EFiled: Jul 29 2014 05:09PM EDT
Filing ID 55803685
Case Number 156,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

APPELLANT'S REPLY BRIEF

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Dated: July 29, 2014

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I. THE STATE'S ATTEMPT TO SIDESTEP THE FOURTH AMENDMENT BY STATUTE IS UNTENABLE AND SHOULD BE REJECTED BY THIS COURT.

In its Answering Brief, the State argues that "[c]onsent provided by a person pursuant to Delaware's Implied Consent law, 21 *Del. C.* §§2740-2750, is consent excusing the warrant requirement."[1] This argument neatly eludes a few key issues, but most importantly ignores the General Assembly's inability to circumvent the Fourth Amendment by statute. A statute cannot erase a voluntariness finding to bypass the warrant requirement under the Fourth Amendment to the United States Constitution or Article I, § 6 of the Delaware Constitution. The issue boils down to a pure question of separation of powers.

The State theorizes that "implied consent laws are completely consistent with the Fourth Amendment."[2] Delaware's Implied Consent law can only be deemed consistent with the Fourth Amendment because its plain language requires application of and compliance with the Fourth Amendment. The State's reading of the Delaware's implied consent statute bypasses that requirement and is therefore unconstitutional.

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[1] State's Answering Brief at 10.

[2] *Id*. at 13.

The gist of Delaware's Implied Consent law is that any driver stopped on suspicion of Driving Under the Influence is subject to chemical testing and the results of the chemical tests can be used to administratively revoke or suspend a driver's license. The General Assembly did not stop there, because it went on to specifically qualify the admission of the test results in criminal proceedings with a preexisting condition: that the evidence be admitted "according to normal rules of search and seizure."[3] In other words, the General Assembly expressly limited the scope of the test results by adding that language to 21 *Del. C.* § 2750(a). This Court has acknowledged that same sentiment.[4] If it is so clear that Delaware's Implied Consent law is consistent with the Fourth Amendment, why bother adding the language "according to normal rules of search and seizure[ ]"?

This language is clear and precise and demonstrates the General Assembly's intent to administratively regulate drivers with chemical tests. The General Assembly obviously envisioned a scenario where a driver may have his or her license suspended as the result of adverse chemical tests even though he may avoid criminal charges due to constitutional infirmities in the administration of the tests.

[3] 21 *Del. C.* § 2750(a).

[4] This Court, as the State acknowledges in its Answering Brief, has stated that 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.*" *Seth v. State*, 592 A.2d 436, 443-44 (Del. 1991); *see also* State's Answering Brief at 13.

By enacting 21 *Del. C.* §§ 2740-2750, catch-all legislative provisions, the General Assembly has effectuated means to keep drunk drivers off of the road. The provisions of 21 *Del. C.* §§ 2740-2750 do not, however, translate the administrative process into a constitutional blessing of chemical testing for Fourth Amendment purposes; hence the addition of 21 *Del. C.* § 2750(a).

Further, while implied consent in the context of chemical tests may be favorable in a "highly regulated" activity,[5] it does bypass the rights afforded to citizens under the Fourth Amendment and automatically make the results of the tests admissible at trial. In fact, the United States Supreme Court addressed the government's interest in regulating its roadways in *Missouri v. McNeely* when it stated:

> But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. To the extent that the State and its *amici* contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.[6]

[5] State's Answering Brief at 13-14.

[6] *Missouri v. McNeely*, 133 S.Ct. 1552, 1565-66 (2013).

The same should hold true with respect to Delaware's Implied Consent law, in that the State's interest in this area does not and should not outweigh a driver's constitutionally protected interest in being secure from an unreasonable search.

The State also contends that the burden rests on the driver to withdraw statutorily implied consent, and until that happens, Fourth Amendment concerns are not implicated.[7] Under the Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution, a citizen has a right to be free from an unreasonable searches and seizures. This right is self-executing and it would be impermissible to shift the burden to the citizen seeking to enjoy that right. Nothing in the United States Constitution, the Delaware Constitution, or any legal authority provides that the State may bypass the Fourth Amendment in the interest of regulating driving. Again, the importance of the language in 21 *Del. C.* § 2750(a) cannot be overstated.

The State has also urged this Court to ignore the Arizona Supreme Court's decision in *State v. Butler*.[8] Whether the State wants to accept it or not, chemical testing, or more specifically blood testing, for the purposes of a criminal

[7] State's Answering Brief at 13.

[8] 302 P.3d 609 (Ariz. 2013).

investigation constitutes a search under the Fourth Amendment.[9] The United States Supreme Court did not make a specific finding with respect to implied consent laws in *McNeely*. It did, however, discuss that a majority of States, notwithstanding the existence of implied consent laws, "either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal … or prohibit nonconsensual blood tests altogether."[10] It did this in the context of discussing the significance of a compelled blood draw and the impact it has on a citizen's privacy interests.[11] This statement seems to suggest that the United States Supreme Court would not approve of an automated finding of consent as the State claims the Delaware Implied Consent law achieves. It has expressly held that blood testing implicates a Fourth Amendment analysis, and thus, the Arizona Supreme Court's decision in *Butler* is persuasive.

Indeed, the State of Arizona argued the very same thing that the State of Delaware does here – tests administered under the implied consent state are not subject to a voluntariness analysis.[12] This theory simply does not comport with

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

[10] *Id*. at 1566.

[11] *Id*. at 1567.

[12] *State v. Butler*, 2013 WL 2353802, at *7 (Ariz. May 30, 2013).

Fourth Amendment jurisprudence or the United States Supreme Court's holding in *McNeely*.

II. THE STATE'S ATTEMPT TO CHANGE COOPERATION INTO CONSENT IS NOT ONLY UNSUPPORTED IN THE RECORD BUT WOULD ALSO PROMOTE A POOR PUBLIC POLICY.

The State makes much of the fact that Mr. Flonnory cooperated with Officer Pietlock and therefore his actions should constitute consent. Requiring a citizen with no formal legal training to actively assert his rights (or to withdraw his consent under the State's theory) while two officers stand in full uniform, lights flashing, investigating a potential crime is an inherently compelling situation. Most, if not all, citizens would be uncomfortable exercising this right, or as the police would put it, declining to cooperate. A submission to authority is not *ipso facto* consent.[13]

Mr. Flonnory was stopped by the Delaware State Police at night and made to exit his car. He was cordial. He did what was asked of him, which should ease any police officer's concerns for safety. He submitted to Officer Pietlock's and his partner's authority. Succumbing to the pressures of facing a fully uniformed Delaware State Trooper with his lights on his car flashing as he investigates you for a possible crime or as he delivers you to a phlebotomist for a blood draw is hardly the time to raise an objection. If anything, requiring a citizen to decline to cooperate in this scenario has potential to turn a calm and controlled situation into one of confrontation.

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

CONCLUSION

Based on the foregoing, as well as the arguments set forth in the Opening Brief, Appellant Freddie Flonnory respectfully requests that this Court grant him a new trial and any other relief the Court deems appropriate.

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