IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHARLES JARETT JOHNSON,
Appellant.

No. 2 CA-CR 2015-0221
Filed March 15, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20141834001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Terry M. Crist III, Assistant Attorney General, Phoenix
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Charles Johnson was convicted after a jury trial of one count of endangerment involving a substantial risk of imminent death; aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with a blood alcohol level of .08 or more, both while his license was suspended or revoked; and one count of driving a vehicle with an illegal drug or its metabolite in his body. Johnson was sentenced to concurrent terms totaling 4.5 years' imprisonment. He argues the trial court erred in denying his motion to suppress blood evidence seized without a warrant. We find no error and therefore affirm.

Factual and Procedural Background

¶2 In reviewing the trial court's ruling on Johnson's motion to suppress, "we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014); *see also State v. Reyes*, 238 Ariz. 575, ¶ 2, 364 P.3d 1134, 1135 (App. 2015). At approximately 8:40 p.m. on May 17, 2013, Pima County Sheriff's Deputy Brett Bernstein received a call about helping "with the investigation of a serious injury collision" involving Johnson. Bernstein went to University Medical Center to determine the seriousness of Johnson's injuries and whether he exhibited any signs of impairment. At the hospital, Bernstein learned Johnson's vehicle had crossed the center line of a street and collided head-on with another vehicle. Johnson had serious and life-threatening injuries and deputies at the scene had detected the odor of alcohol on his breath and found an open container of alcohol inside his car.

¶3 Bernstein arrived at the hospital around 9:00 p.m., and when Johnson arrived shortly thereafter, Bernstein saw a scene "common for someone who was going to the hospital with serious life-threatening injuries." Johnson was surrounded by a team of medical professionals, including "four or five doctors, four or five nurses," and several people "note taking." The doctors and nurses were "frantically giving out orders" and "taking the different vital signs."

¶4 Johnson was intubated, and the medical staff took "X-rays and portable scans of his abdomen." Bernstein overheard the medical staff "talking about bleeding here and there." At some point, Bernstein learned the medical staff was going to perform several tests, including a scan of Johnson's head to determine whether he had sustained any head injuries. Bernstein could not tell if Johnson was conscious or not, only that "he was out of it." Johnson's "eyes were open, but he wasn't responding to anything." Johnson moved only insofar as he reacted to pain and to medical tests being performed on his body. "But he didn't seem all there." Bernstein's observations at the hospital led him to conclude Johnson "was dying or . . . gravely injured."

¶5 Bernstein watched in the emergency room with two test tubes in hand until a nurse noticed him and asked if he needed a blood sample drawn. Bernstein asked if blood was being drawn for medical purposes. When the nurse told him blood testing had been ordered, Bernstein gave her his tubes. At 9:16 p.m., the nurse drew between five and seven tubes of blood for the hospital and then filled the tubes Bernstein had provided. Analysis of the blood, which was admitted at trial, revealed an alcohol concentration of .280.

¶6 The trial court denied Johnson's motion to suppress the blood, concluding it had been drawn pursuant to the medical blood draw exception. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 Johnson contends the trial court should have granted his motion to suppress, arguing (1) no exigent circumstances allowed a warrantless seizure of his blood and (2) the seizure violated his Fourth Amendment rights because "the sample collected and tested was not a portion of the blood collected for medical purposes." We review a "court's ruling on [a] motion to suppress for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). "A blood draw is a search under the Fourth Amendment to the United States Constitution; therefore, to comply with the Fourth Amendment, law enforcement officers must first obtain a warrant or consent, or there must be an exception to the warrant requirement." *Reyes*, 238 Ariz. 575, ¶ 6, 364 P.3d at 1135 (citation omitted).

¶8 Arizona has codified one such exception in A.R.S. § 28-1388(E), which in part provides:

> [I]f a law enforcement officer has probable cause to believe that a person has [committed a DUI offense] and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

Before any such warrantless blood draw, however, (1) there must be "probable cause . . . to believe the person has violated" the DUI statute; (2) "exigent circumstances [must be] present"; and (3) "the blood [must be] drawn for medical purposes by medical personnel." *State v. Cocio*, 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985). Exigent circumstances are those which "'make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, 563 U.S. 452, 460 (2011), *quoting Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (alteration in *King*).

¶9 "[I]n some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1559 (2013). In *Schmerber v. California*, the Court, recognizing the evanescent nature of alcohol in blood, deemed it reasonable for the officer to "secure evidence of blood-alcohol content." 384 U.S. 757, 770-71 (1966). There, "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident," allowing the officer "no time to seek out a magistrate and secure a warrant." *Id.* The Court concluded, under the circumstances, the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant . . . threatened 'the destruction of evidence.'" *Id.* at 770, *quoting Preston v. United States*, 376 U.S. 364, 367 (1964).

¶10 However, "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically." *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1563. Rather, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* "[S]ome 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." *Id.* at ___, 133 S. Ct. at 1561. But, "[i]n 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." *Id.*

¶11 "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness'. . . ." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Id.* at 404, *quoting Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis and alteration in *Stuart*).

¶12 Johnson argues there were no exigent circumstances sufficient to allow the warrantless seizure of his blood. According to Johnson, the deputy had enough time to apply for a warrant because

he arrived at the hospital before Johnson, he waited an additional ten to sixteen minutes before he was approached by the nurse, and there was no testimony that any medical procedures would have interfered with the officer's ability to get a warrant before seizing Johnson's blood. Johnson further argues law enforcement's ability to obtain search warrants by telephone, *see* A.R.S. § 13-3914(C), makes the time for obtaining a search warrant minimal (thirty minutes or less). Additionally, because A.R.S. § 28-1381(A)(2) makes it a crime to have "an alcohol concentration of 0.08 or more within two hours of driving," "as long as a chemical analysis is obtained within two hours of driving, it is admissible *per se*." Taken together, Johnson urges, the deputy did not face "any . . . circumstances [that] might have created an exigency justifying the warrantless seizure of [his] blood."

¶13 We agree with the state that Bernstein met each of the requirements set forth in *Cocio*: he had probable cause to believe Johnson had violated the DUI statute, there were exigent circumstances, and Johnson's blood was drawn by medical personnel for medical purposes. 147 Ariz. at 286, 709 P.2d at 1345. Bernstein was called based on a report that a vehicle had crossed the center line and collided with an oncoming vehicle. And he had been informed there were "signs of alcohol ingestion on the scene," including an open container of alcohol in the vehicle. Johnson does not dispute this was sufficient evidence to provide probable cause.

¶14 As to the presence of exigent circumstances, more than thirty-five minutes passed between the time Bernstein was informed of the accident and the time the blood draw occurred. Bernstein did not know Johnson's exact condition or what possible medical procedures would be needed following any testing. But, as described above, he testified he had observed Johnson receiving emergency medical treatment. And, as the state argued below, the additional testing Bernstein was told would take place could have resulted in emergency surgery that would have removed Johnson from the emergency room for an extended period of time. Under these circumstances, it was reasonable for the deputy to believe Johnson had life threatening injuries or was gravely injured and that exigent circumstances therefore existed.

¶15 The medical-blood-draw exception will not apply every time a suspected drunk driver is brought to the hospital. In this case, however, the apparent severity of Johnson's injuries, the potential loss of access to Johnson due to medical tests and treatment, the length of time that had passed since the accident, and the evanescent nature of alcohol combined to create an exigency that made it reasonable for the deputy to obtain the sample of blood without a warrant pursuant to the medical blood draw exception.

¶16 Citing *State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127 (App. 1998), Johnson also argues "the [s]tate must make some factual showing that exigent circumstances exist to justify a warrantless blood draw." *Flannigan*, however, did not involve a blood draw pursuant to the medical blood draw exception. 194 Ariz. 150, ¶ 14, 978 P.2d at 153. Rather, the court in *Flannigan* considered the "rote application" of a department policy "that exigent circumstances always exist in vehicular manslaughter and aggravated assault cases." *Id.* ¶ 25. Such was not the case here. Rather, as we concluded above, the state established that exigent circumstances existed.

¶17 Johnson also contends the portion of his blood provided to Bernstein was not "drawn for medical purposes" as required by *Cocio*, 147 Ariz. at 286, 709 P.2d at 1345. He argues "the blood provided to the deputy was not a portion of the sample which was ultimately collected by a nurse for . . . medical purposes. Rather, it was an entirely separate sample collected by the nurse solely for law enforcement purposes and provided to the deputy."

¶18 Johnson makes the same argument that was rejected in *Lind v. Superior Court*, 191 Ariz. 233, 954 P.2d 1058 (App. 1998). There, a hospital had a policy whereby it initially drew "blood for medical reasons . . . and later release[d] a portion of that blood" upon request by an officer certifying "that probable cause exist[ed] to believe the patient ha[d] violated the drunk-driving law." *Id.* ¶ 3. If the medical professional chose to draw extra blood for law enforcement, they would draw "two 7ml grey-topped vials of blood, fill[] out a chain of custody form, and put[] the vials in a locked refrigerator." *Id.* ¶ 4. The defendant claimed "the extra blood was

not drawn 'for medical purposes' within the meaning of the statute." *Id.* ¶ 16.

¶19 The court rejected the defendant's argument, holding when a hospital draws a blood sample, it "draws the entire sample 'for medical purposes' within the meaning of the statute." *Id.* ¶ 17. The court noted "that any other interpretation of the statute would run counter to common sense and sound medical practice," because the language of the statute "requires medical personnel to provide a law-enforcement officer with a portion of a blood sample 'sufficient for analysis.'" *Id.* ¶ 18. And "[u]nless medical personnel withdrew more blood than necessary for their own medical testing, they would be unable to provide a sufficient blood sample to police while retaining enough for their own purposes." *Id.*

¶20 Although *Lind* involved a hospital policy giving discretion to medical professionals to draw extra blood and preserve it for possible law enforcement use, as opposed to a deputy arriving at a hospital with empty vials in case a blood draw was performed, the reasoning behind the holding applies equally here. Section 28-1388(E) requires that if "a sample of blood" is taken from a person "law enforcement . . . has probable cause to believe . . . has violated" A.R.S. § 28-1381, then "a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes." Under Johnson's argument, medical professionals would be required "either [to] take a second blood sample for their own purposes, or fail to comply with the statute." *Lind*, 191 Ariz. 233, ¶ 18, 954 P.2d at 1062. "The minimal intrusion by law enforcement from 'merely . . . sampling off of an additional portion of the defendant's blood' seems preferable to a second needle puncture occasioned by a law enforcement officer's request for a portion of the first sample." *Id.*, *quoting Cocio*, 147 Ariz. at 287, 709 P.2d at 1346. Furthermore, because "a hospital retains custody and control of all blood" at the time it is drawn

> all of the blood is [drawn] "for medical purposes" unless a portion of it is demanded for law-enforcement purposes. . . . Only when the police request and receive the blood sample does it take on a legal,

> rather than medical, purpose; at the time the sample is taken, its purpose is solely medical.

Id. ¶ 19. Accordingly, we reject Johnson's argument. The trial court did not abuse its discretion by denying Johnson's motion to suppress.

Disposition

¶21 For the foregoing reasons, we affirm Johnson's convictions and sentences.