90926-1

SUPREME COURT NO. _____
COURT OF APPEALS NO. 69663-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review the published decision of the Court of Appeals in State v. Martines, No. 69663-7-I (July 21, 2014), a copy of which is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A Washington State Patrol Trooper sought a search warrant to draw vials of Martines's blood for the express purpose of testing that blood for evidence of the crime of Driving Under the Influence. A magistrate approved the warrant, authorizing the seizure of a blood sample, because "there [wa]s probable cause to believe that . . . evidence of the crime(s) of: Driving While under the Influence" would be found in the blood. After the warrant was executed and the blood sample obtained, the blood was tested for evidence of the crime of Driving Under the Influence. No case law or court rule has ever required a separate, express judicial authorization to test a blood sample lawfully obtained by search warrant. Did the trial court properly deny Martines's motion to suppress the results of the forensic analysis of his blood?

C. STATEMENT OF THE CASE

On June 16, 2012, Martines was driving an SUV on Highway 167 when he crashed into another car, hit the highway barrier, and rolled over. Several citizens, an off-duty officer who stopped to help, and the responding Washington State Patrol trooper all believed that Martines was intoxicated. Martines, slip op. at 1-2.

In an affidavit for search warrant, the trooper provided the basis to find probable cause that Martines had committed the crime of Driving Under the Influence, a violation of RCW 46.61.502. CP 95-99. He also explained that a sample of Martines's blood, "if extracted within a reasonable period of time after he/she last operated, or was in physical control of, a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive." CP 97. The magistrate approved the warrant, finding that "there is probable cause to believe that . . . evidence of the crime(s) of: Driving While under the Influence, RCW 46.61.502 is concealed in, about or upon the person of Martines," and commanding the extraction of a "sample of blood" from him. CP 100-01.

The warrant was served on Martines, a blood sample was extracted, and the blood was later tested by the Washington State Patrol Toxicology Laboratory, which determined that Martines's blood alcohol

concentration was about .061 g/100 mL, and that his blood also contained .05 mg/L of diazepam (also known as Valium) and .03 mg/L of nordiazepam, both central nervous system depressants. 3RP 40-47.

Pretrial, Martines moved to suppress any evidence of drugs in his blood, on the grounds that there was inadequate probable cause that he was under the influence of drugs to warrant testing his blood for anything other than alcohol. CP 7-12. The trial court denied the motion. 1RP 30-39, 52-55. Evidence of the alcohol and drug levels in Martines's blood was admitted at trial. 3RP 43-47. He was convicted as charged of one count of Felony Driving Under the Influence. CP 55.

On appeal, Martines seemed to expand his suppression argument to include the claim that the analysis was a separate intrusion that required independent justification, but at oral argument, he argued that alcohol testing was permitted, specifically because the affidavit together with the warrant made clear that alcohol testing would occur.[1] Nonetheless, the Court of Appeals held that *any* testing of the blood sample required an express authorization in the warrant, and reversed Martines's conviction. State v. Martines, No. 69663-7-I (July 21, 2014), attached as Appendix A. The State's Motion for Reconsideration was denied by order of October 8,

[1] Oral argument recording, 3:00-4:40 (http://www.courts.wa.gov/appellate_trial_courts/-appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20140415).

2014, attached as Appendix B. The State timely seeks review of this decision.

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) permits review by this Court where a decision by the Court of Appeals is in conflict with a decision of the Court of Appeals or the Supreme Court, raises a significant question of law under the Washington State or United States Constitutions, or deals with an issue of substantial public interest. These criteria are met here. The decision below mandates that search warrants to draw blood for the purpose of analysis expressly authorize both the taking and the testing of that blood. This novel rule conflicts with decisions from this Court and the Court of Appeals on a constitutional question. The holding will affect warrants obtained before the new rule was announced, and raises many questions as to how future search warrants and court orders must be drafted.

1. THE WARRANT IN THIS CASE AUTHORIZED THE TAKING AND TESTING OF MARTINES'S BLOOD.

Review is warranted because the decision below arises under both the federal and state constitutions. RAP 13.4(b)(3).

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "A search occurs for Fourth Amendment purposes when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'" State v. Young, 123 Wn.2d 173, 189, 867 P.2d 593 (1994) (citations omitted). Article I, section 7 of the Washington Constitution provides greater protection in some areas than does the federal constitution. State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). That provision prohibits government intrusion upon private affairs without authority of law. WASH. CONST. art. I, § 7. Under Article I, section 7, a search occurs when there is an intrusion into "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Rose, 128 Wn.2d 388, 400, 909 P.2d 280 (1996) (citations and internal quotation marks omitted). For the intrusion to constitute a search, it must be an unreasonable intrusion. State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990).

It is undisputed that the taking of a blood sample constitutes a search and seizure for purposes of the Fourth Amendment and Article I, section 7. State v. Kalakosky, 121 Wn.2d 525, 534, 852 P.2d 1064 (1993); State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984).

However, the trooper in this case obtained a search warrant authorizing the search of Martines and the seizure of his blood. CP 94-103; Ex. 20; 2RP 129-32. There is no dispute that the search warrant was supported by probable cause that Martines was driving under the influence of alcohol, and that evidence of that crime could be found in Martines's blood. CP 95-101; Ex. 20. Thus, the only question before the Court of Appeals was Martines's contention that the analysis of his blood, as distinct from the seizure of his blood, violated his constitutional rights.

The affidavit in support of the warrant averred that a sample of Martines's "blood, if extracted within a reasonable period of time after he/she last operated, or was in physical control of, a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive." CP 97. The reviewing magistrate explicitly incorporated the affidavit by reference and authorized the warrant, finding that there was probable cause to believe that evidence of the crime of Driving Under the Influence was "concealed in, about or upon" Martines, and commanding the seizure of "a sample of blood." CP 100-01.

Given the trooper's articulated purpose for obtaining Martines's blood and the trial court's finding that his blood may contain "evidence of the crime" of Driving Under the Influence, the Court of Appeals should

have concluded that the analysis of Martines's blood was anticipated by the warrant, and was permitted.

First, search warrants are to be "interpreted in a common sense, practical manner, rather than in a hypertechnical sense." State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). A vial of blood has no evidentiary value unless or until a forensic analysis is performed upon the blood. Thus, a warrant authorizing the seizure of blood as evidence of a crime necessarily anticipates that the sample will be tested; judicial authorization to conduct the forensic testing outlined in the affidavit is effectively included in the granting of the search warrant. No more express judicial authorization is needed. Accordingly, reading the warrant to authorize seizure but not analysis defies common sense and is wholly impractical. Indeed, a magistrate's authorization for intruding under a suspect's skin and taking a blood sample for the mere purpose of collecting and storing his blood—an intrusion that would lack any evidentiary value—seems unconstitutional on its face.

Second, even if the warrant cannot be construed to authorize the testing for which the blood was sought, Martines's rights were still not violated. An independent and neutral magistrate determined that there was probable cause to believe that Martines's driving was impaired by intoxicants. A law enforcement officer sought that warrant for the express

purpose of analyzing Martines's blood for evidence of intoxicants. Once the warrant was served, the police had Martines's blood sample in their lawful custody. Testing that blood for the purpose identified in the warrant affidavit—to obtain evidence of a crime for which there was probable cause—does not intrude on any reasonable expectation of privacy, nor is such an intrusion itself unreasonable. See Young, 123 Wn.2d at 189; Boland, 115 Wn.2d at 580. Thus, no constitutional violation occurred when the state tested Martines's blood for evidence of the crime of Driving Under the Influence.

Third, the Court of Appeals appeared to believe that the warrant would have been valid if the affidavit was physically attached to the warrant, and the warrant expressly referred to and incorporated the affidavit "with suitable words of reference." Slip op. at 13 n.2 (quoting State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)). The warrant did, however, specifically incorporate the affidavit. CP 100 ("upon the sworn complaint heretofore made and filed . . . and incorporated herein by this reference"), and the two documents were filed with the court as a single exhibit. Ex. 20. The record is otherwise silent as to whether the affidavit was in fact attached, because it was immaterial to Martines's

motion in the trial court which challenged only the drug results, not the alcohol results. CP 7-12.[2]

In the absence of proof that the affidavit was attached to the warrant, the Court of Appeals assumed that it was not and refused to affirm the conviction. But when a record is incomplete, the appellate court is to presume any facts not inconsistent with the record that could sustain the trial court's ruling; it may not presume the existence of facts for the purpose of finding reversible error. State v. Njonge, No. 86072-6, slip op. at 9-10 (Wash. Sept. 25, 2014) (citing State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012). Thus, the Court of Appeals should have concluded that the affidavit was attached, so that the warrant plainly authorized testing of the blood.

In short, this was a search warrant like hundreds of others, and the Court of Appeals had a number of bases upon which it could—and should—have affirmed the trial court's denial of Martines's suppression motion. It should have applied controlling Washington law regarding the interpretation of a search warrant, the breadth of constitutionally protected privacy interests, or the incorporation of an affidavit into a warrant to

[2] Martines's motion was entitled "Motion to Suppress Evidence of Drugs or Drug Testing" and it concluded with this sentence: "Here, the police and witnesses smell and see signs of alcohol activity only. There's never any mention of drugs, no signs of drugs, and no DRE investigation. The Court should suppress any evidence of drugs, because there was no probable cause to test for drugs, only alcohol." CP 12.

conclude that the analysis of Martines's blood was not an unconstitutional intrusion into his personal affairs. It especially should have done so in light of Martines's concession at oral argument that the analysis of his blood for alcohol content was proper.

2. THE DECISION BELOW CONFLICTS WITH SEVERAL APPELLATE DECISIONS IN WASHINGTON.

Instead of resolving this case in the fashion described above, the Court of Appeals reversed the trial court's denial of Martines's suppression motion by separating the act of seizing a sample of a person's blood from the act of examining the seized substance, holding that the latter is a search for which a warrant is required, and the failure to include language in the warrant referring to testing is a constitutional violation that must result in suppression of evidence. Slip op. at 11. This broad holding was not only unnecessary to the resolution of the case, it is inconsistent with Washington cases as well as cases from other jurisdictions, and creates great uncertainty for law enforcement regarding what types of forensic analysis require judicial authorization. See RAP 13.4(b)(1), (2).

First, the holding of the Court of Appeals in Martines conflicts with other decisions of the Court of Appeals and this Court. Division II permitted the forensic examination of a computer, seized pursuant to a

valid search warrant, outside of the ten-day period in which the warrant was to be executed. State v. Grenning, 142 Wn. App. 518, 174 P.3d 706 (2008), aff'd, 169 Wn.2d 47 (2010). In doing so, that court observed that "it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value."[3] Id. at 532 (citing 2 Wayne R. LaFave, Search and Seizure § 4.10(e), at 771 (4th ed. 2004)).

Similarly, this Court has concluded that law enforcement may forensically examine evidence without further authorization because, once the evidence is lawfully in police custody, the suspect's expectation of privacy in that evidence is so reduced that no protectable interest remains under either the federal or state constitution. State v. Cheatam, 150 Wn.2d 626, 634-44, 81 P.3d 830 (2003) (concluding that an arrested defendant lost any privacy interest in his shoes once they were lawfully in police custody); State v. Gregory, 158 Wn.2d 759, 820-29 & n.36, 147 P.3d 1201 (2006) (relying on People v. King, 232 A.D.2d 111 (N.Y. App. Div. 1997), for the conclusion that "[p]rivacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and

[3] Although the Court of Appeals took pains to distinguish a number of cases on which the State relied, Slip op. at 5-10, the Court did not mention Grenning at all. The State cited and discussed Grenning in its brief, see Brief of Respondent at 13-14, and the case directly addresses the claim raised by Martines.

the scientific analysis of a sample does not involve any further search and seizure of a defendant's person").

Moreover, this notion is embedded in this Court's own rules. Criminal Rule 4.7 provides that the trial court may require a defendant to submit to "the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof." CrR 4.7(b)(2)(vi). The rule contains no express authorization for testing. Surely this Court did not intend for superior courts to routinely authorize seizures of blood simply to compile stocks of blood vials in police evidence rooms. Instead, this Court must have intended that the seizure of blood or other biological samples includes subjecting that evidence to relevant forensic analysis, or the seizure was pointless.

Other jurisdictions have reached similar results. See, e.g., State v. Price, 270 P.3d 527 (Utah 2012) (holding, on facts nearly identical to those presented in Martines, that a suspect has no reasonable expectation of privacy in the presence of contraband in his lawfully obtained blood); Harrison v. Commissioner of Public Safety, 781 N.W.2d 918 (Minn. Ct. App. 2010) ("[W]hen the state has lawfully obtained a sample of a person's blood . . . specifically for the purpose of determining alcohol concentration, the person has lost any legitimate expectation of privacy in

the alcohol concentration derived from analysis of the sample."); Wright v. State, 579 S.E.2d 214, 222 (Ga. 2003) (determining that development of film in a camera need not be authorized by warrant, as it is "akin to a laboratory test on any lawfully seized object"); Patterson v. State, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) (concluding that there is no reasonable expectation of privacy in a blood sample lawfully obtained by police); State v. Wallace, 910 P.2d 695 (Haw. 1996) (determining that the chemical testing of evidence already within police custody does not invade any legitimate expectation of privacy); State v. Petrone, 468 N.W.2d 676, 681 (Wisc. 1991) (holding that police may develop film seized during execution of a search warrant because a "search warrant does not limit officers to naked-eye inspections of objects lawfully seized"), overruled on other grounds by State v. Greve, 468 N.W.2d 676 (Wisc. 1991); United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988) (concluding that, if a blood sample is lawfully obtained, "the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes"); State v. Moretti, 521 A.2d 1003, 1009 (R.I. 1987) ("No principle of constitutional law requires any law enforcement official to obtain a warrant prior to testing any item seized during a valid search."), abrogated on other grounds by Advisory Opinion to the Governor (Appointed Counsel), 666 A.2d 813 (1995); see also United States v.

Edwards, 415 U.S. 800, 803-06, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974) ("Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest."); Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (treating extraction of blood for testing and the testing of the blood as a single event for Fourth Amendment purposes).

Against this bulwark of authority, Martines offered not a single case that concluded that express judicial authorization was required to forensically analyze evidence lawfully in the possession of law enforcement. The Court of Appeals likewise cited no such authority. Instead, the Court accepted Martines's invitation to use the reasoning of Skinner v. Ry. Labor Execs.' Assn., 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), and Robinson v. City of Seattle, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000), to conclude that the taking of a biological sample and the analysis of a biological sample are separate events for purposes of the Fourth Amendment and Article I, section 7.

These cases do not support the court's holding. The administrative searches in these cases were analyzed under the "special needs" doctrine, meaning that the searches were not supported by probable cause or individualized suspicion, let alone authorized by a warrant. Further,

although the cases make some distinction between the privacy interest in the taking of the sample and the privacy interest in the analysis of the sample, that distinction makes no difference to the outcome of the cases—rendering it dicta. Skinner, 489 U.S. at 616; Robinson, 102 Wn. App. at 822 n.105. Finally, while these cases recognize that different privacy interests may be at stake in the acquisition of evidence and in the analysis of it, neither holds that the testing alone is an unreasonable intrusion into an individual's privacy.[4]

This is not to say that courts should turn a blind eye to a forensic examination that intrudes into sensitive areas unrelated to any possible crime under investigation. Courts have a role to play if the police, instead of looking for evidence of intoxication, had analyzed Martines's blood for "evidence of disease, pregnancy, and genetic family relationships or lack thereof." Slip op. at 11. But here, law enforcement did no such thing. Its analysis of Martines's blood looked solely and precisely at what the issuing magistrate plainly intended: evidence of impairment relevant to the crime of Driving Under the Influence. Where the Court of Appeals' concerns are hypothetical but not raised in the instant case, the court

[4] Martines also cited to additional special needs cases: Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993); United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011); United States v. Weikert, 504 F.3d 1 (1st Cir. 2007). The application of any of these cases to the question raised by Martines suffers from the same infirmities discussed above.

should not have relied on those concerns to issue a broad ruling inconsistent with Washington precedent. Compare State v. Athan, 160 Wn.2d 354, 367-68, 158 P.3d 27 (2007) (declining to address the fact that DNA testing of abandoned saliva "has the potential to reveal a vast amount of personal information" when law enforcement used it solely for the limited purpose of identification). Review is appropriate to address the conflict with Grenning, Cheatam, Gregory, and Athan.

3. THE COURT OF APPEALS DECISION IS OF SUBSTANTIAL PUBLIC INTEREST BECAUSE IT CREATES AN UNNECESSARY CONSTITUTIONAL HURDLE TO PROSECUTING IMPAIRED DRIVERS.

The breadth of the Martines decision presents an issue of substantial public interest. RAP 13.4(b)(4). The court held that the collection and forensic examination of blood samples are separate events for constitutional purposes that require separate and express authorization in a search warrant. This requirement for express language in search warrants did not exist before Martines. Thus, following the Martines holding, countless forensic tests on blood samples taken pursuant to search warrants in cases charging driving while intoxicated, boating while intoxicated, vehicular assault, vehicular homicide, and all similar crimes have been placed in jeopardy. For some cases pending in the trial courts,

it may be possible to seek a new warrant authorizing testing. But repeat testing places an enormous strain on the already over-taxed resources of the Washington State Toxicology Laboratory, meaning that only select cases can realistically be retested. And, legal challenges to retesting will proliferate based on the timing of the retest or an assertion that a second test is unreliable. In short, the holding in Martines will seriously affect many DUI-related cases in Washington.

The logic of this holding may also extend to other cases where bodily fluids were taken from a defendant. The court's rationale focuses on the nature of blood: "The personal information contained in blood is hidden and highly sensitive. Testing of a blood sample can reveal not only evidence of intoxication, but also evidence of disease, pregnancy, and genetic family relationships or lack thereof." Slip op. at 11. The same can be said, of course, regarding DNA analysis of any human cell. Warrants authorizing the taking of a buccal swab are routine in the prosecution of serious felonies. Such warrants do not always expressly authorize testing of the buccal swab because it has been generally understood, even without express language in the warrant, that reasonable testing would occur.

Similarly, buccal swabs taken pursuant to a court order under CrR 4.7 will also be subject to attack. Court orders for bodily

samples under CrR 4.7 must meet the standards for search warrants. See State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010). CrR 4.7 expressly authorizes only the taking not the testing of a buccal swab, and orders under CrR 4.7 routinely cite the language of the rule, meaning that such orders may not meet the new requirement announced in Martines. It will likely be impossible to retest all such samples.

The decision also creates ambiguities as to future warrants and orders. For instance, the decision suggests that a warrant must "specifi[y] the types of evidence for which the sample may be tested." It is not clear what level of specificity is required. In the DUI context, must the warrant simply expressly authorize testing for alcohol and drugs? Must the warrant specify the types of drugs, even where it is impossible to know what drug a suspect has taken?[5] In the DNA arena, must it distinguish

[5] The Toxicology Lab generally screens a blood sample for many drugs because a wide spectrum of drugs can impair driving. Such testing can assist a trier of fact in determining whether drugs contributed to poor driving. It might also assist a defendant who seeks a mitigated sentence based on the fact that he was unwittingly affected by prescription medication. Moreover, this Court recognizes that even a drug recognition expert cannot precisely determine without forensic testing the class of drug that is impaired driving. See State v. Baity, 140 Wn.2d 1, 6, 991 P.2d 1151 (2000) (drug recognition officers may not render an opinion as to what categories of drugs are consistent with the suspect's behavior and physical attributes absent compliance with the 12-step protocol; step 12 of the protocol is "toxicology analysis").

between CODIS, Y-STR, and/or mitochondrial testing?[6] In "cold case" prosecutions where the sample was gathered perhaps thirty years earlier must the police seek a warrant to conduct new DNA testing?

It is also unclear whether or how traditional search warrant requirements will apply under this new rule. For example, must a toxicology lab or the crime lab complete their "search" of the blood within 10 days of the warrant, or is it sufficient that the sample be delivered to the lab within 10 days? See CrR 2.3(c). Grenning, 142 Wn. App. at 531-32, would suggest that the examination of the blood need not be done in 10 days.[7] However, because the Martines opinion does not address the State's argument based on Grenning, there is certain to be confusion over the question. Questions will also arise as to the return and inventory of search warrant. CrR 2.3(d) was drafted for tangible items like property, blood, or the taking of a buccal swab. If forensic analysis is now a

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[6] The logic of the opinion also suggests that police must obtain a search warrant to test biological evidence, even where they lawfully—by consent, abandonment, or warrant—obtained the biological sample. This Court has already held that DNA testing of an abandoned item for identification purposes is permissible. Athan, 160 Wn.2d at 367-68. However, warrants often issue for bloody items of evidentiary value in a defendant's home or in some other place where it cannot be said that the item was "abandoned." The Martines decision will likely be invoked to suppress evidence under such circumstances. If testing consumed the sample, admissible evidence might be impossible to obtain.

[7] In Grenning, the court held that a warrant authorizing seizure of a computer required that it be seized within 10 days, but the computer need not be fully examined within 10 days. The rationale turned on the conclusion that the examination of the computer was not a search. Authorities suggest that the sample need not be examined within a fixed time period. 3 Wayne R. LaFave, Search & Seizure § 5.3(c) (5th ed.).

"search," does it also follow that a return and inventory must be supplied, and if so, by whom, to whom, how, and when?

This uncertainty will hamper prosecution of impaired driving and other serious cases where evidence was gathered in accord with existing constitutional precedents, raising an issue of substantial public interest.

E. CONCLUSION

The warrant in this case plainly authorized both the seizure and examination of a vial of Martines's blood. A new rule was not required to adjudicate this case or to protect privacy the interests of Washington citizens. The lower court's decision conflicts with existing precedent, concerns a constitutional question, and is of substantial public interest. For those reasons, the State respectfully asks this Court to grant review.

DATED this 16th day of October, 2014.

Respectfully submitted,

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APPENDIX A

COPY

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July 21, 2014

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CASE #: 69663-7-I
State of Washington, Respondent v. Jose Figeroa Martines, Appellant
King County, Cause No. 12-1-02563-7 KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"The conviction is reversed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAM

Enclosure

c: The Honorable Mariane Spearman
Jose Figeroa Martines

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSE FIGEROA MARTINES, Appellant.	)	No. 69663-7-I DIVISION ONE PUBLISHED OPINION FILED: July 21, 2014

BECKER, J. — The extraction of blood from a drunk driving suspect is a search. Testing the blood sample is a second search. It is distinct from the initial extraction because its purpose is to examine the personal information blood contains. We hold that the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested.

The events leading to this appeal occurred on June 20, 2012. Appellant Jose Martines was observed driving his sport utility vehicle erratically on State Route 167. He veered into another car, careened across the highway, bounced off the barrier, and rolled over. Washington State Trooper Dennis Tardiff arrived and took Martines into custody. Martines smelled of intoxicants, had bloodshot and watery eyes, and stumbled while walking.

Trooper Tardiff sought a warrant to extract a blood sample from Martines. His affidavit of probable cause stated that a blood sample "may be tested to

determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive." He obtained a warrant that authorized a competent health care authority to extract a blood sample and ensure its safekeeping. The warrant did not say anything about testing of the blood sample.

Pursuant to the warrant, a blood sample was drawn from Martines at a local hospital. Then it was tested for the presence of drugs and alcohol. The test results indicated that Martines had a blood alcohol level of .121 within an hour after the accident and that the drug diazepam (Valium) was also present. Martines had a prior conviction for vehicular assault while driving under the influence. The State charged him with felony driving under the influence of an intoxicant, RCW 46.61.502(6)(b)(ii).

Martines moved to suppress evidence of drugs or drug testing. He argued there was no probable cause to support testing his blood for drugs because the witnesses observed only the signs and smells of alcohol. The trial court found that probable cause to test for alcohol included probable cause to test for drugs.

At trial, a toxicologist presented the results of the blood test. She testified that both alcohol and diazepam can affect driving ability.

To convict Martines as charged, one of the elements the jury had to find was that at the time of driving a motor vehicle, he:

> (a) was under the influence of or affected by intoxicating liquor or any drug; or
> (b) was under the combined influence of or affected by intoxicating liquor and a drug.

The prosecutor argued in closing that the blood test results confirmed the opinions of various witnesses who believed Martinez was intoxicated based on their observations at the scene. "You take a look at all of that together, and it's pretty clear the defendant was under the influence at that time, alcohol and drugs."

The jury returned a guilty verdict. Martines appeals.

On appeal, Martines briefly repeats his argument that without specific facts in the search warrant supporting a suspicion that Martines was affected by a drug, it was improper to admit the results of the laboratory tests for the presence of drugs. We do not address that argument in this opinion. The primary issue Martines raises on appeal is that testing a blood sample for any purpose is a search for which a warrant is required. Because the warrant authorizing the extraction of blood did not specifically authorize blood testing of any kind, Martines contends that the results should have been suppressed as the fruit of an illegal search. This additional issue is constitutional in nature, and therefore we consider it even though it is raised for the first time on appeal. RAP 2.5(a).

The State responds that a warrant is needed only for the extraction of blood and no further authority is needed to test the extracted sample. It is undisputed that the State had probable cause to suspect that Martines was driving under the influence of alcohol and that evidence of the crime could be found in his blood. In the State's view, once the police obtained a blood sample as authorized by the warrant, they could subject it to testing without any further

showing of probable cause and without a search warrant authorizing testing and particularly identifying the types of evidence for which the sample could be tested. The State asserts that blood is a thing to be seized, not a place to be searched, and once a blood sample is lawfully seized, the individual whose blood has been seized no longer has a constitutionally protected privacy interest in it.

The principal case upon which the State relies is State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003). The defendant in Cheatam was suspected of rape. He was arrested on an unrelated charge and booked into jail. His clothing and personal effects were inventoried and stored in the jail's property room. A detective took his shoes from the property room and confirmed a visual match between the tread and a footprint near the site of the alleged rape. The State charged Cheatam with rape, the court admitted the shoe evidence at the trial, and Cheatam was convicted. He argued on appeal, unsuccessfully, that the shoe evidence should have been suppressed as the fruit of a warrantless search. Cheatam, 150 Wn.2d at 634. The court held that "once an inmate's personal effects have been exposed to police view in a lawful inventory search and stored in the continuous custody of the police, the inmate no longer has a legitimate expectation of privacy in the items free of further governmental intrusion." Cheatam, 150 Wn.2d at 638. It made no difference that an investigation was being conducted into a different crime than the one the inmate was arrested for "because one's privacy interest does not change depending on which crime is under investigation *once lawful exposure has already occurred.*" Cheatam, 150 Wn.2d at 642 (emphasis added).

The State here argues that blood, like shoes, belongs in the category of personal effects and police therefore have unlimited authority to subject a lawfully obtained blood sample to forensic testing for any purpose. The State contends our Supreme Court adopted that position when it applied Cheatam in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). We believe the State reads Gregory too expansively.

In Gregory, the State drew the defendant's blood in connection with a rape investigation, pursuant to a court order authorized by CrR 4.7(b)(2)(vi) and supported by probable cause. By testing the blood sample, the State obtained Gregory's DNA (deoxyribonucleic acid) profile. Gregory did not challenge the reasonableness of the test that produced his DNA profile. Gregory, 158 Wn.2d at 822-23. Later, the State compared the DNA profile to DNA in semen collected from the scene of a murder. The result of this comparison implicated Gregory in the murder. He moved to suppress the use of the DNA evidence in the murder case. He asserted "an ongoing privacy interest in the characteristics of his DNA" such that the State was obligated to obtain a warrant to compare his DNA profile with material collected in connection with an unrelated crime. Gregory, 158 Wn.2d at 825-26.

The court rejected the argument that a warrant was necessary, following Cheatam and holding that Gregory's DNA profile was comparable to Cheatam's shoes:

> While unique requirements must be met to support a blood draw, Gregory has failed to adequately explain why, after the blood draw is complete, *a DNA profile that is lawfully in the State's possession* should be treated differently from other items of a

> defendant's property with regard to subsequent criminal investigations. Gregory's blood *was drawn for the very purpose of conducting DNA analyses* and the resulting DNA profile was lawfully in the possession of police, regardless of which evidence that DNA profile was being compared against, swabs from R.S.'s rape kit or samples from the G.H. crime scene. Gregory does not point to any court that has concluded that *DNA evidence, lawfully in the possession of the State* for the purposes of one criminal investigation, cannot be compared with evidence collected for the purposes of an unrelated criminal investigation. We conclude that *once the suspect's DNA profile is lawfully in the State's possession,* the State need not obtain an independent warrant to compare that profile with new crime scene evidence.

Gregory, 158 Wn.2d at 827 (emphasis added) (footnote omitted).

What must be noted in the passage quoted above is that the item the court regarded as comparable to Cheatam's shoes was Gregory's DNA profile—not his blood. The court held that once the police lawfully obtained Gregory's DNA profile from his blood sample, they were free to compare *that profile* to DNA found during an investigation into a different crime. The court did not hold that the police were free to go back to the blood sample and test it for other types of information not contained in the DNA profile.[1] Gregory does not answer the question posed by Martines—whether a forensic test to acquire particular

[1] In a footnote to the passage from Gregory quoted above, the court cited cases from other jurisdictions in support of the conclusion that once a blood sample has been lawfully procured *for the purpose of DNA testing*, the police do not need an independent warrant to compare it to DNA evidence found at the scene of another crime. Gregory, 158 Wn.2d at 827 n.36, citing People v. King, 232 A.D.2d 111, 663 N.Y.S.2d 610, 614 (1997); Bickley v. State, 227 Ga. App. 413, 489 S.E.2d 167, 170 (1997); Wilson v. State, 132 Md. App. 510, 752 A.2d 1250, 1272 (2000). Arguably, King goes further and indicates that a blood sample, lawfully seized for any purpose at all, is no different from lawfully seized items of tangible property such as a gun or a controlled substance. King, 232 A.D.2d at 117. We are not persuaded by that reasoning, and we do not read Gregory as going that far.

information from a blood sample is itself a search separate from the drawing of the sample.

That question is also unanswered by the next case on which the State relies, State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007). In Athan, the court held that the defendant abandoned any expectation of privacy he may have had in his saliva when he unwittingly but voluntarily mailed to detectives an envelope he had licked. Athan, 160 Wn.2d at 374. Martines did not voluntarily give up his blood sample or any expectation of privacy he had in its contents.

In Athan, the court declined to address an argument by amicus curiae American Civil Liberties Union that "DNA should constitute a privacy interest" because of its potential to reveal a vast amount of personal information, including medical conditions and familial relations. Athan, 160 Wn.2d at 368. The court stated that the concern raised by amicus, "while valid," was not present because the State had used the saliva sample only for identification purposes, not to investigate more personal matters. Athan, 160 Wn.2d at 368. Here, the State suggests that this court can similarly avoid addressing whether there is a privacy interest in blood because the blood sample was used only to investigate whether Martines was guilty of driving under the influence, not to test for unrelated personal information. But in this case, we cannot avoid deciding whether testing of blood is a separate search distinct from drawing of blood. The issue determines the outcome. The importance of deciding it is heightened by the fact that the exigency exception to the Fourth Amendment no longer categorically applies in drunk driving investigations. Missouri v. McNeely, __ U.S. __, 133 S.

Ct. 1552, 1555, 185 L. Ed. 2d 696 (2013). Warrants for testing the blood of drunk driving suspects will now become more prevalent. Law enforcement officers who seek warrants and judges who issue them need guidance as to what these warrants must authorize.

If a government action intrudes upon an individual's "reasonable expectation of privacy," a search occurs under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 360-61, 88 S. Ct. 507, 19 L. Ed. 576 (1967) (Harlan, J., concurring). When the government disturbs those privacy interests that citizens of the state have held, and should be entitled to hold, safe from governmental trespass absent a warrant, a search occurs under article I, section 7 of the Washington Constitution. State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908 (1966). In the context of determining what limitations the Fourth Amendment imposes upon intrusions into the human body, limitations on the kinds of property which may be seized under warrant "are not instructive." Schmerber, 384 U.S. at 768. Similarly, the examinations that may be made of shoes and other personal effects are not instructive when determining whether limitations on the testing of blood are required by the Fourth Amendment or article I, section 7.

In light of our society's concern for the security of one's person, it has long been recognized that a compelled intrusion into the body for blood to be

analyzed for alcohol content is a search. Skinner v. Ry. Labor Exec's. Ass'n, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), citing Schmerber, 384 U.S. at 767-68; State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984) (following Schmerber). "It is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." Skinner, 489 U.S. at 616. According to Skinner, the testing of the blood constitutes a second search. "The ensuing chemical analysis of the sample to obtain physiological data *is a further invasion* of the tested employee's privacy interests." Skinner, 489 U.S. at 616 (emphasis added).

Following Skinner, this court has held that in the context of government employment, the collection and testing of urine invades privacy in at least two distinct ways:

> The invasion in fact is twofold: first, the taking of the sample, which is highly intrusive, and second, the chemical analysis of its contents—which may involve still a third invasion, disclosure of explanatory medical conditions or treatments.

Robinson v. City of Seattle, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000).

The State does not discuss Skinner and Robinson. The State contends, however, that under Schmerber, the right to seize blood from a drunk driving suspect encompasses the right to conduct a blood-alcohol test at some later time. For this proposition, the State relies on United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988). In Snyder, a drunk driving case, blood was drawn without a warrant under the exigency exception to the Fourth Amendment. The defendant argued that police had to seek a warrant for testing after the blood had

been extracted. The court rejected the argument and explained that the seizure and testing of the blood amounted to "a single event" under Schmerber:

> The flaw in Snyder's argument is his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for fourth amendment purposes. He would have us hold that his person was seized when he was arrested, his blood was seized again upon extraction at the hospital, and finally his blood was searched two days later when the blood test was conducted. It seems clear, however, that Schmerber viewed the seizure and separate search of the blood as a single event for fourth amendment purposes.

Snyder, 852 F.2d at 473-74.

Snyder does not control our analysis in this case. The court did not consider whether the Fourth Amendment permits a per se rule allowing unlimited testing upon a lawfully obtained blood sample. The State's argument in this case demands just such a per se rule. In addition, because the blood was drawn under the exigency exception to the warrant requirement, the Snyder court did not consider whether a warrant that expressly authorizes a blood draw should also expressly authorize and limit the purposes for which testing can be conducted. Finally, Skinner had not yet been decided and the Snyder court did not have a precedent indicating that chemical analysis of blood is an independent invasion of privacy.

Physical characteristics which are knowingly exposed to the public are not subject to Fourth Amendment protection. Katz, 389 U.S. at 351; Athan, 160 Wn.2d at 374. Thus, one has no reasonable expectation of privacy in one's voice, fingerprints, handwriting, or facial characteristics. United States v. Dionisio, 410 U.S. 1, 14, 93 S. Ct. 764, 771, 35 L. Ed. 2d 67 (1973) ("No person

can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.")

Blood is not like a voice or a face or handwriting or fingerprints or shoes. The personal information contained in blood is hidden and highly sensitive. Testing of a blood sample can reveal not only evidence of intoxication, but also evidence of disease, pregnancy, and genetic family relationships or lack thereof, conditions that the court in Skinner referred to as "private medical facts." Skinner, 489 U.S. at 617. Citizens of this state have traditionally held, and should be entitled to hold, this kind of information safe from governmental trespass.

Consistent with Skinner and Robinson, we conclude the testing of blood intrudes upon a privacy interest that is distinct from the privacy interests in bodily integrity and personal security that are invaded by a physical penetration of the skin. It follows that the testing of blood is itself a search, and we so hold.

Because the testing of blood is a search, a warrant is required. Riley v. California, No. 13–132, slip op. at 5 (S. Ct. June 25, 2014) (where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant). There are two distinct constitutional protections served by the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038-39, 29 L. Ed. 2d 564 (1971). First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The second, distinct

objective is that those searches deemed necessary "should be as limited as possible" so as to prevent the "rummaging in a person's belongings" that the colonists so abhorred. Coolidge, 403 U.S. at 467. The particularity requirement serves this second objective. A warrant ensures that a search will be "carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Maryland v. Garrison, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). A properly particularized warrant serves the dual function of limiting the executing officer's discretion and informing the person subject to the search what items the officer may seize. State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

Where the State has probable cause to suspect driving under the influence, the requirement to obtain a particularized warrant for blood testing will prevent the State from rummaging among the various items of information contained in a blood sample for evidence unrelated to drunk driving. For example, when a blood sample is obtained in the course of investigating driving under the influence, the State may not—without further warrant—use the sample to produce a DNA profile that can be added to government data banks.

Here the warrant obtained by the trooper could easily have been written to authorize testing the blood for evidence of alcohol and drug intoxication, but it contained no such language. As written, the warrant did not authorize testing at all. It did not limit the trooper's discretion to searching the blood sample only for evidence of alcohol or drugs. Nor did it serve to inform Martines that the testing

would be limited to evidence of alcohol or drug consumption.[2] The testing that occurred in the toxicology lab was a warrantless search.

We presume that a warrantless search violates both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). The State can rebut the presumption by showing that an exception to the warrant requirement applies. Day, 161 Wn.2d 894. The State does not claim there is an exception to the warrant requirement that would apply in this case. Because the blood test results were obtained without a warrant, they should have been suppressed. State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982).

Error in admitting evidence obtained through an unconstitutional search is subject to the constitutional harmless error test of Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). State v. Peele, 10 Wn. App. 58, 66, 516 P.2d 788 (1973), review denied, 83 Wn.2d 1014 (1974). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error

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[2] An overbroad warrant may be cured where the affidavit and the search warrant are physically attached and the warrant expressly refers to the affidavit and incorporates it with "'suitable words of reference.'" Riley, 121 Wn.2d at 29, quoting Bloom v. State, 283 So.2d 134, 136 (Fl. Dist. Ct. App. 1973). Though the issue was not briefed, we have considered whether the deficiencies in the warrant can be cured by recourse to the probable cause affidavit. The affidavit states that a sample of blood from Martines "may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive," and the warrant incorporates by reference the testimonial evidence given to the court. But it is not clear in the record that the affidavit was physically attached to the warrant. The State has not briefed the case under Riley and has not asked us to affirm the conviction on that narrow technical ground.

was harmless. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The State does not offer a harmless error analysis. Presenting the test results was a major focus of the trial, and the prosecutor relied on them in closing. Under the circumstances, we cannot conclude the admission of the alcohol and drug test results was harmless.

The conviction is reversed.

Becker, J.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JOSE FIGEROA MARTINES, Appellant.	No. 69663-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, State of Washington, has filed a motion for reconsideration of the opinion filed on July 21, 2014. Appellant, Jose Figeroa Martines, has filed an answer to respondent's motion for reconsideration. The court has determined that respondent's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 8th day of October, 2014.

FOR THE COURT:

Becker, J.
Judge

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the Petition for Review, in State v. Jose Figueroa Martines, Cause No. 69663-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of October, 2014.

CBrame

Name:
Done in Seattle, Washington

KING COUNTY PROSECUTOR

October 16, 2014 - 10:46 AM

Transmittal Letter

Document Uploaded: 696637-Petition for Review.pdf

Case Name: Jose Figeroa Martines

Court of Appeals Case Number: 69663-7

Party Respresented:

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
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Comments:

No Comments were entered.

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