IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE

City of Seattle, Plaintiff, vs. Douglas L. Haugen, Defendant	)	Case No.: 584913 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS BREATH TEST RESULTS

Comes now the Court and issues the following Findings of Fact and Conclusions of Law deciding the Defendant's Motion to Suppress the breath test results in this case and issues the following:

I. FINDINGS OF FACT

1. Mr. Haugen was arrested for DUI on December 22, 2012 in Seattle, Washington.

2. Upon deciding that he had probable cause to arrest Mr. Haugen, Seattle Police Officer Johnson placed Mr. Haugen under arrest for DUI.

3. After transporting Mr. Haugen to the West Precinct, Officer Johnson read Mr. Haugen Implied Consent Warnings ("ICWs")(Ex. E admitted at hearing). Mr. Haugen then consented to give a breath test. After Mr. Haugen provided an invalid sample on the West Precinct BAC machine, Officer Johnson transported him to the South Precinct.

4. At the South Precinct, Mr. Haugen gave breath samples that resulted in a printed BAC ticket which the Defendant seeks to suppress.

5. The parties to this case agreed that the request for breath samples was a request for a search under the 4th Amendment to the United States Constitution and Article 1, Section 7 of Washington's Constitution.

6. The parties to this case also agreed that there were not exigent circumstances that would have justified a warrantless search of Mr. Haugen's breath.

II. CONCLUSIONS OF LAW/ANALYSIS

The defendant asserts that Missouri v. McNeely, 133 S.Ct. 1552 (2013) requires police to obtain search warrants before requesting breath samples from DUI suspects. In order to properly understand the United States Supreme Court's holding in McNeely, a careful analysis of the facts of McNeely and the case that first dealt with search issues as related to DUI blood draws, Schmerber v. California, 384 US 757 (1966) is required.

A. Schmerber Did Not Involved Consent

On November 13, 1964, Mr. Schmerber was involved in a DUI injury accident.[1] The arresting officer ordered a blood draw for alcohol analysis after Mr. Schmerber refused to provide a blood sample. Schmerber at 759. Upon review, the United States Supreme Court held that the potential delay in getting a warrant along with the dissipation of alcohol from Mr. Schmerber's blood justified an exception to the 4th Amendment's warrant requirement: exigent circumstances. Id. at 770-71.

At the time of the accident in Schmberber there was not an implied consent law in California. California's first implied consent statute took effect on October 6, 1966. See, 1966 California Statutes, 1st Ext. Session, Chapter 138, and Sec. 13353 of the California Vehicle

[1] Brief of Respondent in Schmerber, 1966 WL 100528 (1966).

Code.[2] The Supreme Court in Schmerber decided that blood test results in DUIs were admissible only pursuant to exigency, not pursuant to implied or explicit consent.

B. McNeely's Blood Draw Was Taken Without His Consent

On October 3, 2010, Missouri police officer Winder arrested Mr. McNeely for a routine DUI. State v. McNeely, 2012 WL 135417. Officer Winder placed Mr. McNeely under arrest and asked Mr. McNeely if he would take a breath test. Id. Mr. McNeely stated that he would refuse the breath test. Id. Officer Winder then transported Mr. McNeely to a hospital to obtain a blood sample. Id. At the hospital, Officer Winder read Mr. McNeely Missouri ICWs and then asked for a blood sample. Id. Mr. McNeely refused. Id. Officer Winder then told Mr. McNeely that he was going to obtain a blood sample anyway pursuant to Missouri law, and ordered a lab technician to draw Mr. McNeely's blood. Id.

However, Missouri law did not actually allow a police officer to order a blood draw over an arrestee's objection in a routine, noninjury DUI. See, Id., Mo. Ann. Stat. Sec. 577.041, and State v. McNeely, 358 S.W.3d 65 at 68, fn 2 (2012). Officer Winder's misunderstanding of Missouri law was based on a newsletter author's misreading of Schmerber. State v. McNeely, 358 S.W.3d 65 at 68, fn 2 (2012). Officer Winder's directive that the lab technician draw blood was not made with Mr. McNeely's consent, implied or otherwise.

The United States Supreme court eventually held that technological advances since Schmerber reduced the exigency in routine DUI arrests and found that Officer Winder should have sought a search warrant before taking Mr. McNeely's blood. Missouri v. McNeely, 133 S. Ct. 1552, 1556 (2013). The Supreme Court overruled Schmerber and stated that exigency was

[2] California's implied consent law was signed by Governor Brown on June 20, 1966, the same day the Supreme Court decided Schmerber, and after 13 years of effort by law enforcement officials. *California's Implied Consent Statute: An Examination and Evaluation*, 1 Loy. L.A. L. Rev. 23 (1968).

no longer presumed in DUI arrests but should be determined on a case by case basis based on the totality of the circumstances. Id.

C. **Analysis**

The above review of the facts of Schmerber and McNeely make it clear that neither case involved consent, impliedly or expressly given. In both cases the arrestee expressly *refused* to give consent. Both warrantless blood draw searches were completed only after a directive from law enforcement overcame the lack of consent.[3] The only basis the US Supreme Court considered for the warrantless searches was the exigent circumstances exception to the warrant requirement. The Court could not have considered other exceptions, such as consent, because they did not apply factually.

Although not applicable to the facts of Schmerber and McNeely, there are exceptions to the warrant requirement other than exigent circumstances. A warrant is not required before a search if the subject of the search consents. State v. Ferrier, 136 Wn.2d 103, 111 (1998). To the extent the defendant and other organizations[4] conclude McNeely means that search warrants are always required before a DUI blood draw without considering warrant exceptions such as consent, they are mistaken.

In the present case, Mr. Haugen validly consented to take a breath test twice. First, by driving in Washington Mr. Haugen consented to a test of his breath or blood. RCW 46.20.308 ("Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the

[3] Stated another way, the prosecution in Schmerber and McNeely were attempting to admit blood results that were not obtained pursuant to implied consent statutes or verbal consent. They were simply bare warrantless searches.

[4] "The Washington Association of Prosecuting Attorneys now recommends that police get search warrants in every DUI case - even injury cases…" http://www.seattlepi.com/local/article/Blood-evidence-in-Wedwood-DUI-case-in-question-4476541.php

purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood."). Second, Mr. Haugen consented to take a breath test when asked by Officer Johnson. Officer Johnson asked Mr. Haugen, "Will you now submit to a breath test?" Exhibit E. Mr. Haugen stated, "Yes." Id. First by action and the effect of RCW 46.20.308 and second by verbal consent, Mr. Haugen consented to a search of his breath.

All 50 states have adopted ICW laws. Missouri v. McNeely, 133 S. Ct. 1552, 1566. Washington's ICW law, RCW 46.20.308, is constitutional. State v. Moore, 79 Wash.2d 51 (1971). The consent implied by RCW 46.20.308 and Mr. Haugen's expressly given consent operate as exceptions to the warrant requirement. Schneckloth v. Bustamonte, 412 US. 218 (1973).[5] McNeely has no bearing on this analysis whatsoever as the City does not allege any exigent circumstances in this case. The City meets its burden in showing an exception to the warrant requirement by Mr. Haugen's twice given consent. Therefore, Mr. Haugen's breath test results are admissible at trial.

Dated September 17, 2013

____

Steven Rosen, Judge

[5] "It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Bustamonte at 219.