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No. 90598-3

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MARK MECHAM,
Petitioner,

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON

Filed
Washington State Supreme Court

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ORIGINAL

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE*.....1

ISSUE TO BE ADDRESSED BY *AMICUS*1

STATEMENT OF THE CASE.....1

ARGUMENT2

 A. The Right to Consent Is Protected and To Be Meaningful It
 Must Be Without Unknown Adverse Consequences..... 3

 B. Policy Concerns Apply with Equal Force to Waivers of
 Both Constitutional and Non-constitutional Privacy Rights 8

CONCLUSION.....11

TABLE OF AUTHORITIES

State Cases

<i>City of Seattle v. Personeus</i> , 63 Wn. App. 461, 819 P.2d 821 (1991).....	8
<i>City of Seattle v. Stalsbrotten</i> , 138 Wn.2d. 227, 978 P.2d 1059 (1999).....	5, 6, 7
<i>State v. Gauthier</i> , 174 Wn. App. 257, 298 P.3d 126 (2013).....	4
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	3, 4
<i>State v. Mecham</i> , 181 Wn. App. 932, 331 P.3d 80 (2014), <i>rev. granted</i> , 337 Wn.2d 325 (Nov. 5, 2014).....	1, 2, 5, 8
<i>State v. Nordlund</i> , 113 Wn. App. 171, 53 P.3d 520 (2002).....	4
<i>State v. Zwicker</i> , 105 Wn.2d 228, 713 P.2d 1101 (1986).....	7

Federal Cases

<i>Schneckoith v. Bustamonte</i> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....	3
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Statutes

RCW 46.20.308	6, 7, 10
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Constitutional Provisions

U.S. Const. amend. IV	4, 9
U.S. Const. amend. V.....	6
Wash. Const. art. 1, § 7.....	4, 9

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports the privacy rights of Washingtonians. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether refusal to consent to a police officer's request may be used as evidence of guilt when consent is stated to be voluntary and no consequences of refusal are made known or otherwise expressed.

STATEMENT OF THE CASE

The parties have presented the case. The summary of facts set forth here are relevant to the position of *amicus curiae*. The petitioner, Mark Mecham, was asked by a police officer if he would "mind doing voluntary sobriety tests[.]" Petitioner's Supplemental Brief at 3. Mecham declined to give his consent. *Id.* At trial, the State used this against him as substantive evidence of his guilt. *Id. at 4.* The Court of Appeals held this use was acceptable. *State v. Mecham*, 181 Wn. App. 932, 331 P.3d 80 (2014), *rev. granted*, 337 Wn.2d 325 (Nov. 5, 2014). In its decision, the Court of Appeals assumed a field sobriety test is a search, but it held Mecham did

not have a constitutional right to refuse consent, and the State was allowed to comment on his refusal. *Id.* at 946-47. Mecham petitioned this Court for review which was granted.

ARGUMENT

A field sobriety test (FST) is an intrusion into one's private affairs regardless of whether the test is a search or a seizure. It matters not whether the State may compel an FST or whether the right to refuse is rooted in the constitution or common law. This case is far simpler than the briefing and decision below would indicate. The parties and Court of Appeals discuss whether an FST should be characterized as a search or instead as a seizure, whether the State can compel such a test, and the source of the right to refuse such a test. *Amicus* respectfully suggests that none of these questions need be answered.

Instead, the central issue in this case is whether the State can use as evidence of guilt in a criminal trial a refusal to consent to a request from a police officer that is presented as voluntary without any warning about consequences for refusal. The answer is no. Here, a police officer asked Mecham if he would voluntarily take an FST. The police officer did not state there could be negative consequences if Mecham refused to take the test. Mecham refused. And the State subsequently used Mecham's refusal

to argue for a conviction. The State's use of Mecham's refusal was improper.

A. The Right to Consent Is Protected and To Be Meaningful It Must Be Without Unknown Adverse Consequences

The State, including the police, may appropriately request citizens to consent to intrusions into their private affairs. That can include a request to take a field sobriety test. While the Courts have recognized the need for law enforcement to create and utilize tools to enforce the laws, our courts equally assert this interest must be balanced against society's deeply held belief that criminal law enforcement tools cannot be used as instruments of unfairness and that unfair police tools pose a serious threat to civilized notions of justice. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Thus, where consent is asked for without warning of a consequence for refusal, any use of a person's right to refuse is unfair and contrary to notions of justice.

This Court recognized this principle when it unanimously said it is improper for the State to comment on a defendant's refusal to be disturbed in his private affairs. *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010). There, the prosecutor "highlighted [to the jury] how Jones had only provided a DNA swab sample *after* a court order forced him to do so." *Id.* (emphasis in the original). The prosecutor was using the refusal to

consent to an intrusion into Jones' private affairs—a swab sample for DNA—to argue Jones' guilt. On remand, this Court instructed that the State refrain from such improper comments during closing argument. *Id.* Here, similar to *Jones*, Mecham was asked to consent to an intrusion into his private affairs when a police officer asked if he would “mind doing voluntary sobriety tests[.]” Mecham was not warned of any consequences to refusing consent. Mecham refused. Later, the State used that refusal as evidence of guilt. There is no substantive difference between Jones' refusal to consent to a DNA swab and Mecham's refusal to consent to an FST, when neither was warned of consequences of refusal. In keeping with *State v Jones*, this Court should find any use of a person's right to refuse is unfair and contrary to notions of justice.

The Court of Appeals here declined to apply its holding in *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013). In *Gauthier*, which relied in part on *Jones*, the appellate court held an individual's refusal to consent to a warrantless search may not be admitted as evidence of guilt without violating Article 1, Section 7 and the Fourth Amendment. *Id.* As argued by Mecham in his supplemental brief, the court erred by distinguishing *Gauthier* from *State v. Nordlund*, 113 Wn. App. 171, 53 P.3d 520 (2002). In *Nordlund*, a court order was issued for a hair sample and Nordlund refused to comply with a lawful order. In contrast, Mecham

was asked to perform a voluntary test—he was not told to comply with a lawful order. Therefore, it is irrelevant whether compliance was required.

By illustration, if police obtain an arrest warrant and do not make the warrant known, but instead invite the person to accompany the officers to the police station, if the person refuses and is unaware of the warrant, the refusal cannot be used as evidence of guilt. Similarly, if police obtain a search warrant and do not make the warrant known, but instead ask consent to search the premises, the person's refusal cannot be used as evidence of guilt. In both cases, compliance could be compelled, but that is irrelevant, since that is not known by the person; the police are relying on the person's voluntary consent, not compliance with a warrant.

Here, the State is claiming that the officer could have required the test. However, the facts show Mecham was not told to comply with a lawful request. Regardless of whether or not the officer in this case *could* have so requested, the fact remains the officer did not do so; instead the officer asked for Mecham's voluntary consent and Mecham's refusal should not be used as evidence of guilt.

The Court of Appeals relied on *City of Seattle v. Stalsbrotten*, 138 Wn.2d. 227, 978 P.2d 1059 (1999) to find that the refusal to consent to a field sobriety test can be used by the State as evidence of guilt. *Mecham*, 181 Wn. App. at 946-47. This reliance is misplaced. *Stalsbrotten* involved

only a Fifth Amendment challenge, and therefore was looking at whether the refusal was testimonial and coerced, issues not at question here. To the extent that *Stalsbrotten* used language beyond the Fifth Amendment context, its reasoning was imprecise and should not be followed.

Specifically, the *Stalsbrotten* reasoning was imprecise when it compared a field sobriety test to breathalyzer and blood tests. 138 Wn.2d at 237 (“Just as with blood alcohol and Breathalyzer tests, admitting refusal evidence in the context of FSTs is equally permissible in light of the fact that the State could legally require suspects to perform FSTs.”). This Court should clarify and reject the imprecise comparison because, even if the State may require field sobriety tests, it has yet to do so.

Unlike breathalyzer tests or blood tests, field sobriety tests have not been debated, adopted or otherwise promulgated by the legislative branch of government. *Cf.* RCW 46.20.308 (establishing implied consent to breath tests; earlier versions also established consent to blood tests). Unlike procedures for breathalyzer and blood tests enacted by the legislature, field sobriety tests remain solely a procedure of the executive branch. Thus, FSTs are a tool developed for law enforcement to enforce the existing laws against drunk driving. But FSTs have not been debated nor adopted by elected legislators who are in the best position to consider

checks and balances of the need for enforcement of the laws versus the need for privacy.

As a consequence, the legislature has not made a field sobriety test part of the implied consent statute where the driver may refuse a breath test and where the legislature has mandated that the driver must be made aware of the consequences of such a refusal. RCW 46.20.308. Accordingly, no consequences for refusal of an FST are specified by the legislature and drivers are not informed of any negative consequences for their refusal to consent.

Stalsbrotten did not address this key distinction. And the distinction is especially important because there has been no determination to invoke consequences to the refusal to consent to a field sobriety test. As this court held in *State v. Zwicker*, 105 Wn.2d 228, 233, 238, 713 P.2d 1101 (1986): it is “important” whether or not the defendant had been granted the right of refusal “without a corresponding warning of the consequences of exercising that right.” *Zwicker*, 105 Wn.2d at 242.

In summary, the field sobriety test has neither been subjected to scrutiny as to the appropriateness of its use nor as to what limitations or consequences should follow the refusal to take the test. It follows that if a driver withholds her consent to perform a voluntary field sobriety test

without any warning from the state of negative consequences, it is improper to use that refusal as substantive evidence of guilt.

B. Policy Concerns Apply with Equal Force to Waivers of Both Constitutional and Non-constitutional Privacy Rights

The Court of Appeals properly recognized that Mecham had no legal obligation to perform the field sobriety test. *Mecham*, 181 Wn. App at 941 (quoting *City of Seattle v. Personeus*, 63 Wn. App. 461, 465-66, 819 P.2d 821 (1991)). The court improperly reasoned, however, that it mattered whether Mecham's right was constitutional or non-constitutional in nature. The decision is wrong for several reasons.

First, the Court of Appeal's decision assumes that Mecham and like persons can assess the constitutionality of the requested action in deciding whether or not to consent. In order to decide whether or not to consent, a person necessarily weighs the advantages and disadvantages involved. If the refusal is going to be used as evidence of guilt, that is a significant disadvantage to refusal—whether or not the person is actually guilty. The court's decision assumes that people know when that disadvantage is present and when it is not.

In essence, the Court's decision presupposes that the person should understand whether the action being requested is not really voluntary (*e.g.*, the request is part of a lawful Terry stop) such that the person should

understand that the refusal can be used against him or her. It is unreasonable to place such a burden on people to discern the difference. Must a person ask, is this a constitutional right where the decision to give consent to law enforcement is truly voluntary or is it a right derived from other sources, or is it not a right at all, just improperly phrased as a “voluntary” request to give consent? The fact that declining such consent can result in harsh consequences is an essential piece of information that a person must have before making a voluntary decision whether or not to consent.

There are a multitude of reasons why a person might refuse to perform an FST. A small sampling includes persons with disabilities or poor balance due to age. Others are terrified to be stopped by police and fear the added pressure of the FST or they may be upset or scared because it is night or traffic is busy. If such persons tell an officer, “I do mind, I won’t take the tests,” must they consider whether the test is truly voluntary, or whether it falls under Article 1, Section 7 of our constitution or the Fourth Amendment? Or whether it is a common law right to refuse? The answer is no one should be expected to determine whether a refusal might be used against them as evidence of guilt despite the fact they’ve done nothing wrong. Even assuming any one of these persons is a lawyer, these are intricate questions of law they are unlikely to be able to answer

on the side of the road. The appellate court creates an untenable situation for the average person.

Second, when an officer, as in the present case, asks for voluntary consent, the driver should be free to assume withholding consent is without penalty unless the officer otherwise informs the driver. It is unreasonable to expect the driver to know that there are consequences for refusal of what is presented as a voluntary action. Indeed, it is both reasonable and appropriate for the driver to expect to be informed of the potential for negative consequences for the refusal to consent—exactly as is required when a driver is asked to submit to a breath test. RCW 46.20.308(2). The police officer's failure to inform the driver of consequences most reasonably suggests to the driver there are no such consequences. Knowledge of consequences is necessary in order for the consent, or lack thereof, to be truly voluntary.

Third, the appellate court's rule creates perverse incentives. Innocent people, when faced with the choice of performing an FST that might exonerate versus having refusal used as evidence of guilt, are likely to choose to surrender their privacy and consent to the test. A guilty person, on the other hand, facing the near-certainty of the FST demonstrating guilt versus the potentially less-damning inference of guilt from a refusal, may well choose not to perform the FST. As such, the

result is innocent people coerced into surrendering their privacy with no recourse, and only guilty parties benefiting from the right of refusal. This is contrary to the notions of justice; the right of refusal is intended to protect the privacy of all.

Finally, the gravamen of the admissibility of evidence in a criminal trial is that the evidence has a tendency to prove guilt. As demonstrated above, there are a variety of reasons why a person would choose to refuse consent to a “voluntary” field sobriety test. It may be a matter of a belief in the right to privacy, it may be a matter of being reserved, and it may be a matter of actually believing the police officer is telling the truth that the test is truly voluntary. That the defendant was intoxicated is only one potential reason for refusing the test. As such, the refusal is not probative of guilt, and should not be allowed to be used as evidence.

CONCLUSION

For the foregoing reasons, the ACLU of Washington respectfully asks this Court to hold admissibility of one’s refusal to consent is inherently incompatible with the concept of voluntary consent when the person is not notified in advance of any consequences of refusal.

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Dear Clerk,

Please accept for filing in State v. Mecham (No. 90598-3) the attached documents:

1. *Motion for Leave to File Amicus Curiae Brief*
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