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 No. 130242160 CA A154526 SC S064016

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on 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, J. pro tempore
Concurring Judges: Armstrong, Presiding Judge, and Egan, Judge.

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INTRODUCTION

Like every other state, Oregon requires drivers—in exchange for the privilege of using public roads—to consent to take a breath test if they are arrested for driving under the influence of intoxicants (DUII). This case presents two fundamental issues about a police officer's ability to enforce that implied-consent law after a defendant has invoked his right under Article I, section 12, to cut off custodial interrogation.

The first issue is whether merely asking a DUII suspect if he intends to take the breath test is itself a form of "interrogation" for purposes of Article I, section 12. Defendant urges this court to conclude that it is, but the position he asks this court to adopt is inconsistent with this court's case law and one that would undermine the very purpose of the implied-consent law. Other courts, including the U.S. Supreme Court, have consistently rejected the contention that enforcing the implied-consent law is a form of interrogation, and this court should do the same thing.

The second issue is about whether an officer's *Miranda* violation earlier in the encounter—one committed by the officer sometime before asking whether the defendant intends to submit to the breath test —requires exclusion of the test results. It does not. Although physical evidence can be subject to

exclusion if it is the product of a *Miranda* violation, under the implied consent statute—and this court's case law interpreting it—the defendant cannot legally refuse to take a breath test. The state's ability to obtain evidence from that test is not, as a matter of law, a product of an earlier violation. At the very least, exclusion is not required where, as here, the *Miranda* violation did not affect the defendant's decision to submit to the test.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question presented: If a defendant arrested for DUII invokes his right against self-incrimination under Article I, section 12, may the police nonetheless ask him, "Will you take a breath test?"

First proposed rule of law: Yes. A question that is necessarily attendant to legitimate police procedure related to custody and not likely to be perceived as calling for any incriminating response is not interrogation within the meaning of Article I, section 12. The question "Will you take a breath test" falls within this category.

Second question presented: If a defendant submits to a breath test after an earlier violation of his rights under Article I, section 12, can the results of that test be used in a later criminal prosecution?

Second proposed rule of law: Yes. Because the defendant cannot legally refuse to take the test, the state's legal entitlement to the breath test does not depend on the defendant's responses to the improper interrogation, and the

evidence is not derived from the violation of Article I, section 12. The evidence also is not derived from the violation if, in the totality of the circumstances, the defendant's decision to submit to the test attenuated the violation.

STATEMENT OF FACTS

A. Defendant took a breath test after being lawfully arrested for DUII.

Early in the morning of February 24, 2013, Portland Traffic Officer David Enz reported to the scene of a traffic crash investigation. (Tr 26-27). When he arrived, Officer Enz contacted defendant, who was still seated in the driver's seat of one of the involved vehicles. (Tr 27).

Officer Enz observed that defendant had his eyes closed, and defendant's head kept bobbing forward before Officer Enz knocked on the window to draw defendant's attention. (Tr 27). After several failed attempts to locate the window lever, defendant opened the door. (Tr 27-28). Officer Enz explained to defendant why he had responded to the scene, and he asked defendant what had happened to his car, pointing at the damage to the right front quarter panel. (Tr 28). In response, defendant said that he "had clipped a car." (Tr 28). Defendant had slurred speech, he smelled of alcohol, and his eyes were watery and bloodshot. (Tr 28). Officer Enz asked whether defendant was injured, and defendant said he was not injured. (Tr 28). At that point, Officer Enz was of the opinion that defendant was intoxicated. (Tr 28).

Officer Enz explained to defendant that he believed that defendant was impaired. (Tr 28). He described the standardized field sobriety tests, and asked whether defendant would perform those tests voluntarily. (Tr 28). In response, defendant said that he would like to talk to a lawyer. (Tr 29). Officer Enz told defendant that, if he had a cell phone, he could call the attorney from the car. (Tr 29). Defendant started dialing the phone, so Officer Enz closed the car door, and went to take measurements of the crash scene. (Tr 29). Officer Enz closed the car door at 3:07 a.m., and at that point, defendant had privacy. (Tr 29).

Officer Enz returned to defendant's vehicle at 3:18 a.m., and asked defendant again "if he would like to perform the voluntary field sobriety tests" that Officer Enz had described earlier. (Tr 29). Defendant asked, "What exactly are you asking me to do?" (Tr 29). Officer Enz again described the field sobriety tests, while defendant repeated into the phone everything that Officer Enz was saying. (Tr 29). Defendant then said, "Yes. Yes, I will." (Tr 29).

Officer Enz observed that defendant exhibited a sway and a stagger. (Tr 30). They moved over to the sidewalk, and once they were on the sidewalk, defendant continued to sway. (Tr 30). Officer Enz asked defendant about medical, physical, or visual problems and defendant denied that he had any of those issues. (Tr 31). Defendant then took and failed the field sobriety tests.

Officer Enz believed that it was more likely than not that defendant was impaired; he advised defendant that he was under arrest for DUII and handcuffed him. (Tr 30-31). He read defendant his *Miranda* rights, and asked whether defendant understood them. Defendant responded, " NO! I want to talk to my lawyer." (Tr 37, 75). Officer Enz told defendant that he would have another opportunity to consult with someone privately when they got back to the precinct, and defendant then said, "Yes, I understand my rights." (Tr 31).

Officer Enz transported defendant to the precinct. (Tr 31). When they arrived, Officer Enz provided defendant with his cell phone, a landline, a phone book, and a copy of the Implied Consent Combined Report, a form that describes the consequences of a person's decision to refuse a breath test under the implied-consent law. (Tr 31, 39, 48). He advised defendant that he could make as many calls as he liked to whomever he liked, and that he would be closing the cell door to provide him with privacy while he was on the phone. (Tr 31). He explained the implied-consent procedure, and then closed the cell door at 3:47 a.m. (Tr 31). At 4:07 a.m., Officer Enz returned and opened the cell door. (Tr 31). Defendant was still on the phone, so Officer Enz advised him that he would give him another minute or so to complete his call, and closed the door again. (Tr 31). At 4:10 a.m., Officer Enz checked on defendant again and found that he was finishing his call. (Tr 31).

Officer Enz escorted defendant into the intoxilyzer room and began the 15-minute observation period that is required before administering a breath test. (Tr 32). During the 15-minute observation period, Officer Enz asked defendant the questions on the DUII Interview Report and read him the implied-consent rights and consequences. (Tr 32). Before conducting the DUII Interview Report, Officer Enz explained that it contained 28 questions and that if defendant did not wish to answer any of those questions, he did not need to. (Tr 39). When asked if he would like to continue on and answer the questions, defendant "readily agreed to answer those questions." (Tr 45). But during the interview defendant specifically declined to answer at least one of the questions—when asked who was driving, defendant said that he was not going to answer that. (Tr 43).

When Officer Enz asked defendant if he would take the breath test, defendant just stared at him and started reading the Implied Consent Combined Report. (Tr 32). Officer Enz told defendant that he would have a moment to think about it, because Officer Enz would be asking him again once the instrument started up and was ready for a breath sample. (Tr 32, 49). Defendant said that he would like to speak with his attorney before answering that question. (Tr 43). Officer Enz explained to defendant that he had already had ample time to consult with someone for legal advice both at the scene and at the precinct; he asked again whether defendant would take the breath test,

and he responded "Yes." (Tr 32, 43). At 4:35 a.m., defendant completed the breath test, which indicated that he had a blood alcohol content of .18% —more than twice the legal limit. (Tr 32).

B. The trial court denied defendant's motion to suppress the breath test, and the Court of Appeals affirmed that ruling.

As a result of the events described above, defendant was charged with one count of DUII and one count of reckless driving.[1] Defendant moved to suppress both his statements and the results of the breath test, contending that Officer Enz had violated his rights under Article I, section 12, by asking defendant the questions from the DUII Interview Report, and that the breath test evidence was "fruit of the poisonous tree." (ER 4, 6; Tr 5). The trial court granted the motion with respect to defendant's responses to the questions on the DUII Interview Report, but denied the motion with respect to the breath test evidence. (Tr 77). Defendant was tried on stipulated facts and the court found him guilty of DUII and reckless driving. (Tr 83).

On appeal, defendant contended that the trial court erred in declining to suppress the breath test evidence based on his argument that it was derived from the violation of Article I, section 12. (App Br 6, 12-14). The state responded

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[1] The information contained a third count charging criminal mischief in the second degree, but that count was dismissed on motion of the state. (Tr 82-83).

that the breath test evidence was not "derived" from the Article I, section 12, violation. (Resp Br 17-33).

The Court of Appeals affirmed. The court held that merely asking defendant if he would take a breath test after he had invoked his right to counsel did not violate Article I, section 12. *State v. Swan*, 276 Or App 192, 201, 366 P3d 802 (2016). The court explained that Officer "Enz's question—whether defendant would take the breath test—was not 'interrogation' because it was part of the 'normal arrest and booking procedures.'" *Id*. Next, the court considered whether the breath test evidence "derived" from Officer Enz's unlawful interrogation of defendant using the questions from the DUII Interview Report. The court applied the five factors this court identified in *State v. Jarnagin*, 351 Or 703, 716, 277 P3d 535 (2012), as relevant to the "totality of the circumstances" analysis for "determining whether physical or testimonial evidence derives from or is the product of an earlier *Miranda* violation." *Swan*, 276 Or App at 202-07. The court concluded that, under the exploitation analysis from *Jarnagin*, "defendant's decision to consent to the breath test and the breath test result * * * were not the product of the earlier Article I, section 12, violation such that suppression of the evidence is required to vindicate defendant's right. *Id*. at 207.

SUMMARY OF ARGUMENT

Article I, section 12, prohibits the police from interrogating a defendant who has invoked his right to counsel without counsel being present. But does not prohibit the police from asking a person lawfully arrested for DUII whether that person will take a breath test, because the question "Will you take a breath test?" is not interrogation..

Like other routine booking questions, asking a defendant if they intend to submit to a breath test is attendant to arrest and not likely to be perceived as calling for any incriminating response. Contrary to defendant's argument, the attendant-to-arrest exception is not limited to questions seeking only biographical information. The routine booking and custody process includes questions about whether the arrestee will submit to physical searches, such as requests to comply with fingerprinting or to allow the police to inventory the arrestee's property. Those questions allow officers to avoid having to use physical force to compel compliance with the booking process. Asking an arrestee to take the breath test is similarly part of the normal process of collecting physical evidence incident to a DUII arrest, and thus is not interrogation.

The state has conceded that Officer Enz did conduct interrogation when he asked defendant questions from the DUII interview report. But as the lower courts correctly concluded, that violation of Article I, section 12, did not require

suppression of the results of the breath test. Suppression would have been appropriate only if the results of the breath test were derived from the violation of the right not to be interrogated without counsel present. And for two separate reasons, the breath-test results were not derived from the violation here.

First, defendant could not legally refuse to take the breath test, and thus the state's legal entitlement to have him take the test in no way turned on his responses to the questions Officer Enz asked during the DUII interview. Defendant had already impliedly consented to take a breath test when he drove on Oregon's roads, long before Officer Enz asked him any questions. And the state did not need defendant's consent to conduct the breath test without a warrant, because it could rely on other exceptions to the warrant requirement, such as exigency or search incident to arrest. Suppressing the breath test results thus would place defendant in a better position that he would have been if Officer Enz had not violated Article I, section 12. That would not be consistent with the purpose of the exclusionary rule, which is to vindicate an individual's rights and ensure that they are not placed in a worse position by police misconduct.

Second, in any event defendant's decision to submit to the breath test here was not tainted by the earlier violation of Article I, section 12. The three most important factors that bear on this issue are the nature of the violation, the

character of the consent, and the causal relationship between the two. All three factors weigh in favor of attenuation here. First, the violation was not flagrant or egregious. Officer Enz made a good-faith mistake about whether defendant was merely invoking his limited right under Article I, section 11, to *consult* with counsel about whether to take a breath test during a DUII investigation, or whether he was invoking his right under Article I, section 12, not to be questioned without the presence of counsel. Second, defendant's consent was voluntary and informed. Officer Enz fully advised defendant of the consequences of either consenting to or refusing to take a breath test, and defendant had an opportunity to consult with an attorney before making his choice. Third, Officer Enz did not trade on any statements obtained as a result of the prior violation. Rather, defendant's decision to take the breath test was the product of his evaluation of his rights and consequences under the implied-consent law. Thus, even if other factors like temporal proximity or the fact that defendant remained in custody might have weighed against attenuation, the totality of the circumstances demonstrated that defendant's decision to submit to a breath test was not derived from a violation of his rights.

ARGUMENT

Article I, section 12, provides that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." To protect against compelled self-incrimination, the police must give the *Miranda* warnings—

which include a reminder that a suspect has the right to have counsel present—before interrogating a suspect who is in custody or compelling circumstances. *Jarnagin*, 351 Or at 713. Once a suspect invokes the right to counsel, the police generally must stop all "interrogation." *State v. Boyd*, 360 Or 302, 318, __ P3d __ (2016). If the police violate that rule, the court will suppress evidence that derives from or is a product of the violation. *Jarnagin*, 351 Or at 713.

Here, defendant advances two arguments as to why his breath test results derived from unlawful interrogation and must be suppressed. As discussed below, however, both arguments are without merit. Officer Enz lawfully obtained defendant's breath test results, and the trial court correctly declined to exclude that evidence.

A. The question "Will you take a breath test?" is not interrogation, because it is attendant to arrest and not likely to be perceived as calling for an incriminating response.

Defendant first contends that asking him if he would take the breath test after he had invoked his right to counsel violated Article I, section 12. (App BROM 26). Defendant is wrong. When defendant asked to talk to a lawyer, the police were required to stop interrogating him. But that does not mean that all conversation, or even all questioning, had to stop. Rather, only questioning that amounted to "interrogation" for purposes of Article I, section 12, had to stop. *See Boyd*, 360 Or at 316. The question "Will you take a breath test?" is not interrogation.

Questions that are not likely to be perceived as calling for an incriminating response, such as questions normally attendant to arrest and custody, do not constitute interrogation. That rule comes from *Rhode Island v. Innis*, 446 US 291, 297, 100 S Ct 1682, 64 L Ed 2d 297 (1980), in which the Court stated that "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id*. at 300-02 (emphasis in original). This court adopted the *Innis* rule in *State v. Scott*, 343 Or 195, 166 P3d 528 (2007), and recently reaffirmed it in *Boyd*, 360 Or at 316.

As the Court of Appeals recognized here, "Enz's question—whether defendant would take the breath test—was not 'interrogation' because it was part of the 'normal arrest and booking procedures.'" *Swan*, 276 Or App at 201 (quoting *State v. Gardner*, 236 Or App 150, 154–55, 236 P3d 742, *rev den*, 349 Or 173, 243 P3d 468 (2010)). That holding is consistent with the federal decisions on point. In *South Dakota v. Neville*, for example, the U.S. Supreme Court observed that "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*" because it does not seek to elicit testimonial evidence and is "similar to a police request to submit to fingerprinting or photography." 459 US 553, 560-61, 564 n 15, 103 S Ct 916, 74 L Ed 2d 748 (1983). And in *Pennsylvania v. Muniz*, the Court held that a

request to take a breath test is not custodial interrogation, because it is "necessarily 'attendant to' the legitimate police procedure, * * * and [was] not likely to be perceived as calling for any incriminating response." 496 US 582, 603-05, 110 S Ct 2638, 110 L Ed 2d 528 (1990).

This court recently cited exactly that part of *Muniz* in *Boyd* when illustrating how it had "borrowed from federal case law in determining what constitutes 'interrogation' for Article I, section 12, purposes," 360 Or at 314. The court expressly identified "questions about whether a person being asked to undergo sobriety testing understands the instructions and is willing to submit to the testing," as examples of questions that are not interrogation under the Fifth Amendment and, by extension, under Article I, section 12. *Id.* at 312.

In short, the question, "Will you take the breath test?" is the paradigmatic example of a question that is not "interrogation." *Boyd* thus clarified that the question did not constitute unlawful interrogation under Article I, section 12.

Citing *Muniz*, defendant argues that this court should limit the "routine booking question" exception to "questioning ** * limited to seeking only biographical information[.]" (App BROM 23-24). There are a number of problems with that argument.

First, *Muniz* discussed questions "normally attendant to arrest and custody," not simply questions about biographical information. 496 US at 600. And, as this court acknowledged in *Boyd*, a question regarding whether the

defendant is willing to take the breath test is an example of a question that falls within this category.

Second, as this court reaffirmed in *Boyd*, the basis for the attendant-to-arrest exception is the more general rule that questions are not interrogation unless they are reasonably likely to elicit an incriminating response. 360 Or at 315-17. That rule covers a wide range of questions, not just requests for biographical information, and there is no principled basis for limiting it to one particular category. Contrary to defendant's argument (App BROM 30), a request to take a breath test is "not likely to be perceived as calling for any incriminating response," *Boyd*, 360 Or at 317 (quoting *Muniz*, 496 US at 605), any more than a question to comply with fingerprinting or an inventory search would. *Cf. Vondehn*, 348 Or at 489 (Linder, J., concurring) ("With apparent unanimity, courts throughout the country that have considered the question have held that asking for consent to search is not interrogation within the meaning of the *Miranda* doctrine.").[2]

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[2] *State v. Fish*, 321 Or 48, 893 P2d 1023 (1995), is not to the contrary. In that case, the court held that it violated Article I, section 12, to admit evidence of a defendant's refusal to take field sobriety tests. The police could not compel the defendant to take those tests, because they were testimonial, so the court held that evidence of a refusal also could not be admitted. *Id.* at 60, 62. The court expressly distinguished "the 'non-testimonial' blood-alcohol test," which the police could compel. *Id.* at 62. In any event, unlike *Muniz* and *Boyd*, *Fish* did not address whether a question to take a breath test is "interrogation."

Defendant purports to find support in *State v. Cram*, 176 Or 577, 160 P2d 283 (1945), but that case does not advance his argument. In *Cram*, both the majority and the concurrence concluded that the use of blood-alcohol evidence seized at the behest of police through a nonconsensual blood draw did not implicate Article I, section 12, because the defendant was not being compelled to testify against himself. 176 Or at 593, 595. Although the majority discussed whether compelling a defendant to produce physical evidence might be unlawful, that discussion was *dicta* because it concluded that the issue was not presented in the case. 176 Or at 593-94. The concurrence explained (correctly) that the majority had confusingly intermingled "the rule against self-crimination and the rule against admissibility of evidence illegally obtained." 176 Or at 595-96.

Both the majority and the concurrence did note in *Cram* that requiring a defendant to produce evidence in response to a subpoena might implicate Article I, section 12, to the extent that it required the defendant, either directly or indirectly, to acknowledge the existence of or authenticate incriminating evidence. 176 Or at 581-82, 595. But, contrary to what defendant suggests, asking defendant to submit to a breath test did not amount to requiring defendant to act as a witness against himself "pursuant to process." (App BROM 34). Defendant was not called upon to identify or authenticate the

breath test results in court. Rather, he was subject to a lawful search under Article I, section 9. Defendant's reliance on *Cram* is inapposite.

Finally, it makes logical sense that the attendant-to-arrest exception extends beyond requests for biographical information. The routine booking and custody process itself requires questions relating to whether the subject will submit to physical searches. A subject may be asked to walk to a location for fingerprinting and to present his hands for that process. Similarly, a person may be asked to submit to an inventory of his possessions pursuant to jail policy. Those questions and requests are directed at the logistics of facilitating the physical process of booking the individual and placing him into custody. An officer should be able to request physical compliance from the arrestee, rather than simply applying physical force in the first instance.

A request to take the breath test falls into that category. An officer may search incident to arrest for evidence of the crime for which the suspect has been arrested. *State v. Owens*, 302 Or 196, 200, 729 P2d 524 (1986). As discussed further below, a breath test administered to a subject arrested for DUII is a lawful search incident to arrest as well as a lawful exigency search administered to the suspect as soon as practicable after arrest. Asking the suspect if he will take the breath test is directed at facilitating the physical process of administering the search. As such, it is part of the normal process of arrest and custody, and it is not interrogation.

B. The implied-consent breath test was not derived from a violation of Article I, section 12.

Although Officer Enz did violate Article I, section 12, when he asked defendant questions from the DUII interview report, that violation did not require suppression of the results of the breath test, because the evidence was not derived from that violation. First, defendant had no legal right to refuse a chemical test administered under the implied-consent law and, indeed, a primary objective of the law is to induce the person to take the test. Suppressing the breath-test results thus would place defendant in a better position that he would have been if Officer Enz had not violated Article I, section 12—a result that would be inconsistent with the purposes of the exclusionary rule. Second, even if the state had needed defendant's voluntary consent to obtain the breath-test results, defendant gave that consent here, and his decision to do so was not tainted by the earlier violation of Article I, section 12. The totality of the circumstances demonstrate that defendant's voluntary consent to take a breath test was not derived from a violation of his rights.

1. The breath test evidence was not derived from a violation of Article I, section 12, because defendant had no right to refuse the test.

Officer Enz's improper questioning had no causal connection to the state's ability to obtain the results of the breath test. That is because nothing that Officer Enz said, and nothing that defendant said in response, had any

bearing on whether the police had a legal right to administer the breath test and use the results against defendant. Because defendant was legally required to take the test regardless of anything he or Officer Enz said during the improper questioning, the results were not derived from the questioning.

"Under ORS 813.100(1), anyone driving on public roads in Oregon has impliedly consented to a chemical test of his or her breath for purposes of determining the person's blood alcohol content if the person has been arrested for DUII." *State v. Cabanilla*, 351 Or 622, 627, 273 P3d 125 (2012). Officer Enz arrested defendant based on probable cause to believe that he had committed DUII under ORS 813.010. Accordingly, under Oregon's implied-consent law, ORS 813.100, defendant was deemed to have consented to a breath test, subject to being advised of the consequences and rights as required by ORS 813.130.[3] As this court stated in *Cabanilla*, "under the law, a driver

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[3] ORS 813.100(1) provides:

> (1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of

Footnote continued…

already has consented to the test. The driver cannot legally refuse." *Id*. at 633 (emphasis in original). In fact, "the overarching purpose of the rights and consequences requirement is to coerce a driver's submission to take the tests." *Id*.; *see also id*. at 334-35 ("the legislative history of ORS 813.130 suggests that the legislature's concern in enacting that statute was mainly with devising a simple form to serve as a persuasive tool to compel submission to the tests").

The 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. *Cf. State v. Moore*, 354 Or 493, 495, 318 P3d 1133 (2013), *adh'd to as modified on recons*., 354 Or 835, 322 P3d 486 (2014) (holding that the statutory implied-consent warnings are not so coercive as to render otherwise voluntary consent to the test involuntary). But 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. *Cabanilla*, 351 Or at 633 ("As this court has stated, the purpose of the reference to 'refusal' in the implied-consent statutes 'is not to reinstate a driver's right to choice, let alone a voluntary and informed choice, but rather to nonforcibly enforce the driver's previous implied

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(…continued)

> intoxicants in violation of ORS 813.010 or of a municipal ordinance. Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130.

consent.'") (quoting *State v. Newton*, 291 Or 788, 793, 636 P2d 393 (1981)). The police may seize breath test evidence without a warrant for several other reasons, any one of which would make voluntary consent unnecessary. For example, the exigency created by dissipating blood-alcohol evidence ordinarily justifies the seizure of that evidence without a warrant, irrespective of voluntary consent. *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010).[4] An implied-consent breath test also constitutes a lawful search incident to arrest, because its purpose is to prevent the destruction of evidence of the crime of DUII, and it is reasonable in scope, time, and intensity. *See, e.g.*, *State v. Mazzola*, 356 Or 804, 811-12, 819-20, 345 P3d 424 (2015) (describing parameters of the search-incident-to-arrest exception to the warrant requirement and noting its relationship to the exigency exception in the context of blood-alcohol evidence: "a warrantless search for evidence of the crime of DUII is supported by probable cause to arrest the defendant, the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity."); *see also Birchfield v. North Dakota*, __ US __, 136 S Ct 2160, 2184, __ L Ed 2d __

[4] The *Machuca* court recognized the possibility of the rare case in which exigency would not justify the warrantless seizure of blood alcohol evidence where "particular facts may show * * * that a warrant could have been obtained and executed significantly faster than the actual process otherwise used." *Machuca*, 347 Or at 657. But Officer Enz's testimony regarding the timeline and series of events eliminates the possibility that this could be that hypothetical "rare case."

(2016) ("[W]e conclude that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving. The impact of breath tests on privacy is slight and the need for BAC testing is great.").[5]

In sum, a person lawfully arrested for DUII has no legal right to refuse a breath test administered pursuant to the implied-consent law and, indeed, a primary objective of the law is to induce the person to take the test.

Because a person in that situation has no right to refuse to take a breath test, the results of the test should not be suppressed even if the police violated Article I, section 12, earlier in the encounter. The purpose of the exclusionary rule is "'to preserve * ** rights to the same extent as if the government's officers had stayed within the law" and "protecting the individual's rights *vis-a-vis* the government.'" *State v. Vondehn*, 348 Or 462, 473, 236 P3d 691 (2010)

[5] There are additional theories—such as the exception for administrative searches or a search based on special needs of law enforcement under a general reasonableness analysis— that support the conclusion that police were entitled to seize the blood-alcohol evidence without a warrant, and defendant had no right to refuse. *See, e.g.*, *Fish*, 321 Or at 81 (Van Hoomissen, J., concurring in part; dissenting in part) (explaining that "because of the pervasive regulation to which the activity of driving has been subjected in this state, where that activity is concerned, a driver has a reduced level of constitutional protections); *Maryland v. King*, __US __, 133 S Ct 1958, 186 L Ed2d 1 (2013) (noting "special law enforcement needs" exception; applying general standards of reasonableness to conclude that "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.").

(quoting *State v. Simonsen*, 319 Or 510, 512, 878 P2d 409 (1994)). That purpose would not be served by suppression.

When a breath test follows a violation of Article I, section 12, suppressing the results of that test would not serve to vindicate the defendant's personal rights or put him in the same position he would have been in if there had been no violation. A defendant has no legal right, constitutional or otherwise, to withhold compliance with a breath test administered under the implied-consent law. Thus, exclusion of the implied-consent breath test evidence would not "preserve * ** rights to the same extent as if the government's officers had stayed within the law." Rather, it would provide a defendant with greater rights than he otherwise has under the law. Concerns about any coercion inherent in custodial interrogations is beside the point, when a driver is deemed to have consented to the test already and the purpose of the statute is to coerce the individual's submission to take the test.

This court has not previously addressed the application of the Article I, section 12, exclusionary rule in a context where the disputed evidence was obtained through a detailed statutory framework under which the defendant inevitably would be requested to relinquish the evidence and where the

defendant had no right to withhold the evidence at issue.[6] Under those circumstances, the evidence cannot be said to have derived from the violation of Article I, section 12. And it would be anomalous to suppress the breath test evidence based on the exclusionary rule under Article I, section 12, because that would place defendant in a *better* position that he otherwise would have been had there been no violation of Article I, section 12. That result would not be consistent with the purpose of the exclusionary rule.

2. Alternatively, under the totality of the circumstances, defendant's decision to submit to a breath test was not derived from a violation of Article I, section 12.

Even if the effect of any violation on defendant's decision to submit to the breath test were relevant, he still would not be entitled to have the test results suppressed here. That is because his decision was not itself derived from the unlawful interrogation that occurred when Officer Enz asked defendant the questions from the DUII Interview Report. (App BROM 5).[7]

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[6] *See, e.g.*, *Vondehn*, 348 Or at 476 ("the state makes no argument that the request for consent to search or the seizure of the marijuana derived from some source other than defendant's answers to those unwarned questions"); *Delong*, 357 Or at 372-73 ("The court's conclusion that the marijuana derived from the *Miranda* violation in *Vondehn* thus appears to have turned primarily on the absence of any argument to the contrary.").

[7] The record does not disclose what responses, if any, defendant gave to those questions, other than that he refused to answer the question "who was driving?" (Tr 40-43).

This court looks to "the totality of the circumstances in determining whether physical or testimonial evidence derives from or is the product of an earlier *Miranda* violation." *Jarnagin*, 351 Or at 716. In *Jarnagin*, the court identified five factors that may bear on this analysis: the nature of the violation, the amount of time between the violation and the later evidence, whether the suspect remained in custody, subsequent events that may have dissipated the taint of the earlier violation, and the use the state has made of the evidence. *Id.* But more recently, in *State v. Delong*, the court focused on the three factors that are most important when, as here, the police obtained physical evidence through the defendant's consent. 357 Or 365, 378-80, 350 P3d 433 (2015). These factors are "the illegal conduct that comprised the stop or search, the character of the consent, and the causal relationship between the two." *Id.* at 378 (quoting *State v. Unger*, 356 Or 59, 78, 333 P3d 1009 (2014)). As the court noted, those three factors "are a subset of the factors the court identified in" *Jarnagin*. *Id*. at 378 n 13.

Here, Officer Enz's unrefuted testimony shows that defendant's decision to submit to the breath test was an act of voluntary consent. Defendant freely made choices throughout the encounter, including whether to perform field sobriety tests and which questions to answer. (Tr 29, 43). He was given the opportunity to make phone calls and seek advice on whether he would take the breath test. (Tr 31). He reached his decision based on the information in the

rights and consequences form, after studying that document. (Tr 32). *See Moore*, 354 Or at 495 (advice of rights and consequences does not render consent to take the test involuntary).

Because defendant consented to take the test, the correct analysis for whether the consent was derived from a constitutional violation is the one set out in *Delong*. All three factors discussed in *Delong* weigh against suppression here.

Regarding the first factor, although Officer Enz violated defendant's rights when he asked defendant the questions from the DUII Interview Report, that violation was not flagrant or egregious. *See, e.g.*, *Unger*, 356 Or at 82 (explaining that "[p]articularly flagrant conduct * * * is more likely to affect the defendant's decision to consent than more restrained behavior."). Officer Enz apparently misunderstood defendant's request for counsel as an invocation of his limited right to consult with counsel before taking a breath test under Article I, section 11, and *State v. Spencer*, 305 Or 59, 750 P2d 147 (1988), rather than his right to have counsel present during questioning under Article I, section 12. *See Swan*, 276 Or App at 203-04. Given that mistake, however, the officer was scrupulous in his compliance with Article I, section 11. Officer Enz allowed defendant an opportunity to consult privately with counsel while still at the scene of the crash. (Tr 29). And once they arrived at the station, Officer Enz explained the implied-consent procedure to defendant, and furnished him with a

copy of the Implied Consent Combined Report form. (Tr 31). Officer Enz gave defendant his cell phone, a landline, and a phone book, and he provided defendant with privacy, affording defendant the best possible opportunity to seek advice on his decision whether to submit to the implied-consent breath test. (Tr 31). Officer Enz's mistake, therefore, was a good-faith misunderstanding rather than a flagrant or egregious violation of defendant's rights.

In addition, Office Enz did not conduct the interview in a coercive manner. He informed defendant that he did not have to answer any of the questions if he did not wish to do so, and defendant exercised that choice, refusing to answer at least one of the questions, regarding who was driving. (Tr 39, 43). Thus, defendant's responses to the questions, if any, were not actually coerced.

The second factor is the character of defendant's consent. Here, it was made clear to defendant that he was being asked to make a choice, and that it was up to him which option to choose. (Tr 32). He was given an opportunity to consult with an attorney about those options. His consent was fully informed through the implied-consent rights and consequences and, as explained above, his consent was voluntary.

The third consideration—the causal connection between the violation and defendant's decision to submit to the breath test—also weighs in favor of

finding that consent attenuated the prior illegality. Officer Enz did not trade on any response to the unlawful questioning in order to ask defendant to take the test. Officer Enz had probable cause to believe that defendant had committed DUII and had already determined that he was going to ask defendant to take the breath test well before, and completely irrespective of, any statements defendant made in response to the DUII Interview Report. (Tr 30, 31). The procedure Officer Enz followed was set out in the implied-consent statutes, Officer Enz testified that *that* was the reason he asked defendant if he would take the breath test. (Tr 48). Defendant, too, was aware that he would be asked whether he would take a breath test prior to any unlawfully obtained statements and, thus, would have known that there was no connection between his responses and the request to take the test. (Tr 31). Defendant was fully informed of the considerations relevant to making that decision. (Tr 31-32). Nothing that took place during the DUII Interview impaired defendant's ability to make an independent choice. Finally, as will be true in the vast majority of cases, the advice of implied-consent rights and consequences framed the decision defendant was being required to make, and it provided the defendant with a detailed explanation of the pros and cons of either choice. Defendant's decision to submit to the breath test was the product of his weighing his rights and consequences under the implied-consent law. It was not derived from any violation of Article I, section 12.

Even if this court were to consider the other factors mentioned in *Jarnagin* but omitted from *Delong*, the result would be the same. The Court of Appeals analyzed the facts of this case using all five factors identified in *Jarnagin*. *Swan*, 276 Or App at 203-07. Thus, the Court of Appeals also considered the amount of time that elapsed between the violation and the point at which the police obtained the breath test result, and the fact that defendant remained in custody during the relevant time frame. 276 Or at 204-05. With respect to the temporal nexus, the court noted that, although the period between the violation and the breath test was brief, there was a "short, yet significant break" between the two. *Id*. Defendant was advised of the implied-consent rights and consequences; he had a copy of the form, which he read; and he had a few minutes to think about his decision while the Intoxilyzer instrument was starting up. *Id*. at 205. The court concluded that that pause was sufficient to break the casual chain between the two events. *Id*. The fact that defendant remained in custody throughout the period weighed in favor of suppression. But considering the totality of the circumstances, "defendant's decision to consent to the breath test was not a product of the earlier constitutional violation, even though the two were close in time." *Id*. at 206. Thus, regardless of which analysis this court applies, the breath test evidence was not derived from the prior violation of Article I, section 12.

CONCLUSION

For the reasons explained above, this court should affirm the judgment of the Court of Appeals and the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 6, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kali Montague, attorneys for appellant, petitioner on review, 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 7,392 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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