App. 1

23 Cal.App.5th 696
Review Granted
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
Peter BALOV, Defendant and Appellant.

D073018
|
Filed 5/23/2018

Attorneys and Law Firms

Law Office of David Wilson and David Wilson; Law Offices of Gretchen von Helms and Gretchen C. von Helms, San Diego for Defendant and Appellant.

Mara W. Elliot, City Attorney, John C. Hemmerling, Assistant City Attorney, and Shelley A. Webb, Deputy City Attorney, for Plaintiff and Respondent.

Opinion

BENKE, Acting P. J.

After Peter Balov was arrested for suspected drunk driving, the arresting officer advised Balov "that per California law he was required to submit to a chemical test, either a breath or a blood test." Balov did not object and chose a blood test, which showed his blood alcohol level was above the legal limit. Balov was charged with misdemeanor driving under the

influence (Veh. Code, § 23152, subds. (a) & (b)).[1] Before trial, Balov moved to suppress the results of the blood test, arguing, inter alia, that his consent to the test was coerced. The court denied the motion, the appellate division affirmed, and Balov now challenges the ruling here, arguing as he did below that his consent to the blood test was not voluntary. We reject Balov's argument and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

At the hearing on Balov's motion to suppress, San Diego Police Officer Luis Martinez testified that just before 3:00 a.m. on March 22, 2015, he saw Balov abruptly stop his black Range Rover in an intersection when the traffic signal turned yellow. In response, Martinez turned on his police vehicle's emergency lights and instructed Balov to pull over. Martinez reported that he noticed the smell of alcohol on Balov's breath and that Balov's speech was slurred. Balov admitted he had been drinking and agreed to submit to field sobriety exercises and a preliminary breath sample, which showed his blood alcohol level was over the legal limit.

As a result, Martinez placed Balov under arrest for driving under the influence of alcohol. Martinez testified that after the arrest, he informed Balov of the implied consent law, telling Balov "that per California Law he was required to submit to a chemical test, either a breath or a blood test." Martinez did not inform

[1] Undesignated statutory references are to the Vehicle Code.

Balov of the statutory consequences of refusing a test. Balov stated he wanted a blood test and Martinez drove Balov to the police headquarters. During the routine blood draw that followed, Balov was calm and gave no indication of wanting to refuse the test.

Before trial, Balov moved to suppress the results of the warrantless blood test under Penal Code section 1538.5, arguing that his consent was invalid because Martinez had not explained the consequences of refusing chemical testing under section 23612. The city attorney opposed the motion. After the evidentiary hearing, the trial court denied Balov's motion. The court concluded that under the totality of the circumstances, Balov voluntarily consented to the blood test and the test was not taken in violation of his Fourth Amendment right to be free from unreasonable searches.

Balov challenged the order in the San Diego County Superior Court's Appellate Division, which unanimously affirmed the trial court's order. After the city attorney filed a request for publication of the appellate division's order, on its own motion, the division certified the matter for transfer to this court. The certification order notes a split of authority on the issue of implied consent contained in two decisions of the Santa Clara County Superior Court Appellate Division, *People v. Mason* (2016) 8 Cal.App.5th Supp. 11, 214 Cal.Rptr.3d 685 (*Mason*), and *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486 (*Agnew*). We accepted the transfer under California Rules of Court, rule 8.1008.

DISCUSSION

I

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362, 45 Cal.Rptr.2d 425, 902 P.2d 729.)

A blood draw is a search subject to the Fourth Amendment. (*Schmerber v. Cal.* (1966) 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908.) Under the Fourth Amendment "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ." While the Fourth Amendment does not specify when a search warrant must be obtained, the United States Supreme Court "has inferred that a warrant must generally be secured." (*Kentucky v. King* (2011) 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865.) However, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650.) "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250, 111 S.Ct.

1801, 114 L.Ed.2d 297.) It is well established that a *consensual* search does not violate the Fourth Amendment "because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." (*Id*. at pp. 250-251, 111 S.Ct. 1801.)

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and 'voluntariness is a question of fact to be determined from all the circumstances. . . .'" (*Ohio v. Robinette* (1996) 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347.) "'If the validity of a consent is challenged, the prosecution must prove it was freely and voluntarily given—i.e., "that it was [not] coerced by threats or force, or granted only in submission to a claim of lawful authority." [Citations.]'" (*People v. Harris* (2015) 234 Cal.App.4th 671, 689-690, 184 Cal.Rptr.3d 198 (*Harris*).) "'"The . . . voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence.'"'" (*Id.* at p. 690, 184 Cal.Rptr.3d 198.)

Under section 23612, a "person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly

committed in violation of Section 23140, 23152, or 23153." (§ 23612, subd. (a)(1)(A).) The statute "applies broadly and generally to 'those who drive'—that is, to those who avail themselves of the public streets, roads, and highways to operate motor vehicles in this state." (*Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1139, 57 Cal.Rptr.3d 306, 156 P.3d 328 (*Troppman*).)

The implied consent law was adopted in response to the United States Supreme Court's decision in *Schmerber*, which "approved forcible, warrantless chemical testing of arrested persons under certain conditions, including certain exigent circumstances." (*Agnew*, *supra*, 242 Cal.App.4th Supp. at p. 6, 195 Cal.Rptr.3d 486.) "'Although it is clear under *Schmerber* that a person who has been lawfully arrested may have a blood sample forcibly removed without his consent, provided [certain conditions are met], nevertheless such an episode remains an unpleasant, undignified and undesirable one.'" (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 759, 280 Cal.Rptr. 745, 809 P.2d 404, quoting *People v. Superior Court of Kern County* (*Hawkins*) (1972) 6 Cal.3d 757, 764, 100 Cal.Rptr. 281, 493 P.2d 1145.) "[B]y enacting the implied consent law, thereby providing an alternative method of compelling a person arrested for driving while under the influence to submit to chemical testing, the Legislature afforded officers a means of enforcement that does not involve physical compulsion." (*Troppman*, *supra*, 40 Cal.4th at p. 1136, 57 Cal.Rptr.3d 306, 156 P.3d 328.)

Under section 23612, by the act of driving on California's roads, Balov accepted the condition of implied,

advance consent if lawfully arrested for drunk driving.[2] That advance consent, however, could also have been withdrawn at the time of arrest by Balov's objection to a breath test or blood draw. " '[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.' [Citation.] Therefore, rather than determine whether 'implied consent' to a chemical test satisfies the Fourth Amendment, we must determine whether submission to a chemical test, after advisement under the implied consent law, is freely and voluntarily given and constitutes *actual* consent." (*Harris*, *supra*, 234 Cal.App.4th at p. 686, 184 Cal.Rptr.3d 198.) The totality of the circumstances that must be considered in determining if consent is voluntary includes not only advance consent, but the driver's conduct at the time of arrest and the circumstances surrounding the testing.

---

[2] In his briefing, Balov discusses another implied consent statute, section 13384, which makes consent to chemical testing if arrested for driving under the influence a condition of obtaining a California driver's license. As the city attorney points out in her brief, however, the People did not rely on this provision in the trial court and it is not relevant on appeal.

II

As he did below, Balov argues that because he was not informed by Martinez that he could object to chemical testing, his consent to the blood test was not voluntary and the warrantless search was obtained in violation of his Fourth Amendment right. In support of this argument, Balov looks primarily to the United States Supreme Court's decision in *Bumper v. North Carolina* (1968) 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (*Bumper*). *Bumper* considered whether a false claim by law enforcement that it had a warrant to search the defendant's home vitiated the defendant's cohabitant's subsequent consent to the search. The court held that it did, stating that a "search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." (*Id*. at p. 549, 88 S.Ct. 1788.)

Balov agrees that "it is the totality of circumstances of an individual's consent that must be analyzed to determine whether consent was voluntary or coerced." However, he argues that Martinez's statement "that per California Law [Balov] was required to submit to a chemical test," is no different than the false claim of a search warrant in *Bumper* and precludes a finding that Balov's consent was voluntary. We do not agree. Unlike law enforcement's claim in *Bumper*, Martinez's statement to Balov was not false.

Section 23612 required Balov to submit to a chemical test. If Balov refused, he would have faced the consequences specified under the consent law including a

fine, the loss of his driver's license, and mandatory imprisonment if convicted of driving under the influence. (§ 23612, subd. (a)(1)(D).) Section 23612 requires the driver to be told that his or her failure to submit to a test will result in these consequences.[3] However, no "presumption of invalidity attaches if a citizen consent[s to a search] without explicit notification that he or she was free to refuse to cooperate. Instead, the [United States Supreme] Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning."

---

[3] The statute provides that the driver "shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code, or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to Section 13353, 13353.1, or 13353.2 for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations." (§ 23612, subd. (a)(1)(D).)

(*United States v. Drayton* (2002) 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242; see *Harris*, *supra*, 234 Cal.App.4th at p. 692, 184 Cal.Rptr.3d 198 ["failure to strictly follow the implied consent law does not violate a defendant's constitutional rights"].)

Here, Balov freely consented to the search of his blood. After driving on the public road and being lawfully arrested for driving under the influence, Martinez correctly told Balov he was required to submit to a breath or a blood test. Although the statement was incomplete under section 23612, subdivision (a)(1)(D), there was no evidence Martinez intended to deceive Balov about his right to refuse a test altogether. Nor was Martinez's statement about the implied consent law demonstrably false.[4] (See *Harris*, *supra*, 234

---

[4] Balov asserts that under *Harris*, *supra*, 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198, which also upheld a consensual search under similar facts, we must conclude that his consent was coerced because – unlike the officer in *Harris* – Martinez did not reference the consequences of refusal. In *Harris*, the defendant was pulled over for speeding and dangerous driving, and then arrested after exhibiting signs of drug use. The arresting officer told the defendant "that, based on his belief that defendant was under the influence of a drug, defendant was required to submit to a chemical blood test. [The officer] advised defendant that he did not have the right to talk to a lawyer when deciding whether to submit to the chemical test, that refusal to submit to the test would result in the suspension of his driver's license, and that refusal could be used against him in court. Defendant responded, 'okay,' and [the officer] testified that at no time did defendant appear unwilling to provide a blood sample." (*Id*. at p. 678, 184 Cal.Rptr.3d 198.)

On appeal of the denial of the defendant's motion to suppress, the Court of Appeal rejected the defendant's argument that his consent was not voluntary because the arresting officer's

Cal.App.4th at p. 692, 184 Cal.Rptr.3d 198 ["failure to strictly follow the implied consent law does not violate a defendant's constitutional rights"].) Martinez's failure to communicate the consequences of refusing a chemical test did not make Martinez's statement any more or less coercive than if the information had been provided. In neither case is the driver advised of his or her right to refuse to test altogether.[5]

---

statements concerning the implied consent law were false. The defendant argued the officer's statements were false because section 23612, subdivision (a)(1)(A) requires the driver to "be given the choice between a blood or breath test" and that the officer incorrectly informed him that his license would be suspended for two or three years (rather than one year). (*Harris*, *supra*, 234 Cal.App.4th at p. 691, 184 Cal.Rptr.3d 198.) In rejecting this argument, the *Harris* court upheld the trial court's finding that the arresting officer did not intentionally deceive the defendant about the implied consent law and concluded the trial court appropriately considered all the circumstances to find the defendant's consent to the blood test was voluntary. (*Id*. at pp. 691-692, 184 Cal.Rptr.3d 198.) Contrary to Balov's assertion, *Harris* does not hold that failure to inform the defendant of the consequences of refusing a chemical test under section 23612 necessarily results in coerced consent. Rather, *Harris* reiterates the principle that the court must look at the totality of the circumstances to determine the voluntariness of a defendant's consent.

[5] Likewise, we disagree with *Mason*, *supra*, 8 Cal.App.5th Supp. 11, 214 Cal.Rptr.3d 685 that the failure to communicate the consequences of refusing the chemical test necessarily conveys to the driver that refusal to test is not an option. Indeed, the *Mason* panel itself conceded that this conclusion is merely an implication that could be drawn by the driver, and not a necessary conclusion. (*Id*. at p. 33, 214 Cal.Rptr.3d 685.) "[R]equiring the statutory admonition about the consequences of withdrawing consent in every case, or even treating that as the critical factor, would improperly elevate the admonishment to a constitutional requirement under the Fourth Amendment." (*Agnew*, *supra*, 242

Further, at no point before or after Balov consented to the test did he indicate any objection. Looking at the totality of the circumstances, including Martinez's conduct, the existence of the implied consent law, and Balov's actions before and after he consented, we cannot say the trial court's finding that Balov voluntarily consented to the blood test was error.

DISPOSITION

The order is affirmed.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.

Cal.App.4th Supp. at p. 16, 195 Cal.Rptr.3d 486; see *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 119, 40 Cal.Rptr.3d 48 [rejecting plaintiff's claim that his Fourth Amendment right against an unreasonable search was violated by the police officers' failure to comply with section 23612].)

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PETER BALOV, Defendant and Appellant.	D073018 (San Diego County Super. Ct. Nos CA270404 & M199722) (Filed Oct. 30, 2017)

THE COURT:

Upon certification by the appellate division of the superior court that transfer is necessary to secure uniformity of decision and to settle an important question of law (Cal. Rules of Court, rule 8.1005(a)(1)), the case is ordered transferred to this court for hearing and decision (*id.*, rule 8.1008(a)(1)(A)). Briefing shall be in accordance with California Rules of Court, rule 8.1012(b)-(d).

O'ROURKE, Acting P. J.

Copies to: All parties

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff(s) and Respondent(s), v. PETER BALOV, Defendant(s) and Appellant(s).	Appellate Division No.: CA270404 Trial Court Case No.: M199722 Trial Court Location: Central Division **DECISION/STATEMENT OF REASONS (CCP § 77(b)) BY THE COURT** (Filed Oct. 13, 2017)

APPEAL from the order denying defendant Peter Balov's pre-trial Penal Code section 1538.5 motion to suppress evidence entered by the Superior Court, San Diego County, Timothy R. Walsh, Judge. Following argument on September 28, 2017, this matter was taken under submission.

AFFIRMED.

Mr. Balov was arrested for driving under the influence in violation of Vehicle Code section 23152, subdivisions (a) and (b). Mr. Balov was told by the arresting San Diego Harbor Patrol Officer that California law requires him to complete a breath or blood chemical test. Mr. Balov chose a blood test. The arresting officer did not inform Mr. Balov that he could refuse to take a

chemical test. The trial court denied the suppression motion because Mr. Balov voluntarily consented to the chemical blood test consistent with the Fourth Amendment of the United States Constitution and Vehicle Code section 23612 ("implied consent").

When reviewing a trial court's ruling on a Penal Code section 1538.5 motion, the court should "defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) The facts in this case are generally not in dispute.

Vehicle Code section 23612 states in part: "A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153." The California Supreme Court has held that "section 23612 applies broadly and generally to 'those who drive'—that is, to those who avail themselves of the public streets, roads, and highways to operate motor vehicles in this state." (*Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1139.) Even with advance consent, however, appellant could have withdrawn that consent and objected to the blood test.

In *Missouri v. McNeely* (2013) 569 U.S. ___, 133 S.Ct. 1552, the United States Supreme Court recognized the

tool of advance consent. In *McNeely*, the Supreme Court addressed whether the natural metabolization of alcohol in the bloodstream presented a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases, and held that it did not. (*Id.* at p. 1556.)

In *People v. Harris* (2015) 234 Cal.App.4th 671, the Court of Appeal held that warrantless blood draws are not limited to the exception of exigent circumstances under *McNeely.* (*Id.* at p. 684.) The Court of Appeal found that actual consent under the implied consent statute satisfies the Fourth Amendment. (*Id.* at p. 689.) The Court, applying "the normal totality of circumstances analysis," found that defendant's submission to the blood draw was free and voluntary. (*Ibid.*) In *Harris*, moreover, the Court addressed defendant's further contention that consent was invalid because the officer's admonition was false in certain respects. The Court of Appeal found "nothing in the record to support defendant's suggestion that Deputy Robinson intentionally deceived him about the contours of the implied consent law." (*Id.* at p. 691.) The admonition, "though not entirely accurate, was not patently false," and the officer correctly informed the defendant of certain consequences. (*Ibid*.) The Court of Appeal recognized that "failure to strictly follow the implied consent law does not violate a defendant's constitutional rights. [Citations.]" (*Id.* at p. 692.)

In *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, the Court of Appeal affirmed the

dismissal of civil rights claims that were based on officers' forcible taking of a blood sample. The plaintiff alleged that the officers had failed to comply with California's implied consent law by not offering him a choice between blood or breath tests, and therefore had violated his constitutional rights. The Court rejected the claim under the Fourth Amendment, holding that "even assuming the officers violated plaintiff's *statutory* rights under California's implied consent law, it was not a violation of his federal constitutional rights." *(Id.* at p. 118, original italics.) "California case law unequivocally establishes a police officer's failure to comply with the implied consent law does not amount to a violation of an arrestee's constitutional rights." (*Ibid.*) "More apropos to the present appeal, case law has rejected contentions that a failure to advise an arrestee of the tests available or to honor the arrestee's choice of a particular test amounts to a constitutional violation. [Citations.]" (*Id.* at p. 119.)

The United States Supreme Court, in evaluating consent under the Fourth Amendment in other contexts, has consistently refused to require informing the person of the right to refuse a request to search. In *United States v. Drayton* (2002) 536 U.S. 194, 122 S.Ct. 2015 for example, the Court considered the searches of two passengers traveling together on a bus. The federal Court of Appeals in that case had reversed denials of motions to suppress, adopting "what is in effect a per se rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of

their right not to cooperate and to refuse consent to a search." (*Id.* at p. 202.) The Supreme Court reversed the Court of Appeals. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." (*Id.* at p. 206.) "Nor do this Court's decisions suggest that even though there are no per se rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning." (*Id.* at p. 207.)

In *United States v. Watson* (1976) 423 U.S. 411, 96 S.Ct. 820, the Supreme Court considered consent given while under arrest and in custody. "[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, . . . the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance." (*Id.* at p. 424.) "In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* [*v. Bustamonte* (1973) 412 U.S. 218, 93 S.Ct. 2041] and would distort the voluntariness standard that we reaffirmed in that case." (*Watson*, *supra*, 423 U.S. at p. 425.)

In all the above cases addressing consent under the Fourth Amendment, the Supreme Court was addressing the purported failure to inform persons of the right to refuse voluntary consent, where there was no advance consent, and where the consequences of refusing consent were not codified. Here, appellant provided advance consent under the implied consent law, and appellant is relying upon the failure to inform him of the consequences of withdrawing that consent, which are stated in the statute. In addition, appellant is presumed to know the law. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 748.) Applying the Supreme Court's analysis in the cases discussed above, the statutory admonishment of the consequences of refusing to submit to testing under Vehicle Code section 23612 is not a constitutional requirement under the Fourth Amendment. (*People. v. Agnew* (2015) 242 Cal.App.4th Supp. 1, 14.)[1]

This case did not involve the type of coercion or deception claimed in the cases referenced above. Here, the officer simply informed appellant that he was required by California law to submit to a blood or breath

---

[1] Appellant relies on the non-binding decision of the Santa Clara Appellate Division in *People v. Mason* (2016) 8 Cal.App.5th Supp. 11. This court finds the reasoning of *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1, another decision from the Santa Clara Appellate Division, to be more persuasive—that the statutory admonishment of the consequences of refusing to submit to testing under section 23612 is not a constitutional requirement under the Fourth Amendment; it is "only a factor in weighing the voluntariness of consent under the totality of the circumstances." (*Id.* at p. 16.)

test, which is an accurate statement of the implied consent law, and he verbally chose the blood test. Under the implied consent law, a motorist consents in advance to testing if arrested for driving under the influence, and the issue is then whether the arrested motorist withdraws that consent by refusing to test. In citing the legal tool of implied consent laws, the Supreme Court recognized that such laws impose significant consequences when a motorist "withdraws" consent. (*McNeely*, *supra*, 133 S.Ct. at p. 1566.) The implied consent statute is not framed in terms of having to request consent once a motorist is arrested, with a choice at that time of whether to consent to a chemical test or refuse a test and face later specified consequences. The issue under the implied consent law is whether appellant withdrew advance consent to testing. The fact that an officer might not provide the statutory admonition concerning the consequences of the refusal to test is a fact to be considered in weighing consent under the totality of all the circumstances. Relying on that fact as the only dispositive fact to defeat consent in effect elevates that statutory admonition into a constitutional requirement under the Fourth Amendment. (*People v. Agnew*, *supra*, 242 Cal.App.4th Supp. at pp. 18-19.)

The motion to suppress was based solely on the testimony of the arresting officer. According to the officer's testimony, Mr. Balov said, "I want to have a blood test." The officer did not threaten appellant with force or state that, even if appellant refused, a test would be forced. Appellant did not object or resist in any way in

providing the blood sample. These facts support the trial court's finding that Mr. Balov voluntarily consented to the blood test. Finally, appellant requested judicial notice of Mr. Balov's valid California driver's license. That request is denied (Evid. Code, §459), but even if the appellate record included evidence that Mr. Balov had a valid license, it would not alter our decision.

The trial court's denial of the motion to suppress evidence is affirmed, and the case is remanded to the trial court for further proceedings consistent with this decision.

Unanimously affirmed.

KERRY WELLS
Presiding Judge, Appellate Division

CHARLES R. GILL
Judge, Appellate Division

GALE E. KANESHIRO
Judge, Appellate Division

[Clerk's Certificate Of Service By Mail Omitted]

Court of Appeal, Fourth Appellate District,
Division One - No. D073018

S249708

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PETER BALOV, Defendant and Appellant.

(Filed Sep. 12, 2018)

The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Arredondo* (*Marcus*), S233582 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Cantil-Sakauye
Chief Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

Associate Justice

Court of Appeal, Fourth Appellate District,
Division One - No. D073018

S249708

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PETER BALOV, Defendant and Appellant.

(Filed Aug. 28, 2019)

Review in the above-captioned matter, which was granted and held for *People v. Arredondo* (S233582), is hereby dismissed. (Cal. Rules of Court, rule 8.528(b)(1).)

Cantil-Sakauye
Chief Justice

Chin
Associate Justice

Corrigan
Associate Justice

Liu
Associate Justice

Cuéllar
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

West's Ann.Cal.Vehicle Code § 23152. Driving under influence; blood alcohol percentage; presumptions

Effective: January 1, 2017

(a) It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle.

(b) It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for a person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

(d) It is unlawful for a person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in Section

15210. In a prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(e) Commencing July 1, 2018, it shall be unlawful for a person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a motor vehicle when a passenger for hire is a passenger in the vehicle at the time of the offense. For purposes of this subdivision, "passenger for hire" means a passenger for whom consideration is contributed or expected as a condition of carriage in the vehicle, whether directly or indirectly flowing to the owner, operator, agent, or any other person having an interest in the vehicle. In a prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(f) It is unlawful for a person who is under the influence of any drug to drive a vehicle.

(g) It is unlawful for a person who is under the combined influence of any alcoholic beverage and drug to drive a vehicle.

West's Ann.Cal.Vehicle Code § 23612.
Chemical, blood, breath, or urine tests

Effective: January 1, 2019

(a)(1)(A) A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood for the purpose of determining the drug content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153. If a blood test is unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test.

(C) The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.

(D) The person shall be told that his or her failure to submit to, or the failure to complete, the required breath or urine testing will result in a fine and mandatory imprisonment if the person is convicted of a

violation of Section 23152 or 23153. The person shall also be told that his or her failure to submit to, or the failure to complete, the required breath, blood, or urine tests will result in (i) the administrative suspension by the department of the person's privilege to operate a motor vehicle for a period of one year, (ii) the administrative revocation by the department of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or (iii) the administrative revocation by the department of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 of this code, or of Section 191.5 or subdivision (a) of Section 192.5 of the Penal Code, or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to Section 13353, 13353.1, or 13353.2 for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations.

(2)(A) If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood or breath, and the officer shall advise the person that he or she has that choice.

(C) A person who chooses to submit to a breath test may also be requested to submit to a blood test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and if the officer has reasonable cause to believe that a blood test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which those beliefs are based. The officer shall advise the person that he or she is required to submit to an additional test. The person shall submit to and complete a blood test. If the person arrested is incapable of completing the blood test, the person shall submit to and complete a urine test.

(3) If the person is lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153, and, because of the need for medical treatment, the person is first transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood or breath, the person has the choice of those tests, including a urine test, that are available at the facility to which that person has been transported. In that case, the officer shall advise the person of those tests that are available at the medical facility and that the person's choice is limited to those tests that are available.

(4) The officer shall also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law.

(5) A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is dead is deemed not to have withdrawn his or her consent and a test or

tests may be administered at the direction of a peace officer.

(b) A person who is afflicted with hemophilia is exempt from the blood test required by this section, but shall submit to and complete a urine test

(c) A person who is afflicted with a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the blood test required by this section, but shall submit to, and complete, a urine test.

(d)(1) A person lawfully arrested for an offense allegedly committed while the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153 may request the arresting officer to have a chemical test made of the arrested person's blood or breath for the purpose of determining the alcoholic content of that person's blood, and, if so requested, the arresting officer shall have the test performed.

(2) If a blood or breath test is not available under subparagraph (A) of paragraph (1) of subdivision (a), or under subparagraph (A) of paragraph (2) of subdivision (a), or under paragraph (1) of this subdivision, the person shall submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood. If both the blood and breath tests are unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test.

(e) If the person, who has been arrested for a violation of Section 23140, 23152, or 23153, refuses or fails to complete a chemical test or tests, or requests that a blood or urine test be taken, the peace officer, acting on behalf of the department, shall serve the notice of the order of suspension or revocation of the person's privilege to operate a motor vehicle personally on the arrested person. The notice shall be on a form provided by the department.

(f) If the peace officer serves the notice of the order of suspension or revocation of the person's privilege to operate a motor vehicle, the peace officer shall take possession of all driver's licenses issued by this state that are held by the person. The temporary driver's license shall be an endorsement on the notice of the order of suspension and shall be valid for 30 days from the date of arrest.

(g)(1) The peace officer shall immediately forward a copy of the completed notice of suspension or revocation form and any driver's license taken into possession under subdivision (f), with the report required by Section 13380, to the department. If the person submitted to a blood or urine test, the peace officer shall forward the results immediately to the appropriate forensic laboratory. The forensic laboratory shall forward the results of the chemical tests to the department within 15 calendar days of the date of the arrest.

(2)(A) Notwithstanding any other law, a document containing data prepared and maintained in the governmental forensic laboratory computerized database

system that is electronically transmitted or retrieved through public or private computer networks to or by the department is the best available evidence of the chemical test results in all administrative proceedings conducted by the department. In addition, any other official record that is maintained in the governmental forensic laboratory, relates to a chemical test analysis prepared and maintained in the governmental forensic laboratory computerized database system, and is electronically transmitted and retrieved through a public or private computer network to or by the department is admissible as evidence in the department's administrative proceedings. In order to be admissible as evidence in administrative proceedings, a document described in this subparagraph shall bear a certification by the employee of the department who retrieved the document certifying that the information was received or retrieved directly from the computerized database system of a governmental forensic laboratory and that the document accurately reflects the data received or retrieved.

(B) Notwithstanding any other law, the failure of an employee of the department to certify under subparagraph (A) is not a public offense.

(h) A preliminary alcohol screening test that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of Section 23140, 23152, or 23153 is a field sobriety test and may be used by an officer as a further investigative tool.

(i) If the officer decides to use a preliminary alcohol screening test, the officer shall advise the person that he or she is requesting that person to take a preliminary alcohol screening test to assist the officer in determining if that person is under the influence of alcohol or drugs, or a combination of alcohol and drugs. The person's obligation to submit to a blood, breath, or urine test, as required by this section, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to a preliminary alcohol screening test. The officer shall advise the person of that fact and of the person's right to refuse to take the preliminary alcohol screening test.