8-23-2016

State v. Lutton Respondent's Brief Dckt. 43257

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43257**
Plaintiff-Respondent,	)	
	)	**Boise County Case No.**
v.	)	**CR-2014-1131**
	)	
LAWRENCE R. LUTTON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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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Nature of the Case

Lawrence R. Lutton appeals from the district court's entry of a withheld judgment entered pursuant to Lutton's guilty plea to vehicular manslaughter. On appeal, Lutton claims the district court erred when it denied his motion to suppress.

Statement of Facts and Course of Proceedings

Lutton was driving on Arrowrock Road. (R., pp. 64-66.) Lutton had been drinking that day. (Id.) Lutton lost control of his vehicle and wrecked his vehicle into Arrowrock Reservoir. (Id.) Lutton's two sons, [redacted] and [redacted] were in the car with him. (Id.) Joseph Mikitish, a neighbor, witnessed the crash and went into the water to assist. (Id.) With assistance, Lutton and [redacted] were able to get out of the car. (Id.) Lutton and [redacted] needed medical care, so Mr. Mikitish drove them towards Boise. (Id.) [redacted] who was two, had not been found when they left for Boise. (Id.)

Approximately an hour later, at 11:10 p.m., Officers Anjelkovich and Zimmer, of the Boise Police Department, stopped Mr. Mikitish because he was driving 60 miles an hour in a 35 mile an hour zone. (R., p. 65; 3/12/15 Tr., p. 35, L. 5 – p. 36, L. 4, p. 65, L. 25 – p. 66, L. 8.) Officer Zimmer made contact with Mr. Mikitish and Officer Anjelkovich made contact with Lutton, who was in the passenger seat. (3/12/15 Tr., p. 36, Ls. 2-25, p. 66, Ls. 13-24.)

While she was speaking with Lutton, Officer Anjelkovich could smell alcohol. (3/12/15 Tr., p. 37, Ls. 1-9.) Lutton told Officer Anjelkovich that he had consumed alcohol that day. (3/12/15 Tr., p. 37, Ls. 4-12.)

Mr. Mikitish told the officers he was concerned for Lutton's health because Lutton had been in the water for 30 minutes and was severely hypothermic. (R., p. 65.) Mr. Mikitish also told the officers that he had learned from Boise County dispatch that [redacted] had been found. (R., p. 66.) [redacted] was being flown via life-flight to St. Luke's hospital. (R., p. 67.)

The officers called an ambulance for Lutton and [redacted] (R., p. 66.) Once Lutton was in the ambulance the paramedics took off Lutton's wet clothes and gave him a blanket. (3/12/15 Tr., p. 19 , Ls. 7-14, p. 80, Ls. 10-11, p. 91, L. 25 – p. 92, L. 11, p. 102, L. 23 – p. 103, L. 5.) The ambulance transported Lutton and [redacted] to St. Luke's hospital. (R., p. 66.)

Officer Anjelkovich remained at the scene with Mr. Mikitish for approximately 30 minutes and then headed to St. Luke's. (R., p. 66.) At St. Luke's Officer Anjelkovich recontacted Lutton. (Id.) Lutton admitted he had consumed two to three beers between 1:00 and 3:00 that afternoon. (Id.)

Because of the multiple counties involved, Trooper Vance of the Idaho State Police was called in to assist. (R. p. 66.) At the hospital, Trooper Vance read Lutton the ALS advisory form. (3/12/15 Tr., p. 6, Ls. 5-11; R., pp. 66-67, 70.) Lutton consented to having his blood drawn. (3/12/15 Tr., p. 6, Ls. 5-11, p. 9, Ls. 7-9, p. 25, Ls. 8-14; R., p. 74.) The blood test showed a blood alcohol concentration of 0.092. (R., p. 64.) [redacted] did not survive. (Id.)

The state charged Lutton with Vehicular Manslaughter and Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs. (R., pp. 15-18.) Lutton moved to suppress evidence obtained from the blood draw. (R., pp. 26-36, 64.)

The district court held a suppression hearing. (R., pp. 40-42.) At the suppression hearing, Officer Anjelkovich testified she made contact with Lutton who was in the passenger seat of Mr. Mikitish's car and she could smell alcohol. (3/12/15 Tr., p. 37, Ls. 1-9.) Lutton told Officer Anjelkovich that he was driving his vehicle on Arrowrock and lost control of his car and it went off into the reservoir. (3/12/15 Tr., p. 37, L. 23 – p. 38, L. 5.) Lutton told Officer Anjelkovich that he had consumed alcohol that day. (3/12/15 Tr., p. 37, Ls. 4-12.) Officer Anjelkovich explained she was concerned that alcohol may have been involved in Lutton's car crash because Lutton admitted to drinking earlier in the day and she could smell alcohol in the car. (3/12/15 Tr., p. 46, Ls. 7-17.)

Officer Anjelkovich testified that when someone suspected of DUI needs medical attention the police do not require the suspects to do field sobriety tests. (3/12/15 Tr., p. 59, Ls. 4-12.) Lutton said he was cold and experiencing hypothermia because of his attempts to retrieve his son. (3/12/15 Tr., p. 38, Ls. 1-23.) Officer Zimmer testified that when they made contact with Lutton everyone was "all wet." (3/12/15 Tr., p. 74, Ls. 21-23.) Officer Anjelkovich testified that by the time she got to the hospital and recontacted Lutton she could no longer smell alcohol. (3/12/15 Tr., p. 42, Ls. 15-21.)

At the hospital, Lutton only admitted to having consumed three beers earlier in the afternoon, between 1:00 and 3:00 p.m. (3/12/15 Tr., p. 51, L.s 5-16.) Officer Anjelkovich testified that, in her 20-plus years' experience of investigating DUIs, individuals who are driving under the influence of alcohol very often minimize the amount of alcohol they have actually consumed. (3/12/15 Tr., p. 56, L. 24 – p. 57, L. 6.)

Trooper Vance testified that he was dispatched to St. Luke's hospital shortly after midnight to collect a blood draw. (3/12/15 Tr., p. 4, Ls. 4-14.) Trooper Vance was informed that there was a crash with a possible fatality and alcohol involved on Arrowrock Road in Boise County. (3/12/15 Tr., p. 4, L. 25 – p. 5, L. 5.) Trooper Vance made contact with Lutton and Officer Anjelkovich. (3/12/15 Tr., p. 4, L. 15 – p. 5, L. 25.) By this point, Lutton was probably only wearing a blanket. (3/12/15 Tr., p. 19 , Ls. 7-14.)

Trooper Vance read Lutton the ALS advisory form. (3/12/15 Tr., p. 6, Ls. 5-11.) Trooper Vance testified that Lutton consented to having his blood drawn. (3/12/15 Tr., p. 6, Ls. 5-11, p. 9, Ls. 7-9, p. 25, Ls. 8-14.)

> Q. And then you told him he had to have a blood draw, and he said okay?
>
> A. He said okay when I asked for the blood draw.

(3/12/15 Tr., p. 26, Ls. 2-4.)

Nurse Chapman testified that she drew blood from Lutton. (3/12/15 Tr., p. 62, Ls. 2-14.) Nurse Chapman recalled that Lutton was calm and that he was not in handcuffs. (3/12/15 Tr., p. 62, L. 18 – p. 63, L. 5.) She also recalled that the officers were not combative or unpleasant. (3/12/15 Tr., p. 63, Ls 6-11.)

Nurse Chapman testified that Lutton was cooperative during the blood draw. (3/12/15 Tr., p. 62, Ls. 18-23.)

Karla Sampson, a staff chaplain at St. Luke's, testified that when she asked the police officers if Lutton could go see his son, the police officers said that would not be a problem. (3/12/15 Tr., p. 76, Ls. 13-24, p. 87, Ls. 5-18.) Ms. Sampson also testified that Lutton had a blanket wrapped around him. (3/12/15 Tr., p. 80, Ls. 10-11.)

Lutton testified that the officers would not let him see his son until he gave a blood sample and Lutton thought the blood sample was mandatory. (3/12/15 Tr., p. 97, L. 13 – p. 98, L. 21.) Lutton testified that the paramedics had removed his clothes once he was put in the ambulance and he was wearing a blanket. (3/12/15 Tr., p. 91, L. 25 – p. 92, L. 11, p. 102, L. 23 – p. 103, L. 5.) Lutton admitted the officers were courteous and he was not handcuffed. (3/12/15 Tr., p. 102, Ls. 19-22.) Lutton also conceded that he did not refuse to give blood and "did not say no." (3/12/15 Tr., p. 103, Ls. 6-15.)

The state filed a post hearing briefing and objection to Lutton's motion to suppress. (R., pp. 43-49.) Lutton also filed a post hearing brief. (R., pp. 54-63.) Lutton argued that the blood draw was not lawful because the officers did not have reasonable grounds to believe that Lutton was driving a vehicle while he was under the influence and his consent was not voluntary because the officers would not let him see his son until he took the blood test. (See R., pp. 29-33, 58-63.)

The district court denied the motion to suppress. (R., pp. 64-76.) The district court found that, because Lutton crashed his car into the reservoir and admitted to drinking, and because the officer smelled alcohol when Lutton was in Mr. Mikitish's vehicle, there were "reasonable grounds" to believe that Lutton was "impaired under Idaho Code § 18-8002." (R., pp. 70-71.)

The district court also found, among other things, that portions of Lutton's testimony regarding the circumstances of the blood draw were not credible. (R., p. 74.) The district court found that Lutton's testimony that he was told repeatedly that he could not see his son unless he provided a blood sample was not credible. (R., p. 74.) The district court found that, under the totality of the circumstances, Lutton "did not revoke or withdraw his implied consent, and he voluntarily consented to the blood draw." (R., p. 74.)

Lutton filed a motion to reconsider. (R., pp. 77-89.) Before the district court ruled on the motion, Lutton pled guilty to Vehicular Manslaughter pursuant to a binding Rule 11 plea agreement. (R., pp. 90-91, 95-102, 109-111.) Lutton's guilty plea allowed Lutton to appeal the denial of his motion to suppress. (R., p. 110.) The district court entered a withheld judgment. (R., pp. 103-108.) Lutton timely appealed. (R., pp. 113-116.)

ISSUE

Lutton states the issue on appeal as:

1. Did the district court error [sic] in denying [sic] motion to suppress?

(Appellant's brief, p. 8.)

The state rephrases the issue as:

Has Lutton failed to show the district court erred when it denied his motion to suppress?

ARGUMENT

Lutton Has Failed To Show The District Court Erred When It Denied His Motion To Suppress

A. Introduction

Lutton argues the district court erred both when it determined the officers had reasonable grounds to believe he was driving under the influence and when it found he consented to the blood draw. (See Appellant's brief, pp. 9-23.) Lutton's arguments are without merit. The officers had reasonable grounds to believe Lutton was driving under the influence because Lutton admitted to drinking, Lutton lost control of his car, Lutton crashed his car into the reservoir, and Officer Anjelkovich smelled alcohol when she first contacted Lutton. (See R., pp. 70-71.) Moreover, correct application of the law to the facts found by the district court shows that Lutton never withdrew his implied consent. (See R., pp. 73-74.) Finally, in addition to implied consent, Lutton also gave actual consent to the blood draw. The totality of the circumstances shows that the officers treated Lutton with empathy and courtesy and Lutton gave actual consent to the blood draw.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

C. Lutton Implicitly Consented To The Blood Draw And The Officers Had Reasonable Grounds To Believe That Lutton Was Operating A Vehicle While Under The Influence

The Fourth Amendment of the United States Constitution provides that "[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." U.S. Const. amend. IV. Requiring that a person submit to a blood alcohol test is a search and seizure under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767 (1966). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

Consent is a valid exception to the Fourth Amendment's warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Implied consent is a type of consent statutorily provided for by Idaho Code § 18-8002(1), which provides:

> 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 as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

I.C. § 18-8002(1).

Pursuant to this statute, "a motorist who operates a vehicle in Idaho implicitly consents to evidentiary testing, provided that the police officer has reasonable grounds to believe the motorist is intoxicated." State v. Nicolescu, 156 Idaho 287, 290, 323 P.3d 1248, 1251 (Ct. App. 2014). Contrary to Lutton's assertions on appeal, application of the law to the facts found by the district court support the district court's conclusion that the officers had reasonable grounds to believe Lutton had been driving while intoxicated and that Lutton impliedly consented to the blood draw.

1. The Officers Had Reasonable Grounds To Request An Evidentiary Test Under Idaho Code § 18-8002

The district court found that the officers had reasonable grounds to believe that Lutton was operating a motor vehicle while he was under the influence. (See R., pp. 65-71.) The district court reviewed the evidence and found that because Lutton admitted to driving, admitted to losing control of his car, admitted to crashing his car into the reservoir, and admitted to drinking earlier in the day, because Officer Anjelkovich, while she was speaking with Lutton, could smell alcohol coming from the vehicle where Lutton was riding, the "officers had 'reasonable grounds' to believe that Lutton was impaired under Idaho Code § 18-8002." (R., pp. 70-71.)

> At the time of the request for an evidentiary test, the officers knew that Lutton lost control of his vehicle which crashed into the reservoir, and that there was reason to believe that there would be a fatality. Lutton's two year old was in the vehicle when the vehicle crashed into the water. Lutton and his four year old son were able to get to shore. [redacted] was left in the water when Lutton left the scene for the hospital. Lutton admitted he had consumed alcohol prior to 3 p.m. Lutton did not admit to drinking after 3 p.m. While speaking with Lutton, Officer Anjelkovich could smell alcohol

> coming from Mikitish's vehicle at about 11:00 p.m. Under these circumstances, the Court will find that the officers had "reasonable grounds" to believe that Lutton was impaired under Idaho Code § 18-8002. Further, the Court will find that the officers had "probable cause" to believe the circumstances constituted vehicular manslaughter under Idaho Code § 18-4006(3). As a result, Trooper Vance was authorized to seek a blood sample for analysis.

(R., pp. 70-71.)[1]

On appeal, Lutton argues the district court erred when it determined the officers had "reasonable grounds" to believe that Lutton was under the influence when he was driving and thus could not request a blood draw. (Appellant's brief, pp. 9-14.) Lutton argues that his admission to drinking, his losing control of the car, his crashing the car into the reservoir, and the smell of alcohol when Officer Anjelkovich first approached him are not enough to establish "reasonable grounds" because "reasonable grounds" requires more evidence. (See id.) Lutton's argument is misplaced.

"[T]he proper standard for administering an evidentiary test for the purpose of criminal DUI is 'reasonable grounds.'" Nicolescu, 156 Idaho at 290, 323 P.3d at 1251. "'Reasonable grounds' is not defined by statute, nor has it been defined by case law in the context of evidentiary testing." Id. The Idaho Court of Appeals has, however, provided some guidance regarding the threshold necessary to establish "reasonable grounds." Id. For example, "the odor of alcohol and the presence of beer cans in a vehicle were sufficient evidence to

[1] The district court found that the statute that authorizes the police to conduct a blood draw if there is probable cause the driver committed vehicular manslaughter is unconstitutional because it conflicts with the recent cases that hold implied consent is revocable. (R., p. 73.) Therefore, in reaching its ultimate decision, the district court did not rely upon this statute.

conduct a blood alcohol test." Id. (citing State v. DeWitt, 145 Idaho 709, 713, 184 P.3d 215, 219 (Ct. App. 2008) (overruled on other grounds) ("Indeed, from the odor of alcohol and presence of beer cans in his vehicle, there was ample evidence that DeWitt had been driving under the influence at the time of the accident."); State v. Curtis, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984) (full and empty beer cans and the strong odor of alcohol)). Here, there was more evidence suggesting Lutton was under the influence than in these two cases relied upon by the Court of Appeals. Lutton admitted to drinking, Lutton lost control of his car, Lutton crashed his car into the reservoir, and Officer Anjelkovich smelled alcohol when she first contacted Lutton.

Lutton's argument is based upon looking at each of these facts in isolation and not considering the totality of the circumstances. Lutton's arguments are not based upon a claim that the district court incorrectly interpreted the law; rather Lutton argues the district court incorrectly interpreted the facts. Looking at the totality of the circumstances, the officers had reasonable grounds to believe Lutton was under the influence. The district court rejected Lutton's interpretation of the facts, and so should this Court.

Lutton argues that the district court erred in finding "reasonable grounds" because Officer Zimmer and Trooper Vance did not smell alcohol on Lutton's person. (Appellant's brief, p. 12.) The district court considered the testimony of Officer Zimmer (R., p. 68) and Trooper Vance (R., p. 67) and still found that, "While speaking with Lutton, Officer Anjeklovitch [sic] could smell alcohol coming from Mikitish's vehicle at about 11:00 p.m." (R., p. 70.) The district court did not

err. Officer Zimmer testified that while he did not smell alcohol when he spoke with Lutton in the ambulance, he did not recall if he was actively attempting to smell alcohol. (3/12/15 Tr., p. 67, L. 22 – p. 70, L. 4.) In addition, once Lutton was put in the ambulance, the paramedics removed his clothes and he was nude except for a blanket. (3/12/15 Tr., p. 102, L. 23 – p. 103, L. 1.) By the time Trooper Vance made contact with Lutton in the emergency room, Lutton was still only wearing the blanket and it was over an hour after Officer Anjelkovich had first made contact. (3/12/15 Tr., p. 4, Ls. 4-11, p. 19 , Ls. 7-14.) Therefore, it is perfectly understandable that Officer Anjelkovich would smell alcohol upon first contact with Lutton and Officer Zimmer and Trooper Vance would not – because Lutton's clothes had been removed and he was receiving medical treatment.[2]

Lutton also argues that his admission to drinking three beers more than nine hours before the accident does not establish reasonable grounds. (R., p. 12.) Officer Anjelkovich testified that in her 20-plus years' experience of investigating DUIs, individuals who are driving under the influence of alcohol very often minimize the amount of alcohol they have actually consumed. (3/12/15 Tr., p. 56, L. 24 – p. 57, L. 6.)

Lutton also argues that the "bare existence of an accident" does not "equate [to] a driving pattern evidencing impairment." (Appellant's brief, p. 13.) However, even Lutton's interpretation of the facts contradicts this argument. (See id.) Lutton claims he lost control on a washboard and overcorrected. (See

[2] In addition, Trooper Vance testified that he has a deviated septum and has difficulty smelling anything. (3/12/15 Tr., p. 16, L. 8 – p. 17, L. 4.)

id.) Contrary to Lutton's argument, this is evidence of an impaired driving pattern. Driving on a washboard does not normally cause one to lose control, and an inability to properly correct the car is also evidence of impaired driving.[3] Finally, Lutton's argument is again undone by his attempt to analyze each piece of evidence individually and not under the totality of the circumstances.

The district court properly considered the totality of the circumstances and correctly held the officers had reasonable grounds to believe Lutton was driving while impaired.

2. Lutton Did Not Withdraw His Implied Consent

Statutory implied consent is revocable. See State v. Halseth, 157 Idaho 643, 646, 339 P.3d 368, 371 (2014) ("Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent."). The Court reinforced that holding in a subsequent case, explaining that "a suspect can withdraw his or her statutorily implied consent to a test for the presence of alcohol." State v. Arrotta, 157 Idaho 773, 774, 339 P.3d 1177, 1178 (2014).

Under Idaho case law, a driver's implied consent is valid so long as it is voluntary. For implied consent to be voluntary, drivers must (1) give their initial consent voluntarily and (2) continue to give voluntary consent. State v. Wulff, 157 Idaho 416, 423, 337 P.3d 575, 582 (2014). "Drivers in Idaho give their initial consent to evidentiary testing by driving on Idaho roads voluntarily." Id. (citing

[3] This Court should reject Lutton's reliance and interpretation of a newspaper article because it was not presented to or considered by the district court. (See Appellant's brief, p. 13, n. 3.)

State v. Diaz, 144 Idaho 300, 303, 160 P.3d 739, 742 (2007)). The driver's consent continues to be voluntary until he or she withdraws that consent by rejecting or resisting the evidentiary testing. Halseth, 157 Idaho at 646, 339 P.3d at 371. Therefore, if a suspect does not affirmatively reject or resist the evidentiary testing authorized by I.C. § 18-8002(1), the consent exception remains valid and no warrant is required. See id.

The district court found that Lutton did not withdraw his implied consent. (R., p. 74.) On appeal, Lutton argues that he did not voluntarily consent to the blood draw because he was told it was mandatory and the officers would not let him see his son until he gave blood. (See Appellant's brief, pp. 14-23.) Further, Lutton argues that his cooperation with the blood draw and the fact he never said "no" was not enough to show he voluntarily consented to the blood draw. (See id. ("That Mr. Lutton was cooperative and did not say 'no' to the blood draw fails to establish that he continued to voluntarily consent to the blood draw.").) Lutton's arguments are not supported by the record or applicable law.

First, the district court found Lutton's testimony – that he was barred from seeing his son, and that he was told the blood draw was mandatory – was not credible. (R., p. 74.)

> Having observed the witnesses and listened to the testimony, the Court did not find that Lutton was credible when he testified that he was told that he could not refuse and that the blood draw was mandatory[.] The Court did not find that Lutton was credible when he testified he was told repeatedly that he could not see his son unless he provided a blood sample. The Court found the contrary testimony of Trooper Vance credible on these same points.

(Id.) The evidence supports the district court's conclusion. Karla Sampson, a staff chaplain at St. Luke's, testified that when she asked the police officers if Lutton could go see his son, the police officers said that would not be a problem. (3/12/15 Tr., p. 76, Ls. 13-24, p. 87, Ls. 5-18; see also R., p. 68 ("[Ms. Sampson] requested the officer permit Lutton to be with his child and they agreed.").)

Second, contrary to Lutton's argument, the fact that Lutton was cooperative and did not say 'no' to the blood draw does, in fact, establish that he did not revoke his implied consent. A driver's consent continues to be voluntary until he or she withdraws that consent by rejecting or resisting the evidentiary testing. Halseth, 157 Idaho at 646, 339 P.3d at 371. Therefore, if a suspect does not affirmatively reject or resist the evidentiary testing authorized by I.C. § 18-8002(1), the consent exception remains valid and no warrant is required. See id.; see also Sims v. State, 159 Idaho 249, 257, 358 P.3d 810, 818 (Ct. App. 2015) (alleged unconsciousness of the driver does not effectively operate as a withdrawal of implied consent). Lutton testified he did not refuse to give blood and "did not say no." (3/12/15 Tr., p. 103, Ls. 6-15; see also R., p. 69 ("Lutton agrees he did not refuse or object.") (citation omitted).) The district court did not err when it held that Lutton did not revoke his implied consent.

D. Under The Totality Of The Circumstances Lutton Gave Actual Consent, In Addition To Implied Consent, To The Blood Draw

The officers had reasonable grounds to believe that Lutton was operating a motor vehicle while under the influence. However, even if the officers did not have the reasonable grounds required to conduct a blood draw pursuant to

Lutton's "implied" consent under Idaho Code § 18-8002, Lutton gave "actual" consent to the blood draw, which is not dependent on any statutory requirements. "Implied" consent and "actual" consent are two different types of consent. See e.g. State v. Rios, 160 Idaho 262, __, 371 P.3d 316, 320 (2016) ("As we concluded in [State v. Eversole, 160 Idaho 239, 371 P.3d 293 (2016)], under [Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1562 (2013)], implied consent may satisfy the consent exception to the warrant requirement. Therefore, actual consent is not required.").

Motorists who drive on Idaho roads implicitly consent to a blood test if an officer has "reasonable grounds" to believe they are driving under the influence. Id. at __, 371 P.3d at 319. This implicit consent is revocable. Id. at __, 371 P.3d at 319-320. However, "actual" consent requires that under the totality of the circumstances the defendant to affirmatively voluntarily consent to the search. See Bustamonte, 412 U.S. at 227.

Trooper Vance testified that Lutton affirmatively consented to having his blood drawn. (3/12/15 Tr., p. 6, Ls. 5-11, p. 9, Ls. 7-9, p. 25, Ls. 8-14.)

> Q. And then you told him he had to have a blood draw, and he said okay?
>
> A. He said okay when I asked for the blood draw.

(3/12/15 Tr., p. 26, Ls. 2-4.) The district court found:

> In the court's view, Lutton was advised of the consequences of refusing the blood draw, and Lutton agreed to provide a sample.

(R., p. 74.)

> Under the totality of the circumstances, the Court is persuaded that Lutton was the driver, was properly advised, and did not revoke or

> withdraw his implied consent, *and he voluntarily consented to the blood draw.*

(R., p. 74 (emphasis added).)

On appeal, Lutton argues his consent was not voluntary. (See Appellant's brief, pp. 17-23.) As noted above, Lutton's argument that his consent was not valid because he was not allowed to see his son is not supported by the record, because the district court did not find his testimony on that subject credible. (See R., p. 74.)

Further, the totality of the circumstances supports a finding of voluntary consent because the officers did not threaten, yell, overbear or otherwise mistreat Lutton. In fact, the evidence shows they were compassionate and courteous towards Lutton because of his son. Trooper Vance testified:

> Q. And, [Trooper] Vance, did you at any time raise your voice to Mr. Lutton?
>
> A. No.
>
> Q. Did you handcuff him?
>
> A. No.
>
> Q. Did you, in any way, restrain him?
>
> A. I was sitting on a stool. I was actually sitting lower than him, talking to him next to him.
>
> Q. And were you trying to be sympathetic to this gentleman?
>
> A. Yeah. I'm a father. I know.

(3/12/15 Tr., 30, L. 19 – p. 31, L. 4.) Officer Anjelkovich also testified that she could hear some of Trooper Vance's conversation with Lutton, and she never heard Trooper Vance yell, make demands, or threaten Lutton. (3/12/15 Tr.,

p. 44, Ls. 1-11.) Nurse Chapman also testified that Lutton was not in handcuffs and the officers were not "loud talking" or otherwise being unpleasant. (3/12/15 Tr., p. 63, Ls. 4-11.) Officer Zimmer testified that he never heard Trooper Vance raise his voice and all the officers appeared empathetic towards Lutton. (3/12/15 Tr., p. 73, L. 25 – p. 74, L. 20.) Ms. Sampson, the chaplain, testified that when she asked the officers if Lutton could see his child, the officers allowed Lutton to go see his son. (3/12/15 Tr., p. 87, Ls. 5-18.) Lutton even testified that he was not in handcuffs and the officer was courteous to him. (3/12/15 Tr., p. 102, Ls. 19-22.)

Under the totality of the circumstances Lutton gave actual voluntary consent to the blood draw. Therefore, even if there were no "reasonable grounds" as required for "implied" consent – the district court still did not err because, under the totality of the circumstances, Lutton gave "actual" consent.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of the district court.

DATED this 23rd day of August, 2016.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of August, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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TST/dd