IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0344-17

THE STATE OF TEXAS

v.

JOEL GARCIA, Appellee

**ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS
EL PASO COUNTY**

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

The Court's analysis today proceeds upon an assumption that a determination whether exigent circumstances justify a warrantless blood draw must invariably be undertaken on a case-by-case basis, with a view to the totality of circumstances, and that categorical rules in this context are—categorically—unacceptable. This assumption derives from the United States Supreme Court's opinion in *Missouri v. McNeely*, 569 U.S. 141 (2013). There, the Supreme Court held that, "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically." *Id*. at 156. As

I have explained before, I do not interpret *McNeely* to prohibit any and all recognition of *per se* rules of exigency: "The Supreme Court in *McNeely* did *not* have to . . . ask itself whether any *particular* set of circumstances beyond the brute fact of [natural alcohol] evidence-dissipation [from the blood] might reasonably support an exemption from the general warrant requirement." *State v. Villarreal*, 475 S.W.3d 784, 848 (Tex. Crim. App. 2015) (Yeary, J., dissenting to dismissal of State's motion for rehearing). As far as I am concerned, that question—whether other *per se* exigency exceptions to the warrant requirement may be recognized by the courts—remains an open one.

In my view, the facts of the instant case present particular (and particularly compelling) circumstances that coalesce to justify a categorical exemption from the general warrant requirement based on practical exigencies. With probable cause to believe that Appellee, while driving drunk, had caused a collision resulting in multiple deaths, police officers had every incentive to obtain the best evidence possible to establish very serious offenses. Knowing that some types of routine medical procedures, such as the intravenous introduction of a saline solution into the bloodstream, will have the effect of altering the blood-alcohol concentration, the officers had a legitimate concern to gather that evidence before any such procedure was initiated, so long as it was possible to do so without compromising the medical treatment. Determining the right time to take a blood sample in the often-chaotic context of a busy hospital emergency room is a difficult call. It may sometimes be the case that a warrant can be obtained before medical intervention

contaminates the blood-alcohol level. But it will undoubtedly prove at least as likely, if not more so, that evidence-compromising medical treatment will, by necessity, occur before it is ever possible for the police to obtain a search warrant.

It strikes me that the police officers in this case acted in the most reasonable way possible under these unruly circumstances: They waited for a lull in the treatment, marveled at their great good fortune that no evidence-compromising procedure had yet occurred, and extracted the evidence in a manner that did not adversely impact the on-going medical evaluation and treatment. We should not conclude in such circumstances that they acted unreasonably. Instead, we should fashion a rule that endorses, rather than condemns, such reasonable police conduct.

The Court's contrary holding today pivots on the deference it pays to the trial court. Specifically, the Court relies upon the trial court's finding of historical fact that, as of the time they ordered the blood draw, Officers Torres and Lom were aware that the medical treatment had come to an end—that there was no longer an objectively reasonable basis to believe that Appellee's blood would be diluted before a warrant could be obtained to extract it. Entertaining the presumption that categorical rules are categorically unacceptable, it is ordinarily appropriate for the Court thus to defer. Even so, the evidence developed at the evidentiary hearing in this case amply illustrates why such a case-by-case approach is problematic at the outset.

It is not my purpose to denigrate our typical deference to a trial court's findings of

historical fact. Nevertheless, it is well worth noting that the officers themselves in this case emphatically denied having had any awareness that Appellee's treatment had come to an end. And there is very good reason, even on a cold record, to credit their denials.

One of the triage nurses testified without contradiction that an IV was "routine" and that she was looking for an opportunity to administer it when she was told it would not be needed. The treating physician acknowledged that it was "common" for a triage nurse to administer an IV without being specifically instructed. It was only because Appellee was being "a little bit uncooperative" and resisting the IV that the physician directed the triage nurse not to administer it—at least, not "at that time." He agreed that a saline-solution IV would, in fact, dilute the blood-alcohol concentration. In lieu of any other treatment, he ordered a CT scan. It was apparently during the subsequent wait for the CT scan that the police officers took the opportunity to extract the blood sample. It is even possible that, before the blood was extracted, a second nurse—Lom testified that he did not *think* it was the same triage nurse who testified, but a different, unidentified nurse—attempted to persuade Appellee to submit to an IV. In any event, Officer Rodriguez testified that, after he arrived at the hospital and discovered that Appellee's blood had already been drawn, a nurse told him that Appellee was *about to be taken* for a CT scan and that, "if there's any internal injury, we're going to give him [an IV]." After the CT scan, the treating physician returned to evaluate Appellee further. Whatever the police officers might have actually inferred from whichever of these circumstances they knew of, it seems clear to me—from the entirety of

the record—that Appellee's evaluation and treatment, including at least the possibility of an IV, remained on-going, if in a momentary lull, at the time of the blood draw.[1]

What is more, all of the testifying police officers and medical personnel uniformly agreed that, so long as medical treatment is being administered, it would be unacceptable for the police to interfere in order to extract Appellee's blood. (Presumably this would be true even if the officers had a valid search warrant!) The trial court determined that, as soon as the medical treatment reached a hiatus, the police officers could not extract the blood without a warrant. This determination places the attending officers in an impossible Catch-22 situation: They may not extract blood *during* medical treatment, and they may not extract blood (at least, without a warrant) during any *break* in the medical treatment, regardless of the likely duration of the break.

The Court would undoubtedly respond that I am missing the point. It would likely say

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[1] The record establishes, without material variance, that Appellee arrived at the hospital at approximately 3:01 a.m., and triage began. By 3:06, he had been taken to a curtained-off portion of the emergency room where assessment and treatment continued, including chest and pelvic X-rays. Officer Lom called Officer Rodriguez at 3:10 to inform him that he believed an IV was imminent, and Lom called Rodriguez again at 3:13 to let Rodriguez know they lacked a blood-draw kit. Nevertheless, Appellee's blood was extracted by at least 3:17, immediately after which Rodriguez arrived. The doctor's testimony confirmed a notation in the hospital records that he ordered the CT scan at about 3:19. Appellee was taken for the CT scan at 3:28, and returned to the ER at 3:38. (Only Officer Torres tentatively remembered that the CT scan came *before* the blood draw—but, of course, the trial judge found Torres's testimony generally unworthy of belief.) Appellee later submitted to an X-ray of his ankle before he was ultimately discharged. The trial judge made no specific written finding of fact with respect to whether the blood draw preceded the CT scan, but several remarks he made during the course of argument and oral announcement of his findings make clear that he did indeed believe that the CT scan came only after the blood draw. He made no specific finding with respect to whether he believed Rodriguez's testimony that a nurse told him Appellee may well be subjected to an IV depending upon the results of the CT scan.

that the trial court simply did not *find* as a matter of historical fact that the medical treatment had merely been put on hold; it found that the medical treatment (or, at least any medical treatment that might include an IV) had come to an *end*, and that the officers *knew* it had come to an end. In a regime in which we are to make every exigency determination on a case-by-case basis, I *might* agree that deference to this fact-finding, dubious as it strikes me (and may strike the Court as well, judging by its coda),[2] should dictate the result here. But the evidence in this very case persuades me that such a case-by-case approach is inadequate to account for the exigencies that seem inherent to the situation.

The pre-trial hearing in this case spanned a full month, from June 23rd to July 23rd of 2015. Over that time, the trial court conducted three full days of witness testimony, a lengthy and contentious final argument involving apparently heated exchanges between the trial court and the parties, and extensive oral findings of fact and conclusions of law, later punctuated by written findings and conclusions. This extensive fact development eventually resulted in one critical resolution of historical fact: that the attending officers were aware that all medical treatment had come to a full stop, leaving them with no objective basis to believe that Appellee's medical treatment was still on-going when they extracted his blood. This bottom line seems not just dubious, but—more to the point—hardly worth the effort.

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[2] *See* Majority Opinion at 32 ("We agree with the State that if an officer holds an objectively reasonable belief that an evidence-destroying medical treatment is about to take place, the Fourth Amendment does not command him to wait until the treatment is moments away before he may act. * * * We simply hold that the trial judge's extensive, record-supported findings foreclose any conclusion that this was an objectively reasonable concern in this case.").

I would adopt a *per se* rule to obviate the whole process. The following exigencies are evident from the testimony in this record:

- The police had probable cause to believe that Appellee, while driving in a state of intoxication, caused a fiery collision in which several persons were killed.[3]

- Evidence of blood-alcohol concentration naturally diminishes in the body over time.

- Appellee was taken to the hospital for medical evaluation and possible treatment—not by the police, but by emergency medical personnel.

- Hospital emergency rooms are chaotic places, and it is not a top priority for medical personnel to keep attending police officers informed of the nature and progress of a DWI suspect's treatment.

- It is routine for persons so evaluated to be subjected to intravenous saline solutions, which dilutes blood-alcohol concentration.

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[3] I have already made known my view that the gravity of the offense should be regarded as a factor in any exigent-circumstances determination. *See Villarreal*, 475 S.W.3d at 856–58 (Yeary, J., dissenting) (arguing that the more serious the offense, the greater the State's need for the best evidence available). This view is not in tension with *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), in which the United States Supreme Court "decline[d] to hold that the seriousness of the offense under investigation creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." In *Mincey*, the State argued that the serious nature of the offense was sufficient, *alone*, to justify the warrantless search. As I said in *Villarreal*:

> I do not mean to suggest that the seriousness of an offense, by itself, should ever amount to an exigent circumstance sufficient to exclude the need for a warrant; far from it. Such a holding would largely eviscerate the warrant requirement. But when there is a realistic danger that evidence may be lost, and the balance of interests between the State and the suspect is otherwise in equipoise, the degree of seriousness that the State has attributed to a particular offense may serve, as it did in *Welsh* [*v. Wisconsin*, 466 U.S. 740 (1984)], to tip the exigency scale.

475 S.W.3d at 856–57. The seriousness of the offense may thus serve, as it should here, as one among many factors in determining whether the real possibility that the best evidence may be lost justifies conducting a search without a warrant.

- The police may not (or at least all the witnesses agreed they *do* not, and I think we can all agree they *should* not) extract blood evidence while medical personnel are actively treating patients.

At least in any case that presents this constellation of facts, I would hold that it is reasonable—for Fourth Amendment purposes—for police officers, without a warrant, to take any available opportunity to extract a sample of blood for evidentiary uses, so long as this can be accomplished without compromising medical evaluation or treatment. As I recognized in *Villarreal*, "[t]he 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." 475 S.W.3d at 858 (Yeary, J., dissenting) (quoting *Kentucky v. King*, 563 U.S. 452, 466 (2011), which in turn quotes *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). I would not engage in the tedious, hair-splitting enterprise of trying to ascertain whether the police might have been aware that all medical evaluation and treatment had come to a complete stop, such that the possibility of blood-evidence contamination is no longer an "objectively reasonable concern" in the particular case. *See* Majority Opinion at 32.

On this basis, I most respectfully dissent.

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