Cite as 2018 Ark. 135

SUPREME COURT OF ARKANSAS

No. CR-17-76

SAMMY W. DORTCH, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** April 26, 2018 APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [NO. 32CR-16-13] HONORABLE JOHN DAN KEMP, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

KAREN R. BAKER, Associate Justice

An Independence County jury found appellant Sammy W. Dortch, Jr., guilty of negligent homicide, driving while intoxicated, and reckless driving. Dortch was sentenced to a total of fifteen years' imprisonment, an $8,000 fine, and suspension of his driver's license for 120 days. On October 23, 2017, the Arkansas Court of Appeals certified the appeal to this court pursuant Arkansas Supreme Court Rule 1-2(b)(1), (3), (4), (5), and (6) because this appeal involves (1) issues of first impression; (2) issues involving federal constitutional interpretation; (3) issues of substantial public interest; (4) significant issues needing clarification or development of the law, or overruling precedent; and (5) substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly. On November 9, 2017, we accepted certification of this appeal. We reverse and remand.

Dortch's convictions stem from the following facts. On September 16, 2015, Dortch and his friend Matthew Anderson went to U.S. Pizza in Batesville for lunch. Tara Hall waited on Dortch and Anderson and testified that Dortch was served two beers—a Shiner Bock in a regular size mug and a Lagunitas IPA "Big Earl," which is approximately twice the size of a regular mug.[1] Dortch testified that the "Big Earl" was purchased for Anderson. Ms. Hall did not see either Dortch or Anderson drink the beers. After leaving U.S. Pizza, Dortch and Anderson went to Beef O' Brady's. The receipt from Beef O' Brady's showed that Dortch purchased three beers. However, Dortch testified that he only drank two of the beers while Anderson drank one. After leaving Beef O' Brady's, Dortch and Anderson went to Stanley Wood Chevrolet and checked out a 2011 black Chevrolet Camaro to test drive. The pair headed to Vista Point Drive where Dortch lost control of the vehicle and the vehicle flipped upside down. In response to dispatch, Deputy Aaron Moody with the Independence County Sheriff's Office was the first to arrive on the scene of the crash. Deputy Moody testified that the vehicle was upside down, and Dortch was standing outside the vehicle. Dortch told Deputy Moody that Anderson was still inside the car and unconscious. Deputy Moody testified that Anderson was still in the passenger seat of the vehicle, upside down with his seatbelt on. Deputy Moody was unable to detect Anderson's brachial pulse, so he left Anderson until first responders arrived. Deputy

[1] Trial testimony established that a regular mug holds 16 ounces, while a "Big Earl" holds approximately 32 ounces.

Moody noticed that Dortch had bloodshot, watery eyes and smelled of intoxicants. Anderson was pronounced dead at the scene by the county coroner. Dortch admitted that he and Anderson had consumed beers together. Deputy Moody concluded that a blood draw was necessary because the accident resulted in a fatality and that Dortch was suspected of driving while intoxicated. Deputy Moody transported Dortch to the emergency room at the White River Medical Center for a blood draw. There, Deputy Moody went over a standard form outlining Arkansas's implied-consent law. The form stated that if he refused to take the test, "none will be given, but you will subject yourself to the penalties provided by law, which includes, but is not limited to, the suspension or revocation of your driving privileges." Dortch signed and initialed the form and a blood draw was performed by a registered nurse. At no point was a warrant obtained for the blood draw. Based on the results of the blood draw, the state crime lab calculated Dortch's blood alcohol level at .139.

On January 8, 2016, Dortch was charged by felony information with negligent homicide. On February 2, 2016, Dortch was charged by an amended felony information with the additional charges of driving while intoxicated and reckless driving. On September 6, 2016, Dortch filed his motion to suppress chemical evidence from his blood draw and a motion to declare unconstitutional the implied-consent statute, Arkansas Code Annotated section 5-65-202(a)(2), and the mandatory-chemical-testing statute, Arkansas Code Annotated section 5-65-208, which requires chemical testing if an accident results in

a fatality. Dortch argued that these statutory provisions violated the Fourth Amendment pursuant to a then recent United States Supreme Court decision, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The circuit court denied Dortch's motion to suppress his blood draw, finding that Dortch impliedly consented to the warrantless blood draw. Further, the circuit court found that Dortch consented to the blood draw and that the consent was voluntary. The circuit court denied Dortch's motion to declare Arkansas Code Annotated sections 5-65-202(a)(2) and 5-65-208 unconstitutional.

As noted above, a jury trial was held and Dortch was convicted of negligent homicide, driving while intoxicated, and reckless driving. On October 28, 2016, Dortch timely filed his notice of appeal. On appeal, Dortch argues that (1) the prosecution presented insufficient evidence of his guilt of negligent homicide; (2) Arkansas Code Annotated sections 5-65-202(a)(2) and 5-65-208 are unconstitutional and therefore his blood draw pursuant to these statutes was required to be suppressed; (3) because Anderson's cause of death was not patently apparent, the circuit court erred in permitting the coroner to testify as to Anderson's cause of death; (4) the failure of the coroner to obtain an autopsy and preserve evidence of the cause of Anderson's death affirmatively prejudiced Dortch's ability to present a defense in this case; (5) the circuit court erred in not permitting rebuttal testimony to correct the State's repeated mischaracterization of the evidence relating to Dortch's alcohol consumption, and in not addressing the

prosecution's misstatements of fact; and (6) the list of errors asserted here are such that reversal should be granted because of their cumulative effect.

I. *Sufficiency of the Evidence*

On appeal, Dortch argues that there was insufficient evidence of his guilt of negligent homicide because the State failed to prove that he caused Anderson's death as required by Arkansas Code Annotated section 5-10-105(a)(1) (Repl. 2013). Although Dortch raised this issue as his last point on appeal, double-jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence prior to the other issues on appeal. *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003). We will affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

With regard to sufficiency-of-the-evidence challenges, Arkansas Rule of Criminal Procedure 33.1 provides, in pertinent part:

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of all of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.
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> . . . .

> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsection[ ] (a) . . . will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.

Ark. R. Crim. P. 33.1. Rule 33.1 is to be strictly construed. *Carey v. State*, 365 Ark. 379, 230 S.W.3d 553 (2006) (citing *Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005)). Accordingly, in order to preserve a challenge to the sufficiency of the evidence, an appellant must make a specific motion for a directed verdict, both at the close of the State's case and at the end of all the evidence, that advises the circuit court of the exact element of the crime that the State has failed to prove. *Id.* (citing *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002)). The reason underlying the requirement that specific grounds be stated and that the absent proof be pinpointed is that it allows the circuit court the option of either granting the motion or, if justice requires, of allowing the State to reopen its case and supply the missing proof. *Id.* (citing *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997)). A general motion that merely asserts that the State has failed to prove its case is inadequate to preserve the issue for appeal. *Id.* (citing *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001)).

Here, Dortch's challenge to the sufficiency of the evidence is not preserved for our review. At trial, Dortch's counsel made a generic directed-verdict motion and renewed motion, which the circuit court denied:

> DEFENSE COUNSEL: Judge, two things. At this time the State has rested and we'll move for a directed verdict of not guilty. And I realize that the Court has ruled on these previously but since all of the evidence is in, we'd again allege that the chain of custody was improper in this matter for the blood samples. And also, as far as the State Crime Lab test to come in, there were so many irregular procedures and defects with that test to where it's not--should not be given any weight. That's the scope of it.
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> . . . .
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> COURT: The Court's ruling would be the same as previously made on the chain of custody issue and the--the blood test. As you mentioned, it goes to the weight and the weight is determined by the jury.
>
> The Court finds that there is sufficient evidence that's been presented by the State to withstand a motion for directed verdict on all three counts. And it'll just be up to the jury to determine the credibility of the witnesses and the weight to be given the evidence. So, the motions for directed verdict will be denied.
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> . . . .
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> DEFENSE COUNSEL: I'd just renew my motions for a directed verdict at the close of all of the evidence, Judge. Same--
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> PROSECUTOR: Same response.
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> DEFENSE COUNSEL: --same grounds.

PROSECUTOR: Same response.

COURT: The motion will be denied based on the Court's previous ruling.

On appeal, Dortch admits that his directed-verdict motion was general in nature. However, Dortch contends that his insufficiency argument was preserved for appellate review because the State expressly raised the elements of the offense and the circuit court ruled. We disagree. In order to preserve a challenge to the sufficiency of the evidence, Rule 33.1(c) clearly places the burden on the defendant to state the specific grounds. While Dortch made a motion for directed verdict at the close of the State's case and renewed his motion at the close of the evidence, his motion did not comply with the dictates of Rule 33.1. Dortch's motion was general in nature and lacked the requisite specificity required by Rule 33.1. Stated differently, because Dortch's motion was general and not specific, his motion was inadequate to preserve for appellate review the specific challenges to the sufficiency of the evidence he now raises on appeal. Accordingly, we affirm on this point.

II. *Motion to Suppress and Motion to Declare Ark. Code Ann. §§ 5-65-202(a)(2) & 5-65-208 Unconstitutional*

For his second point on appeal, Dortch argues that, under Arkansas Code Annotated section 5-65-208, warrantless searches requiring drivers involved in an accident to submit to blood-alcohol testing violate the Fourth Amendment's prohibition on

unreasonable searches.[2] In response, the State argues that we should not address any argument pertaining to section 5-65-208. The State contends that although the circuit

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[2] We note that Arkansas Code Annotated section 5-65-208 was amended in 2017. The word "blood" preceding "breath" in (a) and (b)(2)(A) was deleted and (d) was added, which now requires a warrant based on probable cause for a blood draw under this section. However, the law that controls is the substantive law in effect on the date the crime was committed. *Wood v. State*, 2015 Ark. 477, 478 S.W.3d 194 (2015) (citing *Berry v. State*, 278 Ark. 578, 582, 647 S.W.2d 453, 456 (1983)).

The 2015 version of Ark. Code Ann. § 5-65-208 stated in its entirety:

(a) When the driver of a motor vehicle or operator of a motorboat on the waters of this state is involved in an accident resulting in loss of human life or when there is reason to believe death may result, a chemical test of the driver's or operator's blood, breath, saliva, or urine shall be administered to the driver or operator, even if he or she is fatally injured, to determine the presence of and percentage of alcohol concentration or the presence of a controlled substance, or both, in the driver's or operator's body.

(b)(1) A chemical test under this section shall be ordered as soon as practicable by one (1) of the following persons or agencies:

(A) The law enforcement agency investigating the accident;

(B) The physician in attendance; or

(C) Other person designated by state law.

(2)(A) The person who conducts the chemical test of the driver's or operator's blood, breath, saliva, or urine under this section shall forward the results of the chemical test to the Department of Arkansas State Police, and the department shall establish and maintain the results of the chemical tests required by subsection (a) of this section in a database.

court denied Dortch's motion to declare this provision unconstitutional, the circuit court did not actually analyze or rule on the constitutionality of section 5-65-208 because it concluded that Dortch had impliedly and actually consented to the blood draw. We agree. Here, the circuit court's September 27, 2016 written order merely denied Dortch's motion to declare Arkansas Code Annotated sections 5-65-202(a)(2) and 5-65-208 unconstitutional. The circuit court's ruling authorizing the admission of evidence

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> (B) The information in the database shall reflect the number of fatal motor vehicle accidents in which:
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> > (i) Alcohol was found to be a factor, including the percentage of alcohol concentration involved;
> >
> > (ii) Controlled substances were found to be a factor, including a list of the controlled substances found, the specific class of the controlled substance, and the amount; and
> >
> > (iii) Both alcohol and a controlled substance were found to be factors, including the percentage of alcohol concentration involved, as well as a list of the controlled substances found and the amount.
>
> (c) The result of a chemical test required by this section shall be reported to the department and may be used by state and local officials for:
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> (1) Statistical purposes that do not reveal the identity of the deceased person; or
>
> (2) Any law enforcement purpose, including prosecution for the violation of any law.

Ark. Code Ann. § 5-65-208 (Supp. 2015).

obtained from Dortch's blood draw did not require the circuit court to apply or consider section 5-65-208. The circuit court's order specifically found:

> 1. That the Defendant is charged with Negligent Homicide, a Class B felony, DWI, and Reckless Driving. That on September 16, 2016, the Defendant was involved in a one-vehicle accident that resulted in the death of the passenger of the vehicle. That the Defendant was taken to the White River Medical Center in Batesville, Arkansas by Deputy Aaron Moody of the Independence County Sheriff's Department. That the Defendant was advised of the implied consent law and the consequences of refusal to take a chemical test as contained in the Arkansas Statement of Rights Form.
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> 2. That the recent case of *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) found constitutional the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Furthermore, the *Birchfield* Court stated, "[i]t is well established that a search is reasonable when the subject consents, *e.g.*, *Schneckloth v. Bustamonte*, . . . and that sometimes consent to a search need not be express but may fairly be inferred from context," 136 S. Ct. at 2185 [internal citations omitted]. *Birchfield* was explicit in holding that the warrantless taking of a blood sample pursuant to implied consent—where those implied consent laws impose civil penalties and evidentiary consequences on motorists who refused to comply—was not constitutionally questionable. 135 S. Ct. at 2185. On the other hand, should a state, "not only insist upon an intrusive blood test, but also . . . impose criminal penalties on the refusal to submit to such test," the Court held that such violated the Fourth Amendment to the United States Constitution.
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> . . . .
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> 4. That in Arkansas, refusal to submit is a violation, which subjected Arkansas motorists to a civil administrative penalty of suspension or revocation of driving privileges. Thus, the blood draw from the Defendant did not implicate the Fourth Amendment.
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> 5. That the Defendant was apprised of the implied consent law and the consequences of refusal to submit to a chemical test. He voluntarily signed the form indicating that he would take the test. No coercion or deceit has been alleged by the Defendant or proven. The United States Supreme Court has made clear that

> Fourth Amendment consent need only be voluntary, not knowing and intelligent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). Knowing and intelligent waiver of rights is primarily applied to constitutional rights necessary to preserve a fair trial. *Id.* at 237.
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> 6. That Defendant gave his consent to the blood draw. The consent was voluntary. Consent is a valid exception to the warrant requirement.
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> 7. That any evidence obtained from the blood draw of the Defendant and subsequent test results are admissible and do not violate the U.S. Constitution or Arkansas Constitution.

In reviewing the denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Pickering v. State*, 2012 Ark. 280, 412 S.W.3d 143. A finding is clearly erroneous, even if there is evidence to support it, when the appellate court, after review of the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* We defer to the superiority of the circuit judge to evaluate the credibility of witnesses who testify at a suppression hearing. *Id.*

We begin our analysis with the Fourth Amendment which provides 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." U.S. Const. amend. IV. The United States Supreme Court has held that the compulsory administration of a blood test constitutes a search and is thus

subject to the constraints of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966). The Court has held that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)). A warrantless search of a person is reasonable only if it falls within a recognized exception to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141 (2013).

A. Implied Consent

In *Birchfield*, the Court addressed the constitutionality of a blood draw on the basis of statutory implied consent, as well as whether a blood draw can be justified as a search incident to arrest. The issue before the *Birchfield* court was "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 136 S. Ct. at 2172. The Court concluded that "the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving" but does not permit warrantless blood tests incident to arrest for drunk driving. *Id.* at 2184. Additionally, the Court concluded "that motorists cannot be deemed to have consented to submit to a blood test [by virtue of an implied-consent statute] on pain of committing a criminal offense." *Id.* at 2186.

In *Birchfield*, the Court first considered whether the warrantless "search-incident-to-arrest" doctrine applied to breath and blood tests. The Court explained that "we generally

determine whether to exempt a given type of search from the warrant requirement by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 2176 (internal citations omitted). After applying this balancing test, the Court held that a breath test is a permissible search incident to arrest because it does not implicate significant privacy concerns. *Id.* (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17 (1989)). The Court explained that breath-test results only capture limited information—the amount of alcohol in the subject's breath; and a breath test is not an experience likely to enhance any embarrassment to the subject. *Id.* at 2177. However, the Court explained that, unlike breath tests, blood tests require an intrusive piercing of the skin and "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Id.* at 2178.

Next, after determining that a warrantless blood test could not be justified as a search incident to arrest, the Court turned to whether a blood test is permissible based on a driver's statutory implied consent to submit to it. The Court noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them" *Id.* at 2185. Nonetheless, "[t]here must be a limit to

the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* The Court held that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. *Id.* at 2186.

With *Birchfield* in mind, we now consider Dortch's Fourth Amendment argument and whether Arkansas's implied-consent laws impose criminal penalties upon persons who refuse to submit to a blood test. The State argues that a refusal-to-submit violation sanctions the commission of this offense with civil penalties and not criminal penalties. Therefore, the State argues that Arkansas's implied-consent statutes do not violate the Fourth Amendment.

We now turn to the statutes at issue, Arkansas Code Annotated section 5-65-202 (Supp. 2015)[3] governs our implied-consent laws. Subsection (a) states:

> A person who operates . . . a motor vehicle or is in actual physical control of . . . a motor vehicle is deemed to have given consent, subject to § 5-65-203, to one (1) or more chemical tests of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood if:
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> . . . .
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> (2) The person is involved in an accident while operating or in actual physical control of . . . a motor vehicle[.]

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[3] Arkansas Code Annotated section 5-65-202 was amended in 2017 to add a warrant requirement for blood draws. However, the law that controls is the substantive law in effect on the date the crime was committed. *Wood*, *supra*.

Ark. Code Ann. § 5-65-202(a)(2). Arkansas Code Annotated section 5-65-205(a)(1)(C) (Supp. 2015) states that "if a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in § 5-65-202 . . . [t]he law enforcement officer shall immediately deliver to the person from whom the motor vehicle operator's license, permit, or other evidence of driving privilege was seized a temporary driving permit under § 5-65-402." Turning to section 5-65-402, subsection (d)(1) states that a "decision rendered at an administrative hearing held under this section shall have no effect on any *criminal case* arising from a violation of . . . § 5-65-205." (Emphasis added.) Thus, section 5-65-402 specifically recognizes that a criminal case arises from a violation of the refusal-to-submit statute. Further, Arkansas Code Annotated section 5-65-205(a)(2) states that "refusal to submit to a chemical test under this subsection is a *strict liability offense* and is a *violation*." (Emphasis added.) Pursuant to the Arkansas Criminal Code, a violation is a criminal offense. Specifically, Arkansas Code Annotated section 5-1-108 (Repl. 2013) states:

> (a) An *offense is a violation* if the offense is designated a violation by:
>
> (1) The Arkansas Criminal Code; or
>
> (2) A statute not a part of the Arkansas Criminal Code.
>
> (b) Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of the Arkansas Criminal Code if the statute defining the offense provides that no sentence other than a fine, fine or forfeiture, or civil penalty is authorized upon *conviction*.

(Emphasis added.) Based on the plain language employed by our implied-consent statutes and the Arkansas Criminal Code statutes, we disagree with the State's position that Arkansas's implied-consent statutes merely impose civil penalties. Pursuant to the Arkansas Criminal Code, the successful prosecution of a refusal-to-consent violation is considered a conviction. Ark. Code Ann. § 5-1-108(b). Additionally, Arkansas Code Annotated section 5-4-201(c) states that "a defendant *convicted of a violation* may be sentenced to pay a fine: (1) Not exceeding one hundred dollars ($100) if the violation is defined by the Arkansas Criminal Code or defined by a statute enacted subsequent to January 1, 1976, that does not prescribe a different limitation on the amount of the fine[.]" (Emphasis added.) Moreover, section 5-65-205(c)(1) states that the Office of Driver Services shall consider any of the following that occurred within the five (5) years immediately before the current offense a previous offense for the purposes of enhancing the administrative penalty under this section: (1) A *conviction for an offense* of refusing to submit to a chemical test[.]

The State asserts the Court's ruling in *Birchfield* was based on the threat of imposing severe criminal punishment—mandatory addiction treatment, a fine ranging from $500 to $2,000, and a term of imprisonment of up to one year and one day—not the labels that Arkansas law applies for a refusal to submit. While we agree that the criminal penalty imposed pursuant to Arkansas's refusal-to-consent law is much less severe than the

penalties at issue in *Birchfield*, the plain language utilized in our statutes demonstrates that these are nonetheless criminal penalties. The language employed in our implied-consent statutes establishes that the refusal to submit to a blood test results in a penalty that is criminal in nature. Accordingly, because the refusal to submit to a blood test pursuant to section 5-65-202 would result in the imposition of criminal penalties, we hold that, as applied to Dortch, it is unconstitutional. Thus, we note that the circuit court clearly erred in finding that the "blood draw from [Dortch] did not implicate the Fourth Amendment."

B. Actual Consent

Having determined that Dortch could not have impliedly consented to the blood draw, we now consider Dortch's actual consent to the blood draw and whether the totality of the circumstances established that Dortch voluntarily consented to the warrantless blood draw. The Fourth and Fourteenth Amendments require that consent not be coerced, by explicit or implicit means, by implied threat or covert force. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The voluntariness of consent must be judged in light of the totality of the circumstances. *Id.* It is the State's burden to prove by clear and positive evidence that consent was given freely and voluntarily. *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). This burden cannot be discharged by showing no more than mere acquiescence to a claim of lawful authority; it must be shown that there was no duress or coercion, actual or implied. *Id.*; *see also Bumper v. North Carolina*, 391 U.S. 543 (1968). "To permit a consent to search to be shown by any less quantum of proof would permit the fact finder

to issue in effect an ex post facto search warrant." *Moore v. State*, 265 Ark. 20, 23, 576 S.W.2d 211, 213 (1979).

Here, without conducting a suppression hearing, considering testimony, or reviewing evidence, the circuit court found that Dortch voluntarily consented to the blood draw.[4] As discussed above, it is the State's burden to prove by clear and positive evidence that consent was given freely and voluntarily. Accordingly, because the State failed to meet its required burden of proving that Dortch freely and voluntarily consented by clear and positive evidence, the circuit court's finding on this point is clearly erroneous. Stated differently, without the benefit of a suppression hearing and without considering evidence regarding the voluntariness of Dortch's consent, the circuit court erroneously made an evidentiary determination that Dortch voluntarily consented to the blood draw. Further, because we are unable to say that the State met its burden of proving consent freely and voluntarily given by clear and positive evidence, the evidence obtained from the blood draw should have been suppressed. *See White v. State*, 261 Ark. 23-D, 25, 545 S.W.2d 641,

[4] We note that a pretrial hearing was held on September 27, 2016. However, no evidence or testimony regarding the voluntariness of Dortch's consent was presented. Despite the dissenting opinions, the record is clear and the parties do not dispute that the circuit court did not hold a suppression hearing.

643 (1977). Accordingly, we reverse Dortch's convictions and remand this case for a new trial without the evidence obtained from the blood draw.[5]

Although we are reversing and remanding for a new trial, we will consider Dortch's argument regarding lack of an autopsy because it is both preserved and likely to recur on remand. *See Bailey v. Rose Care Ctr.*, 307 Ark. 14, 20, 817 S.W.2d 412, 415 (1991) (reversing and remanding on first point on appeal, then proceeding to address and reject two of appellant's other points on appeal "since they will likely recur on remand"). We note that the remaining points on appeal are either not preserved for our review or not likely to recur on remand.

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[5] We note that the State argues that the good-faith exception applies to the present case. However, the State acknowledges that while it made this argument below, the circuit court did not rule on this issue. On appeal, the State argues that this court can affirm the denial of the motion to suppress because Deputy Moody reasonably relied on extant statutes and we can affirm for a different reason than those relied on by the circuit court. *See Moya v. State*, 335 Ark. 193, 204, 981 S.W.2d 521, 527 (1998). In *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court stated that when an officer relies in good faith on a search warrant that is later determined to be unsupported by probable cause, any evidence discovered by reason of that search will not be suppressed. In *Leon*, the Court announced that the good-faith exception applies when the executing officers' good-faith reliance on an invalid search warrant is objectively reasonable. *Id.* at 919. Thus, as applicable to the present case, the issue is whether Deputy Moody's good-faith reliance on the statute was objectively reasonable. However, as noted above, no suppression hearing was held and thus no determination was made as to whether Deputy Moody's good-faith reliance was objectively reasonable. Accordingly, based on the facts and circumstances of this case, we decline to apply the good-faith exception.

III. *Lack of an Autopsy*

Next, Dortch argues that the coroner's failure to obtain an autopsy and preserve evidence of the cause of Anderson's death affirmatively prejudiced Dortch's ability to present a defense in his case. As noted above, in his September 26, 2016 memorandum brief in support of his motion in limine to suppress testimony, Dortch specifically cited *Arizona v. Youngblood*, 488 U.S. 51 (1988). In *Youngblood*, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58.

Specifically, Dortch contends that the failure to obtain an autopsy when the cause of death is not patent and not otherwise established should be construed as bad faith. Stated differently, the coroner's failure to obtain an autopsy in this case was de facto bad faith in the sense of withholding potentially exculpatory evidence. Further, Dortch argues that "to the extent that *Youngblood* applies, . . . *Youngblood* should be reconsidered on these facts and that due process should prohibit at the very least destruction of physical evidence relating to causation where any conclusion would be purely circumstantial, particularly where it has been subjected to no scientific evaluation by any party." We find no merit to Dortch's argument. As the State points out, we lack authority to extend federal constitutional protections beyond the holdings of the United States Supreme Court. *See*

Sherman v. State, 2009 Ark. 275, at 13, 308 S.W.3d 614, 620. To the extent that Dortch is asking this court to impose greater protections based upon our own state constitutional law, we decline to do so. Dortch has failed to demonstrate bad faith on the part of the police. Thus, Dortch has failed to demonstrate that he was deprived of his right to due process based on the lack of an autopsy. We affirm on this point.

Affirmed in part; reversed and remanded in part.

WOOD and WOMACK, JJ., and Special Justice MARK D. WANKUM concur in part and dissent in part.

KEMP, C.J., not participating.

SHAWN A. WOMACK, Justice, concurring in part and dissenting in part. I join Special Justice Wankum's opinion regarding the flaws in the majority's constitutional and statutory analysis of Arkansas's implied-consent regime. I write separately for two purposes. First, I believe the majority incorrectly declines to apply the good-faith exception to the exclusionary rule. Even if the entirety of the majority's analysis of the relevant statutes were correct, this is precisely the sort of case in which the good-faith exception must apply. Second, the majority declines to reach two points on appeal because it reverses and remands for a new trial on other grounds and considers the avoided points unlikely to reoccur. Because I would not reverse on the points addressed by the majority, I write to

make clear that Dortch's arguments on his remaining evidentiary objections also lack merit. I would affirm the circuit court's decisions on all points.

The majority's discussion of the good-faith exception is relegated to a footnote. The majority acknowledges that the State has consistently argued for the good-faith exception, but it reaches the curious conclusion that the circuit court's failure to rule on the good-faith exception below prohibits this court from affirming based on that exception on appeal. It is not clear in what context the majority believes the circuit court might have made such a ruling. The circuit court declined to rule that the implied-consent statute as applied to Dortch was unconstitutional, and it admitted the blood-draw evidence pursuant to it. In other words, it found no constitutional defect necessitating the application of a saving exception. Nevertheless, the majority argues that this court should not apply the good-faith exception in circumstances where the circuit court failed to conduct a suppression hearing and determine that the searching officer's reliance on the legal authority for his search was objectively reasonable. It is true that the good-faith exception requires objective reasonableness on the part of the searching officer; contrary to the majority's conclusion, however, it is the very objectivity of the inquiry that makes requiring a ruling by the circuit court nonsensical.

Some of the confusion can be explained by the precedent cited by the majority for its conclusion. While *United States v. Leon*, 468 U.S. 897 (1984), deals with the good-faith exception, the more appropriate framework for discussion is *Illinois v. Krull*, 480 U.S. 340

(1987). *Leon*, as the majority recites, applies the exception when an officer relies in good faith on a search warrant duly issued by a magistrate that is later found defective. The standard in that circumstance is objective reasonableness, but the Court highlights several instances in which facts might complicate the objective analysis. *See Leon*, 468 U.S. at 923. Information in an affidavit used to support the warrant might be so clearly false that an officer could only believe it through reckless disregard of the truth. *Id.* The warrant may be so facially flimsy that belief in the existence of probable cause becomes "entirely unreasonable." *Id.* A different magistrate could have objected to the same warrant application. *Id.* at n.23. Perhaps if this case involved a warrant and a dispute over probable cause, one could imagine a situation opaque enough that the lack of a hearing below would make it impossible to determine whether the officer's reliance on that warrant was objectively reasonable.

Thinking through that analogy is unnecessary, however. In *Krull*, the Court applied the good-faith exception to the exact situation in which the majority finds itself. An officer relied on a statute authorizing warrantless searches, and that statute was later found unconstitutional.[1] *Krull*, 480 U.S. at 342. *Krull* again stresses that the test for applying the exception "is an objective one; the standard does not turn on the subjective good faith of

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[1]In *Krull*, the statute was declared unconstitutional in a separate declaratory-judgment suit; here the majority makes that ruling itself. The distinction, however, does not lessen the applicability of the reasoning in *Krull*.

individual officers." *Id.* at 355. As it did in *Leon* with judges authorizing warrants, the Court in *Krull* noted that there is no evidence to suggest that legislators routinely violate their constitutional oaths by enacting statutes permitting warrantless searches repugnant to the Fourth Amendment. *Id.* at 351. It acknowledges certain circumstances might defeat this presumption that an officer following a statute is objectively reasonable, but those circumstances are limited to when the legislature "wholly abandoned its responsibility to enact constitutional laws" and crafted a statute so flawed that "a reasonable officer should have known that the statute was unconstitutional." *Id.* at 355. Whether a relied-upon statute is so obviously constitutionally defective for this "exception to the exception" to apply is entirely a question of law.[2]

Reading the careful analysis both in the majority opinion and in Special Justice Wankum's dissent should be enough to demonstrate that the legislature's enacting the implied-consent statute at issue here was not some exercise of lawless abandon. The question of the implied-consent statute's constitutionality as applied to Dortch requires fine-grained decisions about whether the penalties imposed are civil or criminal in nature as the United States Supreme Court meant that distinction in *Birchfield v. North Dakota*,

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[2] In *Krull*, for example, the Court's inquiry into the objective reasonableness of relying on the later-overturned statute was entirely an analysis of the constitutionality of similar statutes at the time of the officer's actions. It does not hinge on any unique facts of the sort that might have been teased out in the majority's proposed suppression hearing. *See Krull*, 480 U.S. at 356–60.

136 S. Ct. 2160 (2016). Added to this is the fact that the *Birchfield* decision was not handed down until a year after the disputed search in this case occurred. When the *cause* of the constitutional ambiguity does not exist until after the officer on the ground was required to make the call on whether to follow a statute, we have shifted our expectations of that officer from good faith into the realm of clairvoyance. As *Krull* explains, applying the exclusionary rule in this circumstance invites all the social costs of excluding evidence without securing any of the deterrent effect that is the exclusionary rule's supposed benefit. *See Krull*, 480 U.S. at 351–52. The Court correctly notes the incentives at play:

> [T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute, as happened in this very case.

Krull, 480 U.S. at 352. So too here. The majority itself points out that the legislature has already acted; the amended version of the statute requires a warrant for a blood draw. This response only strengthens the reasoning that applying the exclusionary rule in this case does not serve the deterrent objectives of the rule. The legislature has already been deterred. Finally, I note that applying the good-faith exception in this case would not put Arkansas outside the mainstream of other states that have considered this issue. Despite variations in statutory frameworks, other state courts have reached the conclusion that suppressing evidence obtained pursuant to pre-*Birchfield* implied-consent statutes would

have no positive deterrent effect on officers attempting to apply duly enacted laws going forward.[3] Indeed, punishing the officer for enforcing laws that are not flagrantly unconstitutional invites a sort of case-by-case discretion at the officer level that we are rightly skeptical of in other circumstances. While I would hold the implied-consent statute constitutional as applied to Dortch, the majority errs by not applying the good-faith exception given its opposite conclusion on the constitutional question.

I now turn briefly to two of Dortch's points on appeal, which the majority declined to address given its reversal and remand for a new trial on other grounds. Because I would reach different conclusions than the majority on those grounds, I believe it is necessary to note that Dortch's arguments on these evidentiary points similarly lack merit. First, Dortch argues that the circuit court erred by allowing the coroner to testify about the victim's cause of death given that a cause of death was not obviously apparent. Second, Dortch asserts that (1) the prosecutor misrepresented the testimony of Tara Hall, the waitress who served alcohol to Dortch and the victim prior to the fatal automobile accident, and (2) the circuit court erred in failing to permit correction of these alleged misrepresentations. Despite Dortch's arguments to the contrary, the appropriate standard of review for both of these

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[3] *See, e.g.*, *State v. Hoerle*, 901 N.W.2d 327 (Neb. 2017) (Applying exception, also noting issue is purely a question of law on which the appellate court reaches a conclusion independent of the court below.); *Commonwealth v. Updike*, 172 A.3d 621 (Pa. Super. Ct. 2017; *State v. Schmidt*, 385 P.3d 936 (Kan. Ct. App. 2016) (Applying exception, also noting that State may raise good-faith exception for the first time on appeal.)

evidentiary decisions is whether the circuit court abused its discretion. *See, e.g.*, *Duncan v. State*, 2018 Ark. 71, at 3, 539 S.W.3d 581, 583.

Regarding the coroner testimony, the circuit court was correct in ruling that *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993), and other cases sanction lay testimony about the cause of death when the witness's experience informs that observation. *See id.* at 154, 856 S.W.2d at 26. As in *Tallant*, the coroner here had considerable experience. He had worked on automobile fatalities, attended relevant continuing education about determining cause of death, and worked as a paramedic for 25 years. It was not an abuse of discretion to allow the coroner's testimony that the victim, whose body was found strapped into an overturned vehicle with a frame bent by the force of an accident, had died from blunt-force trauma or internal injuries otherwise sustained from that accident.

Dortch's remaining point relates to the testimony of Hall. As the majority recounts, Hall testified that she served Dortch one regular mug of beer and one "Big Earl" mug, which was nearly twice the size. Dortch's objection is that the prosecutor's later references to Hall's testimony asserted that Dortch drank both of the beers he was served, but Hall had in fact testified that she did not actually watch Dortch drink the beers she had served him. Dortch claims he ordered the "Big Earl" for the victim. Dortch argues that the prosecutor's comments violate his right to due process because they assert facts not in evidence. This argument is not preserved for review. The prosecutor made the claim several times that Dortch drank both beers (a fair inference given that the victim had his own tab

and ordered his own beer), but Dortch objected only after the third instance. Defendants must object at the first opportunity to preserve arguments for appeal. *See, e.g.*, *Vaughn v. State*, 338 Ark. 220, 225, 992 S.W.2d 785, 787 (1999).

I join Special Justice Wankum's reasoning that Arkansas's implied-consent statute was constitutional as applied to Dortch. Even if the majority's analysis finding constitutional fault with the statute were correct, however, I believe it would be an error not to apply the good-faith exception to the exclusionary rule in these circumstances. Finally, as I would reach all points on appeal, Dortch's remaining evidentiary arguments lack merit.

I respectfully dissent.

WOOD, J., and Special Justice MARK D. WANKUM join.

Special Justice MARK D. WANKUM concurring in part and dissenting in part. I write separately to dissent from the majority's decision to invalidate Arkansas's implied consent statute as applied to Mr. Dortch. This court has consistently considered these penalties civil in nature and the majority errs to hold otherwise. Additionally, I join Justice Womack's separate opinion and would affirm the trial court. I concur with the majority's decision to affirm as to the sufficiency of the evidence.

One incarnation of consent by conduct is the implied consent given by virtue of operating a motor vehicle on Arkansas roads. As one court explained: "The use of the word 'implied' in the idiom 'implied consent' is merely descriptive of the way an individual gives

consent. It is no less sufficient consent than consent given by other means." *State v. Brar*, 898 N.W.2d 499, 506 (Wis. 2017). Consent by conduct or implication is sufficient under the Fourth Amendment and cannot be dismissed as some lesser or suspect form of consent.

Turning to Mr. Dortch, there was no dispute at the suppression hearing that Mr. Dortch operated a motor vehicle and was involved in an accident while operating that vehicle. By virtue of that conduct and by operation of Ark. Code Ann. § 5-65-202(a)(2), Mr. Dortch is "deemed to have given consent, subject to § 5-65-203, to one (1) or more chemical tests of his . . . blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his . . . breath or blood." There was no evidence or contention that he withdrew that consent at any time or refused to submit to the blood draw as permitted by Ark. Code Ann. § 5-65-203.

Instead of challenging the circumstances implicating his consent, Mr. Dortch and the majority argue that the consent was insufficient because the implied-consent statute "criminalizes" refusal. It is on this point that I part ways.

In *Birchfield v. North Dakota*, the Court endorsed the use of implied-consent laws, reasoning that implied consent *is* valid consent so long as it is not on pain of committing a criminal offense. 136 S. Ct. 2160, 2185–86 (2016). The Court explained:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not

> question the constitutionality of those laws, and *nothing we say here should be read to cast doubt on them.*

Id. (emphasis added and internal citations omitted).

Civil penalties and evidentiary consequences for refusal do not invalidate consent or cast doubt on the constitutionality of a blood draw performed pursuant to implied consent. These are precisely the consequences imposed by Ark. Code Ann. § 5-65-203(b) and our case law. It is the substance of the consequences for refusal, not its location in the code, which is determinative. To determine whether penalties for refusal are criminal or civil, we need look to the text of the statute and the actual penalties imposed.

Refusal results in suspension or revocation of driving privileges, Ark. Code Ann. § 5-65-205(b), and we have previously affirmed that evidence of an accused's refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt, *see Metzner v. State*, 2015 Ark. 222, at 6, 462 S.W.3d 650, 655. We have previously characterized these consequences as a civil sanction that does not rise to the level of criminal punishment. *See Leathers v. Cotton*, 332 Ark. 49, 51, 961 S.W.2d 32, 33 (1998) ("Administrative suspension or revocation of driver's licenses, which constitutes a remedial *civil* sanction, *see Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997), is primarily governed by section 5-65-104."). In so holding, we acknowledged that driving, itself, is a privilege, not a right, and the revocation of a privilege temporarily granted is traditionally remedial and civil in nature. *See Pyron*, 330 Ark. at 90, 953 S.W.2d at 875

(citing *Helvering v. Mitchell*, 303 U.S. 391 (1938)). Because suspension of driving privileges does not deprive an individual of a right, it is not a criminal sanction.

Much of the majority's decision turns on the placement of this civil penalty in the criminal code; however, that is not persuasive. In *Pyron*, we addressed whether these same penalties located in another section of the criminal code constituted criminal punishment for purposes of double jeopardy. 330 Ark. at 90, 953 S.W.2d at 875. The statutory provision at issue in that case was Ark. Code Ann. § 5-65-104. In nearly identical language, that provision stated that "[t]he Office of Driver Services or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person." Ark. Code Ann. § 5-65-104(a)(2). *Cf.* Ark. Code Ann. § 5-65-205(b)(1) ("The Office of Driver Services shall suspend or revoke the driving privilege of an arrested person who refuses to submit to a chemical test . . . ."). Like the statute at issue here, Ark. Code Ann. § 5-65-104 uses terms like "offense," "arrest," and "conviction." *See generally* Ark. Code Ann. § 5-65-104. Despite the terminology and location in the criminal code, we considered the nature of the sanction, namely the suspension of a privilege, and concluded that the statute did not impose criminal punishment. *Pyron*, 330 Ark. at 93, 953 S.W.2d at 876–77. I see no reason for us to deviate from that conclusion here.

The characterization of these consequences as a civil penalty is perfectly consistent with its statutory definition as a "violation." *See* Ark. Code Ann. § 5-65-205(a)(2). Refusal

to submit to a chemical test is designated as a "strict liability offense and is a violation." Ark. Code Ann. § 5-65-205(a)(2). While designated as such, it also qualifies because "the statute defining the offense provides that no sentence other than a . . . *civil penalty* is authorized upon conviction." Ark. Code Ann. § 5-1-108 (emphasis added). Its civil nature is reinforced by the fact that it is a strict-liability offense with no culpable *mens rea* requirement.

This conclusion finds support from our sister states that have confronted *Birchfield* to address comparable statutory schemes imposing civil penalties. The Wisconsin Supreme Court upheld its implied-consent statute where the consequence of refusal was limited to the suspension of a driver's license. *See Brar*, 898 N.W.2d 499. Colorado reached the same result in *People v. Hyde*, 393 P.3d 962 (Colo. 2017), as did the Idaho Supreme Court in *State v. Charlson*, 377 P.3d 1073 (Idaho 2016), and the Virginia Court of Appeals, *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016). Most recently, the Florida Court of Appeals upheld Florida's implied-consent statute which addressed civil penalties materially identical to those here. *McGraw v. State*, 2018 Fla. App. LEXIS 3943 (decided March 21, 2018). These cases make it quite clear that presence of the civil penalty in the criminal code was inconsequential as was a *de minimis* fine. The courts looked to the nature of the penalty to distinguish civil from criminal consequences. After all, placement of the same penalty in a different part of the code would not change its nature.

In contrast, states which have invalidated their implied consent schemes for warrantless blood draws had statutes clearly imposing criminal consequences. These consequences went beyond suspension of driver's licenses to include substantial fines and incarceration. *See, e.g.*, *State v. McCumber*, 893 N.W.2d 411 (Neb. 2017); *State v. Vargas*, 404 P.3d 416 (N.M. 2017); *State v. Storey*, 410 P.3d 256 (Ariz. Ct. App. 2017). The deprivation of liberty and property is criminal in nature unlike the revocation of a driving privilege.

Given our history characterizing the suspension of driving privileges as a civil penalty, Arkansas's implied-consent statute is not constitutionally suspect under *Birchfield*. Indeed, the Arkansas statute mirrors those approved by *Birchfield* and many other states that have since confronted the same question before us today. Put simply, by operating a motor vehicle in the State of Arkansas, Mr. Dortch was deemed to have given consent to a chemical test in the event of an accident. The consequence of refusal was clearly civil in nature, and so, there was no unconstitutional coercion to invalidate that consent nor did Mr. Dortch affirmatively withdraw his consent. As such, the trial court properly denied Mr. Dortch's suppression motion, upheld the constitutionality of Arkansas's implied-consent statute, and permitted the introduction of the results of that blood draw at trial.

I would affirm the suppression decision and affirm the verdict in its entirety.

WOOD and WOMACK, JJ., join.

Jeremy B. Lowrey; and *Larry Dean Kissee*, for appellant.

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