IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 12909005937
	)	
FREDDIE FLONNORY.	)	

ORDER

On this 17th Day of July, and upon Defendant Freddie Flonnory's ("Defendant") Motion for Reargument, or in the alternative, Motion for Certification to the Supreme Court,[1] it appears to the Court that:

Background

On September 8, 2012, Defendant was stopped for failure to signal and further detained based on suspicion of DUI.[2] After failing four field sobriety tests and a portable breath test, Defendant was placed under arrest and into a patrol vehicle. Before transporting Defendant to the police station, the officers waited for Defendant's girlfriend to retrieve the vehicle. Defendant was then transported to the police station and the police contacted a phlebotomist. Defendant was advised that his blood would be drawn because had had two prior convictions. Cpl. Pietlock did not ask for permission to obtain the blood sample nor did he obtain a warrant. At 11:36

[1] Defendant's motion is brought pursuant to Superior Court Criminal Rule 57(d).
[2] The facts are more fully detailed in the Court's Order, dated June 12, 2013.

p.m., about an hour and a half after Defendant was arrested, Defendant's blood was drawn. During the blood draw, Defendant told the phlebotomist, "that's a good vein, don't miss it."

Defendant filed a motion to suppress and, prior to the suppression hearing, Defendant challenged the warrantless blood draw based on *Missouri v. McNeely,* 133 S. Ct. 1552 (2013), a case which was pending before the U.S. Supreme Court. After the hearing, the U.S. Supreme Court issued *McNeely* and the Court invited the parties to submit supplemental briefing addressing the decision. Defendant argued that the exigent circumstances exception did not apply and that Delaware's Implied Consent Statutes[3] did not make a warrantless blood draw per se reasonable. After considering the parties' submissions, the Court denied Defendant's motion.[4] The Court cited *Seth v. State*, 592 A.2d 436, 443 (Del. 1991) and *State v. Crespo,* 2009 WL 1037732, at *7 (Del. Super. Apr. 17, 2000) in support of its finding that Delaware's implied consent law triggered the consent exception to the warrant requirement. The Court also determined that the only issue in *McNeely* was whether blood alcohol dissipation presented per se exigency sufficient to satisfy the exigent circumstances exception to the warrant requirement and that *McNeely* did not alter the Court's finding that

[3] 21 *Del. C.* § 2740, et seq.
[4] Order, dated June 12, 2013.

the implied consent statutes exempted the extraction from the warrant requirement. Based on *McNeely*'s reaffirmation that the totality of the circumstances test was required to determine exigency, the Court found that exigent circumstances did not exist to justify the blood draw in this case."[5]

Discussion

I. Motion for Reargument

Defendant asserts that the Court misapprehended the law when it found that Defendant's "statutory implied consent exempted the blood draw from the warrant requirement"[6] and that "*McNeely* d[id] not affect the Court's finding that the results from the blood sample are admissible pursuant to the consent exception to the warrant requirement."[7] Defendant argues that the Court's misapprehension of the law stems from a misunderstanding of the relationship between 21 *Del. C.* §§ 2740 and 2750.

A motion for reargument may be granted only when the Court has "overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[8] A motion for reargument is not an opportunity

[5] *Id*. at 13.
[6] *Id.* at 16.
[7] *Id*. at 16-17.
[8] *Fisher v. Beckles*, 2012 WL 5509621, at *2 (Del. Super. Oct. 24, 2012)(quoting *Kennedy v. Invacare, Inc.,* 2006 WL 488590, at *1 (Del.Super.Jan.31, 2006)).

for a party "take a second bite at the apple"[9] by revisiting arguments already decided by the Court or presenting new arguments which have not been raised.[10]

Defendant's argues that, since § 2750 permits the results of the chemical test to be admitted only when they were obtained "according to the normal rules of search and seizure", a reading §§ 2740 and 2750, shows that "'consent' within the meaning of the 'implied consent' statute is not synonymous with 'consent' in the context of a Fourth Amendment or Article I, § 6 [of the Delaware Constitution] analysis."[11] Section 2750(a) states:

> Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol, a drug or drugs, with respect to any chemical test taken by or at the request of the State, the court **shall admit the results of a chemical test of the person's breath, blood or urine according to normal rules of search and seizure law**. The informing or failure to inform the accused concerning the implied consent law shall not affect the admissibility of such results in any case, including a prosecution for a violation of § 4177 of this title. The informing of an accused concerning the implied consent law shall only have application and be relevant at a hearing concerning revocation of the driver's license of said person for a violation of the implied consent law. **Nothing contained in this section shall be deemed to preclude the admissibility of such evidence when such evidence would otherwise be admissible under the law relative to search and seizure law such as when such evidence has been obtained by**

[9] *Id*. (quoting *Accu–Fire Fabrication, Inc. v. Corrozi–Fountainview, LLC,* 2009 WL 930006, at *2 (Del.Super.Mar.26, 2009)).
[10] *Id.*
[11] Def. Mot., at ¶ 12.

valid consent or other means making the obtaining of the evidence legal under the Fourth Amendment.[12]

Defendant is correct that § 2750 must be read in conjunction with § 2740.[13] Nevertheless, the Court does not agree that such a reading demonstrates that statutory implied consent cannot serve as the consent required for the exception to the warrant requirement based on prior interpretations of the implied consent law by the Delaware Supreme Court in *Seth* and this Court in *Cardona* and *Crespo*.

The Court cited *Seth* and *Crespo* to support its finding that the implied consent statute excused Cpl. Pietlock from obtaining a warrant in this case.[14] In *Seth*, the Delaware Supreme Court addressed the admissibility of an intoxilyzer test. In doing so, the Supreme Court explained the effect of the statutory amendments to the implied consent law that were made in 1982 and 1983.[15] The Court described § 2740 as "render[ing] the operation of a motor vehicle a constructive consent of the operator to submit to testing for alcohol or drugs by an officer having 'probable cause to believe' the operator was in violation of 21 *Del. C.* §4177 or § 2742."[16] The Court also stated that the purpose of § 2750 was "to eliminate any defense to the admissibility of the results of chemical tests based on a failure to inform the

[12] § 2750(a)(emphasis added); § 2750(b) is not relevant to Defendant's motion.
[13] *See State v. Onumonu*, 2001 WL 695539, at *4 (Del. Super. June 18, 2001).
[14] Order, at 14.
[15] *Seth*, 592 A.2d at 443-44.
[16] *Id.* at 443.

accused of the implied consent law, where Fourth Amendment concerns are not implicated".[17] The Court further explained that the "net effect of the amendments is an officer's ability to require a suspect to submit to testing, without that person's consent or a reading of the implied consent law, so long as the officer has probable cause and the degree of force is not excessive under the Fourth Amendment."[18]

Seth was cited in two Superior Court cases involving the warrantless extraction of blood pursuant to the implied consent law: *State v. Cardona,*2008 WL 5206771 (Del. Super. Dec. 3, 2008) and *Crespo*. In *Cardona*, after addressing *Seth*'s interpretation of the statutes, the Court found that, since probable cause existed, "[b]y choosing to drive a motor vehicle in Delaware, Defendant impliedly consented to submit his blood for chemical testing."[19] The Court further explained that "the factors and analysis used to determine "reasonableness" in the constitutional context inform the "reasonableness" analysis under Section 2741(a)."[20] The Court described the constitutional analysis in blood extraction cases as "hing[ing] on three prongs: (1) probable cause to believe a suspect is driving under the influence; (2) a search warrant or recognized exception under the Fourth Amendment, and lastly; (3) reasonableness."[21] Applying the three-prong

[17] *Id*. at 444.
[18] *Id.*
[19] *Cardona*, 2008 WL 5206771 at *3-4.
[20] *Id.* at *4.
[21] *Id*. at *5 (citing *Schmerber v.* California, 384 U.S. 757, 768 (1966) and *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

test to the facts before it, the Court stated that "[a]s to the second [prong], Delaware's Implied Consent Statute provides the applicable exception to the warrant requirement."[22] Shortly after *Cardona*, the Court issued the *Crespo* decision and found that a defendant had impliedly consented to a blood draw by operating her vehicle[23] and that Delaware's implied consent statues provided the applicable exception to the warrant requirement.[24] Based on those cases, the Court did not misapprehend the relationship between §§ 2740 and 2750.

The Court will not readdress its rationale as to why *McNeely* did not affect its holding that the implied consent statute exempted the blood draw from the warrant requirement. However, the Court is aware that the Arizona Supreme Court has cited *McNeely*, in a case involving a juvenile arrestee's warrantless blood draw, to conclude that "independent of [Arizona's implied consent statute], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw."[25] The court viewed *McNeely* as holding "that a

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[22] *Id.* (citing *State v. Devonshire,* 2004 WL 84724 at *2 (Del. Super. 2004) for the principle that consent may be express or implied).
[23] *Crespo*, 2009 WL 1037732, at *7.
[24] *Id.*
[25] *State v. Butler*, 302 P.3d 609, 2013 WL 2353802, at *4 (Ariz. 2013). In *Butler,* the court also supported its holding with its own precedent, *Carillo v. Houser,* 232 P.3d 1245, 2013 WL 2353802 (2010), in which it held that "for an officer to administer a test of breath or bodily fluids on an arrestee without a search warrant under [the implied consent statute], consent must be express."*Butler*, 2013 WL 2353802 at *3, *quoting Carillo*, 232 P.3d at 1245. Acknowledging that the *Carillo* decision was based on statutory, but not constitutional grounds, the court explained that "[i]f the arrestee refuses, the *statute specifies that a warrant is required* to administer the test and the arrestee shall have his license suspended." *Id.* at *4 (emphasis added). Here, the Court is

compelled blood draw taken pursuant to Missouri's implied consent law is subject to the Fourth Amendment's restrictions on warrantless searches." [26] Although *McNeely* involved an implied consent statute, this Court does not interpret the *McNeely* holding as one that squarely addresses the relationship between statutory implied consent and the consent exception. *McNeely* involved a defendant's repeated refusal of the blood draw. In this case, Defendant did not refuse the blood draw or act in any way to withdraw his statutory implied consent. Furthermore, the Court does not view *McNeely* as prohibiting courts from finding that statutory implied consent satisfies the consent required for the consent exception, because the U.S. Supreme Court included implied consent statutes as one of the tools that states have "to enforce their drunk-driving laws and to secure BAC evidence without undertaking nonconsensual blood draws."[27]

Based on the reasons stated above, Defendant's motion for reargument is **DENIED.**

II. Application for Certification

Defendant requests, in the alternative, that the Court certify the following questions to the Supreme Court pursuant to Del. Super. Ct. Civ. R. 75.

1) Given the United States Supreme Court's holding in *Missouri v. McNeely*, is a warrantless seizure of blood admissible without the

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not guided by similar statutory language or case law requiring express consent or a warrant.

[26] *Id.* at *3.

[27] *McNeely,* 133 S.Ct. at 1566.

demonstration by the State of exigency or other established exception to the 4th Amendment and Article 1, section 6 of the Delaware Constitution?

2) Does Delaware's Implied Consent law, 21 *Del. C*. § 2740, *et. seq*., provide an automatic exception to the search warrant requirement for blood seizures in DUI investigations?

Defendant requests certification because the interpretation of *McNeely* is an issue of first impression in Delaware.[28]

Superior Court Rule Civil 75 provides that Supreme Court Rule 41 governs certification of questions of law. Under Rule 41, the Superior Court may certify questions of law "in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question or questions by [the Supreme Court] and the certifying court has not decided the question or questions in the case."[29] The Supreme Court, exercising its discretion, will accept certification "only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified" and where material facts are not in dispute.[30] Rule 41(b) states that:

> Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:
> (i) *Original question of law.* The question of law is of first instance in this State;

[28] Def. Application for Cert.
[29] Supr. Ct. R. 41(a).
[30] Supr. Ct. R. 41(b).

> (ii) *Conflicting decisions*. The decisions of the trial courts are conflicting upon the question of law;
> (iii) *Unsettled question.* The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

Neither question presented by Defendant is one of first impression. Defendant's first question is whether, given the decision in *McNeely*, a warrantless seizure of blood is admissible without exigency or any other exception to the warrant requirement. Defendant's question suggests that, after *McNeely*, there is some doubt as to whether a warrantless blood draw can be taken without an applicable exception to the warrant requirement. There is no doubt that an exception must apply in order to justify a warrantless search; here, that exception is the consent exception, which was triggered by Defendant's statutory implied consent. *McNeely* did not foreclose courts from finding that consent, for the purposes of the Fourth Amendment, could be derived from the operation of implied consent statues simply because that was not the issue before the Court. As for the second question, certification is denied because the Court has already addressed the issue of whether statutory implied consent exempts a blood draw from the warrant requirement in *Cardona* and *Crespo*. Therefore, Defendant's request for certification is **DENIED.**

Conclusion

For the aforementioned reasons, Defendant's motion for reargument, or in the alternative, for certification to the Supreme Court is **DENIED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.