FILED June 26, 2014 02:21 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DINA LOUISE MAZZOLA, Defendant-Appellant Petitioner on Review.	Josephine County Circuit Court Case No. 101198M CA A148224 SC S062126

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Josephine County
Honorable Pat Wolke, Judge

Opinion Filed: December 26, 2013
Author of Opinion: Duncan, Judge
Before: Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Defendant executed a conditional guilty plea to driving under the influence of intoxicants (DUII), reserving the right to appeal the trial court's denial of her motion to suppress evidence. On appeal, she argued that the warrantless administration of field sobriety tests (FSTs) was not authorized by probable cause plus exigent circumstances. *State v. Mazzola*, 260 Or App 378, 317 P3d 360 (2013), *rev allowed*, 355 Or 380 (2014). The issue before this court is whether exigent circumstances permit the compelled administration of FSTs whenever an officer has probable cause to believe that a driver is under the influence of a controlled substance.

Question Presented and Proposed Rule of Law

Question Presented

Do exigent circumstances permit the compelled administration of FSTs whenever an officer has probable cause to believe that a driver is under the influence of a controlled substance?

Proposed Rule of Law

In order to rely on the exigent circumstances exception, the state must ordinarily establish that evidence will be lost or destroyed based upon the facts of a particular case. The dissipation of controlled substances from the body

alone does not constitute a *per se* exigency that would permit the compelled administration of FSTs in every case involving probable cause of driving under the influence of a controlled substance.

Summary of Argument

A warrantless search may be justified by exigent circumstances when swift police action is necessary to prevent the destruction of evidence. In order to rely on the exception, the state must ordinarily prove, by a preponderance of the evidence, that exigent circumstances necessitated the search at issue. The record in this case does not show any exigency apart from the abstract notion that controlled substances dissipate from the body.

This court has excused the state from its burden of proving an exigency in specific, narrow categories of cases that pose a significant and undisputed risk of loss of evidence, such as evidence found in a mobile vehicle or evanescent blood-alcohol evidence. However, controlled-substance impairment does not supply a *per se* exigency. Unlike alcohol, which is commonly known to dissipate at a significant rate, the dissipation of controlled substances is not common knowledge and can vary significantly depending on both the kind of drug and the kind of test involved.

Moreover, this case involves FSTs, specifically the walk-and-turn test, the one-leg-stand test, and the finger-to-nose test. Those tests can be justified by

exigent circumstances only if a delay in their administration would result in a loss of evidence. However, FSTs are designed and validated only to detect blood alcohol content (BAC), not controlled substances or general signs of impairment. Although extensive research has been done on the relationship between FSTs and BAC, little research exists on the relationship between FSTs and controlled substances. Rather, other tests, which must be administered by specially-trained officers, have been developed to detect controlled-substance impairment. And because FSTs do not detect any particular level of controlled substances in the body, it is not clear whether FSTs obtain any *dissipating* evidence of controlled-substance impairment.

Although cases may arise in which the circumstances do establish an exigency that would permit the warrantless administration of FSTs, this court should adhere to the requirement that the state prove that exigent circumstances exist based on the particular facts of the case.

Summary of Facts

On September 3, 2010, Grants Pass police officer John Lohrfink observed defendant's car turn without first signaling for 100 feet and make a lane change without first signaling for 100 feet. Tr 6-7, 23-24, 34-35. Lohrfink stopped defendant, approached her car, and asked her for her driver's license and other paperwork. Tr 7-8.

Defendant's speech was slurred, her eyes were glassy, and her eyelids were droopy. Tr 8. She had difficulty retrieving her driver's license from her wallet and fumbled her paperwork. Tr 8-9. She seemed to have difficulty understanding the officer's questions and made slow, methodical movements. Tr 9. Because he did not smell any alcohol, Lohrfink believed that she was under the influence of a controlled substance. Tr 9. He did not believe that defendant's "poor driving" was evidence of intoxication. Tr 35-39.

Defendant gave Lohrfink a California identification card. Tr 10. He asked her again for her driver's license, and she appeared confused, thinking that she had already given it to him. Tr 10. Defendant then clarified that she was in the process of obtaining an Oregon driver's license. Tr 26. Lohrfink asked her about her slurred speech, and she initially denied it but later acknowledged that her speech was slurred. Tr 10-11. Lohrfink asked her where she lived in California, and she was initially unsure and later said that she had just moved to Oregon. Tr 11.

Lohrfink believed that he had probable cause to arrest defendant for driving under the influence of a controlled substance. Tr 12-13. He initially did not know which drugs she might have taken. Tr 18. However, based on

defendant's subsequent statements, he believed that she might be under the influence of sleeping pills and Soma.[1] Tr 17-18.

Lohrfink asked defendant if he could administer the horizontal gaze nystagmus (HGN) test. Tr 28. Specifically, he said, "I'd like to check your eyes and make sure that you're okay to operate a motor vehicle." Tr 28. He then asked, "[A]re you willing to step out so I can check your eyes and make sure you're okay to drive?" Tr 28. Defendant said, "Okay." Tr 28.

Lohrfink asked defendant if she took any medications, and she said that she had a prescription for sleeping pills. Tr 17, 29-30. At 7:58 p.m., Lohrfink asked defendant to estimate the current time, and she estimated that it was 8:00 p.m. Tr 30. Lohrfink then administered the HGN test and observed no "clues of impairment." Tr 19. Lohrfink was not surprised by the HGN test result, because that test does not detect certain medications and controlled substances. Tr 20.

Following the administration of the HGN test, Lohrfink said, "We're going to do a few more tests, okay?" Tr 21. Defendant responded, "Okay." Tr 21. Defendant was surprised by Lohrfink's statement. Tr 53. She believed that Lohrfink was telling her what to do, and when she agreed to perform the additional tests she was "just doing what he told me to do." Tr 53. Lohrfink administered three additional FSTs: the walk-and-turn test, the one-leg-stand

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[1] "Soma," or Carisoprodol, is a central nervous system (CNS) depressant. *State v. McFarland*, 221 Or App 567, 571 n 3, 191 P3d 754 (2008).

test, and the finger-to-nose test.[2] After administering the tests, Lohrfink arrested defendant for a controlled-substance DUII.

Lohrfink had two and one-half years of experience as a police officer and 15 years of experience as a paramedic, and he had received training "about signs to look for" for drivers who are impaired by alcohol and controlled substances. Tr 5-6. His paramedic training included "college level pharmacology courses, anatomy and physiology," and he had taught those courses to other paramedic students. Tr 14-17. Based on that training and experience and his common knowledge, he knew the "basic" fact that "over time the body filters drugs and they dissipate in one's body." Tr 17. Different drugs dissipate at different rates. Tr 17. Lohrfink also knew that controlled substances are different from alcohol in that drug metabolites remain present in the body and can be detected in a later urine test. Tr 51. However, Lohrfink did not know "the specific science of that." Tr 51.

Lohrfink is trained in the administration of FSTs. Tr 19. Lohrfink is not trained as a Drug Recognition Expert (DRE). Tr 46. When asked whether it would have been a hardship to obtain a search warrant, Lohrfink stated, "We

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[2] Lohrfink did not testify regarding the administration or results of the three additional FSTs. The FSTs that he administered were identified in defendant's written motion to suppress. *See Mazzola*, 260 Or App at 380. Because this case involves a conditional guilty plea, the court need not determine whether the admission of the FST results would have been harmful.

don't do search warrants in this county." Tr 18. Lohrfink clarified that he never seeks a search warrant before administering FSTs "because we go based on DMV implied consent." Tr 18-19.

Procedural History

Before trial, defendant filed a motion to suppress evidence resulting from the traffic stop and DUII investigation. Defendant acknowledged that she consented to the HGN test but argued that she did not consent to the walk-and-turn test, the one-leg-stand test, or the finger-to-nose test.

The trial court concluded that defendant did not voluntarily consent to the three additional FSTs. Tr 57. However, the court concluded that Lohrfink had probable cause to believe that defendant was under the influence of a controlled substance. Tr 57-61.

Defendant argued that, in the absence of voluntary consent, the FSTs could not be justified on probable cause alone. Tr 61. Rather, the state had to prove that exigent circumstances existed, and the state had failed to do so in this case. Tr 62.

The trial court concluded that exigent circumstances existed due to the dissipation of controlled substances from the body. Tr 62. Accordingly, the court denied the motion to suppress.

Defendant executed a conditional guilty plea and appealed, challenging the denial of her motion to suppress. *Mazzola*, 260 Or App at 381. On appeal, the state did not argue that defendant consented to the tests, but argued only that exigent circumstances permitted the administration of FSTs. *Id.* The Court of Appeals affirmed the trial court, holding that in light of this court's opinions in *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010) and *State v. Nagel*, 320 Or 24, 880 P2d 451 (1994), "the evanescent nature of controlled-substance intoxication" created an exigency that permitted the compelled administration of FSTs. *Mazzola*, 260 Or App at 382-83.

Argument

I. Ordinarily, the state must prove that exigent circumstances exist based on the particular facts of a case.

Article I, section 9, of the Oregon Constitution provides that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure * * *." Under Article I, section 9, "[a] warrantless search is *per se* unreasonable unless it falls within 'one of the few specifically established and carefully delineated exceptions to the warrant requirement.'" *State v. Connally*, 339 Or 583, 587, 125 P3d 1254 (2005) (quoting *State v. Snow*, 337 Or 219, 223, 94 P3d 872 (2004)). "The state has the burden to establish by a preponderance of the evidence that the search is

reasonable under an exception to the warrant requirement." *State v. Nagel*, 320 Or 24, 31 n 6, 880 P2d 451 (1994).

A search, for purposes of Article I, section 9, "occurs when a person's privacy interests are invaded." *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). In *Nagel*, this court held that FSTs constitute a search. 320 Or at 31. As will be discussed in further detail below, FSTs involve "requiring [a] defendant to perform a series of unusual maneuvers and acts," through which an officer can "detect certain aspects of [the] defendant's physical and psychological condition that were not detectable through simple observation by any member of the public or by a police officer located in a public place." *Id.* at 30. Because the information revealed by FSTs is ordinarily private, and citizens have a significant interest in keeping that information private, FSTs invade a person's privacy interests and therefore constitute a search. *Id.* at 31.

This case involves the warrantless administration of three FSTs: the walk-and-turn test, the one-leg-stand test, and the finger-to-nose test.[3] The trial court found that defendant did not voluntarily consent to those tests, and the state has not challenged that ruling on appeal. Thus, the only exception to the warrant requirement at issue is the exception that permits "a search conducted with probable cause and under exigent circumstances." *Nagel*, 320 Or at 31-32.

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[3] The lawfulness of the HGN test is not at issue, as defendant does not dispute that she voluntarily consented to it.

"An exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence." *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). This case involves the last circumstance, destruction of evidence.

The state ordinarily has the burden of showing, based on the particular facts of the case, that a search was justified in order to prevent the destruction of evidence. A court may not rely on an assumption that evidence could be destroyed, because all evidence poses some risk of loss. For example, the mere possibility that drugs can be destroyed does not permit entry into a residence where drug sales occur. "The fact that drugs are usually of a destructible nature, and the fact that suspects are likely to run out the back door when police enter the front door does not ipso facto create exigent circumstances." *State v. Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979). Presuming the existence of exigent circumstances based on the abstract possibility that evidence can be lost "would expand this exception to swallow the warrant requirement." *Id. Cf. State v. Peller*, 287 Or 255, 264, 598 P2d 684 (1979) ("We do not agree, however, that the mere possibility that defendant could make a break if he were so inclined gives rise to exigent circumstances when there is no indication that he is, in fact, so inclined.").

II. In this case, the state failed to establish that the administration of field sobriety tests was justified by exigent circumstances.

The issue in this case is whether exigent circumstances justified the compelled administration of three FSTs: the walk-and-turn test, the one-leg-stand test, and the finger-to-nose test. The state failed to establish exigent circumstances. The record contains no evidence regarding what evidence Lohrfink obtained or expected to obtain from those tests. Nor does the record contain evidence of how, or whether, the results of those tests might have been affected by the passage of time. And the record contains no evidence regarding the availability of a search warrant—Lohrfink testified that he would *never* seek a warrant for the administration of FSTs. Consequently, the state failed to carry its burden of proving that exigent circumstances existed to permit the compelled administration of FSTs in this case.

III. Exigent circumstances do not permit the compelled administration of field sobriety tests in every controlled-substance DUII case.

As an exception to the ordinary rule that the state must prove an exigency based on the particular facts of a case, this court has found *per se* or near-*per se* exigencies in specific, narrow categories of cases that pose a significant and undisputed risk of loss of evidence. For example, the automobile exception is a "*per se* exigency rule" based on the presumption that exigent circumstances exist whenever police encounter a mobile vehicle in connection with a crime. *State v. Brown*, 301 Or 268, 277, 721 P2d 1357 (1986). Similarly, "the

evanescent nature of blood-*alcohol* evidence" will usually suffice to establish an exigency in the context of an alcohol-related DUII. *State v. Moore*, 354 Or 493, 497 n 5, 318 P3d 1133 (2013), *adh'd to as modified on recons*, 354 Or 835, 322 P3d 486 (2014) (emphasis in original).

Unlike cases involving driving under the influence of alcohol, this court has not held that a controlled-substance DUII presents a *per se* or near-*per se* exigency. *See id.* at 497 n 5 ("This case, however, involves driving under the influence of controlled substances, rather than alcohol, and, as noted, the record contains no evidence of the dissipation rates for any controlled substances that might have been found in defendant's system."). This court should not find a *per se* exigency that authorizes the compelled administration of FSTs in every controlled-substance DUII case, both because of the difference between alcohol and controlled substances and because of the particular nature of FSTs, which are designed and validated only to detect BAC.

A. Unlike alcohol, the dissipation of controlled substances from the body is neither well-established nor common knowledge.

In concluding that the dissipation of alcohol from the body presents an exigency, this court has repeatedly relied on the "common knowledge" that "blood-alcohol dissipates over time[.]" *Nagel*, 320 Or at 33 (citing *State v. Parker*, 317 Or 225, 232 n 9, 855 P2d 636 (1993)). *See, e.g., State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010) ("the evanescent nature of a suspect's

blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw"); *State v. Milligan*, 304 Or 659, 665 n 5, 748 P2d 130 (1988) ("exigent circumstances existed justifying the initial, warrantless, extraction because alcohol was dissipating *at some significant rate*"); *State v. Heintz*, 286 Or 239, 248, 594 P2d 385 (1979) ("it is also clear that alcohol in blood after drinking is 'highly evanescent evidence' in that 'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system'" (quoting *Cupp v. Murphy*, 412 US 291, 296, 93 S Ct 2000, 36 L Ed 2d 900 (1973) and *Schmerber v. California*, 384 US 757, 770, 86 S Ct 1826, 16 L Ed 2d 908 (1966))).

Unlike alcohol, the dissipation of controlled substances is not a matter of common knowledge. For example, the record in this case includes Lohrfink's testimony that, even with his 15 years of training and experience as a paramedic, he only knew the "basic" fact that drugs dissipate over time. Moreover, the dissipation of controlled substances can vary depending on both the kind of drug and the kind of test involved, and can involve very slow rates. Lohrfink testified that drugs dissipate at different rates and that drug metabolites can remain in the urine and be detectable by a urine test long after the effects of the drug have worn off, although he was not aware of the "specific science" of the process. Consequently, "the record contains no evidence of the dissipation rates for any controlled substances that might have

been found in defendant's system." *Moore*, 354 Or at 497 n 5. On this record, the court could only speculate as to whether any measurable loss of evidence might have occurred had Lohrfink sought a warrant to search for evidence of controlled substances.

B. Field sobriety tests are designed only to detect blood alcohol content, not controlled substances or impairment in general.

This case did not involve a blood or urine test, but rather FSTs, specifically the walk-and-turn test, the one-leg-stand test, and the finger-to-nose test. The exigent circumstances exception authorizes a search that is "limited to the exigency that justified it." *Stevens*, 311 Or at 130 (holding that police were permitted to enter a house to search for missing children and "properly limited" the search to the exigency by leaving once the children were located). For a blood test for blood alcohol content, the exigency is dissipation of alcohol from the blood. For a urine test for a controlled substance, whether an exigency exists turns on the dissipation of drug metabolites from the urine. However, the rate of dissipation of evidence from the blood or urine does not necessarily correlate to the dissipation of evidence that would be obtained from FSTs. Exigent circumstances will only justify the administration of FSTs when evidence obtained *from the FSTs* would be impaired by delayed administration.

Common sense may suggest that FSTs detect general signs of impairment that apply to all intoxicants, alcohol and controlled substances alike. But that is not so. The administrative rules, case law, official government publications, and other scientific research relating to FSTs show that the tests are specifically designed to detect BAC, not controlled substances or general signs of impairment, and have only been validated for that purpose. Other, more specialized tests have been developed for the purpose of detecting controlled-substance impairment. It is therefore unclear what, if any, dissipating evidence of controlled-substance impairment FSTs would obtain.

1. Administrative rules

FSTs are physical tests that officers can administer during a DUII investigation. The legislature has directed the Department of State Police to approve FSTs that detect probable impairment from alcohol or controlled substances. ORS 801.272.[4] Accordingly, the Department of State Police has

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[4] ORS 801.272 provides:

> "'Field sobriety test' means a physical or mental test, approved by the Department of State Police by rule after consultation with the Department of Public Safety Standards and Training, that enables a police officer or trier of fact to screen for or detect probable impairment from intoxicating liquor, a controlled substance, an inhalant or any combination of intoxicating liquor, an inhalant and a controlled substance."

adopted rules approving certain FSTs and governing their administration. OAR ch 257, div 25.[5] The rules distinguish between FSTs and more general "acts, signs and symptoms" of impairment—such as difficulty walking, standing, or speaking, the odor of alcohol, and bloodshot, watery, or glassy eyes—that can be observed *without* administering FSTs. OAR 257-025-0010.

The rules approve nine FSTs for administration by all police officers, including the tests at issue in this case, the walk-and-turn test, one-leg-stand test, and finger-to-nose test. OAR 257-025-0012(1). The rules further provide that an officer who has completed "the 8-hour 'Drugs That Impair Driving' curriculum" may administer three additional tests, which measure lack of convergence, pupil size, and pulse rate. OAR 257-025-0012(2). Finally, the rules provide that an officer who has completed 72 hours of training to become a Drug Recognition Expert (DRE) may administer a number of other specialized tests, which include an examination of the person's vital signs,

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[5] The full text of OAR chapter 257, division 25, is attached as an appendix.

psychophysical responses, signs of administration of drugs, eye responses, and physical and behavioral characteristics. OAR 257-025-0012(3).[6]

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[6] The rules also briefly describe the basic FSTs that an officer may administer. The FSTs at issue in this case are described as follows:

> "(b) Walk and Turn Test: The officer will instruct the person, while standing, to place the person's left foot on a line (if no line is available, use a general direction for the person to walk an imaginary line) then place the right foot on the line with the heel of that foot ahead of the toes of the left foot. Instruct the person to take nine steps down the line, keeping arms at sides, looking at feet, and counting each step while walking heel-to-toe. Instruct the person how to turn (at the discretion of the officer) and to walk back in the same manner previously described. Generally demonstrate the test.
>
> "(c) One Leg Stand: Instruct the person to stand straight with the person's feet together and arms at the sides. Instruct the person to raise one foot approximately six inches off the ground while looking at the foot, and to count '1001, 1002, 1003,' etc., until told to stop by the officer. The officer will then time the person for thirty seconds. The person will count 1001, 1002, 1003, etc., until told to stop by the officer. The officer may conduct the same test with the other foot. Generally demonstrate the test.
>
> "* * * * *
>
> "(e) Modified Finger to Nose Test: Instruct the person to stand straight with heels together, eyes closed, arms at sides, and head tilted back. Instruct the person to touch the end of the person's nose with end of the index finger by bringing the person's arm and hand from the person's side directly to the end of the nose. Have the person repeat for the other index finger and repeat the test in the same manner, if deemed appropriate. Generally demonstrate the test."

OAR 257-025-0020(1).

The rules reflect several different levels of investigation that may be performed. First, any officer may observe general signs of impairment that are readily discernable to laypersons. Second, officers may administer FSTs, which involve a more focused search for signs of impairment that may not be readily discernable. Third, officers who have special training in the detection of drugs may administer more specialized tests for the presence of controlled substances.

2. Case law

This court has acknowledged that FSTs are not mere lay observations of impairment in general, but rather are tests designed to obtain information that is not readily discernable to laypersons. FSTs such as the one-leg-stand test and walk-and-turn test require a defendant "to perform a series of unusual maneuvers and acts," through which an officer can "detect certain aspects of [the] defendant's physical and psychological condition that were not detectable through simple observation by any member of the public or by a police officer located in a public place." *Nagel*, 320 Or at 30.

This court has also recognized that the FSTs at issue were designed for the purpose of detecting alcohol. In 1977, the National Highway Traffic Safety Administration (NHTSA) evaluated the effectiveness of six proposed FSTs for detecting a person's BAC. *State v. O'Key*, 321 Or 285, 309, 899 P2d 663 (1995). Based on the results of that study, NHTSA recommended the adoption of three FSTs: the one-leg-stand test, the walk-and-turn test, and the HGN test,

with the HGN test being the most sensitive to the presence of alcohol. *Id.* In 1981, NHTSA "standardized procedures for administering the scoring of those three field sobriety tests" and found that officers who administered the three FSTs were able to identify whether a person had a BAC of 0.10 or higher with 81 percent accuracy. *Id.* at 310. Based on its review of the scientific literature, this court concluded that "in conjunction with other field sobriety tests (*e.g.*, the walk-and-turn test and the one-leg-stand test), the HGN test is a reliable indicator of whether a driver is impaired by alcohol" when administered by a qualified officer. *Id.* at 316-17 (footnote omitted). However, neither this court nor the Court of Appeals has considered validity of FSTs as tests for controlled-substance impairment.

3. NHTSA publications

In a more recent study validating the use of FSTs in the alcohol DUII context, NHTSA cautioned against "the incorrect assumption that field sobriety tests are designed to measure driving impairment." NHTSA DOT-HS-808-839, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, 28 (1998), available at http://ntl.bts.gov/lib/25000/25900/25935/DOT-HS-808-839.pdf (accessed June 26, 2014). FSTs were designed only to "provide statistically valid and reliable indications of a driver's BAC, rather

than indications of driving impairment." *Id.* "Thus, SFST[7] results help officers to make accurate DWI arrest decisions even though SFSTs do not *directly* measure driving impairment." *Id.* (emphasis in original).

NHTSA publications and training materials also state that FSTs should be administered in order to detect BAC, and that in cases involving controlled-substance impairment, other tests, such as a DRE examination, should be administered. For example, NHTSA's 2009 report to Congress on the investigation and prevention of controlled-substance DUIIs only discusses FSTs for their use in "determin[ing] whether the driver is impaired by alcohol and if the driver's BAC is likely to be above the legal limit" and provides that when a driver is suspected of being under the influence of a controlled substance, officers should request a DRE examination or a blood or urine test. NHTSA DOT-HS-811-268, *Drug-Impaired Driving: Understanding the Problem and Ways to Reduce It: A Report to Congress*, 6 (2009), available at http://www.nhtsa.gov/staticfiles/nti/pdf/811268.pdf (accessed June 26, 2014).

In its training program for the administration of FSTs, NHTSA warns that "the focus of this curriculum is on the alcohol-impaired driver" and that "[e]nforcement of alcohol impaired driving is a complex and demanding law enforcement responsibility sufficient to warrant a separate curriculum."

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7 The "standardized" field sobriety tests (SFSTs) are the three that have been validated by NHTSA: HGN, walk-and-turn, and one-leg-stand.

NHTSA, *DWI Detection and Standardized Field Sobriety Testing (SFST) Instructor Guide*, Administrator's Guide (2013), available at http://www.wsp.wa.gov/breathtest/docs/webdms/DRE_Forms/Manuals/dwi/Instructor Manual (DWI Detection) - May 2013.pdf (accessed June 26, 2014). NHTSA emphasizes that it provides separate curricula for "**detecting** and **apprehending** drug impaired drivers." *Id.* (emphasis in original).

The FST program does contain a course entitled "Introduction to Drugged Driving," which provides a general overview of the effects of controlled substances on driving. *Id.* at Session 0. The session discusses a number of eye examinations that can reveal evidence of both alcohol and controlled-substance impairment, including several types of nystagmus, tracking ability, and pupil size. *Id.* at 10-17. The session also discusses a number of specific kinds of drugs, their general symptoms and effects (*e.g.*, slurred speech, hallucinations), and whether they cause nystagmus or change in pupil size. *Id.* at 18-36. However, the session notes that it "will NOT qualify you to perform functions of a Drug Recognition Expert (DRE)" and that "[o]fficers become DREs only after they have completed a very challenging program that includes nine days of classroom training and many weeks of closely-supervised on-the-job training." *Id.* at 5. The session concludes with the recommendation that officers who suspect the presence of controlled substances

should "[c]onsult with a DRE, if possible and document in detail all observations." *Id.* at 38.

NHTSA's courses on FSTs focus on the three standardized FSTs, "namely Horizontal Gaze Nystagmus (HGN), Walk and Turn, and One Leg Stand." *Id.* at SFST Glossary of Terms, 13. The program emphasizes that the standardized FSTs are designed to detect alcohol: "Based on a series of controlled laboratory studies, scientifically validated clues of alcohol impairment have been identified for each of these three tests. They are the only Standardized Field Sobriety Tests for which validated clues have been identified." *Id.* at 13-14. The course introducing the standardized FSTs discusses the accuracy of those tests for detecting BAC levels of 0.10 or higher. *Id.* at Session 7, 7-24. A subsequent course discusses various FST validation studies and summarizes their results, all of which relate to the ability of the standardized FSTs to detect various BAC levels. *Id.* at Session 8, 4-17.

When the course explains the administration of the tests, it discusses each "clue" of impairment that the tests can detect, and to what extent the clue correlates to BAC. For example, if the HGN test reveals the clue "Onset of Nystagmus Prior to 45 Degrees," then "it is evident that the person has a BAC above 0.08, as shown by recent research." *Id.* at 32. If the walk-and-turn test reveals two or more clues, then there is a 79% likelihood that the BAC is at

least 0.08. *Id.* at 76. And if the one-leg-stand test reveals two or more clues, then there is an 83% likelihood that the BAC is at least 0.08. *Id.* at 89.

One of the recommended courses for further training in the detection of controlled substances is titled Advanced Roadside Impaired Driving Enforcement (ARIDE). *Id.* at Administrator's Guide. The ARIDE course does not qualify an officer as a DRE, but it does contain more information about signs and symptoms of controlled-substance impairment. The ARIDE course discusses many of the same studies and statistics about the ability of FSTs to detect BAC levels. NHTSA, *Advanced Roadside Impaired Driving Enforcement (ARIDE)*, Session 2, 3-6 (2013), available at http://www.wsp.wa.gov/breathtest/docs/webdms/DRE_Forms/Manuals/aride/ARIDE Instructor's Guide - May, 2013.pdf (accessed June 26, 2014).

The course also discusses a variety of controlled substances. However, the course does not provide information about how clues of impairment detected by FSTs (other than HGN) correlate to controlled-substance impairment. Rather, the course provides for a number of examinations designed to detect drugs, including examinations of the eyes for pupil-size and lack of convergence, and a "Modified Romberg Balance Test," in which the driver tilts her head back, closes her eyes, and estimates the passage of 30 seconds. *Id.* at Session 5, 7-26.

The course provides a table showing the relationship between particular drug categories and what an officer can observe from an eye examination. For example, depressants, dissociative anesthetics, and inhalants can cause HGN; stimulants, hallucinogens, and cannabis can cause dilated pupils; and narcotic analgesics can cause constricted pupils. *Id.* at 27. However, the course again admonishes that the results of an eye examination can vary from person to person and that "[t]he officer who completes this course is NOT certified as a DRE and does not have the training required to support the selection of a specific drug category, which may be the source of the subject's impairment." *Id.* at 28. The course goes on to discuss the various drug categories in more detail, provide summaries of their effects and symptoms, and reiterate the indicators of each drug that can be found in an eye examination. *Id.* at Session 6, Session 7. However, the course does not propose that FSTs other than the HGN test be used to detect controlled-substance impairment or otherwise address the relationship between controlled substances and FSTs.

The "Drugs That Impair Driving" course, which the Department of State Police requires officers to take before they may administer the eye examinations discussed above, OAR 257-025-0012(2), is meant for officers who have already been trained to administer FSTs and focuses "on the examination of a drug-impaired suspect's eyes * * *." NHTSA, *Drugs That Impair Driving Instructor's Lesson Plans and Administrator's Guide*, 2 (2006), available at

http://www.wsp.wa.gov/breathtest/docs/webdms/DRE_Forms/Manuals/drugs/Instructor Manual (Drugs) - February 2006.pdf (accessed June 26, 2014). However, the course warns that it does not qualify an officer as a DRE and that "no one should attempt to identify drug categories based only on the knowledge acquired through this module." *Id.* at 2. "The purpose of the module is to improve students' ability to recognize suspects who may be under the influence of drugs other than alcohol, and to take appropriate action when they encounter such suspects." *Id.* at 3. In jurisdictions where a DRE is available, "the 'appropriate action' would be to summon a DRE." *Id.*

Although this court has not addressed the DRE protocol, the Court of Appeals has held that it constitutes scientific evidence of controlled-substance impairment. *State v. Sampson*, 167 Or App 489, 495-512, 6 P3d 543, *rev den*, 331 Or 361 (2000). The DRE protocol attempts to detect impairment; determine whether the impairment is caused by alcohol, drugs, or a medical condition; and, if the impairment is caused by drugs, identify which drug or drug category is the cause. *Id.* at 493. The protocol consists of the following 12 steps:

> "1. A blood alcohol content (BAC) analysis is done. If the subject's BAC exceeds 0.08 percent, the DRE protocol ends.
>
> "2. The DRE officer interviews the arresting officer to elicit information about the subject's behavioral and physical symptoms.
>
> "3. The DRE officer conducts a preliminary physical examination: he or she checks the subject's eyes for synchronization and pupil size, checks the pulse, and asks general

> health questions. This step determines whether the subject is impaired by a medical condition.
>
> "4. The DRE officer conducts four standard eye examinations developed to detect intoxication: horizontal gaze nystagmus (HGN), vertical gaze nystagmus (VGN), and lack of convergence (LOC).
>
> "5. The DRE officer conducts four FSTs: the Romberg balance test, the walk and turn test, the one leg stand test, and the finger to nose test.
>
> "6. The DRE officer checks the subject's pulse, blood pressure, and body temperature.
>
> "7. The DRE officer measures the subject's pupil size under three light conditions (near total darkness, indirect light, and direct light), and inspects the nose and mouth for signs of drug ingestion.
>
> "8. The DRE officer checks the subject's muscle tone for extreme flaccidity or rigidity.
>
> "9. The DRE officer inspects for injection sites.
>
> "10. The DRE officer conducts a focused interrogation and observation of the subject's behavior.
>
> "11. Considering the results of all the foregoing procedures, the DRE officer develops a formal opinion identifying the drug that the subject took.
>
> "12. The DRE officer obtains a urine sample for toxicological testing. The test is used to corroborate the DRE officer's opinion and to provide a learning tool for the officer."

Id. at 494-95 (citing NHTSA, *Drug Evaluation and Classification Training Student Manual*, IV-3 to IV-22 (1993); footnotes omitted).

Step five of the DRE protocol involves administering four FSTs, including the three FSTs at issue in this case. However, that is only one step out of twelve. As the Court of Appeals has noted, all twelve steps must be

administered for the examination to qualify as scientific evidence. *State v. Aman*, 194 Or App 463, 472-73, 95 P3d 244 (2004), *rev dismissed*, 339 Or 281 (2005). And the examination must be administered by a qualified officer. *See State v. McFarland*, 221 Or App 567, 577-78, 191 P3d 754 (2008) (holding that a "DRE trainee" who had not completed his training was not qualified to give an opinion as to the results of a DRE examination). As noted above, the Department of State Police requires an officer to undergo 72 hours of training to become a DRE, and the first 16 hours of that training "teaches the officer to recognize the effects of drugs on the eyes, take vital signs, and administer FSTs." *Sampson*, 167 Or App at 495. An officer who has undergone that extensive training might be able to detect signs of controlled-substance impairment by administering FSTs. *See, e.g.*, *State v. Beck*, 254 Or App 60, 67, 292 P3d 653 (2012) (noting that the officer, a trained DRE, testified that the defendant's leg trembling during FSTs was a sign of controlled-substance impairment). That does not mean that an officer *without* that training, such as the officer in this case, would also be able to gather relevant evidence. For those officers, NHTSA admonishes that the "appropriate action" in a case involving possible controlled-substance impairment is to call for a DRE. NHTSA, *Drugs That Impair Driving Instructor's Lesson Plans and Administrator's Guide*, 3.

4. Other scientific research

Little research exists on the relationship between FSTs and controlled substances. Although NHTSA has performed several studies regarding the accuracy with which FSTs can detect blood alcohol, it does not appear that NHTSA has researched the relationship between FSTs and controlled substances. And independent researchers have noted that the relationship between FSTs and controlled substances has not been significantly studied. *See, e.g.*, W. M. Bosker *et al.*, *A placebo-controlled study to assess Standardized Field Sobriety Tests performance during alcohol and cannabis intoxication in heavy cannabis users and accuracy of point of collection testing devices for detecting THC in oral fluid*, 223 Psychopharmacology 439, 440 (2012) ("The SFST have been validated for detection of alcohol impairment, but their sensitivity to impairment caused by other drugs is relatively unknown." (citations omitted)); Luke A. Downey *et al.*, *Examining the effect of* dl-*3,4-methylenedioxymethamphetamine (MDMA) and methamphetamine on the standardized field sobriety tests*, 220 Forensic Science International e33, e33-34 (2012) ("only limited empirical evidence exists for the efficiency of the SFSTs to identify impairment associated with drug consumption").

What research that does exist suggests that FSTs might not reliably detect controlled-substance impairment. For example, research has shown that the three standardized FSTs do not detect impairment from amphetamines. Beata

Y. Silber *et al.*, *An evaluation of the sensitivity of the standardised field sobriety tests to detect the presence of amphetamine*, 182 Psychopharmacology 153, 159 (2005). One study found that the standardized FSTs correctly identified methamphetamine impairment only five percent of the time and MDMA[8] impairment only 22 percent of the time. Downey *et al.*, 220 Forensic Science International at e35. The standardized FSTs detected the antidepressant trazodone 53 percent of the time, although 20 percent of the placebo group in that study also failed the FSTs. Eric J. Ip *et al.*, *The Effect of Trazodone on Standardized Field Sobriety Tests*, 33 Pharmacotherapy 369, 373 (2013). Marijuana has been shown to have some correlation with certain FSTs, but at far lower levels than alcohol—one study found that the standardized FSTs detected marijuana impairment 50 percent of the time, and another study found that the standardized FSTs detected marijuana impairment only 30 percent of the time. Bosker *et al.*, 223 Psychopharmacology at 444. And the walk-and-turn test did not detect marijuana impairment at all. *Id.*

One study has found stronger correlations between FSTs and controlled-substance impairment. Amy J. Porath-Waller and Douglas J. Beirness, *An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification*

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[8] 3,4-methylenedioxymethamphetamine, commonly known as Ecstasy or MDMA. *See State v. Pollock*, 337 Or 618, 621 n 3, 102 P3d 684 (2004).

Program, 15 Traffic Injury Prevention 125 (2013). However, that study also found significant variation in which FSTs can detect different controlled substances. For example, the one-leg-stand test only correctly identified narcotic analgesic impairment in 10.6 percent of cases, and it did not correctly identify any cases of impairment from CNS depressants. *Id.* at 128. The walk-and-turn test only correctly identified CNS depressant impairment in nine percent of cases and narcotic analgesic impairment in 3.5 percent of cases. *Id.* at 129. The study also found that marijuana did not impair performance on the walk-and-turn test. *Id.*

Moreover, "the pattern of impairment [from controlled substances] is not necessarily the same as that displayed by persons who are impaired by alcohol." *Id.* at 130. Different drug categories displayed a wide variety of differing signs of impairment on each FST. *Id.* For example, on the walk-and-turn test, users of CNS depressants were less likely to touch heel-to-toe, whereas users of narcotic analgesics were less likely to take the correct number of steps. *Id.* at 129. Additionally, the study found that the one-leg-stand test in particular "may be too sensitive for determining drug use" in *any* case because "many individuals may not have very good balance even when they are not under the influence of drugs." *Id.* at 130. The study concluded that more research was required to validate FSTs in order for the tests to be useful in detecting controlled substances. *Id.* at 130-31.

C. Field sobriety tests are not designed to detect *dissipating* evidence of controlled-substance impairment.

This court has held that, in the context of an alcohol DUII, the warrantless administration of FSTs was justified by exigent circumstances because "evidence of [the] defendant's intoxication may have dissipated if the officer had taken the time to leave the roadside and obtain a warrant for the search." *Nagel*, 320 Or at 33. In the alcohol context, that is entirely correct—both because of the common knowledge that alcohol in the blood dissipates at a significant rate, and the fact that FSTs are designed to detect a particular BAC level. The very thing that FSTs are designed to detect, the suspect's BAC, is "evidence that was dissipating with every breath he took." *Milligan*, 304 Or at 665.[9]

However, in the context of controlled substances, FSTs are not designed to detect particular concentrations of drugs in the body, and they have not been validated for that purpose. Moreover, FSTs are not tied to any numeric value of controlled-substance impairment and thus do not produce evidence that will necessarily diminish over a short period of time. And defendant is not aware of *any* research on how the passage of time affects FST results in the controlled-

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[9] FST results are not admissible to *prove* the defendant's BAC level, because the legislature requires BAC to be proven "by chemical analysis of the breath or blood * * *." ORS 813.010(1)(a). *See O'Key*, 321 Or at 307-08 (accepting the state's concession that, in light of ORS 813.010(1)(a), the HGN test may not be admitted as proof of a defendant's BAC).

substance context. Thus, even assuming that FSTs could produce some meaningful evidence of controlled-substance impairment, neither this record, nor common knowledge, nor any research supports the proposition that that evidence is *dissipating* at a significant rate.

D. Whether exigent circumstances justify the administration of field sobriety tests for controlled substances should be determined on a case-by-case basis.

Defendant does not ask this court to adopt a blanket rule prohibiting the use of FSTs in a controlled-substance DUII investigation. Nor does defendant contend that exigent circumstances will *never* justify the administration of FSTs in that context. Cases may arise in which the state creates a factual record demonstrating that the circumstances do present an exigency. Accordingly, rather than adopt a *per se* rule with respect to controlled substances, this court should adhere to the ordinary requirement that the state prove exigent circumstances based on the particular facts of the case. On this record, the state failed to meet that burden.

CONCLUSION

Defendant respectfully requests that this court reverse the decision of the Court of Appeals and remand to the trial court to afford defendant the opportunity to withdraw her guilty plea. *State v. Tannehill*, 341 Or 205, 210-12, 141 P3d 584 (2006) (holding that a defendant who enters a conditional guilty plea and prevails on appeal is entitled to withdraw the plea).

Respectfully submitted,

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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 7,472 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 Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on June 26, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, and Susan G. Howe, #882286, Senior Assistant Attorney General, attorneys for Respondent on Review.

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