COURT, EL PASO COUNTY, COLORADO El Paso County Judicial Building 270 S. Tejon Street, PO Box 2980 Colorado Springs, CO 80903 Telephone: 719.452.5000	DATE FILED: June 18, 2021 4:49 PM CASE NUMBER: 2020T11012
The People of the State of Colorado, Plaintiff(s), vs. **Jennifer Jafari-Watkins,** Defendant.	▲COURT USE ONLY▲
	Case #: 20T11012 Division: B

ORDER REGARDING DEEFENDANT'S MOTION TO MOTION TO SUPPRESS AND DISMISS DUE TO VIOLATION OF C.R.S. 42-4-1301.1

The Court, after consideration of the evidence and testimony presented, issues the following order.

FACTUAL AND PROCEDURAL HISTORY

Officers with the Colorado Springs Police Department ("CSPD") contacted the Defendant, Jennifer Jafari-Watkins, at the scene of a traffic accident on September 19, 2020.[1] After some investigation officers with the CSPD believed Ms. Jafari-Watkins drove under the influence and they invoked Colorado's express consent law. And at that point, the issue in this case arose.

This police citizen contact happened during the COVID-19 pandemic. A pandemic that changed American society. Courts across the state (and the nation) stopped allowing in person appearances. Movie theaters closed. Colorado's governor granted early parole to many prisoners, in part, to reduce prison overcrowding. Government discouraged travel and encouraged wearing masks, social distancing, and minimizing in person contact. The National Basketball Association held their playoffs in a "bubble." Business shifted to a "work from home" model. Doctors stopped elective surgeries for a time. And, most soberly, according to the Center for Disease Control ("CDC"), the United States had more than half a million "excess deaths" related to COVID-19.[2]

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[1] The parties permitted the Court to take judicial notice of the summons and complaint in this manner. The Court does so. Further, the Court reviewed a video recording submitted by the parties which shows the invocation of express consent.

[2] The CDC does a complicated statistical analysis to find the number of "excess deaths" associated with COVID-19. Their total, as of June 2, 2021, found 577,726 excess deaths in the United States associated with COVID-19. *See*

Against that backdrop, some law enforcement agencies decided to stop giving breath tests and only give drivers the choice of taking a blood test or refusing. This case is one of those because the Colorado Springs Police Department stopped offering drivers the choice of a breath test in March of 2020.

So on September 19, 2020, following the policy their superiors at the CSPD imposed originally in March of 2020, officers offered Ms. Jafari-Watkins the choice of taking a blood test. She refused. Officers issued her a notice of revocation, and this litigation followed.[3]

APPLICABLE LAW

The issue here is whether extraordinary circumstances justified the decision of the Colorado Springs Police to offer only a blood test in this case. C.R.S. § 42-4-1301.1 is Colorado's Express Consent Statute. The statute requires police, when they have probable cause to suspect a person of driving under the influence,[4] to present drivers with a choice of a blood or breath test. *See* C.R.S. §42-4-1301.1(2). The express consent statute serves several purposes. First, it provides the framework governing police and citizen encounters related to DUI investigations. *See Riley v. People*, 104 P.3d 218, 220 (Colo. 2004). Second, it preserves evidence for the police and the driver. *See People v. Gillett*, 629 P.2d 613, 618-19 (Colo. 1981) (denial of driver's choice of test merited dismissal of action because of due process).

The statute allows police to limit the choice of tests.[5] Per C.R.S. §42-4-1301.1(2)(a.5), when an officer determines there are extraordinary circumstances that prevent the completion of a test selected by a person within two hours, the officer must inform the person of the extraordinary circumstances and allow the person to take the test available. The statute loosely defines "extraordinary circumstances" as "circumstances beyond the control of, and not created by, the law enforcement officer." C.R.S. §42-4-1301.1(2)(a.5)(IV).

The statute cites examples of extraordinary circumstances by saying the term includes, without limitation, "weather-related delays, high call volume affecting medical personnel, power outages, malfunctioning breath test equipment, and other circumstances that preclude the timely collection of a blood or breath sample." C.R.S. §42-4-1301.1(2)(a.5)(IV)(B). But the statute provides counterexamples as well, for non-extraordinary circumstances like "inconvenience, a

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(*https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm*) accessed on June 2, 2021. The worldwide total is much higher.

[3] The Court took argument and evidence in this case along with several other cases at the same time. Those cases included *People v. Little*, 20T11012, *People v. Brink* 2020T12628 and 20T6313, and *People v. Keleher* 20M7903. The Keleher case resolved based upon a different issue. But because the Court heard evidence and argument from attorneys for all of those clients, and the attorneys indicated they adopted the arguments other counsel made, some portions of this order may respond to arguments made in those matters along with the arguments presented by counsel in this case.

[4] The Court, from this point forward, is using the shorthand term of ("DUI") to refer to both the charge of driving under the influence and the lesser included offense of driving while ability impaired.

[5] The express consent statute permits police to offer a blood test only when police reasonably suspect intoxication (in whole or in part) due to drug consumption. *See* C.R.S. §42-4-1301.1(2)(b)(I). If the prosecution provided facts showing drugs were involved, the Court would reach a different conclusion in this matter.

busy workload, minor delays" as well as "routine circumstances that are subject to the control of the law enforcement officer or law enforcement authority." C.R.S. §42-4-1301.1(2)(a.5)(IV)(C).

Case law supplies a gloss to this analysis as well. In *Long v. Colorado Dept. of Rev.*, 2012 COA 130, ¶21-27, the Court of Appeals found that a malfunctioning breathalyzer formed extraordinary circumstances under the statute. In *People v. Null*, 233 P.3d 670 (Colo. 2010) the Colorado Supreme Court found that the prosecution failed to present sufficient evidence regarding why medical personnel could not complete a blood test and thus the trial court's dismissal of a DUI charge was proper.

Some cases predate the statutory inclusion of "extraordinary circumstances" but still guide the analysis. In *Turbyne v. People*, 151 P.3d 563 (Colo. 2007) the court found police did establish extraordinary circumstances when the police department had an adequate protocol for completing blood tests, but weather and a high call volume prevented paramedics from responding to draw blood. And in *Riley*, 104 P.3d 218, the Colorado Supreme Court found no good cause when the prosecution supplied no explanation as to why paramedics could not respond to draw blood. In *Gillett*, 629 P.2d 613, the court found that a police agency's decision not to develop a mechanism to complete blood draws justified dismissal of DUI charges for violating the express consent statute.

EVIDENCE REVIEWED

In reaching this decision, the Court reviewed the following evidence:

1. Testimony of Robin Johnson, M.D. taken in front of the Honorable Samorreyan Burney on May 13, 2021.[6] The undersigned judge attended that hearing and the record here holds a transcript of that hearing. Further, the Court heard more testimony from Dr. Johnson on June 4, 2021. Dr. Johnson supplied credible testimony, in this Court's view, at least in her specific field.

Dr. Johnson's background is that of a practicing emergency medicine physician. After more than twenty years in that role she accepted a position as the medical director at the El Paso County Public Health Department. She started there in 2018. As an emergency room physician, she dealt with infectious diseases and received training through both medical school and her residency program about them.

She testified the El Paso County Public Health Department started monitoring COVID at some point in December 2019. She testified the first confirmed case of COVID in El Paso County occurred in March 6, 2020. She testified that COVID transmits through respiratory droplets. She also testified that COVID reached the number three reason for fatalities in 2020.

Dr. Johnson, though certainly not an expert in breath testing, provided her opinion of the risk associated with doing breath tests during the COVID pandemic. Her concerns centered around the lack of social distancing, the need to expel air from deep in the lungs, the inability of the test

[6] Most judges with a criminal docket in the El Paso County Courthouse have cases dealing with this issue. Through testimony it appears that the CSPD responds to about four thousand DUI cases per year, meaning that this will not be the only opinion on this issue.

subject to wear a mask given the observation period necessary, and the risks associated with close observation of a person for twenty minutes. She also testified that, because blood tests can be accomplished without the twenty-minute deprivation period and can be accomplished while all parties remained masked; that blood tests were, in her estimation, safer than breath tests.[7] The Court notes, however, that neither CSPD nor the Fourth Judicial District Attorney's Office sought her opinion (or any guidance from public health) prior to making the decision to suspend their breath testing program.

Dr. Johnson also testified that most first responders could not receive the COVID vaccine, realistically, until early or mid-March of 2021. The defense impeached some of Dr. Johnson's testimony, and the Court clearly finds she had knowledge of (though perhaps forgot) that she reviewed the Groff memorandum prior to testifying. Further, she offered some "off the cuff" opinions in electronic messages that contradicted some of her other testimony. That said, the Court finds her credible in her specific area. Further, her explanation of not remembering some of those details because of the tremendous pressure she was under related to COVID rings true with the Court.

2. Testimony of CSPD Deputy Chief Vasquez on May 20, 2021 (in the presence of the undersigned judge).

Deputy Chief Vasquez with the CSPD testified about CSPD's decision to stop breath testing. From his testimony the Court understands that a working group at CSPD started meeting at the end of December 2019. The group did not consult with the department of health or any medical professional about the dangers and risks/rewards of the breath testing program. Instead, the group watched and listened to available information from experts like Dr. Anthony Fauci as well as listening to other local experts like Dr. Leon Kelly. But they sought no guidance about breath testing from any specific expert.

Deputy Chief Vasquez also testified the working group spoke with two more senior deputy district attorneys in the Fourth Judicial District. Eventually the group, based upon their concerns related to the expulsion of breath and an analysis of what constituted extraordinary circumstances, decided to stop breath testing during the pandemic.

Deputy Chief Vasquez also testified he received a memorandum authored by Jeff Groff presenting some steps advised by the CDPHE to make breath testing safer. Further, he testified CSPD's policy of stopping breath tests, made in late March of 2020 (March 30th) did not change until late February 2021. He testified CSPD made the decision to protect their officers, suspects, and people in the buildings holding the breath testing machines.

[7] Other witnesses furthered the idea that the two main differences between blood and breath tests (generally speaking) are the twenty-minute observation period and the need for the subject to remove his or her mask during the test. Both blood and breath tests usually require officers to transport a suspect to another location (making them even at that point in terms of risk). But breath tests require the officer to watch the suspect for twenty minutes to make sure he or she does not belch or regurgitate. Doing so requires the suspect to remove his or her mask, or only to wear a clear face shield as the defense asserts. Further, and this seems an obvious point, the suspect must remove his or her mask to breath into the machine itself.

Cross examination proved that the decision to re-institute breath testing came not from any in-depth analysis, but instead came about after two county court judges dismissed DUI cases because of the failure to offer breath tests. At that point, the elected district attorney sent a memorandum to the CSPD. The CSPD restarted their breath test program almost at once after receiving it.

3. Testimony from Jeff Groff of the CDPHE on both May 20, 2021 and May 28, 2021 (in the presence of the undersigned judge) as well as a memorandum he prepared dated March 27, 2020.

Mr. Groff runs the statewide breath testing program administered by the CDPHE. He is a scientist and testified as an expert in the field of evidential breath alcohol testing as well as lab procedures. He testified he became aware of concerns with breath testing in early 2020. In response to those concerns he talked with people at the CDPHE including Peter Davis and Mr. Groff's immediate supervisor, Dr. Emily Travanty.[8] He said he memorialized some guidance in a memorandum dated March 27, 2020. In crafting that guidance, he relied upon guidelines from the Centers for Disease Control ("CDC") and conversations with Peter Davis and Dr. Travanty. Neither Davis nor Travanty are medical doctors or epidemiologists, but he testified that Dr. Travanty holds a Ph.D. in microbiology. He also reached out to C.M.I., the company that makes the breathalyzer, to see if they had any information.

He further testified that he was not aware of any recorded COVID transmission from the breath testing device itself. He said the purpose of the guidance in the memorandum was to reduce the risk of transmission. He does not recall CSPD reaching out to him to discuss the issue, and said he would have been available to consult, to do site inspections, or answer questions. He also testified that Colorado State Patrol ("CSP") and other agencies kept doing breath testing through the pandemic.

Much like officials at CSPD, Mr. Groff did not consult with an epidemiologist, infectious disease specialist, or medical doctor prior to publishing his guidance in the March 27, 2020, memorandum. He said he has no authority to tell agencies to keep doing breath testing or to stop it. He testified credibly about breath testing processes, how the machines work, and the efforts he took. The Court finds his opinions about safety of the process to be less persuasive.

4. Testimony from Officer Parisi with CSPD taken on May 28, 2021 (in the presence of the undersigned judge).

Officer Parisi testified about his experience as a member of the driving under the influence enforcement unit. He testified to his familiarity with both blood and breath testing generally. He played no part in the CSPD decision to curtail breath testing. He also provided some more specific testimony about the physical lay outs of some breath testing facilities and where medical personnel draw blood at Memorial Hospital in Colorado Springs. His testimony also supplied information related to blood testing procedures.

5. Testimony, from reviewing a transcript from Corporal Archer of the Colorado State Patrol, taken February 8, 2021 in front of the Honorable Samorreyan Burney.

[8] The Court is unsure of the spelling of Dr. Travanty's name.

The Court reviewed a transcript of testimony of Corporal Archer of the Colorado State Patrol ("CSP"). Corporal Archer testified that the CSP continued doing breath testing throughout the pandemic. The Corporal acknowledged being aware of the guidance from the CDPHE (the Groff memorandum of March 27, 2020).

6. Exhibits introduced at the foregoing hearings, including, by way of example only, pictures of plexiglass barriers, graphs of COVID-19 reported cases, electronic mail chains between members of the CSPD and the 4th Judicial District Attorney's Office, electronic messages between Dr. Johnson and district attorneys, and images of various types of clear plastic masks.

7. Exhibits attached to pleadings, including, without limitation, an order issued by the Honorable Thomas K. Kane in El Paso County Case 2020CV31667, an opinion issued by the Honorable David Miller in El Paso County Case 2021CV30508,[9] an opinion letter from Robin Johnson, M.D., an order issued by the Honorable C. Gonzales of the Denver County Court in case 2020M2729, an administrative decision issued in Department of Revenue case 005-120-728, and a transcribed interview of Alisa Koval, M.D.

DISCUSSION

The prosecution argues that a global pandemic is an extraordinary circumstance. It was outside the control of police, was not caused by police, and despite the length of stopping testing here, was not a routine circumstance "subject to the control of the law enforcement officer or law enforcement authority." *See* C.R.S. §42-4-1301.1(2)(a.5)(IV)(C).

The defense disagrees. They argue that other police agencies in Colorado continued to do breath tests, that the CSPD's decision to stop breath testing had no scientific support, that blood tests during the pandemic were as dangerous as breath, and that the CSPD could have taken certain steps to minimize or mitigate risks (which they did not take). Further, the defense asserts that even if the pandemic formed extraordinary circumstances, the CSPD's failure to consult with the proper experts (or any experts) made the initial decision by the CSPD improper.

Specifically, the defense argues, when a police agency decides to take away an important statutory right, the police agency must do more. As a fallback position the defense argues that even if the Court finds the initial decision proper, the CSPD's failure to develop some protocols to meet this challenging situation makes the continued failure to change the policy regarding breath tests improper.

If ordinary language matters, the prosecution wins, and the issue is not particularly close. To call a global pandemic resulting in the loss of half a million American lives anything other than an extraordinary circumstance minimizes its impact to the point of absurdity. And no

[9] The orders issued by District Court Judges Kane and Miller present a difficulty for the Court because the orders, though not directly contradictory, do seem to reach opposing conclusions. One order upholds a hearing officer finding the pandemic justified the CSPD's decision to not offer a breath test. The other issues a stay on a driver's license suspension finding there is a reasonable probability the driver will prevail while challenging a hearing officer's conclusion finding extraordinary circumstances. Ordinarily, this Court would defer to findings and rulings issued by the district court. That said, neither district court had the same access to hearings as this Court, and given the split of authority, the Court believes it must reach its own conclusion here.

matter what outcome the Court reaches here, this order neither minimize the dangers of COVID, nor minimizes the loss of American lives attributed to it. Nor does this order say that police supervisors cannot take their officers' safety into account while making important policy decisions.

1. Does the COVID-19 pandemic form extraordinary circumstances?

As a threshold matter, the Court must decide whether the global pandemic is an extraordinary circumstance in terms of the definitions in the statute. The defense asserts it is not; not because the pandemic was not and is not serious, but because the express consent statute ties the definition of extraordinary circumstances to completing tests within two hours. Phrased another way, only those circumstances which prevent testing within two hours of driving, in the defense view, are circumstances justifying the denial of a choice of test. The only thing preventing testing here, the argument goes, was a policy decision; not anything stopping the test from occurring within two hours like weather or a broken machine.

The argument is not without merit. First, a narrow reading of the statutory language supports it. The statute permits an officer to allow only one test when the officer "determines there are extraordinary circumstances that prevent the completion of the test within the two-hour time period . . ." *See* C.R.S. 42-4-1301.1(2)(a.5)(I). The first part of the definition must tie to the second, according to the defense. Further, much of the justification for express consent laws (which allow what is a warrantless search) rests on the fact that alcohol dissipates over time. *See Michell v. Wisconsin*, 139 S.Ct. 2525, 2532-24 (2019).[10]

With that being said, the Court finds the pandemic, specifically in its early days, is an extraordinary circumstance. The pandemic was "circumstances beyond the control of, and not created by, the law enforcement officer." C.R.S. §42-4-1301.1(2)(a.5)(IV). While the examples in the statute and case law tie the testing to the two-hour window, the Court does not find the statute so limited. The construction urged by the defense narrows the definition too much, at least in this Court's view. After all, the pandemic stopped breath tests from being safe not only within two hours of driving, but also outside the two-hour period at the time.

The statute has an exception that allows officers to offer only one test if the suspect is receiving medical treatment. *See* C.R.S. §42-4-1301.1(2)(a)(II) *and Brodak v. Visconti*, 165 P.3d 896 (Colo. App. 2007). And though the statute is silent on whether danger to the suspect and the officer is something to consider, the Court reads the statutory scheme to have an implied condition for both the officer and the suspect that the test be able to be accomplished safely.

One of the true difficulties in this matter is avoiding the distorting effect of hindsight. Had police known then what we know now about the pandemic, would they have reached this decision? Perhaps so, perhaps not. But Dr. Johnson's testimony, as well as the other information presented, proves that COVID-19 is a respiratory virus. Breathing, sharing air in

[10] Defense asserts that officers always can get a warrant to obtain a blood sample. And at least a part of this argument reflects the notion that because the government could obtain a warrant to get a blood sample, the decision here is even more egregious. But that proposition may not be completely correct. *See People v. Raider*, 2021 COA 1 (holding that the express consent statute precludes blood draws, even with a warrant, to those circumstances listed in the statute). *Raider* is not a final opinion yet, but it at least calls into question defense's assertion.

close proximity, spreads it. COVID-19 presents a clear danger to people, including police and suspects. While experts may not have known death rates from infection, transmission rates, and the like in March of 2020, the information disseminated publicly made it clear that respiratory contact, sharing air, presented a significant danger of transmission.

A test that requires someone to exhale deeply, that requires police to monitor that person for at least twenty minutes while being able to see the person's face, and that requires police to be able to detect when someone belches presented a significant risk to the health of the participants at the time.[11] The evidence establishes the CSPD knew of those risks at the time they decided to prohibit breath testing. If weather-related delays present an extraordinary circumstance justifying officers to allow only one test, the risk of death from COVID-19 infection did too.

2. Was the CSPD's decision to suspend breath testing proper?

But even with that finding, the Court must consider the propriety of the CSPD's initial decision to suspend breath testing. As the defense notes, the CSPD's decision took away a statutory right to choose a breath or a blood test. Authorities cannot and should not make such decisions lightly.

The evidence in this matter is that the CSPD did not consult with any medical doctors before they reached the decision to prohibit breath testing. The evidence is clear that the CSPD accessed generally available information (things like statements made by Anthony Fauci, M.D. and statements made by other medical doctors generally). They also reviewed information from the Centers for Disease Control, the Colorado Department of Public Health and Environment, and, like virtually everyone at the time, watched news reports. But they read the memorandum from Mr. Groff at the CDPHE and did not follow it.[12]

Was that enough? The question is not simple. First, unlike some other situations, the evidence is clear as to what the guidance from the local department of health would have been. Had the CSPD asked for guidance, the record is clear that Dr. Johnson would have recommended curtailing or eliminating breath testing. In fact, Dr. Johnson still does not believe doing breath tests is worth the risks of transmission.

The Court notes that in March 2020, when the CSPD made their decision, there was a paucity of information about just how deadly the virus would be. At that point, no one knew with any high degree of certainty whether COVID-19 would kill more or less people than the Great Influenza

[11] The defense asserts police can mitigate the risks of close observation through compelling the suspect to wear a clear face shield and by allowing some increased distance by the officer. But it bears mention police on DUI stops deal with (potentially) intoxicated person. And intoxicated people, at the best of times, are not terribly well known for following orders. Further, clear face shields provide no particulate filtration. Contrast some of those issues with blood testing—where all participants can wear barrier masks, where there is no twenty-minute observation period, where technicians can draw blood in seconds, and where there is no need to worry if someone is belching.

[12] The defense argues that the guidance in the Groff memorandum provided binding guidance from the CDPHE on this issue. But that is not necessarily the case, because as Mr. Groff testified, the guidance neither orders nor compels agencies to continue breath testing. Further, at least in this Court's estimation, at the time the CSPD made the decision the guidance in the memorandum (obtained without talking to any medical doctors, infectious disease specialists, or epidemiologists) was at least as suspect as the information the CSPD relied upon.

outbreak in 1918.[13] Other agencies continued to do breath testing, some did not. The Court must evaluate those decisions at the time made rather than through the brilliant clarity of hindsight. Had the virus killed a higher percentage of the people it infected, we might laud the CSPD decision. Had the pandemic been more deadly, those agencies continuing to do breath testing would have some explaining to do.

Pandemics present unique circumstances. In this one, days before the CSPD decision, Colorado's governor issued a stay at home order. *See Executive Order D 2020-017* issued *March 25, 2020 by Governor Polis*.[14] And there is long precedent for the legal system adopting different approaches to protect lives. For instance, in *Commonwealth v. Jailer of Allegheny County*, 7 Watts 366 (Pa. 1838) a trial court properly delayed a trial while a defendant recovered from smallpox and his "aspect was so loathsome as to spread a general panic, and on the testimony of the physician of the prison that he might still communicate infection." Similarly, in *State v. Caruthers*, 98 P. 474 (Okl. Crim. 1908) an appellate court found it proper for a trial court to have delayed a trial due, in part, to a smallpox epidemic despite the constitutional right to speedy trial.

The CSPD took a cautious approach when they decided to stop breath testing. If this were an administrative law question, the law provides some deference to an agency making such a decision.[15] But even outside that framework, the CSPD's decision fell within the continuum of what is reasonable under the circumstances.[16]

Here, the CSPD considered the evidence available at that point, considered what the scientific community generally knew about the transmission of COVID-19, considered what breath testing required, considered the requirements of the Express Consent Law and the definition of extraordinary circumstances, and decided to stop breath tests to protect their officers and the public. Given the record in this matter, the Court finds their initial decision proper by clear and convincing evidence. The pandemic constituted extraordinary circumstances and the risk of COVID transmission, the unknown nature of the deadliness of infection, and the unknown nature of whether masking and other precautions provided sufficient protection made their decision proper at the time they made it.

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[13] Experts believe that pandemic, from over one hundred years ago now, to have killed roughly 675,000 Americans. *See generally*, John M. Barry, THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY, 238-235 (2005). The worldwide population is much higher now and the COVID-19 pandemic is not yet over, but if the CDC analyzes the numbers correctly, the total number of dead Americans does not trail the total by much. *See supra* note 2.

[14] The Court takes judicial notice of the executive and CDPHE orders issued in the last year related to the pandemic. The CDPHE keeps an online list of those orders at (https://covid19.colorado.gov/public-health-executive-orders).

[15] Under Colorado's Administrative Procedure Act, C.R.S. 24-4-1-1.5 *et seq.*, the decision would receive much deference. If that statute governed here, the Court would have to find the agencies decision to be "arbitrary or capricious, in excess of statutory jurisdiction, authority, purposes, or limitations; an abuse of discretion; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law." *See Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 ¶17-18. Under that standard, this Court would find the CSPD's initial decision to be proper.

[16] The Court would have preferred the CSPD take a more individualized approach. The policy could have had officers ask questions about exposure, take temperatures, and take similar precautions. But simply because the CSPD could have done something different does not make their decision wrong.

Finally, the Court finds that there is a generalized good cause exception regarding the testing question. In footnote 9 of the *Gillett* opinion, the Colorado Supreme Court noted that "good cause generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *Gillett*, 629 P.2d 613 *citing Tucker v. People*, 319 P.2d 983, 986 (1957). And while later cases found "extraordinary circumstances" to be good cause, a good cause finding is not limited to those circumstances only. Here, the Court finds that the risks of death caused by the pandemic (specifically early in the pandemic) constituted good cause for the CSPD to have curtailed breath testing.

3. Was the CSPD's continued policy of suspending breath testing proper on the date of the police/citizen encounter?

While the Court finds the initial decision proper, there is still a question about whether that decision remained proper after the passage of time. As time went on, scientists, the CDPHE, the CDC, and other authorities gained more knowledge. As time went on, the science showed the effectiveness of personal protection equipment (masking), social distancing, and other precautions to help minimize risk.

The prosecution's position here is that until the majority of CSPD officers received a vaccine, the same conditions existed that made the CSPD's initial decision to stop breath testing continued to exist. The Court does not agree. The decision to suspend a statutory right by the CSPD imposed a continued duty to reconsider that decision. Further, the science and generally accepted practices evolved. And while at the outset of the pandemic there were no real experts who could definitively know things like the death rate from infection, the transmission rate, and other important metrics; those became known. Children went back to school. Courthouses re-opened. Dentists started drilling teeth. People adapted, but the CSPD did not.

The Court is aware of Dr. Johnson's opinion here—that the vaccine provided the cut-off on when breath testing became safe. But the Court finds that untenable and unsupported. If dentists could perform procedures, if jury trials could occur, and if children could attend in person classes, then the CSPD could find a way to ameliorate risks of breath testing. Further, the CSPD never consulted any public health doctors, epidemiologists, or subject matter experts. At some point, ameliorating the risks of COVID-19 infections became, in the language of the express consent statute, an issue subject to the control of the CSPD. And at some point, the extraordinary became routine. *See* C.R.S. §42-4-1301.1(2)(a.5)(IV)(C).

Where is that line and what is that date? The Court does not know with certainty. Neither the defense nor the prosecution provided reasonable solutions on this issue. So, the Court notes a few different issues. First, CSPD suspended breath tests as of March 30, 2020. Four days earlier, Governor Polis had ordered Coloradoans to stay at home. *See Executive Order D 2020-017 issued March 25, 2020 by Governor Polis.*

The stay-at home order remained in effect for a time. That being said, on May 25, 2020, the Governor issued an order allowing restaurants to reopen under limited capacities. *See Executive Order D 2020 079 dated May 25, 2020 by Governor Polis.* And one week prior to that, the

CDPHE issued *Public Health Order 20-26*, which required government employees to wear masks and take other precautions while performing critical work.[17]

That date, May 18, 2020, and that order carry weight with this Court. On that date, the CSPD had over forty-five days to determine how to ameliorate risk. And while infection rates climbed during that period, so too did knowledge of how to minimize risk. Doctors and scientists started to understand the virus, what events caused the most risk, what protections helped the most, and how to deal with the virus. Forty-five days gave the CSPD, in this Court's view and on this record, sufficient time for this issue to have become something in the control of CSPD. That period gave the CSPD time to order and implement protective gear. Their failure to make attempts to minimize risks, to consult with experts at that point, and to take any steps to reinstitute testing makes the continued denial of testing something within the CSPD's control.

The issue here occurred on September 19, 2020. On that date, the CSPD had almost six months to have found methods to reduce risk and provide people their statutory right to choose a test. They needed to develop a protocol to effectuate the statute just like the agency needed to in *Gillette*, 629 P.2d 613. They did not. And based upon that failure, this Court finds a violation of the express consent statute in this case.

4. In addition to the Court finding a violation of the Express Consent statute, did the CSPD also violate the Defendant's equal protection rights?

A second argument the defense makes is that the CSPD violated the Defendant's rights to equal protection under the laws. The argument asserts that because a defendant stopped by the CSP could receive a breath test option, and that because a person stopped by CSPD could not, there is an equal protection violation.

The Court disagrees. First, when a defendant makes an equal protection challenge, the level of judicial scrutiny "varies with the type of classification utilized and the nature of the right affected." *People v. Diaz*, 347 P.3d 621, 626-27 (Colo. 2015) (finding sentencing scheme subject to a rational basis analysis). And a rational basis standard applies when "no traditionally suspect class is present, no fundamental right is at issue, and no other classification warrants review under strict or intermediate scrutiny." *Id. citing Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506-07 (Colo. 1997).

A recent opinion by the Colorado Supreme Court addresses a similar issue. In *People v. Hernandez*, 2021 CO 45,[18] the Colorado Supreme Court considered an equal protection challenge that bears some similarity to the issue here. The issue concerned a single district court judge's policy of allowing witnesses to testify via videoconferencing in an immunity hearing under Colorado's "make my day" law. *Id.* at ¶1. First, the Colorado Supreme Court considered whether the challenged police affected or created a suspect class. *Id.* at ¶38-41. Finding none, the Court then considered the right at issue and applied a rational basis analysis. *Id.* at ¶40-43.

[17] Prior orders, including Public Health Order 20-28D, designated police and law enforcement as critical during the pandemic. The CDPHE amended that order multiple times throughout the pandemic.
[18] The opinion is not yet final and is subject to revision or withdrawal.

So what is the class here? The class at issue includes people contacted for DUI in Colorado Springs. The class is not a traditionally suspect class, such as race or gender. Further, the Court notes that the CSPD was not the only agency to have made a decision to stop breath testing for a time, because based on the opinions submitted as exhibits, the Denver Police Department made the same decision. This kind of class—one that is not based on race, gender, or other suspect qualifications—is not the type of class supporting any other analysis except a rational basis review.

The right at issue here is the statutory right to take a breath test as opposed to a blood test. While the Supreme Court has held that a breath test is a lesser intrusion than a blood test; both are searches governed by the Fourth Amendment. *See generally Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). Breath tests create a lesser intrusion, but create an intrusion nonetheless. Here, the right violated is a statutory right to choose a test. Such a right is not a fundamental right. Fundamental rights are interests such as the right to marry another person. *See Obergefell v. Hodges*, 576 U.S. 644, 670-72 (2015). Fundamental rights concern fundamental liberty interests, those rooted in history and tradition. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (finding no fundamental right to physician assisted suicide). The Court does not find the right to choose a chemical test a fundamental right.

So, did the CSPD have a rational basis for stopping breath tests for a time? The answer to that question is yes. The CSPD's decision rested on a rational foundation at the time they made it. One intended to minimize the risk of transmitting COVID-19 to officers, suspects, and others based on the then available knowledge they had. The Court thus denies the equal protection claim.

5. What is the remedy?

Having found a violation of the express consent statute, the Court must determine a suitable remedy. As noted, Colorado's express consent statute, C.R.S. 42-4-1301.1 *et seq.*, creates "mutual rights and responsibilities" for both the police and Colorado drivers. *Null*, 233 P.3d 670. A driver may refuse a test, but that refusal carries both driver's license and evidentiary consequences to the driver. *People v. Fitzgerald*, 2017 CO 26 (Colo. 2017) (using defendant's refusal as evidence of guilt permissible). And where police conduct violates a statute, courts sanction police to deter such conduct in the future.

Courts have found on several occasions that violating the driver's statutory right to a test of their choice merits dismissal or suppression. *See e.g. Lahey v. Department of Rev.*, 881 P.2d 458 (Colo. App. 1994); *Null*, 233 P.3d 670; *and Gillett*, 629 P.2d 613. As the Supreme Court has noted, testing can show sobriety as well as intoxication. *Gillett* at 618-619. Thus, there is a due process issue present in some denial of testing cases.

People v. Shinaut, helps define the parameters of this decision. 940 P.2d 380 (Colo. 1997). There, the Colorado Supreme Court reaffirmed that allowing a driver to change their choice of test is improper, but found the officer allowing the change of test in that case did not justify suppression. The Court reasoned that though the officer violated an important statutory right by allowing the driver to change their test choice, there was no constitutional violation. The Court distinguished *Shinaut* from *Gillette* because in *Shinaut*, the defendant took a test (thus keeping

the due process right to show sobriety through the test). In *Gillette*, the police agency took away the driver's ability to show non-intoxication by deeming the driver's decision to take a blood test, when the agency made no provisions for it to happen, a refusal. Thus, the driver in the *Gillette* lost the right to show sobriety through a chemical test, while the driver in *Shinaut* kept that right. Suppression and dismissal thus were correct in one case, but not the other.

Here, Ms. Jafari-Watkins refused any testing. That, combined with the police agency's decision, kept her from preserving potentially exculpatory evidence. Those situations create a due process issue, because a defendant has the right to potentially exculpatory evidence.[19]

Based upon the Court's reading of the case law associated with this matter, the Court dismisses the driving under the influence count against Ms. Jafari-Watkins as a sanction for the violation of the express consent statute.

SO ORDERED, JUNE 18, 2021

/s/ Samuel A. Evig, County Court Judge

[19] *See Gillett*, 629 at 618-19. The Court is mindful that this reading of the statute incentivizes refusing tests. Consider two defendants—one who refuses the blood test and one who, though he wanted a breath test, decided to take the blood test though he was wrongfully denied the option of taking a breath test. The first defendant lost potentially (though improbably) exculpatory evidence while the second kept it. Appellate courts found dismissal proper for the refusal case. *See Null* 233 P.2d at 681-82 *and Gillett*, 629 P.2d at 618-19. While in the second case, where the police improperly limited the choice of test, but defendant kept the ability to present exculpatory evidence, appellate courts permit suppression. *See Turbyne v. People*, 151 P.3d 63, 569-73 (2007).