In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00259-CR

RANDY BLANCHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 12-15024

MEMORANDUM OPINION

In five issues, Randy Blanchard appeals his conviction for intoxication manslaughter. *See* Tex. Penal Code Ann. § 49.08 (West 2011) (Intoxication Manslaughter). Seeking to overturn his conviction, Blanchard argues that (1) jeopardy attached following a plea proceeding to approve the first of three plea agreements that Blanchard made with the State; (2) error occurred when the prosecutor failed to recommend to the court that it accept Blanchard's first plea

agreement because the prosecutor was bound to perform the obligations he undertook under the proposed agreement; (3) in subsequent proceedings that occurred after the trial court rejected the first of the proposed plea agreements, the trial court erred when it denied Blanchard's motion to suppress, which addressed evidence that police obtained when they seized a sample of his blood; (4) additional error occurred when the trial court failed to suppress the reports of the analysis that State employees performed on the blood sample because the analysis of the sample was not authorized by a duly issued search warrant; and that alternatively, (5) the trial court erred in denying Blanchard's motion to suppress because the State failed to establish during the hearing on his motion that Blanchard's intoxication caused the collision that resulted in his arrest for intoxication manslaughter as required by section 724.012(b) of the Texas Transportation Code. *See* Tex. Transp. Code Ann. § 724.012(b) (West 2011) (requiring police officers to obtain a blood or breath specimen if there was a life-threatening collision, the defendant was arrested for an offense under Chapter 49 of the Texas Penal Code, which defines intoxication and alcoholic beverage offenses, and the arresting officer "reasonably believes" that the collision occurred as a result of the offense).

We conclude that the Double Jeopardy Clause does not bar the State from prosecuting Blanchard on a charge of intoxication manslaughter, but we further conclude the State failed to establish that exigent circumstances existed such that the

police were entitled to order Blanchard to provide them with a sample of his blood without getting a search warrant. We reverse the trial court's ruling on Blanchard's motion to suppress, and we remand the case to the trial court for further proceedings consistent with the opinion.

Background

Shortly after 4:00 p.m. on Saturday, March 17, 2012, Blanchard's truck struck a motorcycle when he drove his truck from a private driveway onto Memorial Boulevard, which is a street consisting of two northbound lanes, two southbound lanes, and a middle turning lane. Port Arthur Police Officer Rogelio Meza arrived on the scene and began investigating the wreck shortly after it occurred. Officer Meza found Francisco Chavez, who was operating the motorcycle, in the northbound lane, next to his motorcycle, lying in a pool of blood. In the hearing on Blanchard's motion to suppress, Officer Meza testified that he found Blanchard still sitting in his truck when he first arrived on the scene, and he found Chavez partly underneath Blanchard's truck. According to Officer Meza, when he spoke to Blanchard on the scene, Blanchard said that he drank four beers earlier that day. When an ambulance took Blanchard to the hospital, Officer Meza followed him there. After Officer Meza got to the hospital, he gave Blanchard a horizontal gaze nystagmus (HGN) test. During the test, Blanchard was seated on a bed. The test was positive on six of six possible clues for intoxication, but Officer Meza did not do any other field sobriety

tests because he did not know whether Blanchard had any injuries that would have interfered with the validity of the other tests.

Based on the results of the HGN test, Officer Meza asked Blanchard to provide a blood sample: Blanchard refused, and he told Officer Meza that he wanted an attorney. Officer Meza did not attempt to get a search warrant, and instead, he ordered a nurse to draw a specimen of Blanchard's blood "[b]ased on the THP-51 that we had at the time[.]"[1] *See* Tex. Transp. Code Ann. § 724.012(b)(1)(A) (authorizing a peace officer to obtain a blood sample if the officer reasonably believes the suspect was driving while intoxicated and caused an accident that resulted in a death). When Blanchard was released from the emergency room, Officer Meza charged Blanchard with intoxication manslaughter and took him to jail. *See* Tex. Penal Code Ann. § 49.08.

In February 2015, Blanchard and the State made the first of the three plea agreements that are discussed in the opinion. The validity of Blanchard's first and last plea agreements are the subject of the issues that Blanchard raises in his appeal. Under the terms of Blanchard's February 2015 plea agreement, Blanchard agreed to

[1] The THP-51 form was admitted into evidence in the suppression hearing. The form, in pertinent part, indicates that peace officers are authorized under section 724.012(b) of the Texas Transportation Code to obtain mandatory blood specimens if the officer who has authorized the mandatory blood draw reasonably believes that the suspect was operating a vehicle while intoxicated and caused a collision that resulted in a person's death. *See* Tex. Transp. Code Ann. § 724.012(b) (West 2011).

plead guilty to criminally negligent homicide, a reduced charge when compared to intoxication manslaughter, in return for the prosecutor's agreement to recommend to the court that the court place Blanchard on deferred adjudication for five years. *See* Tex. Penal Code Ann. § 19.05 (West 2011) (Criminally Negligent Homicide, a State Jail Felony). In the first of two hearings where the trial court considered the February 2015 plea agreement, the trial court found the evidence sufficient to find Blanchard guilty, but the court deferred finding Blanchard guilty so the Community Supervision and Corrections Department (the Department) could conduct a presentence investigation and prepare a report.

After the Department completed its report,[2] the parties appeared in another hearing so the trial court could consider whether it would accept all of the terms that are contained in Blanchard's February 2015 plea agreement. At the beginning of the hearing, which occurred in April 2015, the prosecutor asked the trial court to "reject this plea and set this case back on the trial docket" because the Chavez family had not agreed to the terms in the February 2015 plea agreement. Blanchard objected to the State's request. He asked the trial court to approve the February 2015 plea

[2] In its March 2015 report, among the Department's recommendations, the Department recommended that the trial court should require that Blanchard attend three twelve-step meetings per week and that he be required to install an ignition interlock system on his vehicles.

agreement. Indicating that it wanted to review the Department's presentence report, the trial court briefly recessed the hearing. When the hearing reconvened, the court advised the parties that it would "allow the State to withdraw the plea agreement based on the nature of the miscommunication with the victim's family and widow."

In February 2016, the trial court called Blanchard's case to trial. After seating the jury, the trial court conducted a hearing on Blanchard's motion to suppress, which he filed prior to the date the court called the case for trial. Officer Meza was the only witness who testified in the February 2016 suppression hearing. At the conclusion of the hearing, the trial court found that exigent circumstances existed during the investigation that police conducted into Blanchard's case, and the exigent circumstances allowed the police to order Blanchard to provide them with a sample of his blood without the police first obtaining a search warrant. Shortly after the court denied Blanchard's motion, the parties announced to the court that Blanchard had agreed to plead guilty. This plea resulted from the second of the three plea agreements that are discussed in the opinion. Under Blanchard's February 2016 plea agreement, Blanchard agreed to plead guilty to a charge of intoxication manslaughter in return for the prosecutor's agreement to recommend that he be sentenced to serve a ten-year sentence together with the prosecutor's non-binding recommendation to recommend to the court that it place Blanchard on community supervision for ten

years. The validity of Blanchard's February 2016 plea agreement is not at issue in the appeal.

The record of the proceedings in the trial court show that Blanchard then pleaded guilty pursuant to his February 2016 plea agreement. In the February 2016 hearing on the plea, the trial court pronounced "at this time [I] find you guilty of the second-degree felony offense of intoxication manslaughter." The court then recessed the proceeding in contemplation of a sentencing hearing, which was to be held after the Department provided the court with a second presentence investigation report.

In April 2016, by motion, Blanchard asked the trial court to allow him to withdraw from his February 2016 plea agreement. Blanchard also filed a motion asking that the trial court dismiss the charge of intoxication manslaughter, and he argued that Double Jeopardy barred his prosecution based on his February 2015 plea agreement that resulted in him pleading guilty to the charge of criminally negligent homicide. As an alternative remedy, Blanchard's motion asked that the trial court enforce his February 2015 plea agreement against the State.

In late April, 2016, the trial court heard Blanchard's motions. At the conclusion of the hearing the trial court conducted on the motions, the trial court rejected Blanchard's Double Jeopardy claim, and it rejected Blanchard's request to enforce the terms of his February 2015 plea agreement. However, the trial court allowed Blanchard to withdraw from his February 2016 plea agreement, and granted

Blanchard's request to vacate the court's February 2016 ruling denying Blanchard's motion to suppress. Following the court's April 2016 rulings, the trial court advised the parties: "We are starting from scratch. Everyone is back to where [they need] to be."

In June 2016, Blanchard filed a new motion to suppress. In his motion, Blanchard asked the trial court to suppress "both the blood seized from him as the result of the warrantless search of his person and the warrantless seizure of his blood, and the analytical results of the testing of Blanchard's blood obtained through a subsequent warrantless search of his blood for alcohol." Blanchard also filed another motion to dismiss arguing that his prosecution for intoxication manslaughter was barred on Double Jeopardy grounds.

When the trial court heard these motions in late June 2016, Blanchard argued that because he had pleaded guilty to a reduced charge of criminally negligent homicide, the Double Jeopardy Clause prevented the State from continuing to prosecute him for intoxication manslaughter. According to Blanchard, the February 2015 plea proceedings ended both over his objection and without his consent. The trial court ruled that Blanchard's prosecution for intoxication manslaughter was not barred on Double Jeopardy grounds.

The trial court also considered Blanchard's motion to suppress in the June 2016 hearing. Three witnesses testified in the hearing, all of whom were police

officers who participated in the investigation of the collision that resulted in Chavez's death. The trial court also took judicial notice of several facts in lieu of hearing from several witnesses who were subpoenaed to appear at the hearing.

Detective Troy Robinson, a member of the Port Arthur Police Department's advanced accident investigation team, explained during the June 2016 hearing that he came to the scene of the collision shortly after it occurred. He explained that Officer Meza told him shortly after he arrived on the scene that Blanchard was being investigated for driving under the influence. Detective Robinson also testified that the street where the wreck occurred is one of the busiest streets in the city, and that two or three officers were required following the collision to direct traffic so the investigation could proceed. According to Detective Robinson, there were six Port Arthur police officers who were not directly involved in the investigation of the wreck or involved in controlling traffic on Memorial Boulevard following the wreck, and those six officers were needed so that police protection could be provided in other areas of the city. Detective Robinson described the debris field that resulted from the wreck, and he explained that the investigation into the wreck required his presence at the scene for more than three hours. When asked whether he made any effort to obtain a search warrant before the police obtained a sample of Blanchard's blood, Detective Robinson testified: "[A]t that time, that was not our common practice to obtain a warrant if there was a death in an accident." According to

Detective Robinson, in 2012, the standard practice followed by Port Arthur police officers allowed the officers to obtain a suspect's blood without a warrant if the collision being investigated involved a fatality.

During the hearing, the State attempted to prove that a warrant would not have been easily obtained on the day the collision occurred had police attempted to obtain one. For example, Detective Robinson explained that in 2012, no standardized system existed instructing police officers who handled traffic accidents regarding how they could obtain a search warrant on a weekend. Detective Robinson acknowledged that he was the ranking investigating officer for Blanchard's wreck, and he explained that it would have been his responsibility to obtain a search warrant if he thought one was required. Detective Robinson stated that he could not recall if in 2012 he had access to the home telephone numbers for any judges who might have had the authority to issue a search warrant. According to Detective Robinson, while other Port Arthur police officers who were not involved in investigating car accidents had gotten search warrants on weekends in 2012, it was not his practice to do so in car accident cases.

Officer Meza testified in the June 2016 hearing that he was a patrolman when Blanchard's wreck occurred. Officer Meza explained that he spoke to Blanchard shortly after he came to the scene of the wreck. According to Officer Meza, Blanchard told him that he was exiting a driveway and pulling onto the street. Officer

Meza described Blanchard's appearance at the scene as "uneasy on his feet," and he testified that Blanchard "slurred [his] speech, [and had] bloodshot, watery eyes." Initially, Officer Meza thought that Blanchard was just nervous from having been involved in the collision. Officer Meza stated that when another officer advised him that Blanchard smelled of alcohol, he spoke to Blanchard again. Officer Meza testified that upon speaking to Blanchard a second time, he smelled alcohol on Blanchard's breath, noticed that Blanchard was still slurring his speech, saw that Blanchard was uneasy on his feet, and observed that Blanchard still had bloodshot, watery eyes. Blanchard told Officer Meza that earlier that same day, he drank four beers. Officer Meza testified that he thought Blanchard might be intoxicated based on what he saw at the scene. According to Officer Meza, he did not conduct field sobriety tests on Blanchard at that time because Blanchard left the scene in an ambulance.

Officer Meza followed the ambulance to the hospital. When Officer Meza saw Blanchard, Blanchard was speaking to health care providers in the emergency room. When Officer Meza spoke to Blanchard, he noticed that Blanchard had a strong smell of alcohol on him in the emergency room. Officer Meza explained that while Blanchard was sitting on a bed, he gave Blanchard a horizontal gaze nystagmus test (HGN). According to Officer Meza, the HGN test was positive for six of six possible clues of intoxication. When Officer Meza asked Blanchard to provide a blood

sample, Blanchard refused, and Blanchard requested that he be allowed to speak with an attorney. At that point, Officer Meza instructed a nurse in the emergency room to take a sample of Blanchard's blood. Officer Meza explained that he relied on section 724.012 of the Texas Transportation Code to justify the decision he made to obtain a sample of Blanchard's blood without getting a search warrant. *See* Tex. Transp. Code Ann. § 724.012 (West 2011). Officer Meza addressed why he chose not obtain a search warrant before having the nurse draw a sample of Blanchard's blood. According to Officer Meza, in 2012, Port Arthur police were allowed by policy to obtain a sample of a suspect's blood without getting a search warrant in cases involving traffic accidents that resulted in a fatality. When asked if he stopped and thought about getting a warrant while investigating Blanchard's case, Officer Meza answered: "No, sir." Officer Meza explained that in 2012, he did not have the contact information for any judges that he could have called to get a warrant. He also testified that with the current tablet system that Port Arthur officers use, it can sometimes take as long as three hours to get a warrant. After the nurse collected Blanchard's blood sample, Officer Meza took possession of the vial. When the hospital discharged Blanchard, Officer Meza arrested him and charged him with intoxication manslaughter.

Officer Randy Daws was the last officer who testified in the June 2016 hearing. Officer Daws testified that when he came to the scene of the wreck, he

began taking pictures and noticed a smell of alcohol inside Blanchard's truck. Officer Daws also testified that he noticed Blanchard had difficulty standing, and that Blanchard was "slightly swaying side to side." Officer Daws indicated that his role in the investigation required that he take an inventory of the items that were inside Blanchard's truck. According to Officer Daws, he found a beer can in the truck's center console. Officer Daws testified that Officer Meza was the officer who was responsible for investigating whether Blanchard was intoxicated.

The trial court took judicial notice of several matters that were relevant to the hearing and its findings during the June 2016 hearing. Among the facts that the court judicially noticed, the trial court took judicial notice that magistrates "were available after-hours and that there were ways for people to get their phone numbers." At the conclusion of the hearing, the trial court denied Blanchard's motion to suppress. Explaining its ruling, the trial court stated that, in 2012,

> there were not procedures in place for obtaining a warrant; that there was not an on-call magistrate or a list of magistrate's telephone numbers available to the law enforcement involved; that it would have taken several hours to possibly obtain a warrant, that that could have or would have affected the dissipation of the alcohol in the defendant's blood; that there was some concern the introduction of drugs at the hospital could have affected any results; that the warrants in evidence included zero warrants for any intoxication cases over a seven-year period, and that out of the over 50 warrants in evidence, only five were obtained by the Port Arthur officers and that none of these officers were involved in this case; that there was a need for officers at the scene for traffic control and accident reconstruction, and, also, that the videos do show people standing around at times and also working at times,

> however, it is not clear at all who they were, what their duties were and that the people on the videos I know, at least, included police, fire department, ID techs, EMTs, bystanders and even media.

In July 2016, approximately two weeks after the hearing, Blanchard reached his third of the plea agreements discussed in the opinion. Under Blanchard's July 2016 plea agreement, he agreed to plead guilty to intoxication manslaughter in return for a ten-year sentence, accompanied by the prosecutor's recommendation to the court that it place Blanchard on community supervision for ten years. *See* Tex. Penal Code Ann. § 49.08. The trial court accepted the plea agreement, sentenced Blanchard to serve a ten-year sentence, suspended that sentence, and placed Blanchard on community supervision for ten years. As a condition of the court's community supervision order, the trial court ordered that Blanchard serve 150 days in jail. *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 4.01, sec. 13(b), 1993 Tex. Gen. Laws 3586, 3728, *repealed and replaced by* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 1.01, art. 42A.401(a)(5), § 3.01, 2015 Tex. Sess. Law Serv. 2320, 2340, 2394 (West) (to be codified at Tex. Code Crim. Proc. Ann. art. 42A.401(a)(5)) (requiring judges granting community supervision to persons convicted of intoxication manslaughter to confine the defendant in jail for a period of not less than 120 days as a condition of community supervision).

Does the Double Jeopardy Clause Bar Blanchard's Prosecution for Intoxication Manslaughter?

In Blanchard's first issue, he argues that the Double Jeopardy Clause prevents the State from prosecuting him for intoxication manslaughter when the trial court accepted the first plea agreement, which resulted in Blanchard pleading guilty to the reduced offense of criminally negligent homicide. Generally, the Double Jeopardy Clause protects an accused from being put in jeopardy by the State twice for the same offense. U.S. CONST. amend. V; Tex. Const. art. I, § 14; *see Pierson v. State*, 426 S.W.3d 763, 769 (Tex. Crim. App. 2014). However, when the proceedings concern plea agreements, jeopardy does not attach to the prosecution until the trial court has agreed to accept the terms that concern the defendant's proposed sentence. *See Ortiz v. State*, 933 S.W.2d 102, 106-07 (Tex. Crim. App. 1996) (explaining that in connection with a plea proceeding, "jeopardy does not attach until the plea agreement is accepted because no issue is presented as binding on the parties until the trial court accepts the plea"). In plea proceedings, the trial court ordinarily conditionally accepts the defendant's guilty plea in one hearing and then conducts a subsequent hearing to consider whether it will accept the defendant's proposed sentence. In other words, the decision the trial court makes in the first hearing conducted on a proposed plea agreement is conditional because the trial court has not yet decided whether to accept the defendant's proposed sentence, as that is a

decision the court intends to make in a future hearing. Until the trial court accepts the defendant's proposed sentence, the trial court has the right to reject the plea. *Id*. If the court rejects the proposed sentence in the subsequent hearing, the defendant must be allowed to withdraw his plea. *Id.*

The hearings relevant to Blanchard's Double Jeopardy claims are the hearings that occurred in February and April 2015. The transcript of the February 2015 hearing demonstrates that the trial court only conditionally accepted Blanchard's plea, it did not approve the February 2015 plea agreement during the hearing. At the conclusion of the February 2015 hearing, the court did not pronounce Blanchard guilty of criminally negligent homicide, and it did not sentence him. Instead, the court recessed the proceedings, contemplating a future hearing to decide whether Blanchard was guilty and whether to accept the prosecutor's recommendation regarding Blanchard's sentence.

The record of the April 2015 hearing reflects the prosecutor did not fulfill his part of the plea agreement, as he did not recommend that the trial court approve Blanchard's proposed sentence. Instead, the hearing shows that the prosecutor asked the trial court to reject the agreement because Chavez's family had not approved the terms of the offer. The trial court after taking a short recess did not approve the plea agreement, it did not pronounce Blanchard guilty of criminally negligent homicide, and it did not sentence Blanchard based on his conditional plea. Instead, the trial

court informed the parties that the State was going to be allowed to withdraw from the plea agreement, that the parties would be allowed to negotiate another agreement, or at Blanchard's request, the case would be reset for trial.

We conclude the hearings relevant to Blanchard's first issue show that the trial court never accepted the terms of Blanchard's proposed February 2015 plea agreement. By failing to accept the agreement's terms, the trial court implicitly rejected the February 2015 plea agreement without expressly having stated that the court was rejecting the agreement. Consequently, jeopardy never attached because the agreement was rejected and was not accepted. *See id*. We conclude that issue one is without merit, and it is overruled.

Is Blanchard Entitled to Have the State Specifically Perform Pursuant to the Terms of the February 2015 Plea Agreement?

In Blanchard's second issue, Blanchard argues the trial court erred by refusing to require the State to perform the obligations it undertook based on the terms of Blanchard's February 2015 plea agreement. According to Blanchard, the State breached the agreement at the beginning of the April 2015 hearing by advising the trial court that it should reject the proposed agreement. Blanchard also points out that while the trial court refused to require the State to honor the agreement, it also never expressly announced that it was rejecting the agreement's terms.

Unlike most contracts, plea bargain agreements are subject to a court's approval. While unlike most contracts in that respect, plea agreements in other respects function like contracts. *See Moore v. State*, 295 S.W.3d 329, 331 (Tex. Crim. App. 2009). When a trial court agrees to accept the terms of a proposed plea agreement, the defendant and the State are bound to perform under the terms to which they agreed when they made their bargain. *Id.* at 332 ("If the trial court accepts a plea-bargain agreement, the state may not withdraw its offer."); *see also Perkins v. Court of Appeals for Third Supreme Judicial Dist. of Tex., at Austin*, 738 S.W.2d 276, 283 (Tex. Crim. App. 1987) (explaining that a defendant is entitled to specific performance of a plea agreement if the trial court has accepted the defendant's plea and approved the agreement's terms).

However, trial courts sometimes choose to reject the terms of a proposed plea. In such cases, the defendant is to be given the opportunity to withdraw his plea. *Moore*, 295 S.W.3d at 331; *see* Tex. Code Crim. Proc. Ann. art. 26.13(a)(2) (West Supp. 2017). Unlike traditional contracts, a plea agreement between the State and a defendant is conditional, as it requires the trial court's approval. *See Ortiz*, 933 S.W.2d at 106.

The transcript from the April 2015 hearing shows the trial court did not accept the terms of the February 2015 plea agreement. The trial court announced in the hearing that the court was going to "reset [Blanchard's case charging him with

intoxication manslaughter] on whatever docket [Blanchard] would like it reset[.]" The trial court also expressly stated in the hearing that it would allow the State to withdraw the plea agreement, and that it would allow the parties to negotiate another plea. In our opinion, the trial court's actions on the agreement indicate that the court was implicitly rejecting the agreement's terms.

In considering whether it wanted to approve the terms in the agreement, the trial court was entitled to consider the wishes of the victim's family and to consider whether the State had given the victim's family appropriate notice about the bargain's terms. *See* Tex. Code Crim. Proc. Ann. art. 26.13(e) (West Supp. 2017). No one disputes that the prosecutor's punishment recommendations were not binding on the trial court. *See* Tex. Code Crim. Proc. Ann. art. 26.13(a)(2). No one disputes that the State failed to give the Chavez family an opportunity to provide their input on the proposal. Because Blanchard's plea agreement was conditioned on the trial court's approval, and this is an approval that Blanchard never obtained, the trial court was not obligated to require the State to perform its part of the agreed bargain under the circumstances that were proven in the hearing. *See id.; Perkins,* 738 S.W.2d at 283. We overrule Blanchard's second issue.

Did the Trial Court Abuse its Discretion by Finding that Exigent Circumstances Existed Sufficient to Excuse the Requirement that Police Obtain a Search Warrant?

In issues three through five, Blanchard argues the trial court erred by denying his motion to suppress. On appeal, a trial court's ruling on a motion to suppress is reviewed using a bifurcated standard. *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). In reviewing such rulings, we are required to give the trial court's findings of historical fact almost total deference when its findings are supported by the record. *Id.* In contrast, the trial court's application of search and seizure law to the facts of a case is reviewed using a de novo standard. *See State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). We will sustain the trial court's ruling if its ruling is reasonably supported by the record and if the ruling is correct on any theory of law applicable to the case. *Id*.

Because Blanchard established that the police obtained a specimen of his blood without a warrant in the hearing, the burden of proof shifted to the State to prove that the warrantless seizure that occurred was reasonable. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). Warrantless seizures of evidence of a crime may be justified if "there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime[.]" *Roaden v. Ky.*, 413 U.S. 496, 505 (1973).

When the trial court considered whether exigent circumstances existed that justified a warrantless seizure of a specimen of Blanchard's blood, it was required to consider the totality of the circumstances and to analyze the facts on a case-by-case basis, as are we. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013). If the State failed to meet its burden, "then a warrantless [search] will not withstand judicial scrutiny." *Gutierrez v. State*, 221 S.W.3d 680, 685-86 (Tex. Crim. App. 2007). In finding that exigent circumstances justified the warrantless seizure that occurred in this case, the trial court's findings reflect that it relied, in part, on the fact that alcohol in a person's blood dissipates with time. However, in cases involving intoxicated drivers, the United States Supreme Court has explained that the fact that alcohol dissipates as time passes does not create a categorical rule that excuses police from the requirements that are imposed on them by the Constitution. *See McNeely*, 569 U.S. at 156 ("In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically."). In this case, no evidence was introduced in the hearing to show that a retrograde analysis could not have been done that would have allowed the State to show the blood alcohol content of Blanchard's blood at the time of the collision, or to show the time frame in which the police could have secured a blood specimen so that such an analysis could have been performed. The record is simply

not sufficiently developed to show that the fact that alcohol is metabolized was relevant in Blanchard's case to show that time was of the essence.

The facts the trial court judicially noticed also undermine the ruling the trial court made in Blanchard's case. Early in the suppression hearing, the trial court took judicial notice that in 2012, people knew how to contact judges who could issue warrants. The trial court also took judicial notice that judges were "available after-hours and that there were ways for [law enforcement officers] to get their phone numbers." The State failed to prove during the hearing which magistrates were available on the afternoon that Blanchard's wreck occurred, or how long it would have taken the police to locate those magistrates and have them issue a search warrant. Additionally, there was evidence presented during the hearing that shows that Port Arthur police officers that were not involved in the investigation of traffic cases had obtained search warrants on weekends in 2012. Although the evidence showed that Officer Meza and Detective Robinson, officers who enforced and investigated traffic accidents in 2012, had never obtained search warrants, their testimony reflects that they were following their customary practices and did not consider getting a search warrant in Blanchard's case because they did not think one was required. While the trial court's ruling, in part, relies on the inexperience of the officers who investigated Blanchard's case for its conclusion regarding exigency,

their lack of experience in getting warrants, in our opinion, is not an exigency that excuses the requirements imposed on them by the Fourth Amendment.

Texas law requires that evidence obtained by an officer in violation of the Constitution be excluded even if the officers acted in good faith during their investigation of a crime. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005) (providing that no evidence obtained in violation of the United States or Texas laws or Constitutions "shall be admitted in evidence against the accused on the trial of any criminal case"); *Love v. State*, No. AP-77,024, 2016 Tex. App. LEXIS 1445, *18-19 (Tex. Crim. App. 2016) (not yet released for publication) (holding that good faith exception for police conduct applies under Texas law only when the law enforcement officer acts in objective good faith reliance upon a warrant issued by a neutral magistrate based upon probable cause). Even if Officer Meza relied in good faith on the mandatory-blood-draw provisions in the Texas Transportation Code to justify his decision not to obtain a warrant, an officer's mistaken belief, even if held in good faith, cannot be used to justify the seizure that resulted from the warrantless search that occurred here. *See* Tex. Code Crim. Proc. Ann. art. 38.23 (West 2005); *McNeil v. State*, 443 S.W.3d 295, 303 (Tex. App—San Antonio 2014, pet. ref'd) ("The main purpose of the [exclusionary] rule is to discourage prospective police misconduct, thereby securing the Fourth Amendment's guarantee against unreasonable searches and seizures."). Lower courts are bound by the holding of the

Court of Criminal Appeals in *State v. Villarreal*, 475 S.W.3d 784, 815 (Tex. Crim. App. 2014). In *Villarreal*, the Court of Criminal Appeals 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." *Id*.

In our opinion, the trial court's ruling under the circumstances proven during the hearing violate the Court's holding in *Villarreal*. *Id*. In Blanchard's case, Officer Meza and Detective Robinson both testified they did not think they needed a search warrant to require Blanchard to give them a sample of his blood. Although Officer Meza followed normal police procedures when he obtained Blanchard's blood sample, neither the lack of police procedures on getting warrants in traffic cases nor the fact that the State has a statute allowing the police to obtain blood samples without warrants in cases involving fatality traffic cases are categorical exceptions to the requirements imposed on government officials by the Fourth Amendment. *See McNeely*, 569 U.S. at 158.

The trial court's findings of fact also focus on whether additional officers were available to investigate and control traffic at the scene of the wreck. However, the trial court's findings do not address why Officer Meza could not have gotten Officer Meaux, who was with him at the hospital, to remain with Blanchard while Officer

Meza determined from his supervisor whether magistrates were available to issue a warrant on the afternoon the wreck occurred. According to Officer Meza, Officer Meaux was present with him at the hospital because, based on past experience, family members of victims sometimes appeared at the hospital creating the possibility of a potential disturbance. According to Officer Meza, he never saw Officer Meaux doing anything while he was at the hospital. Although the State had the burden of proving that exigent circumstances existed, the evidence in the hearing failed to establish that any members of Chavez's family came to the hospital, that Officer Meaux was too busy to assist Officer Meza with his duties, or that Officer Meaux was unavailable to detain Blanchard at the hospital while Officer Meza arranged to have a search warrant issued authorizing the police to obtain a specimen of Blanchard's blood.

The circumstances in this case include the fact the trial court took judicial notice that magistrates who were authorized to issue warrants were available in 2012. The evidence in the hearing wholly failed to address how long it would have taken to locate and have one of those magistrates issue a search warrant. In our opinion, the absence of a formal system or written procedures informing field officers how they could arrange to have a search warrant issued on a weekend is not evidence that established the Port Arthur Police Department faced a situation that justified dispensing with the formalities requiring the police to have a neutral

magistrate issue a search warrant authorizing the police to obtain a specimen of Blanchard's blood. *See McNeil*, 443 S.W.3d at 303 (holding that the fact that no magistrate or judge was on call was insufficient to establish exigency when the evidence showed that the officer in charge of the investigation never thought he needed a warrant). While the trial court's findings indicated it "possibly" could have taken several hours to obtain a warrant, the question was how long in all probability would it have taken the police to obtain a warrant based on the circumstances that existed on the Saturday afternoon that Blanchard's collision with Chavez occurred. When viewed in the light that most favors the trial court's ruling, the State's evidence simply failed to show how long it would have taken Officer Meza to obtain a search warrant that afternoon.

We conclude the State failed to establish that Officer Meza could not have obtained a search warrant in a timely manner had he made an effort to do so after he gave Blanchard the HGN test and developed reasonable suspicion that Blanchard was driving under the influence of alcohol. *See id*. at 304. We further conclude that the trial court's error in denying Blanchard's motion to suppress gave the State leverage in the plea bargaining process that it otherwise would not have had. *McKenna v. State*, 780 S.W.2d 797, 800 (Tex. Crim. App. 1989); *see* Tex. R. App. P. 44.2(a). Therefore, we cannot conclude under a standard that is based on beyond

a reasonable doubt that the trial court's error did not contribute to Blanchard's decision to plead guilty. We sustain Blanchard's third issue.

Conclusion

Given our resolution of issue three, we need not resolve issues four and five. These two issues argue that the State, for additional reasons, failed to meet its burden to show that the police had the right to obtain and conduct tests on Blanchard's blood without first getting a search warrant. If sustained, the arguments that Blanchard advances in issues four and five would entitle Blanchard to no relief greater than the relief he has obtained in issue three. *See* Tex. R. App. P. 47.1. We reverse the trial court's judgment, and we remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on September 11, 2017
Opinion Delivered December 20, 2017
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Before Kreger, Horton and Johnson, JJ.