No. 20-

IN THE

Supreme Court of the United States

SHARON LOPEZ,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the State of California condition driving upon its public highways upon a motorist's agreement to surrender Fourth Amendment rights for purposes of searches conducted to determine whether said motorist is driving under the influence of a drug of alcohol?

2. Can a motorist be found to have knowingly consented to a search when the state provides no indication that said motorist can require the state to acquire a warrant to conduct the search?

3. Is California's Implied Consent Statute unconstitutional as violating the Fourth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

The State of California was the plaintiff-respondent below. Sharon Lopez was the defendant-appellant below.

STATEMENT OF RELATED CASES

The People v. Sharon Darlene Lopez, No. S262006, The Supreme Court of California. Review was not accepted. Order denying petition for review was issued on May 27, 2020.

The People v. Sharon Darlene Lopez, No. C080065, The Third Appellate District Court of Appeal, for the State of California decision entered on March 11, 2020, with a Remittitur to the Superior Court for the County of Placer entered on May 28, 2020.

The People of the State of California v. Sharon Darlene Lopez, 62-130483, The Appellate Division of the Superior Court for the County of Place, California. Opinion entered July 5, 2015.

The People of the State of California v. Sharon Darlene Lopez, No. 62-130483. The Superior Court for the County of Placer, California. Order denying a motion, filed pursuant to California Penal Code section 1538.5(a), to suppress evidence acquired in violation of the Fourth Amendment of the United States Constitution was entered on November 06, 2014.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PETITION FOR WRIT OF CERTIORARI

Petitioner Sharon Darlene Lopez petition for a writ of certiorari to review the opinion of the Third Appellate District Court of Appeal for the State of California, Case No. C080065.

OPINIONS BELOW

A. California Supreme Court

The order of the Supreme Court of California denying Defendant/Petitioner's Petition for Review is unreported. *See* Appendix A.

B. Court of Appeal of the State of California Fourth Appellate District

The opinion of the Third Appellate District Court of Appeal for the State of California affirming the trial courts order denying Defendant/Petitioner's motion to suppress pursuant California Penal Code Section 15388.5(a) is reported at 46 Cal. App. 5th 317 (2020). *See* Appendix B.

C. Superior Court and Appellate Division of the Superior Court for the County of Placer, California

The order of the Superior Court and the opinion of the Appellate Division of the Superior Court[1] for the County of Placer, California are each unreported. *See* Appendix C and D.

JURISDICTION

The Trial Court entered an order denying Defendant/Petitioner's motion to suppress the introduction of blood alcohol evidence. *See* Appendix D at 5. The motion to suppress was filed pursuant to California Penal Code section 1538.5(a). *See generally* Appendix D. The order was filed on November 06, 2014. *Id.* The Appellate Division of the Superior Court affirmed the Trial Court's order denying the motion to suppress. Petitioner filed an Application to transfer the matter to the Third District Court of Appeal for the State of California. The Third District Court of Appeal for the State of California granted a petition to hear the matter.

[1] CAL. CONST, ART. VI §§ 4, 11 provide the Appellate Division of the Superior Court with appellate jurisdiction for, *inter alia*, review of interlocutory orders, such as those issues pursuant to California Penal Code section 1538.5.

The Third District Court of Appeal for the State of California affirmed the Trial Court's order in an opinion filed March 11, 2020. *See* generally Appendix B. Petitioner timely filed a petition for review with the California Supreme Court, which was denied on May 27, 2020. *See* Appendix A. A remittitur was issued by the Third District Court of Appeal for the State of California on May 28, 2020 transferring the same back to the Superior Court for the County of Placer, California. Therefore, the decision on Appeal is final.

Petitioner's case is pre-conviction, but presents all four recognized circumstances allowing this Court to treat the judgment of the California reviewing courts as final for jurisdictional purposes. *Florida v. Thomas*, 532 U.S. 774, 777 (2001)(discussing *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469 (1975)).

First, the issue of Petitioner's Fourth Amendment claim within state courts is final. The California Supreme Court denied Petitioners Petition for Review of the decision by the Third District Court of Appeal without comment. Any trial "would be no more than a few formal gestures leading inexorably towards a conviction," after which the same issue would need to be raised with this Court, resulting in an unnecessary waste of time and energy: *Id.* at 778 (*quoting Mills v. Alabama*, 384 U.S. 214, 217-18 (1966)).

Second, the issue in this case will survive and ultimately warrant Supreme Court review regardless of the outcome of future state-court proceedings. *Cox Broadcasting Corp.*, 420 U.S. 469, 480 (1975). Central to the issue in this case is an officer's conduct when attempting to obtain consent to blood testing from a DUI arrestee.

Here, an agent of the State of California, a uniformed police officer for the City of Rocklin, California, commanded submission to a search and Petitioner submitted. *See* Appendix B at 2-6. The voluntariness of that submission is at issue. Thus, the outcome on the Fourth Amendment issue will not change in state court. The issue here will need to be addressed.

Third, Petitioner's case is one in which "the federal claim has been finally decided, with further proceedings on the merits in the state court to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Florida v. Thomas*, 532 U.S. 774, 779 (2001) *quoting Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, 481 (1975). Following a conviction, Petitioner cannot revisit the federal claim on appeal, as the California court of last resort has dismissed review of the issue. Should the Petitioner be convicted at trial, Petitioner will be precluded from pressing its federal claim on appeal. *Id.* at 779 *discussing New York v. Quarles*, 467 U.S. 649 (1984). Governing state law will not permit Petitioner to again present his federal claim for review. *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, 481 (1975). Further, review of the issue in federal *habeas corpus* (28 U.S.C. § 2254) is precluded. *See Stone v. Powell*, 428 U.S. 465 (1976).

Finally, where "a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts." *Id.* at 780 *citing Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469, 482-483 (1975). A denial of Petitioner's case would erode federal policy pertaining to the obtaining of consent. Thereafter, Petitioner's case would serve as authority for an officer to command submission to a warrantless search, and for the government to rely on that submission as proof of voluntary consent. Petitioner's case erodes the long-standing rule that mere acquiescence to a claim of authority is not voluntary consent. The paramount justification for this Court to exercise jurisdiction is to protect federal Fourth Amendment policy and uphold the rule of law. The judgment of the Third District Court of Appeal may be considered final. This Court's jurisdiction is therefore invoked, pursuant to 28 U.S.C. § 1257(a).

Additionally, the Petition is timely filed as being submitted within the extension period granted by this Court via its order of March 19, 2020.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amend provide, in relevant part:

> The 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 be issue, but upon probable cause.

A. Introduction and Summary of the Argument

After satisfying a preliminary alcohol screening (PAS) device which registered .000, indicating an absence of alcohol Petitioner was arrested for driving a motor vehicle under the influence of controlled substances based upon observations of Petitioner by law enforcement. The arresting Officer, Officer Evan Adams, informed Petitioner that "since she was under arrest for a DUI, and since I believed it was a controlled substance DUI, she's required, by law, to submit to a blood test." Officer Adams failed to notify Petitioner of the mandated DUI admonishment required pursuant to California's Implied Consent Statute (ICS) in force at the time: California Vehicle Code § 23612. *See* Appendix B at 8-9 n.1; *see generally* Appendix B at 3-6. More specifically, Office Adams did not provide the admonishment required pursuant to California Vehicle Code sections 23612(a)(1)(D) & (a)(4). *See* Appendix B at 3-6. This admonishment informs the arrestee of the consequences of refusing testing; and is an indirect reference to an option to refuse. Additionally, there was no attorney present representing Petitioner during the interaction between Petitioner and Officer Adams concerning the blood draw. *See id*. Petitioner's blood was, in fact, drawn. *Id*. Petitioner stated that she did not consent to the blood test. *Id*.

The state relies upon a totality of the circumstances test in which to find that Petitioner consented to the blood draw. In its decision the TDCA found inapplicable to whether the Petitioner had notice of her legal rights with respect to consent. Specifically, the Trial Court denied the motion to suppress based upon the implied consent statute and cooperation by an in-

custody defendant "providing a blood sample to law enforcement constitutes valid constitutional consent within the meaning of the Fourth Amendment." The Appellate Division of the Superior Court found that consent was implied based upon a finding that the consent was obtained freely and voluntarily under the totality of the circumstances.

The Third District Court of Appeal (TDCA) determined that the implied consent law operated as a statutory grant of power to an operator of a motor vehicle upon the highways of California to not to consent to a search. *See* Appendix B at 9. The TDCA vitiated the requirement for consent to be informed, despite that being well established Federal Law. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with a sufficient awareness of the relevant circumstances and likely consequences."). It did not matter, that the arresting Officer could not point to any evidence giving rise to a reasonable belief that Petitioner had provided consent to have her blood drawn. For the TDCA Court it was enough evidence of consent that Petitioner after being placed in hand cuffs, transported to a County Jail, surrounded by police officers, while in-custody, offered no resistance to the blood draw and never having been informed of her right to require the State of California to acquire a warrant for the search. Despite the existence of Federal Case law that is over 120 years old. *Bram v. United States*, 168 U.S. 532 (1897) that made clear a waiver of constitutional rights by in-custody defendants was unenforceable, unless represented by counsel. *See Brady v. United States*, 397 U.S. 742, 754-756 (1970) (distinguishing the facts in that case from *Bram* by, *inter alia*, recognizing that unlike the defendant in *Bram*, the defendant Brady was represented by competent counsel). A reasonable interpretation of the decision by the TDCA is that under California's law a condition to operate a motor vehicle upon the highways of California is the surrender of Fourth Amendment rights for purposes of blood draws. However, the TDCA made clear that an operator may be afforded a return of the right when desired. This is in direct contravention to the

holding in *Birchfield v. North Dakota*, 579 U.S., at ___, 136 S.Ct. 2160, 2184-2185 (2016)(finding that warrantless breath tests are constitutionally sound as search incident to arrests on suspicion of driving under the influence, but blood tests are not).

The Supreme Court of California was apparently sanguine with the findings of the Appellate Court as it decided not to hear the matter and denied a Petitioner's Petition for Review without comment.

Certiorari is warranted to address waiver rights under the Fourth Amended of the United States Constitution as a condition for operating a motor vehicle on its highways.

B. Factual Background

Around 1800 hours on Sunday, September 29, 2013, Petitioner was detained by multiple uniformed Police of the Rocklin, California Police Department after observing Petitioner driving. *See* Appendix B at 2; Appendix C at 1. Petitioner was observed having an unsteady gait, constricted pupils, and slurred speech. *See* Appendix B at 2; Appendix C at 2. As a result, one of officers, Evan Adams conducted field sobriety tests that indicated Petitioner was impaired. *Id*. Petitioner was required to blow into a preliminary alcohol screening (PAS) device which registered .000, indicating an absence of alcohol. *Id*. Officer Adams believed that Petitioner was under the influence of controlled substances, as opposed to alcohol. Officer Adams arrest Petitioner and transported her to the county jail. Appendix B at 2; Appendix C at 2-3.

Officer Adams stated to that "since she was under arrest for a DUI, and since I believed it was a controlled substance DUI, she's required, by law, to submit to a blood test." Appendix C at 3. Petitioner stated that she did not consent to the blood test. *See* Appendix B at 5. Office Adams said that Petitioner did not refuse the blood test: "She consented and cooperated." She did not object or resist at any point. If she had refused, he would have obtained a warrant and performed a forced blood draw. *See* Appendix B at 4-5.

When asked on cross-examination how he determined that defendant consented to the blood test, Officer Adams replied, "I informed her she was required by law, she gave no objection, Phlebotomist [Sasha] Perez arrives, and she did not resist saying at any point she wanted to refuse the blood draw at all, and the blood was taken without any incident." Appendix B at 3. Officer Adams did not "directly" ask for her consent, and defendant did not say she consented. *Id*. He explained, "What I did is I informed her that she's required by law to submit to it, and then I believe her consent was implied." *Id*. Asked how defendant manifested consent, Officer Adams said, "I can't recall if she nodded, I can't recall if she said yes, to be honest with you. *Id*. But I can tell you with 100 percent certainty she did not refuse and she did not not consent to the blood draw." *Id*.

Additionally, the mandated DUI admonishment required pursuant to CAL. VEH. CODE § § 23612(a)(1)(D) & (a)(4) was never provided to Petitioner. This admonishment informs the arrestee of the consequences of refusing testing; and is an indirect reference to an option to refuse. Additionally, there was no attorney present representing Petitioner during the interaction between Petitioner and Officer Adams concerning the blood draw. Petitioner's blood was, in fact, drawn.

C. Procedural Background

A misdemeanor complaint was filed on May 14, 2014, charging Petitioner with one count of violating Vehicle Code section 23152(a), driving while under the influence of drugs. *See* Appendix C at 3. Appellant was arraigned on May 20, 2014 and pled not guilty. *Id*. Petitioner filed her motion to suppress pursuant to California Penal Code section 1538.5(a) on August 26, 2014 and a suppression hearing was held on October 20, 2014. *Id*. State and Petitioner stipulated to standing and that there was no search warrant. *Id*. Four witnesses were called at the hearing. Three witnesses testified on behalf of Respondent: (1) Officer Mueller; (2) Officer Osborne; and (3) Michelle Kamakeeaina-Perez. Appellant testified on her own behalf. *Id*. The Trial Court

entered an order denying Petitioner's motion to suppress the introduction of blood evidence. *Id*. The order was filed on November 06, 2014. *See* Appendix D.

The Appellate Division of the Superior Court affirmed the Trial Court's order denying the motion to suppress. *See generally* Appendix C. Petitioner filed an Application to transfer the matter to the Third District Court of Appeal for the State of California. The Third District Court of Appeal for the State of California granted a petition to hear the matter.

The Third District Court of Appeal for the State of California affirmed the Trial Court's order in an opinion filed March 11, 2020. *See generally* Appendix B. Petitioner timely filed a petition for review with the California Supreme Court, which was denied on May 27, 2020. *See* Appendix A. A remittitur was issued by the Third District Court of Appeal for the State of California on May 28, 2020 transferring the same back to the Superior Court for the County of Placer, California. Therefore, the decision on Appeal is final.

REASONS FOR GRANTING THE PETITION

TO ENSURE THAT ALL CITIZENS OF THE UNITED STATES HAVE THEIR FOURTH AMENDMENT RIGHTS RECOGNIZED-EVEN THOSE CITIZENS TRAVELING THROUGH CALIFORNIA

A. Introduction

It is beyond question that the rights of citizens of the United States citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." is but a truism in most instances. A mere forty-four years ago the somewhat docile if not duped, public was shocked awake by the Final Report of the Church Committee describing the complete disregard that the National Security Agency had for the Fourth Amendment. Some of the government activities resulted from technological advances that made it feasible for the agencies of the Federal Government to surveille the public. More recently, Edward Snowden revealed that the same level of incredulity for the Fourth Amendment

continues at the Federal Level. The decision of the Third District Court of Appeal for the State of California (TDCA) is not surprising, therefor, considering the precariousness of the rights of the people secured by the Fourth Amendment.

Recently, however, technology was found by the Supreme Court to reinvigorate some of the rights to the people by the Fourth Amendment. *See Missouri v. McNeely*, 569 U.S. 141, 152 (2013)(recognized that technological advancements had occurred to vitiated the needed for the automatic exigency that was found to have exited during an arrest of any U.S. citizen suspected of driving under the influence of alcohol). Nonetheless, in order to hold-on to the effect of the automatic exigency exception that existed before *McNeely*, the state of California has taken a position of what can arguably be referred to as automatic consent to a search. In this fashion, California will always find consent, unless an accused can demonstrate evidence of affirmatively withholding consent. While the TDCA employs the proper buzz-works for the test: totality of the circumstance, the analysis devolves into a test reminiscent to the "I know it when I see it" test of Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) with all the attendant inconsistency in judicial rulings that accompany it. It is in the vein that Petitioner seeks guidance from this Court to avoid inconsistencies in this body of law so that the 20 million of the 227.5 million licensed drivers stopped by police annually will have a better understanding of their rights, if any secured by the Fourth Amendment of the United States Constitution.

B. The Law of Consent

Consent is an established exception to the warrant requirement of the Fourth Amendment, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and must be given voluntarily in order to be valid. *Id*. at 223. To determine whether consent is voluntary a court must examine "the totality of all the circumstances" surrounding the consent. *Id*. at 227. Upon examining the totality of all the circumstances consent is deemed not voluntary if it was "coerced by threats of force, or granted only in submission to a claim of authority." *Id*. at 233- 234 citing

Bumper v. North Carolina, 391 U. S. 543, 548-549; *Johnson v. United States*, 333 U. S. 10 (1948); *Amos v. United States*, 255 U. S. 313 (1921). The focus of the analysis is to determine whether a defendant's "[will has been overborne and [the] . . . capacity for self-determination critically impaired . . ." making any use of information gained thereby offensive to due process. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). It is the government's burden to prove the voluntariness of consent and not merely consent yielded in submission to authority. *See Florida v. Royer*, 460 U.S. 491, 500 (1983). A voluntary consent, once given, may be refuse or withdrawn. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)("A suspect may . . . delimit as he chooses the scope of the search to which he consent.").

C. California Ignores Federal Law on the Requirement that State Has The Burden to Prove Voluntariness of Consent

This Court has made clear that in the case of a blood draw incident to an arrest for driving under the influence, a warrant is required. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533 (2019) ("We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available.") *citing Birchfield v. North Dakota*, 579 U.S., at ___, 136 S.Ct. 2160, 2184-2185 (2016). The failure of the Third District Court of Appeal for the State of California (TDCA) to heed the holding of *Birchfield* leads to a cascade of erroneous findings on the part of that court. Firstly, that TDCA considered that the implied consent statute is part of the totality of the circumstances analysis. However, that simply cannot be the case, because in so doing, the TDCA nullifies the Fourth Amendment for purposes of drawing blood of a motor vehicle operator upon the public highways. This is in contravention to *Birchfield* that makes clear a warrant is required when the state seeks to draw the blood of a suspect in furtherance of gathering evidence that the defendant was an impaired driver. It is readily obvious that the TDCA considered the implied consent law as requiring Petitioner to withdraw consent when it

found that ICS afforded Petitioner that right. However, that presupposes that Petitioner has already waived/surrendered her Fourth Amendment rights in that situation, ostensibly by virtue of the existence of the ICS and Petitioner's operation of a motor vehicle on a California highway. In this fashion, the TDCA had flipped the requirement that the State prove the voluntariness of the consent to the search by requiring Petitioner to prove that she had withdrawn consent. That is simply not the law. *See Florida v. Royer*, 460 U.S. 491, 500 (1983)(find that it is the government's burden to prove the voluntariness of consent and not merely consent yielded in submission to authority). Firstly the existence of the ICS makes clear that in order to operate a motor vehicle upon the highways of California one must waive one's Fourth Amendment rights. That is a submission to authority, assuming *arguendo*, that the ICS survive constitutional scrutiny in view of *Birchfield*. As a result, the TDCA assumed that consent was given and examined to determine whether Petitioner had withdrawn the same.

D. California Did Not Examine the Totality of the Circumstances When It Found Consent

Although the TDCA used the appropriate words, it failed to take into account whether Petitioner knowingly consent to a waiver of her rights. Throughout its decision the TDCA recognizes that Officer Adams failed to provide the requisite admonitions and, in fact did not explain to Petitioner that she had a right to refuse the blood draw. In response the TDCA stated omission of statutory admonition was a fact to be consider when weighing the totality of the circumstance and cited *People v. Agnew*, 242 Cal. App. 4th Supp. 1, 18 in support thereof. However, this Court has made clear that any consent to waiver of constitutional rights under must be made knowingly. *Brady v. United States*, 397 U.S. 742, 748 (1970)("[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with a sufficient awareness of the relevant circumstances and likely consequences."). In this matter it cannot be said that the Petitioner knowingly consented, because there is not one scintilla of evidence identified at any of the courts at the state level that Petitioner had knowledge of the not

only of the consequences of refusal, but that she had the power to refuse the blood draw in the absence of a warrant. For this reason alone the search conducted of Petitioner's person violates her Fourth Amendment rights.

E. Insofar as California's Applied Consent Statute Permits Warrantless Draw of Blood Absent Exigent Circumstances the Statute is Unconstitutional

A set set forth above, *Birchfield v. North Dakota*, 579 U.S., at ___, 136 S.Ct. 2160, 2184-2185 (2016) make clear that pursuant to the Fourth Amendment warrantless blood draws are not constitutionally permitted in the absence of an exception to the warrant requirement. The plain language of California's implied consent statute, as interpreted by the TDCA, allows the same. Therefore, based upon the foregoing, California's ICS is unconstitutional on its face.

CONCLUSION

Based upon the foregoing it is respectfully requested that Petitioner's petition for a *writ* of *certiorari* be granted.

Date: October 26, 2020

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APPENDIX

APPENDIX A

Court of Appeal, Third Appellate District - No. C080065

S262006

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

SHARON DARLENE LOPEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

Filed 3/11/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. SHARON DARLENE LOPEZ, Defendant and Appellant.	C080065 (Super. Ct. No. 62130483)

APPEAL from a judgment of the Superior Court of Placer County, Jeffrey Penney, Judge. Affirmed.

Kenneth Cleon Brooks, Retained Counsel for Defendant and Appellant.

Kamala D. Harris, Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman, Supervising Deputy Attorney General, Raymond L. Brosterhous II, R. Todd Marshall, and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Sharon Darlene Lopez appeals from the trial court's denial of her motion to suppress evidence obtained from a warrantless blood draw. Police conducted the blood draw upon defendant's arrest for driving under the influence of a controlled substance. The officer instructed defendant she was required to undergo a blood draw by the state's implied consent law, but he did not relate the law's admonitions regarding the consequences should she refuse the test. Defendant did not object or resist, and the draw was performed without a warrant. The trial court concluded defendant consented to the test. We conclude substantial evidence supports the court's ruling, and we affirm the judgment.

FACTS AND PROCEEDINGS

The People charged defendant with one misdemeanor count of driving under the influence of a controlled substance. (Veh. Code, § 23152, subd. (a).) (Statutory references that follow are to the Vehicle Code unless otherwise stated.)

Defendant moved to suppress evidence pursuant to Penal Code section 1538.5. She claimed her blood sample, among other matters, was drawn without her consent or a warrant in violation of the Fourth Amendment.

The following evidence was adduced at the trial court's hearing on the suppression motion. Because defendant does not claim her consent was the result of an unlawful arrest, we relate the facts relevant to the voluntariness of her consent.

Rocklin police detained defendant on September 29, 2013, after observing her driving. Officer Evan Adams took over the investigation for the detaining officer. Officer Adams observed defendant's unsteady gait, constricted pupils, and slurred speech. He conducted field sobriety tests that indicated she was impaired. He had her blow into a preliminary alcohol screening (PAS) device which registered .000, indicating an absence of alcohol. He believed she was under the influence of controlled substances, as opposed to alcohol. He arrested her and transported her to the county jail.

Officer Adams sought a blood sample from defendant. At trial, he explained his "procedure" for obtaining a blood sample from DUI suspects as follows: "So what we'll normally do is I'll advise them that they're required to, by law, to give a blood sample. We will transport them to the Placer County Jail, a phlebotomist will respond and take the blood sample, which I will witness. I will then take possession of the blood and book it into evidence." The officer said that is what he did this time.

Officer Adams stated he told defendant that "since she was under arrest for a DUI, and since I believed it was a controlled substance DUI, she's required, by law, to submit to a blood test." The officer said defendant did not refuse the blood test: "She consented and cooperated." She did not object or resist at any point. If she had refused, he would have obtained a warrant and performed a forced blood draw.

When asked on cross-examination how he determined that defendant consented to the blood test, Officer Adams replied, "I informed her she was required by law, she gave no objection, Phlebotomist [Sasha] Perez arrives, and she did not resist saying at any point she wanted to refuse the blood draw at all, and the blood was taken without any incident." Officer Adams did not "directly" ask for her consent, and defendant did not say she consented. He explained, "What I did is I informed her that she's required by law to submit to it, and then I believe her consent was implied." Asked how defendant manifested consent, Officer Adams said, "I can't recall if she nodded, I can't recall if she said yes, to be honest with you. But I can tell you with 100 percent certainty she did not refuse and she did not not consent to the blood draw."

When asked what he would do if a suspect did not give consent and yet did not refuse, Officer Adams said, "Well, my opinion, sir, if they don't give me consent, it is a refusal, so I would go with our DUI refusal procedure which would be the warrant . . . ."

Defense counsel asked what other signs the officer would look for to determine whether the suspect consented if the suspect did not say, "I give consent." Officer Adams replied, "I would look for someone in any way [to] tell me they didn't want to do

the blood draw, ask several questions about the blood draw, resist the blood draw. Obviously, I would take all those as a refusal."

When asked whether he, as a matter of course, asked a suspect who is being interrogated for consent to a blood draw, Officer Adams said, "I don't know if I can really answer that because I don't really interrogate the DUI suspects at that point, if that makes any sense to you. . . ." The officer continued, "Through most DUIs, I've obtained the statement I need prior to the [field sobriety tests], prior to the arrest. I don't usually Mirandize them and get a secondary statement at all."

In this case, defendant told Officer Adams that she had taken Seroquel the night before and another medication. This told the officer what was "on board" that could have been causing her impairment. Asked whether, after obtaining this statement from defendant, he saw any reason to further request for consent to draw her blood, Officer Adams stated, "[W]hat I did is I informed her that she's required by law, as she is, to submit to a blood draw, and then I kind of walk her through the procedure. And, I mean, at any point—I've had several people that don't want to give a blood draw, we'll take that as a refusal, and then we'll move on with the warrant procedure. That's not what happened in this case.

"Q So since Ms. Lopez did not say, 'I don't want a blood draw,' you infer that she consented to this blood draw?

"A Yes."

Defense counsel asked Officer Adams what his conversation with defendant was right before she provided her breath sample. The officer stated, "What I probably told her—what I actually did tell her, because I do it on every DUI, is I tell her that this is not an implied consent test. What it is—and then I explained to her if she is to be arrested for DUI, that she's still required by law to give a blood test or a breath test. In this case it's blood only because it's a controlled substance DUI. And then the . . . breath test does not

count as that test. And I also usually explain that it's just another one of the standardized field sobriety tests.

"Q And so when you informed Ms. Lopez of the implied consent law during your blood draw . . . did you inform her that she had a right to refuse and to get—force you to get a warrant?

"A I did not, no.

"Q And why would you not inform her of that right?

"A I mean, I can't tell you, to be honest with you."

Officer Adams testified defendant cooperated with the blood test. He did not remember her specifically but believed her test proceeded normally. She would have been unhandcuffed and directed to take a seat. She moved her arm herself into position for the phlebotomist to draw the blood.

Defendant told a different story at the suppression hearing. She claimed police officers "forcibly" "shoved" her into a chair by physical contact with her shoulders and handcuffed wrists. An officer other than Officer Adams removed the handcuffs, grabbed her arm, and "physically slammed it" down on a counter, telling her they were taking her blood. She repeatedly asked for an attorney. She did not remember a phlebotomist being present.

Defendant did not recall Officer Adams telling her she was required to give a blood sample. She never consented. No one in the room asked her if she consented. She would not have consented had she been asked. On cross-examination, defendant said she did not remember what Officer Adams said to her. She said a male police officer drew her blood. She admitted she was on Metoprolol, a strong blood pressure medication, at the time of the traffic stop.

On rebuttal, Officer Adams stated that Sasha Perez drew defendant's blood. Perez is a phlebotomist and not a police officer, and she was not wearing a police officer's uniform. In turn, Perez testified that her records showed she performed a blood draw for

the Rocklin Police Department on the day of defendant's arrest. Although Perez did not recall defendant, she also did not recall anybody being forced to give a blood sample that day.

The trial court denied the suppression motion, finding defendant consented to the blood draw. The court stated: "Officer Adams testified that the defendant was cooperative and did not object to the blood draw. The defendant, on the other hand, testified that she did object and was physically forced to give the blood sample. The court finds the officer's testimony to be more credible and finds that the defendant consented to the blood draw pursuant to California's implied consent law. The court further finds that the blood was drawn in a reasonable manner by a professional phlebotomist."

Defendant appealed to the Superior Court Appellate Division, which affirmed the trial court's order denying suppression. The Appellate Division denied defendant's request to have the matter transferred to the Court of Appeal. We granted defendant's petition for transfer. The Superior Court stayed proceedings pending our resolution of the appeal.

DISCUSSION

Defendant contends the trial court erred when it denied her motion to suppress. She argues the blood draw violated her rights under the Fourth Amendment because she did not consent to the draw. She claims there is insufficient evidence of voluntary consent, as Officer Adams did not provide admonitions required by the implied consent law, any consent was merely her submission to a claim of lawful authority, and any consent was coerced. We do not agree.

I

Legal Background

A. *Fourth Amendment*

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches" and provides that "no warrants shall issue, but upon probable cause." A blood draw is a search of the person. (*Birchfield v. North Dakota* (2016) 579 U.S. __ [195 L.Ed.2d 560] (*Birchfield*).) We must determine if the warrantless draw was reasonable.

While a warrant is normally required to conduct a search, there are judicially-created exceptions to the warrant requirement. (*Mitchell v. Wisconsin* (2019) __ U.S. __ [204 L.Ed.2d 1040] (*Mitchell*).) We can quickly eliminate two of them. Generally, a search may be conducted without a warrant when it is performed incident to an arrest or when it is necessitated by exigent circumstances. Neither of these exceptions applies here. A state may not compel a suspect to undergo a blood test without a warrant as a search incident to arrest. (*Birchfield*, *supra*, 195 L.Ed.2d at pp. 588-589.) California courts have found a blood test may be administered without a warrant as a search incident to arrest where the suspect chooses a blood test after being given a choice between a blood test and a breath or urine test, but that did not occur here. (*People v. Nzolameso* (2019) 39 Cal.App.5th 1181, 1186; *People v. Gutierrez* (2018) 27 Cal.App.5th 1155, 1161, review granted Jan. 2, 2019, S252532.)

As to the exigent circumstances exception, the fact that alcohol dissipates naturally does not by itself justify a warrantless blood test. (*Missouri v. McNeely* (2013) 569 U.S. 141, 152 [185 L.Ed.2d 696].) An exigent circumstance exists when blood-alcohol evidence is dissipating and "some other factor creates pressing health, safety, or law-enforcement needs that would take priority over a warrant application." (*Mitchell*, *supra*, 204 L.Ed.2d at pp. 1050-1051.) The United States Supreme Court found such factors

when a drunk-driving suspect was unconscious, and when the suspect was in a vehicle accident that required police to attend to other pressing needs. (*Ibid*; *Schmerber v. Californi*a (1966) 384 U.S. 757, 770-771 [16 L.Ed.2d 908].) This type of factor does not exist here.

The only possible exception to the warrant requirement that could apply here is when the suspect voluntarily consents to a search. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219, 234 [36 L.Ed.2d 854] (*Schneckloth*).) 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." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250-251 [114 L.Ed.2d 297].) Voluntary consent to a blood test required under the implied consent law satisfies the Fourth Amendment. (*People v. Harris* (2015) 234 Cal.App.4th 671, 685 (*Harris*).)

B. *Implied consent law*

The implied consent law, section 23612, plays a part in our analysis, but it does not itself establish consent. At the time of defendant's arrest, the implied consent law stated that defendant, by driving a motor vehicle, was deemed to have given her consent to chemical testing of her breath or blood if she was lawfully arrested for driving under the influence. (§ 23612, subd. (a)(1)(A), (B).)[1]

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[1] Section 23612 in relevant part reads as follows:

"(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. . . . [¶]

"(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. . . . [¶]

"(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.

The implied consent law also required Officer Adams to inform defendant that she could choose between a breath test and a blood test. (§ 23612, subd. (a)(2)(A), (B).) However, if defendant chose a breath test, Officer Adams was authorized to request that she take a blood test because he had reasonable cause to believe she was under the influence of drugs. (§ 23612, subd. (a)(2)(C).) In that event, "[t]he 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." (*Ibid*.)

Despite its common name, the implied consent law implicitly grants a suspect the right not to consent to a test. "Under section 23612, by the act of driving on California's

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"(D) The person 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 . . . . [¶]

"(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. . . . [¶]

"(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 a clear indication 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 that belief and that clear indication 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. . . . [¶] . . . [¶]

"(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." (Former § 23612, subd. (a)(1), (2), (4) [Stats. 2012, ch. 196, § 1].)

roads, [defendant] accepted the condition of implied, advance consent if lawfully arrested for drunk driving. That advance consent, however, could also have been withdrawn at the time of arrest by [defendant'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.]' " (*People v. Balov* (2018) 23 Cal.App.5th 696, 702, review granted Sept. 12, 2018, S249708 (*Balov*), fn. omitted, original italics.)

A suspect's refusal to consent will have consequences. The implied consent law required Officer Adams to inform defendant that her refusal to submit to testing would result in a fine, suspension of her driver's license, and, if she was convicted of DUI, mandatory imprisonment. (§ 23612, subd. (a)(1)(D).) The law also required Officer Adams to inform defendant that a refusal to submit to the test could be used against her in a court of law, and that she was not entitled to have an attorney present when she decided whether to take the test or during the test. (§ 23612, subd. (a)(4).)

The United States Supreme Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." (*Birchfield*, *supra*, 195 L.Ed.2d at pp. 588-589.) But, the court continued, "our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize. Instead, we have based our decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving." (*Mitchell*, *supra*, 204 L.Ed.2d at p. 1045.)

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 [or lack of advisement] under the implied consent law, is freely and voluntarily given and constitutes *actual* consent." (*Harris, supra*, 234 Cal.App.4th at p. 686, original italics.)

"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,' [citation]." (*Ohio v. Robinette* (1996) 519 U.S. 33, 40 [136 L.Ed.2d 347].) "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." (*Balov, supra*, 23 Cal.App.5th at p. 702, review granted Sept. 12, 2018, S249708.)

"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. Boyer* (2006) 38 Cal.4th 412, 445-446.) " ' "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.' " ' [Citations.]" (*Harris, supra*, 234 Cal.App.4th at p. 690.)

II

Substantial Evidence and Omission of Admonitions

Substantial evidence supports the trial court's finding that defendant voluntarily consented to the blood draw. Consent need not be express. It may be implied from the

suspect's actions. "[N]o words at all need be spoken: in appropriate circumstances, consent to enter may be unmistakably manifested by a gesture alone." (*People v. James* (1977) 19 Cal.3d 99, 113 (*James*).) That is the case here. Officer Adams correctly instructed defendant that she was required to undergo a blood test. Defendant did not object or refuse to undergo the test. She did not resist any of the officers' directions or actions. She voluntarily placed her arm on the table to allow the phlebotomist to draw her blood.

Officer Adams testified he obtained consent. He said that if a suspect did not give him consent, he would explain the warrant procedure, implying he would seek a warrant if the suspect did not consent. He did not seek a warrant here. He stated that "with 100 percent certainty [defendant] did not refuse and she did not not consent to the blood draw." These facts, seen in light of the implied consent law and the regulatory scheme to prevent drunk driving, are substantial evidence supporting the trial court's determination that, under the totality of the circumstances, defendant consented to her blood test.

Defendant claims consent cannot be found on these facts because Officer Adams did not give her the implied consent law's admonitions. She claims *Harris* required the officer to give the admonitions for consent to be valid. Defendant misreads *Harris*. The *Harris* court did not hold that an officer's omitting or misstating the advisements rendered consent invalid per se. Rather, the court considered those facts as part of reviewing the totality of the circumstances, and it found on the facts before it that the suspect had consented. (*Harris, supra*, 234 Cal.App.4th at pp. 691-692.) The court expressly rejected defendant's argument, stating that when considering consent under the totality of the circumstances, "failure to strictly follow the implied consent law does not violate a defendant's constitutional rights." (*Id*. at p. 692.)

In *Harris*, police arrested the defendant for driving under the influence of a controlled substance. The officer informed the defendant he was required to submit to a blood test. The officer advised the defendant that refusal to submit to the test would

result in the suspension of his license for two to three years, his refusal could be used against him in court, and he could not speak with an attorney about whether to submit to the test. The officer gave no other admonitions. The defendant said, " 'okay.' " The sample was taken, and at no time did the defendant object or resist. (*Harris*, *supra*, 234 Cal.App.4th at p. 678.)

The Court of Appeal affirmed the trial court's denial of the defendant's motion to suppress. (*Harris, supra*, 234 Cal.App.4th at p. 676.) The *Harris* defendant contended his consent was involuntary because the admonitions the officer gave under the implied consent law were false. (*Id.* at p. 691.) The Court of Appeal disagreed, holding that under the totality of the circumstances, the defendant freely consented to the blood draw and was not coerced or tricked. He verbally agreed to the blood test after being admonished and he did not object or resist. (*Id*. at p. 692.)

The Court of Appeal considered the officer's incomplete and incorrect admonitions as part of the totality of the circumstances. There was no evidence the officer in *Harris* intentionally deceived the defendant or provided patently false information. (*Harris*, *supra*, 234 Cal.App.4th. at pp. 691-692.) Although the officer did not give the defendant a choice between a breath test or a blood test, he nonetheless correctly stated the defendant was required to take a blood test to check for a controlled substance. And although the officer incorrectly said the defendant's license would be suspended for two to three years if he refused the blood test, he correctly stated defendant's license would be suspended. Considering these facts along with the other circumstances, the Court of Appeal ruled substantial evidence supported the trial court's determination that the defendant voluntarily consented to the blood test because the defendant consented after receiving the admonitions he received and did not object or resist. (*Id*. at p. 692.) Defendant here incorrectly claims that the *Harris* court held the lack of admonitions rendered consent invalid.

Defendant directs us to an Oregon case cited by *Harris* to support her claim that the omission of advisements renders her consent invalid. We quote from *Harris*: "In [*State v.*] *Moore* [(2013) 354 Or. 493], 318 P.3d 1133, the Oregon Supreme Court recognized that, while accurate advisement of the consequences under an implied consent law of refusing to submit to chemical testing does not mean that submission to a chemical test is coerced, '*failure* to disclose accurate information regarding the potential legal consequences of certain behavior would seem to be a more logical basis for a defendant to assert that his or her decision to engage in that behavior was coerced and involuntary.' (318 P.3d at p. 1138.) There, the officer's admonition to the motorist differed from the Oregon implied consent law in several respects, yet the Oregon Supreme Court concluded that the officer's admonition accurately advised the motorist about the consequences of refusing to submit to a blood test and did not result in a coerced submission to a chemical test. (318 P.3d at pp. 1139-1140.)" (*Harris*, *supra*, 234 Cal.App.4th at p. 691, original italics.)

Even if the Oregon court's statement was binding on us, which it is not, it does not make the claim defendant asserts it does. No where did the Oregon court state the lack of admonishments rendered consent invalid per se. Instead, it suggested as dicta that the lack of admonishments would seem to be a "more logical basis" for a defendant to assert that consent was coerced. Even if lack of admonishments is a more logical basis, it nonetheless must be considered as part of the totality of the circumstances.

Since *Harris* was decided, the Court of Appeal in *Balov* considered whether the lack of admonishments rendered consent to a chemical test invalid. On the facts before it, the court found sufficient evidence of voluntary consent. In doing so, it, too, rejected defendant's contention that under *Harris*, consent is involuntary if the implied consent law's admonitions are not given. The court stated: "*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." (*Balov, supra*, 23 Cal.App.5th at p. 704, fn. 4, review granted Sept. 12, 2018, S249708.)

In *Balov*, the arresting officer told the defendant he was required to submit either to a breath test or a blood test after being arrested for driving under the influence of alcohol. The officer did not inform the defendant he could object to the testing or of the statutory consequences of refusing a test. The defendant said he wanted a blood test. During the test, he remained calm and gave no indication he wanted to refuse the test. (*Balov, supra*, 23 Cal.App.5th at p. 699, review granted Sept. 12, 2018, S249708.)

The Court of Appeal affirmed the trial court's denial of the defendant's suppression motion, finding sufficient evidence of voluntary consent. The court stated, "Section 23612 requires the driver to be told that his or her failure to submit to a test will result in these consequences. 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.' (*United States v. Drayton* (2002) 536 U.S. 194, 207 [153 L.Ed.2d 242] [].)" (*Balov, supra*, 23 Cal.App.5th at p. 703, review granted Sept. 12, 2018, S249708.)

As in the case before us, the officer in *Balov* correctly told the defendant he was required to submit to a breath or blood test, and there was no evidence the officer made a false statement or intended to deceive the defendant about his right to refuse a test altogether. (*Balov, supra*, 23 Cal.App.5th at p. 703, review granted Sept. 12, 2018, S249708.) The court reasoned, "[The officer's] failure to communicate the consequences of refusing a chemical test did not make [his] 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." (*Id*. at p. 704, fn. omitted, review granted Sept. 12, 2018,

S249708.) And, as the court stated, the lack of such an advisement does not establish a presumption of invalidity. (*Id*. at p. 703, review granted Sept. 12, 2018, S249708.)

The trial court here considered Officer Adams's omissions of the implied consent law's admonitions when it reviewed the totality of the circumstances, and it found defendant nonetheless voluntarily consented to the blood draw. The omission of the admonitions does not overcome our conclusion that substantial evidence supports the trial court's determination.

III

Submission to Lawful Claim of Authority

In a related argument, defendant contends her consent could not be voluntary because she submitted to Officer Adams' misrepresentation of a lawful claim of authority. The officer told defendant she was required to give a blood sample. Defendant claims this statement was an order under authority of law, and it was a misstatement because case law requires either voluntary consent or a warrant. She thus argues this case is more akin to a case such as *Bumper v. North Carolina* (1968) 391 U.S. 543, 549 [20 L.Ed.2d 797] (*Bumper*), where the high court ruled that a claim by police that they had a warrant vitiated consent to search where the warrant was never shown to be valid.

Defendant's comparison is not persuasive. California cases that have invalidated findings of consent based on the suspect merely submitting to authority have involved "far more coercive circumstances or additional facts such as an illegal arrest or a false claim of authority to search." (*James, supra*, 19 Cal.3d at p. 110.) In *James*, the California Supreme Court held the defendant's consent was voluntary when four uniformed officers went to the defendant's house, asked him to step outside, arrested and handcuffed him, and then asked to search the house. (*Id*. at pp. 106-107.) The court said, "[T]he arresting officer neither held defendant at gunpoint, nor unduly detained or

interrogated him; the officer did not claim the right to search without permission, nor act as if he intended to enter regardless of defendant's answer." (*Id*. at p. 113.) Here, defendant does not challenge her arrest or suggest Officer Adams used any kind of force.

Moreover, Officer Adams did not make a false claim of authority to perform the blood test. Unlike a false or invalid warrant, the implied consent law required defendant to undergo the blood test, and, significantly, it gave her the option to refuse. *Bumper* does not apply here because there, when the officer claimed authority to search a home under a warrant, "he announce[ed] in effect that the occupant ha[d] no right to resist the search." (*Bumper, supra,* 391 U.S. at p. 550.) Here, despite Officer Adams's statement that defendant had to undergo a blood test, the implied consent law gave defendant the right to retract her implied consent and refuse the test. (*Balov, supra*, 23 Cal.App.5th at p. 702, review granted Sept. 12, 2018, S249708.) This distinction sets this case apart from *Bumper*.

And, again, whether defendant knew she could refuse—she did not testify as to whether she understood she had the right to refuse consent—is not determinative. "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." (*Schneckloth, supra,* 412 U.S. at p. 227.)

Two opinions from the appellate division of the Santa Clara County Superior Court disagree with each other on this issue. In *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1 (*Agnew*), the reviewing court rejected the defendant's argument that his consent was invalid under *Bumper* as a submission to lawful authority. As happened here, the officer told the defendant he was required by California law to submit to a blood or breath test, but the officer did not give the implied consent law's admonitions. (*Id*. at p. 4.) The court stated that to equate the officer's "accurate statement of the law with the false statement of having a search warrant in *Bumper* is to ignore the implied consent law. Under the implied consent law, moreover, 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." (*Id*. at p. 16.)

The officer's omission of the statutory admonitions was a fact to be considered when weighing the totality of the circumstances. (*Agnew, supra*, 242 Cal.App.4th Supp. at p. 18.) "[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." (*Id*. at p. 33.)

People v. Mason (2016) 8 Cal.App.5th Supp. 11 (*Mason*), reached a different result. In *Mason*, the arresting officer asked the defendant if she would submit to either a blood or breath test, and he told her she was required to give one or the other. The officer did not give the defendant the implied consent law's admonitions. (*Id*. at pp. 16-17.) The reviewing court held the officer's statement, while a true understanding of the implied consent law, was nonetheless misleading as the defendant had a Fourth Amendment right to refuse to submit to the test which the officer omitted to mention. (*Id*. at pp. 21-22.) What the officer "entirely omitted rendered what he did say misleading, at least for Fourth Amendment purposes as [the defendant] maintained a constitutional right to withhold consent to the blood draw." (*Id*. at p. 32.) The lack of the admonitions, considered as part of the totality of the circumstances, showed the prosecution failed to establish voluntary consent. (*Id*. at p. 33.)

Disagreeing with *Agnew's* rejection of *Bumper* in these circumstances, the *Mason* court stated, "[I]t is not such a leap in the totality of circumstances to equate the ' "claim of lawful authority" ' in *Bumper*—there a representation of a warrant that simultaneously induced and vitiated consent—with the representation here, that submission to a chemical test is legally 'required' without the accompanying statutory mandate that refusal may lead to certain consequences; both representations imply that the person does not have an

actual choice to refuse, at least for Fourth Amendment purposes. (*Agnew, supra*, 242 Cal.App.4th Supp. p. 18.) The problem is not just the omission of the right to refuse or even the statutory consequences of a refusal, the absence of neither of which would generally amount to a constitutional violation. (*Agnew, supra*, 242 Cal.App.4th Supp. at pp. 11-16.) But it is this lacuna coming after the assertion that submission is 'required,' a compulsion of mere statutory dignity not negating the constitutional right to refuse, that in this court's view can taint the actual voluntariness of the ensuing consent to a blood draw." (*Mason, supra*, 8 Cal.App.5th Supp. at pp. 22-23.)

We, like the *Balov* court, agree with *Agnew*. (*Balov, supra*, 23 Cal.App.5th at p. 704, fn. 5, review granted Sept. 12, 2018, S249708.) Unlike the officer in *Bumper*, Officer Adams truthfully told defendant she was required to undergo a blood draw. His omission of the admonitions did not make his statement misleading, as the implied consent law gave defendant the right to object to the test.

And unlike the homeowner in *Bumper*, defendant had given her implied consent to the test. The issue under the implied consent law was whether the defendant withdrew or affirmed her prior implied consent. The lack of the admonitions did not deny her a right to resist the test. To give that implied consent no weight, as the *Mason* court appears to do, effectively repeals the implied consent law based on no constitutional infirmity.

Moreover, *Mason*, despite its use of the totality of the circumstances test, converted the admonitions into a constitutional requirement whenever an officer correctly states that the implied consent law requires motorists to submit to chemical tests if lawfully arrested for driving under the influence. "Relying on [the omission of the admonitions] as the only dispositive fact to defeat consent . . . in effect elevates that statutory admonition into a constitutional requirement under the Fourth Amendment. . . . California cases have rejected elevating a similar admonition under the implied consent law to a constitutional requirement, and the United States Supreme Court has rejected

imposing analogous admonitions as constitutional requirements." (*Agnew, supra*, 242 Cal.App.4th Supp. at p. 19.)

Officer Adams's omission of the admonitions was one factor for the trial court to consider when it reviewed the totality of the circumstances. The omission did not deny defendant her right to withdraw her implied consent and compel her to consent. The court reviewed all of the circumstances and evidence, including Officer Adams's omission, and it concluded defendant had actually consented to the blood draw. Substantial evidence supports its finding of fact.

IV

Coercion

Defendant argues that consent to a blood draw required by the implied consent law can never be voluntary. Analogizing consent of a blood draw to a waiver of constitutional rights by persons pleading guilty to crimes, she claims the implied consent law unlawfully compels a suspect to waive his or her constitutional rights and to consent in order to obtain leniency and avoid the penalties the law imposes for refusing to consent. She asserts such consent can never be voluntary unless the suspect has met and conferred with an attorney who is then present when consent is provided.

The defendant in *Harris* made a similar argument, claiming that consent given after receiving the implied consent law's admonitions could not satisfy the Fourth Amendment because submission was extracted under threat of serious consequences for refusal. (*Harris, supra*, 234 Cal.App.4th at p. 686.) The *Harris* court rejected this argument, as do we. "The fact that a motorist is told he will face serious consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced." (*Id*. at p. 687.)

To reach this conclusion, *Harris* relied on *South Dakota v. Neville* (1983) 459 U.S. 553 [74 L.Ed.2d 748] (*Neville*). In that case, the United States Supreme Court ruled that

using a defendant's refusal to submit to a chemical test as evidence in a DUI trial does not violate the defendant's Fifth Amendment privilege against self-incrimination where the implied consent law gave motorists an option to refuse the test. (*Id*. at pp. 562-564.) "Although the court recognized that in extreme situations the choice given to a suspect is no choice at all, such as when the blood is extracted in a manner 'so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer "confession," ' the court held that 'the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him.' (*Id.* at p. 563.)" (*Harris, supra*, 234 Cal.App.4th at p. 687.)

The defendant in *Neville* conceded that the chemical test was so safe and painless that the state could legitimately compel the suspect to take the test. (*Neville, supra*, 459 U.S. at p. 563.) "Therefore, because 'the offer of taking a blood-alcohol test is clearly legitimate . . .,' the court concluded that 'the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.' ([*Neville, supra*, 459 U.S.] at pp. 563-564.) Finally, the court acknowledged that, although 'the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make,' the difficultly of the decision does not mean the motorist's ultimate choice is coerced. (*Id.* at p. 564.) '[T]he criminal process often requires suspects and defendants to make difficult choices. [Citation.]' (*Ibid.*)" (*Harris, supra*, 234 Cal.App.4th at p. 687.)

Defendant contends *Harris* erred by relying on *Neville* to find no coercion because the latter case involved the Fifth Amendment, not the Fourth. She asserts the choice

made under the implied consent law is "far more reaching than merely asserting a privilege: [Defendant] must decide whether to abrogate her power over government action by waiver of her power to enforce said restrictions against agents of the government." Defendant argues the Fourth Amendment prohibits a waiver of constitutional rights due to a promise of leniency, and she asserts the implied consent law's penalties act as such a promise.

To reach this conclusion, defendant relies on *Bram v. United States* (1897) 168 U.S. 532, 542-543 [42 L.Ed. 568] (*Bram*), which states a confession cannot be obtained by " 'any direct or implied promises, however slight, nor by the exertion of any improper influence.' " She also relies on *Brady v. United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747] (*Brady*), which limited *Bram* to its facts; a confession given by a defendant in custody, alone, and without counsel, after being stripped and searched. (*Bram, supra*, 168 U.S. at pp. 538-539.)

Neither case supports her argument. First, both cases were decided under the voluntariness standard imposed by the Fifth Amendment as it was then interpreted. (*Brady, supra*, 397 U.S. at p. 751; *Bram, supr*a, 168 U.S. at p. 542.) Defendant's consent to a blood test does not trigger a more stringent test of voluntariness under the Fourth Amendment than that required under the Fifth.

Second, the standard of voluntariness stated in *Bram* is no longer correct. Bram's statement that "a confession cannot be obtained by ' "any direct or implied promises, however slight . . ." ' under current precedent does not state the standard for determining the voluntariness of a confession . . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 285 [113 L.Ed.2d 302].) The correct test is the one the trial court applied here, determining the voluntariness of a confession, or consent, by viewing the totality of the circumstances. (*Id*. at pp. 285-286.)

Third, *Brady* directly refutes defendant's argument. The defendant there pleaded guilty to kidnapping to avoid a statutory death sentence if a jury found him guilty.

(*Brady, supra*, 397 U.S. at p. 743.) He contended his plea was not voluntary because the statute operated to coerce his plea and the plea was induced by representations of leniency and clemency. (*Id*. at p. 744.)

The United States Supreme Court concluded that whether the statutory death penalty caused his plea "does not necessarily prove that the plea was coerced and invalid as an involuntary act." (*Brady, supra*, 397 U.S. at p. 750.) The high court "decline[d] to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." (*Id*. at p. 751.)

Brady distinguished *Bram* on its facts; in effect, applying the totality of the circumstances test to the *Bram* facts. (*Brady, supra*, 397 U.S. at p. 754.) *Brady's* holding, however, implicitly rejected Bram's statement that any inducement or leniency, no matter its substance, rendered a confession or consent invalid, even when entering a plea of guilty. (*Id*. at p. 755.) The distinction defendant attempts to draw between the Fourth Amendment and the Fifth does not exist.

Because we find substantial evidence supporting the trial court's finding of consent, we need not address the parties' arguments regarding the good faith exception to the exclusionary rule.

DISPOSITION

The order denying defendant's suppression motion is affirmed.

HULL, Acting P. J.

We concur:

HOCH, J.

RENNER, J.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. SHARON DARLENE LOPEZ, Defendant and Appellant.	Case No.: 62-130483 Opinion

Appellant Sharlene Lopez appeals from the trial court's November 6, 2014 written order denying her motion to suppress evidence pursuant to Penal Code section 1538.5. Both parties waived oral argument and the matter was deemed submitted on June 18, 2015.

Factual and Procedural Background

On September 29, 2013, Officer Tina Mueller was finishing her shift around 6:00 p.m. and heading back to the Rocklin police station when she received a dispatch over her mobile computer. The dispatch stated a reporting party had called in regarding a possible DUI driver leaving the Sierra Lakes Mobile Home Park. The vehicle was described as a silver

Pontiac sedan with Future Ford paper plates. The dispatch further stated the driver was an adult female with blonde hair wearing a white shirt and black pants. Officer Mueller then observed a vehicle and driver matching the description in the dispatch pass her going the opposite direction and traveling westbound on Rocklin Road. Officer Mueller made a u-turn and proceeded to follow the vehicle, which was traveling at an extremely slow rate of speed. The vehicle made a left hand turn on Pacific Street, traveling southbound in the Number 1 lane. Officer Mueller continued to observe the vehicle and saw it straddling between the Number 1 and Number 2 lanes for several seconds. She then activated her vehicle's overhead lights and performed a traffic stop. Officer Mueller made contact with appellant who appeared confused, disoriented, and had constricted pupils. She also observed a prescription bottle in plain sight in the passenger seat. Officer Mueller asked appellant to step out of the vehicle. The officer observed that appellant had an unsteady gait, appeared disoriented, and walked very slowly.

Officer Chris Osborne then arrived at the scene to take over the investigation and was briefed by Officer Mueller. Officer Osborne conducted standard field sobriety tests about five to ten minutes after arriving on the scene, conducting the nystagmus test, the modified Romberg test, the one-leg stand, the walk-and-turn, and the finger-to-nose test. After completing the tests and based upon his observations, Officer Osborne concluded appellant was under the influence of a controlled substance. He asked appellant to take a preliminary alcohol screening (PAS) test. Appellant blew a 0.00 on the PAS test, which indicated she had no measurable alcohol in her system. Officer Osborne then proceeded to measure her pupils and found them to be constricted. He also took her pulse and found it was very slow. Officer Osborne then arrested her for driving while under the influence

of a controlled substance. Appellant was taken to the Placer County Jail, where a blood sample was obtained.

A misdemeanor complaint was filed on May 14, 2014, charging appellant with one count of violating Vehicle Code section 23152(a), driving while under the influence of drugs. Appellant was arraigned on May 20, 2014 and pled not guilty. She filed her motion to suppress on August 26, 2014 and a suppression hearing was held on October 20, 2014. The parties stipulated to standing and that there was no search warrant. Four witnesses were called at the hearing. Three witnesses testified on behalf of Respondent: (1) Officer Mueller; (2) Officer Osborne; and (3) Michelle Kamakeeaina-Perez. Appellant testified on her own behalf.

Officer Mueller testified she saw appellant, fitting the description and driving a vehicle matching a call she received from dispatch, travelling the opposite direction on Rocklin Road. Officer Mueller testified that she observed appellant was gripping the steering wheel tightly and squinting her eyes. She also noticed appellant was traveling through the construction zone at an extremely slow rate of speed, continuously braking and causing the vehicles behind her to brake in order to avoid a collision. Officer Mueller followed appellant as she made a left turn onto Pacific Street. She observed appellant's vehicle straddling the Number 1 and Number 2 lanes for approximately 30 seconds, never completing a lane change, and that appellant left her turn signal on.

Officer Mueller initiated a traffic stop and made contact with appellant. Officer Mueller testified that appellant appeared confused, disoriented, and that appellant's pupils were constricted. Officer Mueller asked appellant to produce her driver's license and registration but appellant continued to appear confused, asking Officer Mueller what documentation she requested to see. Officer Mueller asked appellant if she had taken any drugs and

appellant responded she had taken a Seroquel the previous night. Officer Mueller also observed a prescription bottle in plain sight in the passenger seat. Officer Mueller obtained permission from appellant to search the vehicle. After appellant stepped out of her vehicle, Officer Mueller observed that appellant had an unsteady gait, appeared disoriented, and walked very slowly.

Officer Evan Adams testified that he arrived and took over the investigation after being briefed by Officer Mueller. He observed appellant had an unsteady gait, her speech was very slurred, and her pupils were very constricted. He administered a series of five standardized field sobriety tests to appellant along with measuring the size of her pupils using a DAR card. Officer Adams further testified that appellant's performance on each of the tests was consistent with a person who was under the influence of a controlled substance. He also testified appellant's pulse rate was slow and her pupils were constricted consistent with a person under the influence of several different controlled substances. Officer Adams subsequently arrested appellant and transported her to the Placer County Jail to obtain a blood sample.

Officer Adams testified further that he informed appellant she was required by law to give a blood sample but did not inform her that she could refuse. Officer Adams testified that appellant consented and cooperated with the blood draw. He outlined the blood sampling procedure and stated that he followed this procedure when appellant's blood was drawn. Officer Adams removed appellant's handcuffs prior to the blood draw and a female phlebotomist wearing medical scrubs drew appellant's blood. Appellant's arm was not strapped down during the blood draw and she voluntarily offered her own arm. Officer Adams testified that if appellant had refused the blood draw, a different procedure and chair would have been used.

Michelle Kamakeeaina-Perez, the phlebotomist who drew appellant's blood, could not recall appellant's blood draw. Ms. Kamakeeaina-Perez did testify that she did not observe any forced blood draws on that date.

Appellant testified that four large law enforcement officers were around her throughout the blood draw. Appellant testified she was forcibly moved into a chair by an unknown officer who then physically grabbed her right arm out of her lap and slammed it on a countertop. She stated that the incident left bruising on her arm. Appellant also testified that a male officer drew her blood. Appellant testified she did not understand why her blood was taken and that she would not have consented to a blood draw.

The trial court issued a written ruling on November 6, 2014, denying appellant's motion to suppress. The trial court made several findings: (1) the traffic stop was justified based upon the citizen tip and independent observations of the officer; (2) the officer had reasonable suspicion that appellant was driving under the influence based upon the totality of the circumstances and the traffic stop was constitutionally reasonable within the meaning of the Fourth Amendment; (3) the officer had probable cause to arrest defendant for driving under the influence based upon the totality of the circumstances and the arrest was constitutionally reasonable within the meaning of the Fourth Amendment; (4) the evidence did not support the existence of an exigent circumstance to justify a warrantless blood draw as stated in *Schmerber v. California* (1966) 384 U.S. 757 and *Missouri v. McNeely* (2013) --- U.S. ----; 133 S.Ct. 1552; (5) Officer Adams' testimony was more credible than that of appellant; (6) appellant consented to the blood draw pursuant to California's implied consent law; and (7) the blood was drawn in a reasonable manner by a professional phlebotomist. This timely appeal followed.

Appellant's Contentions

Appellant does not contest the trial court's ruling that the officer had reasonable suspicion to make the traffic stop. (AOB 5.) Appellant contends the warrantless blood draw violated the Fourth Amendment because her consent was obtained without first being fully advised as to the implied consent law and, even so, Vehicle Code section 23612 is "constitutionally infirm." We find these contentions lack merit and shall affirm.

Discussion

Standard of Review

"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, ... is also subject to independent review." (*People v. Williams (1988) 45 Cal.3d 1268, 1301;* see also *People v. Ayala (2000) 23 Cal.4th 225, 255.*)

All presumptions favor the trial court's exercise of its power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences, " 'and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.' " (*People v. Leyba (1981) 29 Cal.3d 591, 596-597,* quoting *People v. Lawler (1973) 9 Cal.3d 156, 160.*) Our

task is simplified where there is no controversy concerning the underlying facts. The only issue for the appellate court to address is whether that rule of law, as applied to the undisputed historical facts, was or was not violated. This is an issue for our independent review. (*People v. Thompson (2006) 38 Cal.4th 811, 818.*)

The appellate court is prohibited from ordering the suppression of evidence unless required to do so under federal constitutional standards. (*People v. Lim (2000) 85 Cal.App.4th 1289, 1296.*) The ruling of the trial court will be affirmed if correct under any legal theory. (*Schabarum v. California Legislature (1998) 60 Cal.App.4th 1205, 1216.*) Nor does the appellate court reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts since these are functions for the trier of fact. (*People v. Bowers (2004) 117 Cal.App.4th 1261, 1271.*) With the above standard of review in mind, we turn to appellant's contentions on appeal.

The Trial Correctly Found Appellant Consented to the Blood Draw

The Fourth Amendment protects citizens from unreasonable searches and seizures, which includes a warrantless search and seizure. (*People v. Williams (1999) 20 Cal.4th 119, 125-126; Johnson v. United States (1948) 333 U.S. 10, 13-14.*) Hence, the well-established presumption is a warrantless search and seizure violates the subscribed fourth amendment protections. An exception to this presumption exists when there is consent. (*People v. Woods (1999) 21 Cal.4th 668, 674; Katz v. U.S. (1967) 389 U.S. 347, 358, fn. 22; Schneckloth v. Bustamonte (1973) 412 U.S. 218, 219.*) Consent may be express or implied and demonstrated by a person's conduct in addition to his or her words. (*People v. Frye (1998) 18 Cal.4th 894, 990* disapproved on other grounds in *People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22; People v. Superior Court (Henry) (1971) 41 Cal.App.3d 636,*

639.) California courts have long held consent may be given based upon nonverbal behavior. (*People v. Harrington (1970) 2 Cal.3d 991* abrogated on other grounds in *People v. Coffman (2004) 34 Cal.4th 1 [defendant stepping aside and making a gesture with his left hand constituted consent.]; People v. Hamilton (1985) 168 Cal.App.3d 1058 [homeowner gave consent when she stepped back and pulled front door open despite initially stating she did not know defendant and refusing to allowing officer to enter.].*) However, silence or a lack of objection does not equate to consent since a person must provide some gesture or nonverbal behavior that could reasonably be understood as agreement. (see *People v. Superior Court (Arketa) (1970) 10 Cal.App.3d 122, 127; U.S. v. Shaibu (9th Cir. 1990) 920 F.2d 1423, 1427.*)

It has recently been held that "free and voluntary submission to a blood test, after receiving an advisement under the implied consent law, constitutes actual consent to a blood draw under the Fourth Amendment." (*People v. Harris (2015) 234 Cal.App.4th 671, 685.*) "[S]ubmission to a blood test is not coerced merely because it is made after advisement under the implied consent law". (*People v. Harris (2015) 234 Cal.App.4th 671, 689.*) The determination of whether consent to the submission of the blood draw exists requires an analysis of whether consent was obtained freely and voluntarily under the totality of the circumstances. (*Ibid.*)

We reiterate that our role in reviewing this issue is limited since the trier of fact determines whether consent was voluntary and all express or implied findings must be upheld where supported by substantial evidence. (*People v. James (1977) 19 Cal.3d 99, 107.*) In this instance, there was conflicting testimony surrounding whether appellant consented to the blood draw. The trial court considered the testimony of both Officer Adams and appellant, making an express finding that Officer Adams' testimony was

more credible. (CT p. 000070.) Again, we do not reweigh the evidence and all factual conflicts are resolved in the manner most favorable to the trial court's ruling on the suppression motion. (*People v. Woods (1999) 21 Cal.4th 668, 673.*) When deciding whether a search and seizure is constitutionally unreasonable, the trial judge is vested with the power to judge the credibility of witnesses, resolve conflicts in the testimony, weigh the evidence, and draw factual inferences. (*People v. Tully (2012) 54 Cal.4th 952, 979; People v. Monterroso (2004) 34 Cal.4th 743, 758; People v. James (1977) 19 Cal.3d 99, 107.*) The reviewing court must accept the trial court's determination of disputed facts and credibility assessments. (*People v. Tully (2012) 54 Cal.4th 952, 979.*) Therefore, we credit the trial court's express finding that Officer Adams' testimony was more credible and review the record to determine whether substantial evidence exists to support appellant consented to the blood draw.

Substantial evidence supports the trial court's findings. Officer Adams testified that appellant consented and cooperated with the blood draw. (October 20, 2014 RT pp. 62:22-23, 63:7-9, 63:13-17, 65:4-8, 68:7-12.) He outlined the procedure used for obtaining a blood sample and stated that he followed this procedure when appellant's blood was drawn. (RT pp. 62:5-13.) Officer Adams testified that he informed appellant she was required by law to give a blood sample. (RT p. 62:14-21, 64:2-7.) He removed appellant's handcuffs prior to the blood draw and a female phlebotomist, in colorful scrubs, drew appellant's blood. (RT pp. 70:12-71:13, 90:18-25, 91:3-4.) Appellant's arm was not strapped down and she offered her own arm during the blood draw. (RT pp. 71:24-72:11, 73:13-17.) Officer Adams further testified that a different chair is used and a different procedure is initiated when a person refuses a blood draw or when a forced blood draw is necessary. (RT p. 73:16-18.) These facts, when considered in

total, provide substantial evidence supporting the trial court's finding of appellant's consent. The trial court found the officer's testimony concerning this event to be credible.

Turning to appellant's next assertion, the failure to provide a complete implied consent advisement does not, in and of itself, invalidate her consent. Appellant proffers the tenuous argument that any deficiency in the recitation of the implied consent advisement negates consent. This proposition, however, cannot be reconciled with the fundamental legal principles applied in determining whether consent is present. Again, consent can be demonstrated by a person's words and/or conduct. (*People v. Frye (1998) 18 Cal.4th 894, 990* disapproved on other grounds in *People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22; People v. Superior Court (Henry) (1971) 41 Cal.App.3d 636, 639.*) Consent is not determined by the officer's actions. Rather, an officer's actions or inactions may affect a defendant's words and/or conduct when determining consent. This, in turn, impacts whether a defendant's consent was freely and voluntarily given. It is the impact of the recitation on defendant's actions that bears upon consent, not the mere recitation of the advisement itself.

The record also does not establish Officer Adams' failure to provide a full advisement affected appellant's ability to freely and voluntarily consent to the blood draw. Officer Adams testified he informed appellant that she was required by law to give a blood sample but did not inform her that she could refuse. (October 20, 2014 RT pp. 62:14-21, 64:2-7, 69:10-16.) The record does not show Officer Adams coerced, intimidated, or forced appellant to provide a blood sample. The trial court specifically found Officer Adams' testimony, that appellant was cooperative and did not object to the blood draw, to be more credible than appellant's testimony to the contrary. Thus, substantial evidence exists to support the court's finding. Moreover,

the failure to strictly follow the implied consent law does not violate a defendant's constitutional rights. (*Ritschel v. City of Fountain Valley (2006) 137 Cal.App.4th 107, 118; People v. Harris (2015) 234 Cal.App.4th 671, 692.*)

Nor does appellant's assertion that the trial court improperly applied the law hold any merit. As previously stated, voluntary submission to a blood test constitutes consent to a blood draw under the Fourth Amendment. (*People v. Harris (2015) 234 Cal.App.4th 671, 685.*) The trial court cited to the Riverside Superior Court appellate division's opinion in *People v. Harris* (2014) 225 Cal.App.4th Supp. 1 to support this proposition. While the Riverside appellate division certified its appeal for transfer to Division 2 of the Fourth District Court of Appeal, the appellate court still held the voluntary submission to a blood test constitutes actual consent. (*People v. Harris (2015) 234 Cal.App.4th 671, 685.*) There was no error in law committed on the part of the trial court.

There is No Merit to Appellant's Claims that Vehicle Code Section 23612 is Constitutionally Infirm

Finally, appellant contends consent does not exist because Vehicle Code section 23612 is "constitutionally infirm." In making this contention, appellant asserts the holding in *People v. Harris* (2015) 234 Cal.App.4th 671 is wrong as the appellate court relied upon the inapposite self-incrimination analysis of *South Dakota v. Neville* (1983) 459 U.S. 553. She argues the *Harris'* consent analysis leads to an improper leniency in waiving a defendant's constitutional rights and the case at bar is more akin to *Bram v. United States* (1897) 168 U.S. 532 where compelling an in-custody defendant to waive his constitutional rights based upon some form of leniency barred admission of a confession. There is no merit to this contention.

First, appellant provides an incomplete analysis of the *Harris* court's opinion. The appellate court's reference to *Neville* was merely a portion of its overall rationale. The *Harris* court recounted the discussion in *Neville* as part of its post-*McNeely* analysis of blood draw submissions under implied consent laws in other sister state courts. (*People v. Harris (2015) 234 Cal.App.4th 671, 687-688.*) After discussing chemical testing under Minnesota's implied consent law in *State v. Brooks* (Minn.2013) 838 N.W.2d 563 and chemical testing under Oregon's implied consent law in *State v. Moore* (2013) 354 Or. 493, the appellate court related the analyses to the implied consent given to California motorists to submit to chemical testing, agreeing that free and voluntary submission to the testing is actual consent under the Fourth Amendment. (*People v. Harris (2015) 234 Cal.App.4th 671, 689.*) There is no constitutional infirmity in this finding that voluntary submission under the implied consent laws constitutes actual consent under the Fourth Amendment.

Second, appellant's reliance upon *Bram* is misplaced. Appellant relies upon dictum in *Bram* that inherent interrogation coerciveness may render any custodial confession inadmissible under the Fifth Amendment. (*Bram v. United States (1897) 168 U.S. 532, 556.*) Appellant attempts to apply this broad language from a different factual scenario made during a different era as a touchstone to assert some individual right of the criminal defendant to control the investigatory powers of law enforcement. There is simply no merit to appellant's extrapolation attempt. The dictum in *Bram* has been specifically disapproved of in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285: "under current precedent [that dictum] does not state the standard for determining the voluntariness of a confession." The passage from *Bram* has no particular relevance to any issue regarding the implied consent law raised by the facts of this case.

We note that appellant states in passing, with no citation to the law or further analysis, that the failure of the implied consent law to allow for the presence of an attorney renders it unconstitutional. We need not consider any perfunctory or insufficiently developed claims since the appellant must support her contentions by citations and analysis. (*People v. Freeman (1994) 8 Cal.4th 450, 482, fn. 2; People v. Hardy (1992) 2 Cal.4th 86, 150; People v. Galambos (2002) 104 Cal.App.4th 1147, 1159.*) As appellant has not seen fit to develop this argument, we need not address the issue.

Finally, appellant raises an argument that the good faith exception to the exclusionary rule cannot apply in this instance. While appellant's argument is not clearly developed, she seems to contend that since her case occurred after the issuance of *Missouri v. McNeely* (2013) (2013) --- U.S. ---; 133 S.Ct. 1552, the good faith exception to the exclusionary rule cannot salvage the warrantless blood draw. However, the issue here is not the officer's good faith misapplication of law, but whether appellant in fact consented to the blood draw.

Disposition

The order denying the motion to suppress, entered on November 6, 2014, is affirmed.

Dated: July 1, 2015

Hon. Charles D. Wachob
Presiding Judge, Appellate Division

Dated: 7-1-15

Hon. Frances A. Kearney
Judge, Appellate Division

Dated: 7/8/15

Hon. Eugene S. Gini, Jr.
Judge, Appellate Division

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

People of the State of California,

Plaintiff,

v.

Sharon Darlene Lopez,

Defendant.

Case No.: 62-130483

RULING ON MOTION TO SUPPRESS EVIDENCE (PC § 1538.5)

The defendant's motion to suppress was heard by this court on 10/20/14. The defendant was represented by Kenneth Brooks. The People were represented by Paige Taylor. The court has carefully considered the evidence and arguments presented in this case.

The People stipulated to standing and that the search/seizure was done without a warrant. Accordingly, the People bear the burden to prove that the search/seizure was constitutionally reasonable within the meaning of the Fourth Amendment. *People v. Williams* (1999) 20 Cal.4th 119, 130.

Rocklin Police Officer Tina Mueller offered the following testimony. On 9/29/13, an anonymous caller told the Rocklin Police Department that a white female with blonde hair was driving under the influence and was leaving a trailer park on Rocklin Road in a silver Pontiac with paper plates from a Ford dealership. While driving on westbound Rocklin Road, Officer Mueller passed a vehicle/driver matching this description driving through a construction zone on eastbound Rocklin Road. The officer noticed that the driver was squinting, gripping the steering wheel tightly, driving very slowly, hitting the brakes frequently, and causing traffic to back up.

Officer Mueller turned around and pulled behind the vehicle in the left-turn lane at the intersection of Rocklin Road and Pacific Street. When the traffic signal turned green, the vehicle turned left into the number one lane and its turn signal remained activated as it drove along southbound Pacific Street. The vehicle then moved partially into the number two lane and then back into the number one lane, causing a car in the number two lane to have to slow down.

Officer Mueller activated her red lights, initiated a traffic stop, and contacted the driver. The defendant, the driver and sole occupant of the vehicle, appeared to be disoriented and confused. The defendant told the officer that she was confused by the construction zone and was "tired and hormonal." When the officer asked for the vehicle's registration and proof of insurance, the defendant acted confused. The officer saw a prescription pill bottle in the vehicle and the defendant told the officer that she had taken prescription medication the previous night.

Officer Evan Adams offered the following testimony. Officers Adams arrived on scene, was briefed by Officer Mueller regarding her observations, and took charge of the investigation. Upon contacting the defendant, Officer Adams observed that she had very slurred speech, a very unsteady gait, and constricted pupils (consistent with opiate use). The officer administered several field sobriety tests to the defendant, which she performed poorly. The defendant breathed into a preliminary alcohol screening device, which indicated an absence of alcohol.

The defendant was arrested for driving under the influence and transported to the jail. Due to the absence of alcohol and the probable presence of drugs, Officer Adams advised the defendant that she was required

to give a blood sample. Officer Adams testified that the blood draw was conducted by phlebotomist Sasha Perez, that the defendant was cooperative during the blood draw, and that the defendant did not object, resist or refuse.

The defendant, on the other hand, testified that she did not consent to the blood draw, that she was shoved into a chair, that her arm was slammed onto a counter, that blood was forcibly drawn from her arm by an officer, and that she repeatedly asked for an attorney to no avail. Phlebotomist Sasha Perez testified that, although she did not specifically recall the blood draw in this case, she did conduct a blood draw for the Rocklin Police Department on 9/29/13.

THE TRAFFIC STOP

An officer may temporarily detain a motorist for investigative purposes based upon reasonable suspicion of a traffic violation, including driving under the influence. *Navarette v. California (2014) __ U.S. __; 134 S.Ct. 1683; People v. Wells (2006) 38 Cal.4th 1078.* An anonymous citizen's tip alone may justify a vehicle stop when the totality of the circumstances provides the officer with reasonable suspicion of a DUI. *Navarette v. California, supra; People v. Wells, supra.* In this case, the stop was justified by the citizen's tip and the officer's independent observations of the defendant's driving. Based upon the totality of the evidence, the court finds that the officer had reasonable suspicion that the defendant was driving under the influence and that the traffic stop was constitutionally reasonable within the meaning of the Fourth Amendment.

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THE ARREST

A warrantless arrest is legal when supported by probable cause that the person committed a crime. Probable cause exists when a person of ordinary care and prudence would entertain an honest and strong suspicion that the individual is guilty of a crime. *People v. Kraft* (2000) 23 Cal.4th 978, 1037. After the vehicle stop, the officer saw a prescription pill bottle inside the car, the defendant admitted taking prescription medication, and the defendant performed poorly during the field sobriety tests. Based upon the totality of the evidence, the court finds that the officer had probable cause to arrest the defendant for driving under the influence and that the arrest was constitutionally reasonable within the meaning of the Fourth Amendment.

THE BLOOD DRAW

In *Schmerber v. California (1966) 384 U.S. 757*, the Supreme Court held that exigent circumstances, including the destruction of evidence in the bloodstream, may justify a warrantless blood draw. In *Missouri v. McNeely (2013) __ U.S. __; 133 S.Ct. 1552*, the Supreme Court held that the natural dissipation of alcohol in the bloodstream by itself does not constitute an exigency and that the existence of an exigency must be determined on a case by case basis considering the totality of the circumstances. The court finds that the evidence in this case does not support the existence of an exigency as set forth in *Schmerber* and *McNeely*.

The People contend that the defendant consented to the warrantless blood draw pursuant to California's implied consent law. The implied consent law is codified in Vehicle Code § 23612 and provides that every person who drives a motor vehicle in California "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." Cooperatively providing a blood sample to law enforcement constitutes valid constitutional consent within the meaning of the Fourth Amendment. *People v. Harris (2014) 225 Cal.App.4th Supp. 1.*

In this case, Officer Adams testified that the defendant was cooperative and did not object to the blood draw. The defendant, on the other hand, testified that she did object and was physically forced to give the blood sample. The court finds the officer's testimony to be more credible and finds that the defendant consented to the blood draw pursuant to California's implied consent law. The court further finds that the blood was drawn in a reasonable manner by a professional phlebotomist.

For the reasons set forth above, the defendant's motion to suppress is denied.

DATE: November 6, 2014

JEFFREY S. PENNEY
PLACER COUNTY SUPERIOR COURT JUDGE