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IN THE
COURT OF APPEALS OF INDIANA

Tina M. Isley,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No. 21A-CR-2837

Appeal from the Johnson Circuit Court

The Honorable Andrew S. Roesener, Judge

Trial Court Cause No. 41C01-2002-F4-4

Opinion by Judge Weissmann
Judge Brown concurs.
Judge May concurs in result with a separate opinion.

[1] In this interlocutory appeal, Tina Isley challenges the admissibility of her blood draw results and medical records as evidence of her intoxication during a fatal car crash. Isley argues that this evidence was obtained in violation of her rights under the Fourth Amendment to the United States Constitution, Article 1, Section 11 of the Indiana Constitution, and Indiana's implied consent laws. Finding no such violations, we affirm.

Facts[1]

[2] After an evening spent drinking with friends, Isley was involved in a two-car, head-on collision that killed the other driver. Police questioned Isley at the scene, and Isley admitted to drinking alcohol that night before she was transported to the hospital. Johnson County Sheriff's Deputy Shawn Hodson followed the ambulance to gather more evidence of Isley's impairment. While en route, Deputy Hodson learned that an open container of alcohol was found in Isley's vehicle. The medics transporting Isley smelled alcohol emanating from Isley and she confessed to them that she had been drinking.

[3] At the hospital, Isley was lucid and able to provide her address and basic details of the crash to Deputy Hodson. During this conversation, taking place in a hospital hallway, Isley was strapped to a gurney in a neck brace. While talking

[1] We held a travelling oral argument in this case on October 18, 2022, at Ivy Tech Community College in Sellersburg, Indiana. We thank Ivy Tech for hosting and counsel for their participation and we commend them for their quality advocacy.

with Isley, Deputy Hodson noticed she smelled of alcohol and was slurring her speech. Isley guessed that she had around five beers that night and drank the last one around 30 minutes before the crash. Eventually, hospital staff took Isley into an examination room to assess her injuries, which ended up just being a broken ankle. After this initial examination, hospital staff gave Deputy Hodson permission to speak with Isley again.

[4] During their second conversation, Deputy Hodson asked Isley to sign a consent form to release her medical records to the State. He stated: "We need your consent to get medical records . . . your medical records for these guys." App. Vol. II, p. 101. Deputy Hodson did not elaborate that "these guys" referred to the local prosecutor's office.

[5] Right after Deputy Hodson spoke and before Isley signed the form, the nurse assigned to perform the blood draw incorrectly explained that the consent form granted permission "to draw [Isley's] blood." *Id.* Isley signed the form, after which the nurse asked for Isley's permission to perform the blood draw. Isley orally consented. Then, despite the consent form already being signed, Deputy Hodson read Isley the form and asked for her oral agreement. Isley provided her verbal consent. The blood draw showed Isley had a blood alcohol content of .144%.

The State charged Isley with causing death when operating a vehicle with an Alcohol Concentration Equivalent (ACE) of .08 or more, a Level 4 felony, alongside four counts of operating a vehicle while intoxicated, as a Class A, a

Class B, and two Class C misdemeanors. Before trial, Isley moved to suppress her blood draw results and medical records. The trial court denied the motion, after which Isely filed this interlocutory appeal.

Discussion and Decision

[6] Isley argues that her blood draw results and medical records were obtained in violation of her rights under the Fourth Amendment to the United States Constitution, Article 1, Section 11 of the Indiana Constitution, and Indiana's implied consent laws.

[7] As laid out by our Supreme Court, we review the denial of a motion to suppress "similar to other sufficiency matters." *Taylor v. State*, 689 N.E.2d 699, 702 (Ind. 1997). This means, "[t]he record must disclose substantial evidence of probative value that supports the trial court's decision." *Id.* The evidence is not reweighed on appeal and conflicting evidence is viewed in the light most favorable to upholding the trial court's ruling. *Id.* We review the constitutionality of a search and seizure de novo. *Wilson v. State*, 173 N.E.3d 1063, 1066 (Ind. Ct. App. 2021).

I. Fourth Amendment

[8] The taking of a blood sample and a suspect's medical records is a search under

[9] the Fourth Amendment.[2] *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). The Fourth Amendment is satisfied when police obtain a warrant, but a warrant is not required when there is consent to search. *Garcia-Torres v. State*, 949 N.E.2d 1229, 1237 (Ind. 2011). Consent to a search is valid when given voluntarily and knowingly, which "is a question of fact determined from the totality of the circumstances." *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1972)). Consent to search is not valid when it follows fraud, duress, fear, intimidation, or a submission to the supremacy of the law. *Wahl v. State*, 148 N.E.3d 1071, 1082 (Ind. Ct. App. 2020).

[10] Isley contends she did not validly consent for two reasons. First, her presence in the hospital, awaiting treatment for her injuries, rendered her too vulnerable to make rational decisions. Second, Deputy Hodson and the phlebotomist made unclear and conflicting statements confusing her on what she was consenting to. We disagree with Isley's characterization of the facts.

[11] Although Isley lay strapped to a hospital bed in a neck brace, she only suffered a broken ankle. Nothing in the record shows that this injury would have

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[2] The Fourth Amendment provides:

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

U.S. Const. amend. IV.

impacted her executive reasoning. Indeed, when prompted by Deputy Hodson, Isley immediately recited her address, provided personal details, and remembered the events of the crash. App. Vol. II, pp. 99-100. The Record demonstrates Isley possessed a lucidity that defies her argument that she was unable to validly consent.

[12] Isley also seizes upon the potential confusion created by Deputy Hodson and the nurse performing the blood draw. Deputy Hodson's initial statement was admittedly vague. He informed Isley only that "these guys" required her consent for the blood draw—without specifying that this referred to the local prosecutor's office. *Id.* at 101. And right after this statement, the nurse incorrectly told Isley that the consent form merely authorized the blood draw itself—rather than allowing the State access to the blood draw's results and her medical history. Isley contends this confusion prevented her from knowingly consenting.

[13] Evidence from the record undercuts Isley's argument. The record shows Isley consenting multiple times both in writing and orally. *Id.* at 101-02. First, Isley gave her consent by signing the consent form. And even assuming that there was ambiguity at this time over what Isley was consenting to, Deputy Hodson cured this by rereading the implied consent form and again asking Isley orally to consent to the blood draw—which she did. *Id.* at 102. At no point during Isley's conversations with Deputy Hodson did she show any sign of disagreement or unwillingness to provide her consent. Deputy Hodson used no threats, coercion, or overt pressure during any of their interactions. *See, e.g.,*

Wahl, 148 N.E.3d at 1082 (upholding consent to a search where suspects cooperated with police and the record reflected no impermissible coercion); *Garcia-Torres*, 949 N.E.2d at 1237 (same). Thus, the totality of the circumstances shows that Isley voluntarily provided her consent.

[14] To the extent Isley disputes the underlying facts, she asks us to reweigh the trial court's findings. We do not reweigh the evidence when reviewing a motion to suppress and consider conflicting evidence in the light most favorable to the trial court's ruling. *Taylor v. State*, 689 N.E.2d 699, 702 (Ind. 1997).

II. Article 1, Section 11

[15] Although Article 1, Section 11 shares the same language as the Fourth Amendment, Indiana courts have interpreted and applied it independently.[3]

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[3] It is currently unclear whether, like the Fourth Amendment, consent to a search serves as a blanket exception to Article 1, Section 11's warrant requirement. One line of cases issued by the Indiana Supreme Court states that a "search based on lawful consent is *consistent* with" the Indiana Constitution, *State v. Cunningham*, 26 N.E.3d 21, 25 (Ind. 2015) (quoting *Campos v. State*, 885 N.E.2d 590, 600 (Ind. 2008) (emphasis added)). Another line of cases describes consent as being only "relevant to determining the degree of intrusion" factor under Article 1, Section 11's *Litchfield* analysis. *Hardin v. State*, 148 N.E.3d 932, 945-46 (Ind. 2020) (citing *Duran v. State*, 930 N.E.2d 10, 18 n.4 (Ind. 2010)). Seemingly stuck in the middle is *McIlquham v. State,* which describes the consent analysis under the Fourth Amendment as one of "a few specifically established and well-delineated exceptions" to its warrant requirement, and contrasts this with Article 1, Section 11 which "requires a different analysis" based upon *Litchfield*. 10 N.E.3d 506, 511 (Ind. 2014). Yet, *McIlquham* decides the consent issue using the same analysis for both constitutions. *See id.* at 511-14. More recently, the Supreme Court stated "[a] suspect may, of course, waive the warrant requirement [to Article 1, Section 11] by consenting to the search," but this case dealt only with whether the defendant was entitled to a *Pirtle* warning, not an analysis of whether consent to a search replaces the *Litchfield* factors. *McCoy v. State*, 193 N.E.3d 387, 388 (Ind. 2022).

The Court of Appeals has also issued conflicting opinions on this issue, finding in some that "consent is an exception to the warrant requirement" under the Indiana Constitution while in others applying the *Litchfield* factors. *See, e.g., Casillas v. State*, 190 N.E.3d 1005, 1013 n.3 (Ind. Ct. App. 2022) (holding consent is an exception to Article 1, Section 11), *trans. denied*; *L.W. v. State*, 199 N.E.3d 1225, 1230 (Ind. Ct. App. 2022) (finding consent "consistent" with Article 1, Section 11); *Wahl v. State*, 148 N.E.3d 1071, 1082-83 (Ind. Ct.

State v. Bulington, 802 N.E.2d 435, 438 (Ind. 2004). The main difference between the two constitutional inquiries is that the Fourth Amendment approach "focus[es] on the defendant's reasonable expectation of privacy" while the Article 1, Section 11 approach "employ[s] a totality-of-the-circumstances test to evaluate the reasonableness of the officer's actions." *Duran v. State*, 930 N.E.2d 10, 17 (Ind. 2010) (internal quotations omitted).

[16] Generally, a warrantless search violates the Indiana Constitution unless the search is reasonable under the totality of the circumstances. Courts consider three non-exhaustive factors when determining the reasonableness of the officer's actions under the Indiana Constitution: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005). The factors are intended to "provide guidance and structure our analysis of Article 1, Section 11 while staying true to considering the totality of the circumstances." *Hardin v. State*, 148 N.E.3d 932, 943 (Ind. 2020).

App. 2020) (analyzing the *Litchfield* factors); *Canfield v. State*, 128 N.E.3d 563, 571-72 (Ind. Ct. App. 2019) (analyzing the *Litchfield* factors), *trans. denied*; *Gutenstein v. State*, 59 N.E.3d 984, 1004 (Ind. Ct. App. 2016) (analyzing the *Litchfield* factors), *trans. denied.*

In this case, both parties analyze this issue using the *Litchfield* factors. We follow the parties' lead along with our understanding of the Indiana Supreme Court's guidance from *Hardin v. State*, 148 N.E.3d 932, 945-46 (Ind. 2020). Thus, we opt to apply the *Litchfield* factors.

Degree of Police Concern, Suspicion, or Knowledge

[17] The degree of police concern, suspicion, or knowledge was high. "In evaluating the officers' degree of suspicion, we consider all "the information available to them at the time" of the search or seizure. *Id.*

[18] Deputy Hodson knew Isley had been drinking that evening. Isley admitted this both to Deputy Hodson and to medical workers who independently conveyed this information to him. Her physical appearance and mannerisms also suggested intoxication, with both nurses and other officers reporting her slurred speech and that she smelled of alcohol.

[19] Isley's arguments suggesting a low degree of police concern, suspicion, or knowledge are unpersuasive. She argues that police only knew at the time of the search that she had consumed "some" alcohol prior to crashing her car and alcohol consumption before driving is not necessarily a crime. But similar facts involving drunk driving have given police a high degree of concern, suspicion, or knowledge. *See, e.g.*, *Gutenstein v. State*, 59 N.E.3d 984, 1004 (Ind. Ct. App. 2016); *Frensemeier v. State*, 849 N.E.2d 157, 164 (Ind. Ct. App. 2006).

Degree of Intrusion

[20] The degree of intrusion was low. This factor considers "the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities." *Litchfield*, 824 N.E.2d at 361. We consider this factor from the defendant's point of view. *Hardin*, 148 N.E.3d at 944. "[A] defendant's consent to the search or seizure is relevant to determining the degree of intrusion." *Id.*

[21] Although Indiana courts have consistently recognized the intrusive effects of a blood draw, *Temperly v. State*, 933 N.E.2d 558, 564 (Ind. Ct. App. 2010) ("a blood draw is a significant intrusion into one's body"), the invasiveness of this physical intrusion into the suspect's person can be mitigated. First, any intrusiveness may be balanced out when the defendant was already at the hospital for his injuries and the blood test was just one of many examinations being performed. *Id.* And second, blood draws have been found reasonable following the defendant's consent. *Gutenstein*, 59 N.E.3d at 1005; *see also Frensemeier*, 849 N.E.2d at 163-64.

[22] The intrusiveness of the blood draw, and the search overall, was mitigated by the surrounding circumstances. When the phlebotomist performed the blood draw, Isley was already at the hospital receiving other treatment for her injuries from the crash. And as seen through our prior analysis under the Fourth Amendment, Isley validly consented to the search. Thus, from Isley's point of view, the search here represented a low degree of intrusion.

Extent of Law-Enforcement Needs

[23] The extent of law enforcement needs was high. Our courts have often recognized that "few Hoosiers would dispute the heartbreaking effects of drunk driving in our state and that law enforcement has a strong interest in preventing crashes involving alcohol-impaired drivers." *Gutenstein*, 59 N.E.3d at 1005 (citing *Frensemeier*, 849 N.E.2d at 164).

[24] But Isley argues Deputy Hodson had a "reasonable alternative" to performing the blood draw. She contends Deputy Hodson could have tried to obtain a warrant or certified to hospital staff the need for a blood draw under Indiana Code Section 9-30-6-6(1). Though Deputy Hodson did neither, he instead obtained Isley's consent. And while Isley may, and did, contest the validity of this consent, her argument that Deputy Hodson could have pursued other means to make the search constitutional under Article 1, Section 11 is unavailing. *See Washburn v. State*, 121 N.E.3d 657, 662 (Ind. Ct. App. 2019) (noting that despite the trial court's statement that "a warrant would have been the preferred method" of carrying out the search," this fact "do[es] not impact our analysis").

[25] Under the totality of the circumstances, the blood draw and release of Isley's medical records was reasonable. Thus, no violation occurred of Article 1, Section 11 of the Indiana Constitution.

III. Implied Consent Laws

[26] Isley also argues the blood draw results should be suppressed because her consent was improperly obtained under Indiana's implied consent laws. Indiana drivers impliedly consent to blood draws following an accident involving serious injury or death. Ind. Code § 9-30-7-2. The driver may refuse to consent to the blood draw subject to various civil penalties. *See* Ind. Code § 9-30-7-5. The purpose behind these laws is to "provide the State with a mechanism necessary to obtain evidence of a driver's intoxication in order to

keep Indiana highways safe by removing the threat posed by the presence of drunk drivers." *Abney v. State*, 821 N.E.2d 375, 379 (Ind. 2005).

[27] Isley's argument boils down to the fact that Deputy Hodson failed to inform her of the penalties for noncompliance before she consented. According to Isley, this omission implicitly imparted that she must comply with the blood draw. Of course, "[n]othing in [Indiana's implied consent laws] authorizes an officer to forcibly take a blood sample if actual consent to a chemical test is not obtained." *Hannoy v. State*, 789 N.E.2d 977, 983 (Ind. Ct. App. 2003).

[28] Isley's argument faces two insurmountable obstacles. First, the relevant chapter of Indiana's implied consent laws, Ind. Code § 9-30-7-1 (Chapter 7), contains no requirement that the officer must inform the driver of the civil penalties of noncompliance; and second, this court has already rejected Isley's argument in a similar context.

[29] Indiana's implied consent laws appear in two chapters of the code: Chapter 6 which applies in most cases and Chapter 7 which is triggered by accidents involving serious injury or death. *Compare* Ind. Code § 9-30-6-1 *with* Ind. Code § 9-30-7-1; *see generally Abney*, 811 N.E.2d at 421-22 (examining the differences between Chapters 6 & 7). Given that Isely's accident resulted in a death, Chapter 7 applies.[4]

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[4] Despite Isley's claim that Chapter 6 "clearly" applies to her accident, she provides no rationale for this claim. *See* Appellant's Br., p. 17 n.2.

[30] Chapter 7 does not require the officer to inform the suspect of the civil penalties of refusing a test. In relevant part: "[a] person who refuses to submit to a portable breath test or chemical test offered under this chapter commits a Class C infraction." Ind. Code § 9-30-7-5. This contrasts with Chapter 6 which states: "*If* a person refuses to submit to a chemical test, the arresting officer shall inform the person that refusal will result in the suspension of the person's driving privileges." Ind. Code § 9-30-6-7 (Chapter 6) (emphasis added). *Brown v. State*, 744 N.E.2d 989, 994 (Ind. Ct. App. 2001) ("common sense would dictate that the two chapters are separate and distinct and should not be read together"). Accordingly, under the plain text of Chapter 7, Isley was not entitled to be informed of the penalties for refusing to consent.

[31] But even if Chapter 6 did apply, we have already rejected the argument that the penalty advisement is a prerequisite to valid consent. Chapter 6 comprises a "two-step procedure" where the officer needs to explain the consequences of refusal only if the suspect first refuses to consent. *State v. Ray*, 886 N.E.2d 43, 47 (Ind. Ct. App. 2008). Courts have upheld this two-step approach before in the face of arguments that the failure to inform the suspect of the civil penalties creates a "coercive effect" on obtaining a suspect's consent. *Temperly v. State*, 933 N.E.2d 558, 563 (Ind. Ct. App. 2010) (citing *Cochran v. State*, 771 N.E.2d 104, 108 (Ind. Ct. App. 2002) Thus, giving full effect to the statute's plain meaning, the warning of the civil penalties must be given only "before steps are taken to suspend [the suspect's] driving privileges for test refusal." *Id.* at 48

(quoting *State v. Huber*, 540 N.E.2d 140, 141 (Ind. 1989)). Because Isley consented, Deputy Hodson never reached the second step of Chapter 6.

[32] Deputy Hodson's final question to Isley also did not vitiate Isley's consent. Deputy Hodson said he had "reason to believe that you were operating a vehicle while intoxicated that was involved in an accident . . . . I must now offer you the opportunity to submit to that chemical test. You do submit to the test[,] right?" App. Vol. II, p. 102. Isley contends this final question, "You do submit to the test[,] right?" violated the implied consent laws by being unduly coercive. We disagree. This statement occurred only after Isley had already conveyed her consent. Given this context, Deputy Hodson was not suggesting his preferred answer to Isley, but simply reiterating that Isley had indeed consented.

Conclusion

[33] Finding no violation of either the Fourth Amendment to the United States Constitution or Article 1, Section 11 of the Indiana Constitution and no violation of Indiana's implied consent laws, we affirm the trial court's denial of Isley's motion to suppress.

Brown, J., concurs.
May, J., concurs in result with a separate opinion.

May, Judge, concurring in result with separate opinion.

[34] While I concur with Sections I and III of the majority's analysis and would also affirm the denial of Isley's motion to suppress, I cannot concur with the majority's decision to analyze the reasonableness of the blood draw under the Indiana Constitution through application of the *Litchfield*[5] factors after having already determined Isley knowingly and voluntarily provided valid consent to that blood draw.

[35] Where the majority sees a lack of clarity in precedent from our Indiana Supreme Court, I see statements of law addressing two related, but distinct, legal issues – (1) whether valid consent eliminated the need to obtain a warrant, *see*, *e.g.*, *McIlquhan v. State*, 10 N.E.3d 506, 511 (Ind. 2014) ("A warrantless search based on lawful consent is consistent with both the Indiana and Federal Constitutions."); and (2) whether the execution of a search (regardless of whether it occurred pursuant to a warrant or valid consent) exceeded the scope of authority given to police by the warrant or consent. *See*, *e.g.*, *Watkins v. State*, 85 N.E.3d 597, 600 (Ind. 2017) (reasonableness under Article 1, Section 11 of the execution of a search warrant is determined by application of the "totality-of-the-circumstances *Litchfield* test"); *see also U.S. v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971) ("A consent search is reasonable only if kept within the bounds of the actual consent.").

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[5] *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

[36] I read both *Hardin v. State*, 148 N.E.3d 932 (Ind. 2020), which addressed the constitutionality of a search of a vehicle found on the curtilage of property when police had a search warrant for the home on the property, and *Duran v. State*, 930 N.E.2d 10 (Ind. 2010), which addressed the reasonableness of an apartment entry during the execution of an arrest warrant, as cases addressing whether police exceeded the proper scope of the warrants obtained. In circumstances when a defendant challenges the scope of execution of a warrant (or consent), the question becomes the reasonableness of the police behavior in the execution, *see*, *e.g.*, *Watkins*, 85 N.E.3d at 600 ("the *Litchfield* test remains well-suited to assess the reasonableness of search warrant executions" when reasonableness challenged under Article 1, Section 11), and the tests of "reasonableness" are different under the Fourth Amendment and Article 1, Section 11. *See Litchfield v. State*, 824 N.E.2d 356,361 (Ind. 2005) (defining three-part balancing test for reasonableness under Article 1, Section 11 of the Indiana Constitution).

[37] That we analyze separately under our state and federal constitutions the reasonableness of the scope and manner of execution of a search does not conflict with saying "a 'search based on lawful consent is consistent with' the Indiana Constitution," *Isley v. State*, No. 21A-CR-2837, *slip op*. at n.5 (quoting *Cunningham*, 26 N.E.3d at 25), because consent eliminates the need for police to obtain a warrant under both constitutions. *See McCoy v. State*, 193 N.E.3d 387, 388 (Ind. 2022) ("suspect may, of course, waive the warrant requirement [of Article 1, Section 11] by consenting to the search"). To hold otherwise would

put police officers in the untenable position of needing to consider whether a search might be upheld by a court applying the *Litchfield* factors even after a citizen has consented to a search. *Cf. McIlquhan*, 10 N.E.3d at 511 ("when Defendant told police 'it was okay' to check the apartment, we find no reason not to take his consent at face value").

[38] Here, the question is whether Isley validly consented to the blood draw, and that question is addressed with the same analysis under both our federal and state constitutions. *See id*. at 511-513 (applying single analysis to determine existence of consent that satisfied the warrant requirements of both constitutions). As Isley does not challenge the reasonableness of the scope of the execution of her consent to the blood draw, there is no need to apply a *Litchfield* analysis.[6] *See Casillas v. State*, 190 N.E.3d 1005, 1013 n.9 (Ind. Ct. App. 2022) (single analysis of consent determined consent was valid, such that evidence was admissible under consent exception to the warrant requirement of both constitutions), *trans. denied*. Accordingly, I cannot join footnote five and Section II of the majority opinion. Nevertheless, I concur in result because the

[6] I acknowledge that I concurred in both *Canfield v. State*, 128 N.E.3d 563 (Ind. Ct. App. 2019), *trans.denied*, and *Gutenstein v. State*, 59 N.E.3d 984 (Ind. Ct. App. 2016), *trans. denied*, which the majority notes are cases in which the *Litchfield* factors were applied to determine the reasonableness of searches after consent was determined to be voluntary under the Fourth Amendment. *See Gutenstein*, 59 N.E.3d at 1003-4; *see Canfield*, 128 N.E.3d at 570-1. However, both of those cases involved much lengthier police engagements with defendants, with multiple instances of consent, and questions about the reasonableness of the scope of police behavior in light of each type of consent. In such a circumstance, the analyses of the validity of the consent given and of the reasonableness of police execution of the consent given become intertwined as a matter of practical necessity, and I see those cases as clearly distinguishable from the fact pattern here, where a single consent was given by a woman who was in a hospital bed for injuries following a fatal car crash.

majority's analyses in Sections I and III lead me to conclude the trial court properly denied Isley's motion to suppress.