STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 25, 2001
v	No. 229338 Calhoun Circuit Court
JAMES WILLIAM BRADY, Defendant-Appellee.	LC No. 00-001136-FH

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order dismissing the charges of operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4); MSA 9.2325(4), involuntary manslaughter, MCL 750.321; MSA 28.553, and failure to stop at a serious injury accident, MCL 257.617; MSA 9.2317.[1] We reverse and remand.

On January 14, 1999, defendant consumed alcohol with his friends.[2] The men departed in defendant's Jeep Cherokee with defendant behind the wheel. Defendant attempted to pass a truck in a far, curbside lane. Defendant struck the curb, lost control of the vehicle, and hit fence posts. The posts entered the windshield of the vehicle and struck the victim, passenger Jim Head, in the chest. Defendant did not stop the vehicle, but continued driving to a friend's home. Two other passengers urged defendant to stop driving and call 911 for assistance. Defendant arrived at the friend's home, and the other passengers carried the victim into the home because he could not walk by himself. As the victim lay on the floor, the other passengers implored defendant to call 911. Eventually, emergency help was called, and police arrived on the scene

[1] Defendant argued that prior to the commencement of trial, the prosecutor indicated that it would no longer pursue the third charge in the case. However, this discussion allegedly occurred off the record, and the assertion is not preserved by written order in the record on appeal. Accordingly, on remand, any dismissal should be evidenced by written order.

[2] We note that the record on appeal is not complete. Specifically, the first volume of the preliminary examination has not been presented on appeal. However, the key issue in the case involves a matter of law. Accordingly, the failure to provide a complete transcription of the record below does not preclude appellate review.

and performed revival procedures until an ambulance arrived. The victim did not survive the accident.

A forensic pathologist examined the body of the victim. The only external sign of injury was, in effect, a "branding" or "tattoo" on the chest of the decedent. Specifically, two rings appeared in the middle of the victim's chest where the fence post had landed. While the fence post did not impale the victim, the internal injuries suffered were overwhelming. The victim's ribs had been fractured with such force that the bones were cracked into spear shaped fragments that pierced the lungs. There was a laceration in the diaphragm, and the liver had split into three pieces. A piece of the liver was found compressing the lung. The aorta was also extensively damaged. The victim lost nearly fifty percent of his blood volume in a very short time frame. The loss of fifteen to twenty-five percent of blood is sufficient to cause the death of a person. The pathologist determined that the cause of death was multiple, blunt force trauma associated with acute internal exsanguination or blood loss. Defendant had prior convictions for alcohol related driving offenses.

Prior to the commencement of trial, defendant moved to dismiss the charges based on the failure to advise defendant of his implied consent rights. Defense counsel argued that this issue was discovered during the course of examining the file. The prosecutor, when approached with the issue of the implied consent, conferred with Officer Bagwell regarding the procedure that had occurred. The prosecutor represented to the court that implied consent rights were not, in fact, given to defendant. Rather, Officer Bagwell arrested defendant and sought a search warrant to secure evidence of defendant's alcohol level. The prosecutor noted that the search warrant contained standard language indicating that implied consent rights had been given. However, the implied consent portion of the search warrant was erroneous, and the officer merely failed to strike that language from the standard form. Defense counsel argued that the failure to comply with the implied consent statute, MCL 257.625a; MSA 9.2325(1), required dismissal of the charges. The trial court agreed and dismissed the charges.

The prosecutor filed a motion for reconsideration. The prosecutor argued that the failure to advise defendant of implied consent rights had no bearing on the charges when the evidence was obtained pursuant to a search warrant. The prosecutor also argued that the affidavit in support of the search warrant was valid on its face despite the failure to strike the standard language regarding the implied consent statute. The trial court did not take testimony or rule on the validity of the search warrant. Rather, the trial court continued to hold that the failure to provide implied consent rights to defendant required dismissal of the charges.

The prosecutor argues that the trial court erred in applying the implied consent statute where evidence was gathered pursuant to a search warrant. We agree. Questions of law are reviewed de novo on appeal. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). Statutory interpretation presents a question of law. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). The Fourth Amendment of the United States Constitution, US Const, Am IV, and Const 1963, art 1, § 11 of the Michigan Constitution provide that a person is secure from unreasonable search and seizures. No warrant shall issue without probable cause supported by oath or affirmation. Const 1963, art 1, § 11. Evidence obtained pursuant to a valid search

warrant is admissible against the defendant. *People v Barkley*, 225 Mich App 539, 544; 571 NW2d 561 (1997).

Defendant argues that police officers were obligated to comply with the implied consent statute. The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). The Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). Where legislative amendments fail to suggest an intention to modify or eliminate a judicial construction, the Legislature's silence is construed as an affirmance of the appellate court's interpretation. *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989).

The creation of the implied consent statute was intended to obtain the best evidence of blood alcohol content at the time of the arrest of a person believed to be driving while intoxicated and prevent such persons from driving on the highways. *People v Campbell*, 236 Mich App 490, 498; 601 NW2d 114 (1999). The purpose of the implied consent statute was to enable the state to obtain convictions without being unduly burdened in the proofs of the crime. *Id*. A driver is forced to consent to a blood alcohol test or face consequences that include suspension of his operator's license and six points on his driver's record. MCL 257.625a(6)(b)(*v*); MSA 9.2325(1)(6)(b)(*v*). Review of the plain language of the statute reveals that there is no prohibition on the acquisition of evidence through a search warrant in accordance with the Fourth Amendment procedure. *Valentin, supra*.

Furthermore, interpretative case law has concluded that the implied consent statute is not invoked when the evidence is obtained pursuant to a search warrant. In *People v Cords*, 75 Mich App 415, 418; 254 NW2d 911 (1977), the defendant was involved in a head-on collision with another vehicle. A deputy arrived on the scene and determined that the driver of the other vehicle was killed and the defendant was injured, requiring medical treatment. The deputy also found the smell of intoxicants on the defendant's breath, alcohol spilled in the defendant's vehicle, and a partially open beer can on the front seat of the vehicle. Based on the evidence discovered at the scene, a search warrant to obtain a blood sample was obtained. On appeal, the defendant argued that the blood alcohol test results were not admissible when he was not advised of his right to have a person of his own choosing perform an additional blood alcohol test on the sample. This Court disagreed because of the execution of the search warrant:

> By obtaining this warrant prior to extracting blood from defendant, authorities removed the issue of consent from this case and therefore removed any question of admissibility from the "implied consent" statute. Because of the warrant, we perceive no possible reliance by hospital personnel on the protections of the statute, no triggering of presumptions under the statute and no need to observe specified statutory procedures. In short, the "implied consent" statute was simply not a factor in obtaining the blood sample and test results and consequently does not act to limit the evidentiary use to which these test results may be put. [*Id*. at 421 (citations omitted).]

Thus, the constitutional procedure for obtaining evidence while safeguarding the protections afforded a person has not been usurped by a statute created to prevent intoxicated persons from driving on highways thereby endangering the general public and designed to enable the state to obtain convictions without being unduly burdened in its proofs. *Campbell, supra*; *Cords, supra*.

This conclusion, that the acquisition of a search warrant for blood alcohol evidence removes any question of admissibility from the implied consent statute, has repeatedly been upheld by this Court since its initial adoption in 1977. See *People v Jagotka*, 232 Mich App 345, 353; 591 NW2d 303 (1998), rev'd on other grounds 461 Mich 274 (1999); *Manko v Root*, 190 Mich App 702, 704; 476 NW2d 776 (1991); *People v Snyder*, 181 Mich App 768, 770; 449 NW2d 703 (1989); *People v Hempstead*, 144 Mich App 348, 353; 375 NW2d 445 (1985). The implied consent statute has been amended in 1999, 1997, 1995, 1993, and 1992. The Legislature did not amend the statute to modify or eliminate this judicial construction, and the silence is construed as an affirmance of the interpretation. *Craig, supra*. Accordingly, the trial court erred in concluding that the failure to comply with the implied consent statute resulted in the dismissal of the charges when a search warrant was executed for evidence of defendant's blood alcohol level.

We note that our analysis of this issue has been based on the representations that the officer did not act in accordance with the implied consent statute, but rather obtained a search warrant in lieu thereof. When the issue of the actions of the officer was raised, the parties did not present testimony on the record. Thus, the allegation, that the false information in the affidavit regarding compliance with the implied consent statute was merely a mistake and should have been stricken, has not been established by sworn testimony. In order to obtain suppression of evidence based on the inclusion of alleged false information in an affidavit, the defendant must show, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that false information was necessary to a finding of probable cause. *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000). Accordingly, we remand for an evidentiary hearing, if necessary, to determine the validity of the search warrant used to obtain the blood alcohol evidence in light of the failure to take testimony from the officer regarding this issue.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Mark J. Cavanagh