Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-13-00826-CR

Taylor M. **MOSER**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 216th Judicial District Court, Gillespie County, Texas
Trial Court No. 4960
Honorable N. Keith Williams, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice

Delivered and Filed: August 10, 2016

AFFIRMED

This appeal arises out of the trial court's denial of Appellant Taylor M. Moser's motions to suppress evidence. On April 29, 2015, we reversed the trial court's judgment and remanded the cause for a new trial, holding that Moser's rights under the Fourth Amendment were violated by the warrantless, nonconsensual blood draw. *See Moser v. State*, No. 04-13-00826-CR, 2015 WL 1938865 (Tex. App.—San Antonio Apr. 29, 2015). On January 27, 2016, the Texas Court of Criminal Appeals vacated our judgment and remanded the cause to this court to address grounds

(1) and (4) of the State's petition for discretionary review. *See Moser v. State*, No. PD-0662-15, 2016 WL 325435, at *2 (Tex. Crim. App. Jan. 27, 2016).

In ground (1) of its petition for discretionary review, the State argued that this court erred in failing to address whether Moser preserved error before addressing, and reversing on, the merits of his point of error. In its opinion, the court of criminal appeals stated that a "court of appeals must issue a written opinion 'that addresses every issue raised and necessary to final disposition of the appeal.'" *Moser*, 2016 WL 325435, at *2 (quoting TEX. R. APP. P. 47.1). The court of criminal appeals then explained that an "appellate court 'may not *reverse* a judgment of conviction without first addressing any issue of error preservation.'" *Id.* (quoting *Gipson v. State*, 383 S.W.3d 152, 159 (Tex. Crim. App. 2014)) (emphasis in original).[1]

In filing its petition for discretionary review, the State for the first time argued that Moser failed to preserve error because his "motions to suppress and his arguments at the suppression hearing never challenged the validity of the draw mandated by Transportation Code section 724.012(b)(a)(A), based upon *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)." *Moser*, 2016 WL 325435, at *2. In its opinion remanding this case, the Texas Court of Criminal Appeals pointed to its recent opinion: *Douds v. State*, 472 S.W.3d 670 (Tex. Crim. App. 2015).

In *Douds*, 472 S.W.3d at 672, the appellant filed two motions to suppress that asserted various grounds. However, at the evidentiary hearing, the appellant's counsel told the trial court he was limiting his second motion to a complaint about the admission of his oral statements.[2] *Id.* The court of criminal appeals concluded that because the "appellant expressly stated at the end of the evidentiary hearing that he was narrowing his second motion to his complaint about the

[1] We note that in its original brief on the merits the State did not raise the issue of error preservation.

[2] As in the instant case, the suppression hearing in *Douds* was held before the Supreme Court issued its opinion in *McNeely*. *See Douds*, 472 S.W.3d at 672 n.7.

admission of oral statement, [it] must only address whether his first motion apprised the trial court of the complaint he presents in this appeal." *Id.* at 674. The court of criminal appeals stated that "in resolving questions of preservation of error, [it] may not consider arguments in isolation, but [it] instead must look to the context of the entire record." *Id.* The court concluded,

> To the extent that appellant's first written motion, viewed in isolation, could be construed as also having presented a Fourth Amendment complaint based on Officer's Tran's failure to secure a search warrant prior to collecting a blood specimen, the motion, when viewed in the context of the entire record, reasonably shows that the trial court was fairly apprised solely of appellant's argument that the requirements of the mandatory-blood-draw statute had not been met by the officer's testimony describing the passenger's injuries.

Id. "Viewing appellant's arguments in their entirety, [the court of criminal appeals] conclude[d] that they can be fairly characterized as presenting a challenge to the admissibility of the blood evidence only on the basis of Officer Tran's application of the mandatory-blood-draw statute to appellant's case." *Id.* at 676. According to the court of criminal appeals, "[a]ppellant's counsel's questions and arguments at the hearing were devoted solely to establishing that the statutory requirements for a mandatory blood draw had not been met." *Id.* "Furthermore, to the extent that appellant mentioned Fourth Amendment principles at all during the hearing, it was for the sole purpose of asserting that, in light of those principles, the statute must be narrowly construed." Thus, the court held that the appellant had "failed to preserve error with respect to his Fourth Amendment complaint that the blood evidence was subject to suppression on the basis that it was obtained without a warrant." *Id.* at 677.

In this case, Moser filed three separate motions to suppress: Motion to Suppress Arrest of Defendant, Motion to Suppress Blood Test Taken by D.P.S., and Motion to Suppress Hospital Blood Test. In all three motions, Moser argued that his arrest and search was "without valid warrant, reasonable suspicion, or probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution." In his Motion to Suppress Blood Test Taken by

D.P.S., he argued that "the blood seized from the defendant and the blood alcohol concentration analysis should be suppressed as the defendant's blood was taken in violation of the defendant's rights." However, at the suppression hearing, Moser's counsel limited his argument:

> The motion to suppress the arrest of the Defendant and the motion to suppress blood test taken by DPS, and they kind of go hand in hand and, if I may, Your Honor, I can kind of explain that. It's our position that Trooper Bacon did not have probable cause to arrest Mr. Moser on the night in question and that's because he didn't have probable cause to arrest him under 724.012 of the Code of Criminal Procedure – I mean, not of the Code of Criminal Procedure, the Texas Transportation Code, that a mandatory specimen was basically illegal, so the results of that blood test that was taken by Trooper Bacon should be suppressed. . . . That's the gist, and it's kind of a combination of the motion to suppress the arrest of the Defendant and the motion to suppress the blood test taken by DPS. I've kind of combined those two and narrowed it down, but that's what we're here for, probable cause to arrest. If he didn't have probable cause to arrest, then it's our position the blood test should be suppressed.

The evidentiary hearing then focused on whether the officer had probable cause to arrest Moser. At the end of the hearing, Moser's attorney again focused on whether the officer had probable cause to arrest Moser:

> So I submit to you he wasn't really even under arrest, but they didn't have probable cause to arrest. If they don't have probable cause to arrest, then you can't get to 724.012, and if they're not placed under arrest, then you can't take the specimen against their will. And I believe that's exactly what happened in this case, Your Honor. I don't think there was probable cause. I don't think he was arrested. If there's no probable cause to arrest, you can't get to 724.012, and if they're not arrested, you can't take that specimen against their will.

In reviewing the record as a whole and following *Douds*, we must conclude that Moser did not preserve error for appeal. He did not argue in the trial court that the mandatory blood draw performed without a warrant violated his rights under the Fourth Amendment. Instead, Moser, not having the benefit of the Supreme Court's opinion in *McNeely*, focused his arguments on whether the statutory requirements of section 724.012, the mandatory blood draw statute, had been fulfilled.

Therefore, because Moser did not preserve error for appeal, we affirm the judgment of the trial court.[3]

Karen Angelini, Justice

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[3] Having determined that Moser did not preserve his complaint, we need not address ground (2).