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NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF NEBRASKA

State of Nebraska,

Plaintiff / Appellee,

vs.

Richard Pester,

Defendant / Appellant.

Case No. S-15-000530

Proof of Service

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Dated, this the 11th day of January, 2016.

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Subscribed in my presence and sworn to before me on this 11th day of January, 2016.

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My Comm. Exp. April 7, 2019

Notary Public

Case No. S-15-000530

NEBRASKA SUPREME COURT

STATE OF NEBRASKA,

Plaintiff / Appellee

vs.

RICHARD PESTER,

Defendant / Appellant

APPEAL FROM THE DISTRICT COURT
OF SCOTTS BLUFF COUNTY, NEBRASKA

The Honorable Randall L. Lippstreu, District Judge

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE OF DUI DEFENSE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the National College for DUI Defense ("NCDD"), is a nonprofit professional organization of lawyers, with over two thousand members, focusing on issues related to the defense of persons charged with driving under the influence. Through its extensive educational programs, its website, and its e-mail list, the NCDD trains lawyers to more effectively represent persons accused of driving under the influence.

Counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part and no person, other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation of this brief.

STATEMENT OF QUESTIONS PRESENTED FOR DECISION

Whether a statute that criminalizes the refusal to consent to a warrantless search of a person's breath or bodily substances is unconstitutional under the Fourth Amendment to the United States Constitution and article I, § 7 of the Nebraska Constitution?

PROCEDURAL AND FACTUAL BACKGROUND

Amicus curiae, NCDD, adopts the summary of prior proceedings and material facts set forth by Appellant, Richard Pester.

ARGUMENT

1. Nebraska's criminalization of a citizen's right to refuse a warrantless search is unconstitutional under the United States Constitution and the Nebraska Constitution

Where the right to be free of warrantless searches is a fundamental protection provided by the Fourth Amendment to the United States Constitution and article I, § 7 of the Nebraska Constitution, Nebraska's criminalization of a citizen's right to withhold or withdraw consent to a warrantless search stands as an affront to the principles embodied by both constitutions. Similarly, consent gained only on threat of criminal penalties is no consent at all and exemplifies the unconstitutional application of coercion explicitly intended to overcome the will of an accused.

It is well settled that "[s]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions." *State v. Modlin*, 291 Neb. 660, 669, 867 N.W.2d 609 (2015); *see also Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989) and *Riley v. California*, 134 S.Ct. 2473, 2482 (2014). As the United States Supreme Court made clear in *Missouri v. McNeely*, "Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception." 133 S.Ct. 1552, 1558 (2013). "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great," and therefore supports the requirement of a warrant in cases "where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757, 770 (1966).

While "[t]he warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3)

inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest," the only exception at issue in this case is that of consent. *Modlin*, 291 Neb. at 669. Although Mr. Pester revoked any consent pursuant to Nebraska's implied consent statute and never provided the actual consent on which the State could claim a true exception to the warrant requirement, the State points to its implied consent statute as a justification (or perhaps a loophole) for its unconstitutional criminalization of its citizens' right to refuse a warrantless search.

Because Nebraska Revised Statute § 60-6,197 requires a citizen to choose between abandoning the right to refuse a warrantless intrusion into his or her body or committing a crime in the presence of law enforcement by actually exercising that right, the statute does not present citizens with a true choice and is therefore unconstitutional under both the United States and Nebraska constitutions.

1.1. Taking and testing a citizen's blood for purposes of a DUI investigation is a search subject to constitutional constraints

The Supreme Court of the United States has time and again affirmed that the government cannot compel a citizen to produce any sample from his or her body—whether it be breath, blood, urine, semen, feces, membrane, or cells—free from the protections of Fourth Amendment. Despite the fact that the government has a vested interest in ferreting out those citizens actually driving under the influence, it does not have the power to waive or weaken the mandated search warrant process by fiat, edict, or statute. Particularly because "[t]he integrity of an individual's person is a cherished value of our society," *Schmerber*, 384 U.S. 772, the government must adhere to the warrant requirement or demonstrate the reasonableness of a warrantless search through one of the specific and limited warrant exceptions.

In *State v. Modlin*, this Court confirmed, "It has long been recognized that the drawing of blood from a person's body for the purpose of administering blood tests is a search of the person subject to Fourth Amendment constraints." 291 Neb. at 668–69. Similarly, the Supreme Court of the United States declared in *Schmerber v. California*, "It could not reasonably be argued...that the administration of the blood test in this case was free of the constraints of the Fourth Amendment." 384 U.S. at 767. Rather, "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable," and "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the [citizen]'s privacy interests." *Skinner*, 489 U.S. at 616.

Where, as here, there is no argument that the State's search of a citizen's blood is untethered from the "constraints of the Fourth Amendment," the State must demonstrate the existence of a warrant or one of the "few specifically established and well-delineated exceptions, which must be strictly confined by their justifications." *State v. Smith*, 279 Neb. 918, 927, 782 N.W.2d 913 (2010). "In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement." *Id.* at 927. The fact that the search in question may be authorized by an implied consent statute does not exempt the search from the traditional warrant analysis rooted in the Fourth Amendment of the United States Constitution and article I, § 7 of the Nebraska Constitution.

For instance, in *McNeely v. Missouri*, the Supreme Court considered a case in which law enforcement drew a citizen's blood, without a warrant and without consent, as part of a DUI investigation. 133 S.Ct. 1552, 1554 (2013). After reiterating that its "cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception,"

id. at 1558, the Court rejected Missouri's argument that there should be a per se exigency exception for a blood draw in a DUI investigation, *id.* at 1556. Without minimizing the impact caused by those citizens who drive while under the influence, the Court made clear that "[w]e have never retreated...from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id.* at 1565. It therefore suppressed the blood test result as a violation of the Fourth Amendment.

As did the United States Supreme Court, this Court confirmed in *Modlin* that implied consent statutes do not vitiate the need to conduct a traditional Fourth Amendment analysis when the government undertakes a warrantless search and seizure of a citizen's blood. 291 Neb. at 673. Although this Court held that it was not error to admit the results of the blood test in *Modlin* because the defendant had given actual consent, this Court made clear that implied consent alone was insufficient to act as an exception to the warrant requirement. *Id.* at 677. In line with this Court's decision, "[t]he vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams v. State*, 167 So.3d 483, 490 (Fla. Dist. Ct. App. 2015) (collecting cases at note 4 and holding that statutory implied consent is not equivalent to Fourth Amendment consent exception to the warrant requirement). *See also State v. Villarreal*, --- S.W.3d ----, 2014 WL 6734178, *13 (Tex. Crim. App. 2014) (collecting cases and noting that "courts in several other jurisdictions have recently considered challenges to statutes that aim to establish irrevocable implied consent and have concluded that those statutes, when used to draw a suspect's blood without a warrant and over his objection, do not establish valid legal consent within the bounds of the Fourth Amendment").

Therefore, because the government's forcible taking and testing of a citizen's blood is subject to the protections of the Fourth Amendment, an implied consent statute or legislative

scheme that criminalizes a citizen's right to refuse the warrantless test is similarly subject to a traditional Fourth Amendment review.

1.2. Because Nebraska's citizens are constitutionally entitled to refuse to consent to a warrantless search or revoke consent at any point before its completion, the criminalization of its citizens' right to do so is unconstitutional

For the simple reason that consent is an exception to the foundational requirement that the government procure a warrant prior to a search, a citizen can refuse to consent to a warrantless search or revoke that consent before the search is complete. In contrast to the State's characterization of implied consent as irrevocable consent, Appellee's Brief at 16, the rulings of this Court and the Supreme Court of the United States demonstrate that the Fourth Amendment's protections against warrantless searches protect a citizen's right to refuse or revoke consent to a warrantless search even where an implied consent law exists.

1.2.1. Nebraska's citizens have the constitutional right to refuse or revoke consent to a warrantless search

As explained above, the protections afforded by the Fourth Amendment and article I, § 7 provide that warrantless searches are presumptively unreasonable and, therefore, invalid, in the absence of a warrant exception. This Court and the United States Supreme Court have repeatedly recognized that a citizen has a constitutional right to refuse consent to a search when consent is requested by the government. *See, e.g.*, *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967) (stating that the basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"). "Consent to be searched is a waiver of one's right not to be searched." *State v. Won*, 361 P.3d 1195, 1206, 136 Hawai'i 292 (2015) (suppressing the result of a citizen's warrantless and nonconsensual blood test and overturning that state's criminal refusal law).

"To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne." *State v. Modlin*, 291 Neb. 660, 671, 867 N.W.2d 609 (2015). Even where the government can demonstrate "that the consent to search was freely and voluntarily given," a citizen has not forsaken the protections afforded by the United States and Nebraska constitutions. *State v. Konfrst*, 251 Neb. 214, 226, 556 N.W.2d 250 (1996). Rather, a citizen "may of course delimit as he chooses the scope of the search to which he consents." *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). Similarly, "[o]nce given, consent to search may be withdrawn." *State v. Smith*, 279 Neb. 918, 931, 782 N.W.2d 913 (2010). *Jimeno* and *Smith* both recognize that a search reliant on consent is undertaken by the grace of the citizen and may therefore be limited or ended by that same citizen.

For instance, in *Smith*, this Court suppressed the fruits of a search conducted by off-duty law enforcement officers, acting as private security guards, because the defendant explicitly revoked any express or implied consent to the search. *Smith*, 279 Neb. at 934. There, the government argued the defendant consented to the search because he had been notified the nightclub conducted pat down searches on its patrons, he made no attempt to leave when the first officer began his pat down search, and he had initially provided consent. *Id.* at 931.

This Court rejected the State's argument, however, because the defendant objectively demonstrated his intent to withdraw consent before the officer reached the defendant's pocket containing the illegal contraband. *Id.* at 933. Starting with the principle that consent to a search may always be withdrawn, this Court noted that a citizen need only demonstrate "an intent to withdraw consent...by unequivocal act or statement." *Id.* This Court then addressed the State's argument that the defendant "could not withdraw his consent once the pat down had begun." *Id.* This Court responded simply, stating "that is not the law." *Id.*

This Court addressed a similar argument—that a citizen's implied consent constitutes irrevocable consent which operates as an exception to the warrant requirement—in *State v. Modlin*. 291 Neb. 660, 867 N.W.2d 609 (2015). There, it held that "a court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes...." *Id.* at 673. Similarly, the Idaho Supreme Court concluded in *State v. Wulff*, "[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent." 337 P.3d 575, 581, 157 Idaho 416 (2014) (holding that Idaho's implied consent statute was a per se exception to the warrant requirement in violation of the Fourth Amendment. *See also State v. Villarreal*, --- S.W.3d ----, 2014 WL 6734178, *11 (2014) (concluding that a citizen's "explicit refusal to submit to blood testing overrides the existence of any implied consent, and, unless some other justification for the search applies, there remains no valid basis for conducting a warrantless search under those circumstances") and *State v. Butler*, 302 P.3d 609, 613, 232 Ariz. 84 (2013) (holding that "independent of [Arizona's implied consent law], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw").

As with any other type of consent, this Court has confirmed that implied consent is not irrevocable consent and a citizen has the prerogative and the constitutional right to withdraw his or her implied consent before completion of a search.

1.2.2. Nebraska's criminalization of its citizens' right to refuse or revoke consent to a warrantless search is unconstitutional

Contrary to the State's argument that "[s]tates are not even required to give a suspect the choice of refusing to submit to a chemical test," Appellee's Brief at 16, this Court's holdings in *Smith* and *Modlin*, along with the United States Supreme Court cases from which the cases draw their authority, make clear that a citizen's consent to a warrantless search may always be

withheld or withdrawn. While a citizen's choice to withhold or withdraw consent does not prevent the government from procuring a warrant, Nebraska's implied consent statute and its attendant criminal penalties unconstitutionally burden a citizen's right to withhold or withdraw consent to a warrantless intrusion into his or her body.

In *Camara v. Municipal Court of City and County of San Francisco*, the United States Supreme Court held an ordinance criminalizing a citizen's refusal to consent to a warrantless search was unconstitutional on its face. 387 U.S. 523, 540 (1967). There, a property owner faced criminal charges for refusing to allow an inspection of his property without a warrant. *Id.* at 527. Under the challenged law, refusal to permit an inspection was itself a crime.

The government argued that because the ordinance in *Camara* was hedged with various safeguards, including multiple prior notices and a standard of reasonableness before an inspector could make a decision to enter, the warrant requirement was unnecessary. *Id.* at 531. The Supreme Court concluded otherwise, stating, "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment." *Id.* at 532. The Supreme Court continued, "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.* at 533.

As the Supreme Court made clear in *Camara*, there can be no question that a statute threatening criminal prosecution unless a citizen consents to a warrantless search of his or her house is unconstitutional on its face. Even more indisputable is the fact that the Fourth Amendment provides greater protections to a person's body than it does a person's house. As stated in *Katz v. United States*, "the Fourth Amendment protects people, not places." 389 U.S.

347, 351 (1967). Despite these undeniable principles, the State attempts to muddle the issue by characterizing the search in *Camara* as an "*unlawful* warrantless search," and characterizing a search pursuant to Nebraska's implied consent statute as a "*lawful* search." Appellee's Brief at 18 (emphases in original). What the State neglects is that a search pursuant to its implied consent statute—a search unjustified by an exception to the warrant requirement and, after *Modlin*, a search that may be bereft of actual consent—is no different than the "*unlawful* warrantless search" in *Camara*.

Even if this Court was to accept that Nebraska's implied consent statute is somehow distinguishable from the challenged law in *Camara*, Nebraska's implied consent statute still runs afoul of the unconstitutional-conditions doctrine. "In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 6-7 (1988). "Thus, in the context of individual rights, the doctrine provides that on at least some occasions[,] receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution." *Id.* at 7 (footnote omitted).

Applied to the current case, the unconstitutional-conditions doctrine prohibits Nebraska from conditioning its citizens' right to drive upon the irrevocable waiver of the right to refuse a warrantless intrusion to their bodies. It does not matter that a citizen does not possess a constitutional right to drive. Rather, because the State has affirmatively bestowed a privilege on its citizens—the right to drive—it cannot condition that privilege on the abandonment of a constitutional protection—the right to be free from warrantless searches and seizures. "[T]he

privilege of driving does not alone create consent for a forcible blood draw." *State v. Wells*, 2014 WL 4977356, *13 (Tenn. Crim. App. 2014).

"Given the gravity of the intrusion into privacy inherent in a forcible blood draw...such a search is not reasonable [under the Fourth Amendment] unless performed pursuant to a warrant or to an exception to the warrant requirement." *Id.* While a statute that suspends or revokes driving privileges as a result of a citizen's refusal of a warrantless blood draw may pass judicial muster, *see Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013)—because the statute does not burden a constitutional right—a state cannot enact a statute that criminally punishes someone who refuses a warrantless search—for the very reason that the statute would burden the constitutional right to be free from warrantless searches and seizures.

Therefore, because Nebraska Revised Statute § 60-6,197 burdens a citizen's acknowledged constitutional right to refuse or withdraw consent to a warrantless search and, in fact, coerces a citizen to abandon his or her right to refuse or withdraw consent, the statute violates the United States and Nebraska constitutions.

1.3. A criminal statute cannot be employed to coerce a person's consent and avoid the constitutional protections afforded by the warrant requirement

In the same way that an implied consent statute criminalizing a citizen's refusal does not afford proper deference to a citizen's right to refuse or revoke consent to a warrantless search, coercing consent at the threat of criminal punishment is not a suitable substitute for the constitutional dictates of a search warrant application and review by a detached and neutral magistrate. While "the criminal process often requires suspects and defendants to make difficult choices," *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), the criminal process may not require suspects and defendants to make the choice-less choice of abandoning his or her

constitutional right to refuse consent to a warrantless search or face criminal sanctions for the exercise of that right.

In accord with the United States Supreme Court's holdings, this Court has repeatedly stated, "Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological." *State v. Modlin*, 291 Neb. 660, 671, 867 N.W.2d 609 (2015). Actual consent must not be the "product of a will overborne," *id.*, and the State's burden to demonstrate actual consent "cannot be discharged by showing no more than acquiescence to a claim of lawful authority," *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968).

"[T]he determination of actual consent to the procuring and testing of a driver's blood requires the determination of the voluntariness of the consent under the totality of the circumstances." *Modlin*, 291 Neb. at 672. And while the United States Supreme Court in *South Dakota v. Neville* allowed that a state could impose administrative sanctions for a citizen's refusal to consent to a warrantless blood-alcohol test, it did not address the question of whether a state could substitute criminal penalties and the threat of jail for the same refusal. 459 U.S. 553, 560 (1983). In fact, the Supreme Court distinguished its holding in *Neville* from a case in which "the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice." *Id.* at 563–64.

Where, as here, the totality of the circumstances demonstrates that Nebraska Revised Statute § 60-6,197 is explicitly designed to overcome the will of an accused and save law enforcement the effort of procuring a warrant, the holding in *Neville* provides no safe haven from unconstitutionality. To begin, it cannot be seriously contended that a "request" by law enforcement, the refusal of which subjects a citizen to criminal sanctions including jail, is not

designed to coerce a citizen to waive his or her right to refuse consent. As the court in *State v. Won* concluded, "the threat of imprisonment is inherently coercive." 361 P.3d 1195, 1215, 136 Hawai'i 292 (2015). Evaluating, and finding unconstitutional, a similar statute criminalizing a citizen's right to refuse warrantless blood testing, the Court went on:

> It is manifestly coercive to present a person with a "choice" that requires surrender of the constitutional right to refuse a search in order to preserve the right to not be arrested for conduct in compliance with the constitution. It is equally coercive to "allow" the person to preserve the fundamental right to refuse a search by requiring the person to relinquish the right to not be arrested for conduct that does not violate the constitution.

Won, 361 P.3d at 1213.

As was the case in *Won*, the "choice" presented by Nebraska Revised Statute § 60-6,197 is not the "true choice" examined by the Supreme Court in *Neville*. In contrast, the "choice" presented by Nebraska Revised Statute § 60-6,197 requires that a citizen discard the protections of the Fourth Amendment and article I, § 7 unless he or she is willing to commit a crime in the presence of law enforcement (by refusing to consent to a warrantless search). An implied consent scheme that requires a citizen to choose jail if he or she wishes to stand by the rights afforded by the Fourth Amendment and article I, § 7 presents no "true choice" to a rational citizen.

Since, by its very design, Nebraska Revised Statute § 60-6,197 diminishes the constitutional protections of the Fourth Amendment and article I, § 7, the statute is invalid on its face as well as applied to any citizen.

CONCLUSION

Amicus curiae National College of DUI Defense urge this honorable Court to find that Nebraska Revised Statute § 60-6,197 violates the Fourth Amendment of the United States Constitution and article I, § 7 of the Nebraska Constitution. Because the statute criminalizes a citizen's right to withhold or withdraw consent to a warrantless search and coerces consent by requiring a citizen to choose between criminal prosecution and the exercise of his or her constitutional rights, the statute is unconstitutional on its face and as applied to Mr. Pester.

Dated this 11th day of January, 2016.

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