not meet the standard for exigent circumstances, and 3) the prosecutor conceded Baird's consent to the test was coerced. CP 146-57. Finding the State failed to meet its burden to show either a warrant or an exception to the warrant requirement, the District Court suppressed the breath test as an unreasonable warrantless search in violation of the Fourth Amendment and Article I, Section 7. CP 157.

The Superior Court granted a writ of review and consolidated this case with that of Collette Adams, where the District Court suppressed her refusal to participate in breath alcohol testing on similar grounds. CP 79-80, 355. This Court granted direct review of the suppression issues in both cases.

D. ARGUMENT

THE DISTRICT COURT CORRECTLY SUPPRESSED THE BREATH TEST AS THE RESULT OF AN UNCONSTITUTIONAL WARRANTLESS SEARCH.

The State correctly agrees breath alcohol testing is a search. Brief of Petitioner at 11. Breath tests have been repeatedly held or assumed to be searches under the Fourth Amendment. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1423, 103 L. Ed. 2d 639 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (intrusions into human body are searches); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986). And Article I, Section 7 of Washington's constitution "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment." State v. Garcia-Salgado, 170 Wn.2d 176, 183, 240 P.3d 153 (2010) (quoting State v. Parker, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999)).

Because warrantless searches are per se unreasonable, the fruits of such searches must be suppressed unless the State can show a valid exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Garcia-Salgado, 170 Wn.2d at 184; State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). The trial court's conclusions of law and its application of law to the facts in

ruling on a suppression motion are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012). The District Court here correctly suppressed the results of Baird's breath alcohol test because the State failed to meet its burden.

The State suggests two potential exceptions to the warrant requirement: exigent circumstances and consent. With no evidence that the delay necessary to obtain a warrant in this case would have been so lengthy as to risk destruction of the evidence or would have endangered officer safety, the State cannot show that exigent circumstances necessitated dispensing with the warrant requirement. McNeely, ___ U.S. at ___, 133 S. Ct. at 1560-61. This Court should also reject the State's half-hearted argument that Baird's consent was free of coercion despite warnings that his refusal could be used against him in violation of the Fourth Amendment and Article I, Section 7. Brief of Petitioner at 38-41.

The absence of any emergency and the personal integrity concerns presented by a breath test also preclude warrantless breath alcohol testing as an incident to arrest. Schmerber, 384 U.S. at 769-70. The special circumstances that have, on occasion, justified courts in applying a pure balancing of interests rather than requiring a warrant or an exception, see, e.g., King, ___ U.S. ___, 133 S. Ct. 1958, do not apply in this case. Therefore, this Court should decline the State's implicit suggestion that it

create a vast new exception to the warrant requirement that would apply in every DUI case and instead apply the same constitutional principles applied to other evidentiary searches. Baird asks this Court to affirm the District Court.

a. This Court Should not Create a Per Se Exigency Rule, and the State Has Failed to Show Actual Exigency.

Exigent circumstances justify dispensing with the protections of a warrant when the delay to obtain a warrant would risk destruction of evidence. Schmerber, 384 U.S. at 770-71; State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885, 888 (2010). But the safeguard of having a neutral magistrate determine probable cause and define the scope of a search is not lightly dispensed with: “The importance of informed, detached, and deliberate determinations of the issue whether or not to invade another’s body in search of evidence of guilt is indisputable and great.” Schmerber, 384 U.S. at 770.

The mere existence of a risk of destruction of evidence is insufficient to justify an exception to the warrant requirement. Tibbles, 169 Wn.2d at 370. Nor do exigent circumstances exist merely because it is cumbersome or time-consuming to obtain a warrant. Id. at 372 (“mere convenience is simply not enough”) (quoting State v. Patterson, 112 Wn.2d 731, 735, 774 P.2d 10 (1989)). For example, exigent circumstances do not justify a search

where a police guard at the door could have prevented loss of the evidence. Mincey v. Arizona, 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Courts must decide whether the circumstances, in fact, justified avoidance of the warrant process by considering the totality of the circumstances. McNeely, ___ U.S. at ___, 133 S. Ct. at 1559; Tibbles, 169 Wn.2d at 370. The warrant requirement is excused only if the delay required to obtain a warrant would actually risk destruction of the evidence. Id.

This Court should, as the McNeely court did, uphold the long-standing rule that exigent circumstances must be determined based on the totality of the circumstances. Because no evidence was presented in Baird's case to show that a warrant could not have been obtained before requiring him to take the breath test, the State has failed to show that exigent circumstances justified testing his breath without a warrant.

1. Under Both the State and Federal Constitutions, Exigency Is Determined from the Totality of the Circumstances.

Schmerber stands for the proposition that, when the specific facts of the case show that the delay necessary to obtain a warrant would threaten the destruction of evidence, an officer may search without a warrant. Schmerber, 384 U.S. at 770-71. In Schmerber, the Court held the warrantless blood draw was justified. Id. In so holding, the Court specifically relied on the fact that there was no time to obtain a warrant due

to the delay that had already occurred while securing the accident scene and transporting the defendant to the hospital. Id.

The Schmerber court did not suggest it would approve of the search without these “special facts” showing actual exigency. Id. at 771. On the contrary, the court emphasized, “we reach this judgment [upholding the warrantless blood test] only on the facts of the present record.” Id. at 772. The Court explained that its holding permitting the blood test “under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions.” Id.

In summarizing the holding of Schmerber nearly fifty years later, the McNeely court also focused on the facts that specifically showed exigency, stating the warrantless blood test in Schmerber was upheld, “because the officer ‘might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.’” McNeely, ___ U.S. at ___, 133 S. Ct. at 1556. The court explained that the Schmerber decision rested on the “special facts” of that case, which included the necessity of securing the crime scene and transporting the defendant to the hospital. McNeely, ___ U.S. at ___, 133 S. Ct. at 1560 (discussing Schmerber, 384 U.S. at 770-72). These “special facts” showed there was “no time to seek out a warrant and secure a magistrate.” Id.

In every case of exigent circumstances surveyed by the McNeely court, there was both “compelling need for official action and no time to secure a warrant.” McNeely, ___ U.S. at ___, 133 S. Ct. at 1559. Citing cases as early as 1931, the Court explained that the existence of exigent circumstances excusing the absence of a warrant depends upon the “totality of the circumstances.” McNeely, ___ U.S. at ___, 133 S. Ct. at 1559 (citing, *inter alia*, Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931)). Because of Schmerber’s grounding in the specific facts of the case, the Court reasoned that Schmerber’s holding “fits comfortably within our case law applying the exigent circumstances exception.” Id. Washington’s case law on exigency under Article I, Section 7 also emphatically requires consideration of the totality of the circumstances. Tibbles, 169 Wn.2d at 370-73.

2. Like the State in *McNeely*, the State Here Argues for a Departure from this Long-Standing Rule.

Since 1966, some courts have relied on Schmerber’s language about the natural dissipation of alcohol in the bloodstream to conclude that a risk of destruction of evidence necessarily exists in every DUI arrest. *See, e.g., United States v. Reid*, 929 F.2d 990 (4th Cir. 1991); *State v. Curran*, 116 Wn.2d 174, 184-85, 804 P.2d 558 (1991). McNeely did not establish a new rule. It did, however, point out that these interpretations of Schmerber are

incorrect. McNeely reaffirmed that exigency must be determined, as the Court did in Schmerber, by considering the totality of the circumstances. McNeely, ___ U.S. at ___, 133 S. Ct. at 1559-60.

The totality of the circumstances analysis for exigency is not a new rule created to deal with the extraordinary invasiveness of blood draws or the compelling governmental interest in stamping out drunk driving. See McNeely ___ U.S. at ___, 133 S. Ct. at 1559 (discussing cases back to 1931). On the contrary, Justice Sotomayor described the blood test at issue in McNeely as “concededly less intrusive than other bodily invasions we have found unreasonable.” McNeely, ___ U.S. at ___, 133 S. Ct. at 1565. The Schmerber Court, too, described the blood tests as “minor intrusions.” 384 U.S. at 772. In addition to the blood tests at issue in Schmerber and McNeely, the totality of the circumstances analysis for exigency has been applied in cases involving searches of a parked vehicle, Patterson, 112 Wn.2d at 735-36, seizure of a gun, State v. Carter, 151 Wn.2d 118, 128, 85 P.3d 887 (2004), a search of a suspect’s fingernails, Cupp v. Murphy, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973), and seizure of books and film, Roaden v. Kent, 413 U.S. 496, 93 S. Ct. 279, 637 L. Ed. 2d 757 (1973).

The State in McNeely acknowledged existing law but asked the Supreme Court to depart from it and create a new rule for cases involving the dissipation of alcohol in the bloodstream:

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances. Brief for Petitioner 28–29. But the State nevertheless seeks a per se rule for blood testing in drunk-driving cases.

McNeely, ___ U.S. at ___, 133 S. Ct. at 1560. But the McNeely court declined to create a new per se rule; “it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State.” Id. Nor should this Court do so here.

3. The *McNeely* Court’s Reasons for Rejecting a Per Se Exigency Rule Apply Equally to This Case.

The McNeely court rejected the State’s suggestion that it create a new per se rule for blood tests in the DUI context. ___ U.S. at ___, 133 S. Ct. at ___. The State asks this Court to do precisely what the United States Supreme Court declined to do in McNeely: to allow exigent circumstances to be determined ahead of time, without regard for the actual circumstances of the case. In short, to replace the legal fiction of “implied consent” with the legal fiction of “implied exigency.”

The State urges this Court to rely on dicta from McNeely that was not joined by a majority of the Court. Brief of Petitioner at 21-23 (citing

McNeely, ___ U.S. at ___, 133 S. Ct. at 1566). But the State's reasons for suggesting this Court should follow McNeely's dicta instead of its holding do not hold up under a closer analysis.

First, the State argues a lesser showing of exigency is required when the search is less invasive. Brief of Petitioner at 23-24, 28. But the per se rule requested by the State does not merely require a lesser showing. It requires no showing at all. As with the per se rule suggested in McNeely, the State here asks this Court to accept a "considerable overgeneralization." ___ U.S. ___, 133 S. Ct. at 1561 (quoting Richards v. Wisconsin, 520 U.S. 385, 393, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997)). A per se rule guarantees that, in some cases, there will be no exigency. McNeely, ___ U.S. at ___, 133 S. Ct. at 1561. As the court explained in McNeely, because blood testing occurs at a hospital, some delay for transport is inevitable. Id. If one officer can obtain a warrant while another transports the defendant for the test, then there is no plausible justification for not obtaining a warrant. Id.

This overgeneralization applies equally to blood and breath testing. The invasiveness of the search is unrelated to the likelihood that exigent circumstances actually exist. Exigency depends on whether the dissipation rate of alcohol makes it impracticable to obtain a warrant, and essentially requires a comparison of time frames: the time necessary to obtain a warrant,

the inevitable delays involved, and the time that will permit destruction of the evidence. Id.; see also Schmerber, 384 U.S. at 770 (comparing dissipation of alcohol in bloodstream with necessary delay to deal with accident and finding no time to seek a warrant).

Alcohol in the bloodstream dissipates at the same rate, whether the State seeks to compel a blood test or a breath test. And as with blood testing, some delay is inevitable. Just as blood tests generally require transport to a hospital, breath testing usually occurs after transport to the police station, as was the case with Baird. See 2RP 33. Once at the station, breath test protocols require a fifteen-minute observation period before the test can be performed. WAC 448-15-030. When the time to obtain a warrant is less than the delay to transport the suspect to the station to administer the breath test, there is no justification for not obtaining a warrant. McNeely, ___ U.S. at ___, 133 S. Ct. at 1561.

The focus of exigency analysis under McNeely is the timing and the potential for destruction of evidence, not the invasiveness of the search. In rejecting the per se rule, the McNeely court expressly contrasted that case, not with less intrusive searches, but with cases where the risk of destruction of evidence is greater, such as easily disposable evidence where there is a true “now or never” situation. Id.

The McNeely court also rejected a per se rule because technological advances since Schmerber have reduced the time it takes to obtain a warrant. McNeely, ___ U.S. at ___, 133 S. Ct. at 1561-62. For example, as three concurring justices noted, “in one county in Kansas, police officers can e-mail warrant requests to judges’ iPads; judges have signed such warrants and e-mailed them back to officers in less than 15 minutes.” Id. at 1573 (Roberts, C.J., concurring in part) (citing Benefiel, DUI Search Warrants: Prosecuting DUI Refusals, 9 Kansas Prosecutor 17, 18 (Spring 2012)). Technological advances, and the resulting reduction in warrant delays, are not different whether the search in question is a breath or blood test.

The Court also rejected a per se rule on policy grounds. A per se rule would discourage development of processes to “preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.” McNeely, ___ U.S. at ___, 133 S. Ct. at 1563 (quoting State v. Rodriguez, 2007 UT 15, ¶ 46, 156 P.3d 771, 779 (2007)). This consideration also applies equally to blood and breath testing.

The reasoning that caused the McNeely court to reject a per se exigency rule for blood tests applies equally to the breath test in this case. The distinction the State draws between the intrusiveness of blood versus breath testing presents no reason for a different conclusion than the one drawn in McNeely: the rejection of a per se exigency rule. And the

overgeneralization of a per se rule directly conflicts with the basic principle that exceptions to the warrant requirement are “jealously and carefully drawn.” State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

Next, the State argues for a per se rule because the breath test only occurs after an officer finds probable cause. Brief of Petitioner at 27. This rationale also fails to distinguish McNeely, which involved a similar “routine” DUI arrest based on probable cause. Brief of Petitioner at 20; McNeely, ___ U.S. at ___, 133 S. Ct. at 1557. As the State concedes, the protection of the warrant process is not dispensed with merely on the basis of probable cause to arrest. “[T]he existence of probable cause, standing alone, does not justify a *warrantless* search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.” Tibbles, 169 Wn.2d at 369.

The Schmerber Court explained that the question is not whether there was probable cause; the question is whether there was a good reason to permit the officer, rather than a neutral magistrate, to make that determination. 384 U.S. at 770. The existence of probable cause does not provide such a reason. Nor does it make it more likely that the timing of a given search is truly exigent. Therefore, the existence of probable cause provides no basis to depart from the holdings of Schmerber or McNeely. Under Schmerber, probable cause and reasonableness are required in

addition to actual exigent circumstances, not instead of them. Garcia-Salgado, 170 Wn.2d at 185-86 (discussing Schmerber, 384 U.S. at 770 and rejecting arguments based on Curran, 116 Wn.2d 174, and State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984)).

Finally, the State argues the breath test is an attempt to secure evanescent evidence. Brief of Petitioner at 28. Again, the exigent circumstances exception requires more. It requires a showing that the delay necessary to obtain a warrant would have permitted destruction of the evidence under the “special facts” of a given case. Schmerber, 384 U.S. at 770-71; see also Tibbles, 169 Wn.2d at 370 (“[M]erely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. A court must look to the totality of the circumstances.”) (citations omitted). As McNeely points out, in many cases the delay to obtain a warrant will be minimal and will not severely affect the States’ case. ___ U.S. at ___, 133 S. Ct. at 1561.

Exigencies arise out of the facts of individual cases; they do not arise as a matter of law. McNeely, ___ U.S. at ___, 133 S. Ct. at 1563; Schmerber, 384 U.S. at 770-71; Tibbles, 169 Wn.2d at 370. McNeely merely reaffirmed this principle: “In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically.” McNeely, ___ U.S. at

_____, 133 S. Ct. at 1563. The State has offered no persuasive reason to depart from McNeely, Schmerber, or Tibbles, all of which require analysis of the totality of the circumstances to determine exigency. This Court should, therefore, decline to create a per se exigency rule permitting warrantless breath tests in all DUI cases.

Absent a per se rule, the State has made no attempt to demonstrate that exigent circumstances actually existed in Baird's case or that a telephonic warrant could not have been obtained in time to preserve the evidence. Thus, the record is insufficient to show exigent circumstances. See Tibbles, 169 Wn.2d at 364 (declining to find exigency when record contained no evidence of what officer would have had to do to obtain a warrant). The State has failed to meet its burden to show that exigent circumstances justified testing Baird's breath for alcohol content without first obtaining a warrant.

b. Breath Alcohol Testing Is Outside the Scope of the Search Incident to Arrest.

The State has not, in this Court, expressly argued a warrantless breath test could be permissible incident to arrest, and for good reason: Concerns for officer safety and preservation of evidence are also the source of the warrant exception for searches incident to arrest. Arizona v. Gant, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (citing Weeks v.

United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914); United States v. Robinson, 414 U.S. 218, 230-34, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). Given these concerns, it is unsurprising that neither Schmerber nor McNeely relied on the search incident to arrest exception. McNeely, ___ U.S. at ___, 133 S. Ct. at 1559 n.3; Schmerber, 384 U.S. at 771.

Courts do not mechanically approve of all searches that coincide more or less with a lawful arrest. “A meaningful analysis of the reasonableness of a warrantless search or seizure involves more than simply attempting to fit a given situation into an exception to the warrant requirement.” State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995). On the contrary, the guide for the analysis is the underlying rationale for the exception. Id.

Recent decisions under both the Fourth Amendment and Article I, Section 7 have backed away from the “police entitlement” that the search incident to arrest was long thought to provide, and have returned this exception to its original, narrow intent “to protect against frustration of the arrest itself or destruction of evidence by the arrestee.” State v. Ringer, 100 Wn.2d 686, 692, 674 P.2d 1240 (1983); see also Gant, 556 U.S. at 338; State v. Snapp, 174 Wn.2d 177, 188-89, 275 P.3d 289 (2012).—A valid search incident to arrest rests on the reasonableness of a search for weapons that could be used against the officer and evidence that could be concealed or

destroyed. Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685 (1969).

The search incident to arrest exception cannot justify the warrantless breath test in this case for two main reasons. First, breath alcohol content is outside the scope of the search incident to arrest because it is not under a person's voluntary control. See e.g., State v. Francisco, 148 Wn. App. 168, 175, 199 P.3d 478 (2009) (“[T]he presence of liquor in a person's body does not constitute possession because the person's power to control, possess, or dispose of it ends upon assimilation.”) (citing State v. Hornaday, 105 Wn.2d 120, 126, 713 P.2d 71 (1986); State v. Allen, 63 Wn. App. 623, 625, 821 P.2d 533 (1991)). Searches of the person incident to arrest are permitted because courts presume that 1) items closely associated with an arrestee may be used to threaten the officer or resist arrest and 2) items of evidentiary value may be destroyed or discarded. State v. Byrd, 178 Wn.2d 611, 618-20, 310 P.3d 793, 799 (2013).

Because the alcohol content of a person's breath implicates neither of these concerns, it cannot fall within the scope of the search incident to arrest. To paraphrase the District Court's ruling in this case, it is difficult to imagine how an arrestee could use breath alcohol content as a weapon against an officer. CP 153. Similarly, alcohol in the bloodstream cannot be used to facilitate escape. And an arrestee cannot, by his or her own

conduct, conceal, destroy, or discard alcohol once it has been absorbed into the body. Because it is not an item that could be used or affected by the arrestee in any way, breath or blood alcohol content is not properly the subject of a search incident to arrest.

Second, the search incident to arrest does not apply to “searches involving intrusions beyond the body’s surface.” Schmerber, 384 U.S. at 770. The deep lung breath required for breath alcohol testing “implicates similar concerns about bodily integrity” to blood and urine testing. Skinner, 489 U.S. at 616-17. “The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.” Schmerber, 384 U.S. at 770. In short, the search incident to arrest does not permit a search inside the body, but that is precisely what a breath test for alcohol does. Moreover, the ensuing chemical analysis after the breath is produced is a second, further, intrusion into privacy. Skinner, 489 U.S. at 616; State v. Martines, 182 Wn. App. 519, ___, 331 P.3d 105, 107 (2014).

By requiring production of deep lung breath, breath alcohol testing is akin to other types of invasive searches that are not permitted solely based on a lawful arrest. For example, strip searches of arrestees are not permitted merely on the basis of a search incident to arrest. Audley, 77 Wn. App. at 905. Body cavity searches, even of arrestees, are unlawful without a

warrant. RCW 10.79.080.³ Recent cases have also limited the scope of the search incident to arrest even when personal property is involved. The fact of arrest may justify seizure of the arrestee's phone, but not a search of the information contained in the phone's memory. Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014); State v. Valdez, 167 Wn.2d 761, 776, 224 P.3d 751 (2009).

Breath alcohol testing is a search that penetrates inside the body and does not address concerns for preservation of evidence or officer safety. It is therefore not permissible merely as an incident to a lawful arrest. Schmerber, 384 U.S. at 770-71.

c. The Warrant Exception from *Maryland v. King* Does Not Apply to Breath Alcohol Tests.

In the District Court, the State also attempted to justify the warrantless breath test under Maryland v. King, ___ U.S. ___, 133 S. Ct. 1958. But that case is inapposite because it involves information obtained when a person is booked into jail to ensure proper identification. Id. at 1971.

The DNA swab in King was upheld because of the government's compelling interests in establishing the identity of arrested persons. Id. The Court specifically relied on the fact that the DNA swab does not provide any

³ See also Giles v. Ackerman, 746 F.2d 614, 616 (9th Cir. 1984) (“[I]ntrusions into the arrestee's body, including body cavity searches. . . are not authorized by arrest alone.”); Chapman v. Nichols, 989 F.2d 393, 395-96 (10th Cir. 1993) (arrest alone does not permit a “strip search,”).

information beyond the identity of the person. Id. at 1972. The court expressly contrasted DNA swabbing with a “drug test” designed to gather evidence of a crime. Id.

Breath alcohol testing is far more akin to a drug test and fails to even implicate the rationale for avoiding the warrant requirement under King. The purpose of a breath alcohol test is not to identify the person, but to reveal aspects of the person’s interior that are not otherwise exposed to the public. Skinner, 489 U.S. at 616-17. The information sought is substantive evidence of a crime under RCW 46.61.502. And in addition to revealing information about alcohol consumption, the test may reveal other physical and medical conditions such as acid reflux, asthma, emphysema or other conditions affecting lung capacity, and environmental acetone exposure. Ronald E. Henson, Breath Alcohol Testing, Aspatore, 2013 WL 6140725, at *16, *20 (Oct. 2013).

d. The Implied Consent Warnings Are Coercion that Vitiates Any Consent to a Breath Alcohol Test.

The State’s half-hearted argument that consent relieves it of the obligation to obtain a search warrant for the breath test fails as well. Brief of Petitioner at 38-41. If the State can compel a warrantless breath test, then consent is immaterial. And if not, then the penalties attached to refusal render any consent involuntary.

The State may dispense with obtaining a warrant if an individual consents to a search. Bustamonte, 412 U.S. at 219, 222-23. However, that consent is only valid if the State proves the consent was given freely and voluntarily. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). The State has a heavy burden to prove consent because exceptions to the warrant requirement are “jealously and carefully drawn.” State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (quoting State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). “No matter how subtly,” consent may not be coerced “by explicit or implicit means, by implied threat or covert force.” Bustamonte, 412 U.S. at 228.

As the State appears to have conceded in the District Court, the implied consent warnings are coercive because they contain explicit threats of the penalties for refusal. CP 156-57; 3RP 51. Therefore, Baird’s consent was not freely or voluntarily given. 3RP 51. The so-called implied consent that a person is supposed to have given in exchange for the privilege of driving on public roads in the State of Washington is a violation of the doctrine of unconstitutional conditions. Moreover, the “consent” thereby obtained is similarly coerced by being required as the price of driving, a fundamental attendant of everyday life.

1. Consent Given in the Face of the Implied Consent Warnings Is Coerced, Not Voluntary.

The State has repeatedly argued it can lawfully require warrantless breath tests and there is no constitutional right to refuse. 3RP 52; Brief of Petitioner at 17 (citing State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995)). Although it claims lawful authority to require breath testing, the State recognizes it is, practically speaking, impossible to physically force a person to take a breath test. Brief of Petitioner at 34-35. Therefore, the State uses threats of future consequences, instead of physical force, to compel submission. RCW 46.20.308; see also State v. Won, 134 Haw. 59, 65, 332 P.3d 661, 667 (Ct. App. 2014) cert. granted, No. SCWC-12-0000858, 2014 WL 2881259 (Haw. June 24, 2014) (effect of implied consent legislation is to equip law enforcement with instrument of enforcement not involving physical compulsion). But the State cannot simultaneously claim lawful authority and constitutionally valid, voluntary consent of the individual. Consent that is granted “only in submission to a claim of lawful authority” is not voluntary. State v. Ruem, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013); see also Bumper, 391 U.S. at 548-49.

The State argues, however, that the implied consent warnings are not unconstitutionally coercive. Brief of Petitioner at 40-41. It is true that not every burden on the exercise of a constitutional right amounts to a violation

of that right. See, e.g., Portuondo v. Agard, 529 U.S. 61, 70, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (Constitution does not forbid every government-imposed choice that has the effect of discouraging the exercise of constitutional rights). But this Court, the Court of Appeals, and the Ninth Circuit have all concluded that exercising the right to refuse consent to a warrantless search may not be transformed into evidence of guilt at trial without violating the Fourth Amendment. United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978); State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010); State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013). Therefore, this is a penalty that may not be constitutionally applied.

The District Court concluded the implied consent law announcing this penalty (RCW 46.20.308) is not necessarily unconstitutional because a refusal may still be used at trial as impeachment if a defendant opens the door by bringing up the subject. CP 347; Gauthier, 174 Wn. App. at 267-70 (discussing impeachment exception). But the coercive nature of the warnings should not be judged by the District Court judge's attempt to find a constitutional interpretation of the statute. The warnings required by law do not inform the arrestee of any limits on the State's use of refusal evidence. A reasonable person would believe a refusal could be used as substantive evidence of guilt and would thus be unconstitutionally coerced into consenting to the warrantless search.

2. The State May Not Extract a Waiver of Fourth Amendment Protection as the Price of Driving on Public Roads.

Despite the apparent assertion to the contrary in RCW 46.20.308, a person does not give constitutionally valid consent to a warrantless breath test merely by driving in the State of Washington. Even if the consent implied under the statute could amount to constitutionally valid consent, implied consent is not triggered until the moment of arrest. State v. Wetherell, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973). Prior to arrest, no consent can be implied. Id.

Even if the State could, under the statute, claim Baird consented merely by driving, that consent was also not voluntary. Even if it attaches at the moment of driving, rather than the moment of arrest, the so-called implied consent is coerced by the imposition of an unconstitutional condition.

Given the prevalence of driving in our culture, and its importance to accomplishing the tasks of everyday living, the State may not require, as a price for that “privilege,” a broad waiver of fundamental Fourth Amendment protection:

Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right “functions to preserve spheres of

autonomy ... [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands.

Butler v. Kato, 137 Wn. App. 515, 531, 154 P.3d 259 (2007) (quoting United States v. Scott, 450 F.3d 863 (9th Cir. 2006)). Extracting consent to search as the price of driving, a fundamental aspect of modern life, is certainly a “lop-sided deal” that erodes constitutional protection by creating an “end-run” around the protection of the Fourth Amendment. This “deal” violates the doctrine of unconstitutional conditions. See id.

It makes little difference whether this Court considers the time Baird began to drive or the time of his breath test. Coercion vitiates the validity of any consent in both cases. Any implied consent at the time of driving was coerced by unconstitutional condition placed on the privilege of driving. Butler, 137 Wn. App. at 531. At the time of the test, he was coerced by the threat that a refusal would be used against him at trial, in violation of the Fourth Amendment and Article I, Section 7. Gauthier, 174 Wn. App. at 267. “Consent” given under these unconstitutionally coercive circumstances cannot excuse the failure to obtain a warrant.

- e. This Court Should Not Create a New Exception to the Warrant Requirement for Prosecution of Driving Under the Influence.

Despite the above analysis regarding well-established exceptions to the warrant requirement, the State argues warrantless breath alcohol testing

is reasonable because it is a minimally intrusive and a judicially efficient way to protect society from the havoc wrought by impaired drivers. Brief of Petitioner at 31-35 (citing State v. Mecham, 181 Wn. App. 932, 944, 331 P.3d 80 (2014), rev. granted ___ Wn.2d ___ (Nov. 5, 2014)). This Court should decline the invitation to so dramatically diminish the constitutional protection afforded to Washingtonians.

First, courts are rightly reluctant to depart from the general rule that the reasonableness of a search is shown, in the first place, via a probable cause determination by a neutral magistrate. See United States v. Askew, 529 F.3d 1119, 1149 (D.C. Cir. 2008) (Griffith, J., concurring) (“As a court of appeals we are in no position to create a new exception that would have far-reaching effects on how the police may properly investigate crime. Rather, we are bound by Supreme Court precedent, which in this case requires probable cause.”). In general, when police have opportunity to obtain a warrant, “we do not look kindly on their failure to do so.” State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989) (quoting United States v. Impink, 728 F.2d 1228, 1231 (9th Cir.1984)).

Under Article I, Section 7, the warrant requirement is “especially important as it is the warrant which provides the requisite ‘authority of law.’” State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (quoting State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). Exceptions to the

warrant requirement are to be “jealously and carefully drawn.” Id. (quoting State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004)). This Court has, in the past declined to adopt, under Article I, Section 7, even some warrant exceptions permitted under the Fourth Amendment, such as the “special needs” exception permitting warrantless searches whenever the State can articulate a special need beyond the usual needs of law enforcement and the “automobile exception” based on a per se exigency created by the inherent mobility of the automobile. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 312-14, 178 P.3d 995 (2008); Patterson, 112 Wn.2d at 738-39. This Court should decline to extend Terry to cover searches for evidence of drunk driving or otherwise create a new exception to the warrant requirement for driving under the influence cases.

The Mecham court erred in relying on Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), to justify warrantless searches upon arrest for driving under the influence. Mecham, 181 Wn. App. at 943-44. Terry permits only a brief detention for questioning and pat-down for weapons that could pose a threat to the officer. Ybarra v. Illinois, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979). It does not permit *any* evidentiary searches. Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). Terry does not authorize the breath tests at

issue here. And the State's other policy arguments do not warrant creation of a new exception.

The State claims requiring warrants for breath tests will increase the frequency of blood tests. Brief of Petitioner at 25-26. The State hypothesizes it would be unreasonable for an officer to request a breath test warrant because the individual could then refuse to perform the breath test, and the officer would then have to go back and request a second argument for a blood test. This so-called difficulty is easily dispensed with. Officers could simply apply for a warrant authorizing breath and/or blood testing, and leave the choice up to the individual. In that case, any increase in the frequency of blood tests would occur only because the individual has deemed the blood test preferable. That choice would not be unreasonable given that blood tests are a more direct way to measure impairment and may be more accurate. See, e.g., State v. Brayman, 110 Wn.2d 183, 193-95, 751 P.2d 294 (1988) (discussing research comparing breath alcohol, blood alcohol, and actual impairment).

The State also argues the threat to public safety posed by drivers under the influence is such that the warrant requirement must be dispensed with. Brief of Petitioner at 31. But the McNeely court considered this threat to public safety as well in *rejecting* a per se finding of exigency for blood testing. Joined by three other justices, Justice Sotomayor declared, “[T]he

government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." ___ U.S. ___, 133 S. Ct. at 1565. The danger to public safety is no different, whether the test required is of the blood or of the breath. Therefore, this distinction does not provide a basis for departing from McNeely's precedent. Additionally, the public safety issue is abated somewhat by RCW 46.55.360, which requires a mandatory 12-hour impound of the vehicle when an individual is arrested for driving under the influence, regardless of whether the person takes or refuses a breath test.

In other areas of criminal law, the warrant requirement does not prevent effective law enforcement, and it will not do so in the area of DUIs. In many cases, officers will likely be able to obtain search warrants for breath tests via an efficient telephonic warrant process. In many other cases, courts may find exigent circumstances justify warrantless breath tests based on the actual circumstances of the case or the unavailability of magistrates to efficiently consider late-night warrant applications. Even if breath or blood tests are not obtained, DUI may still be charged and proved under the "affected by" prong of the statute without resort to the percentage of alcohol in the breath or blood. See RCW 46.61.502 ("A person is guilty of driving while under the influence of intoxicating liquor . . . if the person drives a

vehicle within this state: . . . (c) While the person is under the influence of or affected by intoxicating liquor.”).

The scope of the problem and the past practice of law enforcement should not cause abandonment of constitutional protections. “Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.” Skinner, 489 U.S. at 635 (Marshall, J. dissenting).

The vast quantity of prosecutions for DUI is not a reason to value expediency over constitutional protections. On the contrary, where so many are likely to be affected, courts should be even more careful to protect constitutional rights. Law enforcement efficiency “can never by itself justify disregard of the Fourth Amendment.” Mincey, 437 U.S. at 393. As the Court explained in Gant, “If it is clear that a practice is unlawful, individuals’ interest in its discontinuance clearly outweighs any law enforcement ‘entitlement’ to its persistence.” 556 U.S. at 349.

“Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done . . . so that an objective mind might weigh the need to invade [the citizen’s] privacy in order to enforce the law.” Groh v. Ramirez, 540 U.S. 551, 560,

124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (quoting McDonald v. United States, 335 U.S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153 (1948)). The State asks this Court to remove that “objective mind.” Instead, it would subject all those detained on suspicion of DUI to searches based solely on probable cause determinations made by law enforcement officers “engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948). Baird asks this Court to reject such a sweeping exception to one of the most cherished principles of constitutional privacy law.

E. CONCLUSION

Exigency is an exception to the warrant requirement only where an exigency actually exists. Skinner, 489 U.S. at 643 (citing Chimel, 395 U.S. at 761–764). The mere fact that alcohol in the bloodstream dissipates with time, naturally and predictably, does not constitute an exigency in every single case. McNeely, ___ U.S. ___, 133 S. Ct. at 1563. With no facts showing actual exigency or any other exception to the warrant requirement, the District Court correctly suppressed the results of Baird’s warrantless breath test. Baird asks this Court to affirm.

DATED this 22nd day of December, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner,

v.

DOMINIC BAIRD,

Respondent.

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) SUPREME COURT NO. 90419-7
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] DOMINIC BRAIRD
8650 44TH AVENUE S.
SEATTLE, WA 98118

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

X *Patrick Mayovsky*

OFFICE RECEPTIONIST, CLERK

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Subject: State v. Dominic Baird, No. 90419-7 / Brief of Respondent

Attached for filing today is the brief of respondent for the case referenced below.

State v. Dominic Baird

No. 90419-7

Brief of Respondent

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