IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0077-15

STEVEN COLE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS GREGG COUNTY

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, HERVEY, ALCALA, RICHARDSON, and NEWELL, JJ., joined. JOHNSON, J., filed a dissenting opinion. YEARY, J., concurred.

O P I N I O N

At Steven Cole's intoxication-manslaughter trial, the judge overruled Cole's motion to suppress evidence obtained by a warrantless blood draw. Holding that the record did not establish exigent circumstances, the court of appeals reversed the trial court's judgment. We conclude that the record established circumstances rendering obtaining a warrant impractical and that the warrantless search is justified under the exigency exception to the Fourth Amendment's warrant requirement. We accordingly reverse and remand the case to the court

of appeals.

I.

A. Trial

At 10:30 p.m. in early December 2011, Steven Cole drove his large pickup truck 110 miles per hour down a city street in Longview. Running the red light at a busy intersection, Cole struck Jim Hightower's pickup truck causing an explosion and engulfing Hightower's truck in flames. Hightower was killed instantly.

Longview Police Department Officer Castillo was the first officer to arrive at the accident scene. He approached the burning truck and saw Hightower in the driver's seat, but he was not sure if Hightower was dead or alive. At the other end of the accident scene, he saw Cole's truck against a nearby building with fire approaching it. Cole was in the driver's seat yelling for help, but Castillo could not open the doors. By this time, other officers arrived on the scene and began attempting to put out the fires. With the help of the other officers, Castillo was able to remove Cole from his heavily damaged truck's driver's seat. Castillo then started to secure the area to make sure nobody entered the accident scene.

Even at that time of night, there was still considerable activity and traffic in the area of the accident. Because of the traffic and activity, Castillo testified that, from a law enforcement and public safety perspective, they needed as many officers on the scene as they could possibly get. The fire and its continued explosions required keeping people away for their own safety. The fire's danger required blocking off several major intersections around

the area. Castillo testified that the accident occurred around a shift change, when officers would be leaving evening shifts and others arriving for the late-night shift. This further complicated satisfying the manpower needed to secure the scene, conduct an investigation, and maintain public safety.

When Officer Wright arrived at the scene, she spoke to Cole who was sitting on the ground away from the burning truck and wreckage. Cole was confused and did not know where he was. EMS arrived and started evaluating Cole's injuries. While being evaluated, Cole told EMS that he had taken "some meth." At the hospital, Wright described Cole as mumbling incoherently to himself and experiencing involuntary leg and hand movements. Wright described this behavior as "tweaking"—a condition consistent with methamphetamine intoxication.

Officer Higginbotham was the lead accident investigator and officer investigating whether a crime was committed. That night he had finished his shift, but was called back out into the field to coordinate and lead the accident investigation. At the time he arrived, Cole had already been transported to the hospital. He discovered a large debris field that spread beyond the intersection and nearly a full block long. He noted extensive damage to Hightower's truck's driver side. The damage indicated that the truck was broadsided or "T-boned" that bent the frame of the truck into a crescent shape. As the accident investigator, Higginbotham spent approximately three hours investigating the scene of the accident. He testified that fourteen officers were dispatched to assist with the scene. Like Officer Castillo,

Higginbotham testified that securing the accident scene required a significant number of officers. According to Higginbotham, those officers were needed because the accident scene's location was in a large, busy downtown intersection and that the accident investigation could become compromised if the area was not blocked off. The entire accident scene was not cleaned up and cleared until 6:00 the following morning.

At the direction of her superior officer, Wright arrested Cole at 11:38 p.m. and attempted to obtain a sample of his blood by first reading the statutory warning to Cole. Cole frequently interrupted Wright's reading of the warnings, insisting that he used "meth" and was not drunk, every time she read the word "alcohol" or "intoxication" in the statutory warning. Cole refused to provide a blood sample. Wright then requested hospital staff to draw Cole's blood. His blood was drawn at 12:20 a.m., forty-two minutes later. Subsequent testing and trial testimony revealed that Cole's blood contained intoxicating levels of amphetamine and methamphetamine.

At trial, Cole moved to suppress the results of the blood sample and the testimony concerning the warrantless search. In a hearing outside the jury's presence, Higginbotham testified that, before he arrived and conducted his investigation, there was no one else who could have determined the nature and cause of the accident or who was at fault. Although he did not try to get a warrant with an on-call judge, Higginbotham testified that he was unable to leave the scene to go to the courthouse and speak to a prosecutor to secure a warrant for Cole's blood. According to Higginbotham, the warrant process takes an hour to

an hour-and-a-half "at best," and it was not feasible to wait until the accident investigation was entirely complete before securing a warrant. Higginbotham also expressed concern that medical intervention and treatment—specifically the administration of medicine and especially narcotic medicines—could affect the integrity of a blood sample. To assign another officer at the scene the responsibility to obtain a warrant, Higginbotham asserted, would leave an essential duty unfulfilled.

The judge overruled Cole's motions to suppress during trial and made several verbal findings and conclusions. First, the judge held that the United States Supreme Court's holding in *Missouri v. McNeeley*[1] did not overrule Transportation Code Chapter 724. Second, the judge concluded that exigent circumstances justified the warrantless seizure and found the following circumstances distinguished the present case from *McNeely*:

- the accident required shutting down a major intersection;
- the accident's severity and large debris field required the accident reconstuction expert to remain at the scene;
- the number of officers involved and the time to clear the intersection;
- the accident involved a death and was not a "regular DWI"; and
- the uncertainty of Cole's physical condition and the valid concern that medication administered at the hospital could affect any subsequent blood sample.

The jury convicted Cole of intoxication manslaughter, found true Cole's two prior felony convictions, and assessed a life sentence.

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[1] 133 S. Ct. 1552 (2013).

B. Court of Appeals

The court of appeals held that the judge erred in failing to suppress Cole's blood sample evidence.[2] The court first held that this Court's judgment in *State v. Villarreal*[3] foreclosed the State's reliance on the mandatory blood-draw provision found in Transportation Code § 724.012(b)(1)(A).[4] After a suspect's arrest for an alcohol-related offense, § 724.012(b)(1)(A) requires an officer to obtain the suspect's breath or blood sample when the officer reasonably believes that, as a direct result of the suspect's intoxication, someone is killed in a motor vehicle accident.[5] The court then found that the record failed to establish that an exigency existed to justify the warrantless search.[6] Specifically, the court noted that Higginbotham made no attempt to obtain a warrant even though a magistrate was available, there was no indication that another officer was not available to obtain a warrant, and the record contained no evidence of the elimination rate of methamphetamine.[7] The court held that, based on the totality of the circumstances, the State failed to satisfy its burden that an exigency existed and the warrantless seizure was justified under the Fourth

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[2] *Cole v. State*, 454 S.W.3d 89, 103 (Tex. App.—Texarkana 2014).

[3] 475 S.W.3d 784 (Tex. Crim. App. 2014), *reh'g denied*, 475 S.W.3d 817 (Tex. Crim. App. 2015) (per curiam).

[4] *Cole*, 454 S.W.3d at 97.

[5] TEX. TRANSP. CODE § 724.012(b)(1)(A) (West 2012).

[6] *Cole*, 454 S.W.3d at 103.

[7] *Id.*

Amendment.[8]

We granted the State's petition for discretionary review to evaluate these holdings.

II.

We review a trial judge's ruling on a motion to suppress under a bifurcated standard of review.[9] First, we afford almost total deference to a trial judge's determination of historical facts. The judge is the sole trier of fact and judge of witnesses' credibility and the weight to be given their testimony.[10] When findings of fact are not entered, we view the evidence in the light most favorable to the judge's ruling and assume the judge made implicit findings of fact that support the ruling as the record supports those findings.[11] Second, we review a judge's application of the law to the facts *de novo*.[12] We will sustain the judge's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case.[13]

A. The Fourth Amendment

The Fourth Amendment provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

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[8] *Id.*

[9] *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013).

[10] *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 447–48.

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[14] A warrantless search of a person is reasonable only if it falls within a recognized exception.[15] Intrusions into the human body implicate an individual's "most personal and deep-rooted expectations of privacy," and therefore are considered searches that fall under the Fourth Amendment's warrant requirement.[16] While there are several exceptions to the warrant requirement, the present case deals only with an exigency based on imminent destruction of evidence.[17] The established warrant-requirement exceptions are permitted because each is potentially reasonable and "there is a compelling need for official action and no time to secure a warrant."[18]

B. The Fourth Amendment and Texas's Transportation Code

The State argues that compliance with Transportation Code § 724.012(b) does not violate the Fourth Amendment because the statute dispenses with the warrant requirement. It further maintains that a warrantless blood draw taken in compliance with the statute is reasonable based on the totality of the considerations "viewed under the aggregate framework encompassing components of consent, special needs, search incident to arrest,

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[14] U.S. CONST. amend. IV.

[15] *Villarreal*, 475 S.W.3d at 796.

[16] *McNeely*, 133 S. Ct. at 1558–59 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

[17] *See Cupp v. Murphy*, 412 U.S. 291, 296 (1973).

[18] *McNeely*, 133 S. Ct. at 1559 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

and exigent circumstances."[19] The State's submitted the instant brief while the State's motion for rehearing in *State v. Villarreal* was pending. That motion was ultimately denied, and the Court's opinion on original submission rejected the arguments the State presents here.[20]

C. Exigency and Warrantless Blood Draws

As *Villarreal* made plain, a warrantless search is *per s*e unreasonable unless it falls within a well-recognized exception to the warrant requirement.[21] Whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances.[22] "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation."[23] An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.[24]

The Supreme Court's and this Court's jurisprudence on exigency created by the imminent destruction of physical evidence stands only at the periphery of the issue presented

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[19] State's Brief on the Merits at 16.

[20] *See generally Villarreal*, 475 S.W.3d at 800–13 (rejecting, among other arguments, that a warrantless blood draw could be reasonable under a balancing test).

[21] *Id.* at 808–09 (holding that the Texas Transportation Code provisions requiring a blood draw under certain circumstances did not create a Fourth Amendment exception).

[22] *McNeely*, 133 S. Ct. at 1559.

[23] *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

[24] *Brigham City*, *Utah v. Stuart*, 547 U.S. 398, 404 (2006).

here. "The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation."[25] The body's natural metabolism of intoxicating substances is distinguishable from the potential destruction of easily disposable evidence when the police knock on the door.[26] Contrary to the court of appeals' conclusion, the principles animating exigency cases addressing physical evidence destruction does not directly answer the issue before us.[27]

Like in *Weems v. State*,[28] an opinion handed down today, we conclude this case is controlled by United States Supreme Court's precedent and language found in *Schmerber v. California*[29] and *Missouri v. McNeely*.[30] A more detailed recitation of the precedent emanating from those cases is found in the *Weems* opinion. But suffice it to say that the Supreme Court has previously found sufficient exigent circumstances, such as in *Schmerber* where the record established that the officer had probable cause to believe Schmerber was driving under the influence of alcohol and "might reasonably have believed that he was

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[25] *McNeely*, 133 S. Ct. at 1561.

[26] *Cf. Kentucky v. King*, 563 U.S. 452, 459–60 (2011) (recognizing the warrant requirement exception to prevent the imminent destruction of evidence when law enforcement, after knocking on a suspect's door, believed drugs were being destroyed).

[27] *See Cole*, 454 S.W.3d at 103 (holding that this case did not "reach the 'now or never' level contemplated by exigent circumstances precedent") (citing *King*, 131 S. Ct. at 1856).

[28] No. PD-0635-14, ___ S.W.3d ___ (Tex. Crim. App. May 25, 2016).

[29] 384 U.S. 757 (1966).

[30] 133 S. Ct. 1552 (2013).

confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence."[31]

Nearly fifty years later, the Court in *McNeely* held that the natural dissipation of alcohol in the bloodstream did not create a *per se* exigency justifying an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing.[32] The *McNeely* Court held firm to the warrant requirement by stating that "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."[33] Yet the Court still recognized the gravity of the body's natural metabolic process and the attendant evidence destruction over time.[34] With this balance in mind, the Court adhered to a totality of the circumstances analysis with the notion that certain circumstances may permit a warrantless search of a suspect's blood. The narrow issue before the Court prohibited it from providing an exhaustive analysis of when exigency in intoxication related offenses may be found. However, the Court provided insight on the issue by identifying a few relevant circumstances that may establish exigency in this context.[35] In addition to the body's

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[31] *Schmerber*, 384 U.S. at 770.

[32] *McNeely*, 133 S. Ct. at 1568.

[33] *Id.* at 1561.

[34] *Id*. at 1568 ("It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required.").

[35] *Id.* at 1568.

metabolization, they include "the procedures in place for obtaining a warrant,[36] "the availability of a magistrate judge,"[37] and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence."[38]

III.

The court of appeals' exigency analysis first suggested that, had the warrant process started when Wright received the instruction to arrest Cole and obtain his blood sample, law enforcement could have been able to draw Cole's blood pursuant to a warrant before 2:00 a.m.[39] This time line, the court suggests, demonstrates that an exigency did not exist. The court's analytical approach in constructing a time line containing a hypothetical warrant obtained at a particular point followed by the potential timeliness of the search's results impermissibly views law enforcement action though the lens of hindsight.[40] Through reasoned deliberation free from tense, uncertain, and rapidly evolving circumstances, there is a tempting draw for a reviewing court to pronounce what law enforcement ideally should

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[36] *Id*.

[37] *Id*.

[38] *Id.*

[39] *Cole*, 454 S.W.3d at 103.

[40] *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (per curiam) (instructing that "reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight and that the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.") (internal quotations omitted).

have done in a particular case after all the facts are known. But hindsight distorts a proper exigency analysis's focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search. This approach also overlooks the practical problems and considerations found in the record that made obtaining a warrant impractical.

The amount of time it took for Higginbotham to investigate the accident scene was the most significant obstacle law enforcement faced in obtaining a warrant for Cole's blood. The accident's severity and the block-long debris field it created necessitated Higginbotham's three-hour examination of the roadway, damaged vehicles, distances, direction the vehicles' travel, debris, vehicles' weight, vehicles' travel angles, road surface drag factors. According to Higginbotham, no one else was capable of determining the nature or cause of the accident, or who was at fault. Only after Higginbotham measured, calculated, and assessed the vehicles' damage was he able to form probable cause to believe that Cole was responsible for the accident and Hightower's death.[41]

Additionally, both the time required to complete the accident investigation and the lack of available law enforcement personnel further hindered pursuing the warrant process. Higginbotham testified that he believed it was not feasible for him to leave the accident scene and abandon the accident investigation or to wait until the accident investigation was

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[41] *See* TEX. PENAL CODE § 49.08 (West 2012) ("A person commits [intoxication manslaughter] if the person: (1) operates a motor vehicle . . . ; and (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.").

complete before attempting to obtain a warrant. Because he was the only available officer capable of performing the accident investigation, his continued presence at the scene was vital. And without first completing the investigation, debris could not be cleared from the intersection and reopened to traffic. In Higginbotham's estimation, Officer Wright would not be able to obtain a warrant for him. After placing Cole under arrest, Wright was now responsible for his custody at the hospital and could no longer handle that responsibility while simultaneously drawing up a statement regarding her belief of Cole's intoxication.

The accident scene's location and the public-safety danger required a number of officers at the scene to perform necessary responsibilities including securing the accident scene, directing traffic, and keeping the public away from the scene. We do not disagree with the court of appeals' conclusion that "[t]here is no indication that officers not on the scene were unavailable to help obtain a warrant."[42] We do disagree, however, that an exigency finding cannot be made without the record establishing—and by extension, the State proving—that there was no other officer available to get a warrant in the lead investigator's stead. In all but the rarest instances, there will theoretically be an officer somewhere within the jurisdiction that could assist the lead investigator. Requiring such a showing in every case where exigency is argued improperly injects the courts into local law-enforcement personnel management decisions and public policing strategy. It further reduces the exigency exception to an exceedingly and inappropriately small set of facts, and would

[42] *Cole*, 454 S.W.3d at 103.

defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires. Nonetheless, the availability of other officers is a relevant consideration in an exigency analysis.

This record establishes that fourteen officers were present and who, in Higginbotham's estimation, were all performing important law enforcement or public-safety duties. Taking any one of them away, according to Higginbotham, would have left a necessary duty unfulfilled. This record further reflects that the fourteen officers at the scene made up nearly half of the minimum amount of officers the Longview Police Department requires for the entire city over two shifts. By the same estimation, the record does not establish that there was a readily available officer who could have gotten a warrant while Higginbotham continued his investigation and Wright kept Cole in custody at the hospital.

Even had Higginbotham attempted to secure a warrant from an on-call magistrate, the issuance of a warrant would have taken an hour to an hour and a half "at best." During that time, Higginbotham was reasonably concerned that both potential medical intervention performed at the hospital and the natural dissipation of methamphetamine in Cole's body would adversely affect the reliability of his blood sample. According to EMS, Cole reported having "pain all over." Higginbotham was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity.

In addition to the logistical obstacles of securing a warrant, Higginbotham knew that during the hour to an hour and a half necessary to obtain a warrant Cole's body would

continue to metabolize the methamphetamine and other intoxicating substances he may have ingested. The court of appeals correctly notes that the record does not contain evidence regarding the rate the body metabolizes methamphetamine.[43] But the lack of a known elimination rate of a substance law enforcement believes a suspect ingested does not necessarily mean that the body's natural metabolism of intoxicating substances is irrelevant to or cuts against the State's exigency argument. In fact, it serves to distinguish this case from *McNeely*.

The *McNeely* Court relied in significant part on the widely known fact that alcohol "naturally dissipates over time in a gradual and relatively predictable manner."[44] The lack of a known elimination rate is at odds with the undercurrent running through the *McNeely* opinion: While time is of the essence, a minimally delayed test when dealing with an alcohol-related offense does not drain the test of reliability because experts can work backwards to calculate blood-alcohol content at an earlier date.[45] In this case, without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know—unlike alcohol's widely accepted elimination rate—how much evidence it was losing as time passed.

IV.

From our review of the totality of the circumstances, we conclude that law

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[43] *Cole*, 454 S.W.3d at 99.

[44] *McNeely*, 133 S. Ct. at 1561.

[45] *See id.* at 1560–61, 1563.

enforcement reasonably believed that obtaining a warrant in this case would have significantly undermined the efficacy of searching Cole's blood.[46] The circumstances surrounding the taking of Cole's blood sample demonstrate that obtaining a warrant was impractical.[47] Like the officer in *Schmerber*, law enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded.[48] We therefore conclude that exigent circumstances justified Cole's warrantless blood draw.

The court of appeals' judgment is reversed, and the case is remanded to the court of appeals to address Cole's remaining issue on appeal.

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[46] *Id.* at 1561.

[47] *Id*.

[48] *See Schmerber*, 384 U.S. at 770. *See also McNeely*, 133 S. Ct. at 1559–60.