COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-20-00021-CR
Appellant,	§	Appeal from the
v.	§	County Criminal Court at Law No. 4
RODOLFO MORALES,	§	of El Paso County, Texas
Appellee.	§	(TC# 20180C06554)

OPINION

On July 23, 2018, Rodolfo Morales ("Morales") was charged by information with driving a motor vehicle while intoxicated, second offense. TEX.PENAL CODE ANN. §§ 49.04(b), 49.09(a). In three issues, the State of Texas ("State") appeals the trial court's order granting Morales's motion to suppress his blood test results. In its first issue, the State asserts the trial court erred in concluding blood-collection instructions issued by the Texas Department of Public Safety ("DPS") are "laws of the State of Texas" within the meaning of Texas Code of Criminal Procedure § 38.23(a). In Issue Two, the State argues the trial court misapplied Texas Transportation Code § 724.017(b). In the third issue, the State contends the trial court improperly found Morales's blood was drawn in an unreasonable manner under the Fourth Amendment to the United States' Constitution. Morales did not respond to the State's appeal. For the following reasons, we reverse and remand.

BACKGROUND

Factual Background

Morales was arrested on suspicion of driving a motor vehicle under the influence of alcohol by a Texas Highway Patrol trooper around 1:35 a.m. on February 25, 2018. Morales refused to provide a breath specimen for a blood alcohol content analysis. Consequently, the arresting trooper applied for and was granted a warrant to seize blood from Morales as evidence of his intoxication. Morales did not contest the validity of the warrant in the trial court. A nurse then drew blood from Morales at approximately 3:47 a.m. on February 25, 2018. Then, as stipulated by the parties in the trial court, the nurse gave the vial of Morales's blood to the arresting trooper who mixed it with anticoagulant powder by inverting the vial. Morales's blood sample was sent to the Department of Public Safety crime laboratory in El Paso, Texas, which concluded his blood-alcohol level exceeded the allowable limits to operate a motor vehicle. TEX.PENAL CODE ANN. §§ 49.01(2)(B), 49.04(a).

Procedural Background

Morales was charged with driving while intoxicated, second offense. He filed a motion to suppress all evidence stemming from the February 25 blood draw claiming it was done in violation of the laws of the State of Texas. Specifically, he argued a DPS regulation requiring the blood sample be collected in a "medically approved manner" by a qualified individual is a "law[] of the State of Texas" for purposes of the exclusionary rule under Texas Rules of Criminal Procedure Article 38.23(a). Morales attached "Instructions for the Collection and Submission of Blood Specimens for Alcohol and/or Drug Determinations" ("DPS Blood-Collection Instructions") issued by DPS as an exhibit to his motion. The DPS Blood-Collection Instructions state "[i]mmediately after blood collection," the "Blood Collector" should "slowly mix the

anticoagulant powder and blood by inverting the blood vial(s) several times" before giving it to the law enforcement officer. Morales contended his blood draw was not done in a "medically approved manner" because the Texas Highway Patrol trooper—not the collecting nurse—inverted the vial.

The trial court orally granted Morales's motion to suppress on January 17, 2020. The trial judge explained the motion to suppress was based on whether the blood draw "was made under medically necessary, reasonable, sanitary and statutorily required conditions, drawn by a physician—qualified physician, registered nurse, LVN, a licensed or a certified emergency medical technician, as described in the Code." The trial court further held the blood draw was performed "in accord with Texas Transportation Code 724.017(b)." Ultimately, the trial court found the collecting nurse and the arresting trooper violated a law of the State of Texas by not following the DPS Blood-Collection Instructions:

> It has been stipulated, I believe, that the trooper, and not the technician, did the agitation. Now, whether this agitation by the trooper violated the statute or the regulations or basically the instructions for collection and submission of blood specimens, was a permissible act or not, and that leads me to the conclusion that the procedure followed, as I have indicated in some detail, was not at the level required by these instructions or by the statute, that the agitation should have been performed by the blood collector, Roxanne Madrid . . . .
>
> Therefore, I am inclined as a matter of law, strictly interpreting the regulations and the instructions as indicated by the Department of Public Safety's own crime laboratory instructions, that this motion to suppress this test is granted.

This appeal followed.

DISCUSSION

Issues

The State appeals the trial court's suppression order. In three issues, the State argues DPS regulations and Blood-Collection Instructions should not be considered "laws of the State of

Texas" for purposes of Texas Code of Criminal Procedure Article 38.23(a), that Texas Transportation Code § 724.017(b) does not apply to cases in which blood is drawn pursuant to a search warrant, and Morales's blood was drawn in a reasonable manner.

Standard of Review

We review a ruling on a motion to suppress using a bifurcated standard of review. *See Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App. 2010); *Guzman v. State*, 955 S.W.2d 85, 87-91 (Tex.Crim.App. 1997); *Newbrough v. State*, 225 S.W.3d 863, 866 (Tex.App.—El Paso 2007, no pet.). We afford almost total deference to the trial court's findings of historical fact that are supported by the record, and to mixed questions of law and fact that turn on an assessment of a witness's credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex.Crim.App. 2010); *Amador v. State*, 221 S.W.3d 666, 673 (Tex.Crim.App. 2007); *Guzman*, 955 S.W.2d at 89. We review *de novo* the trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor. *Valtierra*, 310 S.W.3d at 447; *Amador*, 221 S.W.3d at 673; *Kothe v. State*, 152 S.W.3d 54, 62-63 (Tex.Crim.App. 2004); *Guzman*, 955 S.W.2d at 89. "We uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case." *State v. Iduarte*, 268 S.W.3d 544, 548-49 (Tex.Crim.App. 2008); *see also State v. Stevens*, 235 S.W.3d 736, 740 (Tex.Crim.App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex.Crim.App. 2003), *cert. denied,* 541 U.S. 974 (2004).

Motion to Suppress

Under Texas Code of Criminal Procedure Article 38.23(a), evidence obtained by law enforcement "in violation of any provision of the Constitution or laws of the State of Texas" or in violation "of the Constitution or laws of the United States of America" must be excluded as

evidence "against the accused on the trial of any criminal case." *Atkinson v. State*, 923 S.W.2d 21, 23 (Tex.Crim.App. 1996). Here, Morales does not assert any violation of the "laws of the United States." Consequently, we must analyze whether the arresting trooper inverting the vial of Morales's blood violated the "laws of the State of Texas" or the Constitution.

A. Laws of the State of Texas

The State's first two issues turn on whether state law was violated. The Court of Criminal Appeals has narrowly construed the phrase "laws of the State of Texas" as used in Article 38.23(a) to mean statutes passed by the Legislature and "not to 'law' in a more general sense." *Rocha v. State*, 16 S.W.3d 1, 14 (Tex.Crim.App. 2000). Consequently, to uphold the trial court's order we must find a statute passed by the Texas Legislature was violated.

1. *Texas Administration Code & DPS Blood-Collection Instructions*

In its first issue, the State argues the trial court erred by construing DPS regulations and Blood-Collection Instructions as "laws of the State of Texas." During the suppression hearing, Morales argued the DPS regulation found at 37 Texas Administration Code § 28.4(1) requiring a blood sample be taken "in a medically approved manner" by a "physician, registered nurse, licensed vocational nurse, licensed clinical laboratory technologist, or another person who is trained to properly collect blood samples" qualifies as a law of the State of Texas under Article 38.23(a). He also argued the DPS Blood-Draw Instructions included in the DPS's blood draw kit defined "medically approved manner" as requiring the collecting nurse to "[i]mmediately after blood collection, slowly mix the anticoagulant powder and blood by inverting the blood vial(s) several times" before giving the sample to the arresting law enforcement officer.

Morales relied on the decision of the Court of Criminal Appeals in *Atkinson v. State* to support his argument DPS regulations constitute "laws of the State of Texas" under Article 38.23.

The *Atkinson* court held the trial court should have instructed the jury to disregard evidence of alcohol concentration in the defendant's system if it found the analysis of his breath specimen was done in violation of a DPS regulation requiring a technician continuously observe the person being tested for 15 minutes before administering the test. *Atkinson*, 923 S.W.2d at 23-25; *see* 37 TEX.ADMIN.CODE § 19.3. The DPS regulation at issue in *Atkinson*, however, was implemented by a now repealed statute that stated the "[a]nalysis of a specimen of the person's breath, to be considered valid . . ., must be performed according to rules of the Texas Department of Public Safety[.]" *Atkinson*, 923 S.W.2d at 23. There is no statute implementing 37 Texas Administration Code § 28.4(1) or the TX DPS Blood-Draw Instructions. As a result, *Atkinson* is inapplicable.

More relevant is the decision of the Court of Criminal Appeals in *Pannell v. State*, 666 S.W.2d 96 (Tex.Crim.App. 1984). In *Pannell*, the defendant waived his right to counsel and gave a voluntary confession to law enforcement, to include a district attorney. At trial, he argued the confession should be excluded under Article 38.23(a) because the district attorney violated state law when he interviewed the defendant without obtaining consent from his court-appointed attorney in violation of the Texas Code of Professional Responsibility. *Id.* at 97. The *Pannell* court disagreed. It found the Texas Code of Professional Responsibility "was not promulgated by the Legislature, the law-making body of this State, but by the Supreme Court, part of the judicial branch of the state government." *Id.* at 98. Thus, the Code of Professional Responsibility was not a statute passed by the Legislature, it did not qualify as the "laws of the State of Texas" under Article 38.23(a). *Id.; see also Rocha*, 16 S.W.3d at 14 (stating Article 38.23(a) refers to "statutes and not to 'law' in a more general sense.").

Like the defendant in *Pannell*, Morales relies on a regulation promulgated not by the Texas Legislature but by an administrative body. DPS issued 37 Texas Administration Code § 28.4(1)

under the broad authority allowing it to adopt "rules considered necessary for carrying out the department's work." TEX.GOV'T CODE ANN. § 411.04(3). Further, the DPS Blood-Collection Instructions—which require the blood collector invert the vials instead of the arresting law enforcement officer—do not even rise to the level of a regulation. While the record is silent as to how or by whom the DPS Blood-Collection Instructions were promulgated, they are not found in any provision of a Texas Statute or the Texas Administrative Code. Because 37 Texas Administrative Code § 28.4(1) and the DPS Blood-Collection Instructions are not statutes passed by the Texas Legislature, the trial court erred in construing them as "laws of the State of Texas" under Article 38.23(a).

2. *Texas Transportation Code § 724.017(b)*

In its second issue, the State argues the trial court erred when it held Morales's blood draw was done "in accord with Texas Transportation Code 724.017(b)." We agree.

Chapter 724 outlines the State's implied consent laws. The Court of Criminal Appeals has held Chapter 724 does not apply when there is a warrant to draw blood. *Beeman v. State*, 86 S.W.3d 613, 616 (Tex.Crim.App. 2002); *State v. Johnston*, 336 S.W.3d 649, 661 (Tex.Crim.App. 2011)("In *Beeman v. State*, we held that Chapter 724 is inapplicable when there is a warrant to draw blood . . . ."). Therefore, the trial court erred by applying Chapter 724 in this case because the arresting trooper obtained a search warrant before drawing Morales's blood.

We sustain the State's first and second issues.

B. United States Constitution

In the third issue, the State posits the trial court erred in ruling the blood draw in this case was unreasonable under the Fourth Amendment. Morales did not argue his blood test was unreasonable under the Fourth Amendment in his written motion to suppress. He did, however,

summarily contend at oral argument before the trial court the arresting officer inverting the vial of Morales's blood was unreasonable and a violation of the Fourth Amendment. To the extent the trial court agreed Morales's blood draw violated the Fourth Amendment, it did so in error.

A blood draw is a search under the Fourth Amendment. *Johnston*, 336 S.W.3d at 658. The Court of Criminal Appeals adopted the United States Supreme Court's analysis in *Schmerber v. California*, 384 U.S. 757 (1966) to determine whether a warrant-based search involving a blood draw is reasonable. *Johnston*, 336 S.W.3d at 658; *Adkins v. State*, 418 S.W.3d 856, 860 (Tex.App.—Houston [14th Dist.] 2013, pet. ref'd). Under *Schmerber*, we must first determine whether law enforcement was justified in requiring the suspect to submit to a blood test. *Schmerber*, 384 U.S at 768-72. Here, Morales did not contest law enforcement had justification to require him to submit to a blood test. He stipulated his blood was drawn pursuant to a valid warrant.

Second, we must determine whether the test employed by law enforcement is itself reasonable. *Schmerber*, 384 U.S. at 771-72; *Johnston*, 336 S.W.3d at 658. Venipuncture blood-draw tests like the one used in this case are presumptively reasonable under the Fourth Amendment. *Johnston*, 336 S.W.3d at 659; *Adkins*, 418 S.W.3d at 860. Morales also does not argue the blood test itself was unreasonable. The record is devoid of the assertion by Morales that he "is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing . . . ." *Schmerber*, 336 S.W.3d at 771.

Finally, the court must determine whether law enforcement used a reasonable procedure in performing the blood draw. *Schmerber*, 384 U.S. at 771-72; *Johnston*, 336 S.W.3d at 658. In looking at whether a procedure is reasonable, other courts of appeal in Texas concentrate on unreasonable risks to the defendant's safety, health, dignitary interests, and personal privacy. *See Siddiq v. State*, 502 S.W.3d 387, 401-03 (Tex.App.—Fort Worth 2016, no pet.); *Adkins*, 418

S.W.3d at 860-61. Minor deviations from standard medical technique that do not implicate these safety or privacy interests do not make a procedure unreasonable. *Siddiq*, 502 S.W.3d at 401-03 (holding that a nurse's failure to fully invert the vial of blood (among other things) did not make the procedure used unreasonable); *Adkins*, 418 S.W.3d at 860-61 (holding blood draw was performed in a reasonable manner despite fact that nurse placed cotton ball on table before using it to clear injection site when blood was drawn). At the suppression hearing, Morales argued the State used an unreasonable procedure to draw his blood by allowing the arresting trooper to invert the vial of Morales's blood instead of the collecting nurse. We agree with the other courts of appeal that minor deviations in standard medical technique such as who inverts a vial of blood after it is drawn does not make a procedure unreasonable for purposes of the Fourth Amendment. Further, Morales did not provide any evidence the blood draw in this case threatened his safety or privacy interests. Consequently, we hold the blood draw in this case was reasonable under the Fourth Amendment. The State's third issue is sustained.

CONCLUSION

We find the trial court erred in finding the blood draw in this case violated the Constitution or laws of the State of Texas, the Constitution of the United States, or under Texas Code of Criminal Procedure Article 38.23(a). Having sustained all the State's issues, we reverse and remand to the trial court for proceedings consistent with this opinion.

May 6, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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