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No. 71613-1-I

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

King County No. 12-1-01971-8 KNT

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ERIC ARMSTRONG,

Appellant.

APPELLANT'S REPLY BRIEF

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I. REPLY TO STATE'S ARGUMENT THAT THIS COURT'S DECISION IN *STATE v. MARTINES* WAS IN ERROR

In Assignment of Error #1, Appellant Armstrong, relying upon this Court's recent decision in *State v. Martines*, 182 Wn.App. 519, 331 P.3d 105 (2014), asked this Court to suppress the results of the BAC testing and remand the case for a new trial. The State of Washington, in response, does not deny that *State v. Martines* is directly on point or that the Appellant misapplied its holding. Instead, the *State* tells this Court that its decision in *Martines* "was wrongly decided." Resp. Brf. p. 26. The State goes on to give reasons why *Martines* should not be followed.

As should be obvious, *Martines* is guiding precedent in Division I. While the State believes that *Martines* was wrongly decided, rather than arguing so in its Brief in this case, it must look to the Supreme Court of Washington for relief.[1] However, as to pending cases in this Court, *Martines* is precedent that must be followed.

Nor, does the State in its Brief explain how a judicial determination of alleged exigent circumstances at the scene of the incident can justify the testing of Defendant's blood some eight days later. Therefore, even in the unlikely event that the State is able to convince the Supreme Court that *Martines* was wrongly decided because, as they urge,

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[1] The State successfully petitioned for review in *Martines* and the case will be argued sometime in 2015. *See*: *State v. Martines*, S.Ct. No. 90926-1, 339 P.3d 634.

a warrant to draw blood assumes that it will be tested, this does not dispose of the second issue raised in the instant case where there was no warrant or judicial approval at all. Even if an exigency existed on the night of the incident which might allow the State to draw blood without a warrant, as an exception to *Missouri v. McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), this does not resolve the issue of whether a judicial warrant is nevertheless required before the State can test the drawn blood, as this Court held in *Martines*.

In order to support its argument that a warrant is not required before blood is tested, the State at page 30 of its Brief analogizes to rule CrR 4.7(b)(2)(vi) which provides that a trial court may require a defendant to submit to the taking of body samples. From this, the State argues that Court rules were not intended "to routinely authorize seizures of blood simply to compile stocks of blood vials in police evidence rooms" and that it is therefore implied that such samples can be tested without a further warrant. Resp. Brf. p. 30.

This analogy, as it relates to the facts in the instant case, does not hold water, because under CrR 4.7(b)(2)(vi) there must be an order from a judge authorizing the seizure of these items in the first instant, prior to any testing. CrR 4.7(b)(2)(vi) clearly contemplates a due process hearing with notice to both sides and an opportunity to respond and be heard. Here

there was no judicial involvement whatsoever. Therefore, the State's argument is meritless.

The State repeats several times in its brief that *Martines* was wrongly and this Court should not follow its own precedent. *See* Resp. Brief p. 28. Any challenge to this Court's decision in *Martines* must await a decision by the Washington Supreme Court. In the meantime, this Court must follow its precedent in *Martines* and suppress the results of the blood testing in this case.

II. REPLY TO THE STATE'S ARGUMENT THAT THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT SAVES AN UNCONSTITUTIONAL SEARCH

At page 21 of its Brief, the State argues that even if the warrantless blood draw or testing is not supported by exigent circumstances, that the good faith exception to the Fourth Amendment warrant requirement should be applied to save the search. In support thereof, the State cites *Illinois v. Khull*, 480 U.S. 340, 350 (1987), which interpreted the Fourth Amendment.

However, the Washington Supreme Court in *State v. Afana*, 169 Wn.2d 169 (2010) has held that such a "good faith" exception to the exclusionary rule would violate article I, Section 7 of the Washington State Constitution:

> . . . the State asks us to make an exception to the exclusionary rule for illegally obtained evidence by analogy to cases in which the evidence was obtained legally. This we will not do. We reject the State's argument that the "good faith" exception is consistent with our past decisions, and hold that it is incompatible with the nearly categorical exclusionary rule under article I, Section 7.

Id. at 184. *See also*: *State v. Riley*, 159 Wn.App. 1016 (2011).

III. RESPONSE TO STATE'S ARGUMENT THAT THE TRIAL COURT PROPERLY ENHANCED DEFENDANT'S SENTENCE ON THE BASIS OF HIS PRIOR DEFERRED PROSECUTION FOR DUI (ASSIGNMENT OF ERROR #4)

The State argued that the Defendant's sentence was properly increased by 24 months because of his "prior offense" for a deferred prosecution for a DUI. However, the DUI prosecution, which resulted in a deferred prosecution pursuant to RCW Ch. 10.05, does not constitute a "conviction."

In *City of Kent v. Jenkins*, 99 Wn.App. 287, 290 (2000), this Court properly held that a deferred prosecution was "not equivalent to a guilty plea or a conviction."[2] This Court's holding in *Jenkins*, *supra*, is further bolstered by the Washington Supreme Court's decision in *State v. Drum*, 168 Wn.2d 23 (2010) where the Court held that a stipulation to the sufficiency of the evidence in a drug court contract was not binding on either the trial court or the Court of Appeals.

Even though the drug court contract in *Drum* contained an acknowledgement that the defendant waived his right to a trial and had a clause stipulating to the sufficiency of the evidence, this was not binding upon the trial court:

> We are troubled by the Court of Appeals' suggestion that a drug court contract clause stipulating to the sufficiency of the evidence results in the defendant waiving his right to the determination of guilt beyond a reasonable doubt. . . . By entering a drug court contract, a defendant is not giving up his right to an independent finding of guilt beyond a reasonable doubt. A trial court still has the authority to find the defendant not guilty if it determines that the stipulated evidence does not establish all elements of the crime beyond a reasonable doubt.

168 Wn.2d at 34.

In the instant case, while the Defendant stipulated that there were facts which could prove the prior DUI deferred prosecution charge, there was never an adjudication of guilt by a court in that matter. As such, the deferred prosecution cannot constitute a conviction.

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[2] This case is discussed further in Appellant's Opening Brief at p. 27.

IV. CONCLUSION

For the reasons stated, this Court should reverse Mr. Armstrong's conviction, suppress the results of the blood testing, find that the sentence was improperly enhanced and grant a new trial.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.

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OID #9110
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PROOF OF SERVICE

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 24th day of March, 2015, I sent by email and by messenger one true copy of Appellant's Opening Brief directed to the attorney for Respondent:

Amy Meckling, Esq.
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Appellate Division
King County Courthouse
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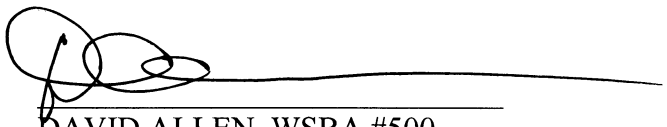
Seattle, WA 98104
amy.meckling@kingcounty.gov

And mailed to Appellant:

Michael Armstrong, #372859
Monroe Corrections Center
Unit C115L
P.O. Box 777
Monroe, WA 98272

DATED at Seattle, Washington this 24th day of March, 2015.



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