EFiled: Jul 14 2014 06:25PM EDT
Filing ID 55729005
Case Number 156,2014

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **FREDDIE FLONNORY,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 156, 2014 |
| | ) | |
| | ) | |
| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

# STATE'S ANSWERING BRIEF

Karen V. Sullivan (No. 3872)
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Dated: July 14, 2014

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES** **PAGE**

**CONSTITUTIONS AND STATUTES**

## NATURE AND STAGE OF THE PROCEEDINGS

On September 8, 2012, Freddie Flonnory ("Flonnory") was arrested for Driving Under the Influence of Alcohol or With a Prohibited Alcohol Content ("DUI") and Failure to Use a Turn Signal. (A1). Because Flonnory had two prior convictions for DUI, he faced a felony if convicted and was charged by Indictment on October 22, 2012. (A1, D.I. 2).

On December 28, 2012, Flonnory moved to suppress the results of his blood alcohol concentration test. (A2, D.I. 10). Following a January 18, 2013 hearing, Superior Court reserved decision until the United States Supreme Court decided *Missouri v. McNeely*.[1] On April 17, 2013, the United States Supreme Court concluded that the natural dissipation of alcohol in the bloodstream does not provide a *per se* exigent circumstance to the Fourth Amendment warrant requirement in DUI cases, and that, to determine whether the exigent circumstance exception is met in an individual case, courts must examine the totality of the circumstances.[2] The parties thereafter submitted supplemental memoranda regarding the impact, if any, of *McNeely* on Flonnory's motion to suppress. (A3, D.I. 25 & 26). On June 12, 2013, Superior Court denied Flonnory's motion. (A4, D.I. 27; Op. Brf. Ex. A).[3] Flonnory filed multiple motions seeking reargument or

[1] 133 S. Ct. 1552 (2013).
[2] *Id.*
[3] *State v. Flonnory*, 2013 WL 3327526 (Del. Super. Ct. June 12, 2013).

certification of questions to this Court, which the State opposed, and which Superior Court denied.[4] (A5, D.I. 30, 31, 33, 36, 37, 43-46).

Following a 2 day trial, a New Castle County jury found Flonnory guilty of DUI.[5] (A7, 52). After a presentence investigation, Superior Court sentenced Flonnory on February 28, 2014 to 2 years at supervision level 5, suspended after 3 months for 1 year at supervision level 3, but stayed imposition of the sentence pending the outcome of an appeal to this Court. (A7, D.I. 55; Op. Brf. Ex. B).

Flonnory timely appealed and filed an opening brief. This is the State's answering brief.

[4] *State v. Flonnory*, 2013 WL 4567874 (Del. Super. Ct. July 17, 2013) (denying motion for reargument and alternative motion for certification). Superior Court granted Flonnory's last renewed motion for certification of questions of law prior to allowing the State an opportunity to respond, but, 3 days later, with the benefit of the State's response, Superior Court vacated its prior order and denied the motion. (A5-6, D.I. 38, 39, 40, 43-46). *State v. Flonnory*, 2013 WL 6039299 (Del. Super. Ct. Sept. 20, 2013) (denying renewed motion for certification of questions of law).

[5] The jury convicted Flonnory of operating a motor vehicle above the legal limit of .08, but found him not guilty as to the "impairment" theory of DUI. (A91). Prior to jury selection, the State entered a *nolle prosequi* on the charge of Failure to Signal. (A7, D.I. 52).

## SUMMARY OF THE ARGUMENT

I. Flonnory's arguments I and II are **denied**. Superior Court did not err in denying Flonnory's motion to suppress the results of the blood draw that showed that his blood alcohol concentration was .14. Superior Court correctly concluded that "[t]he Supreme Court's holding in *McNeely* does not alter the application of Delaware's Implied Consent Statutes to the facts of this case."[6] Flonnory "was deemed to have consented to the blood draw by simply operating his vehicle."[7] Flonnory did not withdraw that consent. As Superior Court correctly found, "[i]nstead of refusing or challenging the blood draw, [Flonnory] stated 'that's a good vein, don't miss it.'"[8]

[6] *Flonnory*, 2013 WL 3327526, at *6; See 21 *Del. C.* § 2740.
[7] *Id.*
[8] *Id.*

## STATEMENT OF FACTS

On September 28, 2012 at approximately 9:45 p.m., Cpl. Andrew Pietlock participated in Operation Pressure Point, a multijurisdictional strategic operation in which Delaware State Police officers assist the City of Wilmington by patrolling within the City limits. (A49; A95). Cpl. Pietlock was driving north on Bower Street near East 27th Street in Wilmington when he saw a Cadillac Eldorado travelling in front of his police car. (A49; A95-96). Cpl. Pietlock saw the Eldorado turn left onto East 27th Street without signaling, and then stop at a stop sign and turn right onto Northeast Boulevard, again without signaling. (A49-50; A96).

Cpl. Pietlock activated his marked police car's overhead lights and siren and attempted to stop the Eldorado near the intersection of 30th Street and Northeast Boulevard. (A50; A96). The Eldorado slowed and pulled to the shoulder of Northeast Boulevard; however, the Eldorado did not immediately come to a complete stop. (A50; A96). Instead, it crept forward at a slow speed until finally stopping near the intersection of Eastlawn Avenue and Northeast Boulevard. (A50; A96). Cpl. Pietlock approached the Eldorado and spoke to Flonnory, the 55 year-old driver and sole occupant of the Eldorado. (A50; A96).

Upon contacting Flonnory, Cpl. Pietlock "immediately observed his glassy and bloodshot eyes and strong odor of alcoholic beverage emanating from his

breath." (A50. *See also* A96). He also saw an open bottle of Heineken beer in the pocket of the driver's door that was approximately 2/3 full. (A50; A96). Cpl. Pietlock asked Flonnory where he was coming from and going to, and Flonnory replied that he was headed home from his girlfriend's house. (A50). When Cpl. Pietlock asked if he had consumed any alcohol that night, Flonnory initially said he had had one beer, but later said that he had had two beers. (*Id*.; A96). At that point, Cpl. Pietlock asked Flonnory to exit his vehicle to perform field sobriety tests. (A50; A96). Flonnory's performance on these tests led Cpl. Pietlock to conclude that Flonnory was under the influence of alcohol.

After learning that Flonnory was a high school graduate, Cpl. Pietlock first administered the alphabet test, asking Flonnory to recite the alphabet from E to P. (A51; A97; B1, Video of motor vehicle recorder (MVR) at 7:27 (9:52:01 p.m.)).[9] Flonnory was unable to complete the test as requested. Instead, he recited the alphabet from A to T and then stated V. (A51; A97). Flonnory likewise was unable to complete a counting test as requested. (A51; A97).

Cpl. Pietlock next asked Flonnory to perform the one-leg stand test. (A52; A97). Flonnory exhibited 3 of 4 "clues" of intoxication – he raised his left arm for the entire test, hopped on his left foot, and put his right foot down at 9 seconds,

[9] The version of the MVR tape included in the State's Appendix is the unredacted version that was played for Superior Court during the January 18, 2013 suppression hearing and provided as an exhibit thereafter. (A3, D.I. 21; A99-100; A110). A redacted version, omitting the PBT, was introduced at trial as State's Exhibit 1. (A45, A54-55).

despite the fact that the test is supposed to last for 30 seconds. (A52-53; A97). When asked if he was going to complete the test, Flonnory stated he had counted to 30. (A53; A97).

Cpl. Pietlock next administered the walk-and-turn test. (A53; A98). Flonnory exhibited 3 out of 8 clues – Flonnory could not maintain his balance during the instructions, missed heel to toe, and failed to pivot as instructed. (A53; A98). Finally, Cpl. Pietlock asked Flonnory to perform a portable breath test ("PBT"). (A98). Flonnory asked Cpl. Pietlock, "Let me ask you, I don't have to take it, do I?" (B1, Video of motor vehicle recorder (MVR) at 17:40 (9:49:56 p.m.)). Cpl. Pietlock responded, "You don't have to take any test." (*Id.* at 17:42). Ultimately, Flonnory agreed to take the PBT, producing a .163% result. (*Id.* at 19:52 (10:02:30 p.m.); A99). Cpl. Pietlock told Flonnory that he was double the legal limit. (*Id.* at 20:41 (10:03:30 p.m.).

Based upon his observation of Flonnory driving, together with Flonnory's performance on the FSTs, Cpl. Pietlock placed Flonnory under arrest for DUI. (A54; A99). After allowing Flonnory's girlfriend to retrieve Flonnory's car, money and jewelry, Cpl. Pietlock transported him to Delaware State Police Troop 1. (A99; A104). Because it was Flonnory's third DUI, Cpl. Pietlock decided to proceed with a blood test rather than the Intoxilyzer. (A99; A105). Troop 1 contacted Omega to request a phlebotomist to draw Flonnory's blood. (A54; A99).

Flonnory's blood was drawn at 11:36 p.m., within 2 hours of driving. (A55; A104). Flonnory voluntarily said to the phlebotomist, "That's a good vein, don't miss it." (A55; A105). This voluntary cooperation was similar to Flonnory's cooperation at the scene of the traffic stop, where Flonnory volunteered that the police could search his car, his trunk, his pockets, his phone, and "everything."[10] Subsequent analysis of this sample showed that Flonnory's blood alcohol concentration was .14. (A97).

[10] B1, Video of motor vehicle recorder (MVR) at 5:01 (9:49:54 p.m.) ("You can search my car, I don't have no problem."), at 5:52 (9:50:51 p.m.) ("You can search my pockets, everything."), at 5:59 (9:50:49 p.m.) ("You can look in my trunk, everything."), at 6:05 (9:50:52 p.m.) ("my phone, everything").

## I. Superior Court correctly denied Flonnory's motion to suppress the results of the BAC test results where Flonnory did not withdraw his consent to chemical testing provided pursuant to Delaware's Implied Consent Law.

### Question Presented

Whether the consent provided by Flonnory pursuant to the operation of Delaware's Implied Consent Law, 21 *Del. C.* § 2740, *et seq.*, in the absence of any evidence of withdrawal of such consent, constitutes consent obviating the search warrant requirement (set forth in the Fourth Amendment to the United States Constitution and Article 1, Section 6 of the Delaware Constitution) for the seizure of Flonnory's blood when the police officer had probable cause to believe he was driving a vehicle in violation of 21 *Del. C.* § 4177?

### Standard and Scope of Review

This Court generally reviews the trial court's decision on a motion to suppress for an abuse of discretion.[11] The Court must adopt the trial court's factual findings and reasonable inferences as long as there is sufficient evidence in the record to support them and the findings are not clearly erroneous.[12] This Court

[11] *Lopez–Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008) (citations omitted).
[12] *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009) (citing *Lopez-Vazquez*, 956 A.2d at 1285 and *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008)). *See Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000) (factual findings "can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally.").

examines the trial court's legal conclusions or constitutional issues *de novo* for errors in formulating or applying legal precepts.[13]

**Merits of the Argument**

On appeal, Flonnory does not challenge the stop of his Eldorado, the administration of field sobriety tests, or that probable cause existed to believe that he had driven under the influence of alcohol and that his blood would contain evidence of DUI. Instead, Flonnory posits that his blood was drawn without a warrant and, thus, that the blood draw was unconstitutional. Flonnory contends that "statutory implied consent does not rise to the level of constitutional consent under a Fourth Amendment analysis"[14] and that Superior Court "relied on outdated analyses and failed to consider the nature of the Delaware Implied Consent Statute post-*McNeely*." (Op. Brf. at 21, 22). He is wrong. As discussed below, Superior Court correctly found that "[b]ased on Delaware's Implied Consent law, [Flonnory] was deemed to have consented to the blood draw simply by operating

[13] *Lopez*-Vazques, 956 A.2d at 1284–85 (collecting cases).

[14] U.S. Const. amend IV. Flonnory also raises an argument based on Article I, Section 6 of the Delaware Constitution. (Op. Brf. 12 & 20 n.65). Although Flonnory correctly notes that this Court has interpreted the Delaware Constitution to provide greater protections than the United States Constitution in certain circumstances, (Op. Brf. 20 n.65), Flonnory does not explicitly argue that Article I, Section 6 provides greater protection than the Fourth Amendment in his case. If such an argument is implicit, he fails to discuss any of the criteria (textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, or public attitudes) required for a "proper presentation of an alleged violation of the Delaware Constitution." *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005) (citing *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999)). Consequently, this Court need not separately address Flonnory's Delaware constitutional question. *Id.* (declining to consider claim under Article I, § 7 of Delaware Constitution where claim was not fully and fairly presented).

his vehicle" and that "*McNeely* does not affect this Court's finding that the results from the blood sample are admissible pursuant to the consent exception to the warrant requirement."[15]

A warrantless search of a person is reasonable if it falls within a recognized exception.[16] Exigent circumstances is one exception to the warrant requirement.[17] The Superior Court held that the exigent circumstances exception was not applicable here,[18] and the State does not contend otherwise.

Consent is another recognized exception to the warrant requirement.[19] "A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant."[20] Consent provided by a person pursuant to Delaware's Implied Consent law, 21 *Del. C.* §§ 2740-2750, is consent excusing the warrant requirement. Section 2740 provides:

> Any person who drives…a vehicle…within this State shall be deemed to have given consent, subject to this section and §§ 4177 and 4177L of this title to a chemical test or tests of that person's blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs.[21]

---

[15] *State v. Flonnory*, 2013 WL 3327526, at *6 (Del. Super. Ct. June 12, 2013).
[16] *United States v. Robinson*, 414 U.S. 218, 224 (1973).
[17] *McNeely*, 133 S. Ct. 1552 (holding that natural metabolization of alcohol in blood is not a *per se* exigency and requiring totality of the circumstances analysis); *Schmerber v. California*, 284 U.S. 757 (1996) (holding exigent circumstances justify warrantless blood draw).
[18] *Flonnory*, 2013 WL 3327526, at * 5 ("no special facts were present that would warrant the application of the exigent circumstances exception")
[19] *Scott v. State*, 670 A.2d 550, 552 (Del. 1996) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 221-222 (1973)).
[20] *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014).
[21] 21 *Del. C.* § 2740.

Thus, when a person drives in Delaware, that person gives his consent to chemical testing when an officer has probable cause to believe he has committed a DUI. Like consent given in other contexts, implied consent to chemical testing may be withdrawn. If the person is first informed of administrative penalties for a "refusal," a person that "refuses" (i.e., withdraws his implied consent) is subject to administrative penalties.[22] However, under Delaware's Implied Consent law, and in the absence of any words, acts or deeds evidencing withdrawal of the consent previously given, an officer may proceed with chemical testing without first informing the driver of administrative penalties.[23] Here, Flonnory not only maintained his consent, he sought to assist the phlebotomist by pointing out a good vein.

Flonnory's argument that implied consent is not constitutional consent runs contrary to the established law of not only this Court but also the United States Supreme Court. This Court has cited with approval Delaware's Implied Consent

[22] 21 *Del. C.* §§ 2741-2744.

[23] 21 *Del. C.* § 2742(a). To the extent that this Court's or Superior Court's prior decisions held that Delaware's Implied Consent law authorizes a warrantless blood draw in the face of evidence of withdrawal of consent (i.e., "refusal") or stated the impact of the Implied Consent law more broadly than the State advocates here, those authorities are limited by *McNeely*. *See McCann v. State*, 588 A.2d 1100 (Del. 1991); *Seth v. State*, 592 A.2d 436 (Del. 1991); *State v. Crespo*, 2009 WL 1037732 (Del. Super. Ct. 2009). Because *McNeely* determined there is no *per se* exigent circumstance in DUI warrantless blood draw cases, the totality of the circumstances must demonstrate exigent circumstances *or* there must be consent. However, *McNeely* does not preclude triggering the consent exception by statutes that imply consent at the time of driving when that consent is not withdrawn.

law.[24] In *South Dakota v. Neville*,[25] the United States Supreme Court cited with approval that state's implied consent law. Moreover, *McNeely*, which Flonnory contends impacts Delaware's Implied Consent law, specifically notes that all 50 states have adopted implied consent laws and further notes that states continue to have a "broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws."[26]

Despite Flonnory's assertion to the contrary, Delaware's Implied Consent law is not solely intended "to address the administrative aspect of DUI investigations and/or convictions." (Op. Brf. 19). First, the very nature of the statutory authority to proceed with chemical testing when administrative penalties *cannot* be imposed[27] evidences the General Assembly's intent that the Implied Consent law apply in criminal proceedings. Indeed, section 2740 specifically references sections 4177 and 4177L – both criminal DUI provisions. Second, section 2750, quoted by Flonnory (Op. Brf. 18-19), specifically addresses admissibility of chemical test results at "trial," as distinguished from the administrative proceeding, which the General Assembly referred to as a "hearing."[28] Third, Flonnory's claim that a "refusal is only significant in future administrative DMV proceedings" (Op. Brf. 21) is directly contradicted by section

[24] *Seth v. State*, 592 A.2d 436 (Del. 1991); *McCann v. State*, 588 A.2d 1100, 1101 (Del. 1990).
[25] 459 U.S. 553 (1983).
[26] *McNeely*, 133 S. Ct. at 1566.
[27] 21 *Del. C.* § 2742(a).
[28] *Compare* 21 *Del. C.* § 2742 *with* 21 *Del. C.* § 2750.

2749, which provides that such refusal is admissible as evidence in a DUI trial.[29] Thus, Delaware's Implied Consent law is not merely a creature of administrative law, and the consent provided by a driver at the time of driving is consent that satisfies the exception to the warrant requirement.

Flonnory contends that section 2750's reference to admission of test results "according to the normal rules of search and seizure law" precludes implied consent provided pursuant to section 2740 from triggering the consent exception. This argument fails to recognize the State's interest in regulating its roadways and fails to acknowledge an individual's ability to waive certain constitutional rights to avail himself of a government-provided privilege. As this Court previously noted, the purpose of section 2750 was to "eliminate any defense to the admissibility of chemical tests based on a failure to inform the accused of the implied consent law where Fourth Amendment concerns are not implicated."[30] Fourth Amendment concerns are not implicated where, as here, a driver has not withdrawn the consent to chemical testing that he constructively gave when he drove in Delaware.

Moreover, Flonnory's argument ignores the fact that implied consent laws are completely consistent with the Fourth Amendment. If they were not, it would make no sense for courts to cite to them favorably. Moreover, driving is a highly regulated activity. Such other highly regulated activities, such as water travel and

[29] 21 *Del. C.* § 2749.
[30] *Seth*, 592 A.2d at 443-44.

border crossings, have been found by courts to have specifically defined criteria for specific kinds of searches. Applying specific search criteria to searches related to these activities is wholly consistent with a similar, inherently dangerous, activity – driving. Indeed, in creating the automobile exception, courts have noted that driving is both highly mobile and highly regulated.[31] The framework provided by implied consent laws like Delaware's is no different.

Where, as here, there is no evidence that a driver has withdrawn his consent implied pursuant to 21 *Del. C.* § 2740, *McNeely* does not alter the conclusion that Delaware's implied consent law fits within the constitutional consent exception. In *McNeely*, the United States Supreme Court held that the natural dissipation of alcohol in the bloodstream, in and of itself, does not constitute an exigency which justifies conducting a blood test without a warrant.[32] The Court explicitly limited its holding to the exigency exception; no other exception was considered.[33] Indeed, the Court granted certiorari to address the question: "Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in

[31] See *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *California v. Carney*, 471 U.S. 386, 392 (1985).
[32] *McNeely*, 133 S. Ct. at 1568.
[33] *Id.* (stating "having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision we affirm its judgment").

the bloodstream." Therefore, it is not unusual that the issue presented here was not addressed during oral argument. (Op. Brf. 21).

Moreover, with respect to the issue of consent, the facts in the instant case are clearly distinguishable from those in *McNeely*. In *McNeely*, the driver repeatedly refused any form of alcohol testing, even after having a standardized implied consent form read to him.[34] As such, his active and persistent refusal served to signal his withdrawal of his consent, and would have subjected him to Missouri's associated refusal penalties. In the instant case, however, Cpl. Pietlock described the defendant's conduct as "talkative/cooperative." The MVR video played at the suppression hearing showed Flonnory to be pleasant and conversational, although somewhat discombobulated. Flonnory agreed to perform all of the field sobriety tests that he was asked to complete. Indeed, when Cpl. Pietlock asked him to perform the PBT, Flonnory asked several times whether he had to that the test, to which Cpl. Pietlock twice advised Flonnory that he did not have to take *any* test. Nonetheless, Flonnory agreed to take the PBT. Even at the time of the blood draw, Flonnory stated to the phlebotomist, "that's a good vein, don't miss it." In stark contrast to *McNeely*, nothing in the record suggests that Flonnory withdrew his implied consent.

[34] *Id.* at 1557.

Indeed, the record facts here would be sufficient to pass a voluntary consent analysis independent of Delaware's Implied Consent law. To be sure, "[c]onsent may be express or implied, but this waiver of Fourth Amendment rights need not be knowing and intelligent."[35] When assessing voluntariness, courts look to 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 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.[36]

Here, Flonnory was told twice by Cpl. Pietlock that he did not have to perform any of the requested tests. Yet, with this knowledge, the knowledge acquired from two prior DUI arrests, and the knowledge that his PBT result was twice the legal limit, Flonnory chose to allow officers to obtain a sample of his blood. In fact, he assisted by identifying a "good" vein. This unrequested assistance was similar to his unprompted offers at the scene of the traffic stop to allow the police to search his car, trunk, pockets, phone, and "everything." Additionally, Flonnory was a 55-year-old high school graduate who was capable of

[35] *McVaugh v. State*, 2014 WL 1117722, at *2 (Del. Mar. 19, 2014) (quoting *Cooke*, 977 A.2d at 855 (citing *Schneckloth*, 412 U.S. at 241)).
[36] *Cooke*, 977 A.2d at 855 (citing *Schneckloth*, 412 U.S. at 226).

understanding and engaging with Cpl. Pietlock. He was, as noted above, incredibly cooperative with the officer throughout the interactions. Finally, Flonnory's interaction with Cpl. Pietlock was brief and amicable. Thus, Flonnory's consent would satisfy an independent voluntariness analysis.

However, the fact that this case would satisfy a voluntary consent analysis independent of Delaware's Implied Consent law does not mean that this Court should follow the Arizona Supreme Court's decision in *Butler*.[37] As Superior Court correctly noted, the Arizona Supreme Court's conclusion is based on the erroneous premise that *McNeely* held "that a compelled blood draw taken pursuant to Missouri's implied consent law is subject to the Fourth Amendment's restrictions on warrantless searches."[38] Thus, the Arizona Supreme Court incorrectly believed that its conclusion was dictated by *McNeely*. However, Superior Court correctly noted that *McNeely* did not "squarely address[] the relationship between statutory implied consent and the consent exception.[39] Additionally, the Arizona court's conclusion was likely shaped by the fact that Arizona's implied consent law is different than Delaware's. The Arizona implied consent law statutorily requires express consent to be requested (and given) prior

[37] *State v. Butler*, 302 P.3d 609 (Ariz. 2013).
[38] *Flonnory*, 2013 WL 4567874, at *4 (quoting *Butler*, 302 P.3d 609, 2013 WL 2353802, at * 3).
[39] *Id.*

to administering the test.[40] By contrast, Delaware's implied consent law does not require express consent after driving.[41] Because Arizona's statutory scheme requires express consent after driving, it makes some sense to apply a constitutional voluntariness test to that consent. In Delaware, however, where express consent after driving is not statutorily required, there is no reason to perform a constitutional voluntariness test post-driving unless there is some evidence that the driver is withdrawing his implied consent. Here, there is no evidence that Flonnory withdrew his implied consent post-driving.

This Court's decision in *Higgins*[42] and Superior Court's decisions in *Jones*[43] and *Predoux* are inapposite.[44] None of the decisions discussed whether consent, implied pursuant to 21 *Del. C.* § 2740, satisfies the consent exception. Instead, *Higgins* focused on actual consent, and *Jones* and *Predeoux* focused on the exigent circumstance exception. Therefore, they are of no assistance to the issue presently before the Court.

Consequently, Superior Court did not err in denying Flonnory's motion to suppress.

---

[40] *Id.* at 613 (citing *Carrillo v. Houser*, 232 P.3d 1245 (Ariz. 2010) and A.R.S. § 28–1321(A) & (B)).
[41] 21 *Del. C.* § 2740 & 2742.
[42] *Higgins v. State*, 2014 WL 1323387 (Del. Apr. 1, 2014) (cited at Op. Brf. 22, 25, 27).
[43] *State v. Jones*, 2013 WL 5496786 (Del. Super. Ct. Sept. 9, 2013) (cited at Op. Brf. 3).
[44] *State v. Predeoux*, 2013 WL 5913393 (Del. Super. Ct. Nov. 04, 2013) (cited at Op. Brf. 3 and included at A21-27).

## CONCLUSION

For the foregoing reasons, the judgment of Superior Court should be affirmed.

**/s/Karen V. Sullivan**
Karen V. Sullivan (No. 3872)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Dated: July 14, 2014

## CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on July 14, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

Patrick J. Collins, Esq.
Albert J. Roop, V, Esq.
Collins & Roop
8 East 13th Street
Wilmington, DE 19801

**/s/ Karen V. Sullivan**
Karen V. Sullivan (No. 3872)
Deputy Attorney General