In the Supreme Court of the State of Nevada

Stella Sindelar
Appellant

vs.

No. 68789

The State of Nevada,
Appellee.

_____/

Appellant's Appendix Volume 1

Arraignment Transcript District Court	1
Defendant's Motion to Dismiss	4
Defendant's Motion to Suppress Evidence	17
Defendant's Opposition to Introduction of Defendant's Statements	51
Motion to Change Plea to Guilty	58
Order Denying Defendant's Motion to Change Plea	68
Order Denying Motion to Suppress Evidence	71
Sentencing Transcript	95
State's Motion to Introduce Defendant's Statements	103

CASE NO. CR-1304037

Dept. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

STELLA LOUISE SINDELAR,

Defendant.

_____/

TRANSCRIPT
of
ARRAIGNMENT
April 22, 2013

COUNSEL APPEARING:

For the State:

KIRSTY PICKERING, ESQ.

Deputy District Attorney
801 Clark Street, Ste. 3
Ely, NV 89301

For the Defense:

CHARLES ODGERS, ESQ.
P. O. Box 51690
Ely, NV 89315

Transcribed by: Linda Davies, Sworn Court Transcriber

THE COURT: CR one three zero four zero three seven, State of Nevada versus Stella Louise Sindelar. Miss Sindelar's present represented by Mr. Odgers. The State's represented by Miss Pickering. Mr. Dugan from the Department of Parole and Probation is present and this is the time and place set for arraignment. Are the parties prepared to go forward?

MS. PICKERING: The State's prepared Your Honor.

MR. ODGERS: Miss Sindelar is Your Honor.

THE COURT: All right. The case is captioned State of Nevada versus Stella Louise Sindelar. Is that your true and correct name?

MS. SINDELAR: Yes sir.

THE COURT: All right. All proceedings will go forward under that name, and what I'm going to do is summarize the allegations contained in the Information, of which you have a copy there, and then with the assistance of your attorney, you can offer your plea. They charge you with driving under the influence of alcohol and they say - a third offense, and they say that you did on or about -

MS. PICKERING: Your Honor, this is a felony offense.

THE COURT: Oh, a felony, all right. Driving under the influence is a felony offense and they say that you did

on or about March twenty-seventh two thousand thirteen operate a motor vehicle on Great Basin Boulevard in Ely, White Pine Count, State of Nevada, while being under the influence of intoxicating liquor and or having a zero point zero eight percent or more by weight of alcohol in your blood and or by being found by punishment - measurement within two hours of driving or being in actual physical control of a vehicle to have zero point zero eight percent or more by weight of alcohol in your blood and that you were convicted of driving under the influence, a felony in the Third District Court of West Jordan, State of Utah, on February twenty-fourth, two thousand four. So with respect to that charge, what is your plea?

MS. SINDELAR: Not guilty.

THE COURT: Not guilty. The record would so reflect. You may be seated then. Now, Miss Sindelar, with your not guilty plea we need to set the matter for a jury trial and so have you discussed your right to a speedy trial with Mr. Odgers?

MS. SINDELAR: Yes sir.

THE COURT: And so you understand that you have the right to have a jury trial within sixty days of today's date if the calendar would permit that or you can waive that right and we'd set the matter out further. Do you understand all

that?

MS. SINDELAR: Yes sir.

THE COURT: What do you want to do?

MR. ODGERS: Invoke. She going to invoke Your Honor.

THE COURT: You want a speedy trial? All right. So what do we need two - two days to try the case?

MS. PICKERING: Two days max Your Honor.

THE COURT: And obviously you're in custody so looks like May fourteenth - that's State ver - on May twenty-second that's State versus Michael Williams, that's still going?

MS. PICKERING: It is, Your Honor.

THE COURT: Is that the attorney from San Francisco?

MS. PICKERING: I believe it's still going Your Honor.

THE COURT: And that's been set for years.

MS. PICKERING: At least one.

THE COURT: Lets see Mr. Odgers, State versus Newcastle, do we know anything new on that?

MR. ODGERS: Your Honor, it's going to depend on the meeting this Wednesday with the State as the Court maybe recall, we're having a meeting to discuss the status of discovery.

THE COURT: Okay.

MR. ODGERS: My belief is is that a request for a continuance is going to be filed based on documents we have

not yet received.

THE COURT: Okay. Lets do this. Lets make this - we'll give you a second setting behind State versus Newcastle. That would be June eleventh and June twelfth. We'll start at nine thirty. It's a second set so if Newcastle goes off we can utilize the same jury. Lets see, and then I'm - what's State versus Jerome Link, are you going to be on that?

MR. ODGERS: That's mine Your Honor. It's a alleged home invasion case and it is going.

THE COURT: Okay.

MR. ODGERS: I'm going to ask the Court's calendar on the nineteenth and twentieth of June.

THE COURT: I won't be here.

MR. ODGERS: Okay.

THE COURT: So lets see, so then we're - what's today the twenty-second? So then we're outside. Ulibarri going? Don't know -

MR. ODGERS: As of -

THE COURT: - you've got motions pending?

MR. ODGERS: As of right now, it is Your Honor. Motions are pending.

THE COURT: That's an older case, isn't it?

MR. ODGERS: Yes.

THE COURT: How about Barela, is that - Gerald Barela?

MR. ODGERS: That's my case, Your Honor. I can - I don't know what the State's position would be about moving it.

THE COURT: How old's that case?

UNKNOWN PERSON: That was with Mr. Gaumond so probably not too old. He's out of custody.

MR. ODGERS: That's correct. He wouldn't be - I'd have to pull him in but I don't think he'll have a problem moving it Your Honor.

THE COURT: Lets see because otherwise - otherwise its going to be August. Let me look a little deeper here, hold on. Okay, we can't do the - we can't do mid - mid May, that's not available. May twenty-second we have a jury trial that's been set for over a year, bumped a couple times. State versus Gergen, how about that, the twenty-ninth and thirtieth?

MR. ODGERS: Your Honor, he's in custody.

THE COURT: Okay. So the next week we've got Kelly Coyan (sp). I'm going to be in Lincoln County.

MR. ODGERS. Well it would have to be September, I've got a murder trial in August.

THE COURT: Are you - oh, lets see. Does June fourth work, and fifth?

MS. PICKERING: There's no other trials on the calendar?

THE COURT: Well I've got one - I've got a - a trial in Lincoln County and what I'm thinking is maybe - maybe Judge Fairman would - could take that one or this one.

MR. ODGERS: Your Honor, my issue is is that is Newcastle doesn't come off, that's going to be the week that I'm doing all my witnesses.

THE COURT: You're right. That's right. Okay, so what we'll do is -

MR. ODGERS: What about a second behind Barela - I - my problem is that I need to - if we move Barela it's going to have to be into September because we have that two week murder trial in August. There's just no easy way around this one.

THE COURT: Well what we'll do - lets do this. Lets go ahead and set it right now also behind Barela on July ninth. It's a little bit outside the sixty day, but that's all the calendar can accommodate and then we'll know by next Monday whether or not Newcastle's going to be moved around or not and if that's the case, then we're going to have to bump Barela. That's all we can do. Yea, because there's nothing else we can do until - actually it's almost September anyway, yea. All right, so we've got those two dates we'll set and

we'll firm that up - we'll be able to firm that up next week.

MR. ODGERS: Thank you Your Honor.

THE COURT: That's exactly what we're doing here. Okay. Anything further in this case at this time?

MS. PICKERING: Well, motion cutoff Your Honor.

THE COURT: Lets see, should be May - May thirty-first, plenty of time, that's Friday, May thirty-first. All right, anything further then at this point?

MR. ODGERS: No Your Honor.

THE COURT: Hearing none then Miss Sindelar will be remanded back into custody. We'll go to my next one in custody.

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellant Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Linda Davies

LINDA DAVIES
Court Transcriber

Case No. CR-1304037

FILED

2015 JUN 10 PM 3:51

NICHOLE BALDWIN
WHITE PINE COUNTY CLERK
BY _____ DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF WHITE PINE, STATE OF NEVADA

❦ ❦ ❦ ❦ ❦

STATE OF NEVADA,
PLAINTIFF,

vs.

STELLA LOUISE SINDELAR,
DEFENDANT.

MOTION TO DISMISS

COMES NOW STELLA SINDELAR, Defendant, by and through RICHARD W. SEARS, Attorney at Law, and Moves this court for its Order dismissing this case on the basis of the attached Affidavit in support of this Motion, the Memorandum of Points and Authorities attached, and all the pleadings and evidence contained in the court file.

Date: June 10, 2015.

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COPY

POINTS AND AUTHORITIES

FACTUAL ALLEGATIONS

Stella Louise Sindelar, Defendant, is being charged and held for trial for the offense of driving under the influence of alcohol after having been convicted of a felony offense of driving under the influence of alcohol in the State of Utah in 2004.

The Utah conviction resulted from a plea agreement where Stella was represented by legal counsel. However, the conviction does not pass constitutional muster in the State of Nevada, because Stella was never advised by the court or counsel that her crime was not being handled as a misdemeanor. Stella was subject to a misdemeanor penalty: No prison, and less than one year of probation. Had Stella been advised of the fact that her plea agreement resulted in a felony charge when she was advised it would be a misdemeanor charge, she would never had plead guilty, she would have instead required the State of Utah to prove every element of the crime against her.

APPLICABLE LAW

The seminal case in Nevada on plea agreements involving enhancements was the *Koenig* case where the Supreme Court stated in part,

This court has likewise stated that, with respect to an advisement on the waiver of counsel, "[t]he same stringent standard does not apply to guilty pleas in misdemeanor cases" as applies in felony cases.11

FOOTNOTE 11. *Koenig v. State*, 99 Nev. 780, 788-89, 672 P.2d 37, 42-43 (1983); see also *Hartman v. Municipal Ct.* for No. Jud. D. of San Mateo Cty., 35 Cal. App.3d 891, 111 Cal.Rptr. 126, 127 (1973) (rejecting a defendant's attack on the constitutionality of his prior conviction premised upon the insufficiency of a mass advisement noting that '"when a defendant appears in court personally to plead to a misdemeanor offense, the practicalities of the crowded inferior courts will permit some deviation from the strict felony procedure so long

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as the constitutional rights of defendants are respected'" (quoting *Mills v. Municipal Court for San Diego Jud. Dist.*, 10 Cal.3d 288, 110 Cal.Rptr. 329, 515 P.2d 273, 286 (1973))).

> This Court, following the lead of the U.S. Supreme Court, has set forth requirements for a guilty plea to be constitutionally tendered. In *Scott v. State*, 97 Nev. 318, 630 P.2d 257 (1981), *Halbower v. State*, 96 Nev. 210, 606 P.2d 536 (1980), and *Anglin v. State*, 86 Nev. 70, 464 P.2d 504 (1970), we held that in felony cases, an official court record must exist showing that the defendant was apprised of his constitutional rights, understood and waived them, that there were no threats or promises that induced the guilty plea, that the defendant [99 Nev. 789] understood the consequences of the plea in terms of the range of punishment and understood the elements of the offense or made factual admissions evincing commission of the offense. See also *Hanley v. State*, 97 Nev. 130, 624 P.2d 1387 (1981); NRS 174.035.
> *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983)

> The State may use prior misdemeanor convictions for driving under the influence to enhance the penalties established by NRS 484.3792. *Koenig v. State*, 99 Nev. 780, 784, 672 P.2d 37, 40 (1983). However, the record indicates that Smith understood that the State would treat her as a first offender in connection with the 1986 charge. The spirit of constitutional principles does not support the subsequent use of the 1986 conviction for enhancement purposes without appropriate clarification and warning on the occasion of the 1986 plea bargain.
>
> Nothing in the record indicates that, in 1986, the State advised Smith that after receiving treatment as a first-offender, the 1986 conviction would thereafter revert to a second offense in the event of further drunk-driving convictions. Moreover, we assume that Smith's 1986 guilty plea was induced, at least in part, by the knowledge that a first-time offense, for purposes of minimizing criminal penalties for future drunk-driving convictions, was preferable to a second offense. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498-99, 30 L.Ed.2d 427 (1971).
>
> Courts specifically enforce plea bargains when enforcement will implement the reasonable expectations of the parties without binding the trial judge to an unsuitable disposition. *Van Buskirk*, 102 Nev. at 244, 720 P.2d at 1216-1217. In this case, because it was reasonable for the parties to expect that Smith's 1986 conviction would be treated as a first offense in all respects, including penalty enhancement for future drunk-driving convictions, enforcement of the plea agreement is appropriate.
>
> Thus, the use of Smith's 1986 drunk-driving conviction in order to enhance her 1987 charge to felony status would violate the spirit of the plea bargain entered into in 1986 between Smith and the Reno city attorney. See Van Buskirk, 102 Nev. at 243, 720 P.2d at 1216. Therefore, the district court properly suppressed the 1986 conviction.
> *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (Nev., 1989).

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In accordance with Smith, the reasonable expectations of the parties should be honored. When a person pleads guilty to a first-offense DUI, it must be treated as a first-offense DUI for all purposes, including sentencing for later convictions. Although in this case, the judge, rather than the prosecutor, made the plea arrangement with Perry, as we noted in Smith, "we hold the State to "the most meticulous standards of promise and performance.'" *Id.* at —, 774 P.2d at 1040 (citation omitted).

If we hold the state to the strictest standard of upholding the bargain when it is the prosecutor who is striking the bargain, it would be inconsistent not to hold the state to a similar standard when it is the judge who engages in this process. Here, Perry pleaded guilty to a first-offense DUI. To allow the conviction now to be treated as a second-offense DUI for the purpose of enhancing Perry's sentence would be inherently unfair to Perry, who pleaded in good faith to first-offense DUI. Accordingly, we reverse the district court's decision and hold that Perry's second-offense DUI conviction must be treated as a first-offense DUI for all purposes.

Perry v. State, 106 Nev. 436, 794 P.2d 723 (Nev., 1990)

The Nevada Legislature has set up a complex scheme for penalty enhancements for alcohol and drug offenders:

NRS 484C.400, provides in relevant part:

1. Unless a greater penalty is provided pursuant to NRS 484C.430 or 484C.440, and except as otherwise provided in NRS 484C.410, a person who violates the provisions of NRS 484C.110 or 484C.120:

(a) For the first offense within 7 years, is guilty of a misdemeanor. Unless the person is allowed to undergo treatment as provided in NRS 484C.320, the court shall:

(1) Except as otherwise provided in subparagraph (4) of this paragraph or subsection 2 of NRS 484C.420, order the person to pay tuition for an educational course on the abuse of alcohol and controlled substances approved by the Department and complete the course within the time specified in the order, and the court shall notify the Department if the person fails to complete the course within the specified time;

(2) Unless the sentence is reduced pursuant to NRS 484C.320, sentence the person to imprisonment for not less than 2 days nor more than 6 months in jail, or to perform not less than 48 hours, but not more than 96 hours, of community service while dressed in distinctive garb that identifies the person as having violated the provisions of NRS 484C.110 or 484C.120;

(3) Fine the person not less than $400 nor more than $1,000; and

(4) If the person is found to have a concentration of alcohol of 0.18 or more in his or her blood or breath, order the person to attend a program of treatment for the abuse of alcohol or drugs pursuant to the provisions of NRS 484C.360.

(b) For a second offense within 7 years, is guilty of a misdemeanor. Unless the sentence is reduced pursuant to NRS 484C.330, the court shall:

(1) Sentence the person to:

(I) Imprisonment for not less than 10 days nor more than 6 months in jail; or

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(II) Residential confinement for not less than 10 days nor more than 6 months, in the manner provided in NRS 4.376 to 4.3766, inclusive, or 5.0755 to 5.078, inclusive;

(2) Fine the person not less than $750 nor more than $1,000, or order the person to perform an equivalent number of hours of community service while dressed in distinctive garb that identifies the person as having violated the provisions of NRS 484C.110 or 484C.120; and

(3) Order the person to attend a program of treatment for the abuse of alcohol or drugs pursuant to the provisions of NRS 484C.360.

A person who willfully fails or refuses to complete successfully a term of residential confinement or a program of treatment ordered pursuant to this paragraph is guilty of a misdemeanor.

(c) Except as otherwise provided in NRS 484C.340, for a third offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than $2,000 nor more than $5,000. An offender who is imprisoned pursuant to the provisions of this paragraph must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

3. A term of confinement imposed pursuant to the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace, except that a person who is convicted of a second or subsequent offense within 7 years must be confined for at least one segment of not less than 48 consecutive hours. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the offender, but any sentence of 30 days or less must be served within 6 months after the date of conviction or, if the offender was sentenced pursuant to NRS 484C.320 or 484C.330 and the suspension of his or her sentence was revoked, within 6 months after the date of revocation. Any time for which the offender is confined must consist of not less than 24 consecutive hours.

4. Jail sentences simultaneously imposed pursuant to this section and NRS 482.456, 483.560, 484C.410 or 485.330 must run consecutively.

5. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.

6. For the purpose of determining whether one offense occurs within 7 years of another offense, any period of time between the two offenses during which, for any such offense, the offender is imprisoned, serving a term of residential

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confinement, confined in a treatment facility, on parole or on probation must be excluded.

NRS § 484C.410 Penalties when offender previously convicted of certain felonious conduct or homicide; segregation of offender; intermittent confinement; consecutive sentences; aggravating factor. (Nevada Revised Statutes (2013 Edition))

1. Unless a greater penalty is provided in NRS 484C.440, a person who has previously been convicted of:

(a) A violation of NRS 484C.110, 484C.120 or 484C.430;

(b) A homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or resulting from any other conduct prohibited by NRS 484C.110, 484C.130 or 484C.430; or

(c) A violation of a law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a) or (b).[1]

LEGAL ARGUMENT

Enhancements to all criminal actions have been subject to a great deal of judicial scrutiny over the years. The enhancement of multiple prior misdemeanor crimes has also been subject to judicial review. Certain core principles have emerged from enhanced judicial scrutiny. Among the principles articulated is the principle that prior criminal convictions arising out of a plea agreement must be scrutinized by the enhancing court to ensure that constitutional principles were respected; and persons convicted in another jurisdiction should be convicted on a similar basis. In this case, that principle applies to the scrutiny of the criminal conviction in the State of Utah that is the predicate crime enhancing Stella's later Nevada charges a felony.

We know that absent that Utah conviction, Stella would be facing a misdemeanor crime in Nevada and lesser penalties would be a available to her including specialized alcohol treatment. Because the Utah criminal charge is so important, as are all felony crimes, the court should carefully scrutinize that conviction, before trial, to ensure compliance with Nevada law and constitutional principles.

STELLA PLEAD TO A MISDEMEANOR TYPE CHARGE IN UTAH

[1] The 2013 version of the statute is quoted since that was the law in effect at the time of this incident.

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First, Stella was advised by her legal counsel, and was treated by the court, as though her felony crime in Utah was a misdemeanor. Stella received no prison sentence, only 62 days in jail. Stella received a very short sentence of probation, lasting less than six months, that she successfully completed. Stella believed her crime was not being charged as a felony as a result of her plea agreement. Stella's belief was reasonable under the circumstances and comported with her treatment by the court. Stella served 62 days in jail and served two years probation.

Had Stella been properly advised that she was being convicted of a felony, not just a misdemeanor, and that that felony would result in all future driving under the influence charges being treated as a felony, she would never have agreed to the plea agreement in Utah.

The principle that a plea agreement must be knowingly made is in line with the cases noted in the legal section of this memorandum. Both the *State vs. Perry* and *State vs. Smith* cases support the following proposition: A plea agreement that results in a misdemeanor crime means the crime charged is regarded as a misdemeanor for enhancement purposes.

In this case the Utah crime, although designated as a felony in the pleadings, had been agreed to among the parties for misdemeanor treatment.

STELLA'S CHARGE IN UTAH WOULD HAVE BEEN A MISDEMEANOR IN NEVADA

Second, the two enhancing convictions used by the Utah court dated from 1995 and 1998 for a May 2004 conviction enhancement. That 2004 conviction would not have been a felony in Nevada. That is because in Nevada, the 1995 conviction could not have counted as an enhancing conviction because it was outside the seven-year look back enhancement period. Thus, in Nevada the 2004 conviction would only have been treated as a second offense, a misdemeanor, where in Utah it was treated as a felony.

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NRS 484C.400(2), provides that "An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense **constitutes a prior offense** for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury."

At the time of her Utah conviction, Utah law provided that two or more alcohol convictions "within ten years of this violation" qualified for enhancement purposes to a felony. This provision is not the same as Nevada Law at the time of the conviction, or today. Nevada law requires the prior to have occurred within the seven previous years of the current charge for enhancement purposes. Accordingly, because the Utah conviction would not have been a felony if committed in Nevada, it should not be available for use as a qualifying conviction today. See Exhibit A attached.

Nevada's law states: "(c) A violation of a law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a) or (b)." Utah's law does not prohibit the same or similar conduct as set forth in (a) or (b).

CONCLUSION

For the two reasons noted above: Stella's plea bargain amounted to a second misdemeanor driving under the influence and that bargain should be respected in Nevada; and because Stella's crime would not have been treated as a felony in Nevada at the time she committed the crime in Utah, this court should dismiss this case as charged, or, alternatively, remand the case to the Justice Court for further proceedings.

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AFFIDAVIT OF STELLA SINDELAR

STATE OF NEVADA)
) ss.
COUNTY OF WHITE PINE)

Affiant, after being duly sworn, testifies under oath as follows:

At the time Affiant was offered a plea deal in Utah on the December 28, 2003 charge, Affiant was advised the crime would be treated as a misdemeanor, Affiant was not be sent to prison and probation would be two years or less.

Affiant successfully completed probation in accordance with the plea agreement.

Affiant was never advised that the deal would result in a felony crime that would remain on my record as an enhancement so that the next offense would be an automatic felony.

The facts set forth in the foregoing motion are true.

Further this Affiant sayeth naught.

DATED: 5/10/15

Stella Sindelar

SUBSCRIBED AND SWORN to before me

this 10th day of June, 2015.

ALISHA ADAMS
Notary Public-State of Nevada
APPT. NO. 97-2573-11
My App. Expires June 17, 2017

Notary Public

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of Richard W. Sears Law Firm and that on the date below written, I deposited in the United State Post Office, as Ely, Nevada, in a sealed envelope with first class postage fully paid, a true and correct copy of the above and foregoing Motion to Dismiss, dated and addressed as follows:

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Ely, Nevada: and/or

☐ Via Facsimile; and/or

☐ To be hand-delivered to the attorney listed below at the address indicated below:

Mr. Michael Wheable
White Pine County District Attorney
801 Clark Street, Suite 3
Ely, NV 89301

Date: June 15, 2015.

An employee of
Richard W. Sears Law Firm

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DAVID B. YOCOM
District Attorney for Salt Lake County
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Telephone: (801) 468-3422

IN THE THIRD DISTRICT COURT, WEST VALLEY DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- **STELLA L. SINDELAR** DOB 09/26/63, **9051 South 1075 West #A208** **West Jordan, UT 84088** **530-88-7980** Defendant.	Screened by: D. Walsh Assigned to: TBAG DAO # 03001766 BAIL: $5,000 Warrant/Release: Non-Jail **INFORMATION** Case No. 031100411 FS

The undersigned Detective ~~Mr. Soper~~ R. Bell - West Jordan Police Department, Agency Case No. 02H033133, under oath states on information and belief that the defendant committed the crimes of:

COUNT I

DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, (WITH CONVICTIONS), a Third Degree Felony, at 7400 South 4800 West, in Salt Lake County, State of Utah, on or about December 28, 2002, in violation of Title 41, Chapter 6, Section 44(i), Utah Code Annotated 1953, as amended, in that the defendant, **STELLA L. SINDELAR**, did operate or was in actual physical control of a vehicle had sufficient alcohol in her body that a chemical test, the alleged operation or physical control showed that the defendant had a blood or breath alcohol concentration of .08 grams or greater; and the defendant has at least two or more alcohol convictions, any drug, or a combination of both-related reckless under Utah Code § 41-6-44 within ten years of this violation.

9 - DA Discovery

COUNT II
SPEEDING, a Class C Misdemeanor, at 7400 South 4800 West, in Salt Lake County, State of Utah, on or about December 28, 2002, in violation of Title 41, Chapter 6, Section 46, Utah Code Annotated 1953, as amended, in that the defendant, **STELLA L. SINDELAR**, a party to the offense, did operate a motor vehicle at a speed of approximately 48 miles per hour, in an area where the maximum permissible speed is 35 miles per hour, upon said public highway or part of a highway or street, of Salt Lake County.

COUNT III
OPEN CONTAINER, a Class C Misdemeanor, at 7400 South 4800 West, in Salt Lake County, State of Utah, on or about December 28, 2002, in violation of Title 41, Chapter 6, Section 44.20, Utah Code Annotated 1953, as amended, in that the defendant, **STELLA L. SINDELAR**, a party to the offense, did keep, carry, possess or transport or allow another to keep, carry, possess or transport in the passenger compartment of a motor vehicle on any public street or highway, any container whatsoever which contained any alcoholic beverage if the container had been opened, the seal thereon broken, or the contents of the container partially consumed.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Officer R. Faircloth, Detective M. Soper, Officer B. Thomas

PROBABLE CAUSE STATEMENT:

Your Affiant bases probable cause on the following:

The statement of Officer R. Faircloth of the West Jordan Police Department that on or about December 28, 2002, at 7400 South 4800 West, in Salt Lake County, State of Utah, he stopped a vehicle driven by STELLA L. SINDELAR, as she was traveling at 48 mph in a 35 mph zone.

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.
I, the undersigned, Clerk of the Third District Court, State of Utah, Salt Lake County, West Jordan Department, do hereby certify that the foregoing is a true and correct copy of an original document on file in this office.
Witness my hand and seal of said court this 15th day of April, 2013.
CLERK

Upon contact with SINDELAR, Officer Faircloth smelled a strong odor of an alcoholic beverage coming from the defendant's breath. Officer Faircloth also observed an open bottle of beer between SINDELAR's legs. SINDELAR stated she had had three to six beers. SINDELAR failed the field sobriety tests, and an intoxilyzer test showed her BAC to be .167.

Further, SINDELAR has two prior convictions for driving under the influence of alcohol. The first at the Ely Justice Court, case number 32-95000, and the second at the Ely Municipal Court, case number 97-072.

DETECTIVE M. SOPER
Affiant

Subscribed and sworn to before me this 11 day of February, 2003.

MAGISTRATE

Authorized for presentment and filing:

DAVID E. YOCOM, District Attorney

Deputy District Attorney
February 5, 2003
JM/gam/03001766

11 - DA Discovery

COPY

Case No. CR-1304037

Dept. No. 1

FILED
2013 JUN -5 PM 1:34
LINDA F. BURLEIGH
WHITE PINE COUNTY CLERK
BY _____
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,
Plaintiff,

v.

STELLA LOUISE SINDELAR,
Defendant.

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, STELLA LOUISE SINDELAR, by and through his attorneys of record, DIANE R. CROW, ESQ., Nevada State Public Defender; and CHARLES H. ODGERS, ESQ., Deputy Nevada State Public Defender; and hereby files his Motion to Suppress Blood Evidence Obtained without a Search Warrant and Without Exigent Circumstances. This motion is based upon the attached Points and Authorities, all documents and pleadings on file herein and all relevant points of law and rules of court.

Dated this 5 day of June, 2013.

DIANE R. CROW, ESQ.
Nevada State Public Defender

CHARLES H. ODGERS, ESQ., Deputy
Nevada State Public Defender (Bar No. 8596)
P.O. Box 151690
Ely, NV 89315

NOTICE OF MOTION

PLEASE TAKE NOTE that the Defendant shall bring the foregoing Motion on for hearing on the _____ day of _____, 2013 at the hour of _____, in Department 1 of the 7th Judicial District Court, Ely, Nevada or as soon thereafter as counsel may be heard.

DATED this 5 day of June, 2013.

DIANE R. CROW
Nevada State Public Defender

CHARLES H. ODGERS, Esq.
Deputy State Public Defender
P.O. Box 151690
Ely, NV 89301
(775) 289-1680

POINTS AND AUTHORITIES

I.

INTRODUCTION

This case arises out of an original charge of Driving Under the Influence of a Controlled Substance with a prior felony DUI in violation of NRS 484C.110, NRS 484C.020 and NRS 484C.410. The preliminary hearing was held on April 15, 2013. The transcript was received by the Defense on May 14, 2013. This motion follows to suppress the blood evidence obtained by the White Pine County Sheriff's Department in a warrantless seizure and search.

The sole basis for the State bringing this charge is based upon a blood draw taken pursuant to Nevada's Implied Consent law, without a search warrant issued by a neutral magistrate upon a showing of probable cause, let alone probable cause to believe that she was under the influence at the time law enforcement conducted its traffic stop. At the preliminary

hearing there was no testimony establishing probable cause as there was no driving pattern to show that Ms. Sindelar was under the influence. Further, there was no testimony regarding the existence of exigent circumstances negating the warrant requirement of the Fourth Amendment. As a consequence, Ms. Sindelar requests that the blood obtained in violation of her Fourth Amendment be suppressed.

II.

STATEMENT OF FACTS

On March 27, 2013, at 7:38 pm White Pine County Deputy Caleb Sumerall was traveling northbound on Great Basin Highway when a vehicle in front of him turned right onto East Aultman, Ely, White Pine County, Nevada.[1] Deputy Sumerall testified that when the driver executed the right hand turn he noted that the right brake light was non-operable.[2] He then executed a traffic enforcement stop.[3] The driver pulled into the parking lot at Shooters on Aultman.[4]

Deputy Sumerall testified that he asked and received Ms. Sindelar's driver's license, registration and proof of insurance.[5] As she provided the requested information Deputy Sumerall testified that he smelled the odor of an alcoholic beverage emitting from the vehicle.[6] Upon

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[1] Preliminary Hearing Transcript, p. 12, ll. 7-8 (hereinafter referred to as PHT)

[2] PHT, p. 12, l. 9

[3] PHT, p. 12, ll. 19-23

[4] PHT, p. 13, ll. 1-2

[5] PHT, p. 13, ll. 8-9

[6] PHT, p. 14, ll. 23-24

questioning, Ms. Sindelar denied drinking.[7] Deputy Sumerall added that she appeared to have watery eyes and slurred speech.[8] He notified dispatch that he had a possible DUI which results in a second officer responding to his location to assist.[9] A total of two other officers arrived on scene, Deputy Sean Wilkin and Eric Kolada.[10] Deputy Sumerall determined he would have Ms. Sindelar perform field sobriety testing and asked her to exit her vehicle and stand in front of his patrol vehicle.[11] The sole basis for his decision to ask Ms. Sindelar to perform these field sobriety tests was because he "could then smell the odor of an alcoholic beverage emitting from her person."[12]

Deputy Sumerall asked Ms. Sindelar to complete the Horizontal Gaze Nystagmus, the Walk and Turn, and the One Legged Stand.[13] According to Deputy Sumerall Ms. Sindelar failed the Horizontal Gaze Nystagmus because she lacked smooth pursuit, showed signs of nystagmus at maximum deviation and showed nystagmus prior to the forty five degree.[14]

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[7] PHT, p. 15, ll. 3-4

[8] PHT, p. 15, l. 7

[9] PHT, p. 15, ll. 14-23

[10] PHT, p. 16, ll. 1-4

[11] PHT, p. 16, ll. 8-16

[12] PHT, p. 16, ll. 18-19

[13] PHT, p. 16, l. 24, p. 17, l. 1

[14] PHT, p. 17, ll. 10-15

Next he asked Ms. Sindelar to perform the Walk and Turn after he explained and demonstrated the test.[15] During the walk and turn, the only indicator he recalled her failing was that she allegedly used her arms during the test.[16]

On the third test, the One Legged Stand, Deputy Sumerall testified he instructed and demonstrated for Ms. Sindelar on how to perform the test.[17] According to Deputy Sumerall testified that Ms. Sindelar put her foot down for balance and used her arms for balance and counted differently.[18] After completing the standard field sobriety testing, Deputy Sumerall placed Ms. Sindelar under arrest for driving under the influence.[19]

After being arrested Ms. Sindelar was transported to the Public Safety Building and a blood tech was called to "extract blood from Miss. Sindelar."[20] Deputy Sumerall observed the blood draw, took care and custody of the blood and packaged for submittal to the Washoe County crime laboratory.[21]

On cross Deputy Sumerall testified that he smelled the moderate odor of alcohol emitting from the vehicle.[22] He further clarified that Ms. Sindelar raised her arms parallel to her

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[15] PHT, p. 18, ll. 4-10

[16] PHT, p. 18, l. 24, p. 19, l. 1

[17] PHT, p. 20, ll. 19-24, p. 21, ll. 1-13

[18] PHT, p. 21, l. 24, p. 22, ll. 1-8

[19] PHT, p. 23, ll. 20-23

[20] PHT, p. 24, ll. 1-3

[21] PHT, pp. 24-26

[22] PHT, p. 33, ll. 3-6

shoulders during the Walk and Turn test.[23] However, on cross Deputy Sumerall agreed that he did not document any indicators of failure, including raising her arms for balance.[24] On the One Legged Stand, Deputy Sumerall testified that Ms. Sindelar put her foot down once, raised her arms parallel to her shoulders.[25]

There was no testimony regarding any exigent circumstances supporting a warrantless seizure of Ms. Sindelar's blood.

III.

LEGAL ARGUMENT

A. A SUPPRESSION MOTION IS THE APPROPRIATE METHOD TO ADDRESS THE UNCONSTITUTIONAL NATURE OF THE WARRANTLESS SEARCH OF MS. SINDELAR'S BLOOD IN THIS CASE.

The Nevada Supreme Court has held that a suppression motion is the proper method to challenge the constitutionality of a seizure and subsequent search of a citizen. If the Court determines that the seizure and search are unconstitutional, then the evidence obtained from that unconstitutional search and seizure must be suppressed as the fruit of the poisonous tree.[26] Evidence obtained in violation of the Ms. Sindelar's constitutional rights must be suppressed.[27]

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[23] PHT, p. 44, ll.14-18

[24] PHT, p. 44, ll. 7-16 (Deputy Sumerall likewise agreed that he did not document any indicators, but believed his recollection of her using her arms for balance)

[25] PHT, p. 54

[26] Somee v. State of Nevada, 124 Nev. 434, 443, 187 P.3d 152 (Nev. 2008) (citing Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407 (1963))

[27] Wyatt v. State, 77 Nev. 490, 501, 367 P.2d 104, 110 (1961) (citing Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684 (1961) ("[a]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."))

Unless a recognized exception applies, both physical evidence and statements obtained as a result of an illegal search and seizure should be suppressed.[28]

In Weeks v. United States,[29] the Supreme Court reasoned that evidence obtained in violation of the Fourth Amendment must be excluded in federal courts. The Supreme Court in a subsequent case held that this right flowed to citizens when the action is brought in state court as well.[30] To hold otherwise is to grant the right but in reality withhold its privilege and enjoyment by the very people it is meant to protect.[31] Unless the police officer relies on a neutral magistrate's probable cause determination when issuing a warrant, there is no good faith exception.[32] Therefore, if the Court finds the seizure and search to be unconstitutional or illegal, then all evidence flowing from the illegally obtained evidence must be suppressed, whether the evidence is physical or verbal.

Recently the U.S. Supreme Court generally ruled that absent exigent circumstances, blood draws in driving under the influence cases, seized and searched without a search warrant, may violate the Fourth Amendment. The Supreme Court mandated that lower courts employ a case by case analysis of the totality of circumstances in which the person's blood was drawn to determine the constitutionality of the seizure and search of the blood draw. If the trial court

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[28] Wong Sun, 371 U.S. at 484-85, see also Arterburn v. State, 111 Nev. 1121, 1126-27, 901 P.2d 668, 671 (1995)

[29] 232 U.S. 383, 398, 34 S. Ct. 341 (1941)

[30] Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684 (1961) (reasoning that the Fourth Amendment right carries with it a "most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure".)

[31] Id. 367 U. S. at 656

[32] United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984)

determines there is no exigency shown by the State that precluded law enforcement from obtaining a search warrant, then the evidence must be suppressed as a violation of the Fourth Amendment.[33] As articulated below, even if the initial traffic stop was legal, the question is whether law enforcement violated Ms. Sindelar's Fourth Amendment right to be free from a warrantless search of her bodily fluids, in this case blood, based on the totality of circumstances. Based on the facts of this case, the answer is clearly yes, the State violated Ms. Sindelar's constitutional right by conducting a "forced blood draw" to obtain evidence against her in this case. Because Ms. Sindelar's constitutional rights were violated, the Court must suppress the blood evidence as a matter of law.

B. NEVADA'S IMPLIED CONSENT LAW IS UNCONSTITUTIONAL FOR CRIMINAL PROSECUTION BECAUSE IT REQUIRES A PERSON SUSPECTED OF THE CRIME OF DRIVING UNDER THE INFLUENCE IN VIOLATION OF NRS 484C.110, 484C.120,[34] 484C.130[35] OR 484C.430[36] TO PROVIDE BREATH, BLOOD AND/OR URINE SAMPLES WITHOUT LAW ENFORCEMENT BEING REQUIRED TO SHOW PROBABLE CAUSE TO A NEUTRAL MAGISTRATE FOR ISSUANCE OF A SEARCH WARRANT TO SEARCH THE PERSON FOR EVIDENCE OF THE CRIME OF DRIVING WHILE UNDER THE INFLUENCE AND IT REQUIRES AN INDIVIDUAL TO PROSPECTIVELY WAIVE THEIR CONSTITUTIONAL RIGHT TO BE FREE FROM WARRANTLESS SEARCHES OF THEIR BLOOD, BREATH OR URINE.

Nevada's Implied Consent law is codified at NRS 484C.160 and states:

> 1. Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to an

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[33] Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013)

[34] NRS 484C.120 generally prohibits driving under the influence while operating or being in actual physical control of a commercial vehicle.

[35] NRS 484C.130 is the vehicular homicide statute, while the penalty is addressed in NRS 484C.440

[36] NRS 484C.430 addresses penalties when a death or substantial bodily harm results from a violation of any provision of NRS 484C.110

evidentiary test of his or her blood, urine, breath or other bodily substance to determine the concentration of alcohol in his or her blood or breath or to determine whether a controlled substance, chemical, poison, organic solvent or another prohibited substance is present, if such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430.

2. If the person to be tested pursuant to subsection 1 is dead or unconscious, the officer shall direct that samples of blood from the person be tested.

3. Any person who is afflicted with hemophilia or with a heart condition requiring the use of an anticoagulant as determined by a physician is exempt from any blood test which may be required pursuant to this section but must, when appropriate pursuant to the provisions of this section, be required to submit to a breath or urine test.

4. If the concentration of alcohol in the blood or breath of the person to be tested is in issue:

(a) Except as otherwise provided in this section, the person may refuse to submit to a blood test if means are reasonably available to perform a breath test.

(b) The person may request a blood test, but if means are reasonably available to perform a breath test when the blood test is requested, and the person is subsequently convicted, the person must pay for the cost of the blood test, including the fees and expenses of witnesses in court.

(c) A police officer may direct the person to submit to a blood test if the officer has reasonable grounds to believe that the person:

(1) Caused death or substantial bodily harm to another person as a result of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or as a result of engaging in any other conduct prohibited by NRS 484C.110, or 484C.130; or

(2) Has been convicted within the previous 7 years of:

(I) A violation of NRS 484C.110, 484C.120, 484C.130, 484C.430, subsection 2 of NRS 488.400,[37] NRS 488.410,[38] 488.420[39] or 488.425[40] or a law of another jurisdiction that prohibits the same or similar conduct; or

(II) Any other offense in this State or another jurisdiction in which death or substantial bodily harm to another person resulted from conduct prohibited by a law set forth in sub-subparagraph (I).

5. If the presence of a controlled substance, chemical, poison, organic solvent or another prohibited substance in the blood or urine of the person is in issue, the officer may direct the person to submit to a blood or urine test, or both, in addition to the breath test.

6. Except as otherwise provided in subsections 3 and 5, a police officer shall not direct a person to submit to a urine test.

7. If a person to be tested fails to submit to a required test as directed by a police officer pursuant to this section and the officer has reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430,

the officer may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested. Not more than three such samples may be taken during the 5-hour period immediately following the time of the initial arrest. In such a circumstance, the officer is not required to provide the person with a choice of tests for determining the concentration of alcohol or presence of a controlled substance or another prohibited substance in his or her blood.

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[37] NRS 488.400 prohibits one from driving a boat, skis or other craft on the water under the influence of intoxicating liquor or under the influence of any controlled substance.

[38] NRS 488.410 mirrors NRS 484C.110 and prohibits one from operating a motor boat while under the influence of alcohol or controlled substances.

[39] NRS 488.420 provides the penalty for operating a boat while under the influence if death or substantial bodily harm occurs as a result of violating NRS 488.410.

[40] NRS 488.425 is the homicide statute if a death occurs while operation of a motor boat while under the influence of alcohol or a controlled substance.

8. If a person who is less than 18 years of age is directed to submit to an evidentiary test pursuant to this section, the officer shall, before testing the person, make a reasonable attempt to notify the parent, guardian or custodian of the person, if known.

Nevada has an interest in protecting the public from individuals operating a motor vehicle while under the influence of alcohol or prohibited controlled substances. For purposes of this motion it is conceded that this is a legitimate State interest that allows the State to promulgate legislation to take driving privileges away from individuals who drive or are in actual physical control of a motor vehicle while under the influence of intoxicating liquor or controlled substances. Further, for purposes of this motion, it is conceded that for **administrative purposes only** that the State has the right to require individuals to submit to evidentiary testing for purposes of maintaining their driver's license and conditioning the issuance of the driver's license on their consent to prove that at any time an officer reasonably believes that the individual is driving under the influence to request them to submit to evidentiary testing of their breath, blood or urine and based upon the results of that voluntarily provided evidentiary testing or evidence of the refusal to provide a voluntary sample of their breath, blood or urine, that the individual's driving privileges in the State of Nevada may be suspended or revoked.[41] However, criminal prosecutions are different from administrative or civil processes.

NRS 484C.160 is unconstitutional for criminal prosecution purposes because it requires all drivers in the State of Nevada and even drivers who have driver's licenses in other States to waive their right to require law enforcement to obtain a warrant for the seizure and search of their bodily fluids, before they are ever suspected of committing a crime. This can hardly be

[41] See generally NRS 484C.220

considered a knowing and voluntary waiver of Ms. Sindelar's Fourth Amendment Right to be free from warrantless search and seizure of her bodily fluids.

"What suffices for waiver depends on the nature of the right at issue. Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[42] Fundamental rights require the defendant to personally make an informed waiver of that right.[43]

As a general proposition, the law presumes that a defendant who, with a full understanding of her rights, acts inconsistently with the exercise of those known rights, it may be inferred that she has made a deliberate choice to relinquish the protections afforded to her through that right.[44]

The Due Process Clause of the U.S. Constitution protects certain fundamental liberty interests from deprivation by the government unless the infringement is narrowly tailored to serve a compelling state interest.[45] Fundamental rights and liberties deeply rooted in this Nation's history and implicit in the concept of ordered liberty qualify for such protection. Id. The Fourth Amendment guarantees the protection of people to be secure in their person against unreasonable searches and seizures. This is a fundamental right and is preserved by requiring

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[42] United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770 (1993)

[43] Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S. Ct. 1019 (1938) (right to counsel case)

[44] North Carolina v. Butler, 441 U.S. 369, 372-73, 99 S. Ct. 1755 (1979)

[45] Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2302 (1997)

searches to be conducted pursuant to a warrant issued by an independent judicial officer or that a recognized exception to the warrant requirement be met, such as exigent circumstances.[46]

The constitutionality of a statute is a question of law.[47] Because statutes are presumed to be valid, the defendant bears the heavy burden of demonstrating the challenged statute is unconstitutional.[48]

Nevada's Implied Consent law is unconstitutional because a U. S. citizen cannot not be required to prospectively waive his/her constitutional rights. For example, in order for a criminal defendant to waive his right to represent himself as guaranteed by the Sixth Amendment, the Court must advise him of his right to have counsel appointed or retained, and advise him of the dangers and pitfalls of self-representation before allowing the criminal defendant to represent himself. In order for a criminal defendant's voluntary confession to be considered by the trier of fact, the defendant must make a knowing and voluntary waiver of his right to remain silent pursuant to the Fifth Amendment,[49] even though an implied waiver may be inferred from the actions and words of the person interrogated.[50] However, a defendant's Miranda right to counsel must be unambiguously invoked or an equivocal statement invoking his request to counsel and one will not be inferred.[51] When the defendant's course of conduct, coupled with an

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[46] California v. Carney, 471 U.S. 386, 390, 105 S. Ct. 2066 (1985) (dealt with the motor vehicle exception)

[47] Collins v. State, 125 Nev. 60, 62, 203 P.3d 90, 91 (2009)

[48] Douglas Disposal v. Wee Haul, LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007)

[49] See generally, Arizona v. Miranda, 384 U.S. 436, 86 S. Ct. 1602 (1966)

[50] North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755 (1979)

[51] Moran v. Burbine, 475 U. S. 412, 421, 106 S. Ct. 1135 (1986)

acknowledgement of his understanding of his rights has been made, his conduct may imply a knowing and voluntary waiver of that right.[52]

The criminal defendant's right to trial, right to require the state to prove each and every element of the charge against him, the right to confront and cross examine the state's witnesses, the right to subpoena witnesses are all rights that a criminal defendant must knowingly and voluntarily waive, or a plea agreement is constitutionally invalid.[53]

In the Fourth Amendment context, waiver of the right to be free from warrantless searches by the government or consent to be searched must be freely, intelligently, knowingly and voluntarily given.[54] Waiver or consent cannot be inferred by mere acquiescence to a claim of lawful authority.[55] A search conducted in reliance on a warrant, that is later invalidated, cannot thereafter be justified on the basis of consent.[56] The result is the same even if the State does not rely upon the validity of the warrant or fails to show the existence of a valid search warrant.[57] Where law enforcement declares authority to search pursuant to a search warrant, their actions notify the party to be searched that they have no right to resist that search.[58] This constitutes coercion and where there is coercion, there is no consent.[59]

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[52] North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755 (1979)

[53] NRS 174.061

[54] Wren v. United States,

[55] Amos v. United States, 255 U.S. 131, 317, 42 S.Ct. 276 (1921); Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367 (1948)

[56] United States v. Elliott, 210 F.Supp, 357, 360 (Mass. 1962)

[57] Bumper v. North Carolina, 391 U.S. 543, 549, 88 S. Ct. 1788 (1968)

[58] Bumper, 391 U.S. at 550, 88 S. Ct. at 1792

[59] Id.

Nevada's Implied Consent statute is not dissimilar to the situation in Bumper, supra. In Nevada, law enforcement can compel, with reasonable force, the production of breath, blood or urine if the suspect refuses to provide the sample, without the protections afforded through the search warrant process.[60] Under Nevada's Implied Consent law, the suspect has no right to refuse to provide breath, blood or urine samples and if they do so, then law enforcement "may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested."[61] This does not show a knowing, intelligent and voluntary waiver of the suspect's Fourth Amendment right to be free from a warrantless search of his person and acquiescence to law enforcements demands does not constitute consent. Nevada's Implied Consent law obviates the Fourth Amendment and as such is unconstitutional.

According to Deputy Sumerall's report[62], after he conducted field sobriety tests he determined that Ms. Sindelar was under the influence of alcohol, arrested her, transported her to the Public Safety Building and read her Nevada's Implied Consent and informed her that he would be conducting a blood draw. She was not provided a choice and was told that if she refused, he would use that force necessary to draw her blood.[63] Based on Deputy Sumerall invoking Nevada's Implied Consent, Ms. Sindelar submitted to his authority and two vials of her blood was drawn.

The facts of this case are completely devoid of any evidence of exigent circumstances that negates the warrant requirement of the Fourth Amendment. Rather the opposite is true. Deputy Sumerall testified that after he read Ms. Sindelar Nevada's Implied Consent, he directed

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[60] NRS 484C.160 (7)

[61] Id.

[62] *See* Ex. A

[63] NRS 484C.160

the blood draw technician to obtain the two whole blood samples. This is the same blood evidence that the State wishes to use to convict Ms. Sindelar.

There was no consent to the blood draw. There was no warrant sought or obtained. There was no exigent circumstances that would fall within a recognized exception to the Fourth Amendment's warrant requirement. Since no exception has been proffered, because none existed, this search violated the Fourth Amendment and the evidence obtained from the warrantless search must be suppressed as a matter of law.

C. DEPUTY SUMERALL'S FAILURE TO SEEK AND OBTAIN A SEARCH WARRANT VIOLATES THE FOURTH AMENDMENT AS THERE WERE NO ARTICULABLE EXIGENT CIRCUMSTANCES WHICH CREATED AN EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

NRS 484C.110 states:

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree

which renders the person incapable of safely driving or exercising actual physical control of a vehicle,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this State is not a defense against any charge of violating this subsection.

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his or her blood or urine that is equal to or greater than:

Prohibited substance		Urine Nanograms per milliliter	Blood Nanograms per milliliter
(a)	Amphetamine	500	100
(b)	Cocaine	150	50
(c)	Cocaine metabolite	150	50
(d)	Heroin	2,000	50
(e)	Heroin metabolite:		
	(1) Morphine	2,000	50
	(2) 6-monoacetyl morphine	10	10
(f)	Lysergic acid diethylamide	25	10
(g)	Marijuana	10	2
(h)	Marijuana metabolite	15	5
(i)	Methamphetamine	500	100
(j)	Phencyclidine	25	10

4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his or her blood or breath was tested, to cause the defendant to have a concentration of alcohol of 0.08 or more in his or her blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

5. A person who violates any provision of this section may be subject to the additional penalty set forth in NRS 484B.130.

The Fourth Amendment to the U.S. Constitution states in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." A warrantless search is, *per se*, unconstitutional, unless it falls within a recognized exception to the warrant requirement.[64] This includes searches of the type that involve the "compelled physical intrusion" beneath the skin of the person to be searched and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation.[65] This invasion into the body implicates an individual's "most personal and deep-rooted expectations of privacy."[66]

The facts in the McNeely case are rather simple. The highway patrol officer stopped Mr. McNeely when he observed the vehicle exceeding the speed limit and repeatedly cross the center line of the highway.[67] The highway patrol officer observed Mr. McNeely to have blood shot eyes, slurred speech and the odor of alcohol on his breath.[68] Upon questioning, Mr. McNeely admitted to consuming alcohol prior to driving.[69] When the trooper asked McNeely to exit the vehicle for field sobriety testing, the trooper stated that Mr. McNeely appeared unsteady on his

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[64] United States v. Robinson, 414 U.S. 218, 224 (1973)

[65] Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013)

[66] Winston v. Lee, 470 U.S. 753, 760 (1985); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616 (1989)

[67] McNeely, 133 S. Ct. at 1557

[68] Id.

[69] Id.

feet.[70] Mr. McNeely then performed poorly on the standard field sobriety tests, and refused to complete a preliminary breath test resulting in his arrest.[71]

As the trooper was transporting Mr. McNeely to the station for a breath test, Mr. McNeely indicated he would not provide a breath sample, so the trooper transported Mr. McNeely directly to the local hospital for a forced blood draw relying upon Missouri's Implied Consent statute.[72] Mr. McNeely refused to provide blood even after he was read Missouri's Implied Consent statute.[73] When he refused the trooper ordered the blood technician to take the blood.[74]

The issue before the McNeely Court was whether the natural metabolization of alcohol in the bloodstream presents an exigent circumstance that justified an exception to the Fourth Amendment's warrant requirement.[75] The Court held that the natural metabolization of alcohol does not create a per se exception to the warrant requirement in all driving under the influence cases.[76] Rather, consistent with other Fourth Amendment cases, lower courts must analyze these warrantless search cases on a case-by-case basis utilizing the totality of the circumstances as the basis for the analysis.[77]

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[70] McNeely, 133 S. Ct. at 1558

[71] Id.

[72] Id.

[73] Id. (Missouri's Implied Consent law is located at Mo. Ann. Stat. 577.020.1 and 577.041 and are very similar to Nevada's Implied Consent law.)

[74] Id.

[75] McNeely, 133 S. Ct. at 1556

[76] Id.

[77] Id. It should be noted that the Supreme Court did not address the constitutionality of Missouri's Implied Consent statutes

The Supreme Court's analysis reaffirmed that there are situations in which a warrantless search will be held to pass constitutional muster. Specifically the Court addressed the imminent danger of the destruction of evidence citing to its prior holdings in Cupp v. Murphy[78] and Ker v. California.[79] The Court then provided a series of examples which all hold that the Fourth Amendment analysis must necessarily turn on the "totality of the circumstances".[80] The Court reasoned that the general exigency exception focuses on "whether an emergency existed that justified a warrantless search" which mandates the case-by-case analysis.[81]

Even Schmerber v. California,[82] the sentinel case for all driving under the influence cases, was a totality of the circumstances case where Schmerber was injured in an automobile accident and taken to the hospital for treatment, where the police ordered the taking of his blood because the officer might have believed he was confronted with an emergency and a delay may have allowed for the destruction of evidence.[83]

The destruction of evidence that concerned the Court was caused because the officers had to investigate the accident, the defendant was taken to the hospital for treatment and there was no

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[78] 412 U.S. 291, 296, 93 S. Ct. 2000 (1973)

[79] 374 U.S. 23, 40-41, 83 S. Ct. 1623 (1963) (plurality opinion) acknowledging "there is a compelling need for official action and no time to secure a warrant" as the dangers involved with not allowing warrantless searches in certain circumstances.

[80] McNeely, 133 S. Ct. at 1559

[81] Id.

[82] 384 U.S. 757, 86 S. Ct. 1826 (1966)

[83] McNeely, 133 S. Ct. at 1559-60 (internal citations omitted)

time in order to obtain the warrant because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[84]

The Court did not adopt a categorical rule holding all warrantless searches of a DUI suspect's blood would be suppressed. In fact the Court held that in cases involving drunk driving investigations, where law enforcement can reasonably obtain a search warrant they must do so or at least make the attempt to do so, before a blood draw may be forced upon the suspect.[85] The Court acknowledged that there will be situations where a warrant is not practicable such that the dissipation rate of alcohol from the bloodstream will support a warrantless blood draw.[86]

NRS 179.045 authorizes Nevada's law enforcement to obtain search warrants telephonically. This is particularly important because law enforcement has at its disposal, in this jurisdiction, three magistrates capable of issuing search warrants. Moreover, NRS 179.025 states that "[a] search warrant authorized by NRS 179.015 to 179.115, inclusive, may be issued by a magistrate of the State of Nevada." In order to meet the needs of law enforcement, the Nevada legislature has seen fit to authorize not only the magistrates within a specific jurisdiction to issue search warrants, it allows any magistrate within the state to issue the search warrant, provided law enforcement can provide the magistrate with articulable facts to support the probable cause to issue the warrant.

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[84] McNeely, 133 S. Ct. at 1560 (internal citations omitted)

[85] McNeely, 133 S. Ct. at 1561. The Court cited to McDonald v. United States, 335 U. S. 451, 456, 69 S.Ct. 191 (1948) "('We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative')".

[86] Id.

In the case before this court, it is undisputed that Deputy Sumerall did not apply for or receive a search warrant. The incident began at 7:38 p.m. on March 27, 2013. Ms. Sindelar was arrested at 8:00 pm. At 8:28 pm her blood was drawn by Horace Herrin.[87] From the start of the incident until Ms. Sindelar's blood was drawn, fifty minutes passed. The record is devoid of any exigent circumstances which would support the taking of Ms. Sindelar's blood without a warrant.

In Jones v. State,[88] the Nevada Supreme Court was faced with a situation where the defendants were suspected of being under the influence of cocaine in violation of NRS 453.411. Law enforcement saw the defendants on the street and arrested them for being under the influence of cocaine, transported them to the Clark County Detention Center where they refused to provide blood or urine samples.[89] After refusing to provide blood or urine samples voluntarily, law enforcement ordered the warrantless seizure of the defendants' blood by force.[90] During the defendants' suppression hearings the state produced expert testimony establishing the dissipation rate of cocaine in the human body for the active drug at approximately 4 hours after ingestion, and 4 to 6 hours for the metabolite, while a criminalist with the Metro Crime Laboratory testified that the cocaine metabolite could remain in the bloodstream for as many as twelve hours after cocaine dissipates, meaning there was a window of 6 to 14 hours that law enforcement could use to obtain a warrant from a neutral magistrate.[91]

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[87] Ex. B

[88] 111 Nev. 774, 895 P.2d 643 (1995)

[89] Id. at 774-75

[90] Id. at 775-76

[91] Id.

The Court in affirming the motion to suppress reasoned that the difference between the unlawful use case and a driving under the influence case appears to be the difference in the dissipation rate of alcohol and the dissipation rate of cocaine (in that case).[92] The Court further reasoned that the State would not lose its evidence and opportunity to convict if it were required to obtain a warrant before forcibly withdrawing the suspect's blood.[93] The Court also reasoned that a delay of six hours or more to obtain a search warrant did not justify violating the defendant's Fourth Amendment rights.[94] Ultimately the Court held that the state failed to meet its "heavy burden of demonstrating that exceptional circumstances justified a departure from the normal procedure of obtaining a warrant."[95]

In this case, the substance is alcohol. NRS 484C.110 requires blood alcohol to be obtained within two hours of driving or being in actual physical control of a vehicle. The facts of this case show that law enforcement had plenty of time to obtain a warrant before the two hour requirement of NRS 484C.110 would be violated. The state cannot meet its "heavy burden of demonstrating that exceptional circumstances justified a departure from the normal procedure of obtaining a warrant." Deputy Sumerall testified that he believed Ms. Sindelar was under the influence of alcohol. However, in reviewing the evidence in the light most favorable to the state, Deputy Sumeral testified that Ms. Sindelar failed the horizontal gaze nystagmus test because she showed signs of nystagmus before maximum deviation. He fails to document any indicators on his report or the White Pine County DUI form showing Ms. Sindelar failed any aspect of the Walk and Turn, and the only indicator he identified on the One Legged Stand was she used her

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[92] Id. at 776

[93] Id.

[94] Id.

[95] Id. citing United State v. Alvarez, 810 F.2d 879, 881 (9th Cir. 1987) (internal citations omitted)

arms for balance. His testimony differs greatly from his written report, calling into suspect his recollection of this particular arrest. It is possible that Deputy Sumerall confused Ms. Sindelar's case with another case. It is reasonable to infer based on his testimony, that the report was more accurate then his testimony as he failed to document most of the facts he testified to during the preliminary hearing. The State put forth no evidence to support any "exceptional circumstances" justifying a departure from the normal procedures for obtaining a search warrant pursuant to NRS 179.045.

Because law enforcement did not obtain a warrant pursuant to the Fourth Amendment, and there were no exigent circumstances articulated by law enforcement to support the warrantless forced drawing of Ms. Sindelar's blood, the taking of Ms. Sindelar's blood violated her Fourth Amendment rights and as such the blood draw and all evidence derived from that blood draw must be suppressed as a matter of law.

D. DEPUTY SUMERALL LACKED PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT TO CONDUCT AN EVIDENTIARY TESTING OF MS. SINDELAR'S BODILY FLUIDS.

The United States Supreme Court has declared that, even when a traffic stop is supported by probable cause, routine traffic stops should be viewed as a species of investigative stop rather than a formal arrest.[96] For this reason, traffic stops are governed by the principles expounded in Terry v. Ohio,[97] limiting the scope and duration of investigative stops. Id. In Knowles v. Iowa,[98] the Supreme Court held that, even when an officer might lawfully subject a motorist to a full custodial arrest for a traffic offense, the officer can not lawfully conduct the kinds of searches incident to arrest that would be authorized under the Fourth Amendment unless

[96] Berkemer v. McCarty, 468 U.S 420, 440-41, 104 S.Ct. 3138, 3150 n. 29 (1984)

[97] 392 U.S. 1, 88 S.Ct. 1868 (1968)

[98] 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998)

the officer actually performs a full custodial arrest. If the officer instead decides to conduct a routine traffic stop, then the officer's authority to search is limited by Terry v. Ohio, *supra*.[99]

Applying the principles of Terry, a traffic stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop".[100] A police officer's conduct during the stop must be "reasonably related in scope" to the circumstances that justified the stop in the first place.[101] Reasonableness is measured in objective terms by examining the totality of the circumstances.[102] "Reasonable suspicion is something short of probable cause, but it must be more than an "inchoate and unparticularized suspicion or 'hunch.'"[103] Thus a stop becomes unreasonable, and constitutionally invalid, if the duration, manner, or scope of the investigation exceeds these boundaries.[104] When courts assess the validity of the motorist's consent to search, courts have employed the totality of the objective circumstances test enunciated in Schneckloth v. Bustamonte[105] and Ohio v. Robinette.[106]

In this case, the Deputy did not testify to any type of driving pattern. The sole purpose for the traffic enforcement stop was based on the non-operable brake light. An inoperable tail brake light is a reason to pull someone over to notify them of the light not working. It is not

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[99] Knowles, 525 U.S. at 114, 118-19, 119 S.Ct. at 486, 488

[100] Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26 (1983) (plurality opinion)

[101] United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580 (1975) (quoting Terry, 392 U.S. at 29, 88 S.Ct. at 1884)

[102] Ohio v. Robinett, 519 U.S. 33, 39, 117 S.Ct. 417 (1996)

[103] United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1582 (1989) (quoting Terry, 392 U.S. at 27)

[104] Royer, 460 U.S. at 500, 103 S.Ct. at 1325-26

[105] 412 U.S. 218, 93 S.Ct. 2041 (1973)

[106] 519 U.S. 33, 117 S.Ct. 417 (1996)

probable cause to believe another crime is being committed. Further, the simple odor of alcohol on the breath likewise is not probable cause to believe that someone is driving impaired or under the influence. According to Deputy Sumerall, he smelled the odor of alcohol emitting from Ms. Sindelar's vehicle and he alleged that she had watery eyes and slurred speech. After the Deputy had Ms. Sindelar step out of her vehicle only then did he note the odor of alcohol emitting from her person. Based solely upon the odor of alcohol, water eyes and what he called slurred speech, as there was no adverse driving pattern, he determined that he had probable cause to believe she may be under the influence and required her to perform field sobriety testing.

Based upon his testimony there was a total of three uniformed police officers, in patrol cars with lights activated, present during the field sobriety testing. According to the Deputy, his front flashing lights were activated while Ms. Sindelar performed the field sobriety testing. Nonetheless, he testified that Ms. Sindelar failed the horizontal gaze nystagmus test, but then agreed he did not know if she suffered from nystagmus normally. He testified that he found three clues out of six possible clues of impairment. Deputy Sumerall then testified that Ms. Sindelar showed signs of impairment on the Walk and Turn, yet the only indicator he could remember was that she raised her arms. On the One Legged Stand test, Deputy Sumerall testified that Ms. Sindelar put her foot down once for balance and used her arms for balance, for two clues. Finally, Ms. Sindelar submitted to a preliminary breath test. Based on Deputy Sumerall's testimony, he believed Ms. Sindelar showed signs of impairment during the HGN, but based on that same testimony, none of the other tests showed signs of impairment.[107]

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[107] Deputy Sumerall did testify that he had a copy of the department issued DUI form which he testified he read word for word to her, but then he failed to document how Ms. Sindelar performed on each of those tests. He had no explanation as to why he failed to document the results. He also failed to document in his written narrative how Ms. Sindelar performed on the

Therefore, there was not reasonable suspicion that further criminal activity was afoot and Deputy Sumerall was without probable cause to arrest Ms. Sindelar at that point, let alone to seize and search her blood.

Under Terry v. Ohio,[108] the United States Supreme Court articulated a two-part test to determine the validity of a police stop. First, one must "'focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"[109] Second, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[110]

(1) Governmental Interest in Initial Stop

The first prong of Terry in this case is easily met. According to Deputy Sumerall, Ms. Sindelar's vehicle had a non-operable brake light, a safety device on the vehicle. He had a reason to effect the traffic stop, if nothing more than to inform Ms. Sindelar that her brake light was non-operable so that she could have it repaired. But the story does not stop there. Instead of simply issuing the fix it ticket, the Deputy, with nothing more than a hunch based soley upon the odor of alcohol began to establish that Ms. Sindelar was driving under the influence of alcohol even though there was no driving pattern to suggest that she could not safely operate her vehicle.

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field sobriety tests as well. He had nothing to use to refresh his recollection other than his general recollection that she performed poorly on these standard tests.

[108] 392 U.S. 1, 20-21 (1968)

[109] Id., quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)

[110] Terry at 21.

Ms. Sindelar acknowledges that the initial stop was constitutional. However, the second prong of Terry is implicated in this case and based on the totality of the circumstances, it is clear that the Officer violated Ms. Sindelar's rights when he subsequently asked her to step out of the vehicle and perform standard field sobriety tests without reasonable and articulable facts suggesting that Ms. Sindelar was unable to safely operate her motor vehicle.

(2) The Officer is unable to point to specific and articulable facts to warrant the subsequent seizure of Ms. Sindelar and require her to submit to standard field sobriety testing.

A traffic stop that is not extended beyond the time necessary to issue a ticket for a traffic infraction will not implicate the Fourth Amendment when a dog sniff is conducted during the initial stop.[111] Here, it appears that the stop took longer than the time necessary for the Deputy to verify there were no wants or warrants for Ms. Sindelar and issue her a citation for having a non-operable tail light. It was extended beyond the time necessary to issue the fix it ticket so that the Deputy could follow his hunch that she might be impaired.

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.[112] Reasonable suspicion is determined from the totality of circumstances and collective knowledge of the officer which is necessarily based on common sense judgments.[113] To meet the objective reasonable suspicion, the officer must be able to articulate more than a hunch of criminal activity.[114]

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[111] Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834 (2005)

[112] Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673 (2000) (internal citations omitted).

[113] United States v. Nunez, 455 F.3d 1223, 1226 (11th Cir. 2006)

[114] Wardlow, 528 U.S. at 123-24 (quoting Terry, 392 U.S. at 27), see also, State v. Lisenbee, 116 Nev. 1124, 1128, 13 P.3d 947 (Nev. 2000).

In Lisenbee,[115] the issue before the Court dealt specifically with when one is "in custody" for purposes of a seizure. When deputies stopped him as a potential burglary suspect, the deputies approached Mr. Lisenbee and asked for identification. He produced the identification and then "voluntarily pulled up his tee shirt to reveal a small Spyderco knife (a lightweight legal knife) and a cellular phone that were both clipped to his belt." Id. 116 Nev. at 1126. Thereafter, the deputies "reached over to grab the knife and attempted to hold Lisenbee's arm in order to perform a pat down search."[116] Mr. Lisenbee then ran from the police and was subsequently caught. When deputies retraced the path ran by Mr. Lisenbee during the pursuit, they located a large plastic bag containing five smaller bags of methamphetamine. Id. Mr. Lisenbee's motion to dismiss in District Court was granted because the officers action in grabbing Mr. Lisenbee by the arm, and grabbing for the knife constituted an illegal seizure and the drugs seized after the illegal seizure were illegally obtained and not admissible. Id. at 1127.

In reaching its holding in Lisenbee, the Nevada Supreme Court reasoned that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[117] The Court found that the initial contact with Lisenbee was legal and did not violate the Fourth Amendment or Nevada Constitution. The Court reasoned that pursuant to Terry and NRS 171.123(1), when the officer can articulate a reasonable suspicion that the citizen is about to or had committed a criminal act, or the officer had probable cause for an arrest, the detention is justified.[118] Because Lisenbee appeared to match the description of the suspect, and had in his possession a legal knife, and a

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[115] *supra*

[116] Id.

[117] Id. at 1128

[118] Id.

legal cellular telephone that these factors did not rise to the level necessary for his detention.[119] In reaching this conclusion the Court reiterated the need to review the totality of the circumstances to determine the reasonableness of the seizure. Based on the facts articulated by the deputies, the Court ruled that the deputies did not have reasonable suspicion that Lisenbee had committed or was about to commit a criminal act, but rather that the officers only had a "hunch" and nothing more than a "hunch".[120]

The Supreme Court then reiterated its prior holdings that "a person is seized if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave."[121] Similar to Lisenbee, in this case Ms. Sindelar was seized when Deputy Sumerall required her to step out of her vehicle based solely upon the odor of alcohol on her breath. A reasonable person in her circumstance, two uniformed police officers present, police lights activated, would not believe that she was free to leave the scene.

"Once an individual is seized, no subsequent events or circumstances can retroactively justify the seizure."[122] Here the simple fact is that Deputy Sumerall's sole basis for believing Ms. Sindelar was driving under the influence was based upon the odor of alcohol on her breath, nothing more. It is not illegal to have the odor of alcohol on your breath and drive. This alone cannot rise to reasonable suspicion that Ms. Sindelar was driving under the influence, there has to be more.

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[119] Id.

[120] Id. at 1128-29

[121] Id. (internal citations omitted)

[122] State v. Stinnett, 104 Nev. 398, 401, 760 P.2d 124, 127 (Nev. 1988) (internal citations omitted)

Deputy Sumerall's testimony at the preliminary hearing shows that the only field sobriety test Ms. Sindelar failed was the horizontal gaze nystagmus, but he likewise admitted that he did not ask if she suffered from nystagmus normally. More importantly, the mere odor of alcohol, no driving pattern and successfully completing two of the three standard field sobriety tests, does not establish probable cause to believe that Ms. Sindelar was incapable of safely operating her vehicle, nor does it provide probable cause to believe that Ms. Sindelar was driving with a blood alcohol above the per se limit of 0.08. Thus, Deputy Sumerall's seizure and subsequent arrest was not founded upon probable cause. If there was no probable cause to believe that Ms. Sindelar was driving under the influence of alcohol, then she should not have been arrested. She should not have been subjected to the forced blood draw. Since the initial seizure was unsupported by reasonable, articulable facts showing that a crime was being committed, all evidence flowing from Deputy Sumerall's "hunch" must be suppressed.

IV.

CONCLUSION

Based on the foregoing, Ms. Sindelar respectfully requests this honorable Court find that Nevada's Implied Consent law is unconstitutional for criminal prosecution purposes as it requires a criminal defendant to prospectively waive her substantive fundamental constitutional right to be free from warrantless searches of her person, without making a knowing and voluntary waiver of that right when that right is at risk of being violated. It is unconstitutional because it eviscerates the Fourth Amendment's guarantee that a neutral magistrate issue a warrant to search the defendant's body for evidence of a crime, when there is no evidence that critical evidence is being destroyed or capable of being destroyed.

Further, Ms. Sindelar respectfully requests this Honorable Court find that law enforcement's blood draw in this case lacked any exigent circumstances to support a warrantless seizure and search of her blood and as such was unconstitutional.

Moreover, because Nevada's Implied Consent law is unconstitutional for criminal purposes, and because law enforcement lacked exigent circumstances supporting the warrantless search of Ms. Sindelar's blood, it is respectfully requested that this Court suppress all evidence obtained as a result of the warrantless blood draw in this case.

Finally, because there was no driving pattern identified by Deputy Sumerall, and the fact that Ms. Sindelar appears to have showed signs of impairment on only one field sobriety test, as testified to by Deputy Sumerall, the deputy is unable to articulate reasonable facts that show that he had probable cause to arrest Ms. Sindelar for driving under the influence of alcohol and requiring her to submit to a blood test to determine if she was under the influence of alcohol at the time she was operating her motor vehicle.

For these reasons, it is respectfully requested that all evidence seized and searched by the White Pine County Sheriff's Office be suppressed.

DATED this 5 day of June, 2013.

DIANE R. CROW, ESQ.
Nevada State Public Defender

CHARLES H. ODGERS, ESQ.
Deputy Nevada State Public Defender
Nevada Bar No. 8596
P.O. Box 151690
Ely, Nevada 89315

AFFIDAVIT

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

CHARLES H. ODGERS, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney licensed to practice law in the State of Nevada and as such I am employed by the Office of the Nevada State Public Defender as a Deputy, assigned to represent Ms. Stella Sindelar in the above-referenced matter;
2. That the facts alleged in this Motion are true and correct to the best of his knowledge as articulated in the preliminary hearing transcript as well as the discovery provided in this matter;
3. That this motion is made in good faith and not for the purposes of delay; and
4. FURTHER AFFIANT SAYETH NAUGHT.

DATED this 5 day of June, 2013.

DIANE R. CROW, ESQ.
Nevada State Public Defender

CHARLES H. ODGERS, ESQ.
Deputy Nevada State Public Defender
Nevada Bar No. 8896
P.O. Box 151690
Ely, Nevada 89315

SUBSCRIBED AND SWORN to before me this 5th day of June, 2013.

PAMELA B. STURLIN
NOTARY PUBLIC
STATE OF NEVADA
No.92-0136-5 My Appt. Exp. Jan. 08, 2015

NOTARY PUBLIC FOR SAID COUNTY AND STATE

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada State Public Defender's Office and that on this 5 day of June, 2013, I served the foregoing reply by hand-delivering a true and correct copy of the same to:

White Pine County District Attorney's Office
801 Clark St. #3
Ely, NV 89301

An employee of the Public Defenders Office

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, filed in this Court in STATE V. REPINEC, does not contain the social security number of any person.

DATED this 5 day of June, 2013.

CHARLES H. ODGERS, ESQ.
Deputy Nevada State Public Defender

Case No. CR-1304037

Dept. No. 2

FILED

2015 JUN 10 PM 3:52

NICHOLE BALDWIN
WHITE PINE COUNTY CLERK
BY _____ DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WHITE PINE

STATE OF NEVADA,
PLAINTIFF,

vs.

STELLA LOUISE SINDELAR,
DEFENDANT.

OPPOSITION TO ADMISSIONS

COMES NOW Stella Sindelar, Defendant, by and through Richard W. Sears, Attorney at Law, and Moves this court for its Order preventing the State of Nevada from using statements taken in violation of the Miranda doctrine against Stella on the basis of the attached Affidavit in support of this Motion, the Memorandum of Points and Authorities attached, and all the pleadings and evidence contained in the court file.

Date: June 10, 2015.

Richard W. Sears, 5489
457 Fifth Street,
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RICHARD W. SEARS, 5489
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COPY

POINTS AND AUTHORITIES

FACTUAL ALLEGATIONS

Stella Sindelar, defendant in this matter, was arrested by Caleb Summerall of the White Pine County Sheriff's office after she blew a breath test in the field that exceeded the legal limit. At the preliminary examination held in this matter, Caleb stated that after her breath test was completed he placed her under arrest. This fact is confirmed by a viewing of the arrest video where after taking the breath test, Stella asked whether she could have someone in shooters bar take care of her automobile because she knew or had been told she was going to jail.

Caleb did not provide Stella Miranda warnings at the point he arrested her. However, despite the arrest, Caleb continued to ask her questions about her consumption of alcohol and why she had driven into town. All all those statements were elicited after Stella's arrest and before she had received her Miranda warnings.

In the booking video, Caleb can be seen advising Stella she did not have the right to an attorney being present during testing. That was the only warning Stella received until after testing was completed. When Stella was advised before testing that she had no right to an attorney, she complained believing that that was unfair or unlawful.

The warning she received was deceptive. Stella had already been questioned both before and after her arrest. The pre-test warning clearly confused Stella about her right to keep silent and her right to an attorney.

APPLICABLE LAW

The United States Supreme Court and the State of Nevada are bound by decisions in the 1960's about police practice and procedure when conducting custodial interrogations:

> The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning. *See Miranda*, 384 U.S. at 479, 86 S.Ct. 1602; *see also Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (privilege applicable to states

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through Due Process Clause of Fourteenth Amendment). To determine whether a custodial interrogation has taken place, a court must consider the totality of the circumstances, including the site of the interrogation, whether the objective indicia of an arrest are present, 1 and the length and form of questioning. See *Alward v. State*, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996). An individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process, *see Garcia v. Singletary*, 13 F.3d 1487, 1489 (11th Cir.1994), or where the individual questioned is merely the focus of a criminal investigation. See *United States v. Jones*, 21 F.3d 165, 170 (7th Cir.1994).

State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (Nev., 1998)

LEGAL ARGUMENT

The question before the court is whether or not Stella Sindelar was in custody at the time Deputy Summerall questioned her again about her activities earlier in the day of her arrest. Deputy Summerall asked Stella before he had placed her under arrest what she had had to drink. Her response at that point was "nothing". After placing her under arrest, or "detaining her"so that she could not move her automobile and was told she was going to jail, he asked the question again. At that point Stella said she had been drinking vodka throughout the day. After Stella's blood had been drawn, Summerall gave Stella Miranda warnings, and immediately began questioning her about the events of the day and evening prior to her arrest. This time Stella said she had been drinking beer.

The problem with all of this questioning is the initial questioning in violation of Miranda tainted everything that followed. Stella had not been advised at the first questioning when she was entitled to the counsel. She was later told she had no right to a lawyer during testing. She was then told she had Miranda rights and had a right to an attorney present during questioning. Anyone would've been confused after that series of events.

This court must decide what statements, if any, can be introduced against Stella at her upcoming trial. Stella argues the only statement that was not taken in violation of Miranda was the statement "nothing" to drink.

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3566

All statements taken after she was arrested and questioned should be suppressed. Accordingly, any video taken that broadcasts her answers that were taken in violation of Miranda must also be suppressed.

The state seeks admission on the basis of "*res gestae*" .

Inadmissible statements are not cured by the *res gestae* rule.

This court should review the video and conduct a hearing in order to determine whether or not Stella had been legally placed under arrest or was in a situation where an ordinary person would believe they were not free to leave.

Richard W. Sears, 5489
457 Fifth Street,
Ely, Nevada 89301
(775) 289-3366

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 8930
775.289.3366

AFFIDAVIT OF RICHARD W SEARS

STATE OF NEVADA
COUNTY OF WHITE PINE | ss.

The undersigned reviewed the foregoing motion and confirmed the facts stated therein after reviewing all the videos of the arrest sequence, the videos of the booking sequence, and a preliminary hearing transcript. The facts stated in this motion are based upon those video and documentary evidence.

The undersigned says nothing further.

DATED: June 10, 2015

Richard W Sears

SUBSCRIBED AND SWORN to before me

this 10th day of June, 2015.

ALISHA ADAMS
Notary Public-State of Nevada
APPT. NO. 97-2573-11
My App. Expires June 17, 2017

Notary Public

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.2366

AFFIDAVIT OF STELLA SINDELAR

STATE OF NEVADA)
) ss.
COUNTY OF WHITE PINE)

Stella Sindelar, Affiant, after first being sworn, testifies and states:

Affiant reviewed the foregoing motion and confirmed the facts stated therein. The recitation of facts conforms to Affiant's recollection of Affiant's arrest and booking. Affiant wanted a lawyer but was discouraged from having one when told I was not allowed a lawyer after my arrest. The facts stated in this motion are based upon first hand knowledge.

The undersigned says nothing further.

DATED: 6/10/15

Stella Sindelar

SUBSCRIBED AND SWORN to before me

this 10th day of June, 2015.

ALISHA ADAMS
Notary Public-State of Nevada
APPT. NO. 97-2573-11
My App. Expires June 17, 2017

Notary Public

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3366

CERTIFICATE OF MAILING

I hereby certify that I am an employee of Richard W. Sears Law Firm and that on the date below written, I deposited in the United State Post Office, as Ely, Nevada, in a sealed envelope with first class postage fully paid, a true and correct copy of the above and foregoing Opposition to Admissions, dated and addressed as follows:

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Ely, Nevada: and/or

☐ Via Facsimile; and/or

☑ To be hand-delivered to the attorney listed below at the address indicated below:

Mr. Michael Wheable
White Pine County District Attorney
801 Clark Street, Suite 3
Ely, NV 89301

Date: June 10, 2015.

An employee of
Richard W. Sears Law Firm

RICHARD W. SEARS
457 FIFTH STREET, ELY, NEVADA 89301
775.289.3366

Case No. CR-1304037

Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,
Plaintiff,

v.

STELLA LOUISE SINDELAR,
Defendant.

MOTION TO CHANGE PLEA TO GUILTY CONDITIONED ON ACCEPTANCE TO UNDERGO TREATMENT PURSUANT TO NRS 484C.340

COMES NOW the Defendant, STELLA LOUISE SINDELAR, by and through his attorneys of record, KARIN L. KREIZENBECK, ESQ., Nevada State Public Defender; and JAMES S. BEECHER, ESQ., Deputy Nevada State Public Defender; and hereby files his Motion to Change Plea to Guilty Conditioned on Acceptance to Undergo Treatment Pursuant NRS 484C340. This motion is based upon the attached Points and Authorities, all documents and pleadings on file herein and all relevant points of law and rules of court.

Dated this 21 day of January, 2015.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender

JAMES S. BEECHER, ESQ.,
Deputy Nevada State Public Defender
Nevada Bar No. 12555
P.O. Box 151690
Ely, NV 89315

NOTICE OF MOTION

PLEASE TAKE NOTE that the Defendant shall bring the foregoing Motion on for hearing on the _____ day of _____, 2015 at the hour of _____, in Department 1 of the 7th Judicial District Court, Ely, Nevada or as soon thereafter as counsel may be heard.

DATED this 21 day of January, 2015.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender

JAMES S. BEECHER, ESQ.,
Deputy Nevada State Public Defender
Nevada Bar No. 12555
P.O. Box 151690
Ely, NV 89315

POINTS AND AUTHORITIES

I.

INTRODUCTION

This case arises out of an original charge of Driving Under the Influence of a Controlled Substance with a prior felony DUI. Said prior DUI was in the State of Utah, with the date of disposition of February 24, 2004. This motion follows to Change Plea to Guilty Conditioned on Acceptance to Undergo Treatment Pursuant NRS 484C.340.

Ms. Sindelar seeks to undergo treatment pursuant to NRS 484C.340; however, she is excluded from consideration due to NRS 484C.340(7)(f), which prevents participation in the treatment program due to a previous out-of-state felony DUI. This aspect of NRS 484C.340, was enacted by the legislature in 2007. Similarly, NRS 484C.410, which requires any previous

out-of-state felony DUI to aggravate any subsequent DUI to a felony, regardless of time elapsed between DUIs, was enacted by the legislature in 2005. Prior to these changes, the Ms. Sindelar would not be subject to a felony DUI in Nevada, simply because she had pleaded guilty to a felony DUI in Utah ten years prior. These changes to existing law increased the criminal liability of Ms. Sindelar and as such, are unconstitutional as an ex post facto law, as applied to Ms. Sindelar in this case. As a consequence, Ms. Sindelar requests that the NRS 484C.340(7)(f) be found unconstitutional as applied to Ms. Sindelar and she be permitted to apply for treatment pursuant to NRS 484C.340, in normal course.

II.

STATEMENT OF FACTS

On March 27, 2013, at 7:38 pm White Pine County Deputy Caleb Sumerall was traveling northbound on Great Basin Highway when a vehicle in front of him turned right onto East Aultman, Ely, White Pine County, Nevada.[1] Deputy Sumerall testified that when the driver executed the right hand turn he noted that the right brake light was non-operable.[2] He then executed a traffic enforcement stop.[3] The driver pulled into the parking lot at Shooters on Aultman.[4]

Deputy Sumerall testified that he asked and received Ms. Sindelar's driver's license, registration and proof of insurance.[5] As she provided the requested information Deputy Sumerall

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[1] Preliminary Hearing Transcript, p. 12, ll. 7-8 (hereinafter referred to as PHT)

[2] PHT, p. 12, l. 9

[3] PHT, p. 12, ll. 21-23

[4] PHT, p. 13, ll. 1-2

[5] PHT, p. 13, ll. 8-9

testified that he smelled the odor of an alcoholic beverage emitting from the vehicle.[6] Upon questioning, Ms. Sindelar denied drinking.[7] Deputy Sumerall added that she appeared to have watery eyes and slurred speech.[8] He notified dispatch that he had a possible DUI which results in a second officer responding to his location to assist.[9] A total of two other officers arrived on scene, Deputy Sean Wilkin and Eric Kolada.[10] Deputy Sumerall determined he would have Ms. Sindelar perform field sobriety testing.[11] After completing the standard field sobriety testing, Deputy Sumerall placed Ms. Sindelar under arrest for driving under the influence.[12]

In the Preliminary Hearing, the State introduced evidence, State's Exhibit 3, of a prior felony DUI conviction from the State of Utah, with a conviction date of 24 February 2004.[13] Said Exhibit reveals that the prior conviction was obtained via a guilty plea.

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[6] PHT, p. 14, ll. 23-24

[7] PHT, p. 15, ll. 3-4

[8] PHT, p. 15, l. 7

[9] PHT, p. 15, ll. 14-23

[10] PHT, p. 16, ll. 1-4

[11] PHT, p. 16, ll. 8-16

[12] PHT, p. 23, ll. 20-23

[13] PHT, p. 27, ll..5-9

III.

LEGAL ARGUMENT

A. EXCLUSION OF MS. FROM A PROGRAM OF TREATMENT PURSUANT TO NRS 484C.340 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION, DUE TO HER PRIOR FELONY DUI BEING OBTAINED THROUGH A GUILTY PLEA, OUT OF STATE, PRIOR TO NRS 484C.340(7)'S PASSAGE BY THE STATE LEGISLATURE.

The facts of this case demonstrate that Ms. Sindelar suffered a felony DUI conviction in Utah, on 24 February, 2004, a full nine years prior to the charge in the instant case. The prior felony DUI conviction was based on a guilty plea, during which, Ms. Sindelar had no notice that a subsequent DUI, nine years later, would result in a felony.

Article I, Section 10, of the U.S. Constitution states, in pertinent part, that "[n]o State shall...pass any...ex post facto Law." Similarly, Article I, Section 15, of the Nevada Constitution states, in pertinent part, that "[n]o...ex-post-facto law...shall ever be passed. The Nevada Supreme Court held that "the legislature itself cannot make any act punishable which was not so by law at the time it was committed."[14] The Nevada Supreme Court held that ex post facto principles apply to the judicial branch via the Due Process Clause, preventing increasing levels of punishment in "the same way the Ex Post Facto Clause prevents such changes by legislation."[15]

Furthermore, the Nevada Supreme Court has held that prior DUI convictions cannot be used to increase subsequent convictions when such increases violate "the integrity of plea bargains and the reasonable expectations of the parties relating thereto."[16]

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[14] Eureka County Bank Habeas Corpus Cases, 35 Nev. 80, 102 (1912)
[15] Stevens v. Warden, Nevada State Prison, 114 Nev. 1217, 1221 (1998)
[16] State v. Crist, 108 Nev. 1058, 1059 (1992).

NRS 484C.340(7)(f) provides that, "[a]n offender may not apply to the court to undergo a program of treatment for alcoholism or drug abuse pursuant to this section if the offender has previously applied to receive treatment pursuant to this section or if the offender has previously been convicted of: A violation of law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a), (b), (c) or (d)." Prior to 2007 no such provision existed, excluding a person from seeking treatment due to a prior out of state felony DUI conviction.

NRS 484C.410(d) states that "[a] violation of a law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a), (b) or (c) [which includes a prior out-of-state felony DUI]" is punishable as a felony DUI, regardless of time elapsed between felony DUI convictions. Prior to 2005, for a DUI to be considered a felony, there must have been two prior DUIs within seven years of the principal offense. Prior to 2005, there was no provision for a felony DUI occurring out-of-state to aggravate a subsequent DUI to a felony.

Here, Ms. Sindelar pled guilty to the charge of Felony DUI in Utah, on February 24, 2004. The reasonable expectations of the parties, at the time of plea, was that if Ms. Sindelar did not incur a DUI within seven years, she would no longer be subject to a felony for a subsequent offense. However, after Ms. Sindelar plead guilty to the felony DUI in Utah, the Nevada legislature increased the consequences for pleading guilty, rendering any subsequent offense a felony, regardless of time elapsed between offenses. This was an affect that was likely not contemplated by the parties at the time of the plea and served to retroactively increase the penalty for pleading guilty. This affect offends the Ex Post Facto Clause of the U.S. and Nevada Constitutions, as elucidated by the Nevada Supreme Court in Eureka County Bank Habeas Corpus Cases and Stevens. Furthermore, this retroactive increase in punishment violates the

reasonable expectations of the parties, when she pleaded guilty to the prior felony DUI, by rendering any subsequent DUI a felony.

Public policy also favors granting Ms. Sindelar NRS 484C.340. In Brinkley v. State, the Nevada Supreme Court held that,

> Substance abuse is a grave and widespread problem. The American Medical Association recognizes addiction as a psychiatric disorder. There are many treatment programs available, and the legislature's evident intent is to divert qualified substance abusers into appropriate programs. The lower court abused its discretion when Brinkley was denied an evaluation pursuant to NRS 458.300.[17]

Here, on it's face Ms. Sindelar does not qualify for treatment under NRS 484C.340, and as such, denial of an evaluation pursuant to said statute does not fall within the direct holding of the Court in Brinkley. However, due to the Ex Post Facto implications of the statute, as discussed above, and the strong public policy for diversion and treatment for multiple DUI offenders, the only just outcome of the instant case would be to grant Ms. Sindelar the opportunity to apply for treatment, pursuant to NRS 484C.340.

IV.

CONCLUSION

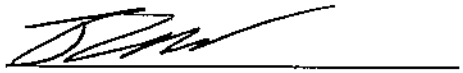
Based on the foregoing, Ms. Sindelar respectfully requests this honorable Court find that NRS 484C.340(7)(f), as applied to Ms. Sindelar, unconstitutionally increases the affect and punishment of her prior out-of-state guilty plea for felony DUI, and is against public policy, as

[17] 101 Nev. 676, 681 (1985)

stated by the Nevada Supreme Court, and permit her application for treatment pursuant to NRS 484C.340.

DATED this 21 day of January, 2015.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender



JAMES S. BEECHER, ESQ.
Deputy Nevada State Public Defender
Nevada Bar No. 12555
P.O. Box 151690
Ely, Nevada 89315

AFFIDAVIT

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

JAMES S. BEECHER, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney licensed to practice law in the State of Nevada and as such I am employed by the Office of the Nevada State Public Defender as a Deputy, assigned to represent Ms. Stella Sindelar in the above-referenced matter;
2. That the facts alleged in this Motion are true and correct to the best of his knowledge as articulated in the preliminary hearing transcript as well as the discovery provided in this matter;
3. That this motion is made in good faith and not for the purposes of delay; and
4. FURTHER AFFIANT SAYETH NAUGHT.

DATED this 21 day of January, 2015.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender

JAMES S. BEECHER, ESQ.
Deputy Nevada State Public Defender
Nevada Bar No. 12555
P.O. Box 151690
Ely, Nevada 89315

SUBSCRIBED AND SWORN to before
me this 21 day of January, 2015.

NOTARY PUBLIC FOR SAID
COUNTY AND STATE

DAWN WHOLEY
NOTARY PUBLIC-STATE of NEVADA
Elko County • Nevada
CERTIFICATE # 13-11999-6
APPT. EXP. NOV. 04, 2017

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada State Public Defender's Office and that on this 21 day of January, 2015, I served the foregoing reply by hand-delivering a true and correct copy of the same to:

White Pine County District Attorney's Office
801 Clark St. #3
Ely, NV 89301

An employee of the Public Defenders Office

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, filed in this Court in STATE V. REPINEC, does not contain the social security number of any person.

DATED this 21 day of January, 2015.

JAMES S. BEECHER, ESQ.
Deputy Nevada State Public Defender

Case No. CR-1304037

Dept No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

****

THE STATE OF NEVADA,

Plaintiff,

-vs-

STELLA SINDELAR,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO CHANGE PLEA TO GUILTY CONDITIONED ON ACCEPTANCE TO UNDERGO TREATMENT

On January 21, 2015, Defendant filed a Motion to Change Plea to Guilty Conditioned on Acceptance to Undergo Treatment Pursuant to NRS 484C.340. No opposition is on file. In her motion, Defendant seeks to withdraw her not guilty plea, and enter a guilty plea conditioned on her acceptance into a treatment program pursuant to NRS 484C.340. The Court has reviewed the file and finds that additional briefing or argument is not necessary.

The salient facts are not in dispute. Defendant was arrested on March 27, 2013, in Ely, Nevada and charged with Felony DUI. Defendant was previously convicted of Felony DUI in Utah in 2003 or 2004. In 2005, the Nevada Legislature

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

enacted NRS 484C.410(d) which made DUI in Nevada punishable as a felony if the person had been previously convicted of a felony DUI. Defendant's prior Utah felony DUI impacts the instant case in two ways: first, Defendant's pending DUI charge is a category B felony with a 2-15 year prison term (NRS 484C.410(1) and secondly, Defendant is not eligible for a treatment program under NRS 484C.340.

Defendant argues that because Nevada did not have a "once a felony always a felony" DUI provision when she plead guilty in 2003, the application of the law to her violates the prohibition against Ex Post Facto legislation. This argument is without merit.

The enactment of a "once a felony always a felony" DUI penalty in Nevada after Defendant plead guilty to a felony DUI in Utah does not change or increase any punishment for Defendant's felony Utah DUI conviction, and therefore on these facts the Nevada law in question does not meet the definition of "retroactive". To be clear, Defendant is not facing increased punishment for her 2003 Utah felony DUI. Rather, because she has a prior felony DUI conviction, she is facing increased punishment for her alleged Nevada DUI in 2013. The key is what the Defendant could have anticipated "*at the time she committed the crime*". See generally Stevens v. Warden, 114 Nev. 1217; 969 P.2d 245 (1998). This does not mean "at the time" she committed the 2003 violation, it means at *the time she allegedly drove drunk in 2013*. Stated a different way, when Defendant allegedly drove drunk in 2013, did Nevada law provide that her prior felony would elevate the penalty for the new DUI? The answer is clearly yes. Because the penalty she is now facing was fixed in Nevada at the time of

the 2013 offense, Defendant cannot establish an Ex Post Facto violation.

Defendant also argues that public policy favors allowing her to enter into a treatment program. Although Defendant may be correct in this argument, the legislature has clearly determined that because she has a prior felony DUI, she is not eligible for treatment in lieu of prison. That decision is for the legislature, and not this Court.[1]

CONCLUSION

Although the Court certainly can allow Defendant to withdraw her not guilty plea and enter a guilty plea, Defendant has not demonstrated, nor is the Court aware of any authority which would authorize the Court to approve Defendant's acceptance into an NRS 484C.340 treatment program in lieu of prison.

Good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Change Plea to Guilty Conditioned on Acceptance to Under Treatment Pursuant to NRS 484C.340 is **DENIED.**

IT IS HEREBY FURTHER ORDERED that the trial in this matter is confirmed to commence on June 30, 2015 at 9:30 a.m.

DATED this 4th day of March, 2015.

DISTRICT JUDGE

[1] Indeed, a strong argument can be made that in a case like this one, both society and the Defendant are better served by long term treatment of the addiction issues, as opposed to lengthy incarceration.

FILED

2013 NOV -1 PM 1:25

LINDA F. SIGLEIGH
WHITE PINE COUNTY CLERK
BY _____ DEPUTY

Case No. CR-1304037

Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

******

THE STATE OF NEVADA,

Plaintiff,

vs.

STELLA LOUISE SINDELAR,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

SEVENTH JUDICIAL DISTRICT COURT
STEVEN L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT I
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

BACKGROUND[1]

On March 27, 2013, at 1938 hours, White Pine County Deputy Caleb Sumrall ("Deputy Sumrall") observed Defendant execute a right hand turn from Great Basin Highway onto East Aultman, Ely, Nevada.[2] Deputy Sumrall noticed that when Defendant

[1] The Court makes the following findings of fact based upon its consideration of the evidence presented in this case, including the testimony from April 15, 2013, preliminary hearing and the September 24, 2013, suppression hearing. See Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (district courts are advised "to clearly set forth the factual findings relied upon in resolving suppression motions").

[2] Prelim. Hr'g Tr. 11–12, April 15, 2013.

applied her brakes, the vehicles right brake light was non-operable.[3] Deputy Sumrall activated his emergency lights and executed an enforcement stop.[4] Subsequently, Defendant pulled her vehicle into the parking lot of Shooter's Lounge off East Aultman.[5]

Deputy Sumrall exited his patrol vehicle and made contact with the Defendant, requesting her driver's license, proof of insurance, and registration.[6] When Defendant provided the requested information, Deputy Sumrall smelled "an odor of an alcoholic beverage emitting from" Defendant's vehicle.[7] Deputy Sumrall then asked Defendant if she had consumed alcohol and Defendant responded that she had not.[8] At that time, Deputy Sumrall also noted that Defendant "had watery eyes and slurred speech."[9] Deputy Sumrall notified dispatch that he had a possible D.U.I. driver.[10] Shortly after contacting dispatch, Deputy Sean Wilkin and Deputy Eric Kolada arrived on scene.[11]

Based on his observations, Deputy Sumrall performed Standardized Field Sobriety Tests ("FSTs") on Defendant.[12] The FSTs included the Horizontal Gaze Nystagmus, the

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[3] Id.

[4] Id.

[5] Id. at 13.

[6] Id.

[7] Id. at 14.

[8] Id. at 15.

[9] Id.

[10] Id.

[11] Id. at 16.

[12] At the preliminary hearing, Deputy Sumrall testified that upon his initial contact he could "smell an odor of an alcoholic beverage emitting from the vehicle," and Defendant had "watery eyes and slurred speech." Id. at 14–15. Deputy Sumrall also testified that

Walk and Turn, and the One Leg Stand.[13] Concluding that Defendant's performance during the FSTs showed impairment,[14] Deputy Sumrall performed a preliminary breath test with a result greater than 0.08% breath alcohol content.[15] Deputy Sumrall arrested Defendant and transported her to the Public Safety Building where he read Defendant the Miranda Warning and Nevada Implied Consent.[16] Based upon Defendant's criminal

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he suspected Defendant was driving under the influence because after contacting dispatch, he could "smell the odor of an alcoholic beverage emitting from her person." Id. at 16.

[13] Id. at 16–17.

[14] Deputy Sumrall testified that Defendant failed the FSTs for the following reasons: (1) the Horizontal Gaze Nystagmus because "she showed signs of lack of smooth pursuit, and she showed signs of nystagmus at maximum deviation, and onset prior to forty-five degrees;" (2) the Walk and Turn because "she raised her arms;" (3) the One Leg Stand because "she put her foot down to keep her balance," "she used her arms to try to stay on balance," and "she had a different way of count, not . . . like we explain and demonstrate." Id. at 17–22.

[15] See Aff. in Supp. of Criminal Compl. at 5.

[16] Id. at 6. At the suppression hearing, Deputy Sumrall testified that he read verbatim the "Evidentiary Testing / Implied Consent Warning" from the Department of Motor Vehicles form titled "Officer's Certification of Cause and Notice of Revocation or Suspension." See State Ex. 2. The form's implied consent warning states, in its entirety:

- You are required to submit to evidentiary testing of your blood or breath to determine alcohol content. If this is your first offense, you may refuse to submit a blood test if breath testing is available. If you choose breath, you must give two or more consecutive samples.
- If this is other than a first offense, or reasonable grounds exist to believe you have caused death of substantial bodily harm to another person, you must submit to a blood test if requested.
- If the presence of a controlled and/or prohibited substance is in issue, you are required to submit to a blood or urine test, or both, in addition to the breath test.
- If you fail to submit to required testing, the law allows me (the officer) to direct that reasonable force be used to the extent necessary to obtain up to three blood samples from you.

history, a blood drawn was chosen.[17] Defendant did not explicitly refuse consent to the blood draw.[18] At 2028 hours, Deputy Sumrall observed Lars Harrin, a blood tech, withdraw Defendant's blood.[19] After the withdraw, Deputy Sumrall took care, custody, and control of the blood sample and packaged it for submittal to the Washoe County Crime Laboratory.[20]

DISCUSSION

Defendant is charged with one count of driving under the influence, a felony, in violation of NRS 484C.110, NRS 484C.020, and NRS 484C.410.[21] Defendant seeks suppression of the blood evidence, which she argues was obtained in violation of her constitutional rights. Specifically, Defendant argues (1) that the stop violated Defendant's Fourth Amendment rights because it extended beyond the scope of the initial stop and Deputy Sumrall lacked probable cause for the arrest and subsequent seizure of blood; (2) that Nevada's implied consent law is unconstitutional for purposes of criminal prosecution; and (3) that the warrantless blood draw at issue violated defendant's Fourth Amendment

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* You are further advised that any warning relating to having an attorney present before answering any questions does not bear on the issue of submitting to evidentiary testing. **YOU DO NOT HAVE THE RIGHT TO SPEAK TO AN ATTORNEY BEFORE TESTING.**

[17] Aff. in Supp. of Criminal Compl. at 6.

[18] See State's Ex. 1 (booking video).

[19] Prelim. Hr'g Tr. 25.

[20] Id. at 25–26. An affidavit of Richard Bell, from the Washoe County Crime Laboratory, submitted at the preliminary hearing showed a blood alcohol content of .045 grams. Id. at 26.

[21] See Compl., Criminal Felony 2.

rights because there existed no exigent circumstances.[22]

1. Reasonable Articulable Suspicion to Extend the Traffic Stop

An officer may conduct a traffic stop if he has reasonable suspicion of criminal activity.[23] In State v. Rincon, the Nevada Supreme Court succinctly laid out the standard for reasonable suspicion with regard to traffic stops:

> The Fourth Amendment prohibition against unreasonable searches and seizures extends to investigative traffic stops. In order for a traffic stop to comply with the Fourth Amendment, there must be, at a minimum, reasonable suspicion to justify the intrusion. Reasonable suspicion is not a stringent standard, but it does require something more than a police officer's hunch. A law enforcement officer has a reasonable suspicion justifying an investigative stop if there are specific, articulable facts supporting an inference of criminal activity. In determining the reasonableness of a stop, the evidence is viewed under the totality of the circumstances and in the context of the law enforcement officer's training and experience.[24]

In Nevada, officers are granted the statutory authority to conduct warrantless detentions for the purpose of investigating crimes.[25] While such detentions have never

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[22] In the opposition motion, the State does not argue that the warrantless seizure of Defendant's blood was justified by exigent circumstances. Rather, the State argues that the warrantless seizure was justified because Defendant provided valid implied consent. Furthermore, at the September 24, 2013, suppression hearing, the State reiterated that the exigent circumstances exception to the warrant requirement did not apply to the case at hand. After review of the record and motions, the Court finds that the warrantless blood draw was not conducted because of exigent circumstances. Thus, Defendant's argument that her Fourth Amendment rights were violated because there were no articulable exigent circumstances for the warrant exception is moot.

[23] Berkemer v. McCarty, 468 U.S. 420, 439 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 335 (1984) (holding that a traffic stop is analogous to a "Terry stop").

[24] 122 Nev. at 1173–74, 147 P.3d at 235–36 (citations omitted).

[25] See NRS 171.123(1) ("Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime").

been explicitly authorized by the United States Supreme Court,[26] Defendant does not challenge NRS 171.123 and the Court presumes its validity.[27] After an officer has lawfully detained a driver for a traffic violation, the officer "may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures."[28] An officer may extend the duration of a traffic stop if the officer reasonably suspects criminal activity is afoot.[29] The investigative means employed by an officer, however, "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[30] When reviewing the duration of an investigative stop, a court should consider whether the officer acted swiftly in developing

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[26] See United States v. Hensley, 469 U.S. 221, 229, 105 S. Ct. 675, 680, 83 L. Ed. 2d 604, 612 (1985) ("We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion").

[27] See Busefink v. State, 128 Nev. ___, ___, 86 P.3d 599, 602 (2012) ("Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional") (internal citations and quotation marks omitted).

[28] Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6, 98 S. Ct. 330, 333 n.6, 54 L. Ed. 2d 331, 337 n.6 (1977).

[29] United States v. Sharpe, 470 U.S. 675, 685–86, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 615 (1985) (internal citations omitted). The Nevada Supreme Court recently held that extension of a traffic stop beyond the time necessary to effectuate the stop's purpose may be constitutionally reasonable when the officer lawfully receives information during the course of the traffic stop that creates a reasonable suspicion of criminal conduct. State v. Beckman, 129 Nev. Adv. Op. 51, slip op. at 9 (2013) (citations omitted).

[30] Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325–26, 75 L. Ed. 2d 229, 238 (1983) (plurality opinion).

the situation, and "not indulge in unrealistic second-guessing."[31]

Examining the totality of the circumstances, Deputy Sumrall had sufficient reasonable suspicion to detain Defendant for the purpose investigating whether she had committed a crime. Deputy Sumrall initiated the traffic stop because he observed that Defendant's right brake light was inoperable. The initial seizure to investigate the right brake light ended after Deputy Sumrall made contact with Defendant. Accordingly, Deputy Sumrall needed further legal justification to prolong the traffic stop.

The record demonstrates that upon initial contact with Defendant, Deputy Sumrall noticed an alcoholic odor emitting from Defendant's vehicle, that Defendant had watery eyes, and Defendant presented slurred speech. These specific articulable facts supported Deputy Sumrall's reasonable suspicion that criminal activity was afoot. Furthermore, Deputy Sumrall proceeded to diligently conduct the investigative stop by administering three FSTs. Deputy Sumrall extensively testified at the preliminary hearing and the suppression hearing how Defendant failed each FST. Moreover, Deputy Sumrall took additional steps to confirm his suspicion by administering the preliminary breath test, which showed results greater than .08% blood alcohol concentration. The total elapsed time between stop and Defendant's arrest was twenty-two (22) minutes.[32] These specific articulable facts, paired with Deputy Sumrall's diligent and unobtrusive investigation, rendered the short extended detention constitutionally reasonable under the circumstances.[33]

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[31] Sharpe, 470 U.S. at 686, 105 S. Ct. at 1575, 84 L. Ed. 2d at 616 (internal citations omitted).

[32] Aff. in Supp. of Criminal Compl. at 5 (The stop occurred at 1938 hours, the arrest occurred at 2000 hours).

[33] Defendant wrongfully asserts that the proper standard is probable cause. NRS 171.123 and case law contemplating seizures for the purpose of investigating criminal

2. Probable Cause for the Arrest

Defendant contends that Deputy Sumrall lacked probable cause to arrest her because Deputy Sumrall testified that she only showed signs of impairment during the Horizontal Gaze Nystgamus.[34] In addition, Defendant argues that Deputy Sumrall failed to testify to any type of driving pattern that would lead to him suspecting she was driving under the influence.[35] These arguments are without merit.

To establish probable cause, an officer must be able to point to objective factual circumstances leading him to believe that a defendant committed a crime.[36] Deputy Sumrall extensively testified that he instructed and executed the FSTs in compliance with his training and that Defendant presented impairment while performing the FSTs.[37] Defendant's signs of impairment led Deputy Sumrall to administer the preliminary

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acts observed or not observed by officers require reasonable suspicion, which is a lower standard than probable cause. See United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (referencing precedent that reasonable suspicion is a less demanding standard than probable cause).

[34] Defendant relies on Deputy Sumrall's testimony where he admitted that he did not properly document how Defendant performed each FST. Additionally, Defendant attacks Deputy Sumrall's ability to properly recall Defendant's performance of the FSTs. Defendant, however, has not presented any evidence challenging Deputy Sumrall's testimony. This Court had ample opportunity to weigh Deputy Sumrall's testimony and judge his credibility and finds him to be a credible witness.

[35] The fact that Deputy Sumrall did not observe a type of driving pattern does not render the arrest constitutionally unreasonable. To so hold would require officers to personally observe, at a bare minimum, suspicious driving behavior even if the officer could articulate other facts that would support reasonable suspicion for a stop. This would be in clear conflict with NRS 171.123, case law, and the state's interest in protecting the public from individuals operating a motor vehicle while under the influence.

[36] See Virginia v. Moore, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008).

[37] As noted earlier, the Court finds Deputy Sumrall to be a credible witness.

breath test. Accordingly, based upon his observations of Defendant's slurred speech, watery eyes, odor of alcohol emitting from her vehicle and person, her performance on the FSTs, and the preliminary breath test, Deputy Sumrall had probable cause to arrest Defendant for driving under the influence.

3. Constitutionality of NRS 484C.160[38]

The felony charge in this case arises out of the charge of driving under the influence with a prior felony DUI. The State seeks to admit evidence from the blood draw in the instant case. Defendant argues that Nevada's implied consent statute, NRS 484C.160, is unconstitutional because it requires drivers to prospectively waive his/her Fourth Amendment right to be protected from unreasonable search and seizure. According to Defendant, NRS 484C.160 is unconstitutional and there is no other exception to the warrant requirement. The State counters that NRS 484C.160 is constitutional because the act of driving is a knowingly and voluntarily waiver of his/her Fourth Amendment right. If the statute is valid, Defendant's consent to the blood draw was properly "implied" and the evidence is admissible. NRS 484C.160 provides in its entirety:

> (1) Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to an evidentiary test of his or her blood, urine, breath or other bodily substance to determine the concentration of alcohol in his or her blood or breath or to determine whether a controlled substance, chemical, poison, organic solvent or another prohibited substance is present, if such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was:

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[38] In State v. Repinec, No. CR-1212131, this Court invalidated NRS 484C.160(7) on the grounds that it unconstitutionally impinged on Mr. Repinec's fundamental Fourth Amendment rights without sufficient justification. The court reached its conclusion after determining that Defendant had successfully met his burden of showing that 484C.160(7) impinged on a fundamental right and that the State then failed to show that 484C.160(7) was narrowly tailored to serve a compelling State interest.

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430.

(2) If the person to be tested pursuant to subsection 1 is dead or unconscious, the officer shall direct that samples of blood from the person be tested.

(3) Any person who is afflicted with hemophilia or with a heart condition requiring the use of an anticoagulant as determined by a physician is exempt from any blood test which may be required pursuant to this section but must, when appropriate pursuant to the provisions of this section, be required to submit to a breath or urine test.

(4) If the concentration of alcohol in the blood or breath of the person to be tested is in issue:

(a) Except as otherwise provided in this section, the person may refuse to submit to a blood test if means are reasonably available to perform a breath test.

(b) The person may request a blood test, but if means are reasonably available to perform a breath test when the blood test is requested, and the person is subsequently convicted, the person must pay for the cost of the blood test, including the fees and expenses of witnesses in court.

(c) A police officer may direct the person to submit to a blood test if the officer has reasonable grounds to believe that the person:

(1) Caused death or substantial bodily harm to another person as a result of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or as a result of engaging in any other conduct prohibited by NRS 484C.110, 484C.130 or 484C.430; or

(2) Has been convicted within the previous 7 years of:

(I) A violation of NRS 484C.110, 484C.120, 484C.130, 484C.430, subsection 2 of NRS 488.400, NRS 488.410, 488.420 or 488.425 or a law of another jurisdiction that prohibits the same or similar conduct; or

(II) Any other offense in this state or another jurisdiction in which death or substantial bodily harm to another person resulted from conduct prohibited by a law set forth in sub-subparagraph (I).

(5) If the presence of a controlled substance, chemical, poison, organic solvent or another prohibited substance in the blood or urine of the person is in issue, the officer may direct the person to submit to a blood or urine test, or both, in addition to the breath test.

(6) Except as otherwise provided in subsections 3 and 5, a police officer shall not direct a person to submit to a urine test.

SEVENTH JUDICIAL DISTRICT COURT
STE[illegible]L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

(7) If a person to be tested fails to submit to a required test as directed by a police officer pursuant to this section and the officer has reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430,

the officer may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested. Not more than three such samples may be taken during the 5-hour period immediately following the time of the initial arrest. In such a circumstance, the officer is not required to provide the person with a choice of tests for determining the concentration of alcohol or presence of a controlled substance or another prohibited substance in his or her blood.

(8) If a person who is less than 18 years of age is directed to submit to an evidentiary test pursuant to this section, the officer shall, before testing the person, make a reasonable attempt to notify the parent, guardian or custodian of the person, if known.

Defendant argues that NRS 484C.160 is unconstitutional because it infringes on a fundamental right protected by the Due Process Clause of the United States Constitution. Specifically, Defendant's Fourth Amendment right to be secure from unreasonable searches and seizures.[39] The constitutionality of a statute is a question of law.[40] "Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality."[41]

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[39] See U.S. Const. amend. IV.

[40] State v. Hughes, 127 Nev. , , 261 P.3d 1067, 1069 (2011) (quoting Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

[41] Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991) (citing Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983)).

Defendant's argument is that in light of a recent United States Supreme Court case, Missouri v. McNeely,[42] Nevada's implied consent statute is unconstitutional because it allows law enforcement officers to compel the production of blood, breath, or urine "without the protections afforded through the search warrant process."[43] As held by this Court in State v. Repinec, "the teachings of McNeely are not new and can be summarized as follows: police officers should obtain a warrant prior to forcing a blood draw in a driving under the influence case, unless some exception to the warrant requirement applies (such as exigent circumstances or consent)."[44]

As noted above, Defendant brings a substantive due process challenge on the ground that NRS 484C.160 impinges on a fundamental right. A statute provokes strict judicial scrutiny when it discriminates against a suspect class[45] or interferes with a fundamental right.[46] Under the strict scrutiny analysis, the challenged statute may not infringe upon a fundamental liberty interest unless the infringement is narrowly tailored

SEVENTH JUDICIAL DISTRICT COURT
STE[illegible]L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT I
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

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[42] 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[43] Incredibly, neither party cited, nor was this Court able to find any published case law that addresses the actual constitutionality of an implied consent law such as NRS 484C.160. Accordingly, this is a case of first impression in Nevada.

[44] Repinec, slip op. at 7.

[45] Defendant does not claim that Nevada's implied consent law violates her right to equal protection.

[46] Sereika v. State, 114 Nev. 142, 148–49, 955 P.2d 175, 179 (1998) (per curiam) (collecting cases).

to serve a compelling state interest.[47] Even then, the infringement can only be justified if there exists no less restrictive alternative.[48]

The Fourth Amendment protection against unreasonable searches and seizures is a fundamental right which is enforceable against the states through the Due Process Clause of the Fourteenth Amendment.[49] Under the backdrop of relevant United States Supreme Court precedent, there is no question that NRS 484C.160 impinges on Defendant's Fourth Amendment rights.[50] The statute explicitly authorizes law enforcement officers to conduct warrantless compelled intrusions into a person's body based solely on whether the officer has "reasonable grounds to believe" that the person has been driving under the influence of alcohol or controlled substances.[51] Because

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[47] Reno v. Flores, 507 U.S. 292, 301–02, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993).

[48] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357, 98 S. Ct. 2733, 2782, 57 L. Ed. 2d 750, 813 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

[49] Ker v. California, 374 U.S. 23, 32, 83 S. Ct. 1623, 1630, 10 L. Ed. 2d 726, 737 (1963) ("Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty' the guaranty of which 'is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . .'") (quoting Gouled v. United States, 255 U.S. 298, 304, 41 S. Ct. 261, 263, 65 L. Ed. 647, 650 (1921)); Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961).

[50] See generally McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696; Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

[51] The court notes that the "reasonable grounds to believe" standard arguably allows compelled blood draws based on less than probable cause. Certainly the legislature could have simply employed the "probable cause" standard in this statute but chose not to for whatever reason. Accordingly, NRS 484C.160 appears to not only grant officers the authority to conduct compelled blood draws without first "reasonably obtain[ing] a

NRS 484C.160 impinges on a fundamental right, the State carries the burden of showing that the statute is narrowly tailored to serve a compelling state interest and that there exists no less restrictive alternative.[52] Defendant concedes that the State has a compelling interest in protecting the public from individuals operating a motor vehicle while under the influence of alcohol or controlled substances.

Although there can be no question that eliminating drunk drivers from public roads is a compelling state interest, in this case the State did not carry its burden of demonstrating how this interest could not be furthered through methods that do not infringe on one's fundamental constitutional right to be free from warrantless searches. At first glance, NRS 484.160 appears reasonable and narrowly tailored. In order to request a chemical test, an officer must have a reasonable belief that the person was operating a vehicle on a public road. The person is then offered a choice of a test of his blood or breath, unless NRS 484C.160(4)(c)(1)-(2) applies, in which case the person must submit to a blood draw. Since consent is an exception to the warrant requirement, the notion that the privilege to drive in Nevada is conditioned on consent

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warrant," McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696, but likewise grants officers such authority based upon a level of suspicion that could be insufficient to obtain a warrant. State v. Allen, 119 Nev. 166, 170, 69 P.3d 232, 234 (2003) ("The Nevada Constitution and the United States Constitution require a search warrant to be issued only upon a showing of probable cause").

[52] Carrigan v. Comm'n on Ethics of Nev., 126 Nev. , , 236 P.3d 616, 622–23 n.9 (2010) ("Strict scrutiny is distinct from other forms of review and varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a compelling state interest; and demands that the regulation promoting the compelling interest be narrowly tailored") (quoting Stephen A. Siegel, The Origin of the Compelling State Interest Test and Strict Scrutiny, 48 Am. J. Legal Hist. 355, 359–60 (2006)) (internal quotation marks omitted), rev'd, 564 U.S.___, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).

to a test is not outrageous. Under close scrutiny, however, it becomes clear that NRS 484C.160 ignores and steps over an obvious method to obtain blood without such a significant impact on the constitutional right to be free from warrantless searches: try to obtain a search warrant before forcing a blood draw.[53]

It is clear there are other ways to keep intoxicated drivers off Nevada's roads than through the use of warrantless intrusions into a person's skin based only upon a "reasonable grounds to believe" suspicion standard.[54] Because the State did not show the absence of a less restrictive alternative, NRS 484C.160 cannot withstand the strict scrutiny analysis and is therefore unconstitutional.

4. Consent Exception to the Warrant Requirement

The State argues the McNeely analysis is not applicable to this case because it is not relying on the exigent circumstances exception to the warrant requirement. Instead, the State argues that Defendant gave valid consent to forgo her Fourth Amendment protection by operating a motor vehicle on a public road pursuant to NRS 484C.160. Defendant counters that, on its face, NRS 484C.160 is coercive and requires drivers to acquiesce to an officer's directive. According to Defendant, the

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[53] It is noteworthy that subsection (8) of NRS 484C.160 requires the officer to "make a reasonable attempt to notify the parent" of a suspect less than 18 years of age before testing the person. Seemingly, language that required an officer to make a "reasonable attempt to obtain a warrant" would likely go a long way to saving NRS 484C.160.

[54] Less constitutionally-intrusive means were raised during the suppression hearing. For example, the imposition of administrative sanctions such as the loss of a driver's license or the seizure the driver's vehicle for failure to provide a breath, urine, or blood sample. The most obvious less restrictive alternative is to follow the holding in McNeely and seek a search warrant if possible under the circumstances.

consent exception is improper because a driver does not freely, intelligently, knowingly, and voluntarily consent under the circumstances, nor can a driver revoke consent.

The State bears a heavy burden of demonstrating that the consent to search was freely and voluntarily given by clear and convincing evidence.[55] "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[56] In Nevada, "acquiescence that is 'the product of official intimidation or harassment is not consent.'"[57] Whether the consent to search "was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances."[58] A court should assess "both the characteristics of the accused and the details of the interrogation."[59] Some factors a court may consider in determining the voluntariness of a consent during a custodial interrogation are analogous to the case at hand. Specifically, the lack of any advice to the individual of her constitutional rights, the length of the detention, the prolonged and repeated nature of the questioning, and the use of physical punishment.[60] Courts have

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[55] State v. McMorran, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002) (internal citations omitted).

[56] Bumper v. North Carolina, 391 U.S. 543, 548–49, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 802 (1968).

[57] McMorran, 118 Nev. at 383, 46 P.3d at 84.

[58] Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047–48, 36 L. Ed. 2d 854, 863 (1973).

[59] Id. at 226, 93 S. Ct. at 2047, L. Ed. 2d at 862.

[60] Id.

also considered other factors, such as, whether the person was in custody, whether the officer informed the person of her right to refuse to consent, and if the individual was told that a search warrant could be obtained.[61]

Here, NRS 484C.160 requires drivers to forfeit a fundamentally protected right, to be free from searches and seizures. In several sections, the statute induces submission because the language of the statute makes it clear that a suspect has no choice in the matter and blood will be taken by force if the suspect does not cooperate. For example, subsection (1) states in relevant part, "any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to an evidentiary test of his or her blood . . . at the direction of a police officer having reasonable grounds."[62] Subsection (4)(c) allows an officer to "direct the person to submit a blood test if the officer has reasonable grounds to believe that the person either (1) caused death, substantially bodily harm to another person, or was in actual physical control of a vehicle while under the influence; or (2) the person was convicted of one of the enumerated violations listed in NRS 484C.160(4)(c)(2)(I)–(II) in the past seven years.[63] In both subsections, the language makes it clear that the driver has no choice but to submit to the blood draw because (1) he/she already gave consent, and/or (2)

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[61] United States v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir. 1997).

[62] NRS 484C.160(1) (emphasis added).

[63] NRS 484C.160(4)(c)(1)–(2)(I)(II) (emphasis added).

that the blood draw will be conducted at the officer's directive if the officer has reasonable grounds.

Assuming arguendo, that NRS 484C.160 does not inherently coerce submission, Defendant's consent to the search does not satisfy the warrantless exception of the Fourth Amendment because her consent was merely acquiescence to a claim of lawful authority. While in custody, Deputy Sumrall read Defendant the Nevada implied consent warning from the Department of Motor Vehicles, "Officer's Certification of Cause and Notice of Revocation or Suspension" form.[64] The form does not inform a defendant of their right to refuse to consent, nor does it inform a defendant that a search warrant could be obtained.[65] Rather, the form states that a defendant is "required to submit" to an evidentiary blood test.[66] In addition, the form states that if a defendant fails "to submit to required testing, the law allows [] (the officer) to direct that reasonable force be used to the extent necessary to obtain up to three blood samples from" the defendant. After Deputy Sumrall recited the implied consent warning, Defendant agreed to provide a blood sample.

These circumstances are evidence of a highly coercive atmosphere and depict a substantial showing of force and intimidation from law enforcement. First, Defendant was not informed of her right to refuse consent or that a warrant could

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[64] At the suppression hearing, Deputy Sumrall testified that it is policy that all officers read the Department of Motor Vehicle's implied consent warning and not NRS 484C.160 in its entirety.

[65] The form does inform an individual that they may refuse a blood test, in lieu of a breath test, only if it is his/her first offense.

[66] Pursuant to NRS 484C.160(4)(c)(2)(I) Defendant was required to submit to an evidentiary blood test because she was charged in violation of NRS 484C.410.

be obtained.[67] Second, the implied consent warning is clearly intended to induce Defendant's submission. The form stated that because it was Defendant's third DUI charge she was "required to submit to a blood test if requested" by Deputy Sumrall. The form also stated that if Defendant refused to submit, Deputy Sumrall would utilize physical force to take up to three samples of her blood. Thus, after Deputy Sumrall read the form to Defendant, she was left no choice but to submit to the blood draw, or accept the prospect of physical force against her by Deputy Sumrall. The State has failed to show that under those circumstances, Defendant's consent was "unequivocal and specific" and "freely and intelligently given."[68] Moreover, the Court has reviewed the booking tape and finds that Defendant's peaceful submission to a law enforcement officer does not establish an intelligent and intentional waiver of her Fourth Amendment rights, and is more indicative of submission and acquiescence to the implied consent warning read to her. For these reasons, the Court finds that Defendant did not give valid consent to the blood draw, and therefore the blood draw violated her Fourth Amendment rights.

5. Judicially-Created Exceptions to the Exclusionary Rule[69]

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[67] See Chan-Jimenez, 125 F.3d at 1327 (factors a court should consider in determining whether consent was voluntary).

[68] Chan-Jimenez, 125 F.3d at 1328.

[69] The parties have not raised whether the blood evidence at issue should not be suppressed pursuant to NRS 484C.240(2). After review of federal precedent, the Court finds that it cannot apply NRS 484C.240(2) to this case because a state law that conflicts with federal law is without effect pursuant to the Supremacy Clause. See Mapp, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (the Court held that the "exclusionary rule," devised by the high court in Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), to enforce the Fourth Amendment's prohibition of

The State argues that the evidence at issue should not be suppressed under the exclusionary rule because law enforcement officers were acting in good faith reliance on binding precedent. The exclusionary rule is a judicially-created "deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation" and whose sole purpose is to deter future Fourth Amendment violations.[70] In Davis, the United States Supreme Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[71] However, Davis dealt with officers relying on the then-"existing" "straightforward" and "workable" automobile search incident to arrest rule laid down in New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), which was later disfavored in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).[72] As discussed above, the State argues that the instant case falls outside the ambit of McNeely because officers here were relying solely on the "consent" exception to the warrant requirement to justify a warrantless blood draw. However, none of the cases cited by the State establish a widely understood bright-line rule that officers may

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unreasonable searches and seizures, applies to the states through the Fourteenth Amendment. Thus, the Fourth Amendment and the exclusionary rule are "the supreme Law of the Land" and "Judges in every State shall be bound thereby.").

[70] Davis v. United States, 131 S. Ct. 2419, 2423, 2426, 180 L. Ed. 2d 285, 290, 294 (2011) (collecting cases).

[71] Id. at 2423–24, 180 L. Ed. 2d at 290.

[72] Id. at 2424–25, 180 L. Ed. 2d at 291 ("For years, Belton was widely understood to have set down a simple, bright-line rule . . . Like most courts, the Eleventh Circuit had long read Belton to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants").

conduct warrantless blood draws based solely on NRS 484C.160 for the purpose of obtaining evidence for a criminal prosecution.[73] The cases cited by the State address administrative proceedings, prior versions of Nevada's implied consent law, exigent circumstances justifying warrantless blood draws, and non-drivers charged with being under the influence of controlled substances. None are sufficiently analogous to this case in law or fact to be characterized as "binding appellate precedent" on which an officer may reasonably rely. More importantly, none "specifically authorize" the particular police practice utilized here: the warrantless seizure of blood evidence for criminal prosecution based on state statute.[74] For this reason, the State's argument fails.

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[73] See McCharles v. Department of Motor Vehicles, 99 Nev. 831, 673 P.2d 488 (affirming district court order affirming Department of Motor Vehicle's suspension of driving privileges for refusal to submit to chemical test); State v. Smith, 105 Nev. 293, 297, 774 P.2d 1037, 1040 (1989) ("the law recognizes the driver's right to refuse his consent, but penalizes him for exercising that right by revoking his license") (citing now-deleted sections of the Nevada Revised Statutes); Galvan v. State, 98 Nev. 550, 554, 655 P.2d 155, 157 (1982) (holding that exigent circumstances existed to justify warrantless a blood draw conducted without a prior formal arrest. "The officer, faced with the inevitable and rapid destruction of the evidence and Galvan's unconsciousness, could reasonably have believed that he was confronted with an emergency, so that he could not delay by obtaining a warrant or waiting until Galvan regained consciousness"); State v. Jones, 111 Nev. 774, 776, 895 P.2d 643, 644 (1995) (discussing in dicta that "a driver suspected of intoxication may be forced to give a blood or urine sample. The implied consent theory, however, does not apply in cases like these, where suspects are arrested on the street").

[74] See Davis, 131 S. Ct. at 2429, 180 L. Ed. 2d at 296–97("when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities") (emphasis in original).

Conversely, the State's argument that the exclusionary rule should not be applied in this case is supported by Illinois v. Krull.[75] In Krull, the United States Supreme Court held that an exception to the exclusionary rule exists when officers act in objectively reasonable reliance on a statute that is later found to violate the Fourth Amendment. The Court held that a statute cannot support a finding of objectively reasonable reliance in two instances: (1) if in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws or; (2) if a reasonable officer should have known that the statute was unconstitutional.[76] "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law."[77]

The Court finds that it was objectively reasonable for officers to rely on NRS 484C.160 when they conducted a warrantless blood draw in the instant case. First, while the statute, as discussed in detail above, infringes on one's Fourth Amendment rights, there is nothing in the record to indicate that the legislature wholly abandoned its duty to the constitution when it enacted NRS 484C.160. Statutes are presumed constitutional and "by according laws a presumption of constitutional validity, courts presume that legislatures act in a constitutional manner."[78]

Second, a reasonable officer charged with enforcing NRS 484C.160 would not have known that this particular Nevada statute was "clearly unconstitutional" and

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[75] 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).

[76] Id. at 355, 107 S. Ct. at 1170, 94 L. Ed. 2d at 378–79.

[77] Id. at 349–50, 107 S. Ct. at 1167, 94 L. Ed. 2d at 375.

[78] Id. at 351, 107 S. Ct. at 1167–68, 94 L. Ed. 2d at 376.

coercive. To the contrary, it appears that the Nevada Supreme Court has authorized implied consent blood draws in DUI cases since the late 1980's.[79] In addition, all 50 states have some form of implied consent law relating to driving under the influence.[80] While Brockett and Jones cannot be characterized as "binding appellate precedent" sufficient to trigger the Davis exception to the exclusionary rule, these cases and their apparent approval of procedures similar to the one authorized by NRS 484C.160 are sufficiently clear to render an officer's reliance on the constitutionality of NRS 484.160 objectively reasonable under the circumstances. For this reason, the Court declines to apply the exclusionary rule to the evidence seized in this case.

CONCLUSION

Because NRS 484C.160's infringement on Defendant's fundamental Fourth Amendment rights is not narrowly tailored to serve the State's compelling interest in keeping intoxicated driver's off Nevada's roadways, NRS 484C.160 is unconstitutional. Furthermore, because NRS 484C.160 is inherently coercive and Defendant did not expressly consent, the statute cannot serve as the basis for an "implied consent" exception to the Fourth Amendment's warrant requirement.

Because the Supremacy Clause mandates that this Court apply federal law, the Fourth Amendment exclusionary rule applies unless United States Supreme Court precedent dictates otherwise. While the officers in this case were not relying on binding appellate precedent, their reliance on 484C.160 was objectively reasonable.

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[79] See Brockett v. State, 107 Nev. 638, 817 P.2d 1183 (1991).

[80] McNeely, 133 S. Ct. at 1566 n.9, 185Ed. 2d at 713 n.9.

Accordingly, the exclusionary rule does not apply and Defendant's motion to suppress must be denied.[81]

Good Cause Appearing,

IT IS **HEREBY ORDERED** that Defendant's Motion to Suppress Evidence is **DENIED.**

DATED this 1ST day of November, 2013.

DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

[81] See Osburn v. State, 118 Nev. 323, 325 n.1, 44 P.3d 523, 525 n.1 (2002) ("evidence obtained from or as a consequence of lawless official acts is excluded as fruit of the poisonous tree" (citing Costello v. United States, 365 U.S. 265, 280, 81 S. Ct. 534, 542, 5 L. Ed. 2d 551, 560 (1961)).

CASE NO. CR-1304037

Dept. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

STELLA LOUISE SINDELAR,

Defendant.

_____/

TRANSCRIPT
of
SENTENCING
September 3, 2015

COUNSEL APPEARING:

For the State:

ANGELA GIANOLI, ESQ.
Deputy District Attorney
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Ely, NV 89301

For the Defense:

RICHARD W. SEARS, ESQ.
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Transcribed by: Linda Davies, Sworn Court Transcriber

THE COURT: Which is case number C R one three zero four zero three seven, State of Nevada versus Stella Louise Sindelar. Miss Sindelar is present represented by Mr. Sears, the State's represented by Miss Gianoli, Parole and Probation is present and this is the time and place set for sentencing. Are the parties prepared to go forward?

MS. GIANOLI: The State is prepared Your Honor. As a preliminary matter, I'm wondering if the Court received the submission of the Defendant's prior conviction which we filed back on August twenty-eighth, two thousand fifteen?

THE COURT: I did. Mr. Sears do you - have you reviewed the prior conviction?

MR. SEARS: I believe we filed motions on it Your Honor.

THE COURT: Oh did you?

MR. SEARS: Yes Your Honor.

THE COURT: Was it - has it been litigated over - numerous times I think, right?

MR. SEARS: Yes Your Honor.

THE COURT: All right. So those are all part of the record, then the prior conviction will be admitted.

MS. GIANOLI: Thank you Your Honor and if the Court deems it appropriate I also have a copy which I could admit it as an exhibit for the purposes of sentencing.

THE COURT: That would be good.

MS. GIANOLI: Right. And I have had an opportunity to review that prior conviction. I do believe that it's constitutionally firm. If I may approach madam Clerk.

THE COURT: All right, so -

MR. SEARS: If I may be heard Your Honor?

THE COURT: - lets mark that as Exhibit Four. All right.

MR. SEARS: We have continuing objections to the admission of that on the basis of the pleading's already filed in the case -

THE COURT: Okay.

MR. SEARS: - and the fact that its constitutionally unfirm.

THE COURT: So noted.

MR. SEARS: Thank you.

THE COURT: All right. And I - I guess just to make my record, the Court has reviewed it, finds that she had counsel, she was advised, there's a proper waiver, it is a felony, and it complies with all the requirements - requirements of Nevada law as necessary, and then obviously the record's full of arguments that have been made about it so - so State's one is admitted and then we'll go to you Mr. Sears. Did you receive the presentence investigation report

and do you have any changes or corrections?

MR. SEARS: I did Your Honor. We received the copy of the presentence investigation report. My client and I talked about it. She found some errors that we need to point out for the Court. As an initial matter on page three, there's a statement with a substance abuse history where it says Miss Sindelar tried methamphetamine for the first time at the age of fourteen and has not used for years. She denies ever having tried methamphetamine. If the Court looks at the gang activity affiliation, the Court will observe the Defendant has states he has never been a member of a criminal organization, there's clearly a typo there that needs to be fixed and we wonder whether or not that sentence just got inadvertently copied in here from some other P. S. I. With respect to incarcerations, it says prison one. Mrs. Sindelar was never set to prison. She did sixty-two days in jail on a conviction that's before the Court and she was not in fact sentenced to prison and did not serve prison. If you go to page four, the Court will note there's a conviction twelve sixteen oh five, pled no contest to retail theft, a misdemeanor. Miss Sindelar challenges that completely. Her identity in fact was stolen, she reported it to the F. B. I., believed that this had been cleared up. This was not her.

THE COURT: All right.

MR. SEARS: Again the - there's a sentence in the - in the midst of the supplemental information that says Mrs. Sindelar tried meth for the first time. Again we dispute that. And Miss Sindelar has already paid the chemical drug analysis of fif - sixty bucks. Other than that, we have no other changes or corrections, Your Honor.

THE COURT: So how about the credit for time served. Is the State going to do it?

MS. GIANOLI: That was the question that I had and that's probably something to pose towards Miss Rice and the question I have was that the final forty-six days is the Court I'm certain recollects is after she was convicted by a jury, Mr. Wheable and myself had asked for prompt remand at which point the Court gave her the latitude to remain out of custody pending sentencing, so I don't know where the additional forty-six days counts from seven one through eight thirty-one two thousand fifteen.

THE COURT: Do we know?

MS. RICE: Um, when I had called Your Honor regarding her credit for time served, when I interviewed her on seven twenty-two she was in fact incarcerated, and at that point they were working to get her released with the ankle monitor or the alcohol monitor and so I just put that she would be in jail until eight thirty-one because we didn't have a date of

her release but she was in fact incarcerated on seven twenty-two when I interviewed her so I'm not sure. I called the jail. Those were the dates that they gave me. I know she had been released and was in Drug Court or something and had failed a test and was then remanded back into custody. I don't know the exact date of that but those are the dates I got from the jail.

THE COURT: Okay. That's right cause there was - cause we were looking to use the robo-cuff and that didn't work out so there was some delay there so that will have to be adjusted. That will have to be figured out for sure.

MR. SEARS: That's for the final forty days or something Your Honor?

THE COURT: Yea. The - let me look here.

MR. SEARS: Forty-six.

THE COURT: I think I've reissued an order, lets see. Yea, August third -

MR. SEARS: That's what she's recollecting August third.

THE COURT: - yea, that - and that's when is issued the order for a - for house arrest and - and let her out of jail on August third so - so we would adjust what twenty-seven day - twenty-eight days would come off that. All right. Any other - any other corrections for you Mr. Sears?

MR. SEARS: No Your Honor.

THE COURT: Miss Gianoli, anything else?

MS. GIANOLI: No Your Honor.

THE COURT: All right so then the rest of the Court will stand as factually accurate and Mr. Sears you can be heard in mitigation.

MR. SEARS: Thank you Your Honor. As the Court's aware having listened to this case there were none of the aggravating factors that we occasionally see in D. U. I. cases. There was no injuries, no deaths, no car accident, there was no driving pattern, no recklessness, no swerving within the lane, no swerving outside the lane. In fact she was stopped because of a taillight. No evidence that she was incapable of driving. The fact of the matter is if the Court looks at her record that's presented in this case, the Court will see that from nineteen ninety-five we had a D. U. I. third offense felony, two twenty-four oh four, driving under the influence of alcohol drugs felony. The ninety-five case basically went away. The oh four case she was not treated very harshly, certainly not the way we would expect to see a felon treated, and there's what nine years between those two cases? In addition, now we see from oh four to thirteen, we have a long period of time where she was behaving herself, quite frankly, and so we recognize and she understands that

she should not have been driving while she's under the influence of alcohol. She learned the lesson clearly and she was behaving for a long period of time. Unfortunately the stresses of returning to White Pine County from Salt Lake City dealing with her mother's requirements for guardianships she has eight siblings, not all of them were alive during that period but there was lots of stress related to - to mom basically. Mom having to go to Idaho, mom's home having to be dealt with, a family that fractured over what's going to happen with that home, how its going to get paid for, do we keep it, do we sell it, a fracturing over should be conservator of Nellie. It was just a lot of litigation and a whole lot of stress including litigation down in Justice Court. If she had stayed in Salt Lake quite frankly I would argue to the Court that she wouldn't have - she wouldn't have gotten into the mess that she got in but she left her job with Swift Transportation, she came back here to help take care of her mother and that's when the problems begin again. It's clear that - that that move was not a good one for her because she had a long stretch of sobriety. Unfortunately when she returned here, that all broke. And the stresses of her mother not only led to this D. U. I., which she takes responsibility for. She understands she wasn't supposed to drink and drive. She could only do one or the other and she

made a mistake clearly, and not only was it a mistake, it was a crime. She understands that. The fact that she took the case to trial does not mean that she's not taking responsibility for the case. As the Court could tell from the extensive litigation that occurred in this case. Trials are designed to ensure that people are properly convicted. People shouldn't be punished for going to trial. And the only thing that I can see in this case that would indicate that she should be punished more harshly than the minimums is the fact that she took the case to trial. There's no other factors here that would demonstrate. We had years and years and years and year after year of sobriety with no issues Your Honor, and then bang, she got picked up on this, okay, and she demanded a trial which she's entitled to do. We'd think the appropriate sentence in this case is the minimum Your Honor, twenty-four to sixty. I'm sure the State is going to be concerned with the fact that this is a third or fourth D. U. I., and it is. No question about it. On the other hand, its not like some of the D. U. I.s that we have seen and litigated in this Courthouse where people, where children were injured, where vehicles were smashed up because someone was simply unable to control a vehicle. She was clearly able to control the vehicle. She's not a very good mechanic and couldn't fix the brake light and that was what got her pulled

over Your Honor quite frankly. It's not the case that a person who drives under the influence of alcohol is a bad person. It is the case that like drug addicts they have a difficult time controlling their behaviors when it comes to whatever they're addicted to, whether its drugs or alcohol or something else. That was the issue in this case Your Honor. We also obviously have concerns with the fact that the felony was so lightly treated back in two thousand four. Maybe if she'd have gotten prison over that maybe it would have made a greater impression, although as we know addiction is a terrible thing. We've heard it before in this courtroom. One drink is too many and ten thousand is not enough for someone who has an addiction to alcohol and drugs and accordingly would ask the Court to remember that the goal of this case is not necessarily punishment although she's going to be punished. The goal is to teach her to behave as a good member of society, don't drink and drive. She's obviously allowed to drink and she's obviously allowed to drive but she can't do both. We would argue to the Court she has finally learned that lesson. In addition she has suffered substantial health complications over the last few years as a result of the family stress and because of those health complications, she simply can't drink and doesn't drink. I think her performance while on the robo-cuff indicates that.

We know that the robo-cuff went off last night at midnight, she came in here sober this morning ready to face what is a very long prison term. We would ask the Court to consider all those factors. Thank you.

THE COURT: Thank you Mr. Sears. Miss Sindelar, you heard what your attorney said and certainly you rely on his statement. This is also your opportunity to make a statement if you'd like to.

MISS SINDELAR: I think I'm fine.

THE COURT: All right. Thank you.

MR. SEARS: Thank you Your Honor.

THE COURT: Miss Gianoli?

MS. GIANOLI: Thank you Your Honor. Your Honor, to start out with there was something that Mr. Sears said that I (unintelligible word) onto that I found particularly profound. And I'm going to talk about her criminal history in a moment but he was talking about the second felony D. U. I. for which she was arrested but a first which she was convicted in Salt Lake City in. If she had been more seriously punished then perhaps we wouldn't be here now, and that kind of forms the basis for the argument I'm going to make to day, that this Court needs to impose a serious punishment on Miss Sindelar. That's never happened, and perhaps that might be the message that needs to be sent to

not only her but this community. Really take this crime seriously, and most importantly to her that these crimes will not be tolerated in this community. As you can see in the P. S. I., Parole and Probation is asking for thirty to seventy months. The State is seeking more. The State is requesting a term of imprisonment of forty-eight to a hundred and twenty months. Now in making my argument Your Honor and I know you're very well informed of, the principles that underlie sentencing but its important sometimes to go and review those. And the two principles of underlying sentencing as the Court is well aware are rehabilitation and deterrence. Starting with rehabilitation there's not much we can do for Miss Sindelar here. Now that's not to say when she does to prison the State hopes that she avails herself to the programs in prison because they can be beneficial. And when she's out I hope she continues to avail herself of A. A., N. A., counseling and lead a clean and sober life. Unfortunately rehabilitation is not something the Court has before it because the legislature has dictated that these types of offenses, once a felon always a felon in D. U. I.s are prison mandatory and there's very little latitude with regards to rehabilitation. So then we turn to deterrence and there's two of those. Specific and generalized. Generalized of course meaning that the Court imposes a

sentence which conveys to this community that these types of offenses are simply are intolerable and will not be accepted in this courtroom. And then specific deterrence. Creating and fashioning a sentence for Miss Sindelar specifically that tells her that this is inappropriate. This conduct will not be tolerated in fashioning a sentence which hope to dissuade her future criminal activity to this end in the future. In talking about specific deterrence Your Honor, in many cases that come before this Court you look at the facts of the case, you look at the P. S. I., you look at their lack of criminal history, you look at the statement that they make in the P. S. I. and you come to a recognition that somebody has - they get it, but they understand the wrongfulness of their action, that there is a recognition of what they've done wrong, there is remorse for what they've done, and they've got a plan to prevent future criminal activity. This is not Miss Sindelar. Now I want to talk about her criminal history and Mr. Sears touched on this as well. It's fair to characterize Miss Sindelar's D. U. I. history and her as having nine lives. She was arrested in nineteen eighty-nine for misdemeanor D. U. I. Fortunately for her, she got a break and there was no disposition in that case. In nineteen ninety, she was convicted of a misdemeanor, again fortunately for her she only received forty-eight hours of community

service. In nineteen ninety-five she was charged with felony D. U. I., again got a break. It was reduced to a misdemeanor in which she served twenty days of residential confinement, given an opportunity to do some treatment to turn her life around. Yet in two thousand four she was convicted of a felony D. U. I. in Salt Lake City where she only received twenty-four months of probation and sixty-two days of jail. And now we find ourselves again in two thousand thirteen before this Court for yet another felony D. U. I. To say that she has been virtually unscathed by her prior punishments and D. U. I. cases is an understatement. It appears from her criminal history and her lengthy criminal history with regards to D. U. I. that Miss Sindelar doesn't get it. Now Mr. Sears spent a quite a lot of time talking about how she's had periods of sobriety and generally when you look at her history, she averages about nine years in between her arrests or convictions for felony D. U. I.s. The State's position is that cuts against her. Often times in this courtroom we see individuals who rack up two or three felonies within a span of - of five to seven years. Those are individuals although they're egregious and although they pose a grave risk to the community are individuals that many times before they get their felony conviction we can bring into this courtroom, we can give them treatment, we see that

that's a blip on the radar of their lifes, we can get them treatment, squared around and many times are successful in leading long productive lives. That's not Miss Sindelar. Miss Sindelar knows what it's like to be sober. In fact in her statement she said she had nine years of sobriety. She knows what it's like when she begins to backslide to go and seek help and treatment so she doesn't drink and drive. Yet every nine years she continues to make the conscientious choice to drink and drive, endangering not only herself but more importantly the community members that are on the roadway at the same time that she does. So her criminal history Your Honor, the fact that it is over a long period of time and the number of offenses cuts against her because she knows what its like to be sober. She knows what its like to be good. Yet she continues to make these conscientious choices to drink and drive. Your Honor I also talked about in specific deterrence in many times when you look in a person's statement how they show a recognition of what they've done is wrong, and a remorsefulness. When you read Miss Sindelar's statement and in fact when you hear Mr. Sears talk about her criminal history, she's taken no accountability. She indicates that in two thousand five when she pled no contest which is maybe the reason she pled no contest but its still guilty finding to the retail theft that

somebody had stole her identity. When you look at her statement, its's a page statement. She spends ninety-nine percent of that statement blaming a sister, blaming her mother, for her mother's poor health, for having to come back and take care of her mother. That's what she blames for her lapse in sobriety. She never once says I'm sorry, Your Honor, I'm sorry to my family for putting them through this. I'm sorry to this community for endangering their lives when I went out there and drove. She never once has a recognition of what she's done is wrong Your Honor. You don't hear in her statement either any sort of plan to dissuade her from this future repeat behavior, that she's going to get treatment, that she's not going to come out and reoffend. There's no assurances and no remorsefulness showing in her statement Your Honor. Along the same lines of accountability I talked about honesty and when you look through this P. S. I. and you look through this case you can see that Miss Sindelar has a problem with honesty. First she indicates in her P. S. I. that the last time she drank was in March of two thousand and thirteen with this date of violation for this case. However, my recollection of a review of the notes is that's simply inaccurate. As you can see in the credit for time served she was revoked around September thirtieth two thousand fourteen for drinking. If my recollection serves me

and my notes serve me correctly she came positive for a test and she was revoked because she was drinking, so she's not being honest with this Court or Parole and Probation about the parameters and scope of her drinking.

MR. SEARS: I'm going to object Your Honor. That was my error. I'm the one who made that statement, not Mrs. Sindelar.

THE COURT: So noted.

MS. GIANOLI: Your Honor, with regards to this case she also was not forthright with the officer. When she was pulled over and during the course of her field sobriety test she was asked twice to as to how much she had to drink. Both times she denied. Finally after she failed the field sobriety test, failing miserably and was taking the P. B. T. where it showed she was above a point oh eight, she was yet again confronted by the officer about how much she had to drink at which point the Defendant stated she had shots of vodka quote unquote now and again and indicated she was at the McGill Club drinking, yet later on when she was taken to the Public Safety Building during the booking process she admitted to having beer throughout the day. So she's inconsistent and dishonest to the officer about what she had to drink.

MR. SEARS: Objection Your Honor. A citizen has no duty to be honest to an officer when the officers are free to

lie to citizens.

MS. GIANOLI: Your Honor it's an argument I can make.

MR. SEARS: It's a misstatement under the law and the facts.

MS. GIANOLI: It's an argument.

THE COURT: Go ahead.

MS. GIANOLI: Thank you. The other concern that we have with regards to the alcohol found in her car and this is more of a public safety issue is when they impounded the vehicle and did an inventory search, in the center console of her car on top of everything inside the center console, officers found two empty bone dry bottles of ninety-nine proof grape liquor. The reason this is concerning is because the Defendant indicated on that date she did not consume the grape liquor which is probably consistent because they were bond dry, no condensation, but given the placement of those liquor bottles on top of everything inside her center console it's likely that recently she had been drinking and driving yet again. That's concerning from a public safety perspective Your Honor in that she's probably been drinking and driving that has not been captured up until this point. And that dovetails with my final argument Your Honor and that's one of public safety. The State places great emphasis on as I know the Court does as well insuring the welfare and

safety of this community. The unfortunate fact is given Miss Sindelar's criminal history and given the facts of this case, she poses a grave risk to this community when she's out. In fact, the facts of this case, she told the officer that as she - after she had shots of vodka now and again at McGill, she decides to make the poor choice to drive eleven miles from McGill to Ely to get Taco Time. By doing that, to get a bite to eat, she endangered not only herself but every patron that was on the roadway at that time. That's egregious Your Honor and that's a conscious choice that she made. Clearly Your Honor when you evaluate all the factors here, criminal history, risk to the community, her dishonesty with the Court and the officer, the number or changes that she's had to turn her life around, the fact that she's showing not remorsefulness for her actions Your Honor, we believe the appropriate sentence would be forty-eight to a hundred and twenty months and we'd ask that the Court impose that. Thank you.

THE COURT: Thank you. Anything further?

MR. SEARS: No Your Honor.

THE COURT: Miss Sindelar, please stand. Miss Sindelar I've read everything in the file obviously and - and it's quite thick. It's - this is an older case. There was a log of work put in on this case by counsel and prior

counsel and as in every case there's good and bad to look at and to talk about and - and on the good side I guess for the most part it - it appears that your - your - you hold steady jobs, you're a good worker and clearly you've got lots of good family support. Those are all pluses that the Court has to consider except for this - except for this alcohol problem and alcohol and drink driving problem. I mean you've got a clean record really. There's - there's really nothing other than these D. U. I.s on your record. As I said the - and - and your age, I mean you're fifty-one, starting to get to that point where you know whether it happens every nine years or whatever, it started - it has to start getting old. And then when we look at the file too, the lots of efforts made by your counsel, this counsel and prior counsel. I think mostly because of the way Nevada law provides. You - certainly you don't get penalized for going to trial in any case, but when we - when we look at the way Nevada law reads its - its really kind of interesting because a person who has a D. U. I. or a third D. U. I. in Nevada is entitled to get a diversion program for help and try to get you heavy duty three years treatment, mandatory three years treatment to stay out of prison on a third offense D. U. I. in Nevada and yet the legislature in its wisdom that writes the law and I have to follow it, say but if you have a felony, no matter

how old it is, you don't get treatment. Well, it's really a inconsistent because who needs the most treatment? The one who has the other D. U. I.s, and they say no, no, no and as Miss Gianoli pointed out basically they say we don't care any more. The legislature doesn't care. There's no rehab. We just want to punish you and put you away. And - and - and we all know that doesn't fix anything. It doesn't straighten anybody out. The fear of going to jail doesn't stop a drunk driver. It just doesn't. And we know that. But that's and that's where there was a lot of work on this case by the attorneys to try to see if there was a way to - to get around that law or - or find a loophole in the law to say look a person needs help, and unfortunately there just wasn't any - any angles that they could come up with. Other things too. Clearly - and - and I would say this on - on the D. U. I. scale the facts of the case clearly as Mr. Sears pointed out, its on the lower end. We didn't have a death, we didn't have a wreck, we didn't have really a driving pattern at all but on the other - and - and also we have this. The prior felony was eleven years ago. Eleven years prior to this case. If you went to a regular trial and testified they can't even use that prior to impeach you cause it's older than ten years old and yet our legislature says we don't care how old it is. This is the road so - so what - what is that all - what does

this all mean, but then I have to go over here and say you know what, it is true that when a person's had a long period of sobriety whether its from drugs or alcohol the - you know the Courts are grappling with how to treat it, what does a person - what should we do. You know there's - there's a concept that it's - it's treated like a disease. Actually there's people that say it is a disease, any addiction is a disease and I don't buy that at all. It may be treated or act like a disease but it's not because you don't get cancer, get remission and then go choose to get cancer. But when you're not drinking or using drugs and you're clean and sober for a period of time that first drink or that first hit off the pipe is absolute choice. Absolute choice. I'm firm on that and I've been doing this for a long time and involved in all the drugs and the addictions and so forth and I - and I can't get past that. Should we treat like a disease? Yes. Cause clearly once that first hit, that first, and its done. So what do we do? Well, I - I guess I mean I guess when I look at everything there's - there's factors on both sides. The age of the D. U. I., the prior D. U. I.s is pretty significant. Eleven years and I don't know whether you had eleven years sobriety. It doesn't matter. What matters is you didn't have eleven - no - no drinking and driving as Mr. Sears said. You can drink yourself to death if you want, but

don't drive is the other rule. So what do we do? Well I have a - Mr. Sears wants the minimum. Miss Gianoli wants just about not the max but a pretty high end and Parole and Probation's got their recommendations, and - and with all that said, here's what I think the appropriate sentence would be. Twenty-five dollar administrative assessment fee, three dollar G. M. A. fee, you've already paid the sixty dollar chemical analysis fee, you've got - this is a category B felony and if I didn't already impose formal judgment I would do that that you're guilty of the offense of driving under the influence of intoxicating liquor, a category B felony by virtue of the jury verdict that was received on April twenty-second and so you're subject to D. N. A. testing to determine genetic markers. I don't believe that Utah did that. I'm pretty sure its not, lets see. No there's nothing indicative that that happened so you - so you have to pay a hundred and fifty dollar D. N. A. testing fee and so this - here's what I think the appropriate sentence is. What we - now this is a category B felony so I think the pretrial credit applies but then the rest goes to the end of I believe is how it works. I'm not positive of that anyway, but here's what I'm at. The issue of what - so what am I supposed to do with this sentence? I'm supposed to punish and I'm supposed to deter a person and so how do we do a deterrence and I think - I think

all in all I think Parole and Probation got it to the closest point of where it should be. You're not being penalized because you went to trial but you're getting a huge amount of slack because of the age of the prior. That's really to me the key. If your prior felony or your last D. U. I. was one or two or three or five years ago, that's one thing, but eleven years ago is a long time ago. It really is. And yet it's still your - that's - that's four you've got now, two felonies on it, so here's the sentence. I'm going to go with the maximum term as Parole and Probation rec - Parole and Probation's recommendation of seventy-five months. I think the minimum term a thirty months is appropriate. You've got quite a bit of time served, a lot of time served, so there's a pretty good likelihood that you're going to be seeing daylight soon and obviously then it's up to you how this - how this comes back because I have no doubt that if you're busted again here the D. A.'s Office will be saying Judge this is a case for a habitual criminal, someone that is a danger to society if they drink and drive again and I don't think that - that would be their call so hopefully we don't get to that. All right so any questions counsel?

MS. GIANOLI: No Your Honor. Thank you.

THE COURT: Mr. Sears?

MR. SEARS: No Your Honor.

THE COURT: All right so you'll be remanded into custody and - and good luck.

MS. SINDELAR: Thank you.

THE COURT: Anything further in this case?

MS. GIANOLI: No Your Honor.

THE COURT: Court will be in recess.

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellant Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

LINDA DAVIES
Court Transcriber

Case Number: CR-1304037
Dept. No. 1

FILED

2015 JUN -5 AM 11:51

NICHOLE BALDWIN
WHITE PINE COUNTY CLERK
BY _____ DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

THE STATE OF NEVADA,
PLAINTIFF,

VS.

STELLA LOUISE SINDELAR,
DEFENDANT.

Motion to Introduce Defendants Statements

District Attorney • White Pine County, Nevada

COMES NOW THE the State of Nevada, by and through its attorney, Michael A. Wheable, White Pine County District Attorney, and hereby moves this court to allow the introduction of Defendant's Statements on the basis of the attached Affidavit in support of this Motion, the Memorandum of Points and Authorities attached, and all the pleadings and evidence contained in the court file.

Date: June 5th, 2015

Michael A. Wheable
White Pine County District Attorney
801 Clark Street, Suite 3
Ely, Nevada 89301

MEMORANDUM OF POINTS AND AUTHORITIES

Facts

On March 27, 2013 around 7:38 p.m., White Pine County Sheriff's Deputy Caleb Sumrall was on patrol in Ely, White Pine County on Great Basin Blvd, heading toward the East Aultman Street intersection when he observed a gray Dodge sedan bearing license 538XWZ in front of his vehicle being operated with only one functional brake lamp, in violation of the Nevada Revised Statutes. Deputy Sumrall observed the vehicle turn right onto East Aultman Street, and then after initiating a right turn signal, pulled right off the road into the parking lot at Shooter's bar and grill. As the vehicle was turning into the parking lot, Deputy Sumrall initiated his patrol vehicle's emergency red and blue lights to initiate a traffic stop, and pulled in behind the gray Dodge.

Deputy Sumrall then approached the vehicle and made contact with the driver of the gray Dodge identified as Stella Sindelar by her Nevada Driver's License, the Defendant herein. While speaking with the Defendant, Deputy Sumrall detected the odor of an alcoholic beverage emitting from her vehicle. During the course of contact, Deputy Sumrall determined that the odor of the alcoholic beverage was actually emitting from the Defendant's person. Deputy Sumrall asked the Defendant if she had been drinking and where she was heading. The Defendant replied that she had not been drinking and that she had to get toilet paper, and food at Taco-Time and was now heading home to McGill. Deputy Sumrall then inquired why, if she was heading home, did she pull into the Shooter's parking lot. To this inquiry the Defendant hesitated and then replied that she was going home.

While speaking with the Defendant about these things, Deputy Sumrall observed the defendant to have slurred speech and watery eyes.

Deputy Sumrall invited the Defendant to exit her vehicle to perform Standardized Field Sobriety Tests. Upon exiting the vehicle, the Defendant was asked again if she had been drinking, to which she

stated she had not. All these, and other statements are captured on Deputy Sumrall's "Lapel Camera" video, a copy of which is attached hereto as Exhibit A.

As Deputy Sumrall performed Standardized Field Sobriety Tests on the Defendant, the Defendant showed signs of impairment during the Horizontal Gaze Nystagmus test, the Walk and Turn test and the One Leg Stand. After being administered a Preliminary Breath Test, the Defendant was arrested for suspicion of Driving While Intoxicated and transported to the Public Safety Building without incident. A records check revealed that the Defendant had been convicted of a previous Felony DUI.

At the Public Safety Building, the Defendant was read Nevada's implied consent language, submitted to a blood draw and was advised of her rights per *Miranda*. Among other statements, the Defendant admitted to Deputy Sumrall that she had consumed a number of beers at the McGill Club. The Defendant made other statements at the Public Safety Building while in custody, prior to, during, and after being *mirandized* and all are audible on the Booking DVD attached hereto as Exhibit B.

Subsequent to the Defendant being arrested, an inventory was conducted of the contents in her vehicle prior to it being towed. During the inventory, empty alcoholic beverage containers were found inside the console of the vehicle. These were photographed as evidence.

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession... Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness..." Jackson v. Denno, 378 U.S. 368, 376-377, 84 S.Ct. 1774, 1780-1781 (1964).

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Accordingly, the State hereby provides notice and moves the Court to allow the introduction of Defendants' statements, including any and all those included on the lapel cam video (Exhibit A) and those statements included on the booking video (Exhibit B) in order to provide sufficient time to schedule a hearing, pursuant to Jackson.

Date: JUNE 5th, 2015.

Michael A. Wheable
White Pine County District Attorney
801 Clark Street, Suite 3
Ely, Nevada 89301

District Attorney • White Pine Co., Nevada

AFFIDAVIT OF CALEB SUMRALL

STATE OF NEVADA)
)
COUNTY OF WHITE PINE)

The undersigned Affiant has read the foregoing motion and makes this Affidavit under penalty of perjury and based upon personal knowledge, as to those matters asserted on information and belief, Affiant has personal knowledge and believes those assertions contained herein to be true.

Caleb Sumrall

SUBSCRIBED AND SWORN TO BEFORE ME
this 5th day of June, 2015.

Notary Public

SHONNA K. SAMPSON
NOTARY PUBLIC • STATE of NEVADA
White Pine County • Nevada
CERTIFICATE # 92-4156-17
APPT. EXP. SEPT. 28, 2016

District Attorney • White Pine County, Nevada

AFFIDAVIT OF MICHAEL A. WHEABLE

STATE OF NEVADA)
)
COUNTY OF WHITE PINE)

The undersigned Affiant makes this Affidavit under penalty of perjury and based upon personal knowledge, as to those matters asserted on information and belief pertaining to the booking video:

1. That this motion is not filed with the intent to delay or harass;
2. That affiant relys on those assertions of Caleb Sumrall to support all of the facts in this motion yet Affiant believes those assertions to be true;
3. That he is the attorney assigned to prosecute this case;

Michael A. Wheable

SUBSCRIBED AND SWORN TO BEFORE ME
this 5th day of June, 2015.

Notary Public

SHONNA K. SAMPSON
NOTARY PUBLIC • STATE of NEVADA
White Pine County • Nevada
CERTIFICATE # 92-4156-17
APPT. EXP. SEPT. 28, 2016

District Attorney • White Pine County, Nevada

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I am an employee of the office of Michael Wheable and on the date below I served a copy of the foregoing Motion by:

___ Hand delivery on _____

Or

X Depositing in the US mail addressed to:

Richard W. Sears, Esq.,
White Pine County Public Defender
457 Fifth Street
Ely, NV 89301

Date: June 5, 2015

Donna K Simpson

District Attorney • White Pine County, Nevada