

**Filed**  
Washington State Supreme Court

DEC 29 2014

Ronald R. Carpenter  
Clerk

NO. 90598-3

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Dec 23, 2014, 3:11 pm  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Petitioner.

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>SUMMARY OF ARGUMENT</u> .....	5
D. <u>ARGUMENT</u> .....	6
1. THE ADMINISTRATION OF FIELD SOBRIETY TESTS IS A VERY LIMITED SEIZURE, AND IS A REASONABLE INVESTIGATORY TOOL THAT FALLS WITHIN THE SCOPE OF AN INVESTIGATORY DETENTION FOR IMPAIRED DRIVING.....	6
2. BECAUSE MECHAM HAD BEEN PLACED UNDER ARREST, THE REQUEST TO PERFORM FIELD SOBRIETY TESTS WAS A VALID INTRUSION INCIDENT TO ARREST .....	19
3. AN INFERENCE OF GUILT CAN BE DRAWN FROM A SUSPECT'S REFUSAL TO PERFORM FIELD SOBRIETY TESTS WHEN THE REQUEST TO PERFORM THE TESTS WAS MADE DURING AN INVESTIGATORY DETENTION FOR IMPAIRED DRIVING, OR WHEN THE SUSPECT WAS UNDER ARREST .....	21
E. <u>CONCLUSION</u> .....	25

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brown v. Texas, 443 U.S. 47,  
99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979) ..... 14

Burnett v. Municipality of Anchorage, 806 F.2d 1447  
(9th Cir. 1986) ..... 24

Hayes v. Florida, 470 U.S. 811,  
105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985)..... 15, 17

Maryland v. King, \_\_\_ U.S. \_\_\_,  
133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013)..... 20

Miranda v. Arizona, 384 U.S. 436,  
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 9

Missouri v. McNeely, \_\_\_ U.S. \_\_\_,  
133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)..... 20

Riley v. California, \_\_\_ U.S. \_\_\_,  
134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)..... 20

South Dakota v. Neville, 459 U.S. 553,  
103 S. Ct. 916, 74 L. Ed. 2d 748 (1983)..... 23

Terry v. Ohio, 392 U.S. 1,  
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....5-9, 11-18

United States v. Robinson, 414 U.S. 218,  
94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)..... 20

Ybarra v. Illinois, 444 U.S. 85,  
100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)..... 14

Washington State:

<u>Heinemann v. Whitman County</u> , 105 Wn.2d 796, 718 P.2d 789 (1986).....	9, 18
<u>Mercer Island v. Walker</u> , 76 Wn.2d 607, 458 P.2d 274 (1969).....	9
<u>State v. Acrey</u> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	6, 7
<u>State v. Baity</u> , 140 Wn.2d 1, 991 P.2d 1151 (2000).....	10
<u>State v. Belieu</u> , 112 Wn.2d 587, 773 P.2d 46 (1989).....	7
<u>State v. Byrd</u> , 178 Wn.2d 611, 310 P.3d 793 (2013).....	19
<u>State v. Doleshall</u> , 53 Wn. App. 69, 765 P.2d 344 (1988), <u>review denied</u> , 112 Wn.2d 1013 (1989).....	20
<u>State v. Doughty</u> , 170 Wn.2d 57, 239 P.3d 573 (2010).....	6
<u>State v. Gauthier</u> , 174 Wn. App. 257, 298 P.3d 126 (2013).....	21, 23
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	7
<u>State v. Nordlund</u> , 113 Wn. App. 171, 53 P.3d 520 (2002).....	22
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	8
<u>State v. Rife</u> , 133 Wn.2d 140, 943 P.3d 266 (1997).....	8

<u>State v. Wheeler</u> , 108 Wn.2d 230, 737 P.2d 1005 (1987).....	7, 8, 10
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	6, 8
<u>Other Jurisdictions:</u>	
<u>Blasi v. State</u> , 167 Md. App. 483, 893 A.2d 1152 (2006).....	12
<u>Commonwealth v. Eckert</u> , 431 Mass. 591, 728 N.E.2d 312 (2000).....	12
<u>Dixon v. State</u> , 103 Nev. 272, 737 P.2d 1162 (1987).....	13
<u>Hulse v. State, Dep't of Justice, Motor Vehicle Div.</u> , 289 Mont. 1, 961 P.2d 75 (1997).....	12
<u>McCormick v. Anchorage</u> , 999 P.2d 155 (Alaska App. 2000).....	11, 24
<u>People v. Carlson</u> , 677 P.2d 310 (Colo. 1984).....	16
<u>People v. Helm</u> , 633 P.2d 1071 (Colo. 1981).....	13
<u>People v. Walter</u> , 374 Ill.App.3d 763, 872 N.E.2d 104 (2007).....	12
<u>State ex rel. Verburg v. Jones</u> , 211 Ariz. 413, 121 P.3d 1283 (Ariz. App. 2005).....	24
<u>State v. Bernoikeits</u> , 423 N.J.Super. 365, 32 A.3d 1152 (2011).....	13
<u>State v. Ferreira</u> , 133 Idaho 474, 988 P.2d 700 (Idaho App. 1999).....	12

<u>State v. Golden</u> , 171 Ga. App. 27, 318 S.Ed.2d 693 (1984) .....	11, 13
<u>State v. Gray</u> , 150 Vt. 184, 552 A.2d 1190 (1988).....	13
<u>State v. Greenough</u> , 216 Or. App. 426, 173 P.3d 1227 (2007).....	24
<u>State v. Lamme</u> , 19 Conn. App. 594, 563 A.2d 1372 (1989).....	11
<u>State v. Little</u> , 468 A.2d 615 (Maine 1983) .....	12, 14
<u>State v. Nagel</u> , 320 Or. 24, 880 P.2d 451 (1994).....	17, 18
<u>State v. Royer</u> , 276 Neb. 173, 753 N.W.2d 333 (2008) .....	12
<u>State v. Stevens</u> , 394 N.W.2d 388 (Iowa 1986) .....	12
<u>State v. Superior Court</u> , 149 Ariz. 269, 718 P.2d 171 (1986).....	11
<u>State v. Taylor</u> , 648 So.2d 701 (Fla. 1995) .....	11, 24
<u>State v. Witte</u> , 251 Kan. 313, 836 P.2d 1110 (1992).....	10
<u>State v. Wyatt</u> , 67 Haw. 293, 687 P.2d 544 (1984).....	12, 13

Constitutional Provisions

Federal:

U.S. Const. amend. IV ..... 6, 15

Washington State:

Const. art. I, § 7..... 6

Statutes

Washington State:

RCW 46.61.5055..... 5

Other Authorities

[http://www.nhtsa.gov/people/injury/alcohol/SFST/  
appendix\\_a.htm](http://www.nhtsa.gov/people/injury/alcohol/SFST/appendix_a.htm)..... 2, 10

A. ISSUES PRESENTED.

1. Whether a police officer's request that a suspect perform field sobriety tests is within the reasonable scope of an investigative detention for impaired driving?

2. Whether a police officer's request that a suspect under arrest perform field sobriety tests is a valid intrusion into privacy incident to arrest?

3. Whether the refusal to perform field sobriety tests is admissible as consciousness of guilt where the refusal is not based on the exercise of a constitutional right?

B. STATEMENT OF THE CASE.

On May 15, 2011, Bellevue Police Department Officer Scott Campbell observed petitioner Mark Mecham driving in Bellevue. 3RP 12-15.<sup>1</sup> He stopped Mecham's car after a random license check revealed an outstanding warrant. 1RP 49. Before the stop, Campbell followed Mecham for a few hundred yards over the course of about a minute. 3RP 16. Campbell testified he did not see Mecham drive unsafely or commit any traffic infractions during that short period. 3RP 15-16. After the stop, the officer identified

---

<sup>1</sup> There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP—October 23, 24, 2012; 2RP—October 25, 29, 2012; 3RP—October 30, 2012; 4RP—October 31, 2012; 5RP—November 1, 8, 19, 2012.

Mecham and arrested him pursuant to the outstanding warrant and because he was driving while his license was revoked. 1RP 49-52; 3RP 19-20. Mecham stipulated that his stop and arrest were lawful. CP 50; 3RP 11.

As he was arresting him, Campbell noticed that Mecham had an odor of intoxicants coming from his breath, his movements were sluggish, his speech was slurred and repetitive, and overall he appeared intoxicated. 3RP 20, 69. Campbell asked him to take field sobriety tests. 3RP 21. Campbell testified that the field sobriety tests are standardized through the National Highway Traffic Safety Administration (NHTSA), and consist of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn test, the latter two testing the subject's balance and ability to listen and comprehend instructions and then perform simple tasks. 3RP 21-22. Mecham declined. 3RP 21. The testimony at trial as to the circumstances of the refusal was as follows:

Q: Okay. So given those observations what did you do next?

A: I gave him the chance to perform voluntary field sobriety tests in order to determine if he was in fact intoxicated.

Q: Did you tell him the tests were voluntary?

A: I did.

Q: And did he perform the tests?

A: He did not.

3RP 21.

Mecham's car was parked in a stall in a private lot, with the doors open and the keys still in the ignition. 3RP 23. Campbell offered to secure the car, but Mecham told the officer that he did not want him going into his car and that he did not need his keys.

3RP 23. So, Campbell just shut the door to Mecham's car.

3RP 23. As he was doing so, the officer noticed a can of alcoholic beverage in the back of the car directly behind the passenger seat; the can was open and upright, with a straw in it. 3RP 23-24.

Campbell transported Mecham to the Bellevue booking facility. 3RP 27. Once there, Campbell advised Mecham of his implied consent warnings and asked him to submit to a breath test. 3RP 27-31. Mecham refused. 3RP 31-33. Campbell then sought the assistance of another officer, Darrell Moore, to obtain a search warrant for Mecham's blood. 3RP 33; 4RP 10-14. Moore observed that Mecham had a medium odor of intoxicants on his breath, that he had slurred speech, and that his eyes were glazed, bloodshot, and had dilated pupils despite the brightness of the room. 4RP 16, 42.

Once they had obtained the search warrant, Officers Campbell and Moore took Mecham to Overlake Hospital for a blood draw. 3RP 33-35. The blood draw was accomplished at 9:13 p.m., nearly three hours after the initial stop. 3RP 18, 35. Debra McArthur, the lab assistant who drew Mecham's blood, testified that Mecham was uncooperative with and unpleasant to the officers, although his mood improved during the course of their interaction. 3RP 122-24, 135-40.

Taking into account all of his observations during the course of their interaction on May 15, 2011, Campbell opined that Mecham was impaired, and that he would not have allowed him to drive. 3RP 35-36. Moore agreed. 4RP 36.

Mecham's blood was later analyzed by a forensic toxicologist. 5RP 7-10. She reported that he had a blood alcohol content of .050 grams per 100 milliliters. 5RP 19. She testified that, based on the rate of alcohol elimination from the body, Mecham likely had a blood alcohol level of approximately .065 two hours after he stopped driving (or one hour before his blood was drawn), and possibly as high as .08. 5RP 28-35. She also discussed at length the effects of alcohol on a person's cognitive abilities, judgment, motor function, vision, and balance, and

explained that most people were unsafe to drive with a blood alcohol level of .05. 5RP 20-28.

Mecham stipulated that, as of May 15, 2011, he had previously been convicted of four or more qualifying prior offenses for impaired driving within ten years pursuant to RCW 46.61.5055(14)(a). CP 49; 3RP 11.

Mecham was found guilty by a jury of felony driving under the influence. CP 87. Mecham was also found guilty by the court of driving while his license was suspended in the first degree, and driving without an ignition interlock, having waived his right to a jury as to those two charges. CP 147-49; 5RP 149-51.

C. SUMMARY OF ARGUMENT.

The administration of field sobriety tests is a minimally intrusive seizure designed specifically to confirm or deny an officer's suspicions that a driver is impaired by alcohol or drugs. As such, it is within the permissible scope of a Terry stop that is based on articulable suspicion of impaired driving. In this case, the administration of field sobriety tests was also constitutionally permissible because the defendant was under arrest. Because the administration of field sobriety tests was constitutionally permissible, Mecham's refusal to cooperate with the officer's

request to perform field sobriety tests was not an assertion of a constitutional right. As such, evidence of his refusal was admissible as consciousness of guilt.

D. ARGUMENT.

1. THE ADMINISTRATION OF FIELD SOBRIETY TESTS IS A VERY LIMITED SEIZURE, AND IS A REASONABLE INVESTIGATORY TOOL THAT FALLS WITHIN THE SCOPE OF AN INVESTIGATORY DETENTION FOR IMPAIRED DRIVING.

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Id. Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The Terry stop—a brief investigatory seizure—is one such exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry stop requires a well-founded suspicion that the defendant has been or is about to be involved in a crime. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Both the federal and state constitutions allow the warrantless Terry stop of a vehicle based on reasonable and articulable suspicion. State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). An investigative stop may be justified by "specific and articulable facts, which, taken together with rational inferences, reasonably warrant the intrusion." Id. at 5 (quoting Terry, 392 U.S. at 1).

An investigative stop must be limited in scope and duration to fulfilling the investigative purpose of the stop. Acrey, 148 Wn.2d at 747. An investigative stop is not transformed into an arrest when the officer orders a suspect out of a vehicle. State v. Belieu, 112 Wn.2d 587, 594, 773 P.2d 46 (1989). When the results of the initial stop further arouse the officer's suspicions, the scope of the stop may be extended and its duration prolonged. Acrey, 148 Wn.2d at 747. The degree of intrusion exercised during a Terry stop must be appropriate to the type of crime under investigation. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

This Court has enunciated three factors to be considered in determining the permissible scope of a detention under Terry:

(1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is

detained. Williams, 102 Wn.2d at 740. In addition to ordering a suspect out of a vehicle, an officer may question the individual and require that he produce identification as part of a Terry stop. State v. O'Neill, 148 Wn.2d 564, 581, 62 P.3d 489 (2003). An officer may also detain a suspect long enough to perform a check on the suspect's driving or warrant status. State v. Rife, 133 Wn.2d 140, 155, 943 P.3d 266 (1997).

In some contexts, a Terry stop may include briefly transporting the suspect to another location for an identification procedure. Wheeler, 108 Wn.2d at 235. In State v. Wheeler, supra, the officers conducted a Terry stop of the defendant, who matched the description of the suspect of a burglary that had just been reported a few blocks away. 108 Wn.2d at 232. The officers handcuffed the defendant and drove him two blocks, where a witness to the burglary identified him. Id. On appeal, Wheeler argued that transporting him a few blocks for a "show-up" exceeded the permissible scope of a Terry stop. Id. at 235. Although this Court found the degree of physical intrusion "significant," it ruled that transporting Wheeler the short distance to be identified by a witness, a process that took no more than ten minutes, was not excessive and was within the permissible scope of a Terry stop. Id.

Mecham argues that the administration of field sobriety tests is beyond the permissible scope of a Terry stop. This Court has addressed the constitutionality of field sobriety tests in the context of the right against self-incrimination and the right to counsel, and these cases are instructive as to the limited nature of field sobriety tests. In Mercer Island v. Walker, 76 Wn.2d 607, 458 P.2d 274 (1969), this Court held that field sobriety tests are not testimonial, and thus the right against self-incrimination is not implicated and Miranda<sup>2</sup> warnings need not be administered. This Court reasoned that the right to self-incrimination does not apply to "simply bodily exhibitions" such as sobriety tests. Id. at 612. Similarly, in Heinemann v. Whitman County, 105 Wn.2d 796, 718 P.2d 789 (1986), this Court held that the right to counsel does not attach to the administration of field sobriety tests. Significantly, in reaching this holding, this Court implicitly held that field sobriety tests are within the permissible scope of a Terry stop. Writing for a unanimous Court, Justice Brachtenbach reasoned that "a request for the performance of field sobriety tests during a routine traffic stop does not *alone* indicate that the motorist would feel subjected

---

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

to coercive restraints comparable to those associated with a formal arrest." Id. at 808.

Analyzing the first factor identified in Wheeler in the context of field sobriety tests administered based on reasonable suspicion of impaired driving, the purpose of the stop is to confirm or dispel the officer's articulable suspicions that the suspect has been driving impaired. The field sobriety tests have been researched and developed by the NHTSA specifically to evaluate a suspect's coordination and determine whether a driver is intoxicated.

State v. Baity, 140 Wn.2d 1, 13, 991 P.2d 1151 (2000); State v.

Witte, 251 Kan. 313, 836 P.2d 1110, 1112 (1992). See also

[http://www.nhtsa.gov/people/injury/alcohol/SFST/appendix\\_a.htm](http://www.nhtsa.gov/people/injury/alcohol/SFST/appendix_a.htm).

The tests are specifically targeted to the purpose of an investigative detention for impaired driving.

In regard to the second factor, the amount of physical intrusion is minimal. The suspect is asked to perform a few simple maneuvers, such as walking, turning and standing on one leg. The amount of physical intrusion is not significantly more than requiring the suspect to exit his vehicle, and significantly less intrusive than transporting the suspect a few blocks for an identification procedure.

Finally, turning to the third factor, the administration of field sobriety tests does not significantly prolong a detention. The tests take only a few minutes to administer. These three factors lead to the conclusion that the administration of field sobriety tests is within the permissible scope of a Terry stop for impaired driving because the tests constitute a brief, limited, physical intrusion that has been specifically developed to determine whether a driver is intoxicated.

The majority of states that have addressed this question have concluded that the administration of field sobriety tests is within the permissible scope of a Terry stop for impaired driving. McCormick v. Anchorage, 999 P.2d 155, 160 (Alaska App. 2000) (administration of FSTs permissible when supported by reasonable suspicion of intoxication); State v. Superior Court, 149 Ariz. 269, 274, 718 P.2d 171, 176 (1986) (administration of FSTs within permissible scope of Terry stop); State v. Lamme, 19 Conn. App. 594, 600, 563 A.2d 1372, 1375 (1989) (FSTs can be administered based on reasonable suspicion); State v. Taylor, 648 So.2d 701, 703-04 (Fla. 1995) (request to perform FSTs within reasonable scope of Terry stop); State v. Golden, 171 Ga. App. 27, 30, 318 S.Ed.2d 693, 696 (1984) (administration of FSTs within scope of

Terry stop); State v. Wyatt, 67 Haw. 293, 305, 687 P.2d 544, 553 (1984) (administration of FSTs within permissible scope of Terry stop); State v. Ferreira, 133 Idaho 474, 480-81, 988 P.2d 700, 706-07 (Idaho App. 1999) (reasonable suspicion, not probable cause, required to administer FSTs); People v. Walter, 374 Ill.App.3d 763, 774, 872 N.E.2d 104, 114 (2007) (administration of FSTs justified under Terry); State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986) (administration of FSTs does not require probable cause); State v. Little, 468 A.2d 615, 617-18 (Maine 1983) (FSTs a reasonable seizure when based on articulable suspicion of driving while intoxicated); Blasi v. State, 167 Md. App. 483, 510, 893 A.2d 1152, 1167 (2006) (FSTs constitutionally permissible when based on reasonable articulable suspicion of driving under the influence of alcohol); Commonwealth v. Eckert, 431 Mass. 591, 598, 728 N.E.2d 312, 318 (2000) (administration of FSTs justified by reasonable suspicion of impaired driving); Hulse v. State, Dep't of Justice, Motor Vehicle Div., 289 Mont. 1, 961 P.2d 75, 87 (1997) (administration of FSTs may be based on particularized suspicion of intoxicated driving); State v. Royer, 276 Neb. 173, 179, 753 N.W.2d 333, 340 (2008) (field sobriety tests may be justified by

reasonable suspicion of intoxicated driving); Dixon v. State, 103 Nev. 272, 273, 737 P.2d 1162, 1164 (1987) (reasonable suspicion of intoxication justifies administration of FSTs); State v. Bernokeits, 423 N.J.Super. 365, 374, 32 A.3d 1152, 1157 (2011) (reasonable suspicion of a driver's intoxication justified administration of FSTs); State v. Gray, 150 Vt. 184, 191-92, 552 A.2d 1190, 1195 (1988) (administration of dexterity tests does not require probable cause).

This Court should find the conclusion reached by the courts of these seventeen other states persuasive. As the Hawai'i Supreme Court has observed, the seizure involved in the administration of field sobriety tests is reasonable as part of a Terry stop for impaired driving because it only entails a display of transitory physical characteristics, and does not involve "the probing into an individual's private life and thoughts that marks an interrogation or a search for concealed evidence of criminal activity." Wyatt, 687 P.2d at 553 (quoting People v. Helm, 633 P.2d 1071, 1080 (Colo. 1981) (Rovira, J., concurring)). As the Georgia Court of Appeals has noted, when a defendant has already been properly detained for investigation of impaired driving, the administration of field sobriety tests is a brief and minimal additional intrusion. Golden, 318 S.E.2d at 696. As the Maine Supreme

Court has reasoned, the administration of field sobriety tests is within the permissible scope of a Terry stop for impaired driving in large part because “the performance of a couple of quick, simply physical coordination tests is not particularly onerous, offensive or restrictive.” Little, 468 A.2d at 617.

The level of intrusion is reasonable when it is balanced against the law enforcement interests at stake: assessing whether a driver is intoxicated and thereby preventing him from “potentially killing or maiming himself or others.” Id. This is a proper application of Terry: the reasonableness of the officer's conduct is to be balanced against the governmental interest that justifies the intrusion. Terry, 392 U.S. at 20-21. As Justice Burger explained in Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), consideration of the constitutionality of a Terry stop “involves a weighing of the gravity of public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

Mecham relies on Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), to argue that the administration of FSTs is a “search” and that only searches for weapons are allowed pursuant to a Terry stop. In that case, the Court stated that Terry

does not allow a general search for evidence during an investigative detention. Id. at 93-94. However, Mecham's argument is based on a mischaracterization of the sobriety tests. The tests are an additional "seizure," not a "search." By administering field sobriety tests, the officer does not look into the suspect's pockets or any other place where a person might conceal items from public view. The officer does not invade the person's bodily integrity.

Significantly, in Hayes v. Florida, 470 U.S. 811, 816, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985), the Court held that it is beyond the permissible scope of a Terry stop to transport a suspect to the police station for fingerprinting, but stated that "[n]one of the foregoing implies that a brief detention in the field for the purposes of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." Justice White concluded, "There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will

establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." Id.

Thus, while a general search for evidence of a crime cannot be based on reasonable suspicion pursuant to a Terry stop, an additional seizure above and beyond the detention itself can be justified if the seizure is a brief and minimal intrusion related to the purpose of the stop, particularly where compelling public safety interests are at stake. The administration of field sobriety tests meets this standard: it is a brief and minimal additional intrusion that is designed to confirm or deny the officer's reasonable suspicion of intoxication. The administration of field sobriety tests is a limited seizure within the scope of a permissible Terry stop when there is reasonable, articulable suspicion that a suspect has been driving while intoxicated.

Only one state has held that the administration of field sobriety tests is beyond the scope of a Terry stop and requires probable cause. In People v. Carlson, 677 P.2d 310, 316 (Colo. 1984), the Colorado Supreme Court held that ordering the defendant to exit and walk to the rear of his vehicle was within the permissible scope of a Terry stop. However, the court reasoned that field sobriety tests are a "search" requiring probable cause

because their "sole purpose is to acquire evidence of criminal conduct." Id. at 317.

This analysis does not withstand scrutiny. First, the sole purpose of field sobriety tests is not to acquire evidence of criminal conduct: a suspect's satisfactory performance on the tests could serve to *dispel* an officer's suspicions of intoxication. But more fundamentally, the entire purpose of a Terry stop is to investigate criminal activity and thereby acquire evidence of criminal conduct. Indeed, in Hayes, 470 U.S. at 816, the Court opined that in-field fingerprinting would be permissible if there was a reasonable basis to believe it would establish "the suspect's connection with that crime." In other words, an officer does not exceed the permissible scope of a Terry stop simply by seeking evidence of criminal conduct.

In State v. Nagel, 320 Or. 24, 30, 880 P.2d 451 (1994), the Oregon Supreme Court reasoned that the administration of field sobriety tests is an intrusion on a suspect's privacy because the tests allow an officer to detect aspects of the suspect's condition that would not be detectable through simple observation. Without addressing the applicability of Terry v. Ohio, the court concluded that the officer in Nagel had probable cause to conduct the tests,

and did not need a warrant due to exigent circumstances, i.e., the fact that "evidence of impairment resulting from blood alcohol was by nature evanescent." Id. at 37. The State in Nagel apparently did not argue that the administration of field sobriety tests can be based on reasonable suspicion, since the officer in that case had probable cause.

This Court should adhere to its decision in Heinemann and follow the majority rule that the administration of field sobriety tests is within the permissible scope of a Terry stop when there is reasonable, articulable suspicion of impaired driving. In this case, Officer Campbell had reasonable, articulable suspicion that Mecham had been driving while impaired by the use of alcohol. Campbell noticed the odor of intoxicants coming from Mecham's breath, noticed that Mecham's movements were sluggish and his speech slurred, and recognized these attributes as signs of intoxication. These observations furnished a basis to suspect Mecham of driving under the influence of alcohol, and Mecham did not argue otherwise below. Given that Officer Campbell had reasonable, articulable suspicion of impaired driving, requesting that Mecham perform field sobriety tests was within the permissible scope of an investigative detention, or Terry stop, for that crime.

2. BECAUSE MECHAM HAD BEEN PLACED UNDER ARREST, THE REQUEST TO PERFORM FIELD SOBRIETY TESTS WAS A VALID INTRUSION INCIDENT TO ARREST.

In most cases, field sobriety tests will be administered before an arrest takes place, with the purpose of confirming or dispelling the officer's suspicion that a driver is intoxicated. In this case, however, Mecham had already been placed under arrest for an outstanding warrant when Officer Campbell detected signs of intoxication. Thus, in this case, the request to perform field sobriety tests was a valid intrusion incident to arrest, as well as being justified by reasonable suspicion of impaired driving.

Another exception to the warrant requirement under both the federal and state constitutions is a search incident to arrest. State v. Byrd, 178 Wn.2d 611, 617, 310 P.3d 793 (2013). This exception embraces two analytically distinct concepts: a search incident to arrest may be made of the area within the control of the arrestee, and a search may be made of the person of the arrestee. Id. A search of an arrestee's person requires no additional

justification beyond the validity of the arrest itself. Id. The authority to search flows from the authority of the custodial arrest itself. Id.<sup>3</sup> A search incident to arrest is not limited to evidence of the crime of arrest. United States v. Robinson, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). Thus, the full search of a person under lawful arrest is per se reasonable. Id.<sup>4</sup> Once a person is in lawful custody, he may be compelled to appear in a lineup for unrelated crimes. State v. Doleshall, 53 Wn. App. 69, 72, 765 P.2d 344 (1988); review denied, 112 Wn.2d 1013 (1989).

Mecham had been placed under arrest for an outstanding warrant before Officer Campbell requested that he perform field

---

<sup>3</sup> Recently, in Riley v. California, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2473, 2490, 189 L. Ed. 2d 430 (2014), the Court held that the search incident to arrest exception does not allow a warrantless search of an arrestee's cell phone primarily because of the amount of information available on a phone: "a cell phone search would typically exposes to the government far *more* than the most exhaustive search of a house." Riley does not alter the long-standing rule that a search incident to arrest includes the search of the arrestee's person and all other items in the arrestee's possession.

<sup>4</sup> A blood draw of a person lawfully arrested still requires a warrant because a blood draw is an intrusion beneath the arrestee's skin and into his veins, and thus an invasion of bodily integrity that implicates an individual's "most personal and deep-rooted expectations of privacy." Missouri v. McNeely, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013). In contrast, a cheek swab to obtain a DNA sample is a minimal intrusion that does not require a warrant when collected to establish the identity of arrestees. Maryland v. King, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1958, 1977, 186 L. Ed. 2d 1 (2013). The administration of field sobriety tests is even less of an intrusion than a cheek swab. No court has held that the administration of field sobriety tests requires a warrant.

sobriety tests. Having been placed in lawful custody, Mecham had a greatly reduced expectation of privacy, and the brief, minimal additional seizure of administering field sobriety tests was reasonable. To the extent that the administration of field sobriety tests is a seizure, it was justified by the lawful arrest of Mecham. To the extent that the administration of field sobriety tests is a search, it was lawful as a search incident to arrest.

3. AN INFERENCE OF GUILT CAN BE DRAWN FROM A SUSPECT'S REFUSAL TO PERFORM FIELD SOBRIETY TESTS WHEN THE REQUEST TO PERFORM THE TESTS WAS MADE DURING AN INVESTIGATORY DETENTION FOR IMPAIRED DRIVING, OR WHEN THE SUSPECT WAS UNDER ARREST.

Mecham relies on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), for the proposition that evidence of his refusal to consent violated the constitution by penalizing him for the exercise of a constitutional right. But Gauthier is easily distinguished. In that case, the Court of Appeals held that the defendant's refusal to consent to a cheek swab for purposes of DNA testing was inadmissible as substantive evidence of guilt. However, the only basis for the State to acquire the cheek swab in Gauthier was the

defendant's consent. The State had no constitutional basis to compel Gauthier, who was not under arrest, to give a cheek swab at the time that he refused. Thus, Gauthier was indeed exercising his constitutional right to privacy by refusing to voluntarily give a cheek swab.

If, by contrast, the State had obtained a warrant for Gauthier's DNA, his refusal to cooperate by providing a sample would have been admissible against him as consciousness of guilt. In State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002), the defendant was charged with sexual offenses against two children. The State obtained a court order to obtain body hair samples to compare them to hairs taken from a ski mask worn by one of the girls' attacker. Id. at 187. When the State attempted to execute the order, Nordlund refused to allow the taking of the hair samples. Id. At trial, the court allowed the State to elicit testimony of his refusal as evidence of consciousness of guilt. Id. The Court of Appeals held that a defendant's refusal to provide properly requested evidence is probative of consciousness of guilt and admissible on that basis. Id. at 188. The evidence was not a comment on the

exercise of a constitutional right, because the State had legal authority to obtain the hair samples. Similarly, where an officer conducts a lawful frisk for weapons but the suspect resists, or a detained suspect refuses to cooperate with a lawful show-up identification procedure, the suspect's conduct is admissible as evidence of guilty knowledge at a subsequent proceeding. See also South Dakota v. Neville, 459 U.S. 553, 564, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (because suspect may be compelled to submit to a blood alcohol test, refusal is admissible as evidence of guilt).

The reasoning of Gauthier applies only where a search or seizure relies solely on consent—a waiver by the defendant of the warrant requirement. In the present case, Mecham was told by Officer Campbell that he could voluntarily refuse to perform the field sobriety tests. But Officer Campbell also had a constitutional basis to compel Mecham to perform field sobriety tests: based on his reasonable suspicion of impaired driving, and incident to Mecham's arrest on the outstanding warrant. Administration of field sobriety tests would have been lawful without regard to whether Mecham

consented or not. Stated differently, evidence of Mecham's lack of consent is not improper evidence of his exercise of a constitutional right because no such right existed. There is no basis to exclude from evidence the fact that Mecham refused a lawful request to perform field sobriety tests. See Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986) (observing that, where there is no constitutional right to refuse a search, a refusal to submit is admissible); McCormick, supra, 999 P.2d at 161-62 (evidence of refusal to perform FSTs admissible); State ex rel. Verburg v. Jones, 211 Ariz. 413, 121 P.3d 1283, 1285-86 (Ariz. App. 2005) (refusal to perform FSTs admissible as consciousness of guilt); Taylor, supra, 648 So.2d at 704 (refusal to perform FSTs admissible to show consciousness of guilt); State v. Greenough, 216 Or. App. 426, 173 P.3d 1227, 1229-30 (2007) (refusal to perform pre-arrest FSTs admissible as evidence of guilt). Mecham's refusal to perform field sobriety tests was properly admitted as substantive evidence of guilt.

E. CONCLUSION.

The administration of field sobriety tests is within the permissible scope of an investigative detention for impaired driving, and is also a permissible intrusion when the suspect is under arrest. In this case, evidence of refusal was properly admitted as consciousness of guilt and did not infer guilt from the exercise of a constitutional right. Mecham's conviction should be affirmed.

DATED this 23rd day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner, Jennifer Sweigert, containing a copy of the Supplemental Brief of Respondent, in STATE V. MECHAM, Cause No. 90598-1, in the Supreme Court, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

12/23/14  
Date

## OFFICE RECEPTIONIST, CLERK

---

**To:** Brame, Wynne  
**Cc:** Summers, Ann; SweigertJ@nwattorney.net; Sloane, John  
**Subject:** RE: State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Received 12-23-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]  
**Sent:** Tuesday, December 23, 2014 3:08 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Summers, Ann; SweigertJ@nwattorney.net; Sloane, John  
**Subject:** State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Please accept for filing the attached document (Motion to File Overlength Brief and Supplemental Brief of Respondent) in State of Washington v. Mark Tracy Mecham, Supreme Court No. 90598-3.

Thank you.

Ann Summers  
Senior Deputy Prosecuting Attorney  
WSBA #21509  
King County Prosecutor's Office  
W554 King County Courthouse  
Seattle, WA 98104  
206-477-1909  
E-mail: [Ann.Summers@kingcounty.gov](mailto:Ann.Summers@kingcounty.gov)  
E-mail: [PAOAppellateUnitMail@kingcounty.gov](mailto:PAOAppellateUnitMail@kingcounty.gov)  
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Ann Summer's direction.

### CONFIDENTIALITY NOTICE

This e-mail message and files transmitted with it may be protected by the attorney / client privilege, work product doctrine or other confidentiality protection. If you believe that it may have been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, and then delete it. Thank you.

## OFFICE RECEPTIONIST, CLERK

---

**To:** Brame, Wynne  
**Cc:** Summers, Ann; SweigertJ@nwattorney.net; Sloane, John  
**Subject:** RE: State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Received 12-23-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]  
**Sent:** Tuesday, December 23, 2014 3:08 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Summers, Ann; SweigertJ@nwattorney.net; Sloane, John  
**Subject:** State v. Mark Tracy Mecham, Supreme Court No. 90598-3

Please accept for filing the attached document (Motion to File Overlength Brief and Supplemental Brief of Respondent) in State of Washington v. Mark Tracy Mecham, Supreme Court No. 90598-3.

Thank you.

Ann Summers  
Senior Deputy Prosecuting Attorney  
WSBA #21509  
King County Prosecutor's Office  
W554 King County Courthouse  
Seattle, WA 98104  
206-477-1909  
E-mail: [Ann.Summers@kingcounty.gov](mailto:Ann.Summers@kingcounty.gov)  
E-mail: [PAOAppellateUnitMail@kingcounty.gov](mailto:PAOAppellateUnitMail@kingcounty.gov)  
**WSBA #91002**

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Ann Summer's direction.

### CONFIDENTIALITY NOTICE

This e-mail message and files transmitted with it may be protected by the attorney / client privilege, work product doctrine or other confidentiality protection. If you believe that it may have been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, and then delete it. Thank you.