

Reverse and Remand; Opinion Filed October 16, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00926-CR

**THE STATE OF TEXAS, Appellant
v.
VINCENT RUSSELL GIORDANO, Appellee**

**On Appeal from the County Criminal Court No. 3
Dallas County, Texas
Trial Court Cause No. M17-41558-C**

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Partida-Kipness

We withdraw our original opinion issued on August 17, 2020, and vacate our judgment dated the same day. This is now the opinion of the Court. We deny appellee Vincent Russell Giordano's motion for rehearing.

The State appeals the trial court's order granting Giordano's motion to suppress results of a blood test. In one issue, the State argues that the trial court erroneously granted the motion on the grounds that a search warrant to take a blood

specimen does not also allow for the testing of the specimen.¹ We agree. Accordingly, as we did in our original opinion, we reverse the trial court's order granting the motion to suppress and remand this cause to the trial court for further proceedings.

BACKGROUND

In the early hours of May 25, 2017, a witness reported seeing a vehicle driven by Giordano proceeding east on IH30 swerving, passing vehicles on the shoulder of the road, hitting a curb, and almost hitting a pedestrian. Officers from the Mesquite Police Department were summoned and followed Giordano's vehicle to a gas station. Responding officer Chris Odom noted the smell of alcohol as he spoke with Giordano after Giordano exited his vehicle. Officer Odom administered a field sobriety test and placed Giordano under arrest for driving while intoxicated when Giordano failed the test.

Officer Odom asked Giordano for permission to take a blood sample. When Giordano refused, Officer Odom executed an affidavit for a search warrant. The affidavit stated that Giordano "has possession of and is concealing human blood, which constitutes evidence that [Giordano] committed the offense" of driving while intoxicated. The affidavit continued, "I believe that [Giordano] is intoxicated by not

¹ The State raises this same issue in a related appeal, cause number 05-19-00927-CR, which also involved the seizure of a blood specimen pursuant to a search warrant following an DWI arrest. *State v. Jones*, No. 05-19-00927-CR, – S.W.3d –, 2020 WL 3867201 (Tex. App.—Dallas July 9, 2020, no pet.) (mem. op.).

having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the suspect's body." The affidavit requested a warrant "that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same evidence that the offense described was committed and that the suspect committed the said offense." The magistrate issued a search warrant to obtain a blood specimen from Giordano. Relevant to this appeal, the search warrant stated:

Now, therefore, you are commanded to take custody of the suspect and transport the suspect to a hospital in Dallas County, Texas[,] where you shall search for, seize and maintain as evidence the property described in said Affidavit, to-wit: human blood from the body of [Giordano].

The magistrate also issued an order for assistance in execution of the search warrant that states, "[T]his court has issued a warrant to search for and seize blood from the suspect named and described in the Affidavit, to-wit: [Giordano]." Giordano's blood was drawn and analyzed.

Giordano moved to suppress the results of the analysis of his blood that was seized pursuant to the warrant.² Giordano argued the search warrant only allowed the State to seize his blood; it did not allow the State to analyze the blood it collected. The trial court granted Giordano's motion to suppress the results of the blood-alcohol analysis and issued findings of fact and conclusions of law. The trial court

² Giordano did not challenge the existence of probable cause to support the blood-draw warrant.

concluded that Giordano had “a privacy interest in the private facts contained in [his] blood and the State’s testing of [his] blood went beyond the scope of the Search Warrant.” The State appeals the trial court’s order.

ANALYSIS

We review a trial court’s ruling on a motion to suppress under a bifurcated standard of review. *State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App. 2019). We give almost total deference to the trial court’s determination of historical facts and review de novo the application of the law to the facts. *Id.* We view the record in the light most favorable to the trial court’s ruling and uphold the ruling if it is supported by the record and is correct under any theory of the law applicable to the case. *Id.*

This appeal presents a purely legal issue: whether the search warrant obtained by the State permitted the testing and analysis of Giordano’s blood. Giordano argued to the trial court and maintains on appeal that the Texas Court of Criminal Appeals’ opinion in *State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019), required the State to obtain an additional search warrant to authorize the testing and analysis of his blood and, because the State failed to do so, the results of the testing must be suppressed. We disagree.

We considered this same argument on virtually identical facts in *State v. Staton*, 599 S.W.3d 614 (Tex. App.—Dallas 2020, pet. filed). Staton was arrested after an auto accident for driving while intoxicated. *Id.* at 615. When Staton refused to give a blood specimen, the arresting officer swore out an affidavit identical to

Officer Odom's affidavit here. *Id.* at 615–16. The magistrate in *Staton* issued a search warrant containing virtually the same language as the warrant at issue here, and Staton's blood was drawn and analyzed. *Id.* at 616. Staton moved to suppress the blood analysis, and the trial court granted Staton's motion on grounds similar to those stated by the trial court here. *Id.*

On appeal from the trial court's order, we noted that Staton relied on *Martinez* to argue that the State had to obtain an additional search warrant to authorize the testing and analysis of her blood. *Id.* We determined, however, that *Martinez* was inapplicable because Martinez had his blood drawn for medical purposes, thus he had a subjective expectation of privacy in the blood drawn. *Id.* at 617.

In *Staton*, we also analyzed the San Antonio court of appeals' holding in *Crider v. State*, No. 04-18-00856-CR, 2019 WL 4178633 (Tex. App.—San Antonio Sept. 4, 2019) (mem. op., not designated for publication), *aff'd*, 2020 WL 5540130 (Tex. Crim. App. Sept. 16, 2020). *Crider* likewise involved a blood draw taken pursuant to a search warrant issued after an arrest for driving while intoxicated. *Id.*, at *1. Relying on *Martinez*, Crider, like Staton and Giordano, filed a motion to suppress the blood analysis. *Id.* The trial court denied Crider's motion. *Id.* On appeal from a jury's guilty verdict, the appellate court concluded, “[W]e do not believe the *Martinez* court intended to require specific authorization for testing where probable cause supports a warrant for blood collection.” *Id.*, at *2.

Following *Crider*, we concluded in *Staton* that “[a]lthough the warrant does not expressly authorize testing and analysis of the blood sample, *Martinez* does not require that it do so.” *Staton*, 599 S.W.3d at 617–18. “Rather, *Martinez* holds that an individual has an expectation of privacy in blood previously drawn for purposes other than police testing.” *Id.* at 618. Because those facts were not before the Court in *Staton*, we concluded that *Staton* did not have a reasonable expectation of privacy in her blood drawn under the search warrant. *Id.*

The facts controlling the *Martinez* holding are likewise not at issue here. The police obtained Giordano’s blood specimen pursuant to a valid search warrant. Giordano’s blood was drawn solely to test for alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other intoxicating substance introduced into his body, as indicated in Officer Odom’s sworn affidavit. The search warrant gave authorization to “search for, seize and maintain as evidence the property described in said Affidavit, to-wit: human blood from the body of” Giordano.

Giordano, like *Staton*, does not identify, and we are not aware of, any authority requiring a search warrant authorizing the drawing of blood for a specific purpose to also expressly authorize testing and analysis of the blood sample to effectuate that purpose. Rather, common sense dictates that blood drawn for a specific purpose will be analyzed for that purpose and no other. *See Staton*, 599 S.W.3d at 618. Giordano’s blood was drawn and analyzed for the purpose of testing

for intoxicating substances, and the State sought to admit the results of that specific testing. Accordingly, we conclude the trial court erred by granting Giordano's motion to suppress, and we sustain the State's sole issue.

In a reply brief filed two days before this case was submitted on the briefs, Giordano raised a supplemental issue concerning the timeframe in which the blood test was conducted. Relying on and adopting appellee's briefing in cause number 05-19-00927-CR, Giordano contends that, even if a second warrant was not required to conduct the test, the State failed to draw and test his blood within the statutory timeframe for executing a warrant. *See Jones*, 2020 WL 3867201 at *2. The appellee in *Jones* argued the blood draw and test had to be conducted within the three-day statutory timeframe for executing a warrant because the *Staton* opinion allegedly "merged the requirements to justify blood analysis with the requirements for obtaining a blood draw warrant, the timeframe requirements for blood testing are controlled by the timeframe for blood draws." *Id.* at *2.

In *Jones*, we noted that Jones cited article 18.07 of the Texas Code of Criminal Procedure, titled "Days allowed for warrant to run," which gives an officer three days for the "execution" of most search warrants, excluding the date of issuance and the date of execution. *Id.*; see TEX. CODE CRIM. PROC. art. 18.07(a)(3). Jones claimed the State "substantially exceeded" the three-day period for conducting tests on his blood but cited no authority beyond the statute itself to support this argument. *Id.* The statute, however, merely provides the deadlines for seizing the evidence, not

analyzing it. *See* TEX. CODE CRIM. PROC. art. 18.07(a)(3). It specifies that, with certain exceptions not applicable here, a warrant must be executed within three days of its issuance, exclusive of the day of issuance and the day of execution. *See id.* On facts similar to those at issue here, we concluded in *Jones* that the execution of the warrant is the blood draw, not the testing and/or analysis of that blood. *Jones*, 2020 WL 3867201, at *2. We further noted in *Jones* that *Staton* says nothing about imposing a deadline for the testing and/or analysis of blood, much less applying the statutory deadline of article 18.07(a)(3) to the testing and/or analysis of the blood. *See id.* Consequently, we declined Jones’s invitation to create new law on this subject. *See id.* We likewise decline Giordano’s invitation here.

CONCLUSION

Having sustained the State’s sole issue and overruled Giordano’s supplemental issue, we reverse the trial court’s order granting the motion to suppress and remand this cause to the trial court for further proceedings consistent with this opinion.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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TEX. R. APP. P. 47.2(b).
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THE STATE OF TEXAS, Appellant

No. 05-19-00926-CR V.

VINCENT RUSSELL GIORDANO,
Appellee

On Appeal from the County Criminal
Court No. 3, Dallas County, Texas
Trial Court Cause No. M17-41558-C.
Opinion delivered by Justice Partida-
Kipness. Justices Myers and Reichek
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 16th day of October, 2020.