IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JENNIFER C. DUSAN,

Appellant,

v. Case No. 5D19-2987

STATE OF FLORIDA,

Appellee.

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Opinion filed May 14, 2021

Appeal from the Circuit Court for Brevard County, John M. Griesbaum, Judge.

William R. Ponall, of Ponall Law, Maitland, and Michael J. Snure, of Michael J. Snure, P.A., Winter Park, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Jennifer Dusan appeals her convictions for DUI manslaughter and DUI causing property damage following a fatal two-car collision in 2014 that she caused. She argues that the trial court erred in not suppressing a warrantless, forced blood draw in the absence of exigent circumstances. *Missouri v. McNeely*, 569 U.S. 141, 152 (2013), sets forth a clear rule: "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." Under the circumstances of this case, the trial court erred by denying Appellant's motion to suppress, and we reverse for a new trial in which the results of the blood draw will be inadmissible.

This crash occurred in Brevard County shortly before midnight March 1, 2014. Five deputy sheriffs along with emergency medical responders were already at the accident scene when Florida Highway Patrol Trooper VanAntwerp arrived at approximately 12:30 a.m. on March 2, 2014. VanAntwerp performed the primary crash investigation and the related criminal DUI investigation.

Within minutes of his arrival, medical responders advised him that a passenger in the other car had a serious head injury as a result of the crash and was being taken immediately to the hospital. That serious injury,

together with probable cause developed at the scene by VanAntwerp that Appellant was driving under the influence of alcohol, compelled VanAntwerp to obtain a forensic blood draw pursuant to section 316.1933(1)(a), Florida Statutes (2013).[1] Within thirty minutes of VanAntwerp's arrival, two more Florida Highway Patrol troopers arrived on scene; one of whom was a traffic homicide investigator.

Somebody at the scene advised VanAntwerp that Appellant was the driver of the vehicle that had crossed US 1 at a high rate of speed, crashing into the car in which the victim was a passenger. After observing indications that Appellant may have been under the influence of alcohol, VanAntwerp read Appellant her *Miranda*[2] rights. Appellant told him that she was the driver

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[1] Section 316.1933(1)(a) provides in pertinent part:

> If a law enforcement officer has probable cause to believe that a motor vehicle driven by . . . a person under the influence of alcoholic beverages [or] any chemical substances . . . has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving . . . the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances . . . . The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test. The blood test shall be performed in a reasonable manner.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

and sole occupant of the Mustang, that it belonged to her husband, and that she lost control while making a turn because she was not familiar with driving that particular car. She admitted that she had consumed a rum and coke around 5 p.m., following which she took a nap.

Trooper VanAntwerp instructed her on how to perform certain field sobriety tests or exercises. She did poorly on those she attempted. Claiming that she had a pre-existing knee injury, Appellant declined to attempt any tests that involved walking. Because VanAntwerp noted her slurred speech, the smell of alcohol on her breath, her blood-shot eyes, and her poor performance on the field sobriety tests, he arrested her at 2:17 a.m. Given the circumstances of the serious injury and Appellant's possible intoxication, he wanted to obtain a blood sample from her to be tested. While still at the crash scene, Appellant refused VanAntwerp's two requests for a voluntary blood draw.

Minutes after her arrest, VanAntwerp drove Appellant to a nearby hospital to obtain a forensic blood draw and to obtain medical clearance for Appellant to be placed in the Brevard County jail. Neither VanAntwerp nor any of the seven other law enforcement officers on the scene made any effort whatsoever to obtain a warrant to require Appellant to submit to the blood draw. At 3:02 a.m., shortly after VanAntwerp learned that the injured

passenger from the other car had died of her injuries, a nurse performed the involuntary blood draw at the hospital. The Florida Department of Law Enforcement (FDLE) analysis of Appellant's blood revealed that, three hours post-collision, she had an unlawfully high blood alcohol level of .130 grams of alcohol per 100 milliliters and a reportable, trace amount, 10 nanograms per 100 milliliters, of Xanax.

Appellant moved to suppress the results of the warrantless blood draw as to the alcohol and moved in limine to exclude mention that she had Xanax in her system at the time of the crash. The trial court denied her motions, and the evidence obtained from the warrantless blood draw was relied upon heavily by the State in convincing the jury of Appellant's guilt.

In *State v. Liles*, decided after this fatal collision, we confirmed that *McNeely* and earlier federal and Florida cases made it clear, "[t]o comply with the Fourth Amendment, law enforcement officers must obtain a warrant or consent for a blood draw, or there must be some other exception to the warrant requirement." 191 So. 3d 484, 486 (Fla. 5th DCA 2016). One such exception to the warrant requirement is "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *McNeely*, 569 U.S.

at 148–49 (internal quotation marks omitted) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

It is the State's burden to prove that such an exception to the warrant requirement, in this case exigent circumstances, applies. *Liles*, 191 So. 3d at 486. As we more fully outline below, the State failed to meet its burden at the suppression hearing of showing that the procurement of a warrant was not feasible due to the exigencies of the situation. *See Diaz v. State*, 34 So. 3d 797, 802 (Fla. 4th DCA 2010).

The Supreme Court rejected the State of Missouri's argument that categorically, all drunk driving investigations involve per se exigencies because the body's natural metabolization of alcohol results in the loss of critical evidence simply with the passage of time. *McNeely*, 569 U.S. at 146, 156. *McNeely* recognized 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 156. However, the Supreme Court held that "[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*. We decline the State's request in the instant appeal to adopt a per se rule that exigent circumstances categorically

exist in all injury causing drunk-driving investigations, because it is completely inconsistent with *McNeely*.

The Supreme Court provided a very useful example in *McNeely* of when exigent circumstances are not present in a drunk-driving investigation:

> Consider for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

McNeely, 569 U.S. at 153–54.

Here, there were eight law enforcement officers on the scene. According to the evidence, none of them made any attempt to find out who the on-call assistant State Attorney was nor which judge might be available nearby or anywhere in Brevard County in order to secure a warrant. None of the officers attempted to make contact with any department's legal advisor. Clearly, the law enforcement officers, including VanAntwerp, were on notice very early in the investigation that a forensic blood draw would be required given the severity of the victim's injuries which was directly communicated by on-scene medical personnel. Under *McNeely* those circumstances would not excuse obtaining a warrant for the forensic blood draw, and they do not do so here. We must likewise decline the State's

request to apply the good faith exception discussed in *Liles*, given the crystal-clear example from *McNeely* which should have guided the officers in this case. *Liles*, 191 So. 3d at 489–91. "After *McNeely*, law enforcement must obtain a warrant or later show that exigent circumstances prevented them from doing so." *Id*. at 489.

Accordingly, we hold that under the specific circumstances of this case, the trial court erred in denying Appellant's motion to suppress. We reverse Appellant's convictions and remand for a new trial in which all results of the blood test will be excluded. Based upon our decision, the remaining issues raised by Appellant are moot and need not be discussed.

REVERSED and REMANDED.

WALLIS and LAMBERT, JJ., concur.