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

JOHNSON, J., filed a dissenting opinion.

D I S S E N T I N G O P I N I O N

The issue on appeal is whether a warrant was required before the state could obtain a blood draw from appellant without his consent. At issue is whether sufficient exigent circumstances existed such that the state may rely on Section 724.012(b) of the Transportation Code, "Taking of Specimen," to relieve it of the constitutional requirement to obtain a search warrant before obtaining a blood sample without consent. I would hold that the circumstances and testimony at trial indicate that a warrant was required.

The court of appeals noted that

> [T]he State argues that the blood draw was reasonable and/or consensual under the mandatory blood-draw provisions of Section 724.012(b)(1)(A) of the Transportation Code, which, in the absence of consent, requires officers to obtain samples of breath or blood when someone is killed in a motor vehicle accident and the officer has reasonable grounds to believe the person was operating a motor vehicle while intoxicated. Here, there is no dispute that the officers on the scene had reasonable grounds to believe that Cole was driving while intoxicated, that Cole refused to consent to having his blood drawn, and that a death resulted from the collision.

Cole v. State, 454 S.W.3d 89, 97 (Tex. App.—Texarkana 2014).

The court of appeals then cited this Court's decision in *Villarreal v. State*, which held that the provisions in the Transportation Code—the implied consent law and the mandatory blood draw law—by themselves, do not form a constitutionally valid alternative to the Fourth Amendment warrant requirement. *State v. Villarreal*, 475 S.W.3d 784 (Tex. Crim. App. 2014). *See also Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973) (A search "without prior judicial evaluation" may be reasonable "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime.").

An individual had died. Appellant was under arrest, had admitted use of methamphetamine, and had refused to consent to the taking of a blood sample. The question is thus narrowed to whether sufficient exigent circumstances existed to excuse the lack of a search warrant.

> "A defendant who alleges a Fourth Amendment violation has the burden of producing evidence that rebuts the presumption of proper police conduct. He may carry this burden by establishing that the seizure occurred without a warrant." . . . The burden then shifts to the State to prove that the seizure was nonetheless reasonable. . . . Here, there is no dispute that Cole's blood was taken without a warrant, and the record establishes that Cole would not consent to having his blood drawn. Therefore, the State bore the burden of proving that the seizure was reasonable.

Cole v. State, 454 S.W.3d at 96 (citations omitted).

The statute states that

> (b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:
>
> (1) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:
>
> (A) any individual has died or will die;
>
> (B) an individual other than the person has suffered serious bodily injury; or
>
> (C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment; . . . .

The state presented fourteen witnesses–the lead investigator, and five persons who had contact with appellant on the night of the collision.[1] Officer Castillo was first on the scene, at about 10:23 p.m. His only contact with appellant was to help to remove appellant from appellant's vehicle. EMT Steelman treated appellant at the scene and transported him to the hospital. Officer Wright sat with appellant waiting for EMS to arrive, then followed EMS as it transported appellant to the hospital, arriving at the hospital at 10:38 p.m. Both Steelman and Wright heard appellant admit to having ingested methamphetamine. Two nurses who were on duty in the hospital emergency room testified; one drew the blood sample at the direction of Officer Wright, the other testified about procedures for drawing blood. Officer Higginbotham, the lead investigator, testified at length about the measurements and calculations he had performed in order to determine how the wreck happened.

Officer Castillo testified that he was on patrol when, at about 10:23 p.m., he heard a loud noise and saw smoke. He went to investigate.

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[1] The other eight witnesses were three civilians who saw the wreck happen (Colby Lewis, George Diaz, and Joshua Diaz), appellant's employer, the forensic photographer, an officer from the Kilgore College Police Department, the laboratory technician who analyzed appellant's blood sample, and the medical examiner who performed the autopsy on the victim.

> Once I got to the intersection, I was closer, I saw it. It was actually a pickup, a vehicle on fire. Fire was coming out from underneath the–the pickup, the driver's area, and all around. . . . I get out of the patrol car. I was able to see that there was somebody in the driver's seat, or the person's hands were up. I wasn't sure if this person was dead, alive, or anything. I had a–all carry a fire extinguisher in the trunk of our patrol car. I exited real quick. Went to the trunk of the patrol car, got a fire extinguisher. By that time, the–the fire was just large in size already. And I knew there wasn't anything I could do for that person inside or put out that vehicle fire, because the fire was just way too big by then.

III R.R. 24, 28.

Officer Castillo's testimony makes clear that, from the very first, it was known that there had been a collision with a fatality.[2]

Officer Wright responded to the scene after hearing a call from Officer Castillo for officers with fire extinguishers. She testified that she sat with appellant until EMS arrived, then followed the emergency vehicle to the hospital. She maintained contact with her sergeant both at the scene and at the hospital. Before she left the scene, she had informed her sergeant of what she had heard from appellant.

> Q. . . . Prior to being placed in custody, he's talking to the medic. Did you hear him say anything to the medic?
> A. Yes, ma'am, I did. The medics asked if he had had anything to drink. He stated no, that he doesn't drink. They asked if he had taken anything. He stated, "Maybe." And at that time they asked, "Well, what had you taken?" And he said, "Some meth."

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[2] On one point, Officer Castillo's testimony is inconsistent with that of one of the civilians who saw the collision. During questioning by the state, Officer Castillo agreed that there was considerable activity.

> Q. Now, South and High Street we saw, as you approached that intersection, even at 10:30 at night, there's still lots of activity and lots of traffic in that area; is that right?
>
> A. That's correct.

III R.R. 36-37.

On the other hand, Colby Lewis, a civilian who saw the collision, stated, "Of course, it was later at night, so there wasn't very many vehicles on the road." III R.R. 46.

> . . .
> Q. Now, the whole time you're–you're at the hospital,–
> A. Yes, ma'am.
> Q. –you're the transport officer at the hospital–you're not on scene,–
> A. No, ma'am.
> Q. –not be able–you're not able to be on scene. Are you in contact with officers on scene during this entire time?
> A. Yes, ma'am.
> Q. And before you left the scene, you were–you were aware that there was a death?
> . . .
> A. Absolutely, yes, ma'am.
> Q. And after you observed the defendant's behavior and after you heard his–what he said about taking meth to the EMS, did you relay this information back to the sergeant or the officer that was in charge of the scene?
> A. Yes, ma'am. Because they–they aren't there to observe it either, and–and that's information that they need to know.
> Q. What happened–how–about how long were you at the hospital, if you had to estimate, before you received the okay that–well, how long were you at the scene at the hospital?
> MS. HOOD: Strike that last part.
> A. I got to the hospital at about 10:38 p.m., and I think I left there–it looks like I left at 1:47 in the morning.
> Q. And at any time did the officers on scene tell you to try and get a blood sample from–
> A. Yes. They asked me to go ahead and read what's called the DIC-24 form. It's a statutory warning, and it's the form that we use to request blood samples or a breath specimen.

III R.R. 233, 235-36.

Clearly, by 10:38 p.m., appellant was being treated at the hospital, and the officers at the scene knew about both the fatality and appellant's use of methamphetamine.

Officer Higginbotham testified that he was the traffic investigator on call.[3] He got a call to return to duty at about 10:30 p.m. because there had been a collision with a fatality. He estimated that it took 30 minutes for him to reach the scene. He conceded that there were magistrates on call.

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[3] Much of Officer Higginbotham's testimony consisted of the state asking leading questions that stated the state's version of events, to which Detective Higginbotham would reply, "That's correct."

> Q. And back during that time, did you–were you aware of the fact that there were judges available to take a blood warrant to?
> A. We do have a–we have a rotation of judges that are on call, yes, sir.

III R.R. 190.

Officer Higginbotham named fourteen other officers at the scene, yet not one of fifteen officers contacted the magistrate on call to ask for a warrant. When questioned about how many officers he needed, Higginbotham answered that four or five officers to block east-west traffic and at most six officers to block north-south traffic, plus Officer Wright at the hospital and two shift supervisors. III R.R. 193-94. This left at least two officers free. Still, no one attempted to get a warrant. No one even discussed getting one.

Higginbotham conceded that, on occasion, in the middle of a traffic-accident investigation, he had taken time out of working the accident to obtain a warrant. And although he knew that there was a rotation of judges "on call" and available at any time of for purposes of issuing a warrant, at no time during his investigation did he discuss with any other police personnel the possibility of getting a warrant to draw Cole's blood. III R.R. 190-91.

Officer Higginbotham also seemed to be of the opinion that only he or Officer Wright could swear out an affidavit.

> Q. Let's just say in this case, that instead of you relying on the statute, you instead decided to get a search warrant for the blood draw. What would you have done?
> A. I would have had to–either Officer Wright and I, or I, both of us, would have had to give some sort of statement; take time out of what we were doing to draw up our probable cause, what we observed and why we believed that Mr. Cole was intoxicated at the time.
> Q. Okay.
> A. We have to draw that up and then, of course, same procedure; send it to a judge, get the judge to sign it, send it back to us.

III R.R. 189-90.

The statute says:

> (b) A peace officer shall require the taking of a specimen of the person's breath or blood . . . if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle . . . and the person refuses the officer's request to submit to the taking of a specimen voluntarily:
> (1) the person was the operator of a motor vehicle . . . involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:
> (A) any individual has died or will die; . . . .

Officer Higginbotham knew before he left home that there had been a fatality. He was in contact with officers at the scene before and after his arrival at about 11:00 p.m. The officers already at the scene knew that appellant was under arrest and had admitted ingesting two hits of methamphetamine and that the victim had died. Three witnesses to the collision had informed the officers that the victim had been moving slowly and that appellant had been traveling at a high rate of speed when he collided with the victim and totaled both large trucks.[4] With that information, any officer at the scene could "reasonably believe" that appellant was at fault. It does not take complex calculations about friction, speed, weight, and inertia to place blame on appellant for the purpose of getting a warrant.

Officer Higginbotham also testified about the procedure for getting a warrant.

> Q. So when you got someone arrested for DWI, you're going to do a blood draw, do you actually leave that person with somebody else and go get the warrant, or do you have somebody else draft it up? How's that work?
> A. Usually we leave that subject with another officer.
> Q. Okay. And then go get the warrant?
> A. Yes, sir.

III R.R. 194.

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[4] The vehicles were appellant's Ford F-250 diesel, estimated to weigh 6,000 pounds, and the victim's Toyota Tundra, estimated to weigh 4,200 pounds. III R.R. 139.

But, apparently unusually, no one relieved Officer Wright so that she could go get a warrant.

Higginbotham also testified about the time to get a warrant.

> Q. Okay. So how long would it have taken to procure a search warrant, based on your knowledge and experience, –
> A. Yes, sir.
> Q. –here in Gregg County?
> A. Yes, sir. About an hour to an hour and a half at the best. That's–ones that we've done previous, that's about what it takes.

III R.R. 191-92.

He knew before he reached the scene, as did numerous other officers, that a blood sample was desirable. If he had begun the process when he was called at 10:30 p.m., or even when he arrived at about 11:00 p.m., he could have had the warrant in hand by about 12:00 a.m. or 12:30 a.m. Officer Wright could have asked for a warrant at any time after 10:38 p.m. when she arrested him at the hospital.[5] There were two shift supervisors on scene; either could have requested a warrant. No one even discussed the issue.

The court of appeals noted that it reportedly took about 40 minutes from the time that Officer Wright arrested appellant at the time noted on the DIC-24, 11:38 p.m., before taking a blood sample at 12:20 a.m. Assuming, as did the court of appeals, that such a delay would also have occurred with a warrant, the blood could have been properly drawn between 11:40 p.m. and 12:10 p.m., 10-50 minutes before it actually was drawn without a warrant. Even assuming a request at 11:38 p.m., the sample could have been drawn at about 1:00 a.m., only 40 minutes after the actual draw.

One of Officer Higginbotham's expressed concerns was that appellant was metabolizing

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[5] State's exhibit 9, the DIC-24, states that appellant was arrested at 11:38 p.m. However, he had been under the watchful eye of Officer Wright at the scene from about 10:30 p.m. and after 10:38 p.m. at the hospital. Given the facts, I conclude that he was under arrest no later than 10:38 p.m, as he clearly would not have been allowed to leave the hospital. State's exhibit 10, the authorization for the blood draw, contains 12:20 a.m. as the time of the draw.

whatever he had ingested, yet, as the court of appeals noted, "Here, while Higginbotham testified that Cole's body was metabolizing the methamphetamine in his system, there is no evidence whatsoever of the dissipation rate for methamphetamine levels in a person's blood." *Cole* at 102; *see also Missouri v. McNeely,* 133 S.Ct. 1552, 1561 (2013). The court of appeals also noted in a footnote that, when the expert witness was asked how quickly the body absorbs methamphetamine, he stated that "it depended on the manner in which the drug was administered—the slowest is by mouth, faster routes include snorting and smoking, and the fastest is intravenous injection." *Cole* at 102, n.8. But no evidence of how the drug was used was presented,[6] even though, according to the United States Supreme Court's decision in *McNeely*, the dissipation rate was "essential" in determining whether exigent circumstances existed. *Cole* at 102. Without such information, it is difficult to posit that this was a "now or never" situation. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) (A search "without prior judicial evaluation" may be reasonable "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime.").[7]

I agree with the court of appeals that this was not a "now or never" situation that would relieve the state of its burden. I would affirm its judgment. Because the Court does not do so, I dissent.

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Publish

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[6] The biggest concern in the State's argument is the dissipation of the drug levels in Cole's blood during the time the "officers were investigating the scene, controlling traffic, documenting evidence, interviewing witnesses before anybody could get back to the office and seek a warrant." While such dissipation should be a concern, the state presented no evidence regarding the rate at which methamphetamine is metabolized by the body or the rate at which it dissipates. *Id*. at 98-99.

[7] The trial court found six exigent circumstances that justified the warrantless blood draw, five of which were based on the severity of the collision. *Cole* at 98. Only one concerned the need to get a blood sample in a timely fashion: Cole's health and safety, and concern that the hospital could give him additional medications.