No. 11-12-00198-CR

IN THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS AT EASTLAND

Haley Diana Forsyth
Appellee

v.

The State of Texas
Appellee

On Appeal from the 167th District Court of Travis County, in Cause No. D-1-DC-10-203431, the Honorable Mike Lynch, Judge Presiding

Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae* Supporting Appellant

Submitted by:

Bobby D. Mims
President, Texas Criminal Defense Lawyers Association
Attorney at Law
216 W Erwin Street, Suite 300
Tyler, Texas 75702
Tel. 903-595-2169
State Bar Card No. 12172200
eMail: bobbymims@gmail.com

State Bar Card No. 10592300

Gena Blount Bunn
Holmes & Moore, P.L.L.C.
110 West Methvin Street
Longview, Texas 75601
Tel. (903) 758-2200
eMail: gbunn@holmesmoore.com

State Bar Card No. 00790323

Angela Moore
Attorney at Law
310 South St. Marys Street, Suite 1830
San Antonio, Texas 778205
Tel. (210) 364-0013
eMail: amoorelaw@aol.com

State Bar Card No. 14320110

David A. Schulman
Attorney at Law
Post Office Box 783
Austin, Texas 78767-0783
Tel. 512-474-4747
Fax: 512-532-6282
State Bar Card No. 17833400
eMail: zdrdavida@davidschulman.com

State Bar Card No. 10592300

Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

Appellant

Haley Diana Forsyth

Trial & Appellate Counsel

David Frank
SBN 00785880
1212 Guadalupe
Austin, Texas 78701

State of Texas

Hon. Rosemary Lehmberg
District Attorney
Post Office Box 783
Austin, Texas 78767-0783

Trial

Mathew Foye
SBN 24043661

Appellate Counsel

Angie Creasy
SBN 24043613

Table of Contents

Index of Authorities

Federal Cases:

Texas Cases:

Federal Constitution:

Texas Statutes / Codes:

Other References:

Statement of the Case

The parties have adequately stated the nature of the case.

Issues Presented by the Parties

Whether the dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw.

Whether the "implied consent" mandated by Transportation Code section 724.012(b)(3)(B) is irrevocable.

Whether the "implied consent" mandated by Transportation Code section 724.012(b)(3)(B) satisfies the standard of "knowing, intelligent and voluntary consent"

Statement Pursuant to Rule 11, Tex.R.App.Pro.

The Texas Criminal Defense Lawyers Association ("TCDLA") is the largest state association for criminal defense attorneys in the nation. TCDLA started more than 40 years ago as a small, nonprofit association and has grown into a state-of-the-art organization, providing assistance, support and continuing education to its members. TCDLA provides a statewide forum for criminal defense lawyers and is the only voice in the legislature interested in basic fairness in criminal defense cases.

This brief complies with all applicable provisions of the Rules of Appellate Procedure, and copies have been served on all parties listed above.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief.

No. 11-12-00198-CR

IN THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS AT EASTLAND

Haley Diana Forsyth
Appellee

v.

The State of Texas
Appellee

On Appeal from the 167th District Court of Travis County, in Cause No. D-1-DC-10-203431, the Honorable Mike Lynch, Judge Presiding

Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae* Supporting Appellant

TO THE HONORABLE ELEVENTH COURT OF APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curae*, respectfully submits this *amicus curiae* brief supporting Appellee, and would show the Court as follows:

Facts of the Case

On June 12, 2010, Sergeant Christine Jacobson of the Austin Police Department was on patrol (RR Vol. 2, PP. 13-14). She observed a vehicle commit several traffic violations, and commenced a traffic stop (RR Vol. 2, P. 14). Officer Steven McDaniel arrived and took over the investigation (RR Vol. 2, PP. 16, 19). When Appellant refused to give a breath or blood sample (2RR 24) and McDaniel learned Appellant had two prior DWI convictions (2RR 29-30), he transported Appellant to Brackenridge

hospital and had blood drawn. No warrant was obtained. No warrant was requested.

Issue as Framed by *Amicus Curae*

TCDLA proposes a three pronged analysis for use in all mandatory blood draw cases. First, that implied consent alone is insufficient; second, that no "implied consent" statute can trump the 4th Amendment; and third, even when the State is entitled to draw blood under an implied consent statute, its agents must first seek a warrant, unless there is a *bona fide* exigency.

Argument & Authorities

I

McNeely Recognizes the Need for More than Implied Consent

The officer whose actions were at issue in ***Missouri v. McNeely***, 569 U. S. _____ (No. 11-1425; April 17, 2013), was acting pursuant to sections 577.020.1, and 577.041, of the Missouri Annotated Statutes. ***McNeely***, slip op. at 2.

> While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar, App. 20, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

> The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. See Mo. Ann. Stat. §§ 577.020.1, 577.041 (West 2011). McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent. See § 577.012.1.

Under any definition, the officer had probable cause to arrest Mr. McNeely and, under Missouri's implied consent law, was entitled to his blood. The question in ***McNeely***, therefore, was only whether there were exigent circumstances which would vitiate the warrant requirement. The ***McNeely*** Court's resolution of the matter makes it clear that the dissipation of alcohol in the bloodstream alone does not create exigent circumstances.

> We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

McNeely, slip op. at 23.

II

A Statute Cannot Trump the 4th Amendment

In ***Sibron v. New York***, 392 U.S. 40 (1968), the Supreme Court considered New York's "stop-and-frisk" law, N.Y. Code Crim. Proc. §

180-a, which the New York Court of Appeals apparently viewed as authorizing a particular search. The Court wrote that,

> Section 180-a, unlike § 813-a, deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to "stop" people, "demand" explanations of them and "search [them] for dangerous weapon[s]" in certain circumstances upon "reasonable suspicion" that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of § 180-a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations.[fn20] New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, see Ker v. California, 374 U.S. 23, 34 (1963), and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure "is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." Cooper v. California, 386 U.S. 58, 61 (1967).

Sibron, 392 U.S. at 61 (footnote omitted). This was, in fact, the holding in ***State v. Villarreal***. _____ S.W.3d _____ (Tex.App. - Corpus Christi No. 13-13-00253-CR; January 23, 2014).

> The officer's sole basis for not getting a warrant was that the repeat offender provision of the mandatory blood draw law required him to take a blood sample without Appellee's consent and without the necessity of obtaining a search warrant. See TEX. TRANSP. CODE ANN. § 724.012(b)(3)(B). Although we agree that the statute required the officer to obtain a breath or blood sample, it did not require the officer to do so without first obtaining a warrant. See id.
>
> * * *
>
> To date, neither the U.S. Supreme Court nor the Court of Criminal Appeals has recognized the repeat offender provision of the mandatory blood draw law as a new exception to the Fourth Amendment's warrant requirement separate and apart from the consent exception and the

> exception for exigent circumstances.[fn11] In fact, in Beeman, the Texas Court of Criminal Appeals recognized that these laws do not give police officers anything "more than [what] the Constitution already gives them." Beeman, 86 S.W.3d at 616. Accordingly, we conclude that the constitutionality of the repeat offender provision of the mandatory blood draw law must be based on the previously recognized exceptions to the Fourth Amendment's warrant requirement.[fn12]

Villarreal, slip op. at 20-21 (footnotes omitted). Additionally, there is no way to read the Supreme Court's summary remand of ***Aviles v. Texas***, _____ U.S. _____ (No. 13-6353; January 13, 2014), other than as a statement, certainly implied, that no statute trumps the 4th Amendment.

Thus, in light of ***McNeely*** and ***Aviles***, it is clear that no "implied consent" mandatory blood draw provision will dispense with the warrant requirement of the 4th Amendment. Even if an officer is entitled to obtain the blood of someone he or she has arrested, they must first at least try to obtain a search warrant.

Additionally, where the State seeks to use a warrantless blood draw based on probable cause and implied consent, it has the burden of demonstrating exigent circumstances. As part of this burden, the State must demonstrate why no warrant was possible.

III

Given the Ease of Locating a Magistrate with Modern Technology, The State Must At Least Try to Obtain A Warrant

In ***McNeely***, the Supreme Court's recent landmark case, the Court discussed the application of technology to the practice of law, observing that technology now "allow[s] for the more expeditious processing of

warrant applications." The Court cited state statutes permitting warrants to be obtained "remotely through various means, including telephonic or radio communication, electronic communication . . ., and video conferencing." The Court stated,

> The State's proposed per se rule also fails to account for advances in the 47 years since Schmerber was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. See 91 Stat. 319. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means." Fed. Rule Crim. Proc. 4.1. States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.[fn4] And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.[fn5]

McNeely, slip op. at 10-12 (footnotes omitted). In Texas, in fact, obtaining warrants without having to meet a magistrate face-to-face is well accepted in law enforcement circles. See ***Clay v. State***, 382 S.W.3d 465 (Tex.App. - Waco 2012), in which the Court of Appeals held that a face-to-face meeting between the trooper and the judge was not required and the making of the oath over the telephone did not invalidate the search warrant.

Application of the Law to the Facts of the Case

This case involved a routine traffic stop with none of the complications which might have caused the arresting officer undue delay. Appellant's blood was forcibly taken without her consent and without any showing of exigent circumstances. The arresting officer had electronic equipment that would have accelerated the preparation of a warrant, and, in Travis County magistrates are positioned 24 hours a day to sign warrants. Nevertheless, the arresting officer in this case did not even attempt to obtain a warrant. Given the short amount of time it would have taken to get a search warrant for blood, there was no reasonable excuse not to do so.

Conclusion

The State neither made nor attempted to make a showing of exigent circumstances. Consequently, the trial court erred when it refused to sustain Appellant's motion to suppress.

Prayer

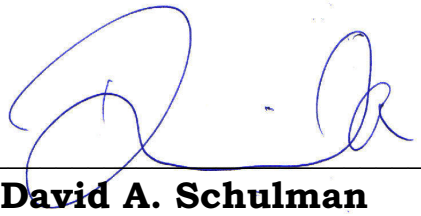
WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, *amicus curiae* in the above styled and numbered cause respectfully prays that, for the reasons set out herein, the Court will reverse the judgment of the trial court and remand this case for further proceedings.

Respectfully submitted:

Bobby D. Mims
President, Texas Criminal Defense Lawyers Association
Attorney at Law
216 W Erwin Street, Suite 300
Tyler, Texas 75702
Tel. 903-595-2169
State Bar Card No. 12172200
eMail: bobbymims@gmail.com
State Bar Card No. 10592300

Gena Blount Bunn
Holmes & Moore, P.L.L.C.
110 West Methvin Street
Longview, Texas 75601
Tel. (903) 758-2200
eMail: gbunn@holmesmoore.com
State Bar Card No. 00790323

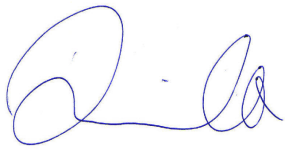
Angela Moore
Attorney at Law
310 South St. Marys Street, Suite 1830
San Antonio, Texas 778205
Tel. (210) 364-0013
eMail: amoorelaw@aol.com
State Bar Card No. 14320110



David A. Schulman
Attorney at Law
Post Office Box 783
Austin, Texas 78767-0783
Tel. 512-474-4747
Fax: 512-532-6282
State Bar Card No. 17833400
eMail: zdrdavida@davidschulman.com
State Bar Card No. 10592300

Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X7 software, contains 1998 words, excluding those items permitted by Rule 9.4 (i)(1), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) on April 4, 2014, a true and correct copy of the above and foregoing "Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae* Supporting Appellant" was transmitted electronic mail (*eMail*) to Angie Creasy (angie.creasy@co.travis.tx.us), counsel of record for the State of Texas, and David Frank (drav@aol.com), counsel of record for Appellant.



David A. Schulman