October 20, 2016 03:43 PM
FILED
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ANDREW A. SWAN, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court Case No. 130242160 Court of Appeals No. A154526 Supreme Court No. S064016

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Multnomah County
Honorable David F. Rees, Judge

Opinion Filed: January 27, 2016
Author of Opinion: Nakamoto, Judge pro tempore
Concurring Judges: Armstrong, Presiding Judge, and Egan, Judge

ERNEST LANNET #013248
Chief Defender
KALI MONTAGUE
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
kali.montague@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JOANNA JENKINS #972930
Senior Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
joanna.jenkins@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Defendant's brief on the merits argues that his motion to suppress breath-test evidence should have been granted, because that evidence was obtained in violation of his rights under Article I, section 12, of the Oregon Constitution. Specifically, defendant invoked his right to counsel, and the officer did not provide him with counsel or cease interrogation. Instead, the officer asked him 28 questions from a DUII Interview Report, read him the Implied Consent Rights and Consequences, asked him to consent to the breath test, and told him that if he did not consent, evidence of his refusal would be used against him in court.

Asking an arrestee to consent to the breath test is interrogation, because it is reasonably likely to elicit an incriminating response and does not fall within the booking-questions exception or the exception for questions normally attendant to arrest and custody. Thus, the physical evidence—the breath-test results—is a direct product of that violation. Alternatively, even if asking an arrestee for consent to take a breath test does not amount to interrogation, it must still be suppressed as evidence that derived from the earlier Article I, section 12, violation that occurred when the officer asked the 28 DUII Interview Report questions.

The state responds that asking a defendant for consent to take a breath test is not interrogation because it is "necessarily" attendant to arrest, essentially aligning it with an exception for "routine booking questions." Alternatively, the state contends that it could have justified the search under the search-incident to arrest exception to the warrant requirement. In response to defendant's alternative derivative-evidence argument, the state argues that the breath test evidence did not derive from the earlier violation, because it could have obtained the evidence through the exigent-circumstances or search-incident-to-arrest exceptions to the warrant requirement.

Defendant has three responses. First, asking a defendant to consent to a take a breath test is not attendant to an arrest because it occurs well after the arrest; it does not help effectuate the arrest; and given the implied-consent context in which it is asked, it is designed to elicit an incriminating response. Second, the state asserts alternative grounds for affirmance based on an assumption that it could have obtained the evidence through other exceptions to the warrant requirement. This court should not consider those arguments, because—had the state raised those issues at trial—the record undoubtedly would have developed differently. Moreover, justifying a search under Article I, section 9, does not excuse the state's violation of Article I, section 12. Thus, defendant requests that this court reverse the decision of the Court of Appeals and the trial court and remand for further proceedings.

Argument

I. Because an arrestee's verbal response to an officer's inquiry as to whether he will take a breath test under the implied-consent statutory scheme is likely to be used to incriminate him at a future prosecution, the inquiry amounts to interrogation.

The state relies on this court's recent decision in *State v. Boyd*, 360 Or 302, __ P3d __ (2016), to support its argument that asking a defendant to consent to a breath test does not amount to interrogation. State's BOM at 13-15. *Boyd* concerned whether police questioning constituted interrogation under Article I, section 12. This court held that police questioning constitutes unlawful interrogation when "the substance of the questions posed to the defendant and the manner in which those questions were asked demonstrated that they were 'likely to elicit some type of incriminating response.'" 360 Or at 316 (quoting *State v. Scott*, 343 Or 195, 203, 166 P3d 528 (2007)). An incriminating response is "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Scott*, 343 Or at 202 (internal quotations omitted).

Boyd does not assist the state's position. Because the manner in which Officer Enz asked defendant to consent to take the breath test involved the implied-consent statutory scheme, which allows the state to use a negative response to that question as incriminating evidence in a future prosecution, Enz's question was impermissible interrogation under *Boyd*.

A. Asking an arrestee whether he will consent to a breath test is not a question normally attendant to arrest and custody.

The state asserts that asking an arrestee whether he will consent to take a breath test does not amount to interrogation, because it is attendant to a DUII arrest. But the state provides no limiting principle for its proposed rule. Under the state's proposed rule, as long as the police routinely ask particular investigatory questions to arrestees suspected of committing particular crimes, an arrestee cannot rely on an unequivocal invocation of the right to the presence of counsel during those "routine" questions.

But the police common practices should not stand in as a limiting principle on an individual's right against self-incrimination. That is, any questioning excusable as "attendant to arrest" should occur near in time to the actual arrest and relate to effectuating the arrest. The purpose of the questioning attendant to arrest must not be designed to elicit an incriminating response.

Asking defendant to consent to take a breath test under the implied-consent statutory scheme did not fall within the exception for questions

attendant to arrest.[1] First, the question did not occur attendant to the arrest: the officer had arrested defendant, *Mirandized* defendant, transported him to the police station, provided defendant with an opportunity to telephone someone, interrogated defendant for 15 minutes, read defendant the implied consent warnings, and only then asked the defendant for consent to take the breath test. The request did not occur contemporaneous—much less close in time—to the arrest. Enz had already completed the arrest long before asking for defendant's consent.

Moreover, asking an arrestee to consent to a breath test after he has already been arrested and transported to jail does not meaningfully assist with the arrest in ways that may otherwise justify questioning under that exception. For instance, it may be permissible for police to ask an arrestee if he has anything in his pockets that will harm the officer prior to conducting a pat down search for officer safety purposes. *State v. Delong*, 357 Or 365, 379, 350 P3d 433 (2015) (citing *State v. Cunningham*, 179 Or App 498, 504, 40 P3d 535

---

[1] The state asserts that asking a defendant to consent to take a breath test is akin to asking the defendant to submit to fingerprinting. State's BOM at 13. But fingerprinting does not call for a suspect's verbal response, and the process does not have a statutory counterpart that renders the defendant's refusal to consent to fingerprinting as admissible evidence against him to establish his guilty conscience. The fingerprinting process is not designed to elicit an incriminating response. And if a defendant who has invoked his right to counsel refuses to participate in the process, the police may nevertheless compel him to comply. But that does not mean his refusal would be admissible against him.

(2002)). But the purpose of that type of inquiry is to protect the officer's safety and not to uncover evidence of a crime.

Here, in contrast, asking an arrestee for consent to take a breath test is not just designed to elicit incriminating evidence from the defendant, it is virtually guaranteed to do so. *See* Pet's BOM 30-35 (discussing why asking defendant to consent to take a breath test under the implied-consent scheme is reasonably likely to produce an incriminating response). At a minimum, the context in which Enz asked defendant to consent to take the breath test included the warning that if he refused to do so, evidence of his refusal would be used against him in court. As this court has explained, "the state wants the jury to infer from the fact of an individual's refusal that he or she is saying, 'I refuse to [consent to the breath test] because I believe I will fail [it]." *State v. Fish*, 321 Or 48, 56, 893 P2d 1023 (1995). Thus, a "no" response to a request to take a breath test under the implied-consent scheme is incriminating. And even though, here, defendant ultimately said "Yes" to taking the test, this court held in *Boyd* that the defendant's actual response is not dispositive. 360 Or at 320-21 (rejecting the state's alternative argument that the detective's question did not amount to unlawful interrogation, because it did not actually produce any incriminating information). That is, the dispositive inquiry is whether the police question is *reasonably likely* to elicit an incriminating response. *See id.* at 319-20 (holding that the officer's question was "*reasonably likely* to elicit

from defendant an incriminating response" (emphasis added)). In the implied-consent context, asking a defendant to take a breath test is reasonably likely to elicit an incriminating response, because it is reasonably likely that the defendant may assert his rights and answer "no," which the state could use against the defendant in a future prosecution.

B. *Pennsylvania v. Muniz* does not support the state's position under Article I, section 12.

The *Boyd* court cited *Pennsylvania v. Muniz*, 496 US 582, 110 S Ct 2638, 110 L Ed 2d 528 (1990), to illustrate two potential examples of police questioning that do not amount interrogation, *i.e.*, routine booking questions and questions attendant to arrest and custody. *Boyd*, 360 Or at 312, 317. The state's reliance on *Boyd*'s reference to *Muniz* does not aid its position.

After analyzing the routine-booking questions exception,[2] the *Muniz* plurality turned to analyzing whether a recording of the police administering FSTs constituted interrogation requiring advance *Miranda* warnings. The officer administered three FSTs that, for purposes of the analysis, did not call for a verbal response: the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-leg-stand test. *Id.* at 603, 603 n 17. The officer instructed the defendant on the how to perform the tests and asked if he understood the

---

[2] Routine-booking questions relate to "questions to secure biographical data necessary to complete booking or pretrial services" and questions that serve law enforcement's record-keeping function. *Muniz* 496 US at 601. The state is not relying on that exception in this case.

instructions. *Id.* 603-04. The defendant "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." *Id.* at 586 (internal quotation omitted). The defendant's "incriminating utterances during th[at] phase of the videotaped proceedings were 'voluntary' in the sense that they were not elicited in response to custodial interrogation." *Id.* at 604. The plurality similarly held that the defendant's response to the officer's question about whether he would take a breath test was "unprompted" when he refused the test, because he thought he was too inebriated to pass. *Id.* at 605 ("We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda,* and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial.").

Importantly, the defendant in *Muniz* did not challenge the admissibility of his refusal. *Id.* at 604 n 19. Therefore, the Court did not address the issue presented, here, that asking for consent to take a breath test, when a refusal response is admissible as incriminating evidence against the defendant in a future prosecution, amounts to interrogation. The *Muniz* Court cited *South Dakota v. Neville*, 459 US 553, 103 S Ct 916, 74 L Ed 2d 748 (1983), for the proposition that asking a defendant for consent to take a breath does not amount to interrogation. *Id.* at 604. But *Neville* addressed "whether the defendant's refusal to submit to a blood-alcohol test that the police sought to administer

after the defendant was arrested and given *Miranda* warnings was admissible under the self-incrimination clause of the Fifth Amendment." *Fish*, 321 Or at 61. The *Neville* Court held that the evidence did not violate the defendant's rights because his refusal was not compelled. *Id.* The Court's holding "was premised on the fact that 'the state could legitimately compel the suspect, against his will, to accede to the test.'" *Id.* (quoting *Neville*, 459 US at 563).

Moreover, that case involved a search incident to arrest and the defendant's concession that the state could compel him to take the test. *Id.* at 62. Thus, the choice was not compelled because "the defendant's choice was between submitting to a test that he had no right to refuse or suffering the consequences of refusal." *Id.* The compelling circumstances are established in this case by the nature of the encounter—custodial interrogation—not based on the choices presented to defendant. Moreover, the state did not seek to justify seizing the evidence under the search-incident-to-arrest exception, and defendant did not concede that the police could lawfully compel him to submit to the test.

In a footnote the *Neville* Court stated that the police were not required to provide *Miranda* warnings outside the basic protections of the Fifth Amendment before asking the defendant to submit to the blood-alcohol test, because that question is attendant to arrest and custody and not interrogation. 459 US at 563 n 15. That footnote is inconsistent with *Fish* because this court

expressly held that asking for consent in the implied-consent context calls for a "testimonial" and an "incriminating" response in that it allows a defendant's refusal to take a test be admitted into evidence. *Fish*, 321 Or at 56-57. That the *Fish* court was considering the compelling nature of the question does not change the outcome. The court held that asking the question was likely to produce an incriminating response similar to the question asked here: that a "no" response amounts to the defendant communicating his state of mind, and when that can be used against him in court, it amounts to self-incrimination.

Thus, the state's relies too heavily on *Muniz* and *Neville* to support its position, especially in light of *Fish*.

For those reasons, and the reasons stated in defendant's brief on the merits, asking a defendant for consent to take a breath test in the implied-consent context is interrogation, because it is reasonably likely to elicit an incriminating response and, unlike questions attendant to arrest, the question is designed for that purpose.

C. The state did not attempt to justify its discovery of the evidence based on the search-incident-to-arrest or exigent-circumstances exceptions to the warrant requirement, and *Outdoor Media* precludes those arguments on review.

That state asserts that asking a defendant for consent to take a breath test did not amount to interrogation and did not constitute unlawfully obtained derivative evidence because defendant had no right to refuse the test. The state

first acknowledges that "[t]he voluntariness of a driver's consent to take a breath or blood test might be relevant if the state were relying on consent as a basis for the warrantless seizure of evidence." State's BOM at 20. But, the state argues, "voluntary consent is not the only lawful basis for an implied-consent breath test, and the state did not have to rely on consent here." State's BOM at 20. The state notes that it could have obtained the evidence under different exceptions to the warrant requirement, including exigent circumstances or a search incident to arrest. The problem with the state's argument is that it chose to obtain and seek admission of the evidence through the consent exception to the warrant requirement and the implied-consent statutory scheme. Tr 70, *see also* Tr 72 (defendant explaining on rebuttal that the violation affected defendant's decision to consent).

If the state had relied on exigent circumstances or search-incident-to-arrest, the record undoubtedly would have developed differently. *See Outdoor Media Dimensions, Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (holding that appellate courts may affirm on alternative grounds when (1) the facts of the record are sufficient to support the alternative grounds for affirmance, (2) the trial court's ruling is consistent with the view of the evidence under the alternative basis, and (3) the record is material the same as it would have been developed had the prevailing party raised the alternative basis below). Defendant could have presented evidence that this was a "rare case"

and that the police could have obtained a warrant significantly faster than it took to compel defendant to submit to a breath test. *State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010).

Further, this court has not recognized a *per se* exception to administering breath tests under the search-incident-to-arrest exception to the warrant requirement. *C.f. State v. Owens*, 302 Or 196, 202, 729 P2d 524 (1986) (noting that the test for a search incident to arrest "is the reasonableness of the search in light of the circumstances of the particular case"). The search-incident-to-arrest exception requires a fact-intensive inquiry of the totality of the circumstances to determine whether the officer's actions were reasonable at the time of the search and whether the search was reasonable in time, scope, and intensity. *Id.* at 199. Had the state raised that issue below, the factual record would have developed differently to establish those circumstances.

Regardless, the state's proposed alternative exceptions to the warrant requirement only speak to an exception to Article I, section 9, not Article I, section 12. Even if the state could have justified the search under the alternative exceptions to the warrant requirement, defendant could not be compelled to agree to the test. Moreover, it does not mean that the police are permitted to interrogate him after he unequivocally invoked his right to counsel. It simply means that the police are allowed to seize the physical evidence. Thus, even under the state's alternative argument that it could have raised

alternative bases to justify seizing defendant's blood, it fails to show how those alternative justifications would vindicate the violation of defendant's Article I, section 12, rights.

II. Defendant's breath-test evidence derived from the earlier unconstitutional interrogation.

A. The legislature cannot abrogate a defendant's constitutional rights.

The state asserts that evidence of defendant's blood-test results did not derive from the earlier constitutional violation because defendant had no right to refuse the test. The state relies on ORS 813.100(1) and *State v. Cabanilla*, 351 Or 622, 273 P3d 125 (2012), for that proposition. But *Cabanilla* addressed the statutory construction of the implied-consent laws and whether individuals have a statutory right to refuse the test. This court explained that a "person may, of course, physically refuse to take the test" but "the implied consent statutes mandate that a person who has refused to take the test must suffer certain consequences." *Id.* at 628. In *State v. Moore*, decided after *Cabanilla*, this court distinguished between permissibly warning a DUII suspect that evidence of his refusal may be offered against him in a civil or administrative proceeding as opposed to a criminal action. *State v. Moore*, 354 Or 493, 505, 518 P3d 1133 (2013). Thus, there is a difference between a defendant's statutory right to refuse consent and constitutional right to refuse consent, and the legislature cannot abrogate his constitutional right.

The legislature lacks constitutional power to eliminate or reduce individual constitutional rights. Pet's BOM at 36-37. That is, the legislature "cannot abridge a constitutional privilege, and * * * it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." *State v. Soriano*, 68 Or App 642, 662, 684 P2d 1220 (1984), *aff'd and opinion adopted*, 298 Or 392 (1984). A search under the consent exception to the warrant requirement is reasonable because the consenter voluntarily allows the police to intrude on his or her privacy. *State v. Bonilla*, 358 Or 475, 480, 366 P3d 331 (2015) (citing *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994)). When the state relies on the consent exception to the warrant requirement, it must show that the consent was given voluntarily and "that any limitations on the scope of the consent were complied with." *Id.* When police conduct a consent search solely on the authority of the consenter, the consenter retains authority to revoke consent and limit or end the search at any time. Thus a defendant still retains a constitutional right to refuse—either by revocation or by limiting the scope of his consent—to a search even under the implied-consent statutory scheme. Otherwise the scheme would unconstitutionally limit the defendant's constitutional rights regarding his ability to place limitations on the scope of his consent search.

The state also asserts that defendant did not have a constitutional right to refuse the test because it could have obtained the test under the search-incident-

to-arrest exception or exigent-circumstances exception to the warrant requirement. But, as explained above, those issues were not presented at the trial court, and this court should not address them now.

B. Defendant's decision to take the breath-test derived from the unlawful interrogation.

In analyzing the *State v. Jarangin*, 351 Or 703, 277 P3d 532 (2012), factors, the state suggests that defendant "freely made choices throughout the encounter," "including which questions to answer." State's BOM at 25. That is legally and factually incorrect.

The nature of custodial interrogation is compelling and coercive. The state conceded that the 28-questions were asked impermissibly. That means that defendant did not freely choose to participate in that questioning. The state points to the 28 questions on the DUII Interview Report where defendant said he would not answer at least one of the questions. But the fact that defendant answered other questions does not somehow make the encounter less coercive—or his choices more free. Indeed, when a suspect has unequivocally invoked his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *State v. Kell*, 303 Or 89, 96, 734 P2d 334 (1987) (internal quotations omitted). The denial of defendant's request for counsel undermined his ability to exercise his right to

remain silent "or to speak without intimidation, blatant or subtle." *Miranda v Arizona*, 384 US 436, 466, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

The state also asserts that Officer Enz's earlier constitutional violation did not taint the discovery of defendant's breath-test results, because the record establishes that Enz would have asked for defendant's consent to take the breath test regardless of the earlier violation. State's BOM at 28. In considering whether physical evidence derived from an earlier constitutional violation, this court considers whether the violation tainted the defendant's decision to consent, not whether it tainted the officer's decision to ask for consent. *State v. Delong*, 357 Or 365, 378, 350 P3d 433 (2015). As explained in defendant's brief on the merits, his decision to consent to the breath test was likely affected by the unlawful interrogation because the impermissible questioning was intertwined with the request for his consent. *See* Pet's BOM at 43-44.

In response to the state's remaining arguments pertaining to the *Jarnagin* and *Delong* factors, defendant relies on the arguments made in the brief on the merits.

CONCLUSION

For the foregoing reasons, and those contained in Petitioner's Brief on the Merits, defendant requests that this court reverse the Court of Appeals and trial court and remand for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

KALI MONTAGUE OSB #094482
DEPUTY PUBLIC DEFENDER
Kali.Montague@opds.state.or.us

Attorneys for Defendant-Appellant
Andrew A Swan

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,866 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 20, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

KALI MONTAGUE OSB #094482
DEPUTY PUBLIC DEFENDER
Kali.Montague@opds.state.or.us

Attorneys for Petitioner on Review
Andrew A Swan