IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. WALTER PERRY LILE, Defendant-Appellant, Respondent on Review.	Curry County Circuit Court No. 11CR0023 CA A148884 SC S063031

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Curry County
Honorable JESSE C. MARGOLIS, Judge

Opinion Filed: December 24, 2014
Before: Duncan, Presiding Judge
Concurring Judges: Haselton, Chief Judge, Wollheim, Senior Judge

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INTRODUCTION

The issue in this case is whether the trial court correctly denied defendant's motion to suppress the results of his breath test after he was arrested for driving under the influence of intoxicants (DUII). In its opening brief, the state argued that defendant's Article I, section 11, right to counsel was not violated because no such right had attached at the time defendant had to decide whether to submit to the breath test and that this court should overrule its contrary decision in *State v. Spencer*, 305 Or 59, 750 P2d 147 (1988). In his respondent's brief on the merits, defendant argues—among other things—that that this court should dismiss review, because the state's argument to overrule *Spencer* was not advanced in the trial court or in the Court of Appeals and that due process gives a DUII arrestee the right to a reasonable opportunity to consult privately with counsel before deciding whether to submit to a breath test. As explained below, neither argument is well taken.[1]

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[1] Defendant also argues that this court should adhere to its decision in *Spencer*. This reply brief addresses only defendant's preservation and due process arguments. The state relies on its opening brief on the merits in support of its argument regarding the proper interpretation of Article I, section 11.

ARGUMENT

A. This court can—and should—revisit and overrule *Spencer* even though the state did not make that argument in the trial court or the Court of Appeals.

Defendant correctly notes that the state's position in the trial court and the Court of Appeals was that *Spencer*—and *State v. Durbin*, 335 Or 183, 63 P3d 576 (2003)—did not require the officer to give the opportunity to consult privately with his attorney's receptionist before deciding whether to submit to a breath test; the state did not argue that "*Spencer* itself was wrongly decided." (Resp BOM 10). The state's failure to challenge *Spencer* earlier in this case, however, is not a reason for this court to decline to consider that argument now, and it is not a reason for this court to dismiss review.

This court has explained that "[p]reservation rules are pragmatic," and that "[w]hat is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). Here, there was no procedural unfairness to defendant or to the trial court. Defendant has not identified any way in which the factual record would have been different had the state raised this argument below. Moreover, the trial court was bound by *Spencer*. Even if the state had argued below that *Spencer* was wrongly decided, neither the trial court nor the Court of Appeals could have accepted

that argument. Raising that argument below would have been futile and inefficient. Not raising it until the petition for review did not procedurally disadvantage either defendant or the lower courts.

The procedural posture here is almost exactly the same as the posture in *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 11 P3d 228 (2000). There, the petitioner on review asked this court—for the first time in its petition for review—to revisit its interpretation of Article IV, section 1, of the Oregon Constitution in *Lloyd Corporation v. Whiffen*, 315 Or 500, 849 P2d 446 (1993) (*Whiffen II*). *See Stranahan*, 331 Or at 47 n 6 ("We note that Fred Meyer first raised the issue that *Whiffen II* was decided incorrectly in its petition to this court. Before the trial court and the Court of Appeals, which are bound to follow decisions of this court and have no ability to overrule such decisions, Fred Meyer argued instead that it should prevail * * * based on factual differences[.]"). Despite the fact that the validity of *Whiffen II* was not raised until the petition for review, this court allowed review to specifically consider that issue, and it ultimately disavowed is decision in *Whiffen II*. Similarly, here, the only issue raised in the state's petition for review was the continuing validity of *Spencer*, and this court allowed review. There is no practical or prudential reason for this court to dismiss review at this stage.

B. A person arrested for DUII does not have a constitutional due process right to consult with counsel before deciding whether to submit to a breath test.

Defendant also argues that, even if Article I, section 11, does not give him the right to a reasonable opportunity to consult with counsel before deciding whether to submit to a breath test, the Due Process Clause of the United States Constitution does give him such a right. (Resp BOM 32-41). As explained below, defendant's due process argument is without merit.

In *State v. Newton*, 291 Or 788, 636 P2d 393 (1981), three justices of this court concluded that a person arrested for DUII had a Fourteenth Amendment liberty interest to communicate with counsel (or anyone) before submitting to a breath test. *Id.* at 807-08; *see also id.* at 813-14 (Tongue, J., concurring) (declining to hold that an arrestee's right to call an attorney was a constitutional "liberty" under the Fourteenth Amendment). Six years later, in *Spencer*, this court "express[ed] no opinion on the *Newton* plurality's conclusion that the denial of access to an attorney violated the Fourteenth Amendment." 305 Or at 75 n 4. The *Newton* plurality's opinion is the closest this court has ever come to finding a due process right to consult with an attorney before deciding whether to submit to a breath test, but that opinion does not provide defendant with any binding precedent in which to ground his new argument to this court.

Additionally, the plurality's basis for finding a due process right to call counsel in *Newton*, was specific to the record in that case. The plurality noted

that, "there was no showing that the time required to make a call would have reduced the efficacy of the breathalyzer test. Indeed, the police allowed about two hours to transpire between the arrest and the breathalyzer request, which suggests a lack of urgency." 291 Or at 808. Here, had defendant made a due process argument in the trial court, perhaps a record could have been made concerning whether additional delay would have undermined the efficacy of the breath test.

Moreover, even the due process right identified by the *Newton* plurality would not have justified allowing defendant the opportunity to consult privately with whomever he chose to call. The plurality noted that the administrative rules in effect at the time required (and still do require) "that the person be under observation for 15 minutes prior to the test." *Id.* The plurality continued that the record "discloses no reason why a call on an available telephone *during the observation period* would impair the evidence gathering process, *assuming the arrested person did not object to observation during the call*." *Id.* (emphasis added); *see also Moore v. MVD*, 293 Or 715, 723, 652 P2d 794 (1982) (holding that any due process right to have the opportunity to make a call before submitting to a breath test "might be given* * * during the 15-minute observation period with affecting the validity of the test"). Thus, the limited right identified by the *Newton* plurality was merely the right to make a phone call during the observation period. But, the right defendant asks this

court to identify here is much broader: he wants this court to find that he has a due process right to *privately* consult with an attorney—which would necessarily go beyond allowing the arrestee to make a phone call during the observation period. (Resp BOM 37-38). However, none of the cases defendant relies on provide support for a right as broad as he seeks.[2]

In fact, the state is not aware of any state or federal courts that have identified a due process right for a DUII arrestee as broad as the right defendant wants from this court. After this court's plurality opinion in *Newton*, "[n]o other state or federal court has subsequently held that the due process clause of the Fourteenth Amendment generally establishes a pre-test right to counsel for a suspected drunk driver." *Motor Vehicle Administration v. Deering*, 438 Md 611, 628, 92 A3d 495 (Md App 2014). In *Deering*, the Court of Appeals of Maryland (that state's highest court) surveyed state and federal decisions on this point and concluded that other state courts had either "considered and rejected the argument that a detained driver has a right to consult counsel rooted in the due process clause of the Fourteenth Amendment," or have found the source for

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[2] The Court of Appeals has specifically recognized that the any right under the Fourteenth Amendment to consult with an attorney (or anyone) before submitting to a breath test does not include the right to "private consultation with an attorney." *Brown v. DMV*, 219 Or App 607, 615, 185 P3d 459, *rev den*, 345 Or 175 (2008). That court held that, "[b]ecause the Fourteenth Amendment protects a liberty interest rather than an entitlement, the state has no affirmative obligation to assist petitioner's exercise of that liberty, including by spontaneously providing privacy." *Id.*

such a right to counsel "in a state constitutional provision, a state rule, or a state statute." *Id.* at 628-29.

Finally, the United States Supreme Court also appears to have cast doubt on the existence of a due process right to privately consult with counsel before deciding whether to submit to a breath test. In *Nyflot v. Minnesota Comm'r of Public Safety*, 474 US 1027, 106 S Ct 586, 88 L Ed 2d 567 (1985), the United States Supreme Court dismissed the driver's appeal "for want of a substantial federal question," after the Minnesota Supreme Court had rejected his contention that such a pre-breath test right to counsel existed under the Fourteenth Amendment. Dismissals for want of a substantial federal question "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 US 173, 176, 97 S Ct 2238, 53 L Ed 2d 199 (1977). "Thus, the Supreme Court's dismissal in *Nyflot* arguably forecloses federal and state courts from holding that there is a due process right to a pre-test consultation with counsel under the due process clause of the federal Constitution." *Deering*, 438 Md at 631.

Whatever the scope of the due process right to consult with counsel before submitting to a breath test, it is not as broad as defendant needs it to be to obtain any advantage in this case. No court has held that such a right would include the right to private consultation, and no Oregon court has suggested that

such a right would extend beyond the 15-minute observation period before the administration of the breath test. Defendant was given a reasonable opportunity to make a phone call in this case—in fact, he reached his attorney's receptionist and he had at least 20 minutes to try to contact any other attorney. Whatever due process requires, it does not require any more than that.

CONCLUSION

For the reasons explained in the state's opening brief on the merits, this court should overrule its holding in *Spencer* that Article I, section 11, of the Oregon Constitution affords a DUII arrestee a right to consult with counsel before deciding whether to submit to a breath test. As explained above, this court should not dismiss review and it should not conclude that defendant's due process rights were violated. This court should reverse the decision of the Court of Appeals, and it should affirm the judgment of the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 20, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew Robinson, attorneys for appellant, by using the court's electronic filing system.

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

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 1,968 words. I further 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(2)(b).

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