No. 2—09—0971
Order Filed April 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 07—CF—2649
ERIKA N. SCOLIERE,	)	Honorable Thomas E. Mueller
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: (1) State's notice of appeal from trial court's order granting defendant's motion to suppress was timely filed when the trial court told the prevailing party that a draft order was unnecessary; and (2) trial court's finding that defendant's consent to a blood test was involuntary was clearly unreasonable when the trial court incorrectly found that the police misled the defendant by telling her that if they believed she was impaired a blood test would have been mandatory but since they did not believe she was impaired they would need her consent, and where there was no evidence offered that the defendant did not understand the officer's request.

INTRODUCTION

The State appeals the trial court's order suppressing the blood alcohol test results obtained from the defendant, Erika N. Scoliere, following her involvement in a fatal motor vehicle accident. The State argues that the defendant voluntarily consented to submitting a sample of her blood for testing and the trial court erred in finding otherwise. The defendant argues that the State's notice of appeal was premature and did not confer jurisdiction on the appellate court. We reverse.

BACKGROUND

On July 13, 2007, at about 11:30 p.m., the defendant, then age 18, was the driver of a Ford Escape motor vehicle which collided with a motorcycle at the intersection of Randall Road and Silver Glen Road in South Elgin, Illinois. The driver of the motorcycle, Frank Ferraro, died as a result of the injuries sustained in the accident. Shortly after the accident, the defendant's parents arrived at the scene and remained with the defendant throughout her involvement with the investigating officers. Witnesses at the scene and the defendant stated that the defendant was traveling southbound on Randall Road, entered the intersection at Silver Glen Road on a yellow light and began to turn left when her vehicle was struck by the victim's motorcycle which was headed northbound on Randall Road. After being interviewed at the scene, the defendant and her parents agreed to go to the South Elgin police department for additional questioning. At the police department, the defendant again related what had occurred and provided a written statement. Following the interview the defendant rode with her parents to St. Joseph's Hospital where a blood sample was taken. The defendant was not arrested and no traffic citations were issued. On September 7, 2007, the defendant was charged by complaint with two counts of aggravated driving under the influence of alcohol and two counts of reckless homicide. 625

ILCS 5/11-501(d)(2)(F) (West 2006); 720 ILCS 5/9–3 (West 2006). On September 25, 2007, the defendant was indicted by the grand jury alleging two counts of aggravated driving under the influence of alcohol (625 ILCS 5/11–501(d)(1)(F) (West 2006)), one count of reckless homicide (720 ILCS 5/9–3 (West 2006)), two counts of driving under the influence of alcohol (625 ILCS 5/11–501(a)(1), (a)(2) (West 2006)), and one count of failure to yield while turning left (625 ILCS 5/11–902 (West 2006)).

The State disclosed that on August 5, 2008, the defendant's urine and blood samples were missing. On August 6, 2008 defendant filed a "Motion to Suppress Defendant's Blood Test." On August 9, 2008 defendant filed her "Amended Motion to Suppress Defendant's Blood Test." On November 19, 2008 the State disclosed that the blood and urine samples collected from the defendant had been mistakenly destroyed.

The defendant's four count, 60 paragraph "Amended Motion to Suppress Defendant's Blood Test" primarily alleged: (1) there was no probable cause to believe the defendant was under the influence; (2) she did not consent to a blood draw; (3) she was not under arrest; (4) she had not been issued any citations prior to or after the blood draw; and (5) the destruction of the blood sample by the State should result in suppression because she was unable to obtain her own independent examination in violation of her due process rights, fundamental fairness, and Illinois law.

On June 3, 2009, the trial court heard evidence on count four of defendant's motion, which concerned the destruction of the blood and urine samples. On July 22, 2009, the trial court denied count four of defendant's motion, finding that there was "no evidence of bad faith" in destroying the blood sample. The case was then continued to August 21, 2009, for hearing on counts one and two of the defendant's motion, which are the subject of this appeal.

Officer Bret Czechowski of the South Elgin police department testified that he arrived at the intersection of Randall and Silver Glen Roads shortly after the accident and interviewed witnesses who indicated that the defendant's vehicle entered the intersection on the yellow light and then proceeded to turn left, when the motorcycle struck the side of her vehicle. The motorcycle was in the inside lane and traveling at a high rate of speed. Officer Czechowski did not interview the defendant.

Officer Creighton testified that he had a conversation with the defendant at the scene. The defendant was "shaken up" but not injured. Officer Creighton did not observe any signs of impairment. The defendant told Creighton that she was driving southbound on Randall Road and that, as she approached the intersection of Silver Glen, the light was yellow. She said a vehicle passed through going north and she then began to complete a left turn onto Silver Glen Road. Creighton testified that the defendant refused medical treatment. The defendant's parents arrived and remained with her. The defendant complained of breathing problems and was evaluated by a paramedic. Officer Creighton asked the defendant and her parents if they would come to the South Elgin police department for an interview, and they agreed. The defendant rode with her parents and followed Creighton to the police department. The defendant was not under arrest at any point. Once at the station, the defendant and her parents were escorted to an interview room, where the defendant spoke to Officer Mike Palazzo. Creighton remained outside the interview room, but could hear the conversation. Creighton testified that the tone of the conversation was soft-spoken, with no yelling or screaming. The following exchange then took place between defense counsel and Officer Creighton:

> "Q. [Defense counsel]: Now, who told Miss Scoliere about the legal requirements for the blood tests?

A. [Officer Creighton]: Officer Palazzo.

Q. Were you present?

A. Yes, I was.

Q. And did he tell her that she had no choice but she had to take the blood test?

A. No.

Q. What did he tell her?

A. What he told her was that from the fatality, by law, okay, if she was under the influence, which at that point in time in the investigation we did not believe because it was still ongoing, that she did not show any signs of being under the influence —

Q. That what?

A. There was no indication at that point in time, but if she would consent to the test, and she agreed.

Q. And was there a consent form there?

A. Was there a consent form? No.

Q. Did she sign a document of any kind?

A. No.

Q. And a blood test was taken, right?

A. That is correct.

Q. And at the time the blood test was taken, she was not under arrest?

A. Correct.

Q. And she had not been issued a traffic ticket?

A. That is correct."

On cross-examination by the assistant state's attorney, Officer Creighton testified that the defendant rode with her parents to St. Joseph's Hospital for the blood draw and followed Officer Creighton because the defendant's father did not know where the hospital was located. The defendant's parents waited with her in a room at the hospital for a phlebotomist to come and draw a blood sample. Officer Creighton waited outside the room. He testified that the defendant was cooperative throughout her interview with the police.

Officer Mike Palazzo testified that on the night of the accident he was directed to the police department to take a witness statement from the defendant. He met with the defendant and her parents in an interview room. Although the defendant had not been charged and was not in custody, Palazzo informed the defendant of her *Miranda* rights. The defendant then gave a verbal account of the accident. Palazzo then asked the defendant to provide a written statement using a "Voluntary Statement" form that Palazzo provided and the defendant agreed. Palazzo briefly left the room while the defendant composed the statement. A review of the common law record indicates that the pre-printed form contains an acknowledgment of rights section and was signed and witnessed by Officer Palazzo. After completing the written statement, Officer Palazzo had a conversation with the defendant in her parents' presence that is the subject of this appeal. The following exchange took place between Officer Palazzo and defense counsel:

"Q. And did you then speak to her about going to the hospital?

A. Yes.

Q. What did you say to her?

A. I advised her that state law required that if she was involved in a fatal or serious injury accident, that she was required to go to the hospital for blood or urine

testing. I explained to her that that wasn't the case, that we didn't feel she was intoxicated so she would need to consent to go to the hospital to have that done.

Q. And did you use the word that she would 'need to consent'? Were those your very words?

A. Yes. It's also written in my report that way.

Q. Sir, my only question I asked you, did you speak the words she would 'need to'?

A. Yes.

Q. And she would 'need to consent' were the words you actually used?

A. Correct.

Q. And she responded to you by saying yes. Is that fair to say?

A. That's correct.

Q. And then you agreed to meet her at the hospital?

A. No, not myself.

Q. You reached an agreement that she and her family would go to the hospital and meet an officer?

A. She stated that she would take any tests requested.

Q. Did you reach an agreement as to going to the hospital?

A. Yes.

Q. What was the agreement?

A. That she was going to meet Officer Creighton at the hospital.

Q. And that was the end of your interview?

A. Yes."

On cross-examination by the assistant state's attorney, Officer Palazzo testified as follows:

Q. Now, counsel asked you about the language that 'she would need.' Now, when you were speaking to Erika, did you call her 'she' or did you say 'you'?

A. 'You.'

Q. Okay, so that's not exactly the language that you used when you were speaking to her?

A. Correct.

Q. Do you recall exactly what you said?

A. I advised her that she would need to consent to testing, which would mean that she would have to give us authorization.

Q. And before that, you had told her that she would be required to do it if you believed that she was impaired?

A. Correct.

Q. And you said that you told her it was not the case?

A. Correct.

Q. So when you were telling her that she would need to consent, were you telling her that she had no choice but to consent or that —

[DEFENSE COUNSEL]: Objection

THE COURT: Basis?

[DEFENSE COUNSEL]: The witness can only tell you what was said. It is for the court to determine the interpretation of it, not the witness.

THE COURT: Response?

[ASSISTANT STATE'S ATTORNEY]: Judge, I can rephrase that.

THE COURT: Okay.

Q: Did you tell her that she had no choice but to consent?

A: Never.

Q: Did you tell her that you needed her consent because you were not able to require her to take the test?

A: That's correct.

Q: And after explaining that, then did you ask her if she was willing to consent?

A: Yes.

Q: What language did you use when you asked?

A: I asked her if she would submit to a blood or urine test.

Q: And what did she say?

A: She said she would submit to any test requested."

Officer Palazzo did not request that the defendant execute a written consent for the blood test and he did not read the warning to motorist pursuant to section 11—501.6 of the Illinois Vehicle Code (625 ILCS 5/11—501.6 (West 2006)) because he was not the investigating officer and "we didn't feel at the time that she was impaired." After Palazzo's testimony the defendant rested on the motion.

The State called firefighter/paramedic Walter Antos of the South Elgin Countryside Fire Protection District who responded to the accident. Antos was informed that defendant was having some difficulty breathing. The defendant was taken into an ambulance along with her mother where Antos took her vitals. While taking defendant's blood pressure Antos detected an odor of alcohol on the defendant's breath. Antos asked the defendant if she had been drinking,

and she said no. The defendant's mother then volunteered that the defendant had not been drinking but that she, the mother, "had a couple of drinks prior to me going to bed." Antos said the odor was coming from the defendant and not the mother. Antos testified that he relayed this information to officers at the scene, but this information was not passed on to the investigating officers. Other than the odor of alcohol, Antos noticed no signs of impairment. Antos did not document this information until sometime later when he was requested to do so by Detective Sergeant Mike Doty.

St. Joseph's Hospital phlebotomist Linda Von Essen testified that she conducted the blood draw from the defendant. She testified that the defendant was very cooperative and never said she did not want to give a blood sample. Von Essen testified that the defendant's parents and a police officer were present for the blood draw. Von Essen testified that the paperwork from the DUI kit was filled out by the police officer and that she signed and initialed the form as to the time the blood was drawn. There was no hospital consent form for the blood draw used. Antos said she had "never seen a consent form in 15 years."

The State rested, and defendant indicated they had no rebuttal. The parties then presented their arguments, and the trial court made its ruling. The court commented on defense counsel's remarks before the hearing began that there is "a chain of custody problem" (regarding the destroyed blood sample). The court said that absent a motion *in limine* (presumably regarding the chain of custody issue) on file he had to rule on the motion to suppress. The court then noted that the fireman's testimony was "fully credible" but that his observations could not be imputed to the police officers. It also found that all of the police officers' testimony was credible. Based upon their testimony the court found that there was no probable cause to believe the defendant was under the influence of alcohol. The court next found that the provisions of

section 11—501.6 of the Illinois Vehicle Code (625 ILCS 5/11–501.6 (West 2006)) had "no application insofar as Miss Scoliere was not arrested nor issued a ticket." The court then ruled on the issue of consent:

"So what this really comes down to then, the last hope that the State could hinge the blood draw on is consent. And I'm not as bothered by the lack of a written consent as I am by the misstatement of the law that preceded the request for consent, advising Miss Scoliere that if they thought she was under the influence, she would be required, she would have to give her blood, which isn't the law, because everyone has the right of refusal. That's what the law says.

And I think anything that happens after you've given an 18-year-old suspect bad law is suspect in terms of its reliability.

So then add to that the language that is used, which, as a 52-year-old judge who's been in the court system for many, many, many, many years, do I understand what the police officer meant when he said I can't force you, so I need you to consent? I understand that. Would I impute that to an 18-year-old? Absolutely not.

I think the combination of the misstatement of the law, followed up with the word "must" consent negates the voluntariness of what would otherwise be — would appear to be a consensual draw.

And again, I don't know, other than having the opportunity to hear this evidence and to discuss what the law is, what the significance of — I am denying — I'm granting the defense motion. I am going to suppress the blood draw.

I don't know what loss it is to the State, because I don't know what the State was intending to do with it anyway, absent the chain of evidence.

So that's the ruling of the court. The defense motion is granted, amended motion, counts one and two."

After the court granted the defendant's motion, the State requested "a date within 30 days to consider options." After agreeing to the date of September 16, defense counsel stated, "And this is for a status on whether the State is appealing or not?" The State said it would be "a status date to consider options." At the conclusion of the proceedings, defense counsel asked:

"Do you want us to prepare a draft order for your signature on the next court date or are you satisfied with the transcript? Some judges tell us to prepare a draft.

THE COURT: Oh, no.

[Defense counsel]: Thank you, your Honor."

The August 21, 2009, order signed by the trial court contained in the common law record contains a section with a pre-printed box with the caption "other" filled in with the following language:

"Evidence and arguments hear (*sic*) on defense amend motion to suppress blood evidence counts 1 + 2. Defense motion to suppress blood evidence is granted."

The common law record also contains a "minute order" signed by the deputy clerk indicating in pre-printed boxes "that a draft order is to follow" and "the minute order is to supplement a draft order." The case was continued to September 16, 2009, for pre-trial status. On September 14, 2009, the State filed its notice and certification pursuant to Supreme Court Rule 604(a)(1) (July 1, 2006), along with its certificate of impairment, from the trial court's ruling suppressing the blood evidence. Ill. S. Ct. R. 601(a)(1) (eff. July 1, 2006). On September 15, 2009, the defendant filed a "Motion for Entry of a *Nunc Pro Tunc* Order" stating in paragraph four, "that it is in the interests of justice that this Honorable Court enter and (*sic*)

Order setting out the findings of facts, the law applicable and the court's opinion for granting Defendant's Motion to Suppress."

On September 16, 2009, the parties appeared before the trial court "for status following the court's ruling on August 21." The assistant state's attorney reported to the court that the State had exercised its right to appeal. The State acknowledged receipt of the defendant's motion for the entry of a *nunc pro tunc* order. Defense counsel stated that, because "we're within 30 days of the date the court entered the decision[,] the court has jurisdiction to enter the decision *nunc pro tunc* to the time it was." Defense counsel Stephen Komie further stated that the proposed draft order followed the court's ruling according to counsel's notes. In arguing that it was appropriate for the court to enter the *nunc pro tunc* order, counsel said:

> "And I don't want to see the court bushwhacked in the appellate court by reconstructions that happen on appeal, and I've had an opportunity to talk to judges who say that's not the case I heard when I read about it in the advance sheets, and the best way to make sure it's the case the court heard is to have a very crystal clear order for the benefit of the appellate judges to look at so they know exactly what you thought was important and what was the underpinnings."

The State objected to the entry of the order, pointing out that there was a brief order entered and a court reporter took down the court's findings verbatim. The assistant state's attorney characterized the proposed order as "redundant and unnecessary." Over the State's objection the court entered the order stating in part ". . . but I'm increasingly convinced that the more opportunities the appellate court has to see something, the more they'll understand what happened at the trial court, and this proposed order sets forth very accurately exactly what this court found and what this *court's order was*." (emphasis added). The "*nunc pro tunc* order"

additionally contained purported findings of fact, findings that were not made on August 21, 2009. For example, paragraph 11 states: "That Officer Creighton directed Defendant to come to the station around 1:00 a.m." Paragraph 17 states: "That the police did not obtain consent to take her blood and urine from Defendant in front of Ms. Essen." These factual determinations were not originally made on August 21.

ANALYSIS

Jurisdiction

We must initially address the issue of jurisdiction. The defense contends that the notice of appeal filed by the State on September 14, 2009, was premature and did not confer jurisdiction on the appellate court because the order disposing of the motion to suppress was not entered until September 16, 2009. In its reply brief, the State maintains that the notice of appeal filed September 14, 2009, was timely filed because: (1) the court's ruling was transcribed verbatim; (2) a summary order suppressing the evidence was entered by the court on August 21, 2009; and (3) the court indicated that a draft order was unnecessary.

In criminal cases the State may appeal from an order suppressing evidence. Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006). A notice of appeal "must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from." Ill. S. Ct. R. 606(b) (eff. March 20, 2009).

We agree with the State that the notice of appeal was timely filed and that the draft order entered on September 16, 2009, was "redundant and unnecessary." Supreme Court Rule 271 is applicable to rulings on motions to suppress and requires that "the attorney for the prevailing party shall prepare and present to the court the order or judgment to be entered, unless the court directs otherwise." Ill. S. Ct. R. 271 (eff. January 1, 1967). The defendant acknowledges in her

brief that when defense counsel asked the court whether a draft order should be prepared the court responded, "[O]h, no." The defendant argues that we should not accept this exchange as evidence of the court's intent but should look instead to the minute order signed by the deputy clerk that has an "X" in the yes box with the words, "[T]his court has directed that a draft order is to follow."

Rule 271 is discretionary. Where the court directs the prevailing party not to prepare a draft order, a ruling on a motion to suppress is ripe for appeal. See Ill. S. Ct. R. 271 (eff. January 1, 1967). When there is a verbatim transcript of the proceedings, we look to the conversation that took place between the court and counsel when the oral ruling was made in order to determine whether a draft order was contemplated. See *People v. Jones*, 104 Ill. 2d 268, 276 (1984). Here, there is no question that the court told defense counsel "no" to his offer to prepare a draft order. Further, the defendant's reliance on *People v. Maynard*, 393 Ill. App. 3d 605 (2009) is misplaced. In *Maynard*, the trial court issued a letter decision in which it instructed defense counsel to prepare a written order "in conformance with" his decision and to submit it for signature. The State's notice of appeal filed that same day was premature and the appeal from the ruling was properly dismissed. *Maynard*, 393 Ill. App. 3d at 607.

Here, the court made it clear that it did not wish to have a draft order prepared. If that had been the case there would have been no need for defense counsel to file a "Motion for Entry of a *Nunc Pro Tunc* Order." The State objected to the entry of the "*nunc pro tunc* order," arguing that a brief order had been entered on August 21, 2009, and there was a verbatim record of the proceedings. The State, in its reply brief, also argues that by presenting her motion as a motion *nunc pro tunc* that she is barred from arguing that the effective date of the suppression order is September 16, 2009. We need not decide that question because the order entered on

August 21, 2009, was ripe for appeal when the court exercised its discretion by directing counsel not to prepare a draft order.

The obvious purpose of Rule 271, like its companion, Rule 272, is to avoid confusion concerning when a final order for judgment is entered. Ill. S. Ct. R. 271 (eff. January 1, 1967); Ill. S. Ct. R. 272 (eff. January 1, 1967); *People v. Dylak*, 258 Ill. App. 3d 141, 143 (1994). Here, the record is clear; there was no confusion. The transcripts of the proceedings on September 16, 2009, reflect a belief on the part of both the trial court and defense counsel that the State's notice of appeal was timely. Defense counsel stated that he did not want to see the trial court "bushwhacked in the appellate court by reconstructions that happen on appeal" and the trial court, in agreeing to sign the *nunc pro tunc* order, stated that, "the more opportunities the appellate court has to see something, the more they'll understand what happened at the trial court." Further, based upon the State's notice of appeal, the court released the defendant from bail pending appeal. Clearly, while the trial court and defense counsel may have felt a draft order would be helpful, the court exercised its discretion pursuant to Supreme Court Rule 271 on August 21, 2009, and when the State filed its notice of appeal, it lost jurisdiction to amend or modify its findings of fact and conclusions of law upon which its order suppressing the evidence was based. Ill. S. C. R. 271 (eff. January 1, 1967).

Voluntariness of Defendant's Consent

The State argues that the trial court erred when it suppressed the blood alcohol test by finding that the defendant's consent to the blood draw was involuntarily given. The trial court found that the combination of a misstatement of law together with the defendant's age and the

words "need to consent"[1] "negates the voluntariness of what would otherwise — would appear to be a consensual draw." The court said that, while he understood what the officer meant when he said, "I can't force you", he would not impute that to an 18-year-old.

In reviewing a trial court's ruling on a motion to suppress, mixed questions of law and fact are presented. Findings of historical fact made by the trial court will be upheld on review unless such findings are against the manifest weight of the evidence. *People v. McDonough*, 239 Ill. 2d 260, 265-66 (2010). However, a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted. *McDonough*, 239 Ill. 2d at 266. Accordingly, the ultimate question of whether the evidence should be suppressed is reviewed *de novo*. *McDonough*, 239 Ill. 2d 266.

The voluntariness of consent to search is a question of fact to be determined from the totality of the circumstances. *People v. Green*, 358 Ill. App. 3d 456, 471 (2005). It is the State's burden to show by a preponderance of the evidence that the consent was voluntarily given. *People v. Casazza*, 144 Ill. 2d 414, 417 (1991). Under some circumstances, where police obtain consent by means of deception, there may be coercion so that the consent is not freely or voluntarily given and is invalid. See *Bumper v. North* Carolina, 391 U.S. 543, 548 (1968); *People v. Daugherty*, 161 Ill. App. 3d 394, 399 (1987).

The "fairness" of the type of deception employed by the police in the particular circumstances is particularly relevant to the issue of voluntariness. *Daugherty*, 161 Ill. App. 3d

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[1]The trial court also used the words "must consent" although there was no evidence that the word "must" was ever used.

at 400. The burden to prove voluntariness of consent cannot be met by "showing no more than acquiescence to a claim of authority." *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

Preliminarily, we note that the trial court found that all of the police officer's testimony was credible, including the fact that no one intentionally misstated the law or told the defendant that she "must" consent. It appears that the trial court's *ratio decidendi* was that, due to the defendant's age and the wording of the request for consent, which included a misstatement of law, her consent amounted to an acquiescence to a claim of authority.

In making its decision, the trial court relied on two factors (age and a perceived misstatement of law) rather than on the totality of the circumstances. We first note that there was nothing coercive at the scene, at the police station, or at the hospital. The encounter with the police began as a result of the defendant's involvement in a traffic accident. Shortly after the accident the defendant's parents arrived and remained with her throughout her entire contact with the police. The defendant was never arrested and remained free to leave at any time. While there was no written consent, the court was not troubled by the absence of a written form because the only issue was voluntariness, not whether consent was actually given.

The trial court found that when the police told the defendant that if they thought she was under the influence she would be required to give her blood, they misstated the law and that affected the voluntariness of the defendant's consent. The court said that "everyone has the right of refusal." False or misleading information provided by the police can vitiate the voluntariness of a consent, especially in a coercive situation. *People v. Cardenas*, 237 Ill. App. 3d 584 (1992).

We must first determine whether the police misled the defendant and, if so, what effect the statement had on the voluntariness of the defendant's consent. Officer Palazzo told the defendant that, under state law, if she showed signs of being under the influence, she would be

required to give a blood sample, but since the police did not feel she was intoxicated she would need to consent.

While Officer Palazzo's statement may not have been precisely worded, it was not a false or misleading statement. The trial court was in error in finding that Officer Palazzo misstated the law. In fact, the trial court misstated the law in commenting that "everyone has the right of refusal." Defense counsel, too, mistakenly asserts that "unlike standard search and consent cases based solely on constitutional principles, drunk driving law is confined by the limits of statutory enactments empowering the police to force an individual to submit to a blood test." Counsel cites no authority for this claim because none exists.

Non-consensual blood draws from drivers are permissible under the Fourth Amendment where the police have probable cause to believe the driver is under the influence of alcohol or drugs so long as the procedures employed in taking the blood samples are reasonable. *Schmerber v. California*, 384 U.S. 757 (1966); *People v. Jones*, 214 Ill. 2d 187 (2005). The Illinois Supreme Court made clear in *Jones* that, where there is probable cause to believe a driver is under the influence, there is no constitutional or statutory right of refusal. *Jones*, 214 Ill. 2d at 199.

Whether consent was voluntary is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Here, Officer Palazzo made clear to the defendant that he did not feel she was under the influence so he would "need" her consent to go to the hospital. The question was then put to her whether she would consent and she said yes, that she would take any tests requested. The fact that prior to this exchange the defendant was given *Miranda* warnings both verbally and in writing is a factor that tends to show voluntariness. *People v. Shaver*, 77 Ill. App. 3d 709, 713 (1970).

The officers said they would "need" the defendant's consent. Her answer demonstrated not only that she agreed to provide a blood sample but that she would perform any tests they requested. There was nothing about this exchange that demonstrated that the defendant misunderstood or was compelled in any way to answer yes to the request for a blood sample.

Moreover, even if we were to agree that Officer Palazzo's statements were inaccurate, which we do not, in order to vitiate a consent, a misstatement or inaccuracy must have been such that it would have misled a reasonable person regarding his options. See *People v. Johnson*, 197 Ill. 2d 478, 491 (2001) (Harrison, J., specially concurring). Here, there is ample evidence in the record that the defendant was not misled into consenting to the blood test. In fact, the record is replete with evidence that the defendant, with her parents present at all times, was a cooperative witness who consented to every request made of her. She voluntarily agreed to go to the police station, she voluntarily agreed to speak with the police, and then she completed a voluntary statement form. None of the facts in the record indicate in any way that the Officer Palzzo's statement misled her about her options.

We turn now to the issue of age. Age, of course, is a relevant factor in determining the voluntariness of consent. See *People v. Spann*, 332 Ill.App. 3d 425, 439 (2002) (factors that might render a consent involuntary include the defendant's age, education, and intelligence, the length of any detention and the duration of the questioning, whether the defendant was advised of his constitutional rights, and whether the defendant was subjected to any physical mistreatment).

In this case the only factor favoring the defendant is her relatively young age. However, the State correctly points out in their brief that "age alone" is "never an automatic barrier to capacity to consent." *People v. Holmes*, 180 Ill. App. 3d 870, 536 N.E.2d 1005 (1989). Here,

there were two concerned adults, the defendant's parents, present with her throughout her contact with the police, even though the defendant, as an 18-year-old, is deemed to be an adult. The defendant had ample opportunity to ask her parents any questions or seek their advice on whether she should go through with the blood test. In addition, the record shows the defendant's mother and father were active participants in the exchange between the fire/police personnel and the defendant. Defendant's mother injected herself in the defendant's conversation with the paramedic regarding the odor of alcohol on the defendant's breath and the defendant's father had discussions with the officers regarding the drive to the police station and the hospital. Common sense dictates that the defendant's father knew the purpose of both trips and had the opportunity to advise his daughter regarding her options.

The trial court failed to even mention the fact that the defendant was accompanied by her parents through the entire evening following the accident, from her interview at the police department to her blood draw at the hospital. The defendant in the instant case was not deprived of the counsel or company of her parents, unlike the defendant in *People v. Westmorland*, 372 Ill. App. 3d 868 (2007). In *Westmorland,* the appellate court found that the 17-year-old defendant's statement was involuntarily given when the police refused his two requests to contact his mother and made no attempts themselves to contact the parent. *Westmorland*, 372 Ill. App. 3d at 878. Here, it was clear from the testimony that defendant's parents never asked for clarification regarding the request for a blood sample from her. While not critical to a finding of voluntariness, the presence of two concerned adults weighs heavily in favor of a finding that the State sustained its burden of proof that the consent in this case was voluntarily given.

We agree with the State that, while it is the State's burden to prove by a preponderance of the evidence that consent was voluntarily given, the defendant failed to present any evidence that she did not knowingly and voluntarily consent to the blood test. See *People v. Cook*, 94 Ill. App. 3d 73, 76 (1981). Accordingly, the trial court erred in granting the defendant's motion to suppress the blood evidence in this case.

CONCLUSION

For the reasons stated, we reverse the trial court's order granting the defendant's amended motion to suppress the blood evidence, and we remand this cause for further proceedings.

Reversed and remanded.