

No. 04-13-00366-CR

IN THE COURT OF APPEALS FOR THE FOURTH
DISTRICT OF TEXAS AT SAN ANTONIO

Daniel James Weems

Appellant

v.

The State of Texas

Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2012-CR-6570
Honorable Sid L. Harle, Judge Presiding

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

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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.

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Statement of the Case

The parties have adequately stated the nature of the case.

Issues Presented

Whether, by purporting to authorize a “mandatory” blood draw, without the need to demonstrate exigent circumstances or obtain a search warrant, Transportation Code section 724.012(b)(3)(B), is unconstitutional.

Presuming Transportation Code section 724.012(b)(3)(B) to be unconstitutional, should the blood draw evidence be nevertheless admitted based on a “good faith” belief in the constitutionality of the statute?

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.

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TO THE HONORABLE TENTH COURT OF APPEALS:

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

Facts of the Case

Following a “rollover” automobile accident in which he was seen to be the driver (RR Vol. 5, P.22), Appellant fled the scene (RR Vol. 5, P. 25), but was found hiding under a sport utility vehicle parked near a house about a quarter of a mile from the accident (RR Vol. 5, PP. 17-19). He was detained and hand-cuffed (RR Vol. 5, PP. 17-18). Appellant was arrested for driving while intoxicated (RR Vol. 5, P. 50), but refused to provide a specimen of his breath or blood (RR Vol. 5, P.51).

Appellant and his passenger (“Noland”) were transported to a hospital for injuries sustained in the rollover (RR Vol. 5, PP. 15, 53–54). Because Noland suffered bodily injury and was taken to the hospital as a result of Appellant’s intoxication, and because Appellant had two prior convictions for driving while intoxicated, Bexar County Deputy Jimmy Bustamante ordered a mandatory blood draw (RR Vol. 5, PP. 47, 53-54; see also State’s Ex. 6), pursuant to the Transportation Code sections 724.012(b)(1)(C) and 724.012(b)(3)(B).

No blood draw search warrant was obtained. No search warrant was ever requested.

Issues as Framed by *Amicus Curiae*

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 Fourth Amendment; and third, that 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. Finally, the application of the exclusionary rule is appropriate, as no trained peace officer could have a “good faith” belief that a statute requiring a warrantless forced blood draw, even when there is no exigency, could pass constitutional muster.

Arguments & Authorities

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 ***McNeely*** Court's resolution of the matter makes it clear that the dissipation of alcohol in the bloodstream alone does not create exigent circumstances.

It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed.

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 this case other than as a statement, certainly implied, that no statute trumps the Fourth Amendment.

Thus, in light of **McNeely** and the summary remand by the Supreme Court of the United States in this case, 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 Search 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).¹ 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 this Court 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.

IV

Application of the Law to the Facts of the Case

The State did not obtain a warrant for Appellant’s blood. Deputy Bustamonte never requested a warrant. There has been no showing that there was any attempt to reach a magistrate and no evidence that there would have been any difficulty in obtaining a warrant, or that the arresting officer did not have cell phone numbers, etc., for the local magistrates. Similarly, there has been no showing of any exigency. The State had the burden of demonstrating why it did not obtain a warrant, but failed to do so.

¹ See **Schmerber v. California**, 384 U.S. 757 (1966).

The Application of the Exclusionary Rule is Appropriate

TCDLA notes that, in this case, and in numerous other cases throughout Texas, and in the wake of McNeely and the summary remand in Aviles v. Texas, (No. 13-6353; January 13, 2014), the State is now asserting that the exclusionary rule should not cause the blood draw evidence to be excluded because the officers involved had a “good faith” belief that the Transportation Code sections at issue were constitutional. To support this claim, the State relies on Illinois v. Krull, 408 U.S. 340 (1987). The State’s reliance on Krull is misplaced, and the argument must fail for several reasons.

First, Krull involved an Illinois statute which required licensed motor vehicle and vehicular parts sellers to permit state officials to inspect certain required records. Consequently, the case concerned administrative searches, and there is a lesser standard of statutory probable cause required for administrative searches. See New York v. Burger, 482 U.S. 691 (1987);² United States v. Biswell, 406 U.S. 311 (1972);³ see also

² Warrantless inspections of commercial premises in certain highly regulated industries may be valid exceptions to the Fourth Amendment warrant requirement if three criteria are met.

³ Administrative search of locked storeroom during business hours as part of inspection procedure authorized by § 923(g) of the Gun Control Act of 1968, which resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons held not violative of Fourth Amendment.

United States v. Schiffman, 572 F.2d 1137 (5th Cir. 1978);⁴ and

Santikos v. State, 836 S.W.2d 631 (Tex.Cr.App. 1992).⁵

Second, even by its own terms, the “good faith” exception set out in **Krull** must be “objectively reasonable.” **Krull**, 480 U.S. at 356-357. **Schmerber**, *supra*, was announced by the Supreme Court more than forty-eight years before the Transportation Code sections at issue, were amended in 2009.⁶

Schmerber and its progeny have made it clear that the withdrawal of a blood specimen is a search and seizure under the Fourth Amendment. See, e.g., **Reeder v. State**, ____ S.W.3d ____ (Tex.App. - Texarkana; No. 06-13-0126-CR; April 29, 2014). Because taking someone’s blood constitutes a Fourth Amendment search, one’s blood cannot be drawn without a warrant or a bona fide exigency. **Schmerber**, 384 U.S. at 770-771.

Given that peace officers, by definition, have more legal training than the average citizen and are trained in the “dos” and “don’ts” of traffic stops, it would be incredible to find an officer who is unfamiliar with the holding

⁴ Enough facts were furnished the magistrate to support the administrative search warrant under the lesser standard of statutory probable cause required for such searches.

⁵ Administrative search by Texas Alcoholic Beverage Commission which led to the discovery of cocaine and drug paraphernalia upheld.

⁶ See TEX. S.B. 328, § 1, 81st Leg., R.S. (2009).

in **Schmerber**.⁷ To have an “objectively reasonable good faith” belief that the Transportation Code sections at issue are constitutional, a trained peace officer would have to believe that the United States Constitution would not be offended by a statute of one of the several states which purports to do away with the warrant requirement of the Fourth Amendment. Given the knowledge of **Schmerber** and/or its holdings, it is asserted that no trained peace officer could believe that the legislature of any given state had that authority.

Since **Schmerber**, trained peace officers have known that the Constitution of the United States prevents authorities from strapping someone down and extracting blood from their body, absent the extreme exigency present in **Schmerber**. To the extent that the Transportation Code sections at issue purport to allow a forced blood draw without a warrant or exigent circumstances, it would not be objectively reasonable to believe that the statutes are constitutional.

Finally, although the State asserts that **Krull** means that there “can be no question that the federal exclusionary rule does not require exclusion of evidence obtained pursuant to statute when the validity of the statute is not questioned at the time the officers rely on it,” it should be noted that, at its core, **Krull** is a 5-4 decision. In her dissent, Justice O’Connor argued that the Court was providing “a grace period for unconstitutional search and seizure legislation during which the State is permitted to violate

⁷ Even if any particular officer might not know the name of the case.

constitutional requirements with impunity.” ***Krull***, 480 U.S. at 361 (O’Connor, dissenting).

Because of ***McNeely*** and the summary remand in ***Aviles***, as well as recent cases holding that the Fourth Amendment requires a warrant or exigent circumstances, such as ***Reeder***, the ultimate decision will be made by the Court of Criminal Appeals or, more likely, the Supreme Court of the United States. Some of the “blood draw” cases currently in the courts involve different outcomes at the trial court, with some motions to suppress being granted,⁸ and some being denied.⁹ Whether ***Krull*** means, as the State suggests, that the exclusionary rule should not apply simply because officers blindly relied on a statute, is an issue that should be decided by those courts.

Conclusion

The State neither made nor attempted to make a showing of exigent circumstances and did not seek a search warrant. Consequently, the trial court erred when it denied Appellant’s motion to suppress the blood draw evidence. The exclusionary rule is not applicable to this case, and Appellant is entitled to a new trial.

⁸ See ***State v. Baker***; No. 12-12-00092-CR (Tex.App. - Tyler; October 16, 2013); PD-1592-13, now pending.

⁹ See ***Aviles v. State***, 385 S.W.3d 110 (Tex.App. - San Antonio 2012); ***Aviles v Texas***, ___ U.S. ___ (No. 13-6353; January 13, 2014); now pending at this Court.

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:

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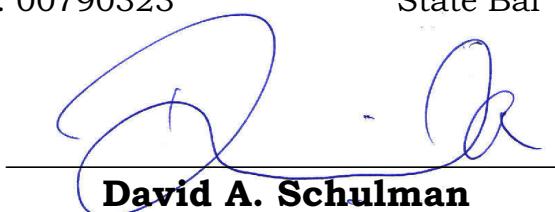
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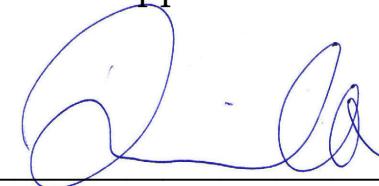
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Certificate of Compliance and Delivery

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