IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0735

CHRISTIAN MICHAEL SMITH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable David J. Grubich, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that there was probable cause to believe Appellant was the driver in an accident that resulted in serious bodily injury.

2. Whether the district court erred in finding that Appellant's statement to the trooper, "I don't want that," in the context of discussions about providing a blood sample, constituted a refusal to submit to a test.

STATEMENT OF THE CASE

On September 2, 2023, the State suspended the driver's license of Christian Michael Smith (Smith) for refusing to provide a blood sample pursuant to Mont. Code Ann. § 61-8-1016. (D.C. Docs. 3 at 2, 4 at 3.)

On September 28, 2023, Smith filed a petition for judicial review of his license revocation with the district court. (D.C. Doc. 1.) The petition asked the court to stay the suspension of Smith's driver's license. (*Id.* at 2.)

On September 29, 2023, the district court denied Smith's request for a stay of his driver's license suspension and set an evidentiary hearing for December 15, 2023. (D.C. Doc. 2.) The district court also ordered the parties to submit trial briefs identifying the facts and law at issue prior to the evidentiary hearing. (*Id.*)

Smith submitted his Petitioner's Brief on December 8, 2023. (D.C. Doc. 3.) In his brief, Smith stated that, "[i]implementing all his rights as a citizen of Montana, Mr. Smith refused to have his blood tested." (*Id.* at 2.) Smith's sole legal argument was that "Trooper Woodland lacked particularized suspicion to justify his request for a blood sample." (*Id.* at 4.) Smith concluded, "Mr. Smith's license was taken and suspended because he refused to take a blood test when the State did not have the particularized suspicion to ask him to do so." (*Id.* at 6.)

The State filed its State's Opposition Brief on December 11, 2023. (D.C. Doc. 4.) The State argued that Trooper Woodland had particularized suspicion that Smith was impaired (*Id.* at 4.) Additionally, the State argued that Trooper Woodland had probable cause to believe Smith was driving a vehicle involved in a motor vehicle accident that resulted in serious bodily injury. (*Id.* at 6.)

On December 15, 2023, the district court held the evidentiary hearing. (D.C. Doc. 5.) Trooper Woodland was the only witness to testify at the hearing, and no exhibits were admitted into evidence. (*Id.*)

After Trooper Woodland's testimony and arguments from the parties, the district court found that Smith had been operating a motorcycle at the time of the accident. (Tr. at 26.) The district court found that the motorcycle crash resulted in serious bodily injury, as defined by Mont. Code Ann. § 45-2-101(66). (*Id*. at

25-26.) Therefore, the district court concluded that the suspension of Smith's driver's license was proper under Mont. Code Ann. § 61-8-1016(2)(a)(iii)(C). (*Id.* at 29.) The district court also found that Smith's statement, "I don't want that," which pertained to the blood draw that had been requested, constituted a refusal. (*Id.* at 28.)

The district court denied Smith's petition. (*Id.* at 29.) This appeal follows.

STATEMENT OF THE FACTS

On September 2, 2023, Trooper Woodland responded to the scene of a single vehicle motorcycle crash at about 9 a.m. (Tr. at 5.) Upon arrival at the scene, Trooper Woodland observed a motorcycle that had gone off of the road and sustained extensive damage. (*Id.*)

Trooper Woodland spoke with the passenger of the motorcycle, who was apparently not seriously injured, and learned that the accident had occurred at approximately 8 a.m. (*Id.*) Trooper Woodland then encountered Smith in an ambulance, where he was being treated by emergency personnel. (*Id.*) Smith had sustained "obvious" and "significant injuries," which included a broken foot, a broken hand, a dislocated shoulder, and an unspecified head injury. (*Id.* at 6-7; *see also* D.C. Doc. 1, Exhibit A, Aff. of Christian Michael Smith.)

When asked about his knowledge of Smith's injuries, Trooper Woodland testified as follows:

> Q. Okay. And then you talked to my—and my client had significant injuries; is that correct?
>
> A. He had obvious injuries; I didn't know the full extent of them, but yes, he did sustain some significant injuries.
>
> Q. He had [a] dislocated shoulder?
>
> A. I do believe that was conveyed to me at the hospital, yes. They weren't sure if it was a broken arm or the shoulder.
>
> Q. A broken foot?
>
> A. I—yes.
>
> Q. Head injury?
>
> A. Yes.

(Tr. at 6.)[1]

At approximately 10 a.m., Trooper Woodland arrived at the hospital, where Smith was being treated in the emergency room. (*Id.* at 8.) Smith was hooked up to "IV's and stuff," and had been administered pain medication. (*Id.* at 9.) Trooper Woodland read Smith the implied consent advisory, and Smith initially consented to providing a blood sample for testing. (*Id.*)

[1] Trooper Woodland was not asked about the broken hand Smith attested to in his affidavit. (D.C. Doc. 1, Ex. A at ¶ 2.) Smith's attorney also asked Trooper Woodland if he was aware Smith had stopped breathing on the way to the hospital, and he responded he was not made aware of that. (Tr. at 8.)

Smith's mother arrived at the hospital and "questioned the legality" of Trooper Woodland reading Smith the implied consent advisory and "[Smith] agreeing to it." (*Id.* at 11.) Smith's mother then "went and spoke with [Smith]." (*Id.*) After the conversation with his mother, Smith stated to Trooper Woodland, "I don't want that." (*Id.*) Trooper Woodland assumed that statement was a refusal to provide a blood sample, and he did not attempt to obtain a blood sample at that point. (*Id.*)

The relevant portion of Trooper Woodland's testimony with respect to Smith's refusal was as follows:

> Q. Okay. And so, after that time, his mother arrived; is that correct?
>
> A. Correct.
>
> Q. And it was his mother that said she didn't want him to take the blood; isn't that correct?
>
> A. She initially questioned the legality of me reading that to him and him agreeing to it.
>
> Q. Uh-huh.
>
> A. And then when she went and spoke with him, yes.
>
> Q. Okay. He didn't—he didn't tell you he refused?
>
> A. He actually did say he did not want to.
>
> Q. He just said, "I don't want that."

A. Which I assumed as a refusal.

(*Id*. at 10-11.)

On cross-examination by the State, Trooper Woodland clarified that the motorcycle accident took place on Morony Dam Road. (*Id.* at 12.) At the time of the crash, the weather was clear and sunny, and there were no obvious obstructions on the road. (*Id.*)

Trooper Woodland described the damage to the motorcycle and indicated that it had "wrecked so violently . . . that it snapped the entire instrument cluster off of the top of the bike." (*Id.*) Upon standing the motorcycle up, Trooper Woodland determined that it had been in fifth gear. (*Id*. at 13.)

Trooper Woodland first spoke with Smith in the ambulance, where he was on a gurney and wearing a neck brace. (*Id.*) Smith informed Trooper Woodland that he recalled events leading up to the crash, but other than that, he only remembered "waking up on the side of the road." (*Id.* at 14.) Smith also estimated that he had been driving at 35 miles per hour and that he had consumed four drinks "periodically through the night." (*Id.*)

Field sobriety tests were not conducted as the ambulance crew informed Trooper Woodland that they needed to transport Smith to the hospital due to his injuries. (*Id.*) Trooper Woodland arrived at the hospital, read Smith the implied consent advisory, and requested a blood sample. (*Id.* at 15.) After speaking to his

mother, Smith stated to Trooper Woodland, "I do not want that." (*Id.*) Trooper Woodland did not administer a blood test. (*Id.*)

After Trooper Woodland's testimony, the parties argued their respective positions. Smith argued that the only indicia of impairment were the motorcycle crash and the odor of alcohol, which gave insufficient probable cause to suspect a DUI. (*Id.* at 16.) Additionally, Smith argued:

> And then we understand—and then at the hospital, my—my client is—was read implied consent; he was fairly conscious; he consented to the implied—to the blood draw; and then his mother came in, and for whatever reason, you know, he's above 18 years of age, and *she withdrew the consent*, which [she] has no legal authority to do so.

(*Id.* (emphasis added).

Consistent with its brief, the State's response was "two-pronged." (*Id.* at 17.) First, addressing particularized suspicion of DUI, the State argued that Smith "crashed his motorcycle on a clear road with no apparent obstructions after admitting to consuming alcohol. He had slurred speech, [the] odor of alcohol, and he was injured in the crash."[2] (*Id.*)

[2] In both their briefs and oral arguments, the parties referenced indicia of intoxication that were not mentioned during Trooper Woodland's testimony. These included the odor of alcohol, slow and slurred speech, bloodshot and watery eyes, and Smith's performance on a partial HGN test. (*See* D.C. Docs. 3 at 1-2, 4; 4 at 2.) The only actual testimony pertaining to signs of impairment was that Smith admitted to consuming "four drinks periodically through the night." (Tr. at 14).

Second, citing Mont. Code Ann. § 61-8-1016(2)(a)(iii)(C), the State argued that Trooper Woodland had probable cause to believe Smith was the driver in a motor vehicle accident that resulted in serious bodily injury. (*Id.*)

The district court agreed with the State with respect to Mont. Code Ann. § 61-8-1016(2)(a)(iii)(C) and found that, based on the description of the injuries, there was probable cause to suspect Smith suffered "serious bodily injury," as defined by Mont. Code Ann. § 45-2-101(66). (*Id.* at 25.) The district court stated, "We did hear testimony that there were—that he was taken to the hospital. We heard testimony that there were injuries to the shoulder, foot, and head, and as to—so, the Court does find that this accident did involve serious bodily injury, despite what the trooper thought or believed." (*Id*.)

The district court also found that the injuries Smith sustained were a result of him operating his motorcycle. (*Id.* at 26.) Lastly, the district court found that, after speaking with his mother, Smith's statement, "I don't want that," constituted a refusal to provide a blood test. (*Id.* at 28.) The district court upheld the driver's license suspension and denied Smith's petition. (*Id.* at 28, 29.)

SUMMARY OF THE ARGUMENT

The district court did not err in finding there was probable cause to believe Smith was operating his motorcycle and involved in a crash that resulted in serious

bodily injuries. The record demonstrates that Smith was knocked unconscious, suffered a broken foot, a broken hand, a dislocated shoulder, and was receiving medical treatment for these injuries for weeks after the crash. (*See* D.C. Doc. 1, Ex. A at ¶ 2 ("Affiant was involved in a motorcycle accident, which resulted in the DUI, and he sustained a broken right foot, broken left hand, and a dislocated right shoulder and needs a valid driver's license in order to go to his medical appointments.").)

Given the context and timing of Smith's statement to Trooper Woodland, "I don't want that," the district court did not err in finding that Smith refused to submit to a blood test. Further, Smith alleges for the first time on appeal that he was "incapable" of refusing a test. This argument was not made in the district court and is therefore waived.

ARGUMENT

I. Standard of review

This Court reviews a "district court's ruling on a driver's license reinstatement petition to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct." *Indreland v. Mont. DOJ, Motor Vehicle Div.*, 2019 MT 141, ¶ 7, 396 Mont. 163, 451 P.3d 51. "A finding is clearly erroneous if it is not supported by substantial credible

evidence, if the trial court misapprehended the effect of the evidence," or the record leaves the Court with the "firm or definite conviction that the trial court made a mistake." *State v. Carrywater*, 2022 MT 131, ¶ 11, 409 Mont. 194, 512 P.3d 1180.

"Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance." *State v. Brave*, 2016 MT 178, ¶ 6, 384 Mont. 169, 376 P.3d 139 (quoting *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841). "The suspension of a driver's license is presumed correct and, accordingly, the petitioner bears the burden of proving the suspension was improper." *Indreland*, ¶ 7.

II. Smith has not met his burden of proving the district court's finding of probable cause to believe he was driving a motorcycle and involved in an accident resulting in serious bodily injury was clearly erroneous.

A. Applicable law

The relevant portion of Montana's implied consent statute provides that a test or tests to determine any measured amount of alcohol must be administered at the direction of a peace officer when "the peace officer has probable cause to believe that the person was driving or in actual physical control of a vehicle . . . and the person has been involved in a motor vehicle accident or collision resulting

in serious bodily injury, as defined in [Mont. Code Ann. §] 45-2-101[.]" Mont. Code Ann. § 61-8-1016(2)(a)(iii). "Serious bodily injury," is defined as injury which, "at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ." Mont. Code Ann. § 45-2-101(66)(a)(iii).

B. The district court did not err in finding that at the time of Smith's motorcycle crash, his injuries could reasonably be expected to result in serious bodily injury.

As Smith concedes, "There is no question that Mr. Smith was operating a motor vehicle and was in a crash." (Appellant's Br. at 8.) Therefore, the only issue with respect to this portion of Smith's appeal is whether the district court erred in its determination that there was probable cause to believe Smith's injuries, "*at the time of injury, [could] reasonably be expected to result in* . . . protracted loss or impairment of the function or process of a bodily member or organ." Mont. Code Ann. § 45-2-101(66)(a)(iii) (emphasis added).

Smith alleges, "Trooper Woodland did not know or could not have reasonably expected that Mr. Smith's had [sic] caused serious bodily injury." (Appellant's Br. at 9.) Smith cites a sentence of Trooper Woodland's testimony where he indicated he "didn't know the full extent" of Smith's injuries, and alleges Trooper Woodland provided no testimony that Smith had probable cause to believe he had sustained serious bodily injuries. (*Id.*)

However, Trooper Woodland did testify that, when he first encountered Smith, Smith was being treated by emergency personnel in an ambulance, on a gurney, and wearing a neck brace. (Tr. at 13.) Smith told Trooper Woodland that he remembered "just waking up on the side of the road." (*Id*. at 14.) In other words, Smith had been knocked unconscious, which was likely a symptom of his unspecified head injury. Trooper Woodland could not conduct field sobriety tests at the scene because the ambulance crew "had to get him to the hospital" to provide emergency care for his injuries. (*Id.*) Contrary to Smith's assertion, and consistent with the findings of the district court, Trooper Woodland testified that he was aware or had been made aware at the hospital that Smith had suffered an injured shoulder, a broken foot, and a head injury. (*Id*. at 6-7.)

Upholding the constitutionality of Mont. Code Ann. § 45-2-101(66), and discussing the meaning of "protracted," this Court has observed,

> We also note that other jurisdictions called upon to interpret "protracted" have concluded that the concept of the word is not beyond the grasp of a jury or subject to "unstructured discretion" in applying it. *See State v. Jim* (N.M. App. 1988), 107 N.M. 779, 765 P.2d 195, 200. *See also Walker v. State* (Alaska App. 1987), 742 P.2d 790 (A victim's broken jaw preventing him from chewing food for six weeks constituted a "protracted impairment" of a body member or organ.); *People v. Gray* (N.Y. App. Div. 1975), 47 A.D.2d 674, 675, 363 N.Y.S.2d 968 (Victim sustained several stab wounds to arm and back which resulted in an inability to spontaneously open his left hand which endured for more than two months.).

State v. Trull, 2006 MT 119, ¶ 34, 332 Mont. 233, 136 P.3d 551.

Notably, the legal standard for the district court in this case was not beyond a reasonable doubt, but whether there was probable cause to suspect serious bodily injury at the time the injuries were sustained. Applying statutes with similar or identical definitions of what constitutes "serious bodily injury," other jurisdictions have held that injuries similar to Smith's constituted serious bodily injury beyond a reasonable doubt. In *Johnson v. State*, 252 So.3d 597, ¶ 16 (Miss. Ct. App. 2017), the Mississippi Court of Appeals stated, "[N]o reasonable juror could characterize [the victim's] injuries as less than serious bodily injury, since her injuries included broken bones and loss of consciousness." *See also People v. Duncan*, 2023 COA 122, ¶ 22, 2023 Colo. App. LEXIS 1930 (holding perforated eardrum resulting in temporary hearing loss sufficient to constitute serious bodily injury); *State v. Kirby*, 2016 UT App 193, ¶ 24, 382 P.3d 644 (deep bruising, laceration, strangulation marks, and a fractured orbital bone); *State v. Hale*, 2006 UT App 434, ¶ 6 (torn rotator cuff); *State v. Bloomfield,* 2003 UT App 3, ¶ 18, 63 P.3d 110 (temporary unconsciousness).

Smith does not attempt to explain how being knocked unconscious, suffering a dislocated shoulder, and breaking a foot would not reasonably be expected to result in a protracted loss or impairment of the function or process of a bodily member. Mont. Code Ann. § 45-2-101(66)(a)(iii). A broken foot alone could

reasonably be expected to result in a protracted impairment of the use of that foot and the leg to which it is attached.

However, when analyzing whether physical harm constitutes "serious bodily injury," this Court does not look at each injury individually but, rather, "considers the evidence of the injury . . . in conjunction with the evidence of . . . other injuries." *State v. Potter*, 2008 MT 381, ¶ 30, 347 Mont. 38, 197 P.3d 471 (citation omitted). In addition to Smith's broken foot, the record shows he sustained a broken hand, a dislocated shoulder, and a loss of consciousness and/or an unspecified head injury.

When Smith sustained these injuries, there was a reasonable expectation that they would result, at a minimum, in a protracted impairment of the function of at least one or two of Smith's bodily members. Therefore, the district court's finding that there was probable cause to believe Smith's accident resulted in serious bodily injury is not clearly erroneous.

III. The district court correctly determined that Smith's statement, "I don't want that," constituted a refusal of consent to a blood draw.

A person does not need to expressly refuse the request for a breath or blood sample; rather, a refusal may be implied from the driver's conduct. *Wessell v. DOJ, Motor Vehicle Div.*, 277 Mont. 234, 239, 921 P.2d 264, 266 (1996). To refuse, the driver must engage in "some action, whether verbal or nonverbal that withdraws"

the implied consent to take the tests. *City of Great Falls v. Allderdice*, 2017 MT 58, ¶¶ 15-16, 387 Mont. 47, 390 P.3d 954. Given the context and timing of Smith's statement to Trooper Woodland, "I don't want that," it was clearly meant to indicate that "[i]mplementing all his rights as a citizen of Montana, Mr. Smith refused to have his blood tested." (D.C. Doc. 3 at 2.)

As Smith points out, "Here, Mr. Smith begins by clearly agreeing to take a blood test." (Appellant's Br. at 13.) His mother subsequently arrived at the hospital and questioned both "the legality" of Trooper Woodland's reading the implied consent and Smith's "agreeing" to provide a sample. (Tr. at 11.) In other words, Smith's mother made it clear that she did not want him to consent to provide a blood sample. Despite originally touting the fact that he refused the test as that was his right as "a citizen of Montana" (D.C. Doc. 3 at 2), Smith later argued to the district court that it was his mother who "withdrew the consent" (Tr. at 16).

However, as Smith concedes, *after* speaking with his mother, Smith stated to Trooper Woodland, "I don't want that." (*Id.* at 11; Appellant's Br. at 13.) In this context, the word "that" could only refer to providing a blood sample pursuant to the implied consent advisory. There is no evidence in the record that anyone was confused about what Trooper Woodland had requested, what Smith had initially consented to provide, or what his mother had advised/convinced Smith not to provide.

Thus, there can be no doubt about what Smith was stating that he did not want or was refusing. The district court's finding that Smith's statement, "I don't want that," was a refusal to consent to providing a blood sample is supported by evidence in the record and was not clearly erroneous.

Smith's argument that he was incapable of refusing a blood test is raised for the first time on appeal and should not be considered by this Court.

"The rule is well established that this Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal. The critical reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Daniels*, 2017 MT 163, ¶ 33, 388 Mont. 89, 397 P.3d 460 (citing *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207 (internal citations omitted)).

At no point in his petition (D.C. Doc. 1), in his brief to the district court (D.C. Doc. 3), or during his oral arguments before the district court (Tr. at 15-16, 19-21), did Smith claim that he was "incapable of refusing a blood test" (Appellant's Br. at 12). As previously referenced, Smith stated in his brief to the district court that "Mr. Smith refused to have his blood tested." (D.C. Doc. 3 at 2.) In the same brief, Smith concluded, "Mr. Smith's license was taken and suspended

because he refused to take a blood test when the State did not have the particularized suspicion to ask him to do so." (*Id.* at 6.)

After Trooper Woodland's testimony, Smith's legal theory evolved, and his attorney argued:

> And then we understand—and then at the hospital, my—my client is—was read implied consent; he was fairly conscious; he consented to the implied—to the blood draw; and then his mother came in, and for whatever reason, you know, he's above 18 years of age, and she withdrew the consent, which [she] has no legal authority to do so.

(Tr. at 16.)

On appeal, Smith alleges for the first time that he was "incapable of refusing a blood test." (Appellant's Br. at 12.) As this issue was not previously raised, and the district court was not given the opportunity to consider it, this Court should determine that arguments pertaining to this theory have been waived.

CONCLUSION

Because Smith has not met his burden of establishing that the district court's findings were clearly erroneous, this Court should affirm the district court's

/ / /

order upholding the suspension of Smith's driver's license for refusing to consent to a blood test.

Respectfully submitted this 22nd day of May, 2024.

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By: */s/ Thad Tudor*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,975 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Thad Tudor
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CERTIFICATE OF SERVICE

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-22-2024:

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