



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-13-00179-CR

STEVEN COLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th District Court
Gregg County, Texas
Trial Court No. 41312-A

Before Morriss, C.J., Carter and Moseley, JJ.
Opinion by Justice Carter
Concurring Opinion by Justice Moseley

OPINION

Steven Cole drove a Ford F-250 through downtown Longview, Texas, at 10:20 p.m., ran a red light, and collided with a Toyota Tundra driven by Jim Hightower. Witnesses described the collision as an explosion. Hightower died instantly, and the Toyota caught fire and burned. Cole admitted that he had taken methamphetamine that night. Police attempted to obtain a voluntary blood sample from Cole, but he refused. In accordance with Texas statutory law, a nurse obtained a sample of Cole's blood, which contained methamphetamine and amphetamine. Cole moved to suppress evidence pertaining to the blood specimen claiming that the specimen was seized without a warrant, consent, or exigent circumstances. The trial court found that exigent circumstances existed and admitted the blood test into evidence. A jury found Cole guilty of intoxication manslaughter and assessed a life sentence.¹

Cole argues that the trial court erred in denying his motion to suppress the evidence obtained through a warrantless, nonconsensual blood draw. We find that no exigent circumstances existed to justify the warrantless blood draw and reverse the judgment and remand to the trial court for further proceedings.

I. Factual Background

This collision occurred around 10:20 p.m., December 1, 2011, in downtown Longview, Texas. Several witnesses testified that Cole was speeding just prior to impact. Hightower was killed in the crash, and when emergency responders arrived, Hightower's Toyota was engulfed in

¹The State alleged and proved two prior Louisiana felony convictions to enhance the punishment range to twenty-five years' to ninety-nine years', or life. *See* Tex. PENAL CODE ANN. § 12.42(d) (West Supp. 2014).

flames. In order to remove Cole from his truck, police officers had to break out the rear window of the truck and pull him out. Prior to the arrival of emergency medical personnel, Officer Audrey Wright arrived on the scene and spoke briefly with Cole. Cole stated his address was on Texas Street, but he did not know where Longview was and had no idea why he was in Longview. Paramedics examined Cole, and he was suffering pain “all over,” specifically in the chest. He also had lacerations to his hands. During the examination, Cole told one of the paramedics that he had taken two hits of methamphetamine that night. Cole was taken by ambulance to Good Shepherd Hospital. During the ambulance ride, Cole again indicated that he had taken methamphetamine that night, even commenting that he was “getting too old for this shit,” apparently referring to methamphetamine.

Being on call that week and also being an accident investigator, Longview Police Officer Jeremy Higginbotham was called to the scene of the accident shortly after it occurred. Higginbotham arrived at approximately 11:00 p.m. After examining the vehicles involved, taking measurements, and making calculations, Higginbotham estimated that Cole was driving about 110 miles per hour when he collided with the Toyota Tundra. Higginbotham left the scene at approximately 2:00 a.m. and went to the police station to complete his initial report and some other documentation. He returned to the scene around 3:45 a.m., when the trucks involved were being loaded onto wreckers.

Officer Wright accompanied Cole to the hospital, and she communicated, both directly and through another officer, with Higginbotham and told him that Cole had admitted taking methamphetamine and that he was “tweaking,” making involuntary movements, mumbling to

himself, and not making any sense.² Wright was told to read the DIC-24 form, give Cole his statutory warnings, and obtain a blood sample. Wright gave Cole the warnings, and Cole was arrested at 11:38 p.m. Cole did not consent to having his blood drawn, and at 12:20 a.m., his blood was drawn involuntarily, pursuant to the mandatory blood-draw statute. Wright testified that, while she was reading him the warnings, he repeatedly interrupted her saying that he was not drunk but rather that he had taken methamphetamine.

About a dozen officers were working the accident scene and the surrounding area. Due to the accident, the officers on the scene had to block traffic at the intersection where the accident occurred as well as nearby intersections. The fire department was also on the scene to deal with the burning Toyota. Higginbotham testified that all available officers were performing necessary functions either at the scene or at the hospital with Cole and that there was not an officer available to pursue a warrant for Cole's blood.

Justin Schwane, a toxicological chemist at Dallas County Southwestern Institute of Forensic Science, tested Cole's blood sample. The test revealed that Cole's blood had a 0.2 level of amphetamine and a 0.23 level of methamphetamine. Schwane testified that that level of methamphetamine in Cole's blood "would be at the very high end of a therapeutic range" but that, in terms of other drug levels, this was a "moderate dose." That level of methamphetamine could cause intoxication, but he could not say with 100 percent certainty that Cole was intoxicated.

²A nurse that treated Cole at the hospital testified that, while taking his history and questioning Cole in order to determine the treatment needed, he was oriented to person, place, time, and event and was able to answer her questions coherently.

II. Admissibility of Evidence Obtained Through the Warrantless Blood Draw

At trial, Cole moved to suppress the evidence obtained through the warrantless blood draw. The State argued that there were exigent circumstances negating the need for a search warrant.³ After the issue was addressed during the voir dire of Higginbotham—the officer in charge of the accident scene—the trial court made detailed findings, denied Cole’s motion, and admitted evidence regarding the results of the blood test. In his first point of error, Cole contends that the trial court erred in denying his motion to suppress because the State failed to sufficiently “establish exigent circumstances to justify a warrantless[,] nonconsensual blood draw.”

A. Standard of Review

We review a trial court’s ruling on a motion to suppress under a bifurcated standard. *Vasquez v. State*, 324 S.W.3d 912, 918 (Tex. App.—Houston [14th Dist.] 2010, pet. ref’d) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). The trial court is the sole finder of fact and is free to believe or disbelieve any or all of the testimony presented at a suppression hearing. *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007). When, as here, there are no explicit findings of historical fact, we review the evidence in the light most favorable to the trial court’s ruling, assuming that the trial court made implicit findings of those facts that are supported by the record and that buttress its ruling. *Carmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000). We will uphold the court’s ruling if it is correct under any theory of law applicable to the case. *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005).

³The good-faith exception, discussed in the concurring opinion, was not raised at trial or on appeal and, therefore, we do not address it.

Although we “give almost total deference to [the] trial court’s express or implied determination of historical facts,” we “review de novo the court’s application of the law of search and seizure to those facts.” *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). To be sure, the reasonableness of a seizure is a fact-sensitive inquiry, but it is “ultimately a question of substantive Fourth Amendment law.” *Kothe v. State*, 152 S.W.3d 54, 62 (Tex. Crim. App. 2004). Therefore, we assume that the trial court made findings of historical fact favorable to its ruling, but whether those facts amount to a reasonable seizure is a question of law that we review de novo. *See id.*

B. Requirement of a Search Warrant

The Fourth Amendment to the United States Constitution provides, “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue” unless certain requirements are met. U.S. CONST. AMEND. IV; *see also* TEX. CONST. art. I, § 9. This right “proscribes all unreasonable searches and seizures,” *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012), and its “basic purpose . . . is to safeguard the privacy and security of individuals against arbitrary invasion by government officials,” *Haynes v. State*, 475 S.W.2d 739, 741 (Tex. Crim. App. 1971).

“Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, [the Supreme Court of the United States] has inferred that a warrant must generally be secured.” *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011). Thus, “it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few

specifically established and well-delineated exceptions.” *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Gonzales*, 369 S.W.3d at 854. “Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.” *Bray v. State*, 597 S.W.2d 763, 765 n.1 (Tex. Crim. App. [Panel Op.] 1980) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)). The warrant requirement has been described as one of “the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.” *Johnson v. United States*, 333 U.S. 10, 17 (1948).⁴

“The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn” *Jones v. United States*, 357 U.S. 493, 499 (1958). Those exceptions include “voluntary consent to search, search under exigent circumstances, and search incident to arrest.” *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). It is the State’s burden to show that a warrantless search falls within one of these exceptions. *Id.* For example, a warrantless seizure of a blood sample can be constitutionally permissible if the State proves that officers have probable cause to arrest a suspect, exigent circumstances exist, and a

⁴Judicial issuance of a warrant is important because it “provides . . . a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.” *Hudson v. State*, 588 S.W.2d 348, 351 (Tex. Crim. App. 1979) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 568–80 (1991) (internal quotation marks omitted)). A neutral magistrate’s prior review “prevent[s] hindsight from coloring the evaluation of the reasonableness of a search or seizure.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”); *Clay v. State*, 391 S.W.3d 94, 100 n.21 (Tex. Crim. App. 2013) (“[O]ne important function of the warrant requirement is to facilitate review of probable cause and avoid justification for a search . . . by facts or evidence turned up in the course of [its] execution.” (quoting Wayne R. LaFare, 2 Search and Seizure: A Treatise on the Fourth Amendment § 4.3(b), at 511 (4th ed. 2004))).

reasonable method of extraction is available. *Schmerber v. California*, 384 U.S. 757, 767–68 (1966); *State v. Mosely*, 348 S.W.3d 435, 440 (Tex. App.—Austin 2011, pet. ref’d).

C. Burden To Prove an Exception to the Warrant Requirement

“A defendant who alleges a Fourth Amendment violation has the burden of producing evidence that rebuts the presumption of proper police conduct. He may carry this burden by establishing that the seizure occurred without a warrant.” *State v. Robinson*, 334 S.W.3d 776, 778–79 (Tex. Crim. App. 2011) (footnotes omitted); *see Robinson*, 334 S.W.3d at 780 (Cochran, J., concurring); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). The burden then shifts to the State to prove that the seizure was nonetheless reasonable. *Robinson*, 334 S.W.3d at 779; *Amador v. State*, 221 S.W.3d 666, 672–73 (Tex. Crim. App. 2007). Here, there is no dispute that Cole’s blood was taken without a warrant, and the record establishes that Cole would not consent to having his blood drawn. Therefore, the State bore the burden of proving that the seizure was reasonable.

D. Implied Consent and Mandatory Blood Draw Statutes

The State’s first argument is based on Section 724.011(a) of the Texas Transportation Code, which states, in relevant part:

If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle, in a public place . . . the person is deemed to have consented . . . to submit to the taking of one or more specimens of the person’s breath or blood for analysis to determine . . . the presence in the person’s body of a controlled substance, drug, dangerous drug, or other substance.

The State contends that, under Section 724.011(a), the seizure of Cole’s blood to test for intoxication was reasonable because “Cole had impliedly consented to having his blood drawn

when he chose to drive . . . while intoxicated.” Here, Cole explicitly refused consent to take his blood. This statute does not authorize drawing blood from a defendant, without his/her consent, unless Section 724.012(b) is involved. TEX. TRANSP. CODE ANN. § 724.013 (West 2011) (“Except as provided by Section 724.012(b), a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer.”)

Next, the State argues that the blood draw was reasonable and/or consensual under the mandatory blood-draw provisions of Section 724.012(b)(1)(A) of the Transportation Code, which, in the absence of consent, requires officers to obtain samples of breath or blood when someone is killed in a motor vehicle accident and the officer has reasonable grounds to believe the person was operating a motor vehicle while intoxicated. Here, there is no dispute that the officers on the scene had reasonable grounds to believe that Cole was driving while intoxicated, that Cole refused to consent to having his blood drawn, and that a death resulted from the collision.

The Texas Court of Criminal Appeals has very recently held that the provisions in the Transportation Code—the implied consent law and the mandatory blood draw law—by themselves, do not form a constitutionally valid alternative to the Fourth Amendment warrant requirement. *State v. Villareal*, No. PD-306-14, 2014 WL 6734178 (Tex. Crim. App. 2014).

Prior to the *Villareal* opinion, this Court and several of our sister courts held that warrantless, nonconsensual blood draws, even taken pursuant to the mandatory provisions of the blood draw statute were unconstitutional in the absence of exigent circumstances. *See Reeder v. State*, 428 S.W.3d 924 (Tex. App.—Texarkana 2014, pet. granted); *Sutherland v. State*, 436

S.W.3d 28 (Tex. App.—Amarillo 2014, no pet.); *Douds v. State*, 434 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2014, pet. granted); *Weems v. State*, 434 S.W.3d 655 (Tex. App.—San Antonio May 14, 2014, pet. granted); *Holidy v. State*, No. 06-13-00261-CR, 2014 WL 1722171 (Tex. App.—Texarkana Apr. 30, 2014, pet. granted) (mem. op., not designated for publication).

E. *McNeely* Applies to this Case

The State contends that *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), is inapplicable to the present case because (1) it was decided after Cole’s blood was drawn; and (2) it is too narrow to apply to Cole’s case.

The *McNeely* case was decided in April 2013. *McNeely*, 133 S.Ct. at 1552. The accident and blood draw in Cole’s case occurred in December 2011. Cole was indicted February 23, 2012, and his trial was from July 29, 2013, through August 1, 2013. The State contends that *McNeely* is inapplicable because it was not decided until after the events in this case. We disagree.

New rules governing the conduct of criminal prosecutions apply retroactively to all cases pending on direct appeal or not yet final at the time the new rule is announced regardless of whether they constitute a clear break from past precedent. *Griffith v. Kentucky*, 479 U.S. 314, 326–28 (1987), *see McClintock v. State*, No. PD-0925-13, 2014 WL 4843959 (Tex. Crim. App. Oct. 1, 2014); *Steadman v. State*, 360 S.W.3d 499, 504 n.13 (Tex. Crim. App. 2012)). Therefore, *McNeely* must apply to this case.

The State also argues that *McNeely* is too narrow to apply because the *McNeely* case did not involve exigent circumstances other than the dissipation of alcohol from the blood stream.

The State contends that there are several exigent circumstances present in this case that distinguish it from *McNeely* and establish the reasonableness of the seizure.

F. Exigent Circumstances

“We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.” *Bray*, 597 S.W.2d at 765 n.1 (quoting *McDonald*, 335 U.S. at 456). Exigent circumstances typically fall within one or more of three categories: (1) “providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance”; (2) “protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous”; and (3) “preventing the destruction of evidence or contraband.” *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Here, the State argued that this case falls within the third category, and “the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search.”⁵ *King*, 131 S.Ct. at 1856 (internal quotation marks omitted).

Following *McNeely* and *Schmerber*, we determine exigency based on whether the specific “facts and circumstances of the particular case” made “obtaining a warrant impractical.” *McNeely*, 133 S.Ct. at 1560–61; *Schmerber*, 384 U.S. at 770. There is no per se rule that the time an officer takes to conducting an accident investigation in a suspected DWI case will provide exigent circumstances authorizing a warrantless blood draw. *Douds*, 434 S.W.3d at 854.

⁵Courts have held that permitting a search “without prior judicial evaluation” is reasonable “[w]here there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime.” *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973).

The relevant inquiry is whether, given the facts and circumstances known to police at the time, it would be objectively reasonable for an officer to conclude that taking the time necessary to obtain a warrant before drawing a blood sample would significantly undermine the efficacy of a blood-alcohol test. *McNeely*, 133 S.Ct. at 1561; *Schmerber*, 384 U.S. at 770.

During the trial in this case, the State attempted to establish exigent circumstances through the voir dire examination of Higginbotham, and both Cole and the State examined the witness regarding the exigencies of the circumstances. In admitting testimony and evidence regarding the blood test, the trial court found that the facts were distinguishable from *McNeely*, and that the State had shown the existence of exigent circumstances that authorized the warrantless search.

In summary, the trial court found that the following exigent circumstances justified the warrantless blood draw: (1) major intersections had to be closed and traffic rerouted; (2) numerous officers were at the scene, each with a specific job to do, and none could be spared to seek a warrant; (3) due to his role, Higginbotham had to remain at the scene; (4) the magnitude of the accident, i.e., that it involved a death, a fire, a large debris field, and traffic issues; (5) Cole's health and safety and concern that the hospital could give him additional medications; and (6) the time needed to get the scene cleared.

The State argued at trial and on appeal two additional factors in support of an exigency finding: dissipation of the drug levels in Cole's blood and the time needed to obtain a warrant. The biggest concern in the State's argument is the dissipation of the drug levels in Cole's blood during the time the "officers were investigating the scene, controlling traffic, documenting

evidence, interviewing witnesses before anybody could get back to the office and seek a warrant.” While Higginbotham testified that Cole’s body was metabolizing whatever drugs were in his blood during the time the accident was under investigation, there is no evidence in the record regarding the rate methamphetamine is metabolized by the body or the rate at which it dissipates.

The State also urged exigency based on the time needed to obtain a warrant. Higginbotham testified that, in his experience in Gregg County, it would take an hour to an hour and a half to obtain a warrant “at the best.” According to Higginbotham, to obtain a warrant, either he or Wright, who was with Cole at the hospital, or both, would have to give a statement, “draw up [their] probable cause . . .[,] send it to a judge, and get the judge to sign it, send it back to us.” Higginbotham admitted that, on occasion, in the middle of a traffic accident investigation, he had taken time out of working the accident to obtain a warrant. Even though he knew that there was a rotation of judges “on call” and available at any time of day to make a probable cause determination for purposes of issuing a warrant, he admitted that at no time during this investigation did he discuss with any other police personnel the possibility of getting a warrant to draw Cole’s blood.

McNeely sheds light on the specific types of facts that may be pertinent to a case-by-case exigency inquiry. In *McNeely*, the United States Supreme Court agreed that metabolization of alcohol is one factor to consider in analyzing exigency. “[B]ecause an individual’s alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results.” *McNeely*, 133 S.Ct. at 1561. But the Court also

recognized that, “because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant.” *Id.* If the “warrant process will not significantly increase [this] delay . . . because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer,” the court reasoned, “there would be no plausible justification for an exception to the warrant requirement.” *Id.*

In addition, the Court noted “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.” *Id.* at 1561–62. The Court explained that “technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge’s essential role as a check on police discretion, are relevant to an assessment of exigency,” particularly given that blood-alcohol evidence “is lost gradually and relatively predictably.” *Id.* at 1562–63.

In *Weems*, the State argued that exigent circumstances existed because the case involved an accident and that, under *Schmerber*, the search was permissible. However, the court of appeals, citing *McNeely*, noted that technological advancements have been made since *Schmerber*, making it much easier and quicker to obtain a warrant. *Weems*, 434 S.W.3d at 665–66. In *Weems*, the officer testified (1) that he made no effort to obtain a warrant, (2) that there

were other officers present at the scene, (3) that there was an accident, (4) that the suspect driver and passenger involved in the accident were injured and taken to the hospital, and (5) that it took three hours after the suspect arrived at the hospital for the blood to be drawn. *Id.* at 666. The court noted that the record did not contain, as mentioned in *McNeely*, the procedures for obtaining a warrant, the availability of a magistrate judge, or the practical problems of obtaining a warrant within a timeframe that preserved the opportunity to obtain reliable evidence. *Id.* The court of appeals found that under the totality of the circumstances, the record did not show that the warrantless blood draw was justified by the exigencies of the circumstances. *Id.*

In *Douds*, people were injured in an accident involving a driver suspected of being under the influence. 434 S.W.3d 842. The driver's blood was taken under the mandatory blood-draw statute. *Id.* at 845–46. The State argued that, because there was an accident involving injury or death, an exigent circumstance existed, but the Fourteenth Court of Appeals stated, “[T]he focus of exigent circumstances analysis in this context is not on the delay attendant to an investigation . . . but on the delay necessary to obtain a warrant.” *Id.* at 853; *see McNeely*, 133 S.Ct. at 1563, (“[E]xigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.”). The Fourteenth Court of Appeals further noted that “the State must prove that ‘*the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.*’” *Douds*, 434 S.W.3d at 853 (quoting *Schmerber*, 384 U.S. at 770; *accord Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013) (holding State has burden to show “exigent circumstances . . . made obtaining a warrant impracticable”); *Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990) (“In

order for a warrantless arrest or search to be justified, the State must show . . . the existence of circumstances which made the procuring of a warrant impracticable.”).

In *Douds*, the Fourteenth Court of Appeals found that the record did not reflect exigent circumstances because it contained no mention of a warrant and because there was no evidence regarding what the officer knew regarding the time needed to obtain a warrant. *Douds*, 434 S.W.3d at 855. It is noteworthy that, in *Douds*, much like the present case, the State and the dissent urged the court to grade the severity of the accident in determining the existence of exigent circumstances. *Id.* at 853–54. In response, the majority stated,

To ensure that the exigencies of the situation make dispensing with the constitutional requirement of a warrant “imperative,” courts must focus on whether the State showed that police could not reasonably obtain a warrant, not on whether it showed how severe the accident was. This distinction is not merely a semantic one: the difference between the delay attendant to investigating an accident and addressing injuries and the delay necessary to obtain a warrant can be substantial depending on the facts of a particular case. Even if an officer’s investigation of a “serious” accident lasts for an hour, the availability of another officer 15 minutes into the investigation, or the presence of medical personnel to treat injuries, could significantly reduce the delay necessary to obtain a warrant. Alternatively, if a lone officer discovers an apparently intoxicated driver during a midnight traffic stop not involving any accident, the delay necessary to obtain a warrant could be substantial if there is no magistrate available

[T]he State should be responsible for asking officers who handle accidents to explain the demands of a particular investigation that made it impractical for police to obtain a warrant before any blood alcohol evidence dissipated.

Id. (citations omitted).

In the unpublished case of *Pearson v. State*, several people were injured in an accident and one of the drivers, Pearson, was suspected of being under the influence. *Pearson v. State*, No. 13-11-00137-CR, 2014 WL 895509, at *3 (Tex. App.—Corpus Christi Mar. 6, 2014, pet. ref’d) (mem. op., not designated for publication). Trooper Aguilar arrived at the scene at about

4:50 a.m. *Id.* Pearson smelled strongly of alcohol and told Aguilar and an emergency medical worker that he had been drinking that night. *Id.* When Aguilar completed his investigation at the scene, he went to the hospital, arriving at about 10:00 a.m., about six hours after the accident, to speak with Aguilar. *Id.* When Pearson refused to consent to a blood-draw, his blood was drawn pursuant to the mandatory blood draw statute. *Id.*

At trial, Aguilar testified that he was the only officer on duty that morning and that he was solely responsible for securing the accident scene and preserving and collecting the evidence. *Id.* Aguilar testified that he did not obtain a warrant because, as it was Sunday, it would have taken at least three hours and because he feared the potential evidence of intoxication was rapidly degrading. *Id.* According to his testimony he obtained Pearson's blood sample in reliance on the mandatory blood-draw statute. *Id.* Pearson argued that Aguilar created the exigent circumstances by waiting so long to seek a blood sample.⁶ *Id.* The Corpus Christi Court of Appeals concluded that the trial court was "within its discretion in determining that Trooper Aguilar acted under exigent circumstances in having [Pearson's] blood drawn without a warrant." *Id.* at *4.

Initially, we must note the primary difference between the facts of this case and those of *McNeely* and its progeny: this case involves alleged intoxication by methamphetamine rather

⁶Determining whether an officer impermissibly manufactured an exigency depends on "the reasonableness and propriety of the investigative tactics that generated the exigency." *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995) (quoting *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990)). The Fourteenth court found the issue of whether Aguilar deliberately created the exigent circumstance was a mixed question of fact and law and, therefore, deferred to the trial court's implied finding that Trooper Aguilar went to the hospital as soon as was practicable considering the circumstances of that morning. *Pearson*, 2014 WL 895509, at *3.

than alcohol.⁷ The *McNeely* court recognized that “an individual’s alcohol level gradually declines soon after he stops drinking” and that a “significant delay in testing will negatively affect the probative value of the results.” The Court explicitly noted that these facts were “essential” to its holding in *Schmerber*, i.e., that under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. *McNeely*, 133 S.Ct. at 1561; *see Schmerber*, 384 U.S. at 770–771.

Here, while Higginbotham testified that Cole’s body was metabolizing the methamphetamine in his system, there is no evidence whatsoever of the dissipation rate for methamphetamine levels in a person’s blood.⁸ However, in its findings regarding exigent circumstances, the trial court did not rely upon the dissipation rate in determining that exigent

⁷Most of the cases involving drawing a specimen involve consumption of an alcoholic beverage. The Texas Court of Criminal Appeals has written extensively on the science of “retrograde extrapolation.” *Mata v. State*, 46 S.W.3d 902, 909 (Tex. Crim. App. 2001) (“Retrograde extrapolation is the computation back in time of the blood-alcohol level—that is, the estimation of the level at the time of driving based on a test result from some later time.”). *Mata* explains the process that occurs from consumption of alcohol, its absorption rate, and the many factors to consider. The Court of Criminal Appeals explained that, in order to present expert testimony on this subject, it is necessary for the expert to demonstrate (1) some understanding of the difficulties associated with retrograde extrapolation, (2) an awareness of the subtleties of the science and the risks inherent in any extrapolation, and (3) an ability to clearly and consistently apply the science. *Id.* at 916.

One case discussing methamphetamine use is *Haley v. State*, 396 S.W.3d 756 (Tex. App.—Houston [14th Dist.] 2013, no pet.). There, an expert witness testified that, even though there is no set blood-methamphetamine level above which a person is considered intoxicated as a matter of law, such as the .08 rate applying to alcohol consumption, appellant’s rate of 0.80 mpl was so high that his coordination, attention, and driving-ability must have been affected. *Id.* at 766. Here, no evidence was offered concerning the absorption/dissipation rate of methamphetamine in the blood. Without some indication of when the methamphetamine evidence would begin to dissipate, we cannot conclude that such evidence would likely be destroyed even if obtaining the warrant took an extra hour and a half.

⁸When asked how quickly the body absorbs methamphetamine, the expert witness stated that it depended on the manner in which the drug was administered—the slowest is by mouth, faster routes include snorting and smoking, and the fastest is intravenous injection.

circumstances existed, even though the fact was “essential” to the United States Supreme Court’s decision in *Schmerber*.

Regarding exigent circumstances, *McNeely* requires that the officers identify other factors that would suggest they faced an emergency or unusual delay in securing a warrant. *McNeely*, 133 S.Ct. at 1567. Although *McNeely* involved a “routine” DWI stop, the Supreme Court stated,

The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

Id. at 1568. In agreeing with the *Schmerber* case, *McNeely* confirmed that the State must show that the time necessary to obtain a warrant under the circumstances threatened the destruction of the blood evidence:

In those drunk-driving investigations where police officers *can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search*, the Fourth Amendment *mandates* that they do so We do not doubt that *some circumstances will make obtaining a warrant impractical* such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the considerable overgeneralization that a per se rule would reflect.

McNeely, 133 S.Ct. at 1561 (internal quotation marks omitted) (emphasis added). The court further noted that “exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.” *Id.* at 1563 (emphasis added).

As it too is based upon *McNeely*, we agree with the well-reasoned opinion of our sister court in *Douds*, as we agree that a court should neither be grading the severity of an accident nor

focusing its analysis on the delay attendant to an investigation. *See Douds*, 434 S.W.3d at 853–54. As in *McNeely* and *Schmerber*, our exigent circumstances analysis should focus on the delay attendant to obtaining a warrant, i.e., whether the State showed that, under the circumstances, the police could not reasonably obtain a warrant. *McNeely*, 133 S.Ct. at 1561; *Schmerber*, 384 U.S. at 770; *Turrubiate*, 399 S.W.3d at 153 n.4 (citing *United States v. Menchaca–Castruita*, 587 F.3d 283, 295–96 (5th Cir. 2009) (A finding of exigent circumstances “must be based on an officer’s reasonable belief that *the delay necessary to obtain a warrant* will facilitate the destruction or removal of evidence” (emphasis added))).

In this case, the accident occurred around 10:20 p.m. Cole was already on the way to the hospital at the time Higginbotham arrived at the scene around 11:00 p.m. At 11:38 p.m., after speaking with her sergeant, Wright arrested Cole, read him the statutory warnings (DIC-24), and ordered his blood drawn. Cole’s blood was drawn at 12:20 a.m., forty-two minutes after Wright spoke to Higginbotham, about an hour and a half after Higginbotham was called to the accident scene, and about two hours after the accident itself.

As a warrant could have been obtained in an hour and a half, if Wright’s call at 11:38 p.m. had spurred the warrant process, then a warrant could have been in hand by 1:08 a.m. Assuming the same forty-minute delay in drawing his blood, Cole’s blood could have been drawn pursuant to a warrant before 2:00 a.m., only an hour and forty minutes after it was actually drawn. Therefore, this fails to reach the “now or never” level contemplated by exigent circumstances precedent. *See King*, 131 S.Ct. at 1856 (need to prevent imminent destruction of evidence sufficient justification for warrantless search); *Tata v. State*, No. 01-12-01119-CR,

2014 WL 4085462 (Tex. App.—Houston [1st Dist.] Aug. 19, 2014, pet. filed) (burning building created exigency justifying warrantless entry by fire officials and the search and seizure of arson evidence because destruction was imminent).

No attempt was made to obtain a warrant in this case, and even though Higginbotham knew neutral magistrates were on call and available to consider warrant requests, he did not speak to anyone about obtaining a warrant. Unlike in *Pearson*, there were about one dozen police officers on the scene in this case, and this accident happened as one group of officers' shift was ending and another group's was beginning. There is no indication that officers not on the scene were unavailable to help obtain a warrant. Finally, there is no evidence of the rate at which the drug was dissipating from Cole's bloodstream. As per our findings hereinabove, having examined the totality of the circumstances, we find that the State failed to show that the warrantless blood draw was justified by exigent circumstances. *Id.*

III. Harm Analysis

Because we find that the State failed to meet its burden, we must now perform a harm analysis. The admission of evidence obtained in violation of the Fourth Amendment is subject to constitutional harm analysis pursuant to Rule 44.2(a) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2(a); *Hernandez v. State*, 60 S.W.3d 106 (Tex. Crim. App. 2001). "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, [we] must reverse [the] judgment of conviction or punishment unless [we] determine[] beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a). The harmless error inquiry under Rule 44.2(a) should adhere strictly to

the question of whether the error committed in a particular case contributed to the verdict obtained in that case. *Snowden v. State*, 353 S.W.3d 815, 821 (Tex. Crim. App. 2011).

Here, the results of the blood test were introduced through the testimony of an expert witness, Schwane, a toxicological chemist. He characterized the methamphetamine level in Cole's blood sample as being at "the very high end of a therapeutic range" and testified that such a level could cause intoxication. We are unable to find beyond a reasonable doubt that this evidence did not contribute to the verdict. While there is testimony that Cole was driving erratically and giving incoherent answers after the accident, and Cole admitted to taking methamphetamine that day, there is no evidence of how much he took, when it was ingested, the method of ingestion, or the rate at which it dissipated from his body. The testimony as to the precise amount of methamphetamine in his bloodstream was very important.

Accordingly, we reverse the trial court's judgment and remand the case for a new trial. Because our ruling on Cole's first point of error is dispositive, we need not address his second point of error.

Jack Carter
Justice

CONCURRING OPINION

The elephant in the courtroom here (and the matter barely touched upon by the majority opinion) is the good-faith exception to the exclusionary rule. In its brief and during oral argument, the State relied almost exclusively on the alleged existence of exigent circumstances

to exculpate it from the need to obtain a search warrant before having taken a sample of Cole's blood.

Until the United States Supreme Court issued its ruling in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), many judges and most law enforcement agencies in Texas believed that implied consent laws relieved authorities of the need to obtain a search warrant for a blood draw when there was intoxication of a driver on a public roadway suspected and the suspected miscreant refused to provide a breath-test specimen. If we are to be candid, we will recognize that the genuine reason that the police department did not promptly seek a search warrant to draw a sample of Cole's blood likely had nothing to do with the severity of the situation or the lack of idle police officers who would have been available to seek a search warrant; rather, the police, relying on the implied consent laws of Texas, did not believe that such a warrant was required.

Even though the good-faith exception to the exclusionary rule was not strongly argued by the State, it is not necessary for the State to raise an issue at either the trial court level or at the court of appeals level if it elects not to do so; it may raise it for the very first time when presented to the Texas Court of Criminal Appeals. *See Canida v. State*, 434 S.W.3d 163 (Tex. Crim. App. 2014). Although the State did not raise this argument at trial and only touched on it at the appellate level, we may address it. *See McClintock v. State*, No. PD-0925-13, 2014 WL 4843959 (Tex. Crim. App. Oct. 1, 2014) (holding that State may raise good-faith exception to exclusionary rule at any time provided it was prevailing party at trial). Therefore, I think it wise for us to demonstrate that our Court has considered the potential application of the good-faith exception to the exclusionary rule.

The exclusionary rule is not found anywhere in the United States Constitution. Rather, it is a court-mandated remedy for violations of the Fourth Amendment wherein the United States Supreme Court held that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). “The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment.” *Davis v. Mississippi*, 394 U.S. 721, 724 (1969). The exclusionary rule is a “last resort” sanction designed to deter police misconduct. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011).

The determination by the United States Supreme Court in *McNeely* that the implied consent laws of the states did not work to abrogate the necessity of obtaining search warrants for blood draws came as a surprise to many in the law enforcement community. *McNeely*, 133 S.Ct. 1552. The majority has said, “New rules for the conduct of criminal prosecutions apply retroactively to all cases pending on direct appeal or not yet final at the time the new rule is announced regardless of whether they constitute a clear break from past precedent” and cites cases to prove that point. An exception to this general rule is the good-faith exception.

The United States Supreme Court (looking back to the original purpose of using the exclusionary rule to deter intentional or reckless disregard of Constitutional protections under the Fourth Amendment) has held that when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the deterrence rationale loses much of its intended force, having the result that the exclusionary rule cannot “pay its way” by insuring compliance with Constitutional safeguards.

Davis, 131 S.Ct. at 2427–28. Therefore, under the circumstances of the good-faith belief as mentioned, there is a valid exception to the exclusionary rule mandated for the enforcement of United States constitutional Fourth Amendment protections.

However, despite that commonly-held belief that Texas’ implied consent law provided cover to circumvent the necessity of obtaining a search warrant, it appears that this wide belief was not the law in Texas anyway. The Texas good-faith exception is much more limited than that announced by the federal courts.

Unlike the federal, judge-made exclusionary rule, the Texas good-faith exception is a statutory rule that provides an exception to the exclusion of unlawfully obtained evidence only if the law enforcement officer was “acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.” TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (West 2005); *see Douds v. State*, 434 S.W.3d 842, 861 (Tex. App.—Houston [14th Dist.] 2014, pet. granted) (en banc). The Texas “Court of Criminal Appeals has previously rejected an effort to broaden the [Texas] good-faith exception using federal precedent. . . .” *Douds*, 434 S.W.3d at 861–62 (citing *Howard v. State*, 617 S.W.2d 191, 193 (Tex. Crim. App. 1979) (op. on reh’g) (declining to apply federal good-faith doctrine to Texas statutory good-faith exception)). Since “the Texas good faith exception is more limited than the scope of its federal counterpart . . . an officer’s good faith reliance on the law or existing precedent is not recognized as an exception to the Texas exclusionary rule.” *State v. Jackson*, 435 S.W.3d 819, 831 (Tex. App.—Eastland 2014, pet. granted) (citations omitted). Accordingly, because no warrant was issued in this case, the Texas good-faith exception does not apply. *See Jackson*, 435 S.W.3d at 831; *Douds*, 434

S.W.3d at 862; *State v. Anderson*, No. 09-13-00400-CR, 2014 WL 5033262, at *14 (Tex. App.—Beaumont Oct. 8, 2014, no pet. h.).

Apparently, then, the police could not rely on their apparently good-faith belief that no search warrant was required before they took a sample of Cole’s blood.

Bailey C. Moseley
Justice

Date Submitted: September 24, 2014
Date Decided: December 18, 2014

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