Supreme Ct No. 913633

COA No. 31776-5-III

IN THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ELOY A. GARZA, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on January 27, 2015 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

On February 19, 2011, Washington State Patrol Trooper Berghoff was advised of a one-car collision on State Route 97. (RP 190-91). The advisement came around 9:53 p.m. (RP 330). A motorist reported that a male was walking down the road and appeared to be injured. (RP 236). It was freezing outside. (RP 192-3, 336, 349). The trooper observed a car that had gone off an embankment and struck a tree. (RP 331). He also saw a male, Garza, walking slowly in the area. (RP 351). Garza was obviously cold, shivering and soaking wet from head to toe. (RP 349). The trooper asked him "what happened?" (RP 274, 282). Instead of answering, Garza asked to sit inside the patrol car. (RP 272, 275, 283, 298, 336). He complained of his shoulder hurting. (RP 284, 353).

Trooper Berghoff was concerned for Garza's health. (RP 284). He patted down Garza for his safety and put a blanket around him. (RP

284-5, 297). The trooper then helped him into the patrol car. (RP 294). The trooper asked Garza if he was in the car that crashed. (RR 286). Garza said he was just trying to get home. (RP 280, 352). Garza said he "missed his turn to Higgins Road." (RP 280, 338). The trooper then asked him who was driving. (RP 287). Garza claimed he did not know who was driving. (RP 352). There was an obvious and strong odor of intoxicants coming from Garza and he had bloodshot and watery eyes. (RP 342, 350-1).

Garza was taken to the hospital. He was contacted by Troopers Haddorrf and Berghoff after he returned from getting X-rays done. (RP 244, 353). It was noted that he was unresponsive, lethargic, and slow. (RP 219-220). He also had a red mark on his left shoulder that was consistent with wearing a seatbelt while on the driver's side of the car. (RP 225-6, 343). Trooper Haddorff, who has in-depth training in DUI detection and investigation, testified that Garza appeared very intoxicated and was slurring his words. (RP 238, 244).

Troopers tried to contact passenger Virginia Gil but she was getting X-rays done at the hospital. This was around 12:23 a.m. (RP 405). She was eventually contacted after being treated for her injuries. The troopers wanted to determine who was driving, who else was in the car, and the extent of her pain and injuries. (RP 345). She stated that she

was sitting in the rear passenger seat behind the driver. (RP 237). She broke her arm as a result of the collision. (RP 405). Based on her injury, a decision was made to arrest Garza for vehicular assault.

Garza was read his rights twice. (RP 238). The first time was a reading of the standard Miranda rights. The second time was the Constitutional Rights from the DUI packet, including the special evidence warning to draw blood. (See Appendix A).[1] The special evidence warning informs a suspect that he is under arrest. (Id.) During the pre-trial hearing, the following dialogue took place regarding the arrest:

> PROSECUTOR: When you were talking to Eloy Garza, he had already been, I guess at that time, fully advised that he may have been under arrest or, or facing charges, is that correct?
> HADDORFF: When, when he was advised of his rights from the, from the DUI packet, I believe so. I believe I have it in my report that...
> PROSECUTOR: So prior to him making any response, he was already aware that he was being a suspect in a... Is that correct?
> HADDORFF: Correct.

RP 245.

Both times, when Garza was asked if he understood those rights, he did not respond. (RP 239). Garza's blood was then drawn to determine

[1] On cross-examination, Trooper Haddorff reviewed the special evidence form and testified that he read it to Garza. RP 242. The form was not admitted, however.

the alcohol content. (RP 107, 111, 228). His blood alcohol concentration (BAC) was .17. (RP 149).

Detectives and troopers evaluated the crime scene. Trooper Kingman concluded that based on the crash dynamics, the driver would have struck the driver's side airbag. (RP 95). Trooper Berghoff also concluded that the airbags had been recently deployed. (RP 360-1).

Detectives also evaluated the vehicle. There was blood on the driver's side air bag. (RP 78, 205). The blood was analyzed and determined to be Garza's blood. (RP 107). The driver's side door was stuck shut after the collision. (RP 110). In addition, the driver's seatbelt was elongated, a sign it was in use during the collision. (RP 368). Further, the driver's side door panel had signs that something had rubbed across it. (Id.). The driver's headrest also had an indentation in the back of it. (RP 369).

On March 18, 2011, about a month after the collision, Detective Bryan spoke to Garza on the phone. Garza indicated that he had a lot of alcohol that evening and did not remember a lot. (RP 126).

Garza was charged with one count of vehicular assault and one count of no valid operator's license. (CP 1). At trial, Garza filed a memorandum in which he asked the court to suppress his BAC based

solely on Missouri v. McNeely. (CP 31-4). He did not move to suppress the DNA results. (CP 34).

On May 15, 2011, the trial commenced with the State calling witnesses to testify, including Asa Law, from the Washington State Patrol Crime Laboratory. (RP 134). During her testimony, the prosecutor moved for admission of the blood alcohol test. (RP 138). Garza's attorney replied, "No objection, your honor." (Id.) The judge asked, "subject to your pending motion?" (Id.) Garza's attorney replied, "Yes." (Id.). There were no objections when the State moved to have the DNA results admitted. (RP 254-58).

The next day, a Criminal Rule 3.5 hearing was held regarding the statements made to Trooper Berghoff. (RP 266-309). The trial court found that Garza was not in custody and therefore, Miranda warnings were not needed. (RP 309).

At the same time, the parties argued the suppression motion that was filed May 14, 2011. The court denied the motion to suppress. (CP 100-103; RP 309-314, 608-609). The court found that McNeely did not decide the issue of implied consent laws. (RP 313).

Trial continued. Gloria Garza, Appellant's mother, testified that when she saw her son at the hospital shortly after the collision, "he was drunker than I've ever seen him in my life." (RP 421). She added, "He

was just not, not really, conscious of where he was or who we were." (Id.) When asked if he was responding very well, she indicated "not anything that made sense." (RP 422). She testified that Garza's cousin told her that they were at a party and "Eloy was arguing with his girlfriend, he was really drunk, so we had to leave." (RP 465).

The party was at the home of Filiberto Gil. (RP 483). Mr. Gil testified that he didn't see who was driving but saw Garza being pushed in the backseat of a car when they left the party. (RP 485). Jesse Garza, Sr., the appellant's father, testified that when he saw his son at the hospital, his son was passed out and bleeding. (RP 512, 516).

Garza testified that on the night of the collision, he was at a party drinking beer and vodka. (RP 522). He did not know how much he had to drink but had two beers and then straight shots of vodka out of the bottle. (RP 522, 524, 529). He said that he had nothing to eat. (RP 532). He testified he did not remember too much of the party or getting in the car and leaving. (RP 523). After the collision, he said "At first I thought I wrecked my van...." (RP 525-26). He indicated that his injuries included a fractured collarbone on his left side, a cut behind his ear, stiff knees, and a chipped tooth. (RP 526.)

The jury found Garza guilty beyond a reasonable doubt of vehicular assault. (CP 74, 104-1112; RP 594).

The Court of Appeals, in an unpublished decision, upheld the conviction, holding that Garza's statements were not custodial or coerced and that any error in admitting the BAC results was harmless. Garza filed a petition for review.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals correctly decided that there was no custodial interrogation requiring Miranda.

Miranda does not apply outside the context of custodial interrogation. Roberts v. United States, 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980). In determining whether the defendant was subject to a custodial interrogation, courts apply an objective test—whether a reasonable person in the suspect's position would have felt that state agents had curtailed his freedom to the degree associated with a formal arrest. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 421-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Berkemer rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone. State v. Short, 113 Wn.2d 35, 40-1, 775 P.2d 458 (1989). The sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed. Id. at 41.

In Berkemer, a single police officer asked a motorist a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. 468 U.S. 442. The Court found this was not the functional equivalent of formal arrest. Id. Accordingly, the motorist was not taken into custody for purposes of Miranda until he was arrested. Id.

Here, Garza indicated he wanted to sit in the patrol car to stay warm. (RP 272, 275, 283, 298, 336). He was not handcuffed. (RP 285). A reasonable person in Garza's position would have felt free to leave the patrol car. The fact that Garza was patted down before being put in the patrol car does not change the analysis. As held in State v. Walker, given the legitimate concern for police safety when a suspect is being transported in a police car, frisking and handcuffing are consistent with good police practice and common sense. 24 Wn. App. 823, 828, 604 P.2d 514 (1979).

In sum, the trial court did not err by admitting the brief statements Garza made prior to his arrest because they were not given in response to a "custodial interrogation." Applying the rationale of Berkemer, Trooper Berghoff's brief questioning of Garza did not constitute a custodial interrogation triggering Miranda warnings.

2. The Court of Appeals correctly held that the trial court did not err in admitting Garza's BAC.

In Washington state, "a person under arrest for vehicular assault [or for vehicular homicide] is subject to a mandatory blood alcohol test" pursuant to RCW 46.20.308. State v. Morales, 173 Wn.2d 560, 563, 269 P.3d 263, 265 (2012). While the non-consensual drawing of blood for testing is a search and seizure under the Fourth Amendment and under article I, § 7 of the Washington Constitution, State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991), the Washington Supreme Court has held that in situations where a police officer has probable cause to believe that a driver is under the influence of alcohol, and has committed vehicular assault, the warrantless extraction of blood pursuant to the implied consent statute does not violate article I, §7. State v. Curran, 116 Wn.2d at 185; see also, State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984).

On appeal, Garza challenged two of the trial court's findings of fact regarding arrest. The Court of Appeals found that findings were supported by substantial evidence. Specifically, the opinion states that "[t]he special evidence warning informs a suspect that he is under arrest. By reading this warning to Mr. Garza, Trooper Haddorff placed Mr. Garza under arrest." (Opinion at 11). The special evidence warning begins with "Warning! You are under arrest for [x] Vehicular Assault." (See Appendix A).

It was uncontroverted that the special evidence warning was read to Garza prior to the blood draw. (RP 238). During the pre-trial hearing, the following dialogue also took place regarding the arrest:

> PROSECUTOR: When you were talking to Eloy Garza, he had already been, I guess at that time, fully advised that he may have been under arrest or, or facing charges, is that correct?
> HADDORFF: When, when he was advised of his rights from the, from the DUI packet, I believe so. I believe I have it in my report that...
> PROSECUTOR: So prior to him making any response, he was already aware that he was being a suspect in a... Is that correct?
> HADDORFF: Correct.

(RP 245). During oral argument on the motion to suppress, Garza never argued or even suggested that there wasn't a valid arrest. (RP 309-311).

Furthermore, when it came time to enter the findings of fact on the hearing, Garza objected to a finding that read as follows: "After speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault." (See Appendix B). His specific objection was as follows:

> DEFENSE: Well, my objection, Your Honor, is that it indicates after speaking to the victim, that's when the --there was a decision to make an arrest, and I, I didn't get that from the testimony. I mean, **I think they just made a decision to arrest him** –
> THE COURT: Well, they did speak with the victim.

> DEFENSE: They did speak with the victim, but I
> mean it's not like after speaking with her they made the decision or that something that she said that, you know, that triggered **the arrest** because she didn't really say anything about Mr. Garza being the driver. But, in any event --

RP 603 (emphasis added). From counsel's objection, it is apparent that Garza *agreed* that there was an arrest and that this fact was not in controversy at the trial level. Garza never objected to the finding on the basis that there was never an arrest to begin with. And while very specific objections were made to other findings, Garza also never objected to the finding that "At approximately 0048 hours, the Trooper read the defendant the Special Evidence warning page from the DUI packet verbatim and advised he was placed under arrest for Vehicular Assault." CP 102. In sum, the Court of Appeals was correct in finding that the trial court properly admitted the BAC result under 46.20.308(3).

Even though the court did not get to the issue of constitutionality, the implied consent statute was not overruled by Missouri v. McNeely. In Missouri v. McNeely, 133 S. Ct. 1552, 1563, 185 L. Ed. 2d 696, 709 (2013), the United States Supreme Court held that there was no per se rule of exigency in every drunk-driving case. McNeely involved a "routine" DUI stop with no special circumstances such as an injury or death. McNeely was stopped for speeding and repeatedly crossing the centerline. Id. at 1556. He exhibited several signs of intoxication and admitted to

consuming a couple of beers. Id. He declined a portable BAC test. Id. He was then taken to a hospital for a blood draw. Id. The State argued for a per se rule for blood testing in all drunk-driving cases. Id. at 1560.

The Supreme Court's holding in McNeely does not, however, alter the application of Washington's implied consent statute to the facts of this case. McNeely only addressed the narrow question of "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." Id. at 1556.

The McNeely Court reiterated many times how narrow the question before it was:

> Because this case was argued on the broad proposition that drunk-driving cases present a per se exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant.

Id. at 1568. Justice Kennedy agreed that the case "does not provide a framework where it is prudent to hold any more than that always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment." Id. at 1569.

McNeely also did not address the validity of implied consent statutes, such as RCW 46.20.308, or tests conducted pursuant to such statutes. Nor did McNeely address other potential exceptions to the warrant requirement. The Court also did not make any specific rulings about Washington's implied consent statute.

To the contrary, the Court acknowledged that implied consent statutes are among the "broad range of legal tools [States have] to enforce their drunk-driving laws and to secure BAC evidence without undertaking nonconsensual blood draws." Id. at 1566. The Court noted that all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drink-driving offense." Id. (citing Washington's implied consent statute, RCW 46.20.308(2)-(3), (5)).

The Court went on to state that "[i]t is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether." Id. The Court used the example of implied consent laws as support that its ruling "will not

'severely hamper effective law enforcement.'" Id. (citing Tenn. v. Garner, 471 U.S. 1, 19, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

Indeed, Justice Sotomayor and three other justices appear to endorse implied consent statutes, and their use of "significant consequences" to discourage a driver from refusing to submit to testing, as a preferred alternative to "nonconsensual blood draws." See McNeely, 133 S. Ct. at 1566 (plurality opinion). Neither McNeely's holding nor reasoning compel the conclusion that RCW 46.20.308 is unconstitutional.

It is notable that McNeely's factual background differs starkly from Garza's case. McNeely was subject to a blood draw for a DUI despite his refusal. 133 S. Ct. 1556. Under Washington's law, McNeely's blood test could not have taken place at that point because there were no special facts which would have allowed a test under subsections (3) or (4) or RCW 46.20.308. RCW 46.20.308(5) indicates that if a person refuses to submit to a test, no test shall be given except as authorized under sections (3) or (4). In Washington, a vehicular assault arrest is an exception allowed under subsection (3). A routine DUI is not an exception.

The McNeely case and holding are limited to non-consensual blood draws. Id. at 1556. Garza's blood draw was consensual. Pursuant to Washington's implied consent statute, the Legislature has imposed

conditions on its grant of the privilege to drive on public roads. As a matter of law, a person who exercises the privilege to drive and operates a vehicle on a public road is deemed to have given his or her consent to submit to a blood test for alcohol under certain situations outlined in the implied consent statute. In this limited context, implied consent is deemed the functional equivalent of actual consent. Thus, under Washington's implied consent statute and the facts of this case, Garza was deemed to have consented to the testing of his blood.

Consent to search is an exception to the search warrant requirement under the Fourth Amendment and article I, § 7. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). As such, Garza's blood test was properly obtained pursuant to the implied consent statute and his rights under the Fourth Amendment and article I, § 7 were not violated. Under the circumstances presented, the police were not required to obtain a search warrant before conducting Garza's blood test.

Obtaining a driver's blood test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment and article I, § 7. The governmental interest in protecting lives, securing the safety of our public roads, and deterring drivers from operating vehicles while intoxicated is strong and compelling. On the other hand, the intrusion on personal privacy effected by a blood test

under the statutory scheme is quite limited. Therefore, Garza's statutory implied consent exempted his blood draw from the warrant requirement. McNeely does not alter this conclusion.

3. The Court of Appeals properly limited review to the BAC result.

At trial, Garza filed a written memorandum seeking suppression of the BAC based solely on Missouri v. McNeely. (CP 34). His written memorandum in support of his motion states "For the foregoing reasons, we would respectfully request that this court find that a warrant was required to obtain a blood draw for **BAC purposes** and therefore the **BAC** in this case should be suppressed. (CP 34, emphasis added). Garza never asked the court to suppress the DNA results. (CP 34).

On May 15, 2011, the trial commenced with the State calling witnesses to testify, including Asa Law, from the Washington State Patrol Crime Laboratory. (RP 134). During her testimony, the prosecutor moved for admission of the blood alcohol test. (RP 138). Garza's attorney replied, "No objection, your honor." (Id.) The court asked, "subject to your pending motion?" (Id.) Garza's attorney replied, "Yes." (Id.). There were no objections when the State moved to have the DNA results admitted. (RP 254-58).

As such, as the Court of Appeals correctly noted, no issue was raised concerning the DNA evidence admissibility. (Opinion at 12, n.5). This was apparent from Garza's written memorandum and from the lack of any objection at trial to the DNA results being admitted. As such, the issue was not preserved for appeal. RAP 2.5 indicates that "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5. The Court of Appeals acted within its discretion in limiting review to the issue that was challenged at trial, Garza's BAC result.

4. Any error in admitting Garza's BAC was harmless.

Assuming that the BAC result was admitted in error, such error was clearly harmless given the other evidence presented at trial. There was ample evidence that Garza was intoxicated when he crashed the car and injured his passenger. First, the troopers smelled an obvious odor of intoxicants on him, (RP 342, 350), and noted that he had bloodshot, watery eyes. (RP 342). Garza told a detective that he had drank a lot of alcohol that evening and didn't remember a lot. (RP 125). At trial, the Defendant's testified he was drinking beer and liquor -- specifically, two beers and straight shots of Vodka from a bottle. (RP 522, 524, 529). He said he had nothing to eat beforehand. (RP 532). He said that he didn't remember exactly how much he had to drink and couldn't remember much of the party. (RP 523).

There was also testimony that he appeared very intoxicated and was slurring his words. (RP 244, 328). Others observed that he was unresponsive, lethargic, and slow moving. (RP 219-20, 239, 240-42, 351). His father testified that he was "passed out." (RP 512). And his own mother testified that, "He was drunker than I've ever seen him in my life." (RP 421). She added, "[H]e was just not, not really conscious of where he was or who we were" and was not responding in a way that makes sense. (RP 422). She testified that another relative, Michael Garza, said that Eloy was "really drunk." (RP 465).

In addition, there was evidence of his driving that indicated that he was impaired. He drove over the fog line, causing his vehicle to become airborne over an embankment and collide head-on with a tree. (RP 95, 324, 331).

In sum, given Garza's numerous admissions of intoxication, and the testimony that was presented at trial, any error in admitted the BAC in this case was clearly harmless. Any reasonable jury would have reached the same result absent the BAC.

5. Any error in admitting the DNA results was harmless.

At trial Garza only moved to suppress the BAC in this case. (CP 34). "A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d

1182 (1985). When the DNA results were admitted at trial, Garza did not make any objections. (RP 254-58). As such, this issue is not reviewable. Even if there had been a timely and proper objection, the evidence would have been properly admitted at trial.

And assuming *arguendo* that the DNA test was properly objected to and admitted in error, such error was clearly harmless given the other evidence presented at trial. There was ample evidence that Garza was the driver. First are his statements. His initial statement at the scene was that "he missed his turn," a statement that clearly implies that he was driving. (RP 338, 351-2). The aerial map presented at trial shows that the only way he could miss Higgins Road is if he was driving from Ashley Road to Higgins Road. In addition, at trial, he stated, "[a]t first I thought I wrecked...my van." (RP 525-26). From this statement, one can also infer that he was driving at the time of the collision.

Second, Garza's father testified that Garza was bleeding and there was blood on the driver's side airbag. (RP 516). Garza also admitted that he cut his ear in the collision. (RP 526).

Third, Garza had a seatbelt mark on his left shoulder, consistent with sitting on the driver's side of the car. (RP 220, 225, 343). The driver's side seatbelt was elongated, indicating use during the collision. (RP 368). Victoria Gil admitted that she was sitting in the left side rear

passenger seat, (RP 237), which would mean Garza was in the driver's seat due to the seatbelt mark. The physical evidence also indicated that Gil was not wearing a seatbelt, as the back of the driver's seat was indented. (RP 369). In addition, Garza testified that he had a fractured collarbone on his left side, (RP 526, 535), an injury consistent with him being in the driver's seat at the time of impact.

F. CONCLUSION

The decision at hand does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals decision correctly affirmed the trial court's decision. As such, the petition for review should be denied.

Respectfully submitted this 1st day of April, 2015,

TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on April 1, 2015, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Ms. Janet G. Gemberling at admin@gemberlaw.com and Ms. Jill Reuter at wa.appeals@gmail.com.

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

DATED this 1st day of April, 2015 at Yakima, Washington.

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APPENDIX A

WASHINGTON STATE
DUI ARREST REPORT

CASE / CITATION NUMBER
CASO / NUMERO DE CITACION
11-002889

SPECIAL EVIDENCE WARNING
ADVERTENCIA SOBRE PRUEBAS ESPECIALES

WARNING! YOU ARE UNDER ARREST FOR:
¡ADVERTENCIA! USTED ESTÁ BAJO ARRESTO POR:

- ☐ VEHICULAR HOMICIDE — **Homicidio vehicular**
- ☐ UNCONSCIOUS (DUI/PHYSICAL-CONTROL/MINOR-DRIVER) — **Inconsciente (Conducir ebrio(a) o drogado(a)/Control-físico/Conductor- menor de edad)**
- ☒ VEHICULAR ASSAULT — **Agresión vehicular**
- ☐ DUI ARREST RESULTING FROM AN ACCIDENT WITH SERIOUS BODILY INJURY TO ANOTHER — **Arresto por conducir ebrio(a) o drogado(a), resultante de un accidente con graves lesiones corporales a un tercero**

A TEST OF YOUR BLOOD OR BREATH WILL BE ADMINISTERED TO DETERMINE THE CONCENTRATION OF ALCOHOL AND/OR ANY DRUG IN YOUR BLOOD, HOWEVER, I MUST ADVISE YOU THAT BECAUSE OF THE NATURE OF THE ARREST, ACCORDING TO THE LAW, A BLOOD OR BREATH TEST MAY BE ADMINISTERED WITHOUT YOUR CONSENT, AND THAT YOU HAVE THE RIGHT TO ADDITIONAL TESTS ADMINISTERED BY A QUALIFIED PERSON OF YOUR OWN CHOOSING
Se le realizará una prueba de sangre o aliento para determinar la concentración de alcohol y/o drogas en su sangre; sin embargo, le debo informar que debido a la naturaleza de su arresto, de acuerdo con la ley, se puede realizar una prueba de aliento o de sangre sin su consentimiento, y que usted tiene derecho a que una persona calificada que usted elija le realice pruebas adicionales.

I HAVE READ THE ABOVE STATEMENT TO THE SUBJECT
He leído la declaración antedicha al sujeto

OFFICER'S SIGNATURE / Firma del oficial

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT
He leído o alguien me ha leído la declaración antedicha

X no Response
SUBJECT'S SIGNATURE / Firma del sujeto

2-20-11 0037 Toppenish Hospital ER Room
DATE / TIME Fecha / Hora LOCATION(s) / Lugar(es)

IMPLIED CONSENT WARNING FOR BLOOD
ADVERTENCIA SOBRE EL CONSENTIMIENTO IMPLÍCITO PARA SANGRE

WARNING! YOU ARE UNDER ARREST FOR:
¡ADVERTENCIA! USTED ESTÁ BAJO ARRESTO POR:

☒ RCW 46 61.502 or RCW 46 61 504 Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs
CRW 46.61.502 o CRW 46.61.504 Conducir o estar en control físico efectivo de un vehículo automotor estando bajo la influencia de alcohol y/o drogas tóxicantes.

☐ RCW 46 61 503 Being under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol
CRW 46.61.503 Ser menor de 21 años de edad y conducir o estar en control físico efectivo de un vehículo automotor después de consumir alcohol.

☐ RCW 46 25 110 Driving a commercial motor vehicle while having alcohol in your system
CRW 46.25.110: Conducir un vehículo automotor comercial teniendo alcohol en su organismo.

Further, you are now being asked to submit to a test of your blood to determine alcohol concentration or the presence of any drug where **Asimismo, se le solicita en este momento *que se someta a un análisis* de sangre para determinar la concentracion de alcohol o la presencia de cualquier droga, si:**

(A) You are incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample; OR **Usted es incapaz de ofrecer una muestra de su aliento debido a lesión física, incapacidad física, u otra limitación física; O**
(B) You are being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility, OR **Está siendo tratado en un hospital, clínica, consultorio médico, vehículo de emergencias médicas, ambulancia, u otra instalación similar; O**
(C) The officer has reasonable grounds to believe that you are under the influence of any drug **El oficial tiene motivos razonables para creer que usted está bajo la influencia de alguna droga**

A blood test shall be administered by a qualified person authorized by RCW 46 61.506(5) **Una persona calificada, mediante la autorización del edicto RCW 46.61.506(5), le realizará un análisis de sangre**

1 You are now advised that you have the right to refuse this blood test, and that if you refuse **Ahora se le advierte que usted tiene derecho a negarse al análisis de sangre, y que si se niega.**
   (A) Your driver's license, permit, or privilege to drive will be revoked or denied by the Department of Licensing for at least one year, AND **Su licencia, permiso o privilegio de conducir será revocado o negado por el Departamento de licencias durante por lo menos un año, Y**
   (B) Your refusal to submit to this test may be used in a criminal trial **Su negación a someterse a esta prueba puede ser usada en un juicio penal**
2 You are further advised that if you submit to this blood test, and the test is administered, your driver's license, permit, or privilege to drive will be suspended, revoked, or denied by the Department of Licensing for at least ninety days if you are **También se le advierte que si usted acepta realizarse este análisis de sangre, y se realiza el análisis, su licencia, permiso o privilegio de conducir será revocado o negado por el *Departamento de licencias durante por lo menos 90 días si usted:***
   (A) Age twenty-one or over and the test indicates the alcohol concentration of your blood is 0 08 or more, or you are in violation of RCW 46.61 502, driving under the influence, or RCW 46 61.504, physical control of a vehicle under the influence, OR **Tiene 21 años de edad o más, y la prueba indica que la concentración de alcohol en su sangre es de 0.08 o más, o si usted está violando el edicto RCW 46.61.502, conduciendo *ebrio(a) o drogado(a), o el edicto RCW 46.61.504, al tener el control físico de un vehículo estando ebrio(a) o drogado(a) O***
   (B) Under age twenty-one and the test indicates the alcohol concentration of your blood is 0 02 or more, or you are in violation of RCW 46 61 502, driving under the influence, or RCW 46 61 504, physical control of a vehicle under the influence **Tiene menos de 21 años de edad, y la prueba indica que la concentración de alcohol en su sangre es de 0.02 o más, o si usted está violando el edicto RCW 46.61.502, conduciendo ebrio(a) o drogado(a), o *el edicto RCW 46.61.504, al tener el control físico de un vehículo* estando ebrio(a) o drogado(a).**

APPENDIX B

4

FILED

2013 MAY 30 P 2:18

KIM EATON
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SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. Eloy Garza Defendant.	NO. 12-1-00540-6 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: 3.6 MOTION

THIS MATER having come on before the above entitled Court on May 16, 2013. Present were Samuel Chen, Deputy Prosecuting Attorney, the Defendant Eloy Garza present and represented by his attorney, Rick Hernandez. The State presented testimony from witnesses and other evidence. The Court, having considered the testimony of the witnesses, the evidence and arguments of counsel, now enters the following:

FINDINGS OF FACT

I.

On February 19, 2011, WSP Trooper Seth Berghoff was advised of a one car collision on Southbound State Route 97 near Milepost 68 at approximately 2153 hours.. Once he arrived at the scene, he observed a Toyota Camry had collided with a tree. The vehicle was abandoned with the front

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passenger door and rear driver's side door ajar. When asked on cross-examination, the trooper checked the inside of the vehicle to see if there were anyone inside and did not find any containers of alcohol inside the vehicle. He testified that based on the two open doors, he believed that there was at least two passengers involved in the collision. Trooper Haddorff soon approached the area and advised Berghoff that a passerby informed him of a male that appeared to be hurt walking on South Camas Road. As he turned NB on S. Camas Road, he observed a young male who was soaking wet and shivering.

II.

The young male was identified as Eloy Garza, the defendant. He asked the defendant what had happened and he stated he was cold and he wanted to sit inside the Trooper's car. He patted the defendant down for officer safety. It was about 30 degrees outside. He gave the defendant a blanket and had him sit in the right rear of his patrol car. The trooper testified that the defendant was not a suspect and was free to leave. When asked if he was in the car that crashed, his response was that he was trying to get home. He then stated that he missed the turn on Higgins Road. As defendant spoke, the trooper could smell an odor of intoxicants coming from his person and his eyes were watery and bloodshot. He was not Mirandized by the Trooper. To keep the defendant warm inside, the trooper cranked up the heater. When asked if he was driving, the defendant stated he did not know who was driving. He then complained that his shoulder hurt so the trooper transported the defendant to Toppenish Hospital.

III.

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At the hospital, the defendant's sweatshirt and t-shirt were removed, Trooper Haddorff noticed marks on his left shoulder and chest which appeared to be marks left from a seatbelt. He also observed that the defendant's eyes were watery and bloodshot. His movements were lethargic and the trooper could smell the odor of intoxicants coming from his person. The troopers also learned information that the other passenger in the vehicle may have suffered a broken arm. Defendant was lying down on a gurney. At approximately 2343 hours, the defendant was read his Constitutional Rights verbatim from the trooper's issued rights card. When asked if he understood his rights, the defendant did not respond. The defendant just laid on the gurney and would not respond when asked to tell what had happened. On cross examination, the trooper testified that in his opinion the defendant's unresponsiveness was due to the defendant's high level of intoxication.

IV.

After speaking with the victim, the troopers decided to arrest the defendant for Vehicular Assault. He was again read his Constitutional Rights verbatim from the DUI packet. Defendant again did not respond when asked if he understood his rights. At approximately 0048 hours, the Trooper read the defendant the Special Evidence warning page from the DUI packet verbatim and advised he was placed under arrest for Vehicular Assault. At approximately 0048 hours, blood was drawn from the defendant into two grey topped vials and it was sent to the WSP Toxicology Lab for analysis.

Based upon the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

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I

The Court has jurisdiction over the parties and the subject II. matter.

There was probable cause to believe the defendant had committed the crime of Vehicular Assault. Consequently, RCW 46.20.308 authorized a blood draw regardless of the defendant's consent. Missouri v. McNeely, Docket #-11-1425 did not address the issue posed by Implied Consent statutes, such as RCW46.20.308, since the State of Missouri's argument was focused solely on the exigent circumstance of the natural dissipation of blood alcohol.

III.

The defendant's suppression motion is denied.

DATED: May 30, 2010.

JUDGE

Presented by:

SAMUEL CHEN
Deputy Prosecuting Attorney
Washington State Bar Number 26738

Approved as to form, copy received:

Rick Hernandez
Attorney for Defendant
Washington State Bar No.

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Subject: STATE V. GARZA 913633

Attached for filing is the State's Answer to Petition for Review.

- case name: State of Washington v. Eloy A. Garza
- case number: 913633

Sincerely,

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