Pursuant to Court Order

SUPREME COURT OF KENTUCKY

Case No. 2013-SC-742-DG

COMMONWEALTH OF KENTUCKY — **APPELLANT**

On Discretionary Review from Court of Appeals (No. 2011-CA-636-DG)
Appeal from Webster Circuit Court
Hon. C. Rene Williams, Judge
Action No. 10-XX-4

CHRISTOPHER DUNCAN — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify the appellate record was not withdrawn from the Clerk of this Court, and that a copy of this brief was delivered this 2nd day of September, 2014, to C. Rene Williams, Judge, Webster County Courthouse, 35 U.S. Highway 41A South, P.O. Box 126, Dixon, KY 42409 (U.S. mail); Zac Greenwell, Esq., 112 South Main Street, P.O. Box 341, Marion, KY 42064-0341 (electronic mail); Amealia R. Zachary, Esq., 66 U.S. Highway 41A South, P.O. Box 338, Dixon, KY 42409 (U.S. mail).

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INTRODUCTION

This is a criminal case in which the Commonwealth of Kentucky seeks reinstatement of the Webster Circuit Court order affirming the district court order denying Christopher Duncan's motion to dismiss the charge of driving while intoxicated.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is unnecessary in this appeal.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The following abbreviation(s) are used in this brief when referring to the certified record:

VRx refers to DVD/CD/videotape of record, *e.g.*, VR2; and

TRx refers to transcript of record, *e.g.*, TR2.

Additional record-related abbreviations will be noted in this brief as appropriate.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. District Court and Circuit Court Proceedings.

On March 31, 2007 Duncan was stopped by a law enforcement officer in Webster County after the officer noticed him not wearing a seat belt and his vehicle cross the centerline. (TR1, 66.) According to the arrest citation, Duncan had a "strong smell" of alcohol about him, bloodshot eyes, and admitted drinking three beers. (*Ibid.*) A preliminary breath test (PBT) "showed [a] presence of alcohol" and Duncan failed a series of field sobriety tests. (*Ibid.*)

When the officer asked Duncan to submit to a blood test, Duncan refused.[1] (TR1, 66.) The citation seems to indicate the officer did not ask Duncan to submit to a urine or additional breath test. (*Ibid.*) Duncan was then arrested and charged with driving while intoxicated (third offense) (DUI). (*Ibid.*)

On October 23, 2007 Duncan filed a motion asking that the DUI charge be dismissed. (TR1, 38-44.) Duncan primarily took issue with the fact the officer asked him to submit to a blood test rather a breath test. (*Id.*) That is, Duncan maintained the breath test should have been offered first rather than the blood test. (*Id.*)

By order entered February 26, 2008, the district court judge denied the motion to dismiss.[2] (TR1, 31.) Looking to KRS 189A.103 (Kentucky's implied consent statute) and *Beach v. Commonwealth*, 927 S.W.2d 826 (Ky. 1996), the district court judge ruled those authorities "give the arresting officer the option as to which test may be given in a DUI

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[1] In his response to the Commonwealth's motion for review, Duncan claims he was afraid the officer – as opposed to a trained medical provider – was going to take the blood sample. (Response to Motion for Discretionary Review, p. 11 ("he was not willing to allow a cop off the street to stick a needle into his veins and get blood").) This claim is specious and any alleged fear of a blood draw was unfounded. *See South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (recognizing blood-alcohol test is "safe, painless, and commonplace"); KRS 189A.103(6) ("Only a physician, registered nurse, phlebotomist, medical technician, or medical technologist not otherwise prohibited by law can withdraw any blood of any person submitting to a test under this section").

[2] It is unclear why two district court orders substantively identical to this order were later signed and entered. (TR1, 25 (entered March 30, 2009) & 26 (entered February 10, 2009).)

case. The Court rejects the Defendant's argument that a breathalyzer must be first given in a case involving 'alcohol only' DUIs." (*Ibid.*)

Duncan subsequently appealed the district court judge's ruling to the Webster Circuit Court. (*See* TR1, 21.) The circuit court judge affirmed that ruling. (TR1, 21-24.)

After multiple procedural missteps involving Duncan seeking review in the Court of Appeals, he pleaded guilty before the Webster District Court to DUI (second offense) and reserved the "right to appeal." (TR1, 7-11.) In the Court of Appeals decision at issue here, the panel observed Duncan reserved "the right to appeal the issue of whether the officer's actions requiring him to submit to a blood test were in error." (Second Opinion, p. 2.[3]) In mid-2011, the Court of Appeals granted Duncan's plea for review. (TR1, 77; TR2, 1-5).

II. Court of Appeals Proceedings.

On appeal, the panel initially affirmed "the decision of the Webster Circuit Court affirming the decision of the Webster District Court." (First Opinion, p. 5.)

At the outset of the First Opinion, the panel characterized the issue to be decided as "whether a blood test is warranted when a breathalyzer would be sufficient." (First Opinion, p. 1.) After discussing the case's procedural history, the panel observed "[w]hether the law of Kentucky allows an arresting officer to choose whether a suspect be offered a blood test rather than a breathalyzer test is a matter of law." (First Opinion, p. 3.) The panel then briefly discussed the *Beach* decision before correctly recognizing "we are bound by [that] decision" with respect to Duncan's claim the officer was required to offer a breath test before a blood test. (First Opinion, pp. 3-4.)

[3] The Second Opinion is the panel opinion rendered July 19, 2013 that replaced the First Opinion rendered April 19, 2013. The Second Opinion is the subject of this case.

Despite the fact Duncan refused the blood test, was not subject to a blood-based search, and never challenged the constitutionality of Kentucky's implied consent statute, the panel concluded the First Opinion with the following:

> In *Schmerber v. California*, 384 U.S. 757 (1966), the United States Supreme Court held that the taking of blood from a person is considered a search and is, consequently, subject to Fourth Amendment and state constitutional limitations. *See Farmer v. Commonwealth*, 169 S.W.3d 50 (Ky. App. 2005).
>
> The implied consent statute is constitutional and the search is allowed under the Fourth Amendment.

(First Opinion, p. 5 (*Schmerber* citation truncated; text reformatted).)

After he sought rehearing based on *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) – a Supreme Court decision issued two days before the First Opinion was issued – the panel granted Duncan's petition and reversed the decision of the circuit court. (Second Opinion, p. 6.) In its order granting the petition, the panel revealed its reversal stemmed from *McNeely*:

> The reissued opinion follows the recent opinion of the United States Supreme Court in *Missouri v. McNeely*, 2013 U.S. LEXIS 3160 (2013).

(Order Granting Petition for Rehearing, pp. 1-2.) Signifying the panel's belief that it had issued a significant decision, the Second Opinion was designated to-be-published.

While the first five pages of the panel's two opinions are almost identical, it notably deleted its earlier observation from the First Opinion that it was "bound by the decision in *Beach*." (First Opinion, p. 4; Second Opinion, p. 4.) From that point forward, the Second Opinion was dramatically different from the First Opinion.

Specifically, the panel began the final two paragraphs of the Second Opinion by quoting *Schmerber* (as it did in the First Opinion) but deleted this sentence from the First Opinion:

> The implied consent statute is constitutional and the search is allowed under the Fourth Amendment.

(First Opinion, p. 5; Second Opinion, p. 5.)

The panel then quoted *McNeely* (setting forth the question presented and the decision's holding) before concluding the following, in this order:

- Missouri's implied consent statute "is very similar" to Kentucky's statute, KRS 189A.103;
- the Supreme Court's interpretation of the United States constitution trumps this Court's interpretation and "'any inconsistent statute'" passed by the Kentucky General Assembly;
- "Thus, this decision in [*McNeely*] is controlling"; and
- the ruling of the circuit court is reversed.

(Second Opinion, pp. 5-6.)

The panel later denied both the Commonwealth's petition for rehearing and motion for *en banc* rehearing, and this Court granted the Commonwealth's motion to review the panel decision (Second Opinion).

ARGUMENT

I. *McNeely* Did Not Affect *Beach* or KRS 189A.103.

The *McNeely* opinion did not negatively impact either *Beach* or Kentucky's implied consent statute. This issue was preserved for review via the Commonwealth's petition for rehearing filed in the Court of Appeals. CR 76.12(4)(c)(v).

A. The *Beach* Decision.

In *Beach*, an officer testified the defendant "smelled strongly of alcohol, was unsteady, [] failed a number of field sobriety tests as well as a portable breath test," and "[h]e believed she was intoxicated." 927 S.W.2d at 827. The defendant was then taken to hospital and consented to a blood test. *Ibid.* This Court noted that while "not part of the

record in this case, it appears that the breathalyzer at the local police headquarters was not working," and the "blood test results were introduced over objection." *Ibid.*

After being convicted for driving under the influence, the defendant appealed and argued "the trial judge committed reversible error . . . when he refused to suppress the results of a blood test as directed by a police officer who did not first offer [her] a breath test." *Beach*, 927 S.W.2d at 827. The defendant argued KRS 189A.103(5) "requires the breath test to be given first," "the arresting officer should not be given unfettered discretion in determining which of the three types of tests should be administered first," and "the statute clearly shows that the General Assembly never intended blood or urine tests to be the initial procedure." *Ibid.* This Court described the "sole issue" as "whether it was proper for the police to take a blood test instead of first conducting a breathalyzer test." *Id.* at 826-27.

Looking to the language of Kentucky's implied consent law, KRS 189A.103, and the purpose of that law, this Court rejected the defendant's argument:

> In order to determine whether an individual is driving a vehicle under the influence, the legislature provided that a person is deemed to consent to one or more or any combination of blood, breath or urine tests. The language of the statute provides that a police officer may require an individual to submit to such tests in the absence of a provision to the contrary.
>
> The argument that Subsection 5 limits the police in their ability to administer blood or urine tests is without merit. There is no priority expressed in the statute and no preferred method for determining blood alcohol content.
>
> . . .
>
> It is the holding of this Court that KRS 189A.103(1) and (5) do not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood test.
>
> The provisions of KRS 189A.103 provide that an individual driving on the highways of Kentucky has given implied consent to the performance of a blood, breath and/or urine tests in the event the individual is suspected of driving a vehicle under the influence.

Beach, 927 S.W.2d at 827-28 (text reformatted).[4]

The *Beach* ruling remains valid today. Kentucky Revised Statute 189A.103 makes clear drivers on Kentucky roads have, by law, consented "to one (1) or more tests of his or her blood, breath, and urine, or combination thereof." *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914, 915 (Ky. 2002) ("As suggested by its name, the 'implied consent' statute begins with the premise that all persons driving on the public highways of this Commonwealth have consented to a blood, breath, or urine test pursuant to a statutorily prescribed procedure"). The plain language of this statute does not support the premise that a driver has consented to just one of these tests or may choose the specific test he wants to take at the time of the DUI stop.

Further, nothing in KRS Chapter 189A requires an officer, under the circumstances found in this case, to follow a certain testing order.[5] This is hardly surprising considering a driver's legislatively mandated and blanket consent "to one (1) or more tests of his or her blood, breath, and urine, or combination thereof."

Consistent with this scheme, KRS Chapter 189A provides a suspect his choice of test *only after* he fully complies with the testing requested by the officer – and not before. KRS 189A.103(7) ("After the person has submitted to all alcohol concentration tests and

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[4] Justice Stumbo concurred in the result but noted,

> My concern is that the breadth of the majority opinion will make it difficult to mount a challenge to an arbitrary or punitive exercise of the broad discretion granted the arresting officer in requiring excessive testing that is bodily intrusive, when the less intrusive breath testing is both available and sufficient to preserve the evidence necessary for a conviction.

Beach, 927 S.W.2d at 829. Notably, Justice Stumbo (now a judge) was on the Court of Appeals panel that decided this case.

[5] The definition of "refusal" does contain a specific, mandatory testing order not relevant to this case. KRS 189A.005(5) ("If the breath testing instrument for any reason shows an insufficient breath sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test.").

substance tests requested by the officer . . . ."). Indeed, KRS 189A.103(7) leaves no doubt that officers may request multiple "alcohol concentration tests" and are not limited to one specific test or, by implication, a particular order of testing.

And contrary to Duncan's arguments before the Court of Appeals, *Beach* is not in any way undermined by the language of KRS 189A.103(5).[6] Not only does that section of the statute fail to contain any directive-type language such as the word "shall," it conspicuously employs the permissive term "may" to describe when multiple tests may be appropriate. KRS 446.010(26) ("'May' is permissive") & (39) ("'Shall' is mandatory"). Rather than setting forth a mandatory testing order or establishing a breath test *must always* precede a blood test, that section is merely an acknowledgment by the General Assembly that some situations "may" require more than one test and that officers have been granted the necessary flexibility to request "one (1) or more tests of [a driver's] blood, breath, and urine, or combination thereof" to keep Kentucky roads clear of impaired drivers. *See Barker v. Commonwealth*, 32 S.W.3d 515, 517 (Ky. 2000) ("The scheme of the law is to provide an effective and efficacious method by which law enforcement can ascertain those DUI suspects who are or are not within the limits of the law and punish the violators"). Nothing in section five restricts this flexibility.

Moreover, that KRS Chapter 189A may arguably support the idea that breath tests should be the primary choice for officers to use does not mean officers are bound by this. If the General Assembly wanted to set forth a mandatory testing order, it certainly could have done so in plain and unequivocal language. The fact it did not do so either in the initial version of KRS 189A.103 or in the amendments after *Beach* eliminates all doubt that

[6] Section five states, "When the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required in addition to a breath test, or in lieu of a breath test."

no testing order was intended.[7] *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) ("courts have recognized the failure of the legislature to change a known judicial interpretation of a statute as extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation of its statute when it does not amend the statute interpreted.").

B. The *McNeely* Decision.

In contrast to *Beach*, the *McNeely* court faced a far different situation involving the propriety of a forced, warrantless blood draw.

In that decision, the driver was observed exceeding the posted speed limit and crossing the centerline before being stopped by Missouri law enforcement. *McNeely*, 133 S.Ct. at 1556. After the officer noticed additional signs of intoxication and the driver admitted consuming alcohol, failed field-sobriety tests, and refused a PBT, the driver was arrested. *Id.* at 1556-57.

During transport, the driver again advised he would not provide a breath sample. *McNeely*, 133 S.Ct. at 1557. Hearing this, the officer then took the driver to a hospital for blood testing but when he asked the driver to submit to the test, the driver refused. *Ibid.* Without securing a search warrant, the officer directed the hospital lab technician to take a blood sample and the sample was collected. *Ibid.*

When the case reached the Supreme Court, the court deemed the relevant question to be "whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk-driving cases." *McNeely*, 133 S.Ct. at 1556. No other question was presented or addressed by the court.

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[7] Kentucky Revised Statute 189A.103 became effective July 1, 1991 and was amended in 2000 and 2007. Section five of the statute has remained the same since its 1991 enactment.

The Supreme Court resolved this very narrow question with the following holding:

> We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

McNeely, 133 S.Ct. at 1568.

C. *McNeely* Has No Bearing On *Beach*.

Despite the patent differences between *Beach* and *McNeely*, in the Second Opinion the panel quoted two sentences from the first paragraph of *McNeely* describing the question presented and the court's holding before noting Missouri's implied consent statute "is very similar" to Kentucky's statute, KRS 189A.103, upon which this Court based its decision in *Beach*. (Second Opinion, pp. 5-6.) From this, the panel deemed *McNeely* "controlling" and reversed the circuit court. (Second Opinion, p. 6.)

Although the Second Opinion contains no mention of a holding, when one considers what was omitted from the First Opinion it seems the panel deemed *Beach* (and its express holding that KRS 189A.103 allows the officer to choose the order of testing) constitutionally inconsistent with the *McNeely* decision and, as a result, that it was no longer "bound by the decision in *Beach*."

Further, with the deletion of the sentence, "[t]he implied consent statute is constitutional and the search is allowed under the Fourth Amendment," from the First Opinion and its conclusion *Beach* is no longer controlling, it also appears the panel used *McNeely* to rule Kentucky's implied consent statute, KRS 189A.103, is unconstitutional in the context of blood draws. That is, while the officer simply asked Duncan for a blood draw and then respected Duncan's refusal, the panel clearly had a problem with this request and seems to have ruled that even the request for a blood draw is no longer proper absent first offering a breath test. (Or perhaps the panel deemed all blood draws in this context im-

proper absent a search warrant. The Second Opinion – especially without comparing it to the First Opinion – is so unclear it is difficult to discern its true effect or reach.)

Had the panel delved deeper into *McNeely*, it would have recognized not only the differences from this case discussed in detail in Section II, *infra*, but that *McNeely* did not criticize Missouri's (or any state's) implied consent law. Rather, the *McNeely* court discussed implied consent laws in a positive manner and stated they are a proper tool for law enforcement.[8]

Near the end of *McNeely*, the Supreme Court addressed the "compelling governmental interest in combating drunk driving" cited by Missouri and its *amici* in support of the argument that the natural dissipation of alcohol in the bloodstream constitutes a *per se* exigency allowing warrantless blood draws, including the contention prompt blood testing "is vital to pursuit of that interest." 133 S.Ct. at 1565-67. To refute that contention, the court looked to implied consent laws:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws.
>
> For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.
>
> Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

Id. at 1566 (citation omitted).

At the end of its discussion of implied consent laws, the *McNeely* court cited its decision in *South Dakota v. Neville*, 459 U.S. 553, 554 & 563-64 (1983), noting parenthe-

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[8] The section of the *McNeely* opinion containing the discussion of implied consent laws (Section III) was authored by Justice Sotomayor and joined by three other justices.

tically "the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination." *Ibid.*; *Commonwealth v. Hager*, 702 S.W.2d 431 (Ky. 1986).

If the *McNeely* court had a problem with implied consent laws as the panel suggested in the Second Opinion, it would not have looked to those same laws adopted in "all 50 States" to counter Missouri's argument in favor of warrantless blood draws. The panel's reading of *McNeely* as somehow criticizing Missouri's implied consent law or, by extension, Kentucky's law, was inconsistent with a plain reading of *McNeely*.

Not surprisingly, courts to have considered *McNeely* in this context have observed it does not impact state implied consent laws. *See State v. Smith*, 849 N.W.2d 599 (N.D. 2014); *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013).[9]

The *McNeely* decision did not undermine *Beach* or any portion of KRS 189A.103. The Court of Appeals panel incorrectly concluded that the nation's high court implicitly overruled *Beach* and that Kentucky's implied consent law, KRS 189A.103, has been rendered unconstitutional.

Further, the panel's reversal of the Webster Circuit Court's affirmation of the district court's order denying Duncan's motion to dismiss the charge was improper. (Second Opinion, p. 6.) Even if this Court concludes there was a problem with the officer failing to offer a breath test before the blood test, the extreme remedy of dismissal is unwarranted since, even without proof of Duncan's refusal, Duncan can still be convicted based on the officer's observations (*e.g.*, vehicle crossing centerline, "strong smell" of alcohol, and bloodshot eyes) and his admission to drinking three beers. *See* KRS 189A.010(1)(b) (person shall not operate motor vehicle "[w]hile under the influence of alcohol").

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[9] At least two courts have discussed *McNeely* in this context in unreported decisions. *In re Hart*, No. 2013AP85, 2013 WL 2990658, fn. 3 (Wis. Ct. App. June 18, 2013) ("The Court's decision in *McNeely* does not impact the implied consent law"); *State v. Flonnory*, No. 12909005937, 2013 WL 3327526, **5-6 (Del. Supr. June 12, 2013) ("The Supreme Court's holding in *McNeely* does not alter the application of Delaware's Implied Consent Statutes to the facts of this case").

II. *McNeely* Has No Application to This Case.

In addition to *McNeely* having no effect on *Beach* or KRS 189A.103, the facts of this case are far removed from those of *McNeely*. The panel wrongly concluded *McNeely* bears on this case. This issue was preserved for review via the Commonwealth's petition for rehearing filed in the Court of Appeals. CR 76.12(4)(c)(v).

From the very outset, the panel's take on what was and was not at issue in this case was off base. Contrary to the panel's description, the relevant issue in this case was not "whether a blood test is warranted when a breathalyzer would be sufficient." (Second Opinion, p. 1.) Rather, the primary issue Duncan pressed before the Court of Appeals was whether the officer was required to request a breath test before a blood test.[10] That is, the relevant issue was whether the officer had the authority to determine which test would be administered and the order of the test(s). Whether a blood test was warranted – *i.e.*, justified – and the breath test "sufficient" to displace the blood test were not at issue and, indeed, that issue represents a policy decision best left to the General Assembly rather than the judiciary.

Similarly, the panel's reliance on the Fourth Amendment regarding Duncan's refusal to submit to a blood draw was improper and lead to a legally incorrect result. (Second Opinion, pp. 5-6.)

While the panel was correct *Schmerber* held "the taking of blood from a person is considered a search and is, consequently, subject to Fourth Amendment and state constitutional limitations," the panel overlooked the key fact no blood was drawn here. (Second Opinion, p. 5.) Again, Duncan withdrew his (implied) consent in response to the officer's request and his refusal was respected.

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[10] Duncan's argument may be found in his opening brief filed in the Court of Appeals (pp. 3-10).

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Its "overriding function" "is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). This Court has ruled Section 10 of the Kentucky Constitution provides no more protections than the Fourth Amendment. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 839 (Ky. 2012) (citing *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996)).

According to the Supreme Court, a "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). That is, a search involves a government's breach of a person's privacy, an intrusion, or a prying into one's affairs.

With no blood sample taken and the search Duncan objected to never having taken place, there was no breach or intrusion and, therefore, the Fourth Amendment has no bearing on this case. The nation's high court agrees:

> To be sure, it created a potential for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.

See United States v. Karo, 468 U.S. 705, 712 (1984). And neither is it surprising the Supreme Court has also emphasized Fourth Amendment cases must be decided on the facts of each case, not on generalizations. *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 n. 5 (1986).

Similarly, other courts have recognized that without a search having occurred, the Fourth Amendment is not implicated:

> Of course, if there is no search and no seizure (and no warrant issued), the Fourth Amendment does nòt require the application of any standards or

> requirements, even the overarching standard of reasonableness, because the protections of the Fourth Amendment are not triggered
>
> . . .
>
> To the extent the Defendant is concerned about *potential* privacy violations[], her concern is not shared by the Fourth Amendment. The Fourth Amendment does not protect against unreasonable potential invasions of privacy, it protects against actual invasions of privacy.

United States v. Walker, 771 F. Supp.2d 803, 807 (W.D. Mich. 2011) (quotation omitted); *Blalock v. State*, 483 N.E.2d 439, 441 (Ind. 1985) ("Only after finding that a certain governmental intrusion constitutes a search do Fourth Amendment safeguards become available"); *People v. Moorer*, 959 N.Y.S.2d 868, 876 (N.Y. County Ct. 2013) ("If no search occurred, the Fourth Amendment is not implicated").

This means the officer's lawful request for a blood sample from Duncan did not constitute a search and did not implicate the Fourth Amendment since that request, by itself, was not a search. *See Karo*, 468 U.S. at 712. Along the same lines, a driver's implied consent to blood testing per KRS 189A.030 does not, by itself, constitute a search or implicate the Fourth Amendment since no search takes place until a test is actually administered. This conclusion is bolstered by the fact a driver may refuse the test offered by the officer, thereby cutting off the potential search. *Helton v. Commonwealth*, 299 S.W.3d 555, 558 (Ky. 2009) ("If a driver refuses the test, he or she effectively withdraws consent for the test . . . it is clear that refusals are anticipated under the statutory scheme . . . allowances are made for withdrawal of consent").

Again, Fourth Amendment protections were not triggered by the officer's request for a blood draw and Duncan's refusal. These events were not subject to Fourth Amendment-based limitations. (*See* Second Opinion, p. 5.) The panel incorrectly based its analysis on Fourth Amendment search-based case law.

Finally, the *McNeely* decision has no relevance to the propriety of the officer asking Duncan to submit to a blood test (and his refusal). Comparing *McNeely* to this case, *McNeely* is neither relevant nor illustrative of any pertinent point. For example, *McNeely* involved a search (forced blood draw) while this case did not. Because of this search, *McNeely* properly included a Fourth Amendment-based analysis. With no blood draw in this case after Duncan's refusal was respected, a Fourth Amendment-based analysis was improper.

Likewise, *McNeely* involved considerations of exigent circumstances and whether an exception to the Fourth Amendment warrant requirement was applicable. This case, with Duncan's refusal to submit to the blood test and consequent lack of search, has absolutely nothing to do with a Fourth Amendment-related search, exigent circumstances, or an exception to the warrant requirement.

Despite these numerous and obvious differences, the panel looked to *McNeely* as grounds to reverse the circuit court and disregard binding authority of this Court. That legal analysis was erroneous and must be corrected by this Court.

CONCLUSION

For these reasons, this Court should vacate the decision of the Court of Appeals and reinstate the order of the Webster Circuit Court denying Duncan's motion to dismiss the charge of driving while intoxicated.

Respectfully submitted,

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