

Supreme Court of Kentucky

2024-SC-0300-DG

SHELLY DAMRON

APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. NO. 2023-CA-1062
LETCHER CIRCUIT COURT NO. 18-CR-00521

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE GOODWINE

REVERSING AND REMANDING

The Letcher Circuit Court granted Shelly Damron’s (“Damron”) motion to suppress evidence obtained through a blood draw. The Commonwealth filed an interlocutory appeal. The Court of Appeals reversed and remanded. We granted discretionary review to consider whether Damron’s consent to the blood test was voluntary. After careful review, we reverse the Court of Appeals, reinstate the circuit court’s suppression order, and remand for further proceedings.

BACKGROUND

In May 2018, Damron was involved in a two-vehicle crash after crossing the center line and striking another vehicle. The driver of the other vehicle was injured, and the driver’s son died. Damron was indicted on charges of second-degree manslaughter; second-degree assault; DUI, first offense with

aggravating circumstances; first-degree criminal mischief; reckless driving; and speeding. Damron moved to suppress the blood test results, arguing she did not give valid consent to the blood draw. After a hearing, the circuit court granted the motion. The Court of Appeals reversed.

At the scene of the accident, Trooper Burton informed Damron of the fatality, and he told her that “any time with a fatality, our policy is that we request blood from all drivers involved, and that we would need to go to the hospital to get blood taken” and asked if she would consent to that. Then, Damron consented to give blood at the hospital. Trooper Burton did not read Damron an implied consent warning. She was not arrested at the scene, and at that point, Trooper Burton did not expect she would be charged with any crimes.

However, Trooper Burton later testified that it was Kentucky State Police (“KSP”) policy to obtain, not simply request, blood draws from both drivers in a fatality accident and then ask for their consent. Had Damron not consented, Trooper Burton said the policy required him to request a search warrant. The trooper did not recall telling Damron that a blood draw was mandatory. He said he did not tell Damron she would incur any penalties for refusing because, under the then-existing policy, the implied consent warning was read only at the blood draw site, not at the scene.

Trooper Burton also testified that if Damron attempted to leave the scene or avoid a blood draw, she would have been immediately detained while awaiting a search warrant. Trooper Burton said he did not and would not have

told her she was free to leave because he wanted her to go to the hospital to have her blood drawn.

Damron declined to ride in an ambulance because she was uninjured, but she agreed to have her boyfriend drive her to the hospital in his car. Trooper Burton testified that Constable Tackett had been assisting with traffic and offered to help, so he asked the constable to follow Damron and her boyfriend to the hospital. The trooper wanted a timeline from leaving the scene to arriving at the hospital to ensure they did not try to run, did not go home to bathe, and that she did not arrive at the hospital an hour later. Trooper Burton further testified that Constable Tackett contacted the Post by radio to confirm the times of departure and arrival.

Constable Tackett testified that he assisted with the crash by helping with traffic and escorting Damron to the hospital. As to the hospital escort, the constable testified that he walked Damron and her boyfriend to his car. Constable Tackett told them to follow him to the hospital, and he watched them the whole way because he was worried. The constable testified that he understood Damron was not free to deviate from the path to the hospital, and that if she were free to leave, Trooper Burton would not have asked him to escort them there. Constable Tackett never told Damron she was not free to leave, did not arrest her, said she was not in his custody, asked her no questions, and never *Mirandized* her. He did not know why she was going to the hospital or that any charges would be filed. The constable testified that his role was to escort Damron to the hospital. However, if she had fled, even

though he felt he did not have the authority to stop her, he would have called it in because she was supposed to go to the hospital.

Trooper Kelly testified that he was working on another complaint when he heard the Post dispatch Trooper Burton to the accident scene. When Trooper Kelly finished his complaint, he called to see if he should go straight to the hospital. He first spoke with the other driver, who was being transported to the hospital by ambulance. The trooper read the other driver an implied consent card and informed him that KSP policy required troopers to obtain blood tests from drivers involved in a fatality or possible fatality accident. The other driver agreed to the blood test. Trooper Kelly asked in which direction the driver was traveling because he heard there was some confusion at the scene.

Trooper Kelly was then notified that Damron was coming to the hospital in a personal vehicle, escorted by Constable Tackett. When she arrived, the constable handed Damron over to Trooper Kelly. The trooper read Damron his implied consent card. At the time, the card used by KSP detailed potential penalties that Damron would face if she refused to submit to the blood draw, including, but not limited to, a double minimum jail sentence upon conviction and revocation of her license. Then, Trooper Kelly explained to Damron that “the reason I’m asking for this test is because this is . . . our procedure any time we have a fatality or a possible fatality, we’re required to get blood from the drivers.” After receiving these warnings, Damron consented to the test. She and Trooper Kelly both signed the hospital’s consent form. He walked Damron to the lab to have her blood drawn.

He testified he did not coerce or threaten her; she was cooperative and made small talk. At the time, he did not know she would be charged with a crime. Neither Trooper Burton nor any other officer directed him to prevent Damron from leaving. He left the hospital after the blood draw. He never said it was mandatory but told her the policy required it. Trooper Kelly testified that if Damron had refused to submit to a blood test, she would have been free to leave, but they would have sought a search warrant to obtain her blood. He never told Damron she could not leave the hospital. The standard hospital consent form stated that Damron was under arrest.

Trooper Kelly testified that the form was false, and she was not under arrest. Trooper Kelly had signed this form numerous times in the past and never questioned it.

At no time did law enforcement seek a search warrant, place Damron under arrest, read her *Miranda* warnings, physically restrain her, or conduct field sobriety tests. During the hearing, the troopers expressed unfamiliarity with developments in the law regarding search warrants and consent to blood draw.

Although not mentioned in the suppression order, KSP Detective Brandon Thomas, the lead investigator, also testified at the hearing. His testimony was not relevant to the voluntariness of Damron's consent because he arrived at the scene and began his investigation after Damron and Constable Tackett left for the hospital. The detective only spoke to Trooper

Kelly after he returned from the hospital. Detective Thomas first spoke to Damron after her blood had been drawn.

Damron did not testify at the hearing. Although not mentioned in the trial court's order, defense counsel attached affidavits from Damron and her boyfriend to the motion to suppress and filed another affidavit from Damron on the day of the hearing. The Commonwealth moved to exclude both, arguing that the original affidavits attached to the suppression motion were not notarized and that the second was not attached to the motion. The trial court determined the original affidavits substantially complied with filing requirements and considered them in ruling on the motion. The trial court excluded the second affidavit because it was improperly filed.

In Damron's original affidavit, Damron stated that an officer at the scene told her it was mandatory to submit to a blood draw because there was a fatality. She rode in her boyfriend's vehicle to the hospital, followed by a law enforcement officer. She stated that she was never read the implied consent warning or informed of her right to an attorney. She was never asked to perform any field sobriety tests or take a preliminary breath test. Damron stated she submitted to the blood draw because the law enforcement officer at the accident scene told her it was mandatory, and if she did not submit to it, the penalty would be worse.

In her boyfriend's affidavit, he stated that Damron called and told him she had been in an accident. He arrived at the scene approximately ten minutes later. Her boyfriend stated the law enforcement officer at the scene

said both parties had to submit to a blood draw because there was a fatality. He drove Damron to the hospital with a law enforcement officer following behind them. When they arrived at the hospital, additional law enforcement officers were there. Her boyfriend did not hear any of the officers read the implied consent warning to Damron or inform her of her right to contact an attorney prior to the blood draw.

The circuit court found that the totality of the circumstances demonstrated that Damron did not validly consent to the blood test. Her actions were restricted by a display of authority from a series of officers, and she submitted to the blood test in the face of enhanced criminal penalties. The circuit court found that the blood test constituted an unreasonable search in violation of the Fourth Amendment and suppressed the evidence.

The Court of Appeals reweighed the evidence presented at the suppression hearing and determined that Damron gave valid consent to the blood draw at the scene of the accident. The appellate court disagreed with the trial court's characterization of the evidence presented at the suppression hearing. The Court of Appeals did not discuss Constable Tackett's or Trooper Kelly's testimony and solely relied on Trooper Burton's statement that Damron freely consented to have her blood drawn. Furthermore, the court found that because Damron's initial consent was valid and she did not withdraw it, Trooper Kelly's reading of the implied consent warning did not invalidate her prior consent. The Court of Appeals reversed the trial court's suppression order. This Court granted discretionary review and heard oral arguments.

STANDARD OF REVIEW

Because the “Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, [a] warrantless search is per se unreasonable . . . ‘unless an established exception applies.’” *Osborne v. Commonwealth*, 718 S.W.3d 622, 626–27 (Ky. 2025) (quoting *Payne v. Commonwealth*, 681 S.W.3d 1, 3 (Ky. 2023)). Consent to a search is a valid “exception to the warrant requirement under the Fourth Amendment.” *Id.* “To establish that a party has consented to a search, the government must show ‘by a preponderance of the evidence’ that the consent was ‘voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.’” *Story v. Commonwealth*, 706 S.W.3d 263, 276 (Ky. 2024) (quoting *United States v. Sheckles*, 996 F.3d 330, 346 (6th Cir. 2021)).

We apply a two-part standard in “reviewing a trial court’s decision on a motion to suppress. First, we must accept the trial court’s findings of fact as conclusive if they are supported by substantial evidence.” *Osborne*, 718 S.W.3d at 627. “[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *Turley v. Commonwealth*, 399 S.W.3d 412, 417–18 (Ky. 2013). “Second, we review de novo the trial court’s application of the law to the particular facts of the case.” *Osborne*, 718 S.W.3d at 627.

ANALYSIS

Damron argues that the totality of the circumstances shows she never validly consented to the blood draw. First, she contends that her initial consent was invalid because Trooper Burton's request was more of a command, and she was objectively in custody based on law enforcement's actions. Second, Damron argues that her consent at the hospital was invalid because the implied consent warning threatened criminal punishment.

First, we consider whether the trial court's findings of fact were supported by substantial evidence. The Court of Appeals failed to defer to the trial court's factual finding and impermissibly reweighed the evidence, concluding that the trial court ignored Damron's voluntary consent at the accident scene. The appellate court faulted the trial court for failing to give greater weight to Trooper Burton's statement that Damron freely consented to have her blood drawn at the hospital, the fact that law enforcement had not physically restrained her or made a show of force, and the hospital escort's lack of meaningful impact.

The Court of Appeals failed to address the conflicting evidence cited by the trial court, including Trooper Burton's testimony that if Damron had attempted to flee, she would have been detained immediately because KSP policy required a blood test. The court also failed to consider any of Constable Tackett's or Trooper Kelly's testimony, which was relevant to determining whether Damron's consent was voluntary under the totality of the circumstances.

Although there was conflicting evidence, the trial court's decision was supported by substantial evidence. The testimony of each law enforcement officer would have supported either denying or granting Damron's motion to suppress. The following facts would have supported an inference that Damron's consent was voluntary: the law enforcement officers consistently testified that Damron was not physically restrained, was not formally arrested, consented to the blood test, and agreed to go to the hospital in a private vehicle.

In support of the trial court's finding that her consent was involuntary, law enforcement officers consistently testified that if Damron had refused the blood test or attempted to flee, she would have been detained while awaiting a search warrant. Trooper Burton and Constable Tackett testified that the hospital escort was intended to prevent Damron from fleeing. The constable handed Damron over to Trooper Kelly at the hospital. He told her that KSP policy required a blood test, read her an implied consent warning that included enhanced penalties for refusal, and escorted her from the exam room to the lab for the blood draw. Trooper Burton's testimony was internally inconsistent. He testified that he informed Damron that the policy required him to request a blood draw and that she freely consented. However, he later testified that the policy required a blood test and, though he did not communicate it to Damron, that she was not free to leave. Damron's affidavit also supported the finding that her consent was involuntary. The trial court's findings of fact were supported by the testimony at the suppression hearing and were not clearly erroneous.

Next, we consider whether the trial court correctly applied the law to the facts. To determine whether Damron's consent was valid, we must examine the totality of the circumstances from the accident scene through her agreement to have her blood drawn at the hospital. In *Birchfield v. North Dakota*, 579 U.S. 438 (2016), the Supreme Court of the United States considered "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." *Id.* at 454. The Supreme 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 477. Pertinent to this appeal, one defendant agreed to have his blood drawn after hearing an implied consent warning "informing him that test refusal in these circumstances is itself a crime." *Id.* at 439. Although the defendant "was not prosecuted for refusing a test," he submitted because "police told him that the law required his submission." *Id.* at 478. The Supreme Court reversed the North Dakota Supreme Court's holding that the defendant's "consent was voluntary" because that holding was based "on the erroneous assumption that the State could permissibly compel both blood and breath tests." *Id.* The United States Supreme Court held that "voluntariness of consent to a search must be determined from the totality of all the circumstances" and remanded the case to the state supreme court to reevaluate the defendant's consent. *Id.* at 478 (internal quotation marks omitted).

In *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), McCarthy was arrested for driving under the influence and submitted to a blood test after receiving an implied consent warning that threatened enhanced criminal penalties. This Court extended *Birchfield*, holding that the defendant “could not be subjected to an enhanced penalty due to his refusal to submit to a warrantless Fourth Amendment search in the form of a blood test” under KRS 189A.105(2)(a). *Id.* at 34. This Court reversed the defendant’s conviction and remanded the case to the trial court for further proceedings, excluding the erroneous evidence. *Id.* at 40.

In *Haney v. Commonwealth*, 653 S.W.3d 559 (Ky. 2022), this Court applied *McCarthy* in a case where the defendant had not been arrested before submitting to a blood test. In *Haney*, the defendant crossed the center line and struck a motorcycle. 653 S.W.3d at 562. At the hospital, a trooper interviewed the defendant, who “was awake and alert.” *Id.* The trooper told her he knew little about the accident except that there was a fatality and that he had been sent to talk to her and get a blood sample. *Id.* The trooper told the defendant she was not under arrest, and she voluntarily spoke to him. *Id.* The trooper read the defendant the implied consent warning, and she acquiesced to a blood draw. *Id.* at 563. The defendant was later “indicted for two counts of wanton murder based on driving while under the influence of drugs.” *Id.* (footnote omitted). The trial court denied her motions to suppress her statements and blood test results.

This Court determined in *Haney* that the defendant was never in custody for *Miranda* purposes because she testified that she never “felt restrained, restricted, or otherwise compelled to speak with” the trooper. 653 S.W.3d at 565. Thus, the trial court's denial of her “motion to suppress her statements was not erroneous.” *Id.* at 566. However, because the order denying suppression of the blood test results was entered before *McCarthy*, this Court reversed and remanded the case to the trial court to consider whether “consent was voluntary under the totality of the circumstances, which included the warning that if she refused the blood test and if she were convicted of DUI, her mandatory minimum jail sentence would be doubled.” *Haney*, 653 S.W.3d at 568.

In *Story*, the defendant was arrested, invoked “his statutory right to an independent blood test,” and a warrant authorized the Commonwealth to test the sample. 706 S.W. 3d at 276-79. The district court found that “the Commonwealth could test the sample because Story had voluntarily provided it in the course of seeking his independent blood test” and denied the suppression motion. The appellate courts affirmed. *Id.* at 279. This Court reversed the lower courts and held that the defendant did not consent to law enforcement testing because “law enforcement had not even requested such testing at the time Story gave the blood. Quite simply, Story cannot be deemed to have consented to a request not made at the time he purportedly gave consent.” *Id.*

This is our first opportunity to review a trial court's suppression of blood test results considering the totality of the circumstances under *McCarthy* and *Haney*. Aside from the coerciveness of an implied consent warning, this Court has not considered what other factors are relevant to a totality of the circumstances analysis. Here, the trial court considered the totality of Damron's encounter with law enforcement and seemed to implicitly find that Damron was in custody because her actions were restricted by the display of authority from a series of law enforcement officers. Additionally, it found her ultimate submission to the test was accomplished through the threat of enhanced criminal penalties.

Given the circumstances, we deem it appropriate to determine whether Damron's initial encounter with Trooper Burton at the accident scene was voluntary. "The line of demarcation between a consensual encounter and an investigative detention is a police officer's use of physical force, show of authority, or other application of explicit or implicit means of coercion 'which . . . would compel a reasonable person to believe he was not free to leave.'" *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999).

The standard governing this determination is objective and does not depend on the suspect's or the officer's "subjective beliefs regarding the nature of the encounter." *Osborne*, 718 S.W.3d at 629 (footnote omitted). Furthermore, "[w]hen confronted with inconsistent testimony or other conflicting evidence at a suppression hearing, the trial court, as factfinder, is entitled to weigh the evidence and judge the credibility of the witnesses." *Id.* Though the totality of

the evidence may support “two inconsistent conclusions,” the trial court is not prevented from supporting its factual findings by substantial evidence. *Id.*

Supra, we reviewed the trial court’s findings of fact and concluded they were supported by substantial evidence. The evidence supports the trial court’s finding that Damron’s freedom of movement was restricted and that she would have been detained while awaiting a warrant if she had refused the test. Damron was escorted to the hospital to prevent her from fleeing, and Trooper Burton did not leave her presence until after her blood had been drawn. Although Damron was not arrested, the record also shows she was never told she was free to leave. Trooper Kelly’s implied consent warning was coercive under *McCarthy*.

Although the trial court did not address it, Damron’s and her boyfriend’s affidavits supported a finding that she was not free to leave from her first encounter with law enforcement at the scene until her blood was drawn. She stated that although she was not formally arrested or physically restrained, she was told to sit in her boyfriend’s truck and was not free to leave the scene. She was told the blood test was mandatory, which is why she was escorted to the hospital. Her boyfriend’s affidavit agreed that Damron was told the blood test was mandatory. The Commonwealth takes issue with Damron’s statement that she was never read an implied consent warning because it is inconsistent with law enforcement testimony. However, it was within the trial court’s discretion to weigh inconsistencies “within the context of the overall proof.” *Osborne*, 718 S.W.3d at 627.

Trooper Burton initially testified that he told Damron that KSP policy required him to request a blood draw and that she was not under arrest. He later testified that a blood test was mandatory and that she was not free to leave. The affidavits also contradict his account. Although the trial court's order does not mention these inconsistencies, the statements were part of the overall proof, and the court clearly weighed the evidence in finding that Damron's freedom of movement was restricted.

Though we may have weighed the facts differently, we defer to the trial court's assessment of the evidence and witness credibility. The following circumstances support the trial court's conclusion that Damron's consent was involuntary: First, Damron was never outside the presence of law enforcement from the time they arrived at the accident scene until her blood was drawn, so a reasonable person would not believe she was free to leave under the circumstances. Second, although Trooper Burton testified that he requested a blood test, both he and Trooper Kelly testified that KSP policy required one. Trooper Kelly told Damron that KSP policy required her to submit to a blood test. Damron's affidavit stated that she was told the blood test was mandatory. Third, the implied consent warning Trooper Kelly read was essentially the same as the coercive warnings in *McCarthy* and *Haney*.

The facts at hand demonstrate why a totality-of-the-circumstances analysis is crucial. *McCarthy* and *Haney* provide that being read a coercive implied consent warning is but one factor to consider in the analysis. Each factor alone may not have rendered Damron's consent involuntary. However,

when considering Trooper Kelly's reading of the coercive implied consent warning in the context of Damron's entire encounter with law enforcement, the Commonwealth failed to prove by a preponderance of the evidence that Damron gave valid consent to the blood test. Based on the totality of the circumstances, suppression of Damron's blood test results was proper.

CONCLUSION

For the foregoing reasons, we reverse the opinion of the Court of Appeals, reinstate the Letcher Circuit Court's order suppressing the blood test results, and remand for further proceedings.

All sitting. Conley, Nickell, and Thompson, JJ., concur.
Keller, J., dissents by separate opinion in which Lambert, C.J., and Bisig, J., join.

KELLER, J., DISSENTING: Respectfully, I dissent. At the scene of the accident, Trooper Michael Burton did not believe Damron was at fault based upon a misunderstanding of the direction he believed each vehicle was traveling. Trooper Burton did not suspect Damron of being intoxicated based upon his initial interaction with her and did not read her the implied consent warning used by KSP at the time. Rather, he informed her that it is KSP's policy to obtain a blood test from all drivers involved in an accident involving a fatality and asked if she consented. At the time, KSP policy was consistent with KRS 189A.105(2)(b) which provided, in relevant part only, that

Nothing in this subsection shall be construed to prohibit a judge of a court of competent jurisdiction from issuing a search warrant or other court order requiring a blood or urine test, or a combination

thereof, of a defendant charged with a violation of KRS 189A.010, or other statutory violation arising from the incident, when a person is killed or suffers physical injury, as defined in KRS 500.080, as a result of the incident in which the defendant has been charged. However, **if the incident involves a motor vehicle accident in which there was a fatality, the investigating peace officer shall seek such a search warrant for blood, breath, or urine testing unless the testing has already been done by consent.**

(Emphasis added.) *See also Simpson v. Commonwealth*, 653 S.W.3d 855, 861 n.6 (Ky. 2022), in which this Court held that KSP policy thus “adheres to the legislative directive as set forth in KRS 189A.105(2)(b).” *Id.* at 864.

There was no violation of *McCarthy* or *Birchfield* when Trooper Burton informed Damron of KSP policy at the scene because she was not threatened with any additional penalty or mandatory jail time if she refused to consent to the blood test. Trooper Burton did not draw his weapon or speak to her in a hostile manner. In fact, he did not believe Damron may have committed any crime at all until much later. Damron’s consent at the scene of the accident was voluntary. The trial court and the majority focus on what *would have* happened in the event Damron did not consent to the blood test. For example, Trooper Burton testified Damron would have likely been detained until he obtained a warrant, but this was never communicated to Damron. Evidence of what *might have* happened, but did not, is irrelevant. Similarly, it is irrelevant that Constable Luther Tackett did not subjectively believe Damron was free to leave when he escorted her to the hospital. He testified he never told her she was not free to leave and his interaction with her was minimal. Constable

Tackett's speculation as to what *would have* happened had Damron not followed him directly to the hospital is therefore also irrelevant.

Trooper Burton testified that it was necessary to keep a timeline of events, including when Damron left the scene and when her blood was drawn. Alcohol can dissipate rapidly from the blood, which is why KRS 189A.010(1)(a) requires testing of a person's breath or blood be "taken within two (2) hours of cessation of operation or physical control of a motor vehicle[.]" In order for the blood test to be meaningful and reliable, it had to be conducted within two hours of the accident. In that sense, Damron's freedom of movement was restricted because she could not simply take the blood test she consented to whenever she pleased. This does not mean she was objectively in custody. Damron was permitted to go to the hospital in a private vehicle to obtain the blood test to which she had consented. The fact that Constable Tackett escorted her in a separate vehicle to make sure she went directly to the hospital and recorded the timing of events is of little consequence.

The majority also relies on Damron's contention that she was informed the blood test was "mandatory." This assertion was made in the form of an unnotarized affidavit submitted with her motion to suppress. The trial court did not refer to the affidavit in its order, but the majority uses the affidavit to highlight Damron's understanding that the blood test was "mandatory."¹ The

¹ Kentucky Rule of Civil Procedure ("CR") 43.13 requires an affidavit to be "sworn to or affirmed before an officer authorized to take depositions by Rule 28." Nevertheless, the trial court allowed the affidavit to remain in the record despite objection from the Commonwealth, finding "substantial compliance." The trial court

Commonwealth was never able to cross-examine Damron on this assertion.

Damron could have testified at the suppression hearing but did not. A defendant

may testify in his own behalf at a suppression hearing without waiving the privilege against self-incrimination. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Furthermore, testimony at a suppression hearing may be confined on cross-examination to the scope of the direct examination. *Shull v. Commonwealth*, 475 S.W.2d 469 (Ky. 1971). And while his testimony may be used later for impeachment purposes, it may not otherwise be used against him unless he fails to object. *Adams v. Commonwealth*, No. 2009-SC-000296-MR, 2010 WL 2025104 (Ky. May 20, 2010); *Commonwealth v. Bertram*, 596 S.W.2d 379 (Ky. App. 1980).

Grady v. Commonwealth, 325 S.W.3d 333, 348 n.3 (Ky. 2010).

While I do not condemn Damron's decision not to testify at the suppression hearing, the majority is incorrect to rely on assertions made in an unnotarized affidavit not subject to cross-examination by the Commonwealth. Any reliance on Damron's affidavit leads to inconsistencies that belie her arguments. For example, the affidavit states that she was *never* read the implied consent warning. This completely undercuts her argument that she was coerced into consenting by the implied consent warning. Both Trooper Burton and Trooper Kelly denied ever telling Damron the blood test was "mandatory." Their testimony was the only evidence presented to that end.

refused to allow a second, notarized affidavit from Damron into the record because she attempted to file it on the date of the suppression hearing, not with her motion.

The trial court's ruling must be based upon substantial evidence. In looking at the totality of circumstances, however, the trial court completely ignored the fact that Damron consented to the blood test at the scene. Consent at the scene occurred without the implied consent warning and without Damron being suspected of any crime. She was not threatened with jail or an enhanced penalty if she refused. No showing of authority occurred apart from officers being in uniform and interacting with Damron. If simply being a uniformed police officer with a holstered weapon is construed as a showing of authority amounting to coercion, police officers will often face insurmountable obstacles to legally obtain consent. Damron could have withdrawn her consent at the hospital either before or after Trooper Kelly read the implied consent warning. Kentucky law requires revocation of consent to be in "unequivocal actions or statements" that "obviously" or "clearly" indicate withdrawal of consent. *Payton v. Commonwealth*, 327 S.W.3d 468, 477 n.22 (Ky. 2010) (internal quotations omitted). Damron did not revoke her consent at any point and her prior, valid consent given at the scene of the accident was not made invalid when Trooper Kelly read the implied consent at the hospital.

Accordingly, I would affirm the Court of Appeals.

Lambert, C.J.; and Bisig, J., join.

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