

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 19-0734

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

HANNAH MARIE KILBY,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
THE HONORABLE WILLIAM PRICE, JUDGE

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**APPELLEE'S BRIEF**

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**STATEMENT OF THE ISSUE PRESENTED FOR  
REVIEW**

**I. The District Court Correctly Denied Kilby’s Motion in Limine. Kilby’s Right to be Free From Unreasonable Searches Under Article I, section 8 of the Iowa Constitution Was Not Violated; Therefore, her Due Process Right to a Fair Trial Under Article I, section 9 of the Iowa Constitution Was Not Violated By the Admission at Trial of Evidence that She Refused to Submit to a Breath Test.**

**Authorities**

*Griffin v. California*, 380 U.S. 609  
*South Dakota v. Neville*, 459 U.S. 553 (1983)  
*Commonwealth. v. Bell*, 267 A.3d 7440 (Pa. Sup. Ct. 2017)  
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*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)  
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Kenneth J. Millilli, “*The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*,” 75 SCALR 901 (May 2002)

## ROUTING STATEMENT

Kilby requests the Supreme Court to retain this case because it presents a “substantial issue of first impression that implicates the continuing validity of a statute—namely: whether Iowa Code section 321J.16, violates the substantive due process rights of Iowans in light of the court’s recent decision on *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017), and is, therefore, unconstitutional as applied.”

Appellant’s Brief p. 14.

Iowa Code section 321J.16 provides that when a person refuses to submit to chemical testing, evidence of that refusal is admissible at trial. Kilby contends that use of the refusal evidence violated her right to due process under Article I, section 9 of the Iowa Constitution because such evidence penalized her from exercising her constitutional right to be free from unreasonable searches under Article I, section 8.

Kilby is correct that the issue she raises is one of first impression as she has framed it. However, the State believes that *Pettijohn*, a case in which the Court found that a boater did not give voluntary consent to a warrantless breath test under Article I, section 8, did not affect the constitutionality of section 321J.16, providing

that a person's *refusal* to submit to a breath test is admissible at trial. Kilby stretches a claimed due process violation under Article I, section 9 into a more targeted claim about whether *Pettijohn's* reasoning applies equally to Iowa Code section 321J.6's implied consent law.

Because any error in the district court's denial of Kilby's motion in limine was harmless beyond a reasonable doubt in this bench trial, neither the issue of whether section 32J.16 is constitutional as applied, nor the broader issue of whether *Pettijohn* affected the constitutionality of Iowa's implied consent law need to be resolved in this case. *See State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001) ("Ordinarily [Supreme Court] will not pass upon constitutional arguments if there are other grounds on which to resolve the case.").

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

The defendant, Hanna Kilby, appeals her conviction of operating while intoxicated, second offense, in violation of Iowa Code

section 321J.2. She argues the district court erred in denying her motion in limine in which she sought to prohibit the State from presenting evidence of her refusal to take a breath test at trial. Kilby maintains the use of evidence of her test refusal violated her due process rights under Article I, section 9 of the Iowa Constitution.

### **Course of Proceedings**

The State accepts Kilby's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

### **Facts**

On July 28, 2019, Des Moines Police Officer Brian Kelley responded to a report that a driver was attempting to leave the site of a hit and run accident. When he arrived at the Extra Innings parking lot, witnesses told Officer Kelley they had stopped the suspect from leaving the scene. Additional Minutes of Testimony (Incident/Investigation Report; Conf. App. 19).

Officer Kelley spoke with the driver who had tried to flee, Hanna Kilby, and observed she had red, watery eyes and smelled of alcohol. When he asked her how much she had to drink, Kilby replied, "two or three." Additional Minutes of Testimony (Incident/Investigation Report); Conf. App. 19.

Officer Mock soon arrived to assist. He spoke with Kilby and also immediately detected an odor of alcohol. Kilby told Officer Mock had consumed a couple of mixed drinks called Vegas Bombs prior to driving her vehicle. Kilby consented to an HGN test; Officer Mock noticed she had unsteady balance as she stepped into a starting position for the test. Kilby showed four clues on the HGN test. Minutes of Testimony (Incident/Investigation Report); Conf. App. 13.

Officer Mock requested Kilby to perform a walk and turn test or a one-leg stand test; she refused. Kilby also refused a preliminary breath test. Officer Mock arrested Kilby and transported her to the Des Moines Police Station. Minutes of Testimony (Incident/Investigation Report); Conf. App. 13.

At the station, Officer Mock read Kilby the implied consent advisory and requested that she submit to a Datamaster breath test. Kilby refused the test. Minutes of Testimony (Incident/Investigation Report); Conf. App. 13.

On September 6, 2018, the State filed a trial information charging Kilby with operating while intoxicated, second offense. Trial Information; Conf. App. 5. Kilby pleaded not guilty. Arraignment.

On November 19, 2018, Kilby filed a motion in limine. Kilby sought “to prevent the prosecution from using evidence that was inadmissible and prejudicial” at her trial. Among other things, Kilby argued that evidence that she refused a breath test “would (1) undermine [her] right to refuse testing, (2) unfairly punish [her] for standing on her rights, and (3) amount to burden shifting.” Motion in Limine; Conf. App. 20. Kilby fleshed out her argument both in a brief in support of the motion filed January 4, 2019, and at the January 15, 2019 hearing. Defendant’s Brief in Support of Motion in Limine; Conf. App. 26.

Following the hearing, the district court denied a portion of her motion in limine finding that Kilby’s constitutional rights under the Iowa and United States Constitutions were not violated by the admission of her refusal to consent to a breath test. Ruling and Order Following Hearing on Motion in Limine; Conf. App. 39. Kilby waived her right to a jury and the parties stipulated to a bench trial on the minutes of testimony. Waiver, Stipulation; Conf. App. 48.

The district court found Kilby guilty of operating while intoxicated, first offense. It sentenced Kilby to a term of incarceration

not to exceed one year and suspended all but five days of her sentence. OWI Sentencing Order; Conf. App. 49.

## ARGUMENT

**I. The District Court Correctly Denied Kilby’s Motion in Limine. Kilby’s Right to be Free From Unreasonable Searches Under Article I, section 8 of the Iowa Constitution Was Not Violated; Therefore, her Due Process Right to a Fair Trial Under Article I, section 9 of the Iowa Constitution Was Not Violated By the Admission at Trial of Evidence that She Refused to Submit to a Breath Test.**

### **Preservation of Error**

The State agrees Kilby preserved error on the issue of whether the admission of evidence that she refused a breath test violated her constitutional due process rights under Article I, section 9 of the Iowa Constitution. Motion in Limine, Brief in Support of Motion in Limine, Ruling and Order Following Hearing on Motion in Limine; Conf. App. 20, 26, 39. However, despite its mention of the constitutionality of Iowa Code section 321J.16, as applied to her, the district court did not specifically rule upon this issue. Ruling and Order Following Hearing on Motion in Limine; Conf. App. 39. Therefore, Kilby was required to file a motion to expand the ruling pursuant to Iowa Rule of Civil Procedure 1.904 in order to preserve error on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa

2002) (“When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.”).

### **Standard of Review**

Kilby’s due process challenge is reviewed de novo. *See State v. Hutton*, 796 N.W.2d 898, 901 (Iowa 2011). “Questions of the admissibility of evidence are generally reviewed for an abuse of discretion.” *State v. Thomas*, 766 N.W.2d 263, 371 (Iowa Ct. App. 2009).

### **Merits**

Iowa’s implied consent law provides that “a person who operates a motor vehicle under circumstances giving rise to a reasonable belief that the person is intoxicated is deemed to have given consent to withdrawal of a specimen of blood, urine or breath to determine alcohol concentration.” *State v. Bloomer*, 618 N.W.2d 550, 552 (Iowa 2000); Iowa Code § 321J.6(1). “Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit[.]” Iowa Code § 321J.6(2). A refusal to submit to chemical testing results in a revocation of the person’s driver’s license for a period of at least one year. *See* Iowa Code §§ 321.J.9(1)(a) and (b). Additionally,

“proof of refusal is admissible in any civil or criminal action or proceeding[.]” Iowa Code § 321J.16.

Kilby argues that the district court erred in finding her test refusal was admissible at trial and in denying her motion in limine. Relying on *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017), Kilby asserts she has a constitutional right under Article 1, section 8 of the Iowa Constitution to be free from unreasonable searches and seizures. Therefore, she argues, the admission of evidence of her test refusal was an impermissible penalty imposed upon this constitutional right and resulted in a violation of her due process right to a fair trial pursuant to Article I, section 9 of the Iowa Constitution (“no person shall be deprived of life, liberty, property, without due process of law”).

In *Pettijohn*, the Court determined that a boater’s rights under Article I, section 8 of the Iowa Constitution were violated by “the warrantless administration” of a breath test invoked under Iowa Code section’s 462A.14A’s implied consent provisions because no exceptions to the warrant requirement existed. *Pettijohn*, 899 N.W.2d at 38. Central to the court’s finding that Pettijohn’s consent to breath testing was not voluntary was the criminal consequence

attached to section 462A.14A's implied consent statute. *Id.* at 35-38. However, the Court in *Pettijohn*, cautioned that readers of its decision “should not jump to the conclusion that [its] analysis will make the statutory scheme governing the operation of a motor vehicle while under the influence unconstitutional.” *Id.* at 38.

In discussing the consent-to-search exception to the warrant requirement, Justice Cady noted that the section 462A.14A's implied consent provisions could be distinguished from Iowa's motor vehicle implied consent statute because under 452A.14.A “the consequences of withholding consent are not limited to the loss of the privilege to operate a boat.” *Pettijohn*, 899 N.W.2d at 40 (Cady, C.J., concurring specially). It was “[t]he threat of [ ] punishment” that “necessarily mean[t] the subsequent consent was obtained by coercion and was thus involuntary.” *Id.*

In finding evidence of Kilby's refusal to submit to a breath test was admissible, the district court determined that *Pettijohn* “did not expressly overrule earlier cases which upheld the constitutionality of Iowa's Implied Consent statute.” Ruling and Order Following Hearing on Motion in Limine; Conf. App. 45. The State agrees. However, the dispositive distinction between this case and *Pettijohn*

is that unlike Pettijohn, who submitted to a breath test, Kilby refused to submit to a test. Therefore, there was no search under the Iowa Constitution.

Kilby has a right to be free from warrantless searches under Article 1, section 8. Iowa Article I, section 8 of the Iowa Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

There was no search here. Kilby does not have the right to be *free to refuse* to submit to a breath test. *See State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) (“right to refuse the test” is “not mandated by the due process, privilege against incrimination or right to counsel provisions of the United States Constitution”); *People v. Gaede*, 20 N.E.3d 1266 (Ill. Ct. App. 2014) (“Defendant erroneously believes he always has a constitutional right to refuse a breath test.”); *Commonwealth v. Bell*, 267 A.3d 7440 (Pa. Sup. Ct. 2017) (“an individual suspected of drunk driving does not have a constitutional right to refuse chemical testing”). Therefore, the admission of

evidence of Kilby's test refusal does not penalize a constitutional right.

The Colorado Court rejected a similar constitutional challenge in *Fitzgerald v. People*, 394 P.3d 671 (Col. 2017). Fitzgerald argued that "because the Fourth Amendment grants an individual the right to be free from unreasonable searches, and a blood or a breath test is a Fourth Amendment search, introducing a defendant's refusal to consent to a blood test as evidence of guilty amounts to an impermissible penalty on the exercise of his Fourth Amendment right." *Fitzgerald*, 394 P.3d. at 674.

The Colorado Supreme Court noted that the defendant's argument was "rooted *Griffin v. California*, 380 U.S. 609 [ ] (1965)." *Id.* "In *Griffin*, the Supreme Court explained that when a criminal defendant fails to testify at trial, commentary suggesting the jury should draw an inference of guilt from the defendant's silence is 'a penalty imposed by courts for exercising a constitutional privilege' that 'cuts down on the privilege by making its assertion costly.'" *Id.* (quoting *Griffin*, 380 U.S. at 614).

However, the *Fitzgerald* Court observed, "in the context of DUI refusal evidence, the Supreme Court has sharply curtailed the use of

the *Griffin* penalty analysis.” *Id.* It explained that in *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), the United States Supreme Court determined that a “refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.” *Id.* (quoting *Neville*, 459 U.S. at 564.). Additionally, the *Fitzgerald* Court quoted a footnote in *Neville*: “Unlike the defendant’s situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable.” *Id.* at 674-75.

In Colorado, as in Iowa, “a driver’s refusal to submit to testing [. . .] does not criminalize a driver’s refusal to consent to a search.” *Id.* at 676. Therefore, the Colorado Supreme Court concluded that “introducing evidence of Fitzgerald’s refusal to consent to a blood or breath test to determine his BAC did not impermissibly burden his Fourth Amendment right.” *Id.* at 675; *see also Bell*, 267 A.3d at 749 (“Appellee had no constitutional right to refuse a blood test upon his lawful arrest for DUI and thus, it was constitutionally permissible for the prosecution to introduce evidence of this refusal at his trial on

DUI charges.”); *State v. Baird*, 386 P.3d 239, 246 (Wash. 2016) (right to refuse breath test is statutory, not constitutional).

Kilby cites *State v. Thomas*, 766 N.W.2d 271 (Iowa Ct. App. 2011), in support of her contention that a refusal to consent to a search may not be used as evidence at trial. In *Thomas* the Court of Appeals found a defendant’s refusal to consent to a warrantless search of her home was irrelevant and unfairly prejudicial pursuant to the rules of evidence. *Thomas*, 766 N.W.2d 270-71. It did not decide the case on due process grounds.

As the Supreme Court explained in *Neville*, “the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.” *Neville*, 459 U.S. 553 (1983) (holding “use of evidence of refusal after [ ] warnings comported with the fundamental fairness required by Due Process). The Vermont Supreme Court observed, in finding the admission of test refusal admissible at trial, that “[p]ractices that enhance the reliability of the criminal process and its truth-seeking function may be permitted, even if a constitutional right is burdened.” *State v. Rajda*, 196 A.3d. 1119 (Vt. 2018). It also found “the

admission of evidence of a refusal to submit to a blood draw is a qualitatively different consequence with respect to its burden on the Fourth Amendment.” *Rajda*, 196 A.3d. at 1120.

In contrasting the Fourth Amendment with the Fifth Amendment and the constitutional penalty theory, one commentator has explained:

The ultimate harm that the Fifth Amendment is designed to prevent is incrimination. By contrast, the Fourth Amendment protects privacy. Therefore, if the consequence of adverse inference evidence or commentary upon the exercise of the Fifth Amendment right is to incriminate the defendant, there is, at least as a threshold matter, some impairment of the very right protected by the Fifth Amendment. On the other hand, if the government were to introduce evidence at trial evidence of the defendant’s refusal to consent to a search to prove consciousness of guilty, the defendant perhaps will have suffered the undesirable consequence of some incremental incrimination, but the defendant’s privacy—the policy behind the Fourth Amendment—will not have suffered at all.

Kenneth J. Millilli, “*The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*,” 75 SCALR 901 (May 2002).

This Court should find that there is no right to be free to submit to a breath test under the Iowa Constitution; therefore, admission of

evidence of Kilby's refusal to submit to a test did not impermissibly burden her right to be free from unreasonable searches. Therefore, Kilby's due process right to a fair trial under the Iowa Constitution was not violated by the admission of the evidence.

Even if the Court endorses Kilby's argument and finds the district court erred in denying her motion in limine, the error was harmless beyond a reasonable doubt. "An error of constitutional magnitude does not mandate a new trial if the error was harmless beyond a reasonable doubt." *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990).

Here, the Minutes of Testimony provided sufficient evidence that Kilby operated a motor vehicle while under the influence in violation of Iowa Code section 321J.2. Excluding evidence of Kilby's test refusal from the district court's recitation of the evidence, it found:

. . . on or about July 28, 2018, Ms. Hann[a] Marie Kilby was operating a motor vehicle in Polk County, Iowa, in the general vicinity of the 500 Block of East Livingston. This motor vehicle was a 2002 Chrysler, Town & Country.

That this occurred shortly before 11:00 p.m. on July 28, 2018.

That prior to officer –an officer of the Des Moines police department coming to the 500 Block of East Livingston, Ms. Kilby had been operating this vehicle in the vicinity of a bar called Extra Innings—

That a motor vehicle accident occurred at Extra Innings and various people followed her to the 500 Block of East Livingston and caused police to come to the 500 Block of East Livingston.

That when Officer Brian Kelley of the Des Moines Police Department observed Ms. Kilby in the driver’s seat of the Chrysler, Town & Country, vehicle in the 500 Block of East Livingston, he observed that she had red and waterily [sic] bloodshot eyes, the strong odor of an alcoholic beverage emanating from her breath, and stated that she had two or three drinks before driving.

That Officer Kelley called for assistance from Officer Mock of the Des Moines Police Department to further investigate the matter of Ms. Kilby.

Officer Mock came to the Block of 500 East Livingston. That he observed Ms. Kilby too—that Officer Mock observed that Ms. Kilby’s demeanor was that of being dull, drowsy, and at times crying. That Ms. Kilby’s speech was slurred and at times she was confused and mumbling. Officer Mock noted a moderate odor of an alcoholic beverage on the breath of Ms. Kilby.

That Ms. Kilby consented to the nystagmus gaze test. And as she was preparing for the test, Officer Mock noticed that her balance was unsteady. That while she was participating in the NGT test or nystagmus gaze test, she was

swaying. Ms. Kilby exhibited four of six clues of the nystagmus gaze test.

That she did not a participant [sic] in the walk and turn test, and became emotional at that point.

Ms. Kilby refused to submit a PBT and refused to submit a breath sample for testing.

That Officer Mock gave her the – read her 804.20 rights and invoked implied consent under 321J. That Ms. Kilby acknowledged she understood the 804.20 and the invocation of implied consent.

That Ms. Kilby, after telling Officer Kell[e]y that she had had two or three drinks, told Officer Mock that she had been drinking mixed drinks called Vegas Bombs prior to operating her vehicle, and she said she had a couple, and told Officer Mock that the couple probably were two.

Trial Tr. p. 9, line 2-p. 11, line 9. The district court would have found Kilby guilty as charged absent the evidence she refused a breath test, beyond a reasonable doubt.

The admission of evidence that Kilby refused a chemical breath test was proper and the district court did not err in denying Kilby's motion in limine. Alternatively, any error in the admission of the evidence was harmless beyond a reasonable doubt.

## CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court to affirm Kilby's conviction of operating while intoxicated.

## REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,514** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 8, 2020



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