NO. 92689-1

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 71613-1-I)

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ERIC ARMSTRONG,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

TO THE SUPREME COURT OF WASHINGTON

ALLEN, HANSEN, MAYBROWN
& OFFENBECHER, P.S.
David Allen

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A. IDENTITY OF PETITIONER

Petitioner Michael Eric Armstrong was the Appellant in the Court of Appeals and Defendant in the King County Superior Court proceeding from which this appeal was taken.

B. COURT OF APPEALS DECISION

On December 7, 2015, Division I of the Court of Appeals filed an unpublished decision affirming the Defendant's convictions for vehicular homicide and vehicular assault. A copy of that decision is attached hereto as Appendix A. A motion for reconsideration was not filed.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Defendant's blood was drawn at the scene of the accident without being authorized by a judicial warrant and where there were no exigencies requiring that the blood be tested immediately, and where in fact the blood was not tested until eight days after it was drawn, was it a violation of the Fourth Amendment of the United States Constitution and Art. 1, Sec. 7 of the Washington State Constitution to test the Defendant's blood without a judicial warrant?

2. Whether this Court's decision in *State v. Martines*, 184 Wn.2d 83 (2015), holding that an additional warrant to test blood in DUI type matters was not required, is limited to those cases where the blood seizure was authorized by a judicial warrant in the first instance?

D. STATEMENT OF THE CASE

On February 19, 2012, at approximately 12:30 a.m., a two-car collision occurred at the intersection of 212th Ave. SE & SE 400th Street in the City of Enumclaw. RP 14.[1] King County Sheriff's Deputies and medical units were dispatched. *Id.*

Defendant Armstrong, who was driving a pickup truck southbound on 212th Avenue SE, was accompanied by a woman friend. The other vehicle, a passenger car, was driven by Mary Ross, Jr. accompanied by her mother, Mary Ross, Sr. Order on Stipulated Facts – Findings of Fact and Conclusions of Law 1, 2, 3, 4.[2]

The Defendant's Chevrolet pickup truck traveled southbound through the stop sign and struck the passenger side of the Ross vehicle. Trial FF 7. The impact to the Ross vehicle resulted in fatal injuries to Mary Ross, Sr., and she was pronounced dead at the scene. Trial FF 8. The driver, Mary Ross, Jr., was injured. Trial FF 9.

Deputy Stanton testified at the August 13, 2013, CrR 3.6 suppression hearing on August 13, 2013 that he had been a King County

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[1] RP refers to the Verbatim Report of Proceedings prepared and filed in this case by the Appellant and includes motions hearings on August 13, 2013; October 9, 2013; the stipulated bench trial from January 13, 2014; and the sentencing hearing. Another hearing occurred on July 11, 2013, but was later located and transcribed because of an error in the Clerk's records, but is not referenced as to issues raised in this appeal or petition.

[2] Findings of Fact and Conclusions of Law from Defendant's stipulated facts trial will be hereinafter designated as "Trial FF." CP 69-74.

Sheriff's Deputy for eight years and had specialized training in DUI enforcement. RP 7.

On February 19, 2012 at 12:31 a.m. he was dispatched to the accident in this case. RP 17. He arrived on scene at 12:43 a.m. RP 18.

Deputy Stanton testified that he first saw Defendant Armstrong walking to the ambulance and then saw him sitting upright on a bench seat in the ambulance. RP 26, lines 18-22.[3] There was also a female present, who he assumed was the passenger in Defendant's vehicle, who was likewise sitting upright on a jump seat in the ambulance. RP 26. Defendant Armstrong was crying. RP 27-28. He heard the EMTs ask Mr. Armstrong questions about his medical status which he answered, although Deputy Stanton did not remember his answers. RP 28. The deputy testified that he smelled the odor of alcohol on Defendant's breath. *Id.* at 29.

It was the deputy's understanding that the EMTs were going to take Mr. Armstrong to a hospital, but he did not know which hospital nor did he have any idea what injuries Mr. Armstrong may have had. His interaction with Mr. Armstrong lasted only "a few minutes." RP 29. Deputy Stanton did not recall any conversations with the EMTs as to the nature of Defendant's injuries. RP 38.

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[3] *See also* Trial FF 17.

Deputy Stanton advised "radio" that he had felt he had probable cause to believe the Defendant was under the influence and that a blood draw needed to be done because he assumed that Defendant would be taken to the hospital "fairly soon." *Id.* at 29.

Sergeant Jencks arrived on the scene at 1:01 a.m. and he and Deputy Stanton had a conversation about doing a blood draw. According to Deputy Stanton, Sergeant Jencks asked him to do have the draw done while the Medic Unit was still on the scene. RP 33.

At 1:09 a.m. Deputy Stanton learned that one of the occupants of the other vehicle had died and he decided that he would do a "Special Evidence" blood draw under the implied consent statute. RP 34-35. Previously, he had done Special Evidence warnings approximately 20 or 30 times. He had obtained a search warrant prior to doing a Special Evidence warning only one time previously. RP 35.

Deputy Stanton read Defendant Armstrong his constitutional rights using a "DUI arrest packet" and asked if he understood. Defendant Armstrong did not answer. RP 37. According to Deputy Stanton, Defendant Armstrong was awake and appeared to be alert. RP 40. Defendant Armstrong was then put on a backboard and a paramedic was instructed to draw Mr. Armstrong's blood. RP 41-43.

Deputy Stanton testified that if a suspect is taken to the hospital and needs medical care, there is typically a delay of 30-40 minutes on "average" before a blood draw can be drawn. RP 48; 56.

Deputy Stanton explained that his cell phone, which operates on the Sprint network, did not get reception for most of the area where they were. RP 56-57. However, the deputy had radio reception through his dispatcher and could have asked the dispatcher to call a judge and speak with the judge over the radio for the purpose of obtaining a warrant. RP 57.

According to the deputy, the blood draw was done under the Special Evidence rules and procedures and not under exigent circumstances. RP 63-64.[4] The blood draw was done at 1:19 a.m. The Defendant remained on the scene for 10 or 15 minutes after the blood draw, which would have been until about 1:30 a.m. when he was then taken by ambulance to St. Elizabeth's Hospital in Enumclaw, which is approximately a 10 or 15 minute drive. RP 65.

Deputy Stanton was asked by the prosecutor whether he was "thinking at all in terms of exigent circumstances with respect to the blood

[4] The trial court, however, ruled that exigent circumstances justified the seizure of the Defendant's blood rather than Deputy Stanton's assumption that it was permitted by the so called "Special Evidence" rules. Order, CP 23, 32.

draw?" Although he had specialized DUI training, his confusing answer demonstrated that he did not understand the procedure:

> Well, Special Evidence I believe in itself is a exigent circumstances. You're trying to get a purist, closest blood draw to the time that the person was last behind the wheel, if possible. So the fact that he was still on scene, the medic on scene, allowed me to get, to get the blood while he was still there. If he had left prior to me, prior to the medics, or the medics were not available, um, I would have had to go to the hospital with him.

RP 65.

The deputy said he believed that he was authorized under "Special Evidence and the implied consent to take blood under certain circumstances, whether it was voluntary or involuntary." RP 66. When Deputy Stanton was asked again on redirect by the prosecutor whether he was thinking at all in terms of exigent circumstances with regard to blood draw, he replied: "Special Evidence I believe in itself is an exigent circumstance." *Id.* at 65. Otherwise, he would have had to go to the hospital with the Defendant to do the blood draw. *Id.*

In response to a question by the trial judge, Deputy Stanton admitted that at the time of this incident he had no information that would have indicated that Mr. Armstrong was likely to get an IV when he arrived at the emergency room. RP 69. Mr. Armstrong was not free to leave the scene once the officer decided to do a blood draw. RP 70. The deputy

had no reason to suspect that Mr. Armstrong was under the influence of anything other than alcohol. RP 71.

The deputy claimed that it would take an hour and a half to two hours to get a search warrant. RP 71. Based on a prior experience, he claims that a judge made him scan his written request to a PDF format and email it to him, the judge then printed it out and signed it and emailed it back to him and he then printed it out. This took place at the Covington Precinct. RP 72. He does not have a scanner in his car and he claims he did not get "very good reception."[5] On the prior warrant, he had to talk to other deputies who helped walk him through it and had to also contact another DRE that evening to assist. RP 73. He claims he has had more training since then on obtaining a warrant. RP 73.

The trial judge asked the deputy about available judges to contact at night and he replied that there was a list mailed out by a paralegal which he had on his computer in his patrol car. RP 74. However, none of the warrants he ever obtained, either before or after this, were done from his police car, but instead at a police precinct. RP 76.

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[5] It is assumed he was referring to his cell phone in that he never complained about radio reception.

Defendant's blood was first tested at the WSP Toxicology Lab on February 27, 2012, eight days after it was seized, and the testing revealed a blood alcohol concentration of .17 g/100mL. Trial FF 20.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Grounds for Discretionary Review

Petitioner believes that the following provisions of RAP 13.4(b) "Considerations Governing Acceptance of Review," are relevant to the acceptance of review in this matter:

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

2. Reasons Why Review Should Be Granted

Petitioner asks this Court to grant review of the Court of Appeals' decision under provisions (3) and (4), *supra*. This appeal presents a very significant question of law under Art. 1, Sec. 7 of the Washington State Constitution and the Fourth Amendment of the United States Constitution. It also presents a critical issue "of substantial public interest that should be determined by the Supreme Court."

Recently, in *State v. Martines*, 184 Wn.2d 83 (2015), this Court reversed Division I of the Court of Appeals (hereinafter "COA") and held

that where, in the first instance, there was a valid judicial search warrant authorizing the seizure of a defendant's blood based on probable cause to believe the defendant had committed a felony driving offense while under the influence of an intoxicant, the State could test the blood without obtaining a second warrant authorizing testing. This was the case even though the original search warrant did not authorize blood testing. Nevertheless, a warrant authorizing the seizure of the blood as evidence of DUI also implicitly authorized its subsequent testing:

> We . . . further hold that the search warrant authorized testing of Martines' blood sample for intoxicants because it authorized a blood draw to obtain evidence of a DUI.

184 Wn.2d at 94.

The *Martines* decision is narrowly written and applies only to situations where a judicial search warrant for seizure of blood was actually obtained in the first instance. The instant case significantly differs from *Martines* in that a judicial warrant was never obtained, but instead the seizure was permitted because of exigent circumstances existing only at the time of the blood draw. There can be no claim in the instant case that there was an exigency which prevented the State from obtaining a warrant to test the blood in that 8 days elapsed between the seizure of the blood and its being tested.

In *Missouri v. McNeely*, _____ U.S. _____, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the United States Supreme Court held that under most circumstances a judicial warrant is required before the State could draw blood, the only exception being where there exists exigent circumstances requiring the immediate drawing of blood.

In rejecting a *per se* rule establishing exigent circumstances in all DUI cases, as urged by the prosecution, the *McNeely* Court held:

> But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. **In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the ethicacy of the search, the Fourth Amendment mandates that they do so.** (Emphasis added.)

Id. at 1561.

The *McNeely* Court rejected the argument that a DUI blood draw presented a "now or never," situation, in that BAC evidence dissipates in a predictable manner. *McNeely*, *id.* Therefore, a retrograde analysis can be conducted which will accurately estimate the blood level at the time of the incident, even if there is delay caused by obtaining a warrant. Furthermore, the *McNeely* Court stressed that advances have been made in blood test analysis since the earlier case, *Schmerber v. California*, 384 U.S. 757 (1966), was decided.

The *McNeely* Court also explained that since 1977 the Federal Rules of Criminal Procedure permitted a federal magistrate to issue a warrant based on sworn testimony communicated by telephone or other reliable electronic means and that

> Well over a majority of the states allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communications, electronic communications such as email, and video conferencing.

Id. at 1562.

Importantly, the foregoing passage from *McNeely* was footnoted (footnote 4) which referenced States that have statutes or rules permitting telephonic or other electronic warrant applications. This footnote specifically mentioned the Washington State's court rule on telephonic warrants "Wash. Super. Ct. Crim. Rule 2.3(c) (2002)." This Washington rule, CrR 2.3(c) "Search and seizure" provides that telephonic search warrants are authorized.[6]

The foregoing discussion from the *McNeely* demonstrates the importance the United States Supreme Court attaches to a judicial warrant under the Fourth Amendment rather than authorizing a seizure based just on an officer's opinion that there are exigent circumstances. The fact that

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[6] Rule CrRLJ 2.3(c) applying to courts of limited jurisdiction is identical and permits a search warrant application to be electronically recorded.

McNeely rejected the very strong recommendations of the prosecution to permit warrantless blood draws in all cases where a driver is suspected of being under the influence, demonstrates the Court's very strong message that a warrant is required unless there are very clear and definite exigent circumstances that will prevent a valid blood draw, even though obtaining a warrant will require extra time and effort by the police.

Although the COA's decision in *Martines* was reversed, its underlying reasoning about the privacy interest a person has in their blood is well reasoned. The COA explained that there is a strong privacy interest protecting the testing of one's blood without a warrant:

> 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, 109 S.Ct. 1402. Citizens of this state have traditionally held, and should be entitled to hold, this kind of information safe from governmental trespass.

State v. Martines, 182 Wn.App. 519, 530, rev'd, 184 Wn.2d 83, 355 P.3d 1111 (2015).

The COA's conclusion in *Martines* that a defendant has a privacy interest in the testing of their blood "that it is distinct from the privacy interest and bodily integrity and personal security that are invaded by a

physical penetration of the skin" means that the testing of blood "is itself a search," (*id.*), is well grounded in established law. The collection and the testing of biological samples such as blood from an individual has been held to constitute a search for purposes of the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001).

In *Ferguson*, *id.*, the Court examined a hospital procedure whereby OB patients who were expecting were tested pursuant to a policy the hospital developed with the police, whereby urine tests that were positive for drugs resulted in criminal charges against the patients. The Supreme Court held that this violated the Fourth Amendment in that absent a patient's consent, these tests were unconstitutional "searches" within the meaning of the Fourth Amendment.

Under both the federal and state constitutions, the collection and subsequent analysis of biological evidence from a person is not a single search, but rather, are two separate invasions of privacy. The U.S. Supreme Court has long recognized that a blood test is a search:

> We have long recognized that a "compelled intrusion into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is further invasion of the tested employee's privacy interests.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989) (Internal citations omitted).

The COA in the instant case issued its opinion after this Court's decision in *Martines.*[7] The COA essentially held that the seizure based upon exigent circumstances served the same purpose as a judicial warrant allowing a seizure.

However, a reading of this Court's decision in *Martines* demonstrates that it was decided on the narrow ground that the judicial warrant specifically authorized the draw of blood and therefore impliedly authorized its testing.

While the COA in the instant case recognized that "judicial scrutiny of government searches serves important purposes," (*Armstrong*, Slip Op. at 8) nevertheless, based on this Court's decision in *Martines,* the COA erroneously held:

> Here, as in *Martines,* although there was no explicit judicial authorization of the blood test, it is sensible to conclude that an examination of Armstrong's blood sample for evidence of intoxication was permissible because that was the purpose of the search occasioned by the exigent circumstances.

Armstrong, Slip Op. at 9.

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[7] The instant case was argued in the COA prior to this Court's decision in *Martines*. There was no further briefing or re-argument following this Court's decision in *Martines*.

In so holding, the COA in the instant case relied on *U.S. v. Snyder*, 852 F.2d 471, 473 (9th Cir. 1988), where that court, relying upon the Supreme Court's 1966 decision in *Schmerber v. California, supra,* held that a warrantless seizure of a defendant's blood and the later testing of it is but one event for Fourth Amendment purposes under *Schmerber. Id.* at 473-474. (*See*: Armstrong Slip Op. at 7.)

U.S. v. Snyder predated *Missouri v. McNeely, supra,* by 25 years. *McNeely* imposed the requirement of a judicial warrant absent actual exigent circumstances for the drawing of blood. Prior to *McNeely*, many state courts allowed the warrantless drawing of blood from DUI suspects, based solely on probable cause, without even the requirement of exigent circumstances. For example, in *State v. Adkins,* 113 A.3d 734, 737 (NJ S.Ct. 2015), the New Jersey Supreme Court explained that:

> prior to *McNeely*, New Jersey courts, including this Court, had cited the United States Supreme Court's prior decision in *Schmerber v. California* . . . as support for warrantless taking of blood samples from suspected intoxicated drivers, so long as the search was supported by probable cause and the sample was obtained in a medically reasonable manner. (Internal citation omitted)

As stated *Schmerber* was decided in 1966 and *Snyder* was decided in 1988, well before scientists had the technological and genetic testing advances that exist today. For example, DNA can be tested by many labs and a person's entire genome can be mapped at a minimal cost. These

types of intrusions require an authorization by a judicial officer for the specific testing of the blood for purposes of determining alcohol and drug content in the blood, but for no other purposes. Without requiring a judicial warrant, a person's privacy is at risk.

Finally, both *Schmerber* and *Snyder* were decided under the Fourth Amendment, while *Armstrong* also raises greater protections provided by Art. 1, Sec. 7 of the Washington State Constitution.

The COA's decision in the instant case is bereft of any in-depth discussion or critical analysis of the issue presented here, which is the situation where the blood draw was based upon the exigent circumstances exception at the time of the blood draw and where there existed no exigencies regarding prompt testing. While this Court reversed the COA in *Martines*, its decision did not resolve the question presented in the instant case.

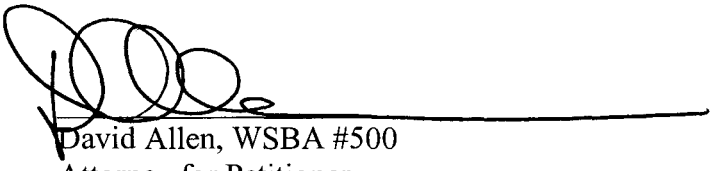
This Court has interpreted Art. 1, Sec. 7 of the Washington State Constitution more expansively than other state and federal courts have interpreted the Fourth Amendment of the United States Constitution. *State v. Gunwall*, 106 Wn.2d 54, 65 (1986). The warrantless testing of a person's blood certainly implicates their Art. 1, Sec. 7 rights under the "private affairs" section of the Washington State Constitution, regardless

of whether it would also violate the Fourth Amendment of the United States Constitution.

F. CONCLUSION

The issue of whether a judicial warrant is required for blood testing under the Fourth Amendment of the United States Constitution or Art. 1, Sec. 7 of the Washington State Constitution, where the blood was seized without a warrant, is one that has never been decided by this Court. This issue will recur in the future in that blood seizures of DUI suspects based on exigent circumstances to be followed by testing at a later date routinely occur. This is an important issue which implicates constitutional and individual rights. The Armstrong case presents this issue in a very clear and straightforward manner. For the foregoing reasons, this Court is urged to accept review and resolve this very important and recurring issue.

DATED this 5th day of January, 2016.



David Allen, WSBA #500
Attorney for Petitioner

PROOF OF SERVICE

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

On the 5th day of January, 2016, I sent by email one true copy of Petition for Discretionary Review directed to attorney for Respondent:

Amy Meckling
Deputy Prosecuting Attorney
King County Prosecutor's Office
King County Courthouse
516 Third Avenue
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amy.meckling@kingcounty.gov

And mailed to Appellant:

Michael Armstrong, #372859
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

DATED at Seattle, Washington this 5th day of January, 2016.

David Allen, WSBA #500
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL ERIC ARMSTRONG, Appellant.	)	No. 71613-1-I DIVISION ONE UNPUBLISHED OPINION FILED: December 7, 2015

SPEARMAN, C.J. — Michael Eric Armstrong appeals his convictions for vehicular homicide and vehicular assault. He raises a number of objections to the admission of the results of the testing of his blood, including whether a warrant was required to (1) draw blood without his consent, and/or (2) test the blood for the presence of intoxicants. He also assigns error to the trial court's findings of fact and the enhanced sentence imposed because of his prior deferred prosecution for DUI. Finding no error, we affirm.

FACTS

On February 19, 2012, at about 12:30 a.m., Michael Eric Armstrong drove through a stop sign and struck another vehicle, killing one of the passengers. Deputy Cory Stanton arrived on the scene and questioned Armstrong while he was sitting upright in the ambulance. The deputy smelled alcohol on Armstrong's breath. Deputy Stanton testified that he understood that Armstrong was to be taken to a hospital but he did not recall specific conversations about any injuries Armstrong may have sustained.

In Stanton's experience, once a suspect has been taken to a hospital, there would usually be a delay of about 30-40 minutes before blood could be drawn.

When Stanton learned that one of the passengers had died, he decided to do a "special evidence" blood draw under the implied consent statute.[1] He had given special evidence warnings before but had only once obtained a search warrant prior to giving such warnings. Stanton instructed a paramedic to draw Armstrong's blood at about 1:19 a.m. Armstrong remained on the scene for about 10-15 additional minutes and was then taken to a hospital about 10-15 minutes away.

Stanton believed that he was authorized to draw Armstrong's blood under the Special Evidence rules and the implied consent statute. He did not seek a warrant, but testified that based on experience, available equipment, reception, and procedures, it would have taken 1.5-2 hours to get a search warrant.

Armstrong's blood was not tested until February 27, 2012, eight days after seizure. The test revealed a blood alcohol concentration of 0.17 g/100 mL ±.0.014. Id. Armstrong was charged with vehicular homicide and vehicular assault. He moved to suppress all evidence obtained from the blood draw and testing. At the suppression hearing, the trial court found sufficient exigent circumstances to uphold the warrantless search. Armstrong stipulated to facts that resulted in the trial court finding him guilty as charged of vehicular homicide and vehicular assault. The trial court sentenced him to concurrent standard range sentences of forty-one months for vehicular homicide and

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[1]The version of RCW 46.20.308 in effect at the time established a statutory presumption that anyone arrested for driving under the influence of alcohol had consented to a breath or blood test for purposes of determining blood alcohol content. Before administering such a test, the arresting officer was required to advise the driver of his right to have additional tests administered by any qualified person of the driver's choosing. Id. A driver was to be apprised of this warning so that he would have the opportunity to gather potentially exculpatory evidence. State v. Morales, 173 Wn.2d 560, 570, 269 P.3d 263 (2012).

fourteen months for vehicular assault. Armstrong had previously been convicted of DUI in 1993 and received a deferred prosecution in 2005. Pursuant to RCW 9.94A.533(7), the trial court also imposed two consecutive twenty-four month periods of confinement, based on Armstrong's two prior offenses. Armstrong appeals.

DISCUSSION

In reviewing the denial of a motion to suppress, we review challenged findings of fact for substantial supporting evidence, and conclusions of law de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. Id. We defer to the trial court on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Armstrong argues that his rights under the Fourth Amendment to the U.S. Constitution and article I, section 7 of the Washington Constitution were violated when his blood was drawn without a search warrant. The State contends the trial court properly found that exigent circumstances justified a warrantless seizure.

The Fourth Amendment and article I, section 7 prohibit warrantless searches and seizures unless an exception applies. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The taking of blood samples is a "search and seizure" for constitutional purposes. State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984); State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991) (citing State v. Meacham, 93 Wn.2d 735, 738, 612 P.2d 79555 (1980)). The State bears the burden of demonstrating that a

warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

A warrantless search and seizure is constitutionally permissible if exigent circumstances exist. State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986); Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1552, 1558-59, 185 L.Ed.2d 696 (2013). "The rationale behind the exigent circumstances exception 'is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'" State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 1156 (2002)). A court must evaluate the totality of the circumstances in determining whether exigent circumstances exist. McNeely, 133 S.Ct. at 1556; Smith, 165 Wn.2d at 518. To support a finding of exigency, the circumstances must clearly demonstrate that the officer needed to act quickly. Cardenas, 146 Wn.2d at 408. Blood alcohol testing in particular requires consideration of the "the natural and inexorable dissipation of blood alcohol" levels over time, the gravity of the offense, and the relative availability of telephonic warrants. State v. Komoto, 40 Wn. App. 200, 211–14, 697 P.2d 1025 (1985). The natural dissipation of blood alcohol is but one factor in assessing the reasonableness of a warrantless blood draw. It is not a per se exigency. McNeely, 133 S.Ct. at 1561-63.

Here, the trial court reviewed the record and found that:

> "[t]he time of day, the remoteness of the area, the lack of cell phone reception, the time that had already elapsed following the fatal collision, the fact that Deputy Stanton expected that Mr. Armstrong would be transported to a hospital imminently, the anticipated delay of at least an

> hour and a half, and perhaps much longer, before a warrant could be obtained (assuming a judge could be located who would consider the warrant application), and the very real risk that any blood test results would be adulterated by fluids and/or mediations that Mr. Armstrong might be given at the hospital, created sufficient exigent circumstances in this case to permit the police to subject Mr. Armstrong to a warrantless blood draw."

CP at 32. Armstrong contends these findings are not supported by substantial evidence. We disagree.

Stanton testified that he arrived about 12:43 a.m., and that there were two or three officers on duty that night. Later, another deputy and two officers from the Muckleshoot tribe arrived. Stanton spoke with Deputy Pritchett when he arrived. After speaking with Armstrong, Stanton set up traffic control. He spoke with Sergeant Jencks about a blood draw around 1:00 a.m. Stanton did not know if anyone was available to have accompanied Armstrong to the hospital.

When Stanton learned that a passenger had died, he read Armstrong his constitutional rights and spoke with a paramedic about drawing his blood. At that time Armstrong was strapped to a gurney with tape over his head. Stanton testified that in his experience, paramedics usually try to get drivers from "a serious injury accident like that" to the hospital as quickly as possible. Verbatim Report of Proceedings (VRP) at 38.

Stanton also testified that once a defendant gets to the hospital and starts to receive medical treatment, that treatment may affect the accuracy of blood testing results. He testified that once a suspect has been taken to the hospital, there is usually a 30-40 minute time delay before blood can be drawn. Stanton testified that he did not have cell phone reception at the scene of the accident. In order to call for a warrant, he

would have had to radio dispatch, ask dispatch to call a judge, and contact the judge over the radio, all the while tying up the radio channel. Stanton estimated it would have taken an hour and a half to two hours at the very least to obtain a warrant. He also testified that the sheriff's office had a list of judges but he did not know if one would have been available at that time.

Based on this testimony, which the trial court found credible, we find that sufficient evidence supports the trial court's findings of fact. In addition, the totality of the circumstances, including the testimony in the record, the severity of the offense, the potential for medical treatment that would affect the blood alcohol content, and the difficulty of obtaining a warrant, support the trial court's conclusion that exigent circumstances existed to justify taking Armstrong's blood without a warrant.[2]

Next, Armstrong argues that even if exigent circumstances justified the warrantless search to obtain a sample of his blood, they do not justify a second warrantless search eight days later to determine the alcohol content of the sample. He argues that the primary justification for the initial search was that the alcohol content of his blood would naturally dissipate over time and thus result in the loss of that evidence. But once the blood had been collected, there was no evidence in the record of any risk that the alcohol content in Armstrong's blood sample would be lost. Under these circumstances, Armstrong contends there is no justification for the failure to obtain a warrant before conducting the analysis of his blood sample.

[2] Because we conclude that the blood draw was constitutional based on the presence of exigent circumstances, we do not consider the State's argument that it was also permissible based on a "good faith" exception to the warrant requirement.

The State does not dispute that there were no exigent circumstances present at the time the blood test was performed. Instead, it contests Armstrong's assertion that the search for the blood sample and the search of the sample are distinct events each requiring its own independent exception to the warrant requirement. The State argues that the extraction of a defendant's blood and subsequent testing is a single event and so long as the former is lawful, no further showing need be made as to the second. The State cites United States v. Snyder, 852 F.2d 471, 473 (9th Cir. 1988), where the Ninth Circuit observed that "[t]he 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." It concluded that so long as the initial extraction of the blood was lawful (there, pursuant to a search incident to a valid arrest) "the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes. . . ." Id. at 474. Similarly, in Schmerber v. California, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the U.S. Supreme Court viewed the seizure and separate search of blood as a single event, considering whether "the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Id. at 768.

In support of his argument that the examination of his blood was a second search that required independent justification for an exception to the warrant requirement, Armstrong relied primarily on State v. Martines, 182 Wn. App. 519, 331 P.3d 105 (2014). There we held that "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. . . ." Id. at 530. Accordingly, we concluded that because the warrant did not specifically authorize the blood test or limit the discretion to search the blood sample for evidence of alcohol or drugs, the blood test was an unlawful warrantless search. Id. at 532.

On appeal, however, the Supreme Court reversed our decision. See State v. Martines, 184 Wn.2d 83, 355 P.3d 1111 (2015). The court held that "a warrant authorizing extraction of a blood sample necessarily authorizes testing of that sample for evidence of the suspected crime." Id. at 1116. The court reasoned that because the purpose of the warrant was "to draw a sample of blood from Martines to obtain evidence of DUI," it was "not sensible to read the warrant in a way that stops short of obtaining that evidence." Id. at 1115.

Armstrong argues that the Supreme Court's holding in Martines is distinguishable and does not preclude his argument that the search of his blood was unlawful. He points out that in Martines a warrant was obtained, whereas in this case no court has ever authorized either the drawing or the testing of his blood. As we noted in Martines, 182 Wn. App. at 531, judicial scrutiny of government searches serves important purposes. It ensures that the requirement of probable cause is met and "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.'" (quoting Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). Here, Armstrong does not dispute that there was probable cause to take the blood sample, but he contends that in the absence of a warrant, there were no express limits placed upon the

officer's discretion in conducting the search. We observed in Martines that limitless "[t]esting 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 v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)] referred to as 'private medical facts.'" Martines, 182 Wn. App. at 530.

We think, however, that even in the absence of a warrant, the scope of the search is properly limited to the purpose for which the exception to the warrant requirement was applied. In Martines, even though the warrant did not explicitly authorize a test of the blood sample, our Supreme Court concluded that since the purpose of the warrant was to obtain evidence of intoxication, it made no sense to read the warrant in a way that did not permit that evidence to be obtained. Here, as in Martines, although there was no explicit judicial authorization of the blood test, it is sensible to conclude that an examination of Armstrong's blood sample for evidence of intoxication was permissible because that was the purpose of the search occasioned by the exigent circumstances. Because nothing in the record suggests that the search at issue here went beyond those common sense boundaries, we hold that on these facts testing Armstrong's blood sample for evidence of intoxication was lawful.[3]

Armstrong's next contention is that the trial court erred when it imposed an enhanced sentence based on a DUI deferred adjudication, because the deferred adjudication is not a conviction. We disagree and find that while a deferred prosecution

[3] In light of our disposition of this issue, we need not address the State's additional argument that once Armstrong's blood sample was lawfully in police custody, his expectation of privacy was so diminished that he retained no protectable interest under the federal or state constitutions.

is not a conviction, it still counts for sentencing purposes. When an individual convicted of DUI has had a prior offense within the previous seven years, the trial court is required to impose a higher minimum sentence. RCW 46.61.5055(2). Prior offenses for sentencing purposes include deferred prosecutions under the provisions of RCW 46.61.5055(14)(a)(xii).[4] Armstrong argues that under City of Kent v. Jenkins, 99 Wn. App. 287, 992 P.2d 1045 (2000), a deferred prosecution is not a conviction and must be found by a jury. The Jenkins court states that "a record of a DUI charge and deferred prosecution is not analogous to a prior conviction," and that "both the purposes and effects of deferred prosecutions differ from convictions." 99 Wn. App. at 289-90. While technically correct, this fact has no impact on the consideration of a deferred prosecution for sentencing purposes. A deferred prosecution is "a form of preconviction sentencing or probation under which an accused must allege under oath that the culpable conduct charged is the result of alcoholism, drug addiction, or mental problems." Jenkins, 99 Wn. App. at 290. The Jenkins court held that "under the statutory provisions applicable here, the courts have always taken into account deferred prosecutions for sentencing purposes." Jenkins, 99 Wn. App at 289.

Armstrong also argues that under State v. Drum, 168 Wn.2d 23, 31, 225 P3d 237 (2010), a defendant's stipulation to a legal conclusion is not binding. In that case, the state supreme court found that the trial court was required to hear Drum's sufficiency of the evidence claim on the merits, even though he stipulated to facts sufficient to find him guilty in a petition for a drug court program. Drum is distinguishable; here, the

[4] A "prior offense" includes "a deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance." RCW 46.61.5055(14)(a)(xii).

sentencing enhancement is based on more than just Armstrong's admission of the facts in his petition for deferred prosecution. RCW 46.61.5055 specifically lists deferred prosecutions as a factor to be included in sentencing. We find that the trial court properly imposed a sentencing enhancement based on Armstrong's 2005 deferred prosecution.

Affirmed.

Spearman, C.J.

WE CONCUR:

Cox, J.

Ann, J.