EFiled: Dec 17 2014 04:53PM EST
Filing ID 56488592
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 SUPPLEMENTAL MEMORANDUM

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: December 17, 2014

A number of jurisdictions around the country have examined their respective implied consent laws post-*McNeely*. Implied consent statutes vary from state to state. For example, unlike Delaware, some require advising the driver of the implied consent penalties for refusal[1] and some require express consent post-driving.[2] Although certain of the State statutes have been found unconstitutional, the common thread found in cases assessing implied consent statutes post-*McNeely* is that consent implied pursuant to statute does not satisfy the consent exception to the warrant requirement where the defendant/driver has revoked that consent post-driving. This is the position advanced by the State: post-*McNeely*, implied consent satisfies the consent exception to the warrant requirement provided that, after driving, the driver does not revoke that consent by his words or actions.

The two North Dakota cases cited by Flonnory provide little guidance here because, although the cases discuss North Dakota's implied consent law, the cases did not address whether consent implied pursuant to statute satisfies the consent exception. Rather, in *Smith*, the Supreme Court of North Dakota examined the trial court's finding that the defendant had given express, "actual," post-driving consent to chemical testing.[3] As required by North Dakota law,[4] and as distinguished by 21 *Del. C.* § 2742 which allows chemical testing without post-driving express

[1] *See, e.g.*, N.D. Cent. Code § 39-20-01.3.
[2] *See, e.g.*, Ariz. Rev. Stat. Ann. § 28–1321(A) & (B).
[3] *State v. Smith*, 849 N.W.2d 599 (N.D. 2014).
[4] N.D. Cent. Code § 39-20-01.3.

consent, provided the officer does *not* inform the driver of the administrative penalties associated with a post-driving refusal, the officer informed Smith of the administrative and criminal[5] penalties applicable to those who refuse to submit to a blood draw. The court held that advising Smith of the administrative and criminal penalties for refusing a chemical test did not render Smith's actual consent coerced or involuntary.[6] Similarly, the court found that while Smith had been arrested for DUI, was handcuffed, and was seated in the back of the police car when he was given the implied consent advisory before agreeing to submit to the Intoxilyzer, his actual consent was not coerced or involuntary. The court held that the trial court had correctly determined that the totality of the circumstances established Smith's express consent to be voluntary.[7]

Four months later, in *Fetch,* the Supreme Court of North Dakota again examined whether a trial court correctly found that the defendant had given express consent, post-driving, to chemical testing.[8] Again, like *Smith* and unlike the case before this Court, the officer informed Fetch of the administrative and criminal penalties associated with his refusal to submit to a blood draw.[9] Fetch

[5] Delaware does not presently have a criminal penalty for a driver's post-driving refusal to submit to chemical testing.
[6] *Smith*, 849 N.W.2d at 603 (noting the North Dakota Legislative Assembly enacted criminal penalty for refusal in 2013) & 605 (holding that consent is not rendered coerced simply because of increase in penalty associated with refusal; must examine the totality of the circumstances).
[7] *Id.* at 606-07.
[8] *State v. Fetch*, 855 N.W.2d 389 (N.D. 2014).
[9] *Fetch*, 855 N.W.2d at 390 & 393.

initially refused because of a fear of needles. However, the Supreme Court of North Dakota held that the trial court correctly found that Fetch ultimately actually consented to the blood draw and that officer's implied consent advisory regarding criminal and administrative penalties associated with a refusal did not render this consent coerced or involuntary.[10] Thus, the decisions of the Supreme Court of North Dakota provide little, if any, guidance to the issue before this Court.

Similarly, the Supreme Court of South Dakota's decision in *Fierro*[11] does not militate against this Court finding that implied consent satisfies the consent exception where that consent had not been withdrawn or revoked. In *Fierro*, unlike here, the defendant both verbally and physically refused to provide a sample.[12] Unlike here, the State of South Dakota argued that implied consent to chemical testing is irrevocable, and that such irrevocable implied consent satisfies the consent exception and/or the "special needs" exception to the warrant requirement.[13] The South Dakota court's rejection of the *irrevocable* implied consent argument does not run contrary to the position the State advances here: a driver can revoke consent implied pursuant to Delaware's Implied Consent Statute (as may be done whenever consent is given), but Flonnory never withdrew his consent.

[10] *Id.* at 393.
[11] *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014).
[12] *Id.* at 237 & 241-42.
[13] *Id.* at 241-43.

In *Byars*, the Supreme Court of Nevada was faced with a driver who verbally and physically refused to provide a blood sample.[14] The court rejected the State of Nevada's argument that Nevada's implied consent statute provided constitutional consent for a forced blood draw even when there is a clear revocation of that consent.[15] Of course, the State's position here, as set forth above, is consistent with this approach.

Similarly, in *Aviles*, the Court of Appeals of Texas reviewed a blood draw where the defendant had "declined" to give a breath or blood sample.[16] The court, relying on its post-*McNeely* decision in *Weems*,[17] held that the Texas statutes implying consent and mandating a blood draw even in the face of a refusal[18] do not satisfy the consent exception to the warrant requirement. However, the Texas statute is different than Delaware's; the Delaware statute does not mandate a blood draw when the driver has refused.

In *Wulff*, the Supreme Court of Idaho also reviewed a blood draw where the defendant had verbally and physically refused chemical testing.[19] The court rejected the State of Idaho's argument that consent implied by statute is irrevocable

[14] *Byars v. State*, 336 P.3d 939, 942 (Nev. 2014).
[15] *Id*. at 945-46.
[16] *Aviles v. State*, 443 S.W. 3d 291, 292 (Tex. Ct. App. 2014).
[17] *Weems v. State*, 434 S.W.3d 655 (Tex. Ct. App. 2014).
[18] Tex. Transp. Code Ann. § 724.12(b).
[19] *State v. Wulff*, 337 P.3d 575, 576 (Idaho 2014).

and satisfies the consent exception.[20] The rule the State asks this Court to follow here avoids the infirmities identified by the Supreme Court of Idaho. Consent implied under the Delaware Implied Consent statute can be revoked; whether a driver has revoked his consent is determined based on the totality of the circumstances.

Although not cited by Flonnory, and not a decision of a state's highest court, a decision of the Appellate Division of the Superior Court of the State of California provides a useful framework upon which the issue of implied consent post-*McNeely* may be assessed. In *Harris*, the court reviewed the denial of a motion to suppress where the defendant "never, at any point, gave either the slightest resistance or suggestion that he wished to revoke his consent [implied pursuant to statute]." The *Harris* court noted: "No California court has expressly considered the question of whether chemical tests taken pursuant to the implied consent law are justifiable under the Fourth Amendment as consent searches; before *McNeely*, none has had to."[21] The court explained that:

> The California Supreme Court first approved warrantless, forced blood draws in DUI cases on the ground that they were searches incident to arrest. (*People v. Duroncelay* (1957) 48 Cal.2d 766, 771–72, 312 P.2d 690.) The following decade, the United States Supreme Court followed suit and in *Schmerber* found that the warrantless, forced blood draw in that case complied with the Fourth Amendment as "an appropriate incident to petitioner's arrest." (*Schmerber*, *supra*,

[20] *Id.* at 581-82.
[21] *People v. Harris*, 170 Cal. Rptr. 3d 729, 732 (Cal. App. Dep't Super. Ct. 2014)

> 384 U.S. at pp. 770–71, 86 S. Ct. 1826; *accord Hawkins, supra*, 6 Cal.3d at p. 761, 100 Cal.Rptr. 281, 493 P.2d 1145.) But despite the *Schmerber* court's own characterization of its holding, its conclusion "did not turn on the existence of a valid prior arrest. To the contrary, the court relied almost exclusively on the exigency created by the evanescent nature of blood alcohol and the danger that important evidence would disappear without an immediate search." (*People v. Trotman* (1989) 214 Cal.App.3d 430, 436, 262 Cal.Rptr. 640.) Today, the *Schmerber* rule is fully understood to be an application of the exigent circumstances exception to the warrant requirement. (*McNeely, supra,* 133 S. Ct. at pp. 1558–60.).[22]

The *Harris* court concluded that "in light of the entire body of law as it has developed over the decades, *it is no great innovation to say that implied consent is legally effective consent, at least* so long as the arrestee has not purported to withdraw that consent*.*"[23] The court found that consent to chemical testing implied upon exercising the privilege of driving is free and voluntary, and the fact that there are penalties for withdrawing consent post-driving "does not render the consent illusory or coercive."[24] But, "[t]his is not to say that a driver arrested for DUI can be said to have consented to a *forcible* blood draw in contravention of his then-expressed wishes in the event he purports to withdraw his consent."[25] To be sure, however, like Flonnory, Harris "never, at any point, gave either the slightest resistance or suggestion that he wished to revoke his consent." The California court, therefore, concluded that "defendant's positive cooperation with the blood

[22] *Id.* at 733-34.
[23] *Id.* at 734 (emphasis added).
[24] *Id.* at 734-35.
[25] *Id.* at 735-36 (emphasis added).

draw therefore constituted valid Fourth Amendment consent."[26] Such is the case here.

An intermediate appellate court in Tennessee reached the same conclusion – consent implied pursuant to statute satisfies the consent exception to the warrant requirement unless the driver withdraws that consent post-driving.[27] The Tennessee court explained that "consent occurs at the point that a driver undertakes the privilege of operating a motor vehicle in the State of Tennessee."[28] The court noted that "once consent has been given, it is effective until it is withdrawn or revoked."[29] Thus, the court concluded, "whether Defendant gave actual consent is irrelevant, if the implied consent statute was triggered by probable cause to believe that she was driving under the influence and if the Defendant never refused the blood draw."[30] Because, the defendant had not withdrawn her consent or refused to submit to the blood draw, the court reversed the trial court's suppression of the test results.[31] In doing so, the Tennessee court upheld the constitutionality of the implied consent law where the driver has not refused post-driving to submit to a chemical test.[32]

---

[26] *Id.* at 736.
[27] *State v. Reynolds*, 2014 WL 5840567 (Tenn. Ct. Crim. App. Nov. 12, 2014).
[28] *Id.* at *11 (citations omitted).
[29] *Id.*
[30] *Id.*
[31] *Id.* at *15.
[32] *Id.* at *13-15.

McNeely does not mandate that this Court find either Flonnory's blood draw specifically or Delaware's Implied Consent law generally to be unconstitutional. "A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant."[33] Consent provided by a person at the time of driving pursuant to Delaware's Implied Consent law, 21 *Del. C.* §§ 2740-2750, is consent excusing the warrant requirement so long as the person does not withdraw that consent by post-driving word, deed or action. Whether a person has withdrawn implied consent post-driving should be determined by the totality of the circumstances. This is the type of the totality of the circumstances test that *McNeely* requires when the exigent circumstance exception is examined.

/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: December 17, 2014

[33] *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014).

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on December 17, 2014, I have caused a copy of the State's Answering Supplemental Memorandum 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