In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00153-CR

MICHAEL KEVIN TULLY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 12-09-09625-CR

MEMORANDUM OPINION

Michael Kevin Tully pleaded guilty to driving while intoxicated. The trial court sentenced Tully to ten years in prison, but suspended imposition of the sentence and placed Tully on community supervision for five years. In one appellate issue, Tully challenges the trial court's denial of his motion to suppress. We sustain issue one, reverse the trial court's judgment, and we remand for further proceedings consistent with this opinion.

"We review a trial court's ruling on a motion to suppress under a bifurcated standard of review." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). "First, we afford almost total deference to a trial judge's determination of historical facts." *Id*. Second, we review a trial court's application of the law to the facts *de novo*. *Id*. We sustain the trial court's ruling if it is reasonably supported by the record and is correct on any applicable legal theory. *Id*. at 447-48.

In his motion to suppress, Tully argued that his blood was drawn without his consent or a warrant, and the results of the draw should be suppressed. At the suppression hearing, Deputy Jeremy Davis testified that around 3:00 a.m. on September 9, 2012, he responded to a domestic disturbance involving a woman and her boyfriend. The woman claimed that her boyfriend assaulted her, then left in a pickup truck. Davis spotted the truck nearby moving at a slow rate of speed and made contact with the driver, who he identified as Tully.

Davis smelled a strong odor of alcohol coming from Tully and the truck. Davis testified that Tully's eyes were bloodshot and glassy, he was combative, did not want to follow directions, and his words were "almost inaudible." Davis suspected that Tully was intoxicated, but he testified that Tully refused to participate in field sobriety tests. Davis also read statutory warnings to Tully and requested a blood sample, but Tully refused. According to Davis, a criminal history

check revealed that Tully had two prior convictions for driving while intoxicated. Andrew James, a Montgomery County assistant district attorney, testified that the law requires an officer to take a mandatory blood sample when a suspect has two prior offenses for driving while intoxicated. Davis testified that he conducted a mandatory blood draw, without a warrant, because of Tully's prior offenses, and that Tully was combative during the blood draw and had to be restrained.

At the conclusion of the hearing, the trial court denied Tully's motion. In its conclusions of law, the trial court found that: (1) exigent, extenuating circumstances, *i.e.*, "the time of night and the fact that officers had to investigate a family violence assault charge[,]" justified the warrantless blood draw; (2) *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) did not invalidate section 724.012 of the Texas Transportation Code; (3) Tully impliedly consented to the blood draw and his consent was irrevocable because of his two prior offenses; (4) the officers were entitled to act in good faith when relying on pre-*McNeely* precedent; and (5) the blood draw was a "valid, warrantless search and seizure." On appeal, Tully challenges these conclusions.

Under Texas's implied-consent provision, when someone is arrested for a DWI, he is deemed to have consented to submit to the taking of a blood or breath specimen for analysis to "determine the alcohol concentration or the presence in

the person's body of a controlled substance, drug, dangerous drug, or other substance." Tex. Transp. Code Ann. § 724.011(a) (West 2011). "[A] specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer." *Id*. § 724.013. However, under Texas's mandatory-blood-draw provision, officers are required to take a blood or breath specimen under certain circumstances, including when a person has at least two previous offenses for driving while intoxicated. *Id*. § 724.012(b)(3).

In *McNeely*, the United States Supreme Court held that "[a] variety of circumstances may give rise to an exigency sufficient to justify a warrantless search[.]"133 S. Ct. at 1558. The Court further held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id*. at 1568. In accordance with *McNeely*, this Court has held that section 724.012(b) of the Texas Transportation Code is not a *per se* exception to the Fourth Amendment's warrant requirement. *State v. Anderson*, 445 S.W.3d 895, 902-903, 908 (Tex. App.—Beaumont 2014, no pet.). Additionally, the Texas Court of Criminal Appeals has held that "a nonconsensual search of a DWI suspect's blood conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the absence of

a warrant or any applicable exception to the warrant requirement, violates the Fourth Amendment." *State v. Villarreal*, No. PD-0306-14, 2014 WL 6734178, at *21 (Tex. Crim. App. Nov. 26, 2014) (not yet released for publication).

Because officers obtained Tully's blood sample without a warrant, and because section 724.012 is not a *per se* exception to the warrant requirement, we must determine whether sufficient exigent circumstances existed to justify the draw. *See id.*; *see also Anderson*, 445 S.W.3d at 908. We consider the totality of the circumstances when determining whether an officer faced an emergency that justified acting without a warrant. *McNeely*, 133 S. Ct. at 1559. Whether a warrantless blood test is reasonable is determined on a case by case basis. *Id*. at 1563. Exigent circumstances justify a warrantless blood draw when there is a "'compelling need for official action and no time to secure a warrant.'" *Id*. at 1559 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id*. at 1561.

The record in this case does not demonstrate that officers had insufficient time to obtain a warrant. Davis arrested Tully around 3:30 a.m. and the blood draw occurred around 4:35 a.m. According to the record, Davis believed the blood draw

was mandatory and a warrant was not required, so he did not consider obtaining a search warrant. The record also indicates that law enforcement would normally contact an on-call judge to obtain a search warrant and does not indicate that a judge was unavailable on the night of Tully's arrest. Absent evidence demonstrating that officers had no time to obtain a search warrant, we conclude that exigent circumstances did not justify the warrantless blood draw. *See id*. at 1559, 1561.

Nor was the blood draw justified by the officer's good faith reliance on the Texas Transportation Code. The federal exclusionary rule does not bar evidence obtained when an officer relies in good faith on (1) a statute authorizing a warrantless search, and the statute is later deemed unconstitutional; or (2) binding appellate precedent which is later overturned. *Anderson*, 445 S.W.3d at 912. However, the only exception to the Texas exclusionary rule arises when "the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." Tex. Code Crim. Proc. Ann. art. 38.23(b) (West 2005). Because the Texas exclusionary rule differs and because the Texas Court of Criminal Appeals has refused to expand the Texas exclusionary rule, this Court has previously rejected the contention that an officer's good faith reliance on the mandatory-blood-draw

provision constitutes an exception to the Texas exclusionary rule. *Anderson*, 445 S.W.3d at 911-12. We decline to revisit that issue in this case.

Accordingly, we conclude that the trial court erred by denying Tully's motion to suppress. We sustain Tully's sole issue. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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CHARLES KREGER
Justice

Submitted on February 5, 2015
Opinion Delivered January 27, 2016
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Before McKeithen, C.J., Kreger and Horton, JJ.