9-17-2015

State v. Charlson Appellant's Reply Brief Dckt. 42201

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 42201
	)	
v.	)	BOISE COUNTY NO. CR 2012-1701
	)	
KIRK MURRAY CHARLSON,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

HONORABLE PATRICK H OWEN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Kirk Murray Charlson appeals from his withheld judgment for felony DUI, I.C. §§ 18-8004; 8005(6). This Reply Brief addresses the State's assertions that implied consent is valid until revoked, and that the exigent circumstances exception to the warrant requirement applies.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Charlson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied Mr. Charlson's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Charlson's Motion To Suppress

A. Introduction

Mr. Charlson asserts that, because implied consent as a warrant exception is an unconstitutional *per se* rule, the blood draw was unlawful. The district court erred by denying his motion to suppress the results of that warrantless blood draw.

B. The District Court Erred When It Denied Mr. Charlson's Motion To Suppress

1. Implied Consent

Idaho's implied consent statute provides that "any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol." I.C. § 18-8002(1). At the time that the motion to suppress was filed in this case, Idaho precedent held implied consent given under this statute could not be revoked. *See State v. Diaz,* 144 Idaho 300 (2007) (*abrogated by State v. Wulff*, 157 Idaho 416 (2014)). This changed, however, with this Court's recent decisions in *Wulff*, *State v. Halseth*, 157 Idaho 643 (2014), and *State v. Arrotta*, 157 Idaho 773, 774 (2014).

In *Wulff*, this Court recognized that, "[*Missouri v.*] *McNeely* repeatedly indicated that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Wulff*, 157 Idaho at 420. This Court determined, "*McNeely*'s overall discussion suggests a broader reading: that implied consent is no longer acceptable when it operates as a *per se* exception to the warrant requirement because the Court repeatedly expressed

disapproval for categorical rules." *Id.* at 421. The *McNeely* Court used a totality of the circumstances analysis because a "case-by case assessment of exigency" was the traditional test. *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552, 1561 (2013). Thus, the test to be applied in this case and others involving implied consent is the traditional test.

Consent is a well-recognized exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Halen v. State*, 136 Idaho 829 (2002). The State has the burden of proving that consent was freely and voluntarily given. *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Mr. Charlson submits that the plain language of this test requires the State to prove, under a totality of the circumstances test, that a defendant actually consented to a search. Implied consent, without more, is insufficient, because it does not take into account the totality of the circumstances.

In *Wulff*, this Court stated, "Idaho's implied consent statute must jump two hurdles to qualify as voluntary: (1) drivers give their initial consent voluntarily and (2) drivers must continue to give voluntary consent. Drivers in Idaho give their initial consent to evidentiary testing by driving on Idaho roads voluntarily." *Wulff*, 157 Idaho at 423. In *Halseth*, this Court stated, "[A]n implied consent statute such as ... Idaho's does not justify a warrantless blood draw from a driver who refuses to consent ... or objects to the blood draw.... Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *Halseth*, 157 Idaho at 646. In *Arrota*, this Court

stated, "a suspect can withdraw his or her statutorily implied consent to a test for the presence of alcohol." *Arrota*, 157 Idaho at 774.

The Court of Appeals has interpreted these statements to mean that implied consent, standing alone, is sufficient to establish consent, and that the defendant must revoke this consent. *See State v. Smith*, 2015 WL 4647062 at *9 (June 15, 2015). The Court of Appeals stated, "taken together, these decisions [*Wulff*, *Halseth*, and *Arrota*] lead to the conclusion that Idaho's law regarding statutorily implied consent retains validity, but that consent may be terminated by a defendant's refusal, protest, or objection to alcohol concentration testing." *Id.* In two case filed just weeks before the filing of this Brief, the Idaho Supreme Court appears to have concluded the same. *See State v. Reindeau*, docket no. 41982 (Aug. 24, 2015); *State v. Haynes*, docket no. 41924 (Aug. 20, 2015).

To the extent that this is the case, these cases should be partially overruled. It is well recognized that the doctrine of *stare decisis* need not be strictly adhered to if the precedent in question is manifestly wrong, has proven over time to be unjust or unwise, or if overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652, 655 (2000) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). To the extent that these recent cases stand for the proposition that implied consent is valid up to the point that a defendant refuses testing, they are in conflict with the rule that it is the State's burden to prove consent, and that consent must be shown to be voluntary under the totality of the circumstances. They are thus manifestly wrong.

A conclusion that every driver consents by voluntarily driving is not a traditional totality of the circumstances test, which is what *McNeely* requires. Further, such a conclusion permits the Idaho legislature to determine the scope of warrant exceptions, which it cannot do. *See, e.g., Ybarra v. Illinois,* 444 U.S. 85, 96 n.11 (1979) (state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within the category of statutes "purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.")

Judge Lansing recognized this problem in her concurrence in *Smith.* Feeling bound by the Court of Appeals' interpretation of *Wulff*, *Halseth*, and *Arrota*, Judge Lansing concurred with the result, but wrote that she would hold that implied consent does not constitute constitutional consent. *Smith* at *12. This is because implied consent, "involves no actual consent at all; the co-called consent is entirely fictitious." *Id.* Judge Lansing concluded that, "implied consent is a legal fiction created by statute which, in my opinion, cannot trump constitutional guarantees against warrantless intrusions on one's person or liberty. A legislative body may not simply legislate away constitutional rights." *Id.*

As *Wulff* acknowledged, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Wulff*, 157 Idaho at 420. The act of voluntarily driving cannot, by itself, establish consent. This does not take into account whether an individual was driving due to coercion, duress, or necessity. It does not take into account any circumstance other than driving, such as the defendant's knowledge of any implied consent. And it

permits the legislature to determinate exceptions to the warrant requirement, which it cannot.[1]

To be clear, Mr. Charlson is not asserting that implied consent statutes are unconstitutional. To the extent that they permit a State to impose administrative penalties in the form of driver's license suspensions on a suspect who refuses, for example, they are valid. *See McNeely*, 133 S.Ct. at 1566-67; *South Dakota v. Neville*, 459 U.S. 443, 554 (1983). But, as Judge Lansing has noted, "this does not mean, however, that consent may be fictitiously deemed to have been given in advance by every person who drives in Idaho and that constitutional safeguards are satisfied by this imaginary consent." *Smith* at *13.

However, to the extent that implied consent is a valid exception to the warrant requirement, Mr. Charlson submits that the facts show that he either never voluntarily gave it, or that he revoked it.

"Idaho's implied consent statute must jump two hurdles to qualify as voluntary: (1) drivers give their initial consent voluntarily and (2) drivers must continue to give voluntary consent. Drivers in Idaho give their initial consent to evidentiary testing by driving on Idaho roads voluntarily." *Wulff*, 157 Idaho at 423.

Mr. Charlson submits that, based on the evidence in this case, the State has not proven that either Mr. Charlson voluntarily drove, or that he continued to give voluntary consent. There is no stipulation that Mr. Charlson *voluntarily* drove – that is, that his

[1] This issue will be addressed by the Idaho Supreme Court in *State v. Eversole*, docket no. 43277, soon. The Supreme Court has granted the State's petition for review in that case and Mr. Eversole is asking the Supreme Court to reconsider whether implied consent is valid until revoked.

driving was not due to coercion, duress, or necessity. Further, there is no evidence that Mr. Charlson continued to give voluntary consent at the time of the test. That there are no facts regarding the blood draw cuts against the State, not Mr. Charlson[2]. Mr. Charlson's evidentiary burden in this case is to show that a warrantless search occurred; the State must prove the exception.

Further, Mr. Charlson submits that the evidence demonstrates that any implied consent was withdrawn. Consent, once given, may also be revoked, for "[i]nherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State v. Halseth,* 157 Idaho 643, 646 (2014). Thus, after a defendant has revoked consent, officers no longer may act pursuant to that initial voluntary consent. *State v. Thorpe,* 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct. App. 2004). As the State acknowledged, Deputy Tatilian indicated that, after providing an initial breath sample, Mr. Charlson was "unable or unwilling" to provide a second sample. (Respondent's Brief, p.7.) As Mr. Charlson was clearly able to provide an initial sample, the reasonable implication is that he was unwilling to provide a second sample and thus revoked any implied consent.[3] The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect."

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[2] The State asserts that there are facts in the record concerning the blood draw because the phlebotomist testified at trial. (Respondent's Brief, pp.7-8.) These facts are irrelevant. The district court obviously could not have relied on these facts when it denied the motion to suppress because it denied the motion prior to trial. Further, the State has submitted no authority for the proposition that this Court can rely on facts adduced at trial when evaluated whether the district court erred by denying a motion to suppress.

Florida v. Jimeno, 500 U.S. 248, 251 (1991). The only reasonable conclusion to draw in this scenario is that Mr. Charlson withdrew his implied consent where the facts show that he was able to provide an initial sample and then was unable or unwilling to provide a second sample.

2. Exigent Circumstances

The State also asserts that this Court should affirm the order of the district court because the exigent circumstances exception applies. (Respondent's Brief, p.10.)[4] The State is incorrect. While the district court did not specifically rule on this issue, it stated,

> For future guidance to the State, the Court will require a thorough and detailed record of the circumstances which would justify application of the exigent circumstances exception to the warrant requirement in a DUI case involving a blood draw. The State has failed to make such a record in this case.

(R., p.67.) The district court was correct because the State failed to present any detailed evidence to support the exigent circumstances exception.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. *McNeely*, 133 S. Ct. at 1559 (citing *Brigham City v. Stuart,* 547 U.S. 398, 406 (2006)). The exigent circumstances identified by the State on appeal are: 1) there was no

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[3] This issue, again, will be resolved by *Eversole*. The primary issue in *Eversole* is whether an individual, by revoking implied consent to a breath test, revokes implied consent entirely. The Court of Appeals found in favor of Mr. Eversole in a 2-1 decision.

[4] The State notes that, while it argued for the exigent circumstances exception in the district court, Mr. Charlson did not offer any argument on that issue in the Appellant's Brief. (Respondent's Brief, p.14.) This is true. No argument was made because there was no adverse ruling from the district court on this issue.

procedure for Boise County Sheriff's to utilize Ada County magistrates to obtain search warrants; 2) there was no effective cell phone coverage at the location of the accident; 3) Deputy Tatilian had to remain at the accident scene and investigate another DUI case and take that suspect to the Ada County jail while Mr. Charlson was life-flighted; and 4) the natural dissipation of alcohol. (Respondent's Brief, pp.10-11.) These facts do not demonstrate that, under the totality of the circumstances, an exigency exists.

The State asserts that, in the district court, Mr. Charlson did not refute any of these facts, but argued that there was "no indication that the officers sought to obtain a warrant before forcibly drawing [his] blood," and that there was not "anything that would have prevented them from doing so within a reasonable amount of time." (Respondent's Brief, p.13 (citing R., p.45.)) The State then asserts that the fact that the deputy did not seek a warrant is irrelevant. (Respondent's Brief, p.14.) Mr. Charlson does not disagree. However, the State does not address the second argument, that there was nothing that would have prevented the officers from getting a warrant within a reasonable amount of time.

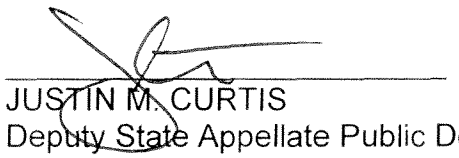
This is because those facts are not in the record. As the district court noted, the State failed to present thorough and detailed facts to support the exigency exception. There is nothing that details how far out of cell phone service the accident was, how the "lack of procedure" for obtaining a warrant from an Ada County magistrate would have prevented an officer from simply calling Ada County once they had cell service, or how long Deputy Tatilian had to wait at the scene to investigate the other case. Further, considering that life-flight was contacted it appears Deputy Tatilian should have been able to radio someone to assist in getting a warrant. There is simply nothing in the

record that shows how long it would have taken the officers to secure a warrant and therefore nothing to indicate how "further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence." *McNeely*, 133 S.Ct. at 1560-61.

CONCLUSION

Mr. Charlson requests that the district court's order denying his motion to suppress be reversed and his case remanded for further proceedings.

DATED this 17th day of September, 2015.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of September, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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