

IN THE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Docket No. CUM 15-568

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STATE OF MAINE

Appellee

v.

MICAH DAY

Appellant

ON APPEAL FROM THE  
UNIFIED CRIMINAL DOCKET

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BRIEF OF APPELLEE

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## **STATEMENT OF THE ISSUES**

1. The trial court did not err by admitting evidence of the defendant's refusals to submit to chemical tests as evidence of intoxication.
2. The State did not commit obvious error by introducing and arguing evidence about defendant's failure to sign a Uniform Summons and Complaint at the Cumberland County Jail.

## **SUMMARY OF THE ARGUMENT**

The trial court did not abuse its discretion in admitting evidence of the defendant's refusals to submit to testing to determine his blood-alcohol level to prove intoxication. The introduction of such evidence is explicitly admissible by statute, and, further, is relevant to prove intoxication because the defendant refused to take the tests because he knew he would fail the tests. The probative value of the refusals is not substantially outweighed by the risk of unfair prejudice to the defendant. Further, admission of the refusal evidence does not violate the Fourth Amendment because the defendant consented to these tests through the implied consent statute.

Second, there was no prosecutorial misconduct in this case. The exclusion of the refusal evidence at the Cumberland County Jail was only in reference to a second opportunity the defendant had to take an Intoxilyzer test, and was not meant to exclude the defendant's failure to sign a Uniform Summons and

Complaint (USAC). As such, there was no error when the State introduced and made argument about the defendant's failure to sign a USAC.

### **PROCEDURAL HISTORY**

On October 15, 2014, the defendant was charged, by complaint, with three criminal counts: (1) Operating Under the Influence of Intoxicants and Failing to Submit to a Test, 29-A M.R.S.A. §2411(1-A)(C)(1), (2) Refusing to Submit to Arrest, 17-A M.R.S.A. §751-B(1)(B), and (3) Failure to Sign a Uniform Summons and Complaint, 17-A M.R.S.A. §15-A(1). A one-day jury trial was held on September 25, 2015 where the jury found the defendant guilty of Operating Under the Influence and Failing to Submit to a Test, and Failing to Sign a Uniform Summons and Complaint, but acquitted him of Refusing to Submit to Arrest. On November 5, 2015, the defendant was sentenced to 10 days in jail, a 150-day license suspension, and a \$750 fine for Operating Under the Influence, and a \$250 fine for Failure to Sign a Uniform Summons and Complaint. The defendant now appeals from the judgment entered in the Cumberland County Unified Criminal Docket (*Marden, J., presiding.*)

### **STATEMENT OF FACTS**

On September 12, 2014, at around 1:30 a.m., Officer Dean Hannon was on patrol in Gorham, Maine. (Tr. 36.) As Officer Hannon was traveling in his cruiser

on Route 114, he noticed a vehicle approaching him from behind at a high rate of speed. (Tr. 37-38.) Officer Hannon activated his cruiser's blinker, pulled to the side of the road, and activated his rear stationary radar. (Tr. 38.) The radar showed that the vehicle was traveling 75 miles-per-hour in a posted 50 mile-per-hour zone. (Tr. 38.) As the vehicle approached Officer Hannon's parked cruiser that had its blinker on, Officer Hannon observed that the vehicle was driving partially in the breakdown lane, which caused Officer Hannon to believe the vehicle may collide with his. (Tr. 38.) The vehicle, however, came to a sudden stop about 10 feet behind Officer Hannon's cruiser. (Tr. 38.) The vehicle started moving again, with some difficulty. (Tr. 38.) Officer Hannon followed the vehicle and activated his blue emergency lights. (Tr. 38-39.) The vehicle did not pull over immediately, instead driving for approximately 500 feet. (Tr. 39.)

Officer Hannon approached the vehicle, and saw the defendant behind the wheel. (Tr. 39.) There was no one else in the vehicle. (Tr. 39.) The defendant had some difficulty in providing his registration and insurance card. (Tr. 39-40.) The defendant informed Officer Hannon that he was coming from Boone's Restaurant where he worked. (Tr. 41.) The defendant said he had one "shift drink" at 12:00 a.m. after he finished his shift. (Tr. 41.) While speaking with the defendant, Officer Hannon smelled the odor of intoxicants coming from the defendant's breath, observed the defendant's eyes to be red and bloodshot, and noted that the

defendant had slurred speech. (Tr. 41.) At this point, Officer Hannon formed the opinion that the defendant was potentially operating under the influence of intoxicants. (Tr. 43.)

While waiting for an officer from the OUI enforcement program, the defendant began to make movements inside the vehicle, out of view of Officer Hannon. (Tr. 44-46.) After repeated instructions for the defendant to stop and a physical struggle, Officer Hannon removed the defendant from the vehicle, and with the aid of a responding officer, placed the defendant in handcuffs. (Tr. 46-47.)

The defendant was transported to the Gorham Police Station Intoxilyzer room, which was equipped with video and audio recording equipment that recorded this event. (Tr. 47-48.) While in the Intoxilyzer room, Officer Hannon read implied consent to the defendant, which included the warning that a refusal to take the test would be admissible at trial to prove intoxication. (Tr. 53.) The defendant never attempted the Intoxilyzer test. (Tr. 53.) Complying with the defendant's request for a blood draw, Officer Hannon offered a blood draw in lieu of the breath test, and Cumberland Police Officer Ryan Martin, who was certified to draw blood, offered to do the draw. (Tr. 54.) The defendant was brought into another room, and Officer Martin attempted to read the implied consent form to the defendant again, but the defendant continued to speak over Officer Martin. (Tr. 98.) Officer Martin offered to do the blood draw, but the defendant now refused to

comply. (Tr. 99.) The defendant never submitted to the blood draw. (Tr. 99.)

During his time with the defendant, Officer Martin smelled the odor of intoxicants coming from the defendant and observed the defendant's speech to be slurred. (Tr. 99.) The defendant also continually asked why he was under arrest. (Tr. 99.)

At this point, Officer Hannon deemed the defendant to have refused to perform any test to measure his blood-alcohol level, and was going to transport him to the Cumberland County Jail. (Tr. 55.) The defendant refused to get into Officer Hannon's vehicle for transport, and Officer Hannon required the assistance of a second officer to get the defendant inside. (Tr. 55-56.) During transport, the defendant told Officer Hannon that he needed to drop the defendant off on the side of the road and make this go away, or he would ruin Officer Hannon's life. (Tr. 56.) At the Cumberland County Jail, the defendant refused to sign a USAC for the OUI charge after being warned that his noncompliance would result in being charged with Failure to Sign a USAC. (Tr. 56-57.) The defendant never signed a USAC, was handed over to jail staff, and placed in a "detox cell." (Tr. 57.)

At trial, both Officers Hannon and Martin testified to the defendant's refusal to submit to a test to measure his blood-alcohol level. (Tr. 48-55, 97-100.) The State entered the video of the defendant's refusal to take the Intoxilyzer test at the Gorham Police Station and the implied consent form read by Officer Hannon. (Tr. 48, 52.) In it's closing, the State argued that the defendant's refusals should be

taken as evidence that the defendant was intoxicated. (Tr. 179.) In the jury instructions, the trial judge instructed the jury that they may consider the defendant's refusals as evidence of intoxication. (Tr. 200.)

## ARGUMENT

### First Assignment of Error

**I. The defendant's refusal to submit to chemical tests is probative of intoxication, and the probative value is not substantially outweighed by the danger of unfair prejudice.**

The defendant first argues that refusal evidence is not probative of intoxication, and that if the refusal evidence is probative of intoxication then it is substantially outweighed by the danger of unfair prejudice. (App. Br. 14.) Further, the defendant argues that 29-A M.R.S.A. § 2431(3), which deems refusal evidence admissible at trial to prove intoxication, is an unconstitutional violation of the separation of powers. (App. Br. 14.)

Under Maine law, evidence of a driver's refusal to perform a test to measure their blood-alcohol level is admissible to prove intoxication. 29-A M.R.S.A. § 2431(3). Beyond this statute, to be admissible at trial, evidence must be relevant. M.R. Evid. 401. Once found relevant, evidence is admissible unless barred by a statute or another rule. M.R. Evid. 402. Rule 403 bars evidence when the probative

value of the evidence is substantially outweighed by the danger of unfair prejudice. M.R. Evid. 403.

In this case, the admission of the defendant's refusals are explicitly authorized by statute, is probative of intoxication, and the probative value is not substantially outweighed by the danger of unfair prejudice. As such, there is no conflict between 29-A M.R.S.A. § 2431(3) and the Maine Rules of Evidence.

**A. The defendant's refusals to submit to tests is statutorily admissible and relevant to prove intoxication.**

The defendant argues that his refusals to submit to a test to measure his blood-alcohol level is not relevant to prove intoxication. (App. Br. 16.) Under the Maine Rules of Evidence, "evidence is relevant if: It has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." M.R. Evid. 401. If the evidence is relevant then it is admissible unless barred by, "a federal or state statute; these rules; or other rules applicable in the courts of this state." M.R. Evid. 402. This Court reviews a trial court's findings regarding relevancy for clear error. *State v. Buchanan*, 2007 ME 58 ¶ 8.

Under 29-A M.R.S.A. §2431, if a driver refuses to fulfill their duty to submit to a chemical test to measure their blood-alcohol level then the "[f]ailure of a

person to submit to a chemical test is admissible in evidence on the issue of whether that person was under the influence of intoxicants.” 29-A M.R.S.A. § 2431(3). Unless this Court finds a conflict between this statute and the Maine Rules of Evidence, then the Court’s inquiry should end here. There is no dispute that the defendant refused to take a test to measure his blood-alcohol level, and thus, under this statute, the refusal evidence is admissible to prove intoxication. Beyond this statute, however, refusal evidence is probative of intoxication.

This Court held that a defendant’s statement as to why he was refusing field sobriety tests was relevant to intoxication. *State v. Millay*, 2001 ME 177 ¶ 10. In that case, the defendant refused to do field sobriety tests, stating, “[n]o, I have been through this before.” *Id.* ¶ 4. This Court reasoned that this statement was “relevant in that it was probative of his guilt.” *Id.* ¶ 10. Further the statement by the defendant “indicated that he did not want to take the field sobriety tests because he knew enough about them to know that he could not pass the tests at that time.” *Id.* In addition, this Court has found that a fact finder may consider the “logical implication of [the] refusal.” *State v. Doughty*, 554 A.2d 1189, 1191 (Me. 1989).

Further, the Oregon Supreme Court held refusal evidence was probative of intoxication. *State v. Cabanilla*, 351 Or. 622, 632 (2012). In that case, a driver spoke very limited English, was read Oregon’s implied consent form, and refused to take a test to measure his blood alcohol level. *Id.* at 626. That court reasoned

that “it is reasonable to infer from the fact of the driver’s refusal to take a test that the driver believed that he or she would fail it.” *Id.* at 633.

Like the refusal to perform field sobriety tests in *Millay*, and the refusal to take a test to measure blood-alcohol level in *Cabanilla*, the defendant here did not take the tests because he knew if he did that he would fail. Officer Hannon observed the defendant’s vehicle traveling at 75 mph in a posted 50 mph zone while also driving “somewhat in the breakdown lane.” (Tr. 38.) Officer Hannon was pulled over to the side of the road with his blinker on, and the defendant almost collided with Officer Hannon’s vehicle. (Tr. 38.) After Officer Hannon activated his blue emergency lights, the defendant continued to drive for approximately 500 feet. (Tr. 39.) The defendant had difficulty producing his insurance card and registration, indicating to Officer Hannon “some sort of faculty issues.” (Tr. 40.) When asked how much he had to drink, the defendant first said “not much,” and then said he had one “shift drink” at 12:00 a.m., an hour and a half prior to this stop. (Tr. 41.) While speaking with the defendant, Officer Hannon smelled the odor of intoxicants “coming from [the defendant’s] breath. He did have [] slurred speech when responding and his eyes were red and bloodshot.” (Tr. 41). Based on his training and experience, Officer Hannon suspected that the defendant was under the influence of intoxicants. (Tr. 43.) Further, Officer Martin, in offering the defendant the blood test that the defendant himself asked for, smelled the odor

of intoxicants on the defendant's breath and observed the defendant to have slurred speech. (Tr. 99.) All this evidence points to the fact that the defendant was intoxicated, and refused to take any test because he knew he would fail. Thus, the "logical implication" of the defendant's repeated refusals in this case was probative of his intoxication.

The defendant, however, argues that the refusals here have no probative value because the refusals were the result of reasons unrelated to guilt, citing *State v. Glover*. (App. Br. 17.) The defendant's reliance on *Glover*, however, is misplaced. In *Glover*, the defendant's refusal was in reference to law enforcement asking the defendant to submit to a voluntary DNA test. *State v. Glover*, 2014 ME 49 ¶ 7. In this case, however, the defendant had a duty to submit to testing under the implied consent statute.<sup>1</sup> 29-A M.R.S.A. § 2521(1). This Court reasoned, "in most circumstances, there is a constitutional right to refuse to submit to warrantless DNA sampling." *Glover*, 2014 ME 49 ¶ 10. In this case, however, no such constitutional right existed for the defendant because he had implicitly agreed to submit to testing when he drove on a Maine road. *State v. Plante*, 417 A.2d 991, 993 (Me. 1980). This Court also noted in *Glover* that the defendant's refusal to submit to a voluntary DNA test "may be admissible for other purposes," thus not

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<sup>1</sup> The implied consent statute will be discussed at greater length in response to the defendant's challenges under the Fourth Amendment.

establishing a *per se* rule that all refusal evidence is never admissible for any purpose. *Glover*, 2014 ME 49 ¶ 13 n.3.

In sum, the defendant's refusals to submit to a test to measure his blood-alcohol level are admissible by statute, and are probative of intoxication.

**B. The probative value of the defendant's refusals is not substantially outweighed by the danger of unfair prejudice.**

The defendant argues that the probative value of the refusal evidence is substantially outweighed by the danger of unfair prejudice, and should have been excluded. (App. Br. 18.) Relevant evidence is admissible unless barred by, "a federal or state statute; these rules; or other rules applicable in the courts of this state." M.R. Evid. 402. Under the Maine Rules of Evidence, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one of the following: unfair prejudice, confusing the issue, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R. Evid. 403. In reviewing a trial court's decision to admit evidence under Rule 403, "an evidentiary ruling will be overturned only when the trial court commits a clear abuse of discretion." *State v. Ifill*, 574 A.2d 889, 891 (Me. 1990). Evidence is not excluded under Rule 403 merely because it is prejudicial to the defendant. *Millay*, 2001 ME 177, ¶ 10. This Court has given "wide discretion [] to

trial courts to determine whether the value of the proffered evidence is substantially outweighed by the danger of unfair prejudice.” *Id.* ¶ 11.

This Court upheld the admission of an implied consent refusal form over objection on Rule 403 grounds. *Ifill*, 574 A.2d at 891. In that case, the defendant had signed the implied consent refusal form, and also wrote on it that he was refusing the test because he was on federal probation. *Id.* This Court found that the trial court did not abuse its discretion when it allowed this in evidence because while one judge may have excluded the evidence under Rule 403, the defendant did not show “an abuse of the trial court’s discretion.” *Id.*

Similarly, in *Millay*, this Court upheld the admission of the defendant’s statements as to why he refused field sobriety tests over a Rule 403 objection. *Millay*, 2001 ME 177 ¶ 11. As stated above, the defendant in that case refused the tests because “I have been through this before.” *Id.* ¶ 4. This Court reasoned that there was no indication that the jury, based on the statements in question, would decide the case on an improper basis. *Id.* ¶ 10. Further, the trial court’s decision to either admit or exclude the statements would not have been abuse of discretion. *Id.* ¶ 11.

In this case, as argued above, the refusal evidence was extremely probative because the defendant refused to take the tests as he knew he would fail because he was intoxicated. Admitting this evidence is prejudicial to the defendant because it

proves his guilt, but that prejudice is not unfair. Like the admission of the defendant's statements in *Millay*, there is no indication that the jury decided this case on an improper basis, such as penalizing the defendant for invoking what he believed to be his Fourth Amendment right. Further, as in *Ifill*, one judge may have excluded the evidence of the refusal form indicating the defendant was on federal probation, there is no showing that every judge should have excluded the evidence in this case.

In contrast, the defendant argues the danger of unfair prejudice come from the possibility that the jury will assign too much weight to the defendant's misplaced assertion of his Fourth Amendment rights.<sup>2</sup> (App. Br. 19.) The potential danger of the jury placing too much weight on this, however, is minimal because beyond the refusal, the defendant displayed many signs of intoxication as elicited during Officers Hannon's and Martin's testimony. Beyond this, the jury watched the Intoxilyzer room video and was able to judge the defendant and his demeanor as he refused that test, requested a blood draw, and then refused that test as well.

Further, the defendant devotes the majority of his argument to the jury instructions as causing the unfair prejudice. (App. Br. 19-20.) The defendant argues that the trial judge's instruction that the jury may consider the refusals as evidence of intoxication, the court was instructing the jury to find the defendant

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<sup>2</sup> This argument will be addressed later, arguing that the defendant had no Fourth Amendment right to refuse these tests.

guilty based on his refusal alone. (App. Br. 20.) The defendant's argument, however, makes a jump that is not represented in the trial judge's jury instruction. The trial judge instructed the jury that "Maine law allows you to *consider* a person's failure to submit to a chemical test as evidence on the issue of whether that person was under the influence of intoxicants." (Tr. 200.) (Emphasis added.) In no way does this rise to the level of instructing the jury that they may find the defendant guilty using less than proof beyond a reasonable doubt. This instruction merely tells the jury they can, if they choose, consider the defendant's refusals as evidence of intoxication.

In sum, the probative value of the refusal evidence is not substantially outweighed by the danger of unfair prejudice, and the trial court did not abuse its discretion in admitting the evidence.

**C. The statutorily authorized admission of refusal evidence to prove intoxication at trial does not violate the separation of powers.**

Finally, the defendant argues that 29-A M.R.S.A. § 2431(3), admitting refusal evidence at trial to prove intoxication, is an unconstitutional violation of the separation of powers. (App. Br. 14.) In Maine, the Legislature has decided that when there is probable cause to believe a driver is operating a motor vehicle while under the influence of intoxicants, then that driver has a duty to submit to a

chemical test to determine their blood-alcohol level. 29-A M.R.S.A. § 2521(1). If a driver refuses to fulfill this duty then “[f]ailure of a person to submit to a chemical test is admissible in evidence on the issue of whether that person was under the influence of intoxicants.” 29-A M.R.S.A. § 2431(3).

By statute, “[t]he Supreme Judicial Court shall have the power and authority to prescribe, repeal, add to, amend or modify rules of evidence. . .” 4 M.R.S.A. § 9-A. This authority in promulgating rules of evidence is not exclusive to the Supreme Judicial Court, with the Law Court finding that “the Legislature has the power to prescribe rules of evidence.” *Ziehm v. Ziehm*, 433 A.2d 725, 727 (Me. 1981). Further, “the Legislature has the authority to regulate rules of evidence.” *Irish v. Gimbel*, 1997 ME 50 ¶ 15. If the rules promulgated by the Supreme Judicial Court conflict with a statute enacted by the Legislature then the rule created by the court controls. *Arsenault v. Crossman*, 1997 ME 92 ¶ 4.

In this case, there is no conflict between 29-A M.R.S.A. § 2431(3) and the Maine Rules of Evidence. As argued above, a driver’s refusal to submit to a chemical test to determine their blood-alcohol level is probative of the driver’s intoxication, and the probative value of the refusal evidence is not substantially outweighed by the danger of unfair prejudice. Screening the refusal evidence through the Maine Rules of Evidence, as the defendant suggests, shows that there is no conflict.

In sum, there is no violation of the separation of powers because the Supreme Judicial Court does not have the sole authority to promulgate rules of evidence, and there is no conflict between 29-A M.R.S.A. § 2431(3) and the Maine Rules of Evidence.

## **II. Admission of evidence about the defendant's refusals to take the tests did not violate the Fourth Amendment.**

The defendant next argues that the admission of the refusal evidence violated the defendant's Fourth Amendment privilege. (App. Br. 21.) This Court reviews Constitutional challenges de novo. *State v. Larsen*, 2013 ME 38 ¶ 17. The Fourth Amendment gives, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Breath and blood tests done to measure blood-alcohol level are searches under the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). For a search to be constitutional under the Fourth Amendment, there needs to be a warrant based on probable cause, or some other exception.<sup>3</sup> *State v. Nadeau*, 2010 ME 71 ¶ 17 Consent is a well-recognized exception to the warrant requirement of the Fourth Amendment. *Id.* In this case,

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<sup>3</sup> The United States Supreme Court heard oral argument in *Bernard v. Minnesota*, 136 S.Ct 615 (2015), consolidated with two cases, on April 20, 2016. An issue in this case is if a breath test is a search incident to arrest. A finding that it is would make the defendant's argument here moot.

the implied consent statute obtains valid consent from the defendant for Fourth Amendment purposes, and the defendant's consent, under implied consent, cannot be revoked. As such, the defendant's Fourth Amendment rights were not violated.

**A. Under the implied consent statute the defendant consented to testing.**

The defendant argues that Maine's implied consent law did not obtain valid consent to submit to testing to measure his blood-alcohol level. (App. Br. 22.) Driving in Maine is a privilege, not a right. *Carrier v. Secretary of State*, 2012 ME 142 ¶ 16. By driving on a road in Maine, every driver has a duty to undergo a test to determine their blood-alcohol level if there is probable cause to believe they are driving under the influence of intoxicants. 29-A M.R.S.A §2521(1), *see also State v. Chase*, 2001 ME 168 ¶ 6. A driver's consent to be tested "is implied from the arrested motorist's having operated or attempted to operate a motor vehicle within the state." *Plante*, 417 A.2d at 993. The Supreme Court has found that implied consent laws, like Maine's, are a valid tool to compel driver's to submit to blood-alcohol testing. *South Dakota v. Neville*, 459 U.S. 553, 559 (1983).

In this case, the facts are uncontroverted that the defendant was operating a motor vehicle on a road in Gorham, Maine. (Tr. 37-39.) At the time of his stop, the defendant produced a Maine driver's license. (Tr. 39.) This means that the defendant, under the implied consent statute, had consented to have his blood-

alcohol level tested if there was probable cause to believe he was operating under the influence of intoxicants. Officer Hannon established this probable cause through observing the defendant's erratic vehicle operation, the odor of intoxicants emanating from the defendant's breath, the defendant's red and bloodshot eyes, all coupled with the defendant's admission to having one shift drink an hour and a half prior to the stop. (Tr. 37-43.)

In contrast, the defendant argues that under *Missouri v. McNeely*, Maine's implied consent statute did not obtain valid consent. (App. Br. 22.) The defendant's almost total reliance on *McNeely*, however, is wholly misplaced. The Supreme Court, in deciding *McNeely*, answered the narrow question of "whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigation." *Missouri v. McNeely*, 133 S.Ct 1552, 1558 (2013.) The Supreme Court held that the natural dissipation of alcohol did not establish this *per se* exigency for nonconsensual blood draws. *Id.* at 1557. Thus, *McNeely* did not categorically strike down implied consent laws, but merely held that a law enforcement officer may not, on a *per se* basis, forcibly draw blood when there has been an affirmative refusal. *Id.* In fact, the Supreme Court in *McNeely* endorses implied consent laws as a means to combat drunk-driving, and notes that "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 1565. Further, even under *McNeely*, a nonconsensual blood-draw can be done depending on the totality of circumstances of a case. *Id.* at 1563. Thus, *McNeely* does not strike down all implied consent laws, but merely says in the instance of a forced blood draw they do not apply. *Id.* at 1557. Here, there was no forced blood draw, or a test at all.

In sum, Maine’s implied consent statute obtained valid consent from the defendant for blood-alcohol testing.

**B. The defendant could not revoke his consent under implied consent.**

Under Maine’s implied consent statute, there is no legal right to refuse, no ability to withdraw legal consent. *State v. Van Reenan*, 355 A.2d 392, 395 (Me. 1976). When a driver refuses to take a test to measure their blood-alcohol level, they are physically refusing, and are not doing so under any right of law. *Plante*, 417 A.2d at 993. The implied consent warnings “are not intended to provide a driver with the choice of taking or refusing a blood-alcohol test.” *Chase*, 2001 ME 168 ¶ 7. Physically refusing a test, “is simply a matter of grace bestowed by the [Maine] Legislature.” *Neville*, 459 U.S. at 565. By not forcing the driver to take a test, “the Legislature has simply made a policy decision that upon an arrested

driver's refusal to submit to the test, the State should forego the use of force to obtain the specimen." *Van Reen*, 355 A.2d at 395.

In this case, it is uncontroverted that the defendant refused all tests meant to measure his blood alcohol level. The defendant never complied with Officer Hannon's request for the defendant to take the Intoxilyzer test at the Gorham Police Station. (Tr. 55.) The defendant also asked for a blood test to be conducted, which he then refused once Officer Martin offered to conduct that blood draw. (Tr. 99.) While the defendant physically refused all the these tests, he had previously consented to undergo these tests by having a Maine driver's license and driving on a Maine road that night, as argued above. *Plante*, 417 A.2d at 993. As such, the defendant's duty and implied consent to these tests did not dissipate when he physically refused to comply with testing. The duty and consent was always present, but the officers chose to follow the Legislature's desire to not physically force a driver to comply with testing. The facts of this case do not rise to the level of a forced blood draw as occurred in *McNeely*, necessitating consent beyond implied consent.

In sum, the defendant did physically refuse to take the tests, but did not revoke his consent under Maine's implied consent statute.

In conclusion, Maine's implied consent statute obtained valid consent from the defendant, and the defendant did not revoke that consent, so no Fourth

Amendment violation occurred by admitting the evidence of the defendant's refusals.

## SECOND ASSIGNMENT OF ERROR

### **I. The State did not commit obvious error by introducing and arguing evidence about defendant's failure to sign a Uniform Summons and Complaint at the Cumberland County Jail.**

The defendant argues there was prosecutorial misconduct when the State entered evidence and made arguments about the defendant's failure to sign a USAC at the Cumberland County Jail. (App. Br. 33.) At trial, the defendant's counsel did not object to this evidence, thus not preserving this claim. Unpreserved claims are reviewed for obvious error. *Glover*, 2014 ME 49, ¶ 8. Analysis under this standard, "calls for an evaluation of the error in the context of the entire trial record to determine [] whether the error was so seriously prejudicial that it is likely that an injustice has occurred." *State v. Pabon*, 2011 ME 100 ¶ 19. To find obvious error, "there must be (1) an error, (2) that is plain, and (3) that affects substantial rights." *Id.* ¶ 29.

In this case, there was no error. The defendant's argument rests on the trial judge's granting of the defendant's second motion in limine, ruling "the refusal at the Cumberland County Jail will not be admitted." (Tr. 6.) This ruling had nothing

to do with the failure of the defendant to sign a USAC at the Cumberland County Jail, but was in reference to another Intoxilyzer test that the defendant refused to perform at the Cumberland County Jail. (JA 24.) This refusal by the defendant to attempt another intoxilyzer test was excluded because the State failed to turn over video footage of the intoxilyzer room at the Cumberland County Jail. (Tr. 6.) The defendant's motion argues, specifically, that the video would have shown the defendant "attempting or refusing a chemical test." (JA 24.) The motion does not mention the failure of the defendant to sign a USAC at the Cumberland County Jail.

As further proof there was no error, the State discussed the defendant's failure to sign the USAC during its opening statement without objection from the defense or comment from the judge, mere moments after the ruling. (Tr. 25.) On direct examination, Officer Hannon testified to the defendant's failure to sign a USAC at the Cumberland County Jail, and the State entered in evidence the USAC from that interaction, without objection by the defense. (Tr. 57.) On cross-examination of Officer Hannon, the defense questioned what happened at the Cumberland County Jail in regards to the defendant's failure to sign the USAC. (Tr. 93.) Finally, in their closings, both the State and the defendant's counsel made argument about the failure of the defendant to sign a USAC at the Cumberland County Jail. (Tr. 175, 185.) While "an inexperienced student-attorney prosecuted

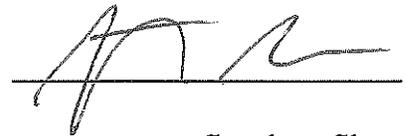
the State's case," that student attorney simply made no error when entering in evidence and discussing the defendant's failure to sign a USAC.

In sum, there was no prosecutorial misconduct in this case because there was no error.

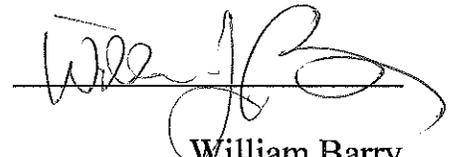
### CONCLUSION

For all the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Shea", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, William Barry, Assistant District Attorney Intern, certify that I have mailed two copies of the foregoing "BRIEF OF THE APPELLEE" to Micah Day's attorney of record, Rory A. McNamara.

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DATED: 5-9-16

  
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