

**Opinion issued November 10, 2010**



**In The  
Court of Appeals  
For The  
First District of Texas**

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**No. 01-09-00720-CR**

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**VINCE COLANGELO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the County Criminal Court at Law No. 14  
Harris County, Texas  
Trial Court Cause No. 1565387**

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**MEMORANDUM OPINION**

Appellant, Vince Colangelo, appeals from a judgment convicting him of driving while intoxicated. Appellant entered a plea of guilty after the trial court denied his motion to suppress evidence. The trial court assessed appellant's sentence to be confinement in the Harris County jail for one year, probated for two

years, and a \$200 fine. In his sole issue on appeal, appellant contends that the trial court erred in denying his motion to suppress the results of a blood test. We find that the trial court properly refused to grant appellant's motion to suppress. We affirm.

### **Background**

One evening, appellant was riding his motorcycle when the vehicle in front of him made a sudden stop. Appellant's motorcycle skidded on its side but apparently did not collide with any vehicle. Appellant suffered a head contusion and skin abrasions on his head, arms, and legs. An ambulance paramedic dressed these wounds, but appellant declined transport to a hospital.

The police arrived and perceived that appellant's breath smelled of alcohol. Appellant acknowledged having had a few beers in the three hours preceding the wreck. An officer asked appellant to perform some standardized field sobriety tests. Appellant refused. Suspecting that appellant was intoxicated, the officer handcuffed appellant and transported him to the police station. There, appellant refused to submit a specimen of his breath for analysis. Defendant was then booked and confined.

After being booked, appellant requested medical treatment. Appellant was transported to the emergency room at Bayshore Medical Center, where he was admitted approximately three and a half hours after the wreck. Upon being

admitted, appellant signed the Conditions of Admission, which contains a clause stating that the patient consents to any “procedures which may be performed . . . including . . . laboratory procedures . . . [and] diagnostic procedures . . . rendered to [the patient] as ordered by [the] physician.” Appellant complained of head pain. The attending physician ordered that a blood test be performed to determine the course of treatment appropriate for appellant. According to the physician, it is standard protocol to order a blood test where a patient may have suffered head trauma in a motor vehicle accident. The nurse on duty informed appellant that, pursuant to the doctor’s order, she was going to draw a specimen of appellant’s blood so that a blood test could be performed. The nurse drew appellant’s blood, which was tested. The test results revealed that appellant’s blood alcohol concentration was 0.175 grams per 100 milliliters of blood. *Cf.* TEX. PENAL CODE ANN. § 49.01(1)–(2) (Vernon 2003) (defining “intoxication” as greater than or equal to 0.08 grams per 100 milliliters of blood).

The trial court conducted the hearing on appellant’s motion to suppress the blood test results on the basis of affidavits submitted by appellant and by the State.<sup>1</sup> In his affidavit testimony, appellant avers that he informed the nurse that he

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<sup>1</sup> By agreement, the parties stipulated to the admissibility of affidavits forming the factual basis of the evidence presented to the court on appellant’s First Amended Motion to Suppress. *See* TEX. CRIM. PROC. CODE ANN. art. 28.01(6) (Vernon 2006) (“[T]he court may determine the merits of [a motion to suppress] on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject

did not consent to the drawing of a blood sample and that he asked her not to do so. The State did not provide any evidence to controvert appellant's statement, but it did provide the attending physician's affidavit, attesting that appellant signed the Conditions of Admission, which included a consent-to-treatment clause. In denying appellant's motion to suppress, the trial court found the attending physician to be a credible witness and it accepted as true his affidavit testimony that appellant gave his written consent. The trial court did not enter any finding regarding appellant's affidavit testimony that he voiced his opposition to the nurse.

### **Motion to Suppress**

In his sole issue, appellant challenges his conviction on the ground that the trial court erred in refusing to grant his motion to suppress the blood test results. Appellant contends that the blood sample was obtained in violation of Texas law. Specifically, appellant asserts that the drawing of his blood constituted an assault absent his consent. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(3) (elements of assault), 22.06(a)(2)(B) (consent is defense to assault) (Vernon Supp. 2010); TEX. HEALTH & SAFETY CODE ANN. § 773.008 (Vernon 2010) (when consent to emergency care is not required).

#### **A. Standard of Review**

An appellate court reviews for abuse of discretion a trial court's ruling on a

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to the discretion of the court . . . ."). Appellant has not challenged a denial of his right to confront.

challenge to the admission of evidence, including a motion to suppress. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). “In other words, the trial court’s ruling will be upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case.” *Id.* at 878–79. In evaluating whether the record reasonably supports a trial court’s determination, an appellate court views the evidence in the light most favorable to the trial court’s determination. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008).

An appellate court should give almost complete deference to a trial court’s determination of a question of historical fact if it is supported by the record. *Id.* Additionally, an appellate court should give almost complete deference to a trial court’s determination of a mixed question of law and fact that turns on an evaluation of credibility and demeanor if that determination is supported by the record. *Id.* In contrast, an appellate court should review de novo questions of law and mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor. *Id.* Where the trial court did not make explicit factual findings, an appellate court will imply that it made those findings that are necessary to uphold the trial court’s ruling if such findings are supported by the record evidence, viewed in the light most favorable to the ruling. *Id.*

## **B. Applicable Law for Review of Motion to Suppress**

In a criminal case, a trial court must exclude, upon appropriate objection, any evidence “obtained by an officer or other person in violation of” Texas or federal law. TEX. CODE CRIM. PROC. art 38.23(a) (Vernon 2005). This exclusionary rule applies to illegal action by private citizens as well as law enforcement. *State v. Johnson*, 939 S.W.2d 586, 587–88 (Tex. Crim. App. 1996); *State v. Kelly*, 166 S.W.3d 905, 910 (Tex. App.—Corpus Christi 2005), *aff’d*, 204 S.W.3d 808 (Tex. Crim. App. 2006). “Thus, if [a defendant’s] blood was taken in violation of any state or federal law or constitutional provision, not only the blood but also the results of the blood test would be properly suppressed.” *Kelly*, 166 S.W.3d at 910 (citing *Johnson v. State*, 871 S.W.2d 744, 750 (Tex. Crim. App. 1994)).

## **C. Applicable Law for Blood Drawn Without Consent**

A person commits the criminal offense of assault if he intentionally or knowingly causes physical contact with another when he knows or should reasonably believe that the other will regard the contact as offensive or provocative. TEX. PENAL CODE ANN. § 22.01(a)(3). That person has a defense to assault if the contact is incident to a recognized medical treatment and the other person effectively consented or that person had a reasonable belief that the other person consented. TEX. PENAL CODE ANN. § 22.06(a)(2)(B); *see also* TEX.

HEALTH & SAFETY CODE ANN. § 773.008 (when consent is not required for emergency care).

If appellant voiced his opposition to having his blood drawn, the nurse should reasonably have believed that he would regard it as offensive and that he had withdrawn his consent. Blood drawn without a person's consent would be an assault, which would require the exclusion of the blood test results. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(3), 22.06(a)(2)(B); *Kelly*, 166 S.W.3d at 910.

#### **D. Analysis**

Appellant argues that we should review de novo the trial court's ruling because its determinations of historical fact were based solely on affidavits and thus did not turn on an evaluation of credibility or demeanor. Appellate courts, however, give almost complete deference to trial court findings of historical fact even where that finding "do[es] not rest on credibility determinations, but [is] based instead on . . . inferences from other facts." *Manzi v. State*, 88 S.W.3d 240, 243 (Tex. Crim. App. 2002) (quoting *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573–74 (1985)). Moreover, "the trial court is not required to believe the factual statements made in an affidavit, even when [it is] uncontradicted by other affidavits." *Proctor v. State*, 01-08-01041-CR, 2010 WL 2545605, at \*185 (Tex. App.—Houston [1st Dist.] June 24, 2010, no pet.) (citing *Charles v. State*, 146 S.W.3d 204, 213 (Tex. Crim. App. 2004)).

We must imply that the trial court found that appellant lacked credibility in his claim that, by voicing his opposition, he withdrew his written consent to having his blood drawn. Appellant had a self-interest in making that assertion. *See Shanklin v. State*, 190 S.W.3d 154, 166–67 (Tex. App—Houston [1st Dist.] 2005, pet. granted) (“The court may consider the interest and bias of any witness and is not required to accept as true the testimony of the accused or any defense witness simply because it was uncontradicted.”) We find that the trial court’s implicit finding is supported by the record, which shows that appellant consented in writing to having his blood drawn, and that the trial court could have reasonably disregarded appellant’s claims as lacking in credibility.

We hold that the trial court did not abuse its discretion in denying appellant’s motion to suppress. We overrule appellant’s sole issue.

### **Conclusion**

We affirm the judgment.

Elsa Alcala  
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).