In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED96402
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Cape Girardeau County
vs.	)	
	)	Hon. Benjamin F. Lewis
TYLER G. MCNEELY,	)	
	)	Filed:
Respondent.	)	June 21, 2011

The State of Missouri appeals from the trial court's grant of Tyler G. McNeely's ("Defendant") motion to suppress evidence. Defendant was charged with driving while intoxicated, Section 577.010, RSMo 2000.[1] In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant's person after he was arrested for driving while intoxicated because the sample was taken without Defendant's consent and without a search warrant. We would reverse; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

On October 3, 2010, Corporal Mark Winder ("Corporal Winder") observed Defendant driving above the posted speed limit. As he was following Defendant before he pulled him over, Corporal Winder observed Defendant crossing the center line of the road three times. When he made contact with Defendant, he detected "a strong odor of intoxicants

[1] All further statutory references are to RSMo 2000, unless otherwise indicated.

on his breath and his eyes were glassy and bloodshot." Defendant stated he had had a couple of beers, and when Corporal Winder asked him to step out of the vehicle, he was unstable on his feet and swayed while maintaining his balance.

Corporal Winder administered four field sobriety tests on Defendant, and Defendant performed poorly on each of them. Defendant refused to give a breath sample into a portable breath tester and was subsequently placed under arrest for driving while intoxicated.

Corporal Winder began to transport Defendant to the Cape Girardeau County Jail to administer a breath test, but Defendant stated he would refuse to take a breath test. Thus, Corporal Winder transported Defendant to the St. Francis Medical Center Lab to obtain a blood sample.

Corporal Winder read Defendant the Missouri Implied Consent and asked that he provide a blood sample. Defendant refused. Corporal Winder informed Defendant that, pursuant to Missouri law, he was going to obtain the blood sample against his refusal. At that point, a lab technician withdrew a blood sample from Defendant. The sample showed Defendant's blood-alcohol level was 0.154 percent. Corporal Winder immediately took possession of the sample and transported Defendant to the Cape Girardeau County Jail. After arriving at the jail, Corporal Winder again read Defendant the Missouri Implied Consent and asked that he submit to a breath test, but Defendant again refused.

The State filed charges against Defendant for driving while intoxicated. Defendant subsequently filed a motion to suppress the blood sample taken from Defendant because it was taken from Defendant without his consent and without a warrant.

In ruling on the motion, the trial court found this case did not involve exigent circumstances and, relying on Schmerber v. California, 384 U.S. 757 (1966), it found the

Fourth Amendment requires either a warrant or exigent circumstances to withdraw blood without consent. The trial court noted that the holding in Schmerber, where the results of the blood test were found to be admissible, was limited to the "special facts" of that case, which included a delay of two hours while the officer investigated the scene of an accident before delivering the defendant to the hospital and the court's specific finding that there was no time to seek out a magistrate and secure a warrant. As a result, the trial court granted Defendant's motion to suppress evidence obtained by the warrantless blood withdrawal in this case where there was no accident and no substantial delay between the traffic stop and the blood draw and both a prosecutor and judge were readily available to issue a search warrant. The State appeals the suppression of the evidence.

In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated because the legislature eliminated the "none shall be given" language from Section 577.041, and that was the only provision under Missouri law barring police officers from obtaining nonconsensual and warrantless blood samples. We agree.

Our review of a trial court's ruling on a motion to suppress is limited to a determination of sufficiency of the evidence to sustain the trial court's finding. State v. Kriley, 976 S.W.2d 16, 19 (Mo. App. W.D. 1998). At the hearing on the motion, the State has the burden of going forward with the evidence and the risk of non-persuasion to show by a preponderance of the evidence that a motion to suppress should be overruled. Section 542.296.6; State v. Cook, 273 S.W.3d 562, 567 (Mo. App. E.D. 2008). The burden is placed upon the State because warrantless searches are presumptively unreasonable. State v.

Weddle, 18 S.W.3d 389, 396 (Mo. App. E.D. 2000). We will affirm the judgment of the trial court if there is sufficient evidence which would support the trial court's decision to sustain the motion to suppress on any ground alleged in the defendant's motion. Kriley, 976 S.W.2d at 19. We will only reverse the trial court's judgment if it is clearly erroneous. Id. The trial court's judgment is clearly erroneous if we are left with the definite and firm belief that a mistake has been made. Id.

In reviewing the trial court's decision to grant a motion to suppress, we view the evidence presented and all reasonable inferences drawn therefrom in the light most favorable to the trial court's order and disregard all evidence and inferences to the contrary. State v. Abeln, 136 S.W.3d 803, 808 (Mo. App. W.D. 2004). We defer to the trial court's factual findings, and we review *de novo* whether the Fourth Amendment was violated as a matter of law under the facts found by the trial court. Id.

The Fourth Amendment to the United States Constitution guarantees that citizens will not be subject to unreasonable searches or seizures. U.S. Const. Amend. IV; Simmons v. State, 247 S.W.3d 86, 90 (Mo. App. S.D. 2008). A search conducted without a warrant is presumptively unreasonable. Id. An exception to the general rule that a search requires a warrant exists when exigent circumstances are present. Id. Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. Id. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. Schmerber, 384 U.S. at 767.

Here, we are dealing with questions of law and, thus, our review is *de novo*. The State contends we are confronted with a two-prong inquiry here: (1) is a nonconsensual and

warrantless blood draw under these circumstances a reasonable search and seizure under the Fourth Amendment; and (2) if so, does the Missouri implied consent law prohibit such nonconsensual and warrantless tests? We will begin with the first question.

The watershed case in this area of law is Schmerber. In Schmerber, the defendant was convicted of driving an automobile while under the influence of intoxicating liquor. Schmerber, 384 U.S. at 758. The defendant had been arrested for driving while intoxicated at a hospital while receiving treatment for injuries suffered in an accident involving the car he had been driving. Id. At the direction of a police officer, a blood sample was taken from the defendant by a doctor at the hospital, and this sample showed he was intoxicated. Id. at 758-59. The report of this analysis was admitted at trial, even though the defendant objected because the blood had been drawn despite his refusal. Id. In affirming the admission of the blood sample at trial, the Supreme Court noted the officer might have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant threatened the destruction of evidence under the circumstances because the percentage of alcohol in the blood diminishes as the body functions to eliminate it from the system. Id. at 770-71. The Supreme Court noted "special facts" of this case included the fact that "time had to be taken to bring the accused to the hospital and to investigate the scene of an accident, [and] there was no time to seek out a magistrate and secure a warrant." Id. The Supreme Court found the defendant's rights under the Fourth Amendment had not been violated. Id. at 772.

While the Court in Schmerber ostensibly relied on the "search incident to arrest" exception to the warrant requirement, subsequent courts have found it can be read as an application of the exigent circumstances exception to the warrant requirement. U.S. v. Berry,

866 F.2d 887, 891 (6th Cir. 1989). The court in Berry noted because "evidence of intoxication begins to dissipate promptly, it is evident in this case that there were exigent circumstances indicating the need to take such action." Id. While Berry involved a warrantless blood draw at the hospital some time after a one car accident and the defendant was unconscious and unable to give consent, the court did not justify its ruling that the blood draw occurred under exigent circumstances with any "special facts." Id. The court merely stated "[t]he officer had ample cause to believe that defendant was under the influence of alcohol. The method of testing was safe and reasonable and administered by qualified personnel. It was done only after there was a reasonable basis to effect this 'search and seizure.'" Id. at 890.

In State v. Faust, 682 N.W.2d 371, 373 (2004), the Supreme Court of Wisconsin found "the rapid dissipation of alcohol in the bloodstream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless[,] nonconsensual test of that individual's blood." In that case, the court went even further by saying a warrantless, nonconsensual blood test was permissible because the presumptively valid chemical sample of the driver's breath that the police already had did not extinguish the exigent circumstances justifying the warrantless, nonconsensual blood draw. Id. The facts of that case involved a routine traffic stop, executed because the license plates were not registered to the vehicle. Id. at 374. Upon approaching the vehicle, the officer smelled a strong odor of intoxicants and observed the driver slurring his speech. Id. The officer then administered a field sobriety test that the driver failed. Id. The driver then volunteered to submit to a preliminary breath test, which indicated his blood alcohol concentration was above the legal limit. Faust, 682 N.W.2d at 374. The driver was then placed under arrest

and taken to police headquarters where he performed another breath test, indicating his blood alcohol content was above the legal limit. Id. The officer then requested that the driver submit to a blood test, but the driver refused, at which point the officer transported him to a hospital and had a phlebotomist administer a blood test without ever seeking a warrant. Id. The results of the blood test were admitted into evidence and showed the driver had a blood alcohol content above the legal limit. Id. The court in Faust also rejected an argument that Defendant puts forth in this case, that is, that Schmerber should be narrowly interpreted and its holding limited to cases with "special facts," finding instead that "exigent circumstances exist based solely on the fact that alcohol rapidly dissipates in the bloodstream." Id. at 377.

Missouri courts have recognized and adopted the holding in Schmerber. In State v. Ikerman, 698 S.W.2d 902, 904-05 (Mo. App. E.D. 1985), the court noted Schmerber supports the general principle that the warrantless extraction of a blood sample without consent but incident to a lawful arrest is not an unconstitutional search and seizure and that the results of a blood test performed thereon are admissible in evidence. Thus, the implied consent statute authorizing a "search," that is, the extraction of blood for a blood alcohol test, without a warrant or actual consent does not offend the constitutional guarantees of due process or of freedom from unreasonable search and seizure of one who has first been arrested. Id.

Further, in State v. Lerette, 858 S.W.2d 816, 819 (Mo. App. W.D. 1993), a trooper arrived at the scene of a one car accident and spoke with the passenger in the vehicle who smelled of intoxicants and who indicated that the defendant had been driving the car at the time of the accident. The trooper also found several beer cans strewn among the wreckage debris including a partially full beer can in a Budweiser "coolie" holder next to the wrecked vehicle. Id. The accident involved a single vehicle driven by the defendant that for no

apparent reason ran 30 feet off the roadway, rolling and flipping over and resulting in serious injuries to the defendant. Id. The court found that considering that the trooper was aware of all of this evidence after he arrived at the scene, he had ample cause to believe that the defendant was under the influence of alcohol while he was driving his car at the time of the accident. Id. The court found these facts establish that the trooper had probable cause to believe that incriminating evidence would be found if the defendant's blood were tested. Id. When the trooper arrived at the hospital, the trooper could not tell if the defendant was conscious or not, but he could not communicate with him and therefore, could not obtain his consent to a blood test. Id. The trooper directed hospital personnel to conduct a blood test anyway, and the results of the blood test were later suppressed by the trial court on the defendant's motion. Id. That order was reversed, and the court noted

> considering that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence, this court finds that there were exigent circumstances warranting [the trooper's] actions and, as such, it would have been unreasonable to require him to take the time to obtain a search warrant.

Id.

In Faust, Berry, and Lerette, where the courts followed Schmerber in applying the exigent circumstances exception to the warrant requirement, the courts did not require any "special facts" to justify the application of the exigent circumstances exception. Instead, they merely rely on the evanescence of blood alcohol concentrations as creating exigent circumstances such that no warrant is needed to conduct a search. We note both Berry and Lerette involved defendants who were unconscious or unable to give consent, but with respect to getting consent while evidence of alcohol is metabolized, an inability to give consent is effectively the same as a refusal of consent; the police are forced to either get a

warrant or justify a blood test under exigent circumstances. We have no reason to require "special facts" in addition to the facts that the officer had ample cause to reasonably believe defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

We also note that while we are dealing with an intrusion into a person's body to obtain their blood, the Court in Schmerber noted extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Schmerber, 384 U.S. at 771. Further, writing over forty years ago, the Court noted "such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." Id.

Thus, we find Defendant's Fourth Amendment rights were not violated by the warrantless blood draw in this case.

We now turn to the question of whether the Missouri implied consent law prohibits such nonconsensual and warrantless tests. To further attempt to rid the highways of drunk drivers, our legislature enacted, like many other states, an "implied consent" statute. The theory behind this law is that the use of public streets and highways is a privilege and not a right, and that a motorist, by applying for and accepting an operator's license, "impliedly consents" to submission to a chemical analysis of his blood alcohol level when charged with driving while intoxicated. Gooch v. Spradling, 523 S.W.2d 861, 865 (Mo. App. W.D. 1975). Section 577.020, Cum. Supp. 2009, the implied consent statute, states in pertinent part:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of

> sections 577.019 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood pursuant to the following circumstances:
>
> (1) If the person is arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition; . . .
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> ***
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> The test shall be administered at the direction of the law enforcement officer whenever the person has been arrested or stopped for any reason.

Along with the implied consent statute, the legislature enacted a "refusal" statute, Section 577.041, RSMo Cum. Supp. 2010 which currently provides, in relevant part:

> If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577. 020, then evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMo, or section 577.010 or 577.012.

Previously, this provision provided:

> If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577. 020, then *none shall be given and* evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMo, or section 577.010 or 577.012.

Section 577.041.1 Cum. Supp. 2009. (emphasis added).

The previous version of Section 577.041 has been interpreted in State v. Trumble, 844 S.W.2d 22, 24 (Mo. App.W.D. 1992), where the court noted the statute meant a motorist "has the present, real option either to consent to the test or refuse it." The court further found the statute provided that if one chooses not to comply with the arresting officer's request, by refusing to take a chemical test, then evidence of that refusal may be admissible in a proceeding against the motorist and further that the motorist's license may be subject to

revocation. Id. The court also noted Section 577.041 provided the statutory requirements which must be satisfied in order to admit an arrestee's refusal into evidence, and, as a result, that section was more consistently read as providing a resource for the state in the prosecution of drunk driving cases rather than creating a "right" for an arrested motorist to refuse the test. Id.

However, no Missouri case has dealt directly with the import of the removal of the words "none shall be given" from Section 577.041. In State v. Smith, 134 S.W.3d 35, 36-37 (Mo. App. E.D. 2003), after arresting a driver for driving while intoxicated, an officer obtained a search warrant to draw blood after the driver refused to submit to a chemical test. The court in that case interpreted the "none shall be given" language of Section 577.041 and concluded that the provisions of Section 577.041 do not prohibit the admission of chemical test results obtained by warrant from a person arrested for driving while intoxicated who has refused a police officer's request to submit to a test. Id. at 38. The court noted the command that "none shall be given" was addressed only to the authority of law enforcement officers to proceed with a warrantless test under Chapter 577. Id. at 40.

Thus, the court in Smith found the "none shall be given" language prevented law enforcement officers from obtaining nonconsensual blood draws without a court-issued warrant. Subsequent to that holding, the legislature amended Section 577.041 to remove the words "none shall be given" from the statute. Thus, we are presented with the question of whether law enforcement officers are now permitted to obtain warrantless, nonconsensual blood draws when they have reasonable suspicion that a person is driving while intoxicated. We note the legislature is presumed to know the state of the law when it enacts a statute. State v. Prince, 311 S.W.3d 327, 334 (Mo. App. W.D. 2010). Further, the legislature is

presumed to intend what the statute says, and we give effect to the words based on their plain and ordinary meaning. Id. at 334-35. In light of our analysis above, we would conclude because of the recent revision of Section 577.041, removing the words "none shall be given," law enforcement officers are now permitted to order a warrantless blood draws when they have reasonable suspicion that a person is driving while intoxicated. However, no Missouri case has yet addressed the import of the removal of the words "none shall be given" from Section 577.041.

We would find the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated. However, in the light of the fact that no Missouri case has yet addressed the import of the removal of the words "none shall be given" from Section 577.041, which we believe involves a significant departure from current case law as represented by the Smith case, and the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

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ROBERT G. DOWD, JR., Judge

Kurt S. Odenwald, P.J. and
Gary P. Kramer, Sp.J., concur.