IN THE COUNTY COURT
SEVENTH JUDICIAL CIRCUIT
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

v. Case No. 2013-314873MMDB

WILLIAM EMORY WILLIAMS, III
_____/

ORDER

This case comes before the Court on the Motion to Dismiss the criminal charge of refusing to submit to a lawful chemical or physical test of breath, blood or urine after having his driving privilege previously suspended for a prior refusal, contrary to section 316.1939, Florida Statutes (2013). Mr. Williams contends that this statute is unconstitutional on its face and as applied to him because it criminalizes the exercise of a right to refuse to consent as an exception to the Fourth Amendment protection against unreasonable search and seizure. For the reasons explained below, the Court DENIES the Motion to Dismiss, but would certify a question of great public importance for resolution by the District Court of Appeal based on the issues raised in this case. Fla. R. App. P. 9.160.

This case began on October 4, 2013, when Mr. Williams was stopped and ultimately arrested for driving under the influence of alcohol and other crimes and infractions. After a jury trial conducted August 25 and 26, 2014, he was found not guilty of DUI and not guilty of driving with a suspended license. Prior to trial, the remaining count of refusing to submit to breath test after previously refusing to do so was severed and remains open. For the purposes of this motion, and based on the evidence heard at that trial, the parties agree and the Court finds: first, that the initial stop was valid; second, that upon being stopped, there was probable cause to believe that Mr. Williams was impaired by alcohol (odor of alcohol, slurred speech, stumbled, eyes bloodshot and glassy); that Mr. Williams refused to take a breath test; and finally, that he previously refused to take a breath test on May 9, 2010.

Section 316.1939, Florida Statutes (2013) states that a first degree misdemeanor is committed when a person has suffered a license suspension for previously refusing a chemical or physical test of his or her breath, blood or urine, who the arresting officer had probable cause to believe was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages, who was placed under lawful arrest for DUI, who

is informed of the license suspension provisions of the implied consent statute, and who after being so informed, refuses to submit to a test.

Relying on the Supreme Court's recent decision in *Missouri v. McNeely*, ___ U.S. ___, 133 S.Ct. 1552 (2013), the Defendant contends that the prior refusal statute is unconstitutional on its face and as applied to him because it violates the exercise of the constitutional right to be free from unreasonable search and seizures, specifically, his constitutional right to refuse to consent to a warrantless search. Due process rights are implicated by a statute that purports to criminalize the exercise of a constitutional right. Such a claim alleges facial invalidity as it goes to the foundation of the State's prosecution of the case. *Crain v. State*, 894 So. 2d 59 (Fla. 2004); *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982).

The Fourth Amendment prohibits unreasonable searches and seizures. As a threshold issue, the parties agree that submission to a test of deep lung air, not exterior exhaled breath, constitutes a search.[1] *Skinner v. Railway Executives Ass'n.*, 489 U.S. 602 (1989); *Blore v. Fierro*,

[1] This is the part of this analysis that was previously misunderstood: the less intrusive nature of a breath test was considered by the author to be akin to taking a picture of an arrestee, or scraping his fingernails, or swabbing her cheek, in other words, not a search with Fourth Amendment implications.

636 So. 2d 1329 (Fla. 1994). To be reasonable, a search must be based on individualized suspicion of wrongdoing. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 308 (1997). The implied consent statute requires probable cause to believe that the driver is impaired before an officer can require a test, and further, for that refusal to constitute a criminal offense, there has to be a prior refusal that resulted in license suspension.

In Florida, in misdemeanor cases, it is not possible under our statutory scheme to lawfully obtain a warrant to search for breath, blood or urine. *State v. Geiss*, 70 So. 3d 642 (Fla. 5th DCA 2011), *rev. dism.* 88 So. 3d 111 (Fla. 2012). The existence of the ability to obtain a valid warrant was the primary reason a Minnesota court upheld their statute making a first refusal a criminal offense after the *McNeely* decision. *State v. Bernard*, 844 N.W. 2d 41 (Mn. App., 2014). After *Geiss*, that rationale is not an option in Florida.

McNeely reminds us that the Fourth Amendment prohibits warrantless searches unless the search falls within a recognized exception to the warrant requirement. *McNeely*, 133 S.Ct. at 1558. One exception is the existence of exigent circumstances that make it objectively unreasonable to require a warrant. In *McNeely*, the State unsuccessfully

argued that the dissipation of alcohol in the blood created an exigency that justified dispensing with the warrant requirement in every DUI investigation. *Id.* at 1560. Significant delay in testing will negatively affect the probative value of any test. This fact weighed heavily in the Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), holding that the additional time needed to secure a warrant before taking Schmerber's blood would have jeopardized the probative value of the evidence. In *McNeely*, the Court declined to adopt a per se rule dispensing with the warrant requirement in all DUI cases. Instead, if no warrant is obtained, the exigencies underlying a lawful test must be decided on a case-by-case basis. The practical aspects of this analysis are not elucidated. Regardless, the exigent circumstances exception to the warrant requirement cannot insulate this statute from a challenge to its facial validity if a case-by-case analysis is required.

A well-recognized exception to the warrant requirement is a search conducted incident to a lawful arrest. *See, Arizona v. Gant*, 556 U.S. 332 (2009). Where there is probable cause to believe evidence may be found in a vehicle, incident to a lawful arrest of the driver, even after *Gant*, the search of the vehicle may be lawful. *State*

v. McIntosh, 116 So. 3d 582 (Fla. 5th DCA 2013). The extraction of breath, blood or urine is a more intrusive search than looking in a car's trunk or backseat. Our Supreme Court long ago held that search incident to lawful arrest "has little applicability with respect to searches involving intrusions beyond the body's surface. *Schmerber v. California*, 384 U.S. at 769." *Filmon v. State*, 336 So. 2d 586, 589 (Fla. 1976). Thus, it would appear that even though the statute requires probable cause for a lawful arrest, the test of breath, blood or urine cannot be constitutionally sustained on the ground that it was incident to a lawful arrest under *Filmon*.

Another possible exception to the warrant requirement is consent. The implied consent statute has long been understood to supply Fourth Amendment consent for a search of breath, blood or urine upon lawful arrest for DUI. On the other hand, our Supreme Court held that the implied consent statute "leads to the inescapable conclusion that a person is given a right to refuse testing." *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980). How then can the prior refusal statute make it a crime to exercise the right to decline to consent to a warrantless search? Is the consent granted by the implied consent statute the functional equivalent of Fourth Amendment consent to search in this

context? That is the issue squarely presented in this case. Ultimately, this Court determines that the implied consent statute supplies Fourth Amendment consent to a warrantless search upon probable cause a driver is DUI.

Although a "search conducted pursuant to a valid consent is constitutionally permissible, see, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), a valid consent means one which is "in fact, freely and voluntarily given," *see, Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). When consent is granted in submission to authority rather than as an intentional waiver of a constitutional right, it is not constitutionally valid consent. *See, Johnson v. United States*, 333 U.S. 10, 13 (1948).

In this case, the defense argues that the consent granted under the implied consent statute when all persons agree in advance to submit to a lawful breath, blood or urine test if there is subsequently probable cause to arrest for DUI, does not suffice for Fourth Amendment consent because "the state *requires* the affected population to 'consent' to the testing in order to gain access or retain a desired benefit." *Lebron v. Florida Dept. Children and Families*, 710 F.3d 1202, 1215 (11th Cir. 2013). Under the well-settled doctrine of "unconstitutional conditions" the government may not require a person to give

up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the right. *Id.* at 1217, citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In this instance, submission in advance to a breath, blood or urine test upon probable cause that one is driving while impaired is directly related to the asserted right to drive. It is beyond question that drunk driving is a dangerous crime that affects all people on public highways. So, the discretionary benefit of driving conferred by the government is directly related to a driver's consent in advance to submit to a test upon lawful arrest for DUI.

Consent to submit to a chemical or physical test of breath, blood or urine is given at two different times in the implied consent statute: first, when a person applies for a driver's license and second, after they have been lawfully arrested for DUI. §316.1932(1), Fla. Stat. (2013). By accepting the privilege to drive and obtaining a driver's license, Florida drivers consent in advance to a test of their breath, blood or urine once probable cause arises that they have driven under the influence.

At the first instance, upon applying for a driver's license, the Defense observes that there is no particularized suspicion so they claim the consent is

invalid. This argument is unavailing because the consent does not become legally relevant until after probable cause to arrest for DUI ripens and there is particularized suspicion in a specific case.

After lawful arrest, a person is advised of the arrest, and asked if they will consent to a breath test. If the driver refuses a breath, blood or urine test, the FDLE "script" for law enforcement to utilize, which the parties agree was followed in this case, requires the officer to read the consequences of the refusal as contained in the implied consent statute.

Pre-arrest breath tests are inadmissible. The Fifth District Court of Appeal has determined that first the person must be under lawful arrest and then the breath test is administered in order for the test to be incident to a lawful arrest. *State v. Whitley*, 846 So. 2d 1163 (Fla. 5th DCA 2003). That being so, the defense in this case contends that post-arrest consent is inherently coercive. Having determined that the first consent upon issuance of a driver's license is the operational consent for Fourth Amendment purposes, the Court need not consider this argument. As a purely factual matter, there is no consent granted, but instead, an express refusal. As a legal

matter, the Court must find that "no" really means "yes" or at least, the "yes" previously granted was irrevocable.

Even if the implied consent statute provides the consent necessary to justify a Fourth Amendment warrantless search, the Defendant contends that the refusal to submit to a test is an express withdrawal of consent. It is true that when an individual consents to be searched, he or she has the right to withdraw that consent. *Robinson v. State*, 976 So. 2d 1229, 1233 (Fla. 2d DCA 2008). Once consent is withdrawn, no further search can take place. *Id.* Review of the implied consent statute "leads to the inescapable conclusion that a person is given a right to refuse testing." *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980).

However, it does not make sense that a person who has already exercised the privilege to drive can thereafter withdraw their consent without consequence. The consent is granted once the driver's license is issued or the person accepts the privilege to drive on a highway in Florida. The acceptance of this privilege is conditioned on the consent in advance to a test upon the lawful arrest for DUI. Once the benefits of this bargain are accepted and enjoyed by the driver, it is too late to withdraw consent after arrest for DUI. Moreover, the statutory option to refuse a breath test cannot be equated with the

constitutional right to withdraw consent, as explained in *State v. Young*, 483 So. 2d 31, 33 (Fla. 5th DCA 1985), by Judge Melvin Orfinger:

> When discussing the "right to refuse testing" in *Sambrine [v. State*, 386 So. 2d 546 (Fla. 1980)], the supreme court was not equating that right with legal rights such as the *right* to vote, or the *right* to a trial by jury, or the *right* to be free from unreasonable searches and seizures. These latter rights are true legal rights in that the citizen is not penalized or punished for exercising them. What the supreme court was saying in *Sambrine* was not that a driver had a legal right to refuse to be tested, (because if he did, he could not be punished for the exercise of such right) but that the statute gave him a legal right to make a choice; or, as stated by the court, the statute gave him the *option* to refuse to submit to the test. This "option" cannot be equated with a legal right when the exercise of that option involves a penalty and can also be used as inculpatory evidence in the driver's criminal trial.

Other decisions discuss this "option" to refuse, characterizing it as a matter of "grace" as opposed to a "right" to refuse a test. *State v. McInnis*, 581 So. 2d 1370, 1373 (Fla. 5th DCA), *cause dism.*, 584 So. 2d 998 (Fla. 1991). The Supreme Court has recognized that it does not offend constitutional principles to attach sanctions to the exercise of this statutory option. *South Dakota v. Neville*, 459 U.S. 553 (1983).

Anticipating this argument, the defense does not assail the administrative consequences of license

suspension, but contends that the second refusal cannot be made a criminal offense.[2] Additionally, after *McNeely*, we are reminded that a breath test is a search requiring Fourth Amendment analysis. The consent granted by the implied consent statute must be equated with Fourth Amendment consent since a breath, blood or urine test is a search without a warrant. If it is Fourth Amendment consent, then under prevailing law, it can be withdrawn without penalty. This presents a logical conundrum, particularly considering the long standing existence of the implied consent statute.

It may be that the answer lies in the recognition that in this context, the reasonable expectation of privacy while driving a vehicle is less and constitutional rights are less protected when people engage in this activity. For instance, there is no Fifth Amendment right against self-incrimination because compelling a breath, blood or urine test "is not an interrogation of constitutional proportions." *State v. Busciglio*, 976 So. 2d 15 (Fla. 2d DCA), *rev. denied*, 992 So. 2d 819 (Fla. 2008). Likewise, there is no Sixth Amendment right to confer with counsel prior to submitting to a test, either at the roadside or at

[2] Perhaps this gives too much, but would seem to be required by *South Dakota v. Neville*, *supra*.

the station. *Id.*; *State v. Burns*, 661 So.2d 842 (Fla. 5th DCA 1995). Perhaps, as Judge David Foxman suggests in an order on this issue, the implied consent statute must be recognized as its own exception to the warrant requirement, but if so, that must be done by judges not sitting in county court. *State v. Caporuscio*, et al., Case No. 2013-318342MMDB.

It is clear that several states have struggled with the interplay with implied consent statutes and statutes which criminalize refusals to submit subsequent to the *McNeely* decision. Some of these other state statutes are markedly different from Florida's statutory scheme, so ultimately, the persuasiveness of the authority is limited. Some states have held post-*McNeely* that a driver's implied consent to a test falls within the consent exception to the warrant requirement. *See, State v. Won*, 2014 WL 1270615 (May 2, 2014), *cert. granted* 2014 WL 2881259(Hawaii, June 24, 2014); *People v. Harris*, 225 Cal. App. 4th Supp 1, 170 Cal. Rptr. 3d 729 (Cal. Sup. A.D. 2014); *State v. Flonnory*, 2013 WL 4567874 (Del. Super. July 17, 2013)(unpublished). Other states have held to the contrary. *State v. Butler*, 232 Ariz. 84, 302 P.3d 609, 612 (Ariz. 2013); *State v. Declerck*, 317 P.3d 794, 803 (Kan. App. 2014). Texas went one way and then the other. *Reeder v. State*, 2014 WL

60162, reh. granted, 2014 WL 1862669 (Tex. App. 2014). *McNeely* has prompted a nationwide reexamination of implied consent and reconsideration of laws making refusal a crime.

In light of the significant constitutional issues raised in this case, the longstanding existence of the relevant statutes, and the uncertain effect of the relatively recent *McNeely* decision, the issue raised herein is a matter of great public importance which requires resolution by an appellate court. Fla. R. App. P. 9.160

> IF THE IMPLIED CONSENT STATUTE PROVIDES CONSENT TO SEARCH AS AN EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT, THEN CAN THAT CONSENT BE WITHDRAWN BY REFUSAL TO SUBMIT TO AN OTHERWISE LAWFUL TEST OF BREATH, BLOOD OR URINE AND CAN THE SECOND SUCH REFUSAL BE PUNISHABLE AS A CRIMINAL OFFENSE?

Based upon the foregoing, it is hereby ORDERED AND ADJUDGED that the Motion to Dismiss is DENIED.

DONE AND ORDERED in chambers at Daytona Beach, Volusia County Florida, this 17 day of September, 2014.

Belle Schumann

Belle B. Schumann
County Court Judge

I hereby certify that a true and correct copy of the above and foregoing Order has been furnished by delivery to Assistant State Attorney Shey McCurdy and Aaron Delgado, counsel for Defendant Williams, at 227 Seabreeze Blvd. Daytona Beach, FL 32118 this 17 day of ~~August~~ Sept., 2014.

Dusty Going

Dusty Going
Judicial Assistant