

[J-82A-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 153 M.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, entered April 1, 1998, at No. 558
	:	Harrisburg 1997, affirming the Judgment
v.	:	of Sentence of the Court of Common
	:	Pleas of Adams County, Criminal Division,
	:	entered May 23, 1997, at No. CC-816-96
DAVID R. SHAW,	:	
	:	
Appellant	:	SUBMITTED: October 20, 1999

OPINION

MR. JUSTICE ZAPPALA

DECIDED: April 16, 2001

This appeal presents the issue of whether under Article 1, Section 8 of the Pennsylvania Constitution, a police officer may obtain the results of a blood alcohol test, pursuant to 75 Pa.C.S. § 3755 (reports by emergency room personnel), without a search warrant and without having requested that the blood alcohol test be performed, for purposes of possible prosecution under 75 Pa.C.S. § 3731 (relating to driving under the influence of alcohol or a controlled substance).

On August 29, 1996, at approximately 3:40 p.m., Pennsylvania State Police Trooper Todd Hershey arrived at the scene of a two vehicle accident involving a van and an automobile. The accident occurred at the intersection of State Route 394 and the south exit ramp of State Route 15. Trooper Hershey observed a stop sign and thirty-two feet of skid marks on the exit ramp and determined that the driver of the van had failed to stop, entered State Route 394 in the path of a westbound vehicle and caused the collision. Trooper Hershey's subsequent inspection of the interior of the van revealed a cooler

containing ice and several unopened cans of beer. Several opened and empty beer cans were also discovered in the vehicle. Trooper Hershey observed that the cooler and all beer cans were readily accessible to the driver.

The driver of the van, Appellant David Shaw, had been taken by ambulance to Gettysburg Hospital. After Trooper Hershey arrived at Gettysburg Hospital, he approached Appellant and inquired whether he was the driver of the van. When Appellant answered affirmatively, Trooper Hershey noticed slurred speech, bloodshot, glassy eyes and the odor of alcohol. Trooper Hershey informed Appellant of his Miranda rights and the implied consent law, 75 Pa.C.S. § 1547, and advised him that the hospital would be drawing a sample of blood for treatment purposes. Appellant then requested that Trooper Hershey inform him of the results.

A few minutes after this encounter, hospital personnel drew a blood sample from Appellant for independent medical purposes. Trooper Hershey called the hospital laboratory a short time later and obtained the results, which indicated that Appellant had a blood alcohol content (BAC) of .267%.

On September 9, 1996, Appellant was arrested and charged with two counts of driving under the influence, 75 Pa.C.S. § 3731(a)(1) and (a)(4), and one count of failing to stop at a clearly marked stop line, 75 Pa.C.S. § 3323(b). The investigating officers subsequently obtained the formal written results of Appellant's BAC test through the issuance of a subpoena.

On December 9, 1996, Appellant filed an omnibus pre-trial motion, seeking suppression of the BAC test results. At the conclusion of a hearing held January 22, 1997, the motion was denied. After a bench trial, Appellant was convicted of all charges and sentenced to seven days house arrest and twenty-three months intermediate punishment, plus fines, costs and restitution. On April 1, 1998, the Superior Court affirmed the judgment of sentence. This Court granted allocatur on September 30, 1998.

In Commonwealth v. Riedel, 651 A.2d 135, 141 (Pa. 1994), this Court held that under the Fourth Amendment of the United States Constitution, “where an officer has probable cause to request a blood test pursuant to 75 Pa.C.S. § 3755(a), the failure to verbalize the request shall not bar the officer from obtaining the results of a medical purposes blood test without a warrant.” Citing to the concurring opinion in Riedel, 651 A.2d at 185-187 (Zappala, J., concurring), Appellant argues on appeal to this Court that a different result follows under Article 1, Section 8 of the Pennsylvania Constitution.

Section 3755 reads as follows:

§ 3755. Reports by emergency room personnel

(a) General rule.--If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3731 (relating to driving under the influence of alcohol or a controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon the request of the person tested, his attorney, his physician or governmental officials or agencies.

(b) Immunity from civil or criminal liability.--No physician, nurse or technician or hospital employing such physician, nurse or technician and no other employer of such physician, nurse or technician shall be civilly or criminally liable for withdrawing blood or obtaining a urine sample and reporting test results to the police pursuant to this section or for performing any other duty imposed by this section. No physician, nurse or technician or hospital employing such physician, nurse or technician may administratively refuse to perform such tests and provide the results to the police officer except as may be reasonably expected from unusual circumstances that pertain at the time of admission.

Section 3755 and the implied consent law, 75 Pa.C.S. § 1547,¹ comprise a statutory scheme which both implies the consent of a driver to undergo blood testing in certain circumstances and requires hospital personnel to release the blood test results at the request of, among others, a police officer.

Appellant asserts that the failure of Trooper Hershey to *request* that the hospital *perform* BAC testing under Section 3755(a), renders Trooper Hershey's subsequent warrantless acquisition of Appellant's BAC test result illegal under the Pennsylvania Constitution.²

Section 3755(a), by its plain language, requires *hospital personnel*, in cases where probable cause exists to believe that an emergency room patient has violated Pennsylvania's DUI statute, to take blood samples for BAC testing. There is *no* requirement in the statute that the BAC testing be conducted at the *request* of a *police officer*. The only requirement is the abstract requirement that "probable cause exists to believe a violation of Section 3731." If such "probable cause exists," then hospital

¹ Section 1547 provides:

(a) General Rule.--Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle:

(1) while under the influence of alcohol or a controlled substance or both

² The dissenting opinion asserts that the opinion announced today is in direct contravention of Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), due to the absence of an "Edmunds" analysis. Edmunds imposes no such requirement on *this Court*, but instead, sets forth the briefing requirements for *litigants* seeking this Court's review of claims based exclusively on the Pennsylvania Constitution. Id., 586 A.2d at 895.

personnel must take blood samples for BAC testing.³ This, however, is not a case where a blood sample has been taken pursuant to Section 3755. It is undisputed that Appellant's BAC test was conducted for independent medical purposes. There was no request by Trooper Hershey that a BAC test be performed, nor did hospital personnel perform the BAC test as a result of any perceived duty arising out of the abstract probable cause requirement in Section 3755.

Accordingly, as Appellant's BAC test was not conducted pursuant to Section 3755(a), the release of the result of the BAC test at the request of Trooper Hershey was not authorized by Section 3755(a), nor is there any other statutory basis for releasing the result. The question then becomes whether the release of the result violates Article 1, Section 8 of the Pennsylvania Constitution.

As stated in Commonwealth v. Kohl, 615 A.2d 308, 314 (Pa. 1992): "Article 1, Section 8 has an identity and vitality that is separate and distinct from that of the Fourth Amendment. ... A state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution." The protection provided by Article 1, Section 8 extends to areas where an individual has a reasonable expectation of privacy. Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), cert. denied, 444 U.S.1032 (1980). The right to privacy extends to medical records of patients. See generally In Re June 1979 Allegheny County Investigating Grand Jury, 415

³ Section 3755(a) is, to say the least, inartfully drafted. For some vague and curious reason, the legislature has required a probable cause determination without specifying who is to make such determination, or how such an abstract requirement is to be met. The request of a police officer, based on probable cause to believe a violation of Section 3731, would seem to satisfy the probable cause requirement and therefore mandate that hospital personnel conduct BAC testing. Likewise, a determination by hospital personnel familiar with Section 3755(a), that probable cause existed to believe that a person requiring treatment had violated Section 3731, would also seem to mandate that hospital personnel conduct BAC testing. However, neither of those scenarios occurred in the instant case.

A.2d 73, 76-78 (Pa. 1980); Denancourt v. Commonwealth of Pennsylvania, State Ethics Commission, 470 A.2d 945, 947-950 (Pa. 1983).

As stated in the Riedel concurrence:

The implied consent provision of 75 Pa.C.S. § 1547(a)(1) does not eliminate the need to obtain a warrant to seize medical records, but only to request and conduct chemical tests. The reason for this is obvious. Due to the evanescent nature of the evidence of blood alcohol content, there is an immediate need to obtain samples of blood for testing. When blood samples have been drawn for medical purposes and the results of blood alcohol content tests are part of a patient's medical record, the evidence will not have dissipated during the time that application for a search warrant is being made.

651 A.2d at 135.

Thus, the release of the result of Appellant's BAC test, taken for independent medical purposes and not pursuant to Section 3755(a), to Trooper Hershey without a warrant and in the absence of exigent circumstances, violated Article 1, Section 8 of the Pennsylvania Constitution. Accordingly, the BAC test results should have been suppressed.⁴

The order of the Superior Court which affirmed the order of the common pleas court is reversed.

Mr. Justice Nigro files a concurring opinion.

Mr. Justice Castille files a dissenting opinion in which Mr. Justice Saylor joins.

⁴ The dissent concludes that today's decision will force citizens to face "more intrusive" government conduct in the form of a "court-ordered freedom to have a blood sample withdrawn by a hypodermic needle twice ...", Slip op. at 5 (emphasis in original). We do not share in this conclusion. Today's decision only requires that police officers request that a BAC test be conducted on any blood withdrawn by the hospital for independent medical purposes, or in the absence of such, that blood be withdrawn for the sole purpose of conducting a BAC test.