IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW R. McVAUGH,	§	
	§	No. 577, 2013
Defendant Below,	§	
Appellant,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	I.D. 1211017937
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: February 26, 2014
Decided: March 19, 2014

Before **HOLLAND**, **BERGER** and **RIDGELY**, Justices.

This 19th day of March 2014, it appears to the Court that:

1) The defendant-appellant, Andrew R. McVaugh ("McVaugh") appeals from bench trial in the Superior Court convicting him of felony Driving Under the Influence, two counts of Vehicular Assault Second, and a stop sign violation.

2) McVaugh raises one claim on appeal.[1] He argues that the trial court abused its discretion when it denied his Motion to Suppress because he did not voluntarily consent to have his blood withdrawn.

[1] Although McVaugh's Opening Brief lists two claims in his appeal, his first claim does not include any discussion or analysis.

3) We conclude that his claim is without merit.[2] Therefore, the judgments of the Superior Court must be affirmed.

4) On the evening of November 22, 2012, Corporal Robert Kunicki ("Officer Kunicki") of the Delaware State Police responded to a report of a vehicle collision on Limestone Road in Hockessin, Delaware. When Officer Kunicki arrived at the collision scene, he found a Nissan in the roadway with significant damage to the front end of the car. Officer Kunicki also observed a Mazda with rear-end damage occupied by two people approximately 300 feet away from the Nissan.

5) McVaughn was seated on a curb near the Nissan. McVaugh advised Officer Kunicki that he ran the red light at the intersection and struck the vehicle in front of him. McVaugh had bloodshot, glassy eyes, his speech was slurred, and there was an odor of alcohol emanating from his breath. Officer Kunicki observed an open bottle of vodka on the rear floorboard of the Nissan and McVaugh admitted that he had consumed alcohol prior to driving. Because McVaugh complained of shoulder pain, and because Officer Kunicki was concerned that McVaugh may have

[2] With commendable candor, McVaugh's opening brief states: "Defense counsel initiated the appeal based upon what he termed 'principle' and, after review of the transcript, has determined that the defendant will not be able to maintain his burden to demonstrate an abuse of discretion on the part of the trial court in denying the Motion to Suppress Evidence."

suffered a head injury, McVaugh was transported to the Christiana Hospital. McVaugh was cooperative throughout his encounter with Officer Kunciki. At the hospital, Officer Kunicki requested that McVaugh provide a sample of his blood for chemical analysis because, based on his observations and interactions with McVaugh, it appeared that alcohol was a contributing factor in the collision. A nurse provided a consent form for a blood draw, which Officer Kunicki filled out and McVaugh signed.

6) As a result of this investigation, McVaugh was charged with one count of driving under the influence, two counts of vehicular assault second degree, and one stop sign violation. McVaugh filed a Motion to Suppress the blood sample. After a hearing, the trial court denied the motion.

7) Following a bench trial, McVaugh was convicted on all counts. He was later sentenced to nine months at Level V incarceration.

8) McVaugh argues that the trial court abused its discretion in denying his Motion to Suppress because his consent to give blood was not voluntary. "We review the grant or denial of a motion to suppress for an abuse of discretion."[3] To the extent questions of law are implicated, we

[3] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008) (citations omitted).

review *de novo*.[4] "To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[5]

9) As this Court has noted, warrantless searches under the Fourth Amendment "are *per se* unreasonable under the Fourth Amendment-subject to a few specifically established and well-delineated exceptions."[6] One such exception is where a defendant voluntarily consents to a police search and seizure.[7] "Consent may be express or implied, but this waiver of Fourth Amendment rights need not be knowing and intelligent."[8] Anyone who has "common authority over . . . the place or effects being searched," may consent to a search so long as it is voluntary.[9]

10) To determine whether consent was given voluntarily, courts examine the totality of the circumstances surrounding the consent, including (1) defendant's knowledge of the constitutional right to refuse consent; (2) defendant's age, intelligence, education, and language ability; (3) the degree

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[4] *McAllister v. State*, 807 A.2d 1119, 1122–23 (Del. 2002).
[5] *Lopez-Vazquez*, 956 A.2d at 1284 (citing *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008)).
[6] *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).
[7] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).
[8] *Cooke*, 977 A.2d at 855 (citing *Schneckloth*, 412 U.S. at 241).
[9] *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181–82 (1990); *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

to which the individual cooperates with police; and (4) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.[10]

11) At the suppression hearing, McVaugh testified that he remembered striking the rear of the car in front of his car as he was driving. While he recalled speaking to the police officer at the scene, he could not remember whether it was Officer Kunicki. McVaugh had no recollection of the interaction between himself and Officer Kunicki at the hospital. He could not remember consenting to a blood draw or signing the consent form, but he recognized his signature on the form.

12) The Superior Court did not abuse its discretion in finding that McVaugh's consent was voluntary. McVaugh signed a consent form that specifically gave the hospital permission to take the his blood for police purposes. The form explained that the purpose of the blood draw was to determine McVaugh's blood alcohol content. McVaugh is thirty-four years old, attended college for two years and is proficient in English. McVaugh continually cooperated with the police and with the hospital. McVaugh testified that he "wanted to cooperate with the police" at the scene of the accident and the hospital. McVaugh remained at the hospital for about one

[10] *Id.* (citing *Schneckloth*, 412 U.S. at 226).

hour, and there is no evidence of coercion or abuse by the police. Thus, the totality of the circumstances supports the trial judge's finding that McVaugh's consent to supply a blood sample was voluntary.

13) The United States Supreme Court's recent decision involving blood alcohol testing in *Missouri v. McNeely* does not change the result here.[11] In *McNeely*, the State of Missouri argued that it should be allowed to conduct a warrantless blood test as a matter of law.[12] This argument was based on the Supreme Court's decision in *Schmerber v. California*, which held that a warrantless blood test of a defendant arrested for drunk driving was reasonable under the destruction of evidence exception after considering all of the facts and circumstances of that case.[13] Based on *Schmerber*, the State of Missouri argued that the natural dissipation of alcohol in the body is *per se* an exigent circumstance allowing officers to conduct a warrantless search. A majority of the Court disagreed and held that where police could reasonably obtain a warrant "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[14]

14) Unlike *McNeely*, the issue in this case involves the voluntariness of the defendant's consent to obtain a blood sample to be used

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[11] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).
[12] *Id*. at 1554–55.
[13] *Schmerber v. California*, 384 U.S. 757, 770 (1966).
[14] *McNeely*, 133 S. Ct. at 1561.

by police. Because the record indicates that McVaugh voluntarily consented to the search (blood draw), the trial court did not abuse its discretion when it denied McVaugh's Motion to Suppress.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice