NO. COA13-627
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Brunswick County
No. 10 CRS 52854
12 CRS 3937

DANIEL HARRISON BRENNICK

Appeal by Defendant from judgment entered 30 November 2012 by Judge Thomas H. Lock in Brunswick County Superior Court. Heard in the Court of Appeals 8 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

John R. Mills for Defendant.

DILLON, Judge.

Daniel Harrison Brennick ("Defendant") appeals from judgment entered convicting him of second degree murder, challenging the trial court's order denying his motion to suppress evidence resulting from a warrantless, compelled blood draw sample. We affirm.

The evidence of record tends to show the following: On 7 May 2010 at approximately 9:30 P.M., Defendant went to a restaurant called Duffer's Pub and Grill at the Oak Island Golf Club, where Defendant imbibed alcohol. Employees offered to call a cab for Defendant, but Defendant said he had a ride. When the bar closed, one employee went outside and saw a "white truck speed off through the middle of the parking lot[.]"

Victoria Barber, a paramedic for Brunswick County, was riding in an ambulance on the night of 7 May 2010 and saw a "small white pickup truck" approach the ambulance from behind "very quickly." Barber said the vehicle "swerve[d] left and right." Barber said the vehicle passed the ambulance and "cut through the Food Lion parking lot" before "cut[ting] all the way to the other side of 211" and "turn[ing] right onto the Southport-Supply road, 211." Approximately five minutes later, Barber was dispatched to a vehicle accident and noticed that the vehicle involved in the accident was the same vehicle that had passed her.

At approximately 11:00 P.M., Defendant caused an accident on Highway 133 in Brunswick County when his northbound truck drifted over the center lane and collided with a Nissan before rolling several times. The driver of the Nissan died as a

result of the collision. Defendant was thrown from his vehicle and was unconscious when the paramedics arrived. Defendant was taken to the hospital and prepped for surgery; his leg was amputated.

Trooper Inman arrived at the scene of the collision and found chilled cans of Natural Light beer in and around Defendant's vehicle. After other law enforcement arrived, Trooper Inman went to the hospital where Defendant was being treated to "try to obtain a blood sample" from Defendant. It took Trooper Inman twenty to thirty minutes to reach the hospital. When he arrived, Trooper Inman learned that Defendant had possibly sustained life-threatening injuries, and hospital staff were attempting to stabilize Defendant so they could perform surgery. Trooper Inman was concerned that if Defendant went into surgery, he might lose access to Defendant. Accordingly, a blood draw took place while Defendant was unconscious and without a warrant or Defendant's consent.

Defendant was subsequently indicted on charges of second degree murder, driving while impaired, and felony death by motor vehicle.

On 20 November 2012, Defendant moved to suppress evidence seized as a result of the blood draw sample. On 29 November

2012, the trial court entered an order denying Defendant's motion to suppress, which contained the following findings of fact:

> 1. On 7 May 2010, at approximately 11:00 p.m., Trooper David Inman of the North Carolina Highway Patrol, responded to [a] call regarding a traffic accident on N.C. Hwy. 133 just north of Southport in Brunswick County. Trooper Inman arrived at the scene of the collision at approximately 11:30 p.m.
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> 2. Upon arrival, Trooper Inman observed a badly damaged Nissan automobile in the south bound lane of Hwy. 133. The driver, who Trooper Inman determined was the sole occupant of that vehicle, was deceased.
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> 3. Trooper Inman then observed another badly damaged vehicle off of the paved roadway. Upon questioning witnesses and emergency personnel at the scene, Trooper Inman determined that the driver of that vehicle had been travelling north on Hwy. 133 and had collided head-on with the Nissan.
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> 4. Trooper Inman further learned that the driver of that vehicle had been seriously injured and had been transported by emergency medical personnel to the nearest major hospital, New Hanover Regional Medical Center in Wilmington. Trooper Inman determined that that vehicle was registered to the defendant.
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> 5. Trooper Inman observed several cans of Natural Lite brand beer strewn about the area of defendant's vehicle. He also saw an open container of beer inside of that vehicle and noticed that it was cool to the touch. He detected a slight odor of alcohol

about defendant's vehicle.

6. Based on the witness['] statements, his observations on the scene, and his training and experience, Trooper Inman formed the opinion that the driver of defendant's vehicle probably was driving while impaired.

7. Trooper Inman was on the scene of the collision conducting his investigation for a period of 45 minutes to one hour. He then turned the scene investigation over to other troopers who had arrived and drove to New Hanover Regional Hospital. The trip to the hospital took between 20 and 30 minutes.

8. Upon arriving at the hospital, Trooper Inman determined that defendant was in the emergency room in critical condition with life-threatening injuries and was unconscious. A nurse told Trooper Inman that medical personnel were trying to stabilize defendant's condition for emergency surgery.

9. Trooper Inman knew that over two and a half hours had elapsed since the time of the collision. He knew that the nearest Brunswick County magistrate was about 21 miles from the hospital. Based on his experience, he also believed that it would take him at least an hour and a half to travel to the Brunswick County magistrate's office, obtain a search warrant for defendant's blood, and travel back to the hospital.

10. Trooper Inman reasonably concluded that upon his return to the hospital, he might be denied access to defendant because defendant by that time might be in surgery.

11. Based on his training and experience, Trooper Inman knew that any . . . alcohol in a person's blood stream is eliminated with

the passage of time and that such a person's blood alcohol concentration dissipates over time.

12. Trooper Inman reasonably believed that any further delay in obtaining a blood sample from defendant would result in the dissipation of the percentage of alcohol in defendant's blood.

13. N.C.G.S. 20-139.1(d1) provides that if a suspected impaired driver refuses to submit to a chemical analysis: ". . . any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine."

14. N.C.G.S. 20-16.2(b) provides in relevant part: "If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed.

15. Based on the totality of the circumstances, Trooper Inman made the decision to obtain a sample of defendant's blood without a search warrant, and he asked medical personnel in the emergency room to draw a sample of defendant's blood for later blood alcohol analysis. Medical personnel drew such a blood sample pursuant to the trooper's request.

Based on the foregoing findings of fact, the trial court concluded that Trooper Inman had probable cause to believe that Defendant had committed the offense of driving while impaired and that exigent circumstances existed to justify a warrantless blood draw from Defendant's person.

Defendant's case came on for trial in the 27 November 2012 session of Brunswick County Superior Court, the Honorable Thomas H. Lock presiding. The jury found Defendant guilty of second degree murder, felony death by motor vehicle, and driving while impaired. On 30 November 2012, the trial court arrested judgment on the felony death by motor vehicle and the driving while impaired convictions and sentenced Defendant to 180 to 225 months incarceration on the second degree murder conviction. From this judgment, Defendant appeals.

In Defendant's sole argument on appeal, he contends that "*Missouri v. McNeely* overrules the trial court's conclusion that North Carolina's implied consent statute permitted Trooper Inman's 'total' reliance on the statute to order a warrantless blood draw from" Defendant.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. The Supreme Court has held that a warrantless search of the person is reasonable only if it falls within a recognized exception. *Missouri v. McNeely*, __ U.S. __, __, 185 L. Ed. 2d 696, 704 (2013). "One well-recognized exception . . . applies 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." *Id.* (citation and quotation marks omitted). "A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, . . . engage in 'hot pursuit' of a fleeing suspect, . . . or enter a burning building to put out a fire and investigate its cause[.]" *Id.* (citations and quotation marks omitted). "[I]n some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *Id.* at __, 185 L. Ed. 2d at 705. (citations omitted). "[A] warrantless search is [in certain situations] potentially reasonable because there is compelling need for official action and no time to secure a warrant." *Id.*

(citation and quotation marks omitted). "To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances." *Id.* (citations omitted).

"The withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution." *State v. Fletcher*, 202 N.C. App. 107, 111, 688 S.E.2d 94, 96 (2010) (citation and quotation marks omitted). "Therefore, a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *Id.* at 111, 688 S.E.2d at 97 (citation and quotation marks omitted). This rule is also codified at N.C. Gen. Stat. § 20-139.1(d1) (2011), which provides the following:

> If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

Id. This Court has recognized that "alcohol and other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples." *State v. Davis*, 142

N.C. App. 81, 86-87, 542 S.E.2d 236, 239 (2001). However, the United States Supreme Court recently held, in *Missouri v. McNeely*, __ U.S. __, 185 L. Ed. 2d 696 (2013), that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant.

The inquiry into an exigency is fact-specific an "demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *McNeely*, __ U.S. at __, 185 L. Ed. 2d at 705 (citation omitted). In this case, Defendant filed a motion to suppress evidence seized from a warrantless withdrawal of a blood sample without Defendant's consent. The trial court entered an order denying Defendant's motion to suppress. "Ordinarily, the scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation and quotation marks omitted) (alteration in original).

This Court held in *State v. Dahlquist*, __ N.C. App. __, __ S.E.2d __ (2013) (COA13-276), that the U.S. Supreme Court's holding in *Missouri v. McNeely*, __ U.S. __, 185 L. Ed. 2d 696 (2013), did not change the operation of N.C. Gen. Stat. § 20-139.1 (2011), stating that "after the Supreme Court's decision in *McNeely*, the question for this Court is still whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.*

In this case, the trial court's findings of fact are supported by competent evidence, and the findings, in turn, support the trial court's conclusion that, considering the totality of the circumstances in this case, exigent circumstances existed such that the warrantless, compelled blood sample draw in this case was proper. We conclude the trial court did not err in entering an order denying Defendant's motion to suppress.

As in *Dahlquist*, the arresting officer in this case did not attempt to video conference with the magistrate to acquire a search warrant as allowed by N.C. Gen. Stat. § 15A-977(f). We emphasize, as we did in *Dahlquist*, that these scenarios are exactly the sort contemplated by the Legislature in which police

officers should take advantage of advances in technology to speed and simplify the process of acquiring a search warrant.

AFFIRMED.

Judge McGEE and Judge McCULLOUGH concur.

Report per Rule 30(e).