No. PD-1592-13

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

The State of Texas

Appellee

v.

Terry Shannon Baker

Appellee

On Appeal from the 174rd Court of Henderson County, in Cause No. A-18,245, the Honorable Harold Entz, Presiding, and the Memorandum Opinion of the Twelfth Court of Appeals in Case No. 12-12-00092-CR, Dated October 16, 2013

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

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL 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

From the Opinion of the Court of Appeals)

> Appellee was indicted for intoxication assault. He filed a motion to suppress evidence, arguing that the evidence was unlawfully obtained. At the suppression hearing, the evidence showed that on June 13, 2009, Texas Parks and Wildlife Game Wardens Shawn Smith and John Thorne responded to a 911 call concerning a jet ski accident on Cedar Creek Lake. There were several people at the scene, and the game wardens interviewed witnesses.
>
> Warden Smith was advised by paramedics that the injured party "was not in good shape." The game wardens described the scene as a "bad situation," and said they were unsure whether the victim would survive. Appellee was on a boat in the water with other people when the game wardens arrived. Witnesses pointed at Appellee and identified him as the operator of the jet ski involved in the accident. At approximately the same

time, the boat docked. Appellee tied the boat down, walked over to the game wardens, and admitted that he had been operating the jet ski at the time of the incident. The game wardens detected the strong odor of alcohol on Appellee's breath, and noted that his eyes were bloodshot and watery. Appellee admitted to Warden Smith that he had consumed "four or five" beers that day. Warden Thorne saw a trash bag full of beer cans on the side of the pier, and he was "told" that they came from the boat Appellee was on. But Warden Thorne did not name the person who made the statement. However, the game wardens stated that they interviewed other witnesses and Appellee was the only person who smelled of alcohol. Warden Thorne also observed blood inside the boat that Appellee had just tied to the pier, but he did not identify the blood's source.

Based on this information, Warden Smith told Appellee that he needed to accompany them to East Texas Medical Center (ETMC) to provide a mandatory blood specimen for testing. Appellee asked to give a breath sample, and Warden Smith told him that a blood specimen was required. Appellee acquiesced and was placed in Warden Smith's vehicle. He was not read his constitutional rights or the "DIC 24" statutory warning. While Appellee was at ETMC, a nurse presented him with an ETMC-supplied form, which stated that "this form is to be completed when blood sample(s) are taken from a patient, at the request of the Law Enforcement Agency, for the purpose of testing the blood for alcohol content." Appellee signed the form. A blood sample was taken, and the test showed that he had a blood alcohol concentration of 0.09. Warden Thorne then conducted field sobriety tests (FSTs) on Appellee and concluded that Appellee exhibited four out of six clues on the horizontal gaze nystagmus test, zero out of four clues on the one-leg stand, and two out of eight clues on the walk and turn test.[FN1] At that point, Warden Smith informed Appellee that he was "formally" under arrest and read his rights.

After the suppression hearing, the trial court granted the motion. The trial court also made express findings of fact and conclusions of law, including that (1) the game wardens lacked probable cause to effect the arrest when the blood sample was taken, (2) Appellee was not placed under arrest until after he performed the FSTs, (3) the game wardens failed to follow the statutory procedures in obtaining mandatory blood draws without warrants and misstated the law to Appellee concerning involuntary blood samples, (4) the State failed to present evidence of exigent circumstances justifying the warrantless acquisition of the blood sample, and (5) the State failed to prove that Appellee voluntarily consented to the procedure. The State appealed.

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" statutes 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.

I

***McNeely* Recognizes the Need for More than Implied Consent**

The officer's 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 widely accepted holding in ***McNeely*** is that "the Supreme Court held that the natural dissipation of alcohol from the blood stream does not establish exigency *per se* but is only one factor to consider in a totality of the circumstances analysis." See SPA's Brief in ***Baker***, P. 16.

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).

Suborn, 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 Fourth 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), 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

The State did not obtain a warrant for Appellee's blood, and the officers involved never even tried. There has been no showing that there was any attempt to reach a magistrate and no evidence that the game wardens did not have cell phone numbers, etc., for the local magistrates. The State had the burden in the trial court and at the Court of Appeals, yet failed to introduce any information about efforts in this case to reach one of the local magistrates.

Courts should not speculate on the ease or difficulty of locating a magistrate. The subject must be a matter of record.

Conclusion

The State neither made nor attempted to make a showing of exigent circumstances. Consequently, the trial court and the Court of Appeals reached the correct result. The Court of Appeals' judgment should be affirmed.