IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDDIE FLONNORY,	)	
	)	
Defendant Below - Appellant,	)	No. 156, 2014
	)	
v.	)	Court Below --- Superior Court of the State of Delaware in and for New Castle County ID No. 1209005937
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below - Appellee.	)	

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

APPELLANT'S OPENING BRIEF

COLLINS & ROOP

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
302.655.4600

and

Albert J. Roop, V, ID No. 5655
8 East 13th Street
Wilmington, DE 19801
302.655.4600

Attorneys for Appellant

Dated: June 9, 2014

TABLE OF CONTENTS

EXHIBITS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Other

NATURE OF PROCEEDINGS

Corporal Pietlock of the Delaware State Police arrested Freddie Flonnory on September 8, 2012 for Driving While Under the Influence of Alcohol or With a Prohibited Alcohol Content and Failure to Use a Turn Signal.[1] The Grand Jury subsequently indicted him on the same charges on October 22, 2012.[2]

Mr. Flonnory's Motion to Suppress.

On December 28, 2012, Mr. Flonnory moved to suppress blood evidence drawn from his body following his arrest. The trial court held a suppression hearing on January 18, 2013 but reserved its decision until the United States Supreme Court decided *Missouri v. McNeely*.[3] Following the *McNeely* Court's holding, the parties submitted supplemental memoranda discussing the effect, if any, *McNeely* had on the admissibility of the blood drawn in this case.[4]

On June 12, 2013, the trial court denied Mr. Flonnory's motion, holding that nothing in the Supreme Court's holding in *McNeely* altered the admissibility of the

---

[1] A1; A9-10. The State entered a *nolle prosequi* on the Failure to Use Turn Signal charge prior to trial. A7.

[2] A1.

[3] 133 S.Ct. 1552 (2013). The Court in *McNeely* revisited whether a non-consensual warrantless blood draw was *per se* reasonable under the Fourth Amendment to the United States Constitution.

[4] A12-20.

blood evidence in this case under Delaware's Implied Consent statute, 21 *Del. C.* § 2740(a).[5]

Mr. Flonnory's Motion for Reargument, or in the alternative, Motion to Certify Questions of Law to the Delaware Supreme Court.

Mr. Flonnory filed a Motion for Reargument on June 17, 2013, arguing that the trial court misapprehended the law with respect to Delaware's Implied Consent statute when read with 21 *Del. C.* § 2750(a).[6] In other words, by operation of *McNeely*, normal rules of search and seizure required excluding the results of Mr. Flonnory's blood test at trial. The trial court denied Mr. Flonnory's Motion. Mr. Flonnory styled his motion as a Motion for Reargument, or in the alternative, a Motion to Certify Questions of Law to the Delaware Supreme Court. The Court denied Mr. Flonnory's Motion on July 22, 2013.

---

[5] Exhibit A at 14-17. The trial court also held that based on the facts presented, and in keeping with *Missouri v. McNeely* and *Schmerber v. State*, "no special facts were present that would warrant the application of the exigent circumstances exception." Exhibit A at 14.

[6] § 2750. Admissibility in evidence of results of chemical test.

(a) Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol, a drug or drugs, with respect to any chemical test taken by or at the request of the State, the court shall admit the results of a chemical test of the person's breath, blood or urine ***according to normal rules of search and seizure law.*** The informing or failure to inform the accused concerning the implied consent law shall not affect the admissibility of such results in any case, including a prosecution for a violation of § 4177 of this title. The informing of an accused concerning the implied consent law shall only have application and be relevant at a hearing concerning revocation of the driver's license of said person for a violation of the implied consent law. Nothing contained in this section shall be deemed to preclude the admissibility of such evidence when such evidence would otherwise be admissible under the law relative to search and seizure law such as when such evidence has been obtained by valid consent or other means making the obtaining of the evidence legal under the Fourth Amendment. (Emphasis added.)

On September 17, 2013, following the Superior Court's decision in *State v. William Jones*,[7] which implicitly rejected the *Flonnory* holding and excluded the blood results, Mr. Flonnory filed a Renewed Motion for Reargument, or in the alternative, a Motion to Certify Questions of Law to the Delaware Supreme Court.[8] That same day, the trial court granted Mr. Flonnory's motion and certified questions of law to the Delaware Supreme Court.[9] However, just three days later, the trial court reversed its decision and denied Mr. Flonnory's motion.[10]

Mr. Flonnory moved to reargue the trial court's decision regarding its authority to certify questions to the Delaware Supreme Court on September 25, 2013.[11] The trial court denied Mr. Flonnory's motion yet again on September 27, 2013.[12]

---

[7] 2013 WL 5496786 (Del. Super.). The Superior Court also implicitly declined to follow the trial court's holding in *Flonnory* in *State v. Predeoux*, A21-27.

[8] A5.

[9] A5-6. *See also* Trial Court's Order granting the motion at A28-32. When addressing the State's opposition to Mr. Flonnory's motion, the trial court acknowledged that, "[i]t appears to the Court that my decision might be an outlier, that it seems like the weight is going against me. So that was my reason for really strongly considering certification." A35.

[10] A5-6.

[11] A6.

[12] A6-7.

Mr. Flonnory's Trial.

The results of the blood test were admitted into evidence at trial. At the conclusion of the two-day trial, the jury returned a not guilty verdict as to the State's "impairment" theory,[13] and found Mr. Flonnory guilty of operating a motor vehicle above the legal limit of .08.[14]

---

[13] A91.

[14] *Id.*

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD THAT DELAWARE'S IMPLIED CONSENT STATUTE TRIGGERED THE CONSENT EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

Although the parties initially focused their attention on the exigency aspect of the United States Supreme Court's decision in *Missouri v. McNeely*, the trial court quickly dispensed with that argument, noting that based on the totality of the circumstances, "no special facts were present that would warrant the application of the exigent circumstances exception."[15] Even so, the trial court denied Mr. Flonnory's Motion to Suppress by relying on 21 *Del. C.* § 2740(a) for the proposition that "[a]ny person who drives, operates or has in actual physical control a vehicle, an off-highway vehicle, or a moped within this State *shall be deemed to have given consent* ... to a chemical test or tests of that person's blood ...."[16]

The interplay of Fourth Amendment rights and statutory provisions related to DUI investigations do not automatically eliminate the warrant requirement.

The trial court's holding misapprehended basic constitutional principles. It failed to consider that notwithstanding the implied consent statute, DUI testing

---

[15] Exhibit A at 14.

[16] *Id.* at 14-15 (citing 21 *Del. C.* § 2740(a).

constitutes a search for Fourth Amendment purposes,[17] and therefore any tests are subject to Fourth Amendment protections and analysis. In other words, Contrary to the trial court's opinion, "implied consent" is not synonymous with "consent" in the context of a Fourth Amendment or Article I, § 6 analysis.

Delaware's implied consent statute relate strictly to the administration of licensure.

Moreover, the trial court failed to give sufficient weight to the combined effect of 21 *Del. C.* § 2750(a) and 21 *Del. C.* § 2740(a), and ignored search and seizure principles when interpreting the foregoing sections. Although a person driving a motor vehicle in Delaware consents to chemical testing to "determin[e] the presence of alcohol or a drug or drugs"[18] in their system, the results of the test are only admissible at trial insofar as it complies with the "normal rules of search and seizure law."[19] After *McNeely*, the search and seizure law in this area is clear – absent a valid exception, a search warrant is required to draw blood in a DUI investigation.

---

[17] *See Lefebrve v. State*, 19 A.3d 287, 292 (Del. 2011).

[18] 11 *Del. C.* § 2740.

[19] 11 *Del. C.* § 2750.

The trial court committed reversible error by holding that Mr. Flonnory's "statutory implied consent exempted the blood draw from the warrant requirement."[20]

II. MR. FLONNORY DID NOT VOLUNTARILY CONSENT TO A BLOOD DRAW.

Apart from the fact that the trial court never subjected Mr. Flonnory's "consent" to an analysis independent of its "implied consent" holding, under the totality of the circumstances, Mr. Flonnory did not voluntarily consent to the blood draw conducted in this case. Based on the Corporal Pietlock's assertion that Mr. Flonnory did not have a choice to refuse the blood draw, and his accompanying failure to inform Mr. Flonnory of this right, the State cannot demonstrate voluntary consent on this record.

[20] Exhibit A at 16.

STATEMENT OF FACTS

On September 8, 2012, Corporal Pietlock of the Delaware State Police was patrolling in the City of Wilmington as a part of a task force designed to assist the Wilmington Police Department. While in the area of Bowers Street, Corporal Pietlock followed Mr. Flonnory's car saw him fail to signal twice.[21] As a result, Trooper Pietlock decided to stop Mr. Flonnory.

Corporal Pietlock approached Mr. Flonnory's car and the two began conversing. After a series of questions, Corporal Pietlock asked Mr. Flonnory to exit his car.[22] Corporal Pietlock then had Mr. Flonnory perform field sobriety tests which, according to Corporal Pietlock, Mr. Flonnory failed.[23] Corporal Pietlock also administered a portable breath test at 10:02 p.m.[24] After these tests, Corporal Pietlock arrested Mr. Flonnory for driving under the influence.

Corporal Pietlock transported Mr. Flonnory to Delaware State Police Troop 1 and contacted Patrick Moore of Omega Medical Center to draw Mr. Flonnory's blood.[25] Mr. Moore completed the draw at 11:36 p.m., approximately an hour and

---

[21] A49-50..

[22] A50.

[23] A50-54.

[24] A98-99. The results of the portable breath test were not admitted at trial.

[25] A54.

a half after Mr. Flonnory's arrest.[26] Later, Julie Wiley of the Delaware State Police Crime Lab tested Mr. Flonnory's blood. Her analysis yielded a result of 0.14 grams of alcohol per one hundred milliliters of blood.[27]

At no point in time did Corporal Pietlock attempt to secure a warrant to draw Mr. Flonnory's blood for the purpose of obtaining evidence in his DUI investigation.[28]

Moreover, Corporal Pietlock did not administer a breath test at Troop 1 nor did he ask for Mr. Flonnory's permission to draw his blood. Corporal Pietlock testified during the January 18, 2013 suppression hearing:

Corporal Pietlock:	Initially, I was -- he was advised that blood was going to be drawn from him due to the two prior convictions for DUI.
Mr. Hendee:	Okay. So you didn't ask permission? In other words, it's your testimony --
Corporal Pietlock:	Correct. I mean, that's -- that was my decision to do the test.[29]

When asked why he chose not to administer an intoxilyzer breath test, Corporal Pietlock testified:

---

[26] *Id.*

[27] A67.

[28] A104-105.

[29] A99.

Corporal Pietlock: Due to the fact that Mr. Flonnory had two prior convictions for DUI, it's a -- it's a more exact test. I went with the blood draw.

Mr. Roop: Is that a department policy or is that your policy?

Corporal Pietlock: No, it's not -- I wouldn't say -- it's not a DSP policy, just a choice.

Mr. Roop: Okay. And you never gave Mr. Flonnory the opportunity to blow into the intoxilyzer?

Corporal Pietlock: No.

Mr. Roop: So he was not aware of the fact that he had that option?

Corporal Pietlock: He doesn't have the option.[30]

With that, Omega Services took a sample of Mr. Flonnory's blood.

[30] A105.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD THAT DELAWARE'S IMPLIED CONSENT STATUTE TRIGGERED THE CONSENT EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

A. Question Presented:

Whether the trial court abused its discretion by relying on the Delaware implied consent statute when it denied Mr. Flonnory's motion to suppress blood evidence? Mr. Flonnory preserved this issue by way of his motion to suppress filed on December 28, 2012 and argued on January 18, 2013.[31] This issue was also addressed in supplemental briefing and subsequent motions for reargument.[32]

B. Scope of Review:

This Court reviews a trial court's decision to grant or deny a motion to suppress for an abuse of discretion.[33] Legal conclusions are examined *de novo* for errors in formulating or applying legal precepts.[34] Factual findings, on the other hand, are scrutinized for an abuse of discretion, focusing on "whether the trial judge abused his or her discretion in determining whether there was sufficient

---

[31] A2; A93-111; A112-122.

[32] A19; A123-135; A136-139.

[33] *State v. Abel*, 2012 WL 6055799, at *2 (Del.)(citing *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)(other citations omitted)).

[34] *Lopez-Vasquez*, 956 A.2d at 1285 (other citations omitted).

evidence to support the findings and whether those findings were clearly erroneous."[35]

C. Merits of the Argument:

The interplay of Fourth Amendment rights and statutory provisions related to DUI investigations do not automatically eliminate the warrant requirement.

The right to be free from unreasonable searches and seizures is guaranteed by two independent sources in Delaware: the Fourth Amendment to the United States Constitution[36] and Article I, Section 6 of the Delaware Constitution.[37] A warrantless search is only "reasonable" when it is accompanied by a recognized exception.[38] Moreover, the State bears the burden of proving the validity of a warrantless search and seizure.[39]

---

[35] *Id.*

[36] U.S. CONST. amend. IV provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." The Fourteenth Amendment makes the Fourth Amendment applicable to the States. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[37] *Jones v. State*, 745 A.2d 856, 860 (Del. 1999). Like the Fourth Amendment, Article I, § 6 of the Delaware Constitution guarantees the citizens of Delaware "shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures."

[38] *See e.g.*, *United States v. Robinson*, 414 U.S. 218, 224 (1973); *Williams v. State*, 962 A.2d 210, 216 (Del. 2008) (noting the warrantless search and seizure are presumed unreasonable unless an exception applies, such as investigatory stops, warrantless arrests, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consent searches, searches of vehicles, inventory searches, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.).

[39] *Hunter v. State*, 783 A.2d 558, 561 (Del. 2001) (other citation omitted).

In *McNeely*, the Court reaffirmed its holding in *Schmerber v. California*[40] regarding the constitutional implications of blood testing, noting that drawing blood from an individual in a criminal investigation constitutes a search for Fourth Amendment purposes.[41] The *McNeely* court grounded its finding in the fact that blood testing involves a "physical intrusion beneath [the] skin and into [a person's] veins to obtain a sample of his blood for use as evidence in a criminal investigation."[42] Given the constitutional protections citizens enjoy in their homes, it is no surprise that "[s]uch an invason of bodily integrity implicates an individual's most personal and deep-rooted expectations of privacy."[43] Indeed, the Court stressed the importance of obtaining authorization from a neutral and detached magistrate prior to law enforcement "invad[ing] another's body in search of evidence of guilt."[44]

---

[40] 384 U.S. 757 (1966).

[41] *McNeely*, 133. S.Ct. at 1558.

[42] *Id.*

[43] *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 760 (1985); *see also Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 609, 616 (1989)(internal quotation marks omitted))); *Schmerber*, 384 U.S. at 770 ("absent an emergency, no less could be required where intrusions into the human body are concerned, even when the search was conducted following a lawful arrest.")(internal quotation marks omitted).

[44] *Id.*

Of course, it is well settled that law enforcement can bypass a warrant where certain well-delineated exceptions exist,[45] for example, consent. However, for consent to be valid, it must be voluntary.[46]

The Delaware Implied Consent Statute cannot abrogate Fourth Amendment rights.

The trial court in this case held that the Delaware Implied Consent Statute, 21 *Del. C.* § 2740(a), acted as an exception to the Fourth Amendment's warrant requirement. In other words, that chemical tests administered by statutory authority are not subject to Fourth Amendment protections, or even a voluntariness analysis. The trial court's holding, which relied on *Seth v. State*,[47] *State v. Cardona*,[48] and *State v. Crespo*,[49] does not comport with accepted constitutional principles.

In *Seth*, this Court held that the results of an intoxilyzer were admissible because the defendant took the test voluntarily and Fourth Amendment concerns were not implicated.[50] After the Supreme Court's holding in *McNeely*, it is without

---

[45] *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

[46] *Liu v. State*, 628 A.2d 1376, 1282 (Del. 1993)(citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973)).

[47] 592 A.2d 436 (Del. 1991).

[48] 2008 WL 5206771 (Del. Super).

[49] 2009 WL 1037732 (Del. Super).

[50] *Seth*, 592 A.2d at 443-445.

question that a blood draw is far more invasive than a breath test.[51] Moreover, the *Seth* court premised its holding on the fact that there were no Fourth Amendment concerns. The record in *Seth* demonstrated that although the defendant initially refused the test, he eventually relented and took it voluntarily.[52] As such, actual valid consent acted as an exception to the warrant requirement.

The *Seth* court also misstated the law with respect to blood draws and Fourth Amendment considerations:

> The net effect of the amendments [to Title 21, Chapter 27] is an officer's ability to require a suspect to submit to testing, without that person's consent or a reading of the implied consent law, so long as the officer has probable cause and the degree of force used is not excessive under the Fourth Amendment."[53]

Probable cause alone or the degree of force have never sufficed as an exception to obtaining a search warrant. As Justice Ginsburg pointed out in *McNeely*, "probable cause is not enough. If you have probable cause, then you can get a warrant … Probable cause is surely not enough. Then we'd never need a warrant when there's probable cause."[54]

---

[51] Justice Sotomayor pointed out this very fact during oral argument in *McNeely*. A155. Justice Scalia later agreed, stating, "It's a different case and what is reasonable for sticking a needle in your arm is not necessarily reasonable for asking you to blow up a balloon (referring to breathylyzers). A188.

[52] *Seth*, 592 A.2d at 438.

[53] *Id.* at 444 (other citations omitted).

[54] A159.

In *State v. Cardona*, the Court held that "Delaware's Implied Consent Statute provides the applicable exception to the warrant requirement" in denying the defendant's motion to suppress the results of a blood draw.[55] Although *Cardona* is a thorough and well-reasoned analysis, its findings have been superceded by the precepts announced in *McNeely*. Therefore, *Cardona* should not be followed.[56]

Following the *McNeely* decision, state courts have begun to address its effect on implied consent laws. Indeed, Mr. McNeely was read an implied consent form,[57] he refused, and the Court's holding remained the same.

The Arizona Supreme Court discussed implied consent immediately following the *McNeely* decision in *State v. Butler*.[58] In *Butler*, a school monitor suspected that a student had smoked marijuana before driving to school. School officials contacted the sheriff's office. A deputy sheriff arrived and read the student his *Miranda* warnings, and the student admitted that he had driven his car after smoking marijuana. Before drawing the student's blood, the deputy sheriff

---

[55] *Cardona*, 2008 WL 5206771, at *5.

[56] The Court in *State v. Crespo* conducted the same analysis as it did in *Cardona*, 2009 WL 1037732 (Del. Super.).

[57] *McNeely*, 133 S.Ct. at 1557.

[58] 2013 WL 2353802 (Ariz. May 30, 2013).

read the student an "implied consent admonition" form twice; once verbatim and once in "plain English."[59] The student agreed, both verbally and in writing, to have his blood drawn.

The State later charged the student with DUI. He moved to suppress the results, arguing that his consent was not voluntary.[60] Arizona's juvenile court granted the motion to suppress holding that the student's consent had not been voluntary under the totality of the circumstances.[61]

On appeal, the State argued that every Arizona driver gives "implied consent" and that tests administered under its statute are not subject to a voluntariness analysis.[62] The Arizona Supreme Court disagreed, and in doing so stated, "[c]ontrary to the State's argument, a compelled blood draw, even when

---

[59] *Id.* at *4. The form read as follows: Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance as chosen by the law enforcement officer to determine alcohol concentration or drug content. The law enforcement officer may require you to submit to two or more tests. You are required to successfully complete each of the tests.

If the test results are not available … or indicate any drug defined in *ARS 13-3401* or its metabolite, without a valid prescription, your Arizona driving privilege will be suspended for not less than 90 consecutive days.

If you refuse to submit or do not successfully complete the specified tests, your Arizona Driving privilege will be suspended for 12 months, or two years if there is a prior implied consent refusal, within the last 84 months, on your record. You are, therefore, required to submit to the specified tests. *Id.* at *4-5.

[60] *Id.* at *5. The student also argued that his age precluded him from voluntarily consenting.

[61] *Id.*

[62] *Id.* at *7.

administered pursuant to [the implied consent statute], is a search subject to the Fourth Amendment's constraints."[63]

Delaware's implied consent statute relates strictly to the administration of licensure.

The Delaware implied consent statute and its related sections can be found under Title 21, Chapter 27, Subchapter III, which is entitled "Suspension and Revocation of License for Refusal to Submit to a Chemical Test." The statutory provisions in this subchapter address the testing procedures the police are required to follow in a DUI investigation, and the administrative consequences a motorist can suffer as the result of refusing to submit to a blood test.

Delaware law provides that any person driving, operating, or controlling motor vehicle consents to chemical testing to determine the presence of alcohol or drugs in their blood.[64] However, this section does not control the admissibility of chemical test results at trial. Indeed, 11 *Del. C.* § 2750 specifically provides:

> § 2750. Admissibility in evidence of results of chemical test.
>
> (a) Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol, a drug or drugs, with respect to any chemical test taken by or at the request of the State, the court shall admit the results of a chemical test of the person's breath, blood or urine ***according to normal rules of search and seizure law.*** The informing or failure to

[63] *Id.* (citing *McNeely*, 133 S.Ct. at 1556)(holding that a compelled blood draw taken pursuant to Missouri's implied consent law is subject to the Fourth Amendment's restrictions on warrantless searches).

[64] *See* 11 *Del. C.* § 2740.

> inform the accused concerning the implied consent law shall not affect the admissibility of such results in any case, including a prosecution for a violation of § 4177 of this title. The informing of an accused concerning the implied consent law shall only have application and be relevant at a hearing concerning revocation of the driver's license of said person for a violation of the implied consent law. Nothing contained in this section shall be deemed to preclude the admissibility of such evidence when such evidence would otherwise be admissible under the law relative to search and seizure law such as when such evidence has been obtained by valid consent or other means making the obtaining of the evidence legal under the Fourth Amendment. (Emphasis added.)

As such, by operation of 11 *Del. C.* § 2750, *McNeely* specifically negates the trial court's finding that the blood results in this case were admissible. Further, Mr. Flonnory's statutory implied consent does *not* exempt the blood draw in this case from a Fourth Amendment analysis for voluntariness.

The sole purpose of the implied consent statute is to address the administrative aspect of DUI investigations and/or convictions. The statute simply does not contemplate depriving a person of his or her constitutional rights at trial. If the General Assembly intended this result, the statute would explicitly provide for it. Instead, the plain and unambiguous language is contrary to that notion. Further, the language in 21 *Del. C.* § 2750 supports the idea that the General Assembly surely would not enact a law, disguised as an administrative procedure, to forgo constitutional protections and deprive citizens of trial rights, which have

existed as long as Delaware has existed.[65] The fundamental protections provided for by the United States Constitution and the Delaware Constitution cannot be swept aside by statute in any event.[66]

Further evincing the General Assembly's intent are the sections that accompany 21 *Del. C.* §§ 2740(a) and 2750(a). Take § 2741(a) for example. Under this section, where an officer has probable cause that a driver is under the influence of alcohol, the person may be informed that if testing is refused, his or her driver's license and privileges shall be revoked for a period of at least one year. This sanction is significant in that it is limited to administrative penalties only. A driver cannot be subject to fines, probation, imprisonment, or any other criminal

---

[65] This Court has held that Delaware courts may not simply hold that Article 1, §6 is in "'lock-step' with the United States Supreme Court's construction of the federal Bill of Rights. *Dorsey v. State*, 761 A.2d 814 (Del. 2000)(citing Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law,* 15 Hastings Const.L.Q., 429, 437–38 (1988)("Under the lockstep formulation, changes or clarification of federal law by the United States Supreme Court lead to parallel changes in state constitutional law.")). Under the notion of duel sovereignty, the Delaware and federal Constitutions are not "mirror image[s]." *Id.* at 814. The history of Delaware search and seizure law exemplifies the concept of dual sovereignty. Delaware first adopted search and seizure law in its 1776 Declaration of Rights and Fundamental Rules; fifteen years prior to the federal Bill of Rights. *Id.* at 815-816. These search and seizure protections were later refined and eventually adopted as Article 1, §6 of Delaware's Constitution. *State v. Heath*, 929 A.2d 390, 864 (Del. Super. 2006). In several important respects, the Delaware Supreme Court has held that the state's Constitution provides greater protections than its federal counterpart. For example, it has held that "the Delaware Constitution provides greater rights…in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury." *Jones*, 745 A.2d 856, 863 (Del.1999)(citing *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989);*Van Arsdall v. State*, 524 A.2d 3, 6–7 (Del. 1987); *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990); *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991))).

[66] *See Ybarra v. Illinois*, 444 U.S. 85, 96 n.11 (1979)(legislature cannot abrogate Fourth Amendment right to be free from unreasonable searches and seizures)).

penalty for refusing a test. This makes sense given the fact that this section, like §§2740 and 2750, is in the administrative section of Title 21.

Next, pursuant to § 2742(a), a person who refuses chemical testing after being informed of the revocation penalty shall not be tested. The officer is, however, obligated to report the refusal to the Delaware Division of Motor Vehicle – the administrative body responsible for drivers in the State of Delaware. The refusal is not reported to the Delaware Department of Justice, a judge, or any court. Rather, the refusal is only significant in future administrative DMV proceedings.

As the foregoing establishes, statutory implied consent does not rise to the level of constitutional consent under a Fourth Amendment analysis. For instance, despite the existence of an implied consent statute in Missouri, the State did not argue in *McNeely* that implied consent was valid consent.[67] In fact, it was not even addressed in oral argument.[68] And although the State of Arizona explicitly advanced this argument in *Butler*, the Arizona Supreme Court rejected it outright, and conducted a separate consent analysis.[69]

---

[67] *See McNeely* generally. The Court did, however, discuss the administrative remedies at the State's disposal in the event a motorist does not comply with implied consent provisions. Notably, in the midst of discussing implied consent, the Court did not hold that implied consent acts as an exception to the warrant requirement.

[68] *See* A150-221.

[69] 2013 WL 2353802 at *7. Despite the existence of an implied consent statute in Minnesota, the Minnesota Supreme Court also declined to rely on implied consent in finding a warrant was not required, and instead analyzed the defendant's consent separately. *State v. Brooks*, 2013 WL

Similar to Missouri, Arizona, Minnesota, and Kansas, Delaware's Implied Consent Statute only exists to address the administrative and licensing aspects of DUI cases. Indeed, when presented with a question of consent post-*McNeely* in *Higgins v. State*,[70] this Court did not rely upon the Delaware Implied Consent statute to justify a warrantless blood draw; rather, this Court, as the court below did, conducted a consent analysis.[71]

The trial court's holding relied on outdated analyses and failed to consider the nature of the Delaware Implied Consent Statute post-*McNeely*. Most importantly, the trial court misinterpreted the relationship between 21 *Del. C.* § 2740 and § 2750. In order to admit the results of the blood draw in this case, the blood draw must comply with the "normal rules of search and seizure law."[72] As the foregoing establishes, implied consent does not meet the criteria for

---

5731811, at *12-15 (Minn.)("As noted above, whether Brooks consented is assessed by examining all of the relevant circumstances. This analysis requires that we consider the totality of the circumstances ....")). In *State v. Declerck*, the Court of Appeals of Kansas, while acknowledging the governmental interest in having an implied consent statute, noted that that none of the cases relied upon in the State's brief established that "implied consent ... constitutes consent under the *Fourth Amendment*." 317 P.3d 794, 803 (Kan. App. 2014). The *Declerk* court also stated that "[u]ltimately ... the State presents us with no cases which have held consent is valid for *Fourth Amendment* purposes based on the implied consent statute alone.

[70] 2014 WL 1323387 (Del.).

[71] *Id.* at *2-3.

[72] 21 *Del. C.* § 2750(a).

constitutionally sound consent worthy of relieving the police of their obligation to obtain a search warrant absent an exception.

II. MR. FLONNORY DID NOT VOLUNTARILY CONSENT TO A BLOOD DRAW.

A. Question Presented:

Whether the State established by a preponderance of the evidence that Mr. Flonnory consented to a blood draw? Mr. Flonnory preserved this issue by way of his June 3, 2013 supplemental memorandum[73] to his motion to suppress filed on December 29, 2012 and argued on January 18, 2013.[74] This issue was also addressed in subsequent motions for reargument.[75]

B. Scope of Review:

This Court reviews a trial court's decision to grant or deny a motion to suppress for an abuse of discretion.[76] Legal conclusions are examined *de novo* for errors in formulating or applying legal precepts.[77] Factual findings, on the other hand, are scrutinized for an abuse of discretion, focusing on "whether the trial judge abused his or her discretion in determining whether there was sufficient

---

[73] A19-20.

[74] A2; A93-111; A112-122.

[75] A19; A123-135; A136-139.

[76] *State v. Abel*, 2012 WL 6055799, at *2 (Del.)(citing *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)(other citations omitted)).

[77] *Lopez-Vasquez*, 956 A.2d at 1285 (other citations omitted).

evidence to support the findings and whether those findings were clearly erroneous."[78]

C. Merits of the Argument:

The Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution protect against "unreasonable searches and seizures."[79] Drawing blood is a search for constitutional purposes.[80] Absent an exception, such as voluntary consent,[81] warrantless searches are *per se* unreasonable.[82] While consent must be free of coercion or a threat of force, "consent need not be knowing and intelligent."[83]

Evaluating consent in the context of a warrantless search requires determining whether "the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."[84] The State bears the burden of

---

[78] *Id.*

[79] U.S. CONST. amend. IV. Article I, § 6 of the Delaware Constitution guarantees the citizens of Delaware "shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures."

[80] *Higgins v. State*, 2014 WL 1323387, at*2 n. 11 (Del.)(citing *McNeely*, 133 S.Ct. 1552 (2013).

[81] *Higgins*, 2014 WL. 1323387, at *2 (citing *Cooke*, 977 A.2d at 855).

[82] *Id.* (other citations omitted).

[83] *Id.*

[84] *Liu*, 628 A.2d at 1382 (citing *Schneckloth*, 412 U.S. at 248).

establishing consent was voluntary.[85] The Court reviews the totality of the circumstances surrounding consent, including: "(1) knowledge of the constitutional right to refuse consent; (2) 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."[86] Consent cannot, however, be found where an individual simply acquiesces to a claim of lawful authority.[87]

In *Bumper v. North Carolina*, the police attempted to justify a warrantless search by relying on a home owner's "go ahead" statement after the police told her they had a warrant to search the house.[88] The *Bumper* court held that the owner's submission to authority did not constitute consent.[89] By announcing the authority to search a house, the police "announce[ ] … that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent."[90]

---

[85] *Schneckloth*, 412 U.S. at 233.

[86] *Cooke v. State*, 977 A.2d 803, 855 (Del. 2009)(citing *Schneckloth*, 412 U.S. at 226).

[87] *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

[88] *Id.* at 546.

[89] *Id.* at 548.

[90] *Id.* at 550.

This Court addressed voluntary consent in the aftermath of *McNeely* in *Higgins*.[91] There, Newark Police took Mr. Higgins to Christiana Hospital. Hospital staff indicated that it would only draw his blood if he signed a consent form. Mr. Higgins refused to sign. As a result, Newark Police requested that an Omega phlebotomist from Omega Medical Center report to the hospital. The officer "possibly" warned Higgins that if he refused the blood draw his license would be suspended for one year, and commented that Higgins "was lucky that he hadn't hit a kid that day."[92] According to the officer, Higgins then consented by saying, "fine, I'll give blood." The record reflected that Higgins also cooperated with the phlebotomist.

Voluntary consent was not obtained.

Corporal Pietlock arrested Mr. Flonnory and took him to Delaware State Police Troop 1. Upon arrival, the desk sergeant called Omega Medical Services to have a phlebotomist respond to Troop 1.[93] Pat Moore arrived and used a blood test kit provided by Corporal Pietlock to draw a sample of Mr. Flonnory's blood.[94]

---

[91] 2014 WL 1323387 (Del.).

[92] *Id.* at *1.

[93] A55.

[94] *Id.*

At no point did Corporal Pietlock advise Mr. Flonnory of his right to refuse the blood test or of his right to opt for a less invasive test, such as the intoxilyzer. It probably would not have mattered anyway, because according to Corporal Pietlock, Mr. Flonnory did not have a choice at that point.[95] Without a choice, there cannot be consent.

Mr. Flonnory effectively acquiesced to Corporal Pietlock's power under the totality of the circumstances. He was in a police station late at night with a police officer who did not advise him of any rights related to chemical testing. Under these circumstances, it is reasonable to conclude that Mr. Flonnory felt that he had no right to refuse the blood draw. Indeed, Mr. Flonnory's level of cooperation is analogous to the "go ahead" statement in *Bumper*.

Mr. Flonnory did not know that he had a constitutional right to refuse.

Mr. Flonnory had no idea he had the constitutional right to refuse to consent to the blood draw in this case. Corporal Pietlock never informed Mr. Flonnory of any rights or furnished him with any information related to the blood draw. It probably would not have mattered anyway, because according to Corporal Pietlock, Mr. Flonnory did not have a choice at that point.[96] Without a choice, there cannot be consent. Mr. Flonnory effectively acquiesced to Corporal

---

[95] A105.

[96] *Id.*

Pietlock's power because he did not know any better. It is reasonable to conclude that a person in Mr. Flonnory's position, without the benefit knowing his rights, would feel like he had to do as requested of him. As such, Mr. Flonnory did not voluntarily consent to the blood draw.

CONCLUSION

For the foregoing reasons, Freddie Flonnory respectfully requests that this Court reverse the trial court's decision to deny Mr. Flonnory's motion to suppress and remand for a new trial.

COLLINS & ROOP

/s/ Patrick J. Collins
Patrick J. Coolins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
302.655.4600

and

/s/ Albert J. Roop
Albert J. Roop, V, ID No. 5655
8 East 13th Street
Wilmington, DE 19801
302.655.4600

Attorneys for Appellant

Dated: June 9, 2014