TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00588-CR

The State of Texas, Appellant

v.

Hector Martinez, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 427TH JUDICIAL DISTRICT
NO. D-1-DC-13-900228, HONORABLE JIM CORONADO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Following his arrest for the felony offense of driving while intoxicated,[1] appellee Hector Martinez's blood was drawn without a warrant pursuant to section 724.012(b) of the Texas Transportation Code, commonly known as the mandatory-blood-draw statute.[2] Prior to trial, Martinez filed a motion to suppress evidence relating to the results of the blood draw, which the district court granted following a hearing. In five points of error on appeal, the State asserts that the district court abused its discretion in granting the motion to suppress. We will affirm the district court's order.

[1] *See* Tex. Penal Code §§ 49.04(a), 49.09(b)(2).

[2] *See* Tex. Transp. Code § 724.012(b).

BACKGROUND

At the hearing on the motion to suppress, an associate judge heard evidence that on the night of March 15, 2013, at approximately 12:30 a.m., Officer Marcus Johnson of the Austin Police Department (APD) responded to a report of a man "banging on a door of a residence" in southeast Austin. Officer Johnson testified that when he arrived at the residence, he observed the man, later identified as Martinez, sitting inside a vehicle, preparing to drive away. Johnson proceeded to stop the vehicle and detain Martinez. According to Johnson, Martinez exhibited signs of intoxication, including bloodshot eyes, an odor of alcohol, and "swaying back and forth" when he walked. After performing field sobriety tests on Martinez, Johnson testified, he placed Martinez under arrest for driving while intoxicated and requested a sample of his breath or blood. According to Johnson, Martinez refused.

Johnson further testified that he then transported Martinez to APD's blood-alcohol-testing (BAT) bus, where he learned that Martinez had two prior convictions for driving while intoxicated. Johnson explained that as a result of Martinez's prior DWI convictions, Johnson was required to initiate APD's procedures for a mandatory blood draw. According to Johnson, blood cannot be drawn at the BAT bus, so he had to transport Martinez to the Travis County Jail, where Martinez's blood could be drawn.

Johnson testified that when they arrived at the jail, Martinez did not respond to Johnson's commands and appeared to be hyperventilating. Johnson then called EMS. Once EMS arrived at the jail, Johnson recounted, Martinez "started, like, flailing around, kicking his legs and stuff." Eventually, Johnson explained, EMS was able to sedate Martinez and transport him to Brackenridge Hospital, where Martinez's blood was drawn at approximately 3:34 a.m.,

approximately three hours after Johnson had first made contact with Martinez. According to Johnson, he never attempted to obtain a warrant for Martinez's blood because APD policy did not require him to do so.

After taking the matter under advisement, the associate judge recommended granting the motion to suppress and made findings of fact and conclusions of law, including the following regarding whether "exigent circumstances" justified Johnson's decision to draw Martinez's blood without first obtaining a warrant:

> I find that the medical intervention did not present exigent circumstances which would have made a warrantless blood draw objectively reasonable. The time from the initial call to when the blood was drawn was about three hours. According to Officer Johnson's testimony, it would have been about the same amount of time had a warrant been sought. The medical situation might have given rise to exigency had it been prolonged, as the passage of time does make the blood test evidence less reliable, but that did not in fact happen.

The district court adopted the associate judge's findings and granted the motion to suppress. This appeal by the State followed.

STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress, "an appellate court must apply a standard of abuse of discretion and overturn the trial court's ruling only if it is outside the zone of reasonable disagreement."[3] We will uphold the court's ruling if it is reasonably supported by the record and correct under any theory of law applicable to the case.[4] "The appellate court must

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[3] *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)).

[4] *See Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009).

apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations."[5] In this case, we review de novo the trial court's application of the law of search and seizure to the facts.[6]

ANALYSIS

Exigent circumstances

In its first point of error, the State asserts that the blood-draw evidence is admissible pursuant to the exigent-circumstances exception to the warrant requirement. Specifically, the State claims that there was "an actual medical emergency," which, in the State's view, justified the officer's decision to forego obtaining a warrant prior to drawing Martinez's blood.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[7] The drawing of a person's blood is considered a search under the Fourth Amendment.[8]

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[5] *Martinez*, 348 S.W.3d at 922-23 (citing *Guzman v. State*, 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997)).

[6] *See Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2011); *Thompson v. State*, 408 S.W.3d 614, 621 (Tex. App.—Austin 2013, no pet.); *see also State v. Villarreal*, 475 S.W.3d 784, 798 (Tex. Crim. App. 2014) ("[B]ecause the facts are undisputed and the questions before us are matters of law, we apply a de novo standard of review."); *Kothe v. State*, 152 S.W.3d 54, 62 (Tex. Crim. App. 2004) ("On appeal, the question of whether a specific search or seizure is 'reasonable' under the Fourth Amendment is subject to de novo review. Despite its fact-sensitive analysis, 'reasonableness' is ultimately a question of substantive Fourth Amendment law.").

[7] U.S. Const. amend. IV.

[8] *See Schmerber v. California*, 384 U.S. 757, 769 (1966).

"Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."[9] "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."[10] Therefore, "a warrantless search of the person is reasonable only if it falls within a recognized exception" to the warrant requirement.[11]

"'One well-recognized exception,' and the one at issue in this case, 'applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.'"[12] One such exigent circumstance, and the one applicable to this case, is preventing the destruction of evidence or contraband.[13] In drunk-driving cases, the evidence that is at risk of destruction is a suspect's blood-alcohol content, which "begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[14] Accordingly, the Supreme Court has held that the warrantless collection of blood from a DWI suspect does not violate the Fourth Amendment in cases "when the officer might reasonably

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[9] *Id*. at 770.

[10] *Id*.

[11] *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013) (citing *United States v. Robinson*, 414 U.S. 218, 224 (1973)).

[12] *Id*. (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

[13] *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007) (citing *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991)).

[14] *Schmerber*, 384 U.S. at 770.

have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[15]

More recently, however, the Supreme Court has clarified that holding, rejecting the argument that "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases."[16] Instead, the Court has held, "exigency in this context must be determined case by case based on the totality of the circumstances."[17] Although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," in other cases, "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."[18] As with other warrantless searches, the burden is on the State to prove that the warrantless blood draw was reasonable under the totality of the circumstances.[19]

On this record, we cannot conclude that the district court abused its discretion in finding that the State failed to satisfy its burden to show that there were exigent circumstances sufficient to justify dispensing with the warrant requirement. It is true, as the State contends, that

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[15] *Id*. (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

[16] *McNeely*, 133 S. Ct. at 1558.

[17] *Id*.

[18] *Id*.; *see also McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative")

[19] *See Amador v. State*, 221 S.W.3d 666, 672-73 (Tex. Crim. App. 2007); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

in some cases, the necessity of medical treatment may justify an officer's decision to forego a warrant prior to a blood draw.[20] But not always. As the Supreme Court observed in *McNeely*: "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement."[21]

Here, the record supports the district court's finding that Martinez's blood could have been drawn with a warrant in "about the same amount of time" as it was drawn without a warrant. Officer Johnson testified that it usually takes him 45 minutes to an hour to obtain a warrant,[22] which is less than the total amount of time that had elapsed between the arrival of Johnson and Martinez at the Travis County Jail (approximately 2:15 a.m.) and the subsequent blood draw at Brackenridge Hospital (approximately 3:34 a.m.). Johnson testified that there was a magistrate available at the jail 24 hours per day for the purpose of signing warrants. Thus, the district court could have reasonably inferred that a warrant could have been obtained at the jail. Although Johnson accompanied Martinez to the hospital and remained there, there is nothing in the record to indicate that Johnson was required to do so or that he could not have asked another officer to take custody of Martinez

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[20] *See Schmerber*, 384 U.S. at 770-71.

[21] 133 S. Ct. at 1561.

[22] The district court here could have reasonably inferred that obtaining a warrant might have taken less time than that. Johnson testified that Martinez's arrest took place on a "no-refusal" weekend during South by Southwest. According to Johnson, on "no-refusal" weekends, because multiple "DWI units" are available to process DWI suspects, the time it takes to obtain a warrant is "a whole lot faster." Johnson estimated that when an officer in a DWI unit seeks a warrant, the process might take approximately 20 or 30 minutes.

while Johnson remained behind at the jail to secure a warrant. Nor did Johnson testify that other officers were unavailable at the jail to obtain a warrant while Johnson accompanied Martinez to the hospital.[23] Thus, the district court could have reasonably inferred that during the time Martinez was being transported to the hospital, Johnson or another officer could have secured a warrant without "significantly increasing the delay" in drawing Martinez's blood.[24] Additionally, Johnson provided no testimony suggesting that the reason he decided not to obtain a warrant was because of the medical situation with Martinez or any other exigency. Rather, Johnson testified that he did not attempt to obtain a warrant because APD policy allowed him to proceed without one. Thus, the district court could have reasonably concluded that the decision to forego obtaining a warrant in this case was not the result of exigent circumstances. On this record, we cannot conclude that the district court abused its discretion in finding that the exigent-circumstances exception to the warrant requirement did not apply here.[25]

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[23] In fact, because of Johnson's testimony regarding the procedures during "no-refusal" weekends, the district court could have reasonably inferred that other officers would have been available to assist Johnson in securing a warrant.

[24] Johnson also testified that it was possible to obtain a warrant over the phone. Thus, the district court could have reasonably inferred that the warrant process could have occurred telephonically, either while Johnson was en route to the hospital with Martinez or once he arrived there. *See Clay v. State*, 391 S.W.3d 94, 103-04 (Tex. Crim. App. 2013) (explaining that warrants may be obtained telephonically in certain cases).

[25] *See McNeely*, 133 S. Ct. at 1561; *Roop v. State*, ___ S.W.3d ___, 2016 Tex. App. LEXIS 1541, at *14-15 (Tex. App.—Austin Feb. 17, 2016, no pet. h.) (op., designated for publication) (explaining that burden is on State to prove that officer's decision to not seek warrant was result of exigent circumstances); *Huff v. State*, 467 S.W.3d 11, 33-34 (Tex. App.—San Antonio 2015, pet. filed) (finding no exigent circumstances when officer testified that he did not obtain warrant because "it was simply not the practice of San Antonio police officers to obtain a warrant under circumstances such as those presented in this case"); *Cole v. State*, 454 S.W.3d 89, 103 (Tex. App.—Texarkana 2014, pet. granted) (concluding that exigent-circumstances exception did

Other issues

In its second point of error, the State asserts that the blood-draw evidence is admissible because warrantless blood draws, which the State contends are authorized by section 724.012(b) of the Transportation Code,[26] are "reasonable" under a traditional Fourth-Amendment balancing test. In its third point of error, the State argues in the alternative that the evidence is admissible because Martinez "impliedly consented" to the blood draw pursuant to section 724.011(a) of the Transportation Code.[27] These arguments have been previously considered and rejected by the Texas Court of Criminal Appeals, this Court, and other appellate courts in similar cases.[28] Consistent with the precedent established in these cases, we overrule the State's first and second points of error.

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not apply when process of obtaining warrant would not have significantly delayed blood draw following suspect's transport to hospital).

[26] *See* Tex. Transp. Code § 724.012(b).

[27] *See id*. § 724.011(a) ("If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, . . the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood 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.").

[28] *See Villarreal*, 475 S.W.3d at 799-800, 808-09, 813; *State v. Molden*, ___ S.W.3d ___, No. 03-14-00166-CR, 2016 Tex. App. LEXIS 1539, at *4-9 (Tex. App.—Austin Feb. 17, 2016, pet. filed) (op., designated for publication); *State v. Hill*, ___ S.W.3d ___, No. 03-13-00834-CR, 2016 Tex. App. LEXIS 1540, at *3-8 (Tex. App.—Austin Feb. 17, 2016, no pet. h.) (op., designated for publication); *Roop*, ___ S.W.3d ___, 2016 Tex. App. LEXIS 1541, at *11-13; *see also State v. Ayala*, No. 03-14-00651-CR, 2016 Tex. App. LEXIS 2166, at *6-10 (Tex. App.—Austin Mar. 2, 2016, pet. filed) (mem. op., not designated for publication); *State v. Munoz*, 474 S.W.3d 8, 13-14 (Tex. App.—El Paso 2015, pet. ref'd); *State v. Tercero*, 467 S.W.3d 1, 6-9 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *Chidyausiku v. State*, 457 S.W.3d 627, 630-31 (Tex. App.—Fort Worth 2015, pet. filed); *State v. Garcia*, 457 S.W.3d 546, 547-48 (Tex. App.—San Antonio 2015, pet. filed); *Lloyd v. State*, 453 S.W.3d 544, 546-48 (Tex. App.—Dallas 2014, pet. ref'd).

In its fourth and fifth points of error, the State asserts that, even if the evidence was obtained in violation of the Fourth Amendment, the state and federal exclusionary rules do not require the evidence to be suppressed. These arguments have been previously considered and rejected by this Court and others in similar cases.[29] Unless and until the Court of Criminal Appeals instructs us otherwise, we will continue to follow those cases. We overrule the State's fourth and fifth points of error.

CONCLUSION

We affirm the district court's order granting the motion to suppress.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: March 30, 2016

Do Not Publish

[29] *See Molden*, 2016 Tex. App. LEXIS 1539, at *12-15; *Hill*, 2016 Tex. App. LEXIS 1540, at *10-14; *Roop*, 2016 Tex. App. LEXIS 1541, at *15-17; *Munoz*, 474 S.W.3d at 16; *Tercero*, 467 S.W.3d at 10-11; *Burks v. State*, 454 S.W.3d 705, 709 (Tex. App.—Fort Worth 2015, pet. ref'd); *State v. Anderson*, 445 S.W.3d 895, 912 (Tex. App.—Beaumont 2014, no pet.); *Forsyth v. State*, 438 S.W.3d 216, 224-25 (Tex. App.—Eastland 2014, pet. ref'd); *see also Ayala*, 2016 Tex. App. LEXIS 2166, at *11-12; *State v. Esher*, No. 05-14-00694-CR, 2015 Tex. App. LEXIS 7722, at *10-11 (Tex. App.—Dallas July 27, 2015, no pet.) (mem. op., not designated for publication); *Gentry v. State*, No. 12-13-00168-CR, 2014 Tex. App. LEXIS 9538, at *6-7 (Tex. App.—Tyler Aug. 27, 2014, pet. ref'd) (mem. op., not designated for publication); *Fitzgerald v. State*, No. 04-13-00662-CR, 2014 Tex. App. LEXIS 8208, at *6 (Tex. App.—San Antonio July 30, 2014, pet. ref'd) (mem. op., not designated for publication).