

CASE NAME: Washington v Mecham (No. 90598-3; June 16, 2016)

FACTS:

In 2011, Officer Campbell observed Mecham driving in King County. While at a stoplight, Officer Campbell ran a random license check on Mecham's vehicle and discovered an outstanding warrant. He then turned on his emergency lights, and Mecham pulled over by turning into a parking lot. The stop was purely for the outstanding warrant; Officer Campbell did not notice anything unsafe about the manner in which Mecham was driving.

As Officer Campbell approached Mecham's vehicle, he noticed that Mecham had already begun to exit his vehicle. Officer Campbell instructed Mecham to remain seated and asked him for identification. After Mecham confirmed his identity, Officer Campbell ordered him from his vehicle, placed him in handcuffs, arrested him, and read him his *Miranda*¹ rights from a department issued card.

Following arrest, Officer Campbell smelled intoxicants on Mecham's breath and noticed that Mecham's movements were sluggish and that his speech was slurred and repetitive. He also observed an open beer can with a straw behind the passenger seat of Mecham's vehicle. Believing that Mecham was intoxicated, Officer Campbell asked Mecham if he would consent to perform FSTs in order to determine whether he was, in fact, intoxicated.

An FST is an officer's observations of a suspect driver's physical actions. The standard FST includes three components. First, in the horizontal gaze nystagmus test, the suspect driver must follow a moving object with the eyes while the officer looks for involuntary eye movements. Second, in the walk-and-turn test, the suspect driver must take several heel-to-toe steps in a line. The third test requires the suspect driver to stand on one leg while counting out loud. These tests are specifically designed to provide statistically valid and reliable indications of a driver's blood alcohol content and "are usable only for a sobriety determination." *Heinemann v. Whitman County*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986); *see also State v. Quaal*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014) (horizontal gaze nystagmus test "merely shows physical signs consistent with ingestion of intoxicants"); U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., *Development of a Standardized Field Sobriety Test (SFST) Training Management System* 1-12 (Nov. 2001) (DOT-HS-809-400).

Officer Campbell told Mecham that the FSTs were voluntary, and Mecham declined to perform the test.

Officer Campbell then transported Mecham to a King County booking facility to process him on the outstanding warrant. At the booking facility, Mecham spoke with an attorney. Officer Campbell then asked Mecham to submit to a breath test.² This time Mecham was informed that while he had the right to refuse, his license would be revoked or suspended and that his refusal could be used against him in a criminal trial. Mecham signed a form stating that he understood the consequences of refusing to submit to a breath test. Officer Campbell repeated that the breath test was voluntary and asked Mecham whether he would agree to take the breath test. Mecham responded that his attorney advised him not to answer any further questions. Officer Campbell

asked Mecham a second and third time to take the breath test, and Mecham refused based on his attorney's advice.

Following this exchange, Officer Campbell spoke with Officer Darrell Moore, a drug recognition expert. With Officer Moore's help, Officer Campbell drafted an application for—and received—a search warrant authorizing a blood draw to test Mecham's blood alcohol content (BAC). Officer Campbell transported Mecham to Overtake Hospital, and the blood draw was completed just short of three hours after Mecham's initial arrest. A forensic toxicologist analyzed the blood and reported that Mecham's BAC was .05 grams per 100 milliliters (g/100 ml). This toxicologist testified that given the passage of time and the rate at which alcohol is metabolized, Mecham's BAC was likely .065 g/100 ml within two hours after he stopped driving and possibly as high as .08 g/100 ml. The State charged Mecham with one count of felony driving under the influence (DUI).

PROCEDURAL HISTORY:

At trial, Mecham stipulated that Officer Campbell made a lawful stop and a lawful arrest. He also stipulated that at the time of his arrest, he had previously been convicted of 4 or more prior offenses within 10 years, making this a felony DUI. RCW 46.61.5055(14)(a).

Mecham made several motions to exclude his refusal to perform an FST from evidence. The trial court denied these motions, ruling that even if an FST was a search, the search was supported by probable cause. The trial court also rejected defense counsel's proposed jury instruction that read:

Evidence has been submitted that Mr. Mecham refused to participate in voluntary field sobriety tests. This was admitted to explain the chain of events in this case.

Every person suspected of driving under the influence has the right to refuse voluntary field sobriety tests. This evidence was admitted to explain the chain of events in this case. You may not consider this evidence for any other purpose. You shall³ use the fact Mr. Mecham refused to participate in voluntary field sobriety tests to infer guilt or to prejudice him in any way. Any discussion of the evidence during your deliberation must be consistent with this instruction.

The State elicited testimony throughout the trial that Mecham refused to perform an FST. It relied on this evidence in its closing argument, arguing that Mecham refused to take the tests because he was guilty and because he was trying to frustrate the investigation. The jury found Mecham guilty of felony DUI.

Mecham timely appealed, asserting that an FST constitutes an unreasonable search under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. As a result, he argues, the State improperly penalized him for exercising his constitutional right to refuse consent to an FST by commenting on his refusal at trial. The Court of Appeals, Division One, affirmed his conviction. *State v. Mecham*, 181 Wn. App. 932, 954, 331 P.3d 80, *review granted*, 181 Wn.2d 1014, 337 P.3d 325 (2014). In a unanimous published opinion, the Court of Appeals rejected his argument, assuming *arguendo* that an FST was a search but holding that Officer Campbell's request for Mecham to perform the FST was justified

under the *Terry*⁴ stop exception to the warrant requirement.⁵ *Id.* The court further held that the State did not impermissibly comment on Mecham's refusal because Mecham did not have a constitutional right to refuse the test. *Id.* at 946.

The Court of Appeals denied Mecham's motion for reconsideration but withdrew its decision and modified its opinion in ways that are unrelated to his appeal. Mecham filed a petition for review, and the State cross appealed pursuant to RAP 13.7(b), arguing that we should consider alternative arguments for affirmance that the Court of Appeals did not address. We granted both Mecham's petition for review and the State's request to review alternative issues for affirmance.

ISSUE:

Can the State introduce evidence at trial of a defendant's refusal to perform field sobriety tests?

HOLDING:

Yes. We conclude that the State may offer evidence of such a refusal because FSTs are not searches under the Washington or federal constitutions, and a defendant thus has no constitutional right to refuse to perform FSTs. There is no legal obligation in Washington to submit to FSTs. *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 237, 978 P.2d 1059 (1999) (citing *City of Seattle v. Personeus*, 63 Wn. App. 461, 465, 819 P.2d 821 (1991)). Instead, a defendant's right to refuse to participate in an FST is rooted in the common law.⁶ However, the absence of a statutory right of refusal has no effect on the admissibility of refusal testimony in the context of FSTs—the admissibility rests on whether constitutional privileges apply. *Id.* at 236-37.

Prosecutors may not comment on a refusal to waive a constitutional right. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (consent to waive a constitutional right may not be coerced, either explicitly or implicitly); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (evidence of defendant's refusal to consent to warrantless search violates Fourth Amendment and article I, section 7); *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010) (prosecutor's comment on refusal to provide a DNA (deoxyribonucleic acid) sample and exercise of right to remain silent violate Fifth and Fourth Amendment rights (U.S. CONST. amends. IV, V)). However, the State may admit evidence that a defendant is asserting a nonconstitutional right as evidence of consciousness of guilt at trial. *State v. Nordlund*, 113 Wn. App. 171, 188, 53 P.3d 520 (2002).

Since the State cannot comment on a defendant's refusal to waive a constitutional right, the dispositive issue is whether a defendant has a constitutional right to refuse to perform an FST. This is a question of first impression for this court.⁷ Both Washington's constitution and the federal constitution bestow a right to be free from unlawful searches and seizures. WASH CONST. art. I, § 7; U.S. CONST. amend. IV. Mecham argues that FSTs are searches subject to these constitutional provisions because they reveal private information that is not voluntarily exposed to the public view. We reject this argument because FSTs reveal only some physical characteristics associated with inebriation, none of which is substantially different from the characteristics a person would observe from simple observation of the defendant. These characteristics are not analogous to the types of information that we have previously accorded protection under article I, section 7. We therefore hold that while a field sobriety test is a seizure,

it is not a search either under article I, section 7 of the Washington Constitution or under the Fourth Amendment to the United States Constitution.

Since Mecham's refusal to perform an FST was not an exercise of a constitutional right, the trial court properly permitted the prosecutor to introduce evidence of the defendant's refusal at trial and comment on that refusal during closing argument.