

**FILED: August 17, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Appellant,

v.

STEVEN F. STCLAIR,  
Defendant-Respondent.

Washington County Circuit Court  
D091992T

A144084

Steven L. Price, Judge.

On appellant's petition for reconsideration filed March 25, 2011. Opinion filed March 16, 2011. 241 Or App 572, 250 P3d 464.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Joanna L. Jenkins, Assistant Attorney General, for petition.

Before Wollheim, Presiding Judge, and Brewer, Chief Judge, and Nakamoto, Judge.

PER CURIAM

Reconsideration allowed; former disposition withdrawn; reversed and remanded.

1 PER CURIAM

2 The state petitions for reconsideration of our disposition in *State v. Stclair*,  
3 241 Or App 572, 250 P3d 464 (2011), which we affirmed without opinion. We grant the  
4 state's petition and, on reconsideration, withdraw our former disposition and reverse and  
5 remand.

6 Defendant was charged with driving under the influence of intoxicants,  
7 ORS 813.010(1), and reckless driving, ORS 811.140. The results of an Intoxilyzer test  
8 showed that, at the time of defendant's arrest, his blood alcohol content was .12 percent,  
9 .04 percent above the legal limit. Defendant filed a motion to suppress evidence from the  
10 Intoxilyzer test, relying on [State v. Machuca](#), 231 Or App 232, 218 P3d 145 (2009)  
11 (*Machuca I*), [rev'd](#), 347 Or 644, 227 P3d 729 (2010), to argue that the burden was "on the  
12 state to demonstrate that a warrant could not be obtained within a reasonable time to  
13 secure the evidence." The trial court expressly relied on *Machuca I* in granting  
14 defendant's motion to suppress "because it was done without a warrant and without  
15 exigent circumstances."

16 In [State v. Machuca](#), 347 Or 644, 227 P3d 729 (2010) (*Machuca II*), the  
17 Oregon Supreme Court reversed our decision in *Machuca I*. The court held that, "for  
18 purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol  
19 content is an exigent circumstance that will ordinarily permit a warrantless blood draw of  
20 the kind taken here." 347 Or at 657. In addition, in [State v. Allen](#), 234 Or App 363, 364,  
21 228 P3d 606 (2010), a case with similar facts to *Machuca II*, we held that *Machuca II*  
22 controlled the result and "[t]he breath test was justified by probable cause that it would

1 reveal evidence of the crime of driving under the influence of intoxicants, and a warrant  
2 was excused because of exigent circumstances." *Machuca II* controls the result in this  
3 case as well. Accordingly, we conclude that the trial court erred in granting defendant's  
4 motion to suppress.

5                   Reconsideration allowed; former disposition withdrawn; reversed and  
6 remanded.