

No: 49174-5  
Jefferson County Superior Court No: 15-1-00102-2

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

BOB L. INMAN,

Petitioner.

---

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Superior Court Judge

---

---

---

BRIEF OF APPELLANT

---

---

RICHARD L. DAVIES  
Attorney for Appellant  
624 Polk Street  
Port Townsend, WA 98368  
(360) 379-8906 - phone  
(360) 385-4012 – fax

**TABLE OF CONTENTS**

Table of Authorities ..... 1

A. ASSIGNMENT OF ERROR..... 2

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 3

C. SUMMARY OF ARGUMENT..... 4

D. STATEMENT OF THE CASE..... 5

E. ARGUMENT ..... 9

    1. Probable Cause..... 11

    2. Exigent Circumstances ..... 14

    3. Warrant to Analyze Blood Sample.....19

F. CONCLUSION..... 24

G. Certificate of Service..... 25

**TABLE OF AUTHORITIES**

Page

Cases

City of Seattle v. Pearson, 192 Wash. App. 802, 811, 369 P.3d 194 (2016)  
..... 11, 14, 15, 18

College Place v. Staudenmeier, 110 Wash.App. 841 (2002)..... 12

Riley v. California, \_\_\_ U.S. \_\_\_\_, 134 S.Ct. 2473, 189 L.Ed2d 430  
(2014)..... 23

Robinson v. City of Seattle, 102 Wash.App. 795, 10 P.3d 452 (2000) .... 21

Scherber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908  
(1966)..... 22

Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (1989) .. 21, 22

State v. Gillenwater, 96 Wash.App. 667, 980 P.2d 318 (1999), review  
denied 140 Wash.2d 1004 (2000) ..... 11

State v. Gregory, 158 Wash.2d 759, 147 P.3d 1201 (2006) ..... 11

State v. Hill, 48 Wash.App. 344, 739 P.2d 707 (1987), review denied 109  
Wash.2d 1018 (1987)..... 13

<u>State v. Mendez</u> , 137 Wash.2d 208, 970 P.2d 722 (1999).....	10
<u>State v. Terrovona</u> , 105 Wash.2d 632, 716 P.2d 295 (1986).....	11
<u>State v. Tibbles</u> , 169 Wash. 2d 364, 236 P.3d 885 (2010).....	14

Statutes

Former RCW 46.61.522(2).....	13
Former RCW 46.20.308(3).....	9, 10, 13
RCW 46.20.308(4).....	10

Constitutional Provisions

U.S.Const., Fourth Amendment.....	14
Washington State Const., Art. I, Section 7.....	14

A. ASSIGNMENT OF ERROR

1. The trial court erred in paragraph 1 of its findings of fact by finding that “[t]he call indicated that two people were possibly injured.” CP 35.
2. The trial court erred in paragraph 32 of its findings of fact that paramedic Manly had previously requested that Ms. Vanderhoof be taken to a Level 1 Trauma Facility because of her injuries. CP 39.
3. The trial court erred in paragraph 33 of its findings of fact that Deputy Przygocki was aware when he arrived there was a helicopter en route to transport Ms. Vanderhoof to Harborview. CP 39.

4. The trial court erred in paragraph 35 of its findings of fact that Deputy Przygocki did not have enough time to request a warrant. CP 39.
5. The trial court erred in paragraph 3 of its conclusions of law by deciding that at the time of the warrantless blood draw the investigating deputy had probable cause for DUI. CP 46.
6. The trial court erred in paragraph 4 of its conclusions of law by deciding that the warrantless blood draw was justified due to exigent circumstances. CP 46.
7. The trial court erred in paragraph 4 of its conclusions of law by deciding that the blood sample having been legally seized, a warrant to test it for evidence of DUI was not required. CP 46.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court's findings with respect to Assignments of Error 1 – 4 are not supported by substantial evidence.
2. Whether, at the time of the blood draw, the investigating officer had probable cause to arrest Mr. Inman for vehicular assault or DUI involving serious bodily injury to another person.

3. Whether exigent circumstances existed to justify a warrantless blood draw at the scene of the accident when the officer could have requested a telephonic warrant for a blood draw and had it served on Mr. Inman at the hospital where he was being transported.
4. Whether the investigating officer, after conducting a warrantless blood draw, must secure a warrant to authorize the testing of the blood drawn before sending it to the State Tox Lab after any exigency had long passed.

C. SUMMARY OF ARGUMENT

The warrantless blood draw extracted from Mr. Inman after a motorcycle accident, and its subsequent testing, should have been suppressed because 1) at the time of the blood draw the investigating officer did not have probable cause to arrest Mr. Inman for vehicular assault or a DUI involving serious bodily injury to another person, 2) exigent circumstances did not justify the warrantless blood draw, and 3) any exigency that may have existed had long passed before the blood sample was sent to the lab to be tested.

D. STATEMENT OF THE CASE

On Saturday, May 30, 2015, Mr. Inman got into a motorcycle accident on Dosewallips Road, a remote, narrow, and hilly road with ditches on both sides, just above the small town of Brinnon on Hood Canal. RP 31, SCP Exhibit 1. Someone called 911 from a cell phone at 1712 to report the accident. RP 82-83.

Paramedic Manly and his crew arrived at the scene at about 1729 in an ambulance, with State Trooper Hester close behind. RP 36-37, 49, 68. Before they even got there paramedic Manly requested a helicopter to airlift a possibly injured patient to Harborview Medical Center in Seattle. RP 42-43. The request was made based paramedic Manly's experience, intuition, and preparing for the worst case scenario. RP 43. Once there, they saw a cruiser-style motorcycle in a ditch with front end damage and two people, later identified as Mrs. Vanderhoof and Mr. Inman, lying on the ground on their backs. RP 8-9, 37, 68-69. There was also a large group of motorcyclists at the scene. RP 8. 69. Multiple people came up and told paramedic Manly what had happened. RP 37. One of the group, apparently a retired firefighter, reported that Mr. Inman had been unconscious and unresponsive for five minutes; however, by the time paramedic Manly arrived Mr. Inman was awake, alert and oriented. RP 38-39. Paramedic Manly did not testify that Mr. Inman either smelled of

or appeared under the influence of alcohol or any other substance. See RP 5-33. Given the retired firefighter's report, the abrasions on Mr. Inman's face, damage to his helmet, and his complaints of a headache, paramedic Manly treated him for possible severe head trauma. RP 38-39.

No one in the group of motorcyclists actually witnessed the accident. RP 69. Mr. Inman was apparently ahead of the group when the accident happened. RP 69. The group all rode up on the scene afterwards. RP 69. Trooper Hester checked on Mrs. Vanderhoof. RP 69. She complained of a pelvis injury. RP 69. When Trooper Hester bent down to talk to Mr. Inman, he smelled "some alcohol" on Mr. Inman's breath. RP 69-70.

Jefferson County Sheriff Deputy Pryzgocki arrived at the accident scene at 1741. RP 86. Shortly after he arrived, the deputy went into the back of the ambulance and could smell intoxicants. RP 9. Mr. Inman told him that he had been driving his motorcycle and had drank a "Gallagher" cocktail. RP 10-11. The deputy did not testify that he observed any other possible signs of intoxication. See RP 5-33.

The deputy read the Special Evidence Warning to Mr. Inman before a blood draw was conducted by the paramedic at 1547. RP 14, SCP Ex. 2. The deputy ordered the blood draw before the paramedic punctured Mr. Inman's skin to insert an I.V. RP 41. At the time, the deputy

suspected that Mr. Inman had committed the crime of DUI. RP 12. He was not sure of the injuries sustained by Mrs. Vanderhoof at that point. RP 12. After the blood draw was done, the deputy secured the evidence and “began investigation into the collision.” RP 18. By that time, there was another Jefferson County deputy on scene and two others arrived within the hour. RP 86.

Deputy Pryzgocki made no attempt to contact a judge to get a telephonic warrant before drawing Mr. Inman’s blood. RP 23. He did not think that there was cell phone coverage at the scene; however, he was able to communicate with dispatch via radio. RP 23. He did know, though, that Mr. Inman would be airlifted to Harborview Medical Center in Seattle for some sort of further medical attention shortly. RP 15-17. The deputy did not think he had time to get a warrant because of the ongoing investigation and Mr. Inman’s imminent airlift. RP 32.

Deputy Pryzgocki testified it would take about 30 minutes to prepare a telephonic warrant for a blood draw and another 15 to 20 minutes to get a local judge to telephonically authorize it. RP 19.

After the blood draw, paramedic Manly started a slow I.V. drip of saline solution in Mr. Inman’s arm - just enough to keep the incision open. RP 47-48. No pain medications were administered. RP 47. Mr. Inman was airlifted to Harborview from just down the road in Brinnon at 1823.

RP 48, 87. It is only a 15 to 20 minute flight from there to Harborview.  
RP 50-51.

A scientist from the Washington State Patrol Toxicology Laboratory (“WSP Tox Lab”) testified that if a large amount of saline solution is administered it would decrease blood alcohol content. RP 66. However, she had no idea how much saline solution was administered to Mr. Inman. RP 64. Nor could she testify whether his blood alcohol content would be higher or lower 30 minutes after a small amount of saline solution was put in his blood stream. RP 64. All she could say is that it “may alter it. It may decrease it.” RP 66.

Trooper Hester reluctantly acknowledged that “since the new law requiring a blood draw search warrant” officers investigating DUI injury accidents that require airlifts to Harborview can apply for telephonic warrants authorizing blood draws and have them served by officers at Harborview. RP 70-79. He described it as problematic, though. RP 71,79. It most often happens when the person is airlifted before law enforcement gets to the scene. RP 79.

The deputy made no effort to contact a judge to get authorization to test the blood before sending it to the WSP Tox Lab five days later to be tested for the presence of alcohol. RP 23, 24-25; SCP Ex. 5; CP 45. The blood evidence was sent to the WSP Tox Lab on Thursday, 6/4/15;

received there on 6/8/15; and tested on 6/10-11/15 for the presence of both drugs and alcohol pursuant to an internal lab policy. CP 45; SCP Ex. 5, 6; RP 61-62. The deputy acknowledged that there was no judicial order preventing him from testing the blood for the presence of any number of other things, including DNA. RP 25-27. Although the deputy requested and was granted a warrant for Mrs. Vanderhoof's Harborview medical records, he never requested a warrant for Mr. Inman's medical records. RP 27-28. The WSP Tox Lab scientist acknowledged that such medical records will often times include blood test results. RP 64-65.

E. ARGUMENT

The Supreme Court's decision in Missouri v. McNeely, \_\_\_ U.S. \_\_\_\_, 133 S.Ct. 1552, 1558-59, 185 L.Ed.2d 696 (2013) set off cascading changes to the law regarding blood draws in DUI related cases. Prior to McNeely, the Washington implied consent statute authorized involuntary blood draws without a warrant, or any recognized exception thereto, after arrests for serious DUI related offenses. See Former RCW 46.20.308(3), 2013 2<sup>nd</sup> Sp.s. c35 §36, eff. Sept. 28, 2013. At the time of Mr. Inman's accident, the implied consent statute had been changed to provide in pertinent part that:

Except as provided in this section, the test administered shall be of breath only. If an

individual ... is under arrest for ... vehicular assault ... or [DUI involving] an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without consent of the individual so arrested ... when exigent circumstances exist.

Former RCW 46.20.308(3); 2013 2<sup>nd</sup> Sp.s. c35 §36, eff. Sept. 28, 2013.<sup>1</sup>

Therefore, there needs to be both probable cause to arrest for the underlying offense and exigent circumstances to justify a warrantless blood draw.

In reviewing the denial of a motion to suppress, the appellate court reviews challenged findings of fact for substantial supporting evidence, and conclusions of law de novo. State v. Mendez, 137 Wash.2d 208, 214, 970 P.2d 722 (1999). In the context of probable cause:

[T]he determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard, [however], the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review.

---

<sup>1</sup> After Mr. Inman's accident, the implied consent statute was amended again, striking this entire section and inserting:

Nothing ... precludes a law enforcement officer from obtaining a person's blood to test for alcohol, marijuana, or any drug, pursuant to a search warrant [or] when exigent circumstances exist... Any blood drawn ... is drawn pursuant to this section when the officer has reasonable grounds to believe that he person is driving a vehicle under the influence...

RCW 46.20.308(4); 2<sup>nd</sup> sp.s c3 §5, eff. Sept. 26, 2015.

State v. Gregory, 158 Wash.2d 759, 822, 147 P.3d 1201 (2006). Whether exigent circumstances exist is reviewed de novo. City of Seattle v. Pearson, 192 Wash.App. 802, 811-12, 369 P.3d 194 (2016).

**I. The trial court erred by denying Mr. Inman’s motion to suppress because the blood draw was conducted without probable cause to arrest Mr. Inman for vehicular assault or a DUI accident involving serious bodily injury to another person.**

An arrest for an alcohol-related driving offense is unlawful unless supported by probable cause. See State v. Gillenwater, 96 Wash.App. 667, 670, 980 P.2d 318 (1999), review denied 140 Wash.2d 1004 (2000). Probable cause exists where the totality of the circumstances known to the officer at the time of arrest would lead a reasonable person to conclude that the suspect has committed a crime. State v. Gillenwater, 96 Wash.App. at 667 (citations omitted). It must be based on more than bare suspicion. State v. Gillenwater, 96 Wash.App. 667 at 670 (citing State v. Terrovona, 105 Wash.2d 632, 643, 716 P.2d 295 (1986)). And it “must be judged on the facts known to the arresting officer before or at the time of arrest.” Gillenwater, at 670.

In Gillenwater, the court held that there was probable cause to arrest a driver for DUI during an investigation of an accident he did not

cause. 96 Wash.App. 667. “While evidence that a driver has had something to drink is insufficient to convict, and perhaps establish probable cause, the trooper here had more.” Gillenwater, 96 Wash.App. at 671. There was a cooler full of beer and three opened cans in the defendant’s car, the deceased passenger smelled of alcohol, and the paramedic reported a strong odor of alcohol on him. Gillenwater, at 671.

The court in College Place v. Staudenmeier, 110 Wash.App. 841, 43 P.3d 43 (2002), held that, while there is not a “mechanical rule” for establishing probable cause, probable cause to arrest for DUI existed where: the defendant’s breath smelled strongly of alcohol, his eyes were watery and bloodshot, the defendant admitted to drinking five or six beers, and he did poorly on the field sobriety tests.

In State v. Martines, 184 Wash.2d 83, 355 P.3d 1111 (2015), the court held that there was probable cause to believe that the defendant was under the influence of alcohol and/or drugs to support a warrant to draw blood. Probable cause was established by the defendant (1) smelling like alcohol, (2) admitting to drinking one beer, (3) but seen hiding a six pack with five empty beer bottles, (4) having bloodshot, watery eyes and (5) a flush face, (6) walking in a slow, deliberate manner, and (7) seemingly off balance. Martines, 184 Wash.2d at 91.

The arresting deputy in this case did not have probable cause to

arrest Mr. Inman for DUI at the time he ordered the blood draw. All Deputy Przygocki had established at that time is that there had been an accident involving a motorcycle driven by Mr. Inman resulting in possible serious injury to himself, he had the smell of “some alcohol” on his breath and admitted to having had a cocktail. RP 10-11, 69-70. Deputy Przygocki testified that he did not even begin to investigate the accident until after completing the blood draw. RP 18. The deputy did not know the cause of the accident or who, if anyone, was at fault.

Nor did the arresting deputy have probable cause to arrest Mr. Inman for vehicular assault or DUI involving “an accident in which there has been serious bodily injury to another person.” See Former RCW 46.20.308(3) (emphasis added). Deputy Przygocki was not sure of the injuries sustained by Mrs. Vanderhoof at that point. RP 12. Even if Trooper Hestor’s knowledge is imputed to him, all he knew is that Mrs. Vanderhoof complained of a pelvis injury. RP 69.

“Serious bodily injury” means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.

State v. Hill, 48 Wash.App. 344, 347, 739 P.2d 707 (1987) (citing former RCW 46.61.522(2)), review denied 109 Wash.2d 1018 (1987). There is no evidence in the record that Mrs. Vanderhoof’s complaint of pain in her

pelvic area constituted “serious bodily injury.” Finding out that Mrs. Vanderhoof needed to be airlifted to Harborview for medical attention after ordering the blood draw is immaterial.

Because there was not probable cause to arrest Mr. Inman for the underlying offense at the time of the warrantless blood draw, it cannot be justified on exigent circumstance grounds.

**II. The trial court erred in concluding that, at the time of the blood draw, exigent circumstances justified the warrantless seizure of Mr. Inman’s blood.**

The Fourth Amendment to the U.S. Constitution and Article 1, Section 7 of the Washington Constitution protect people from unreasonable searches. City of Seattle v. Pearson, 192 Wash. App. 802, 811. A State-ordered blood draw triggers these constitutional protections. Pearson, 192 Wash.App. at 811. Unless done under exigent circumstances, or other recognized exception to the warrant requirement, a warrantless blood draw is unlawful. Id. The state bears the burden of demonstrating by clear and convincing evidence that exigent circumstances justified a warrantless search. Id.

Exigent circumstances only exist, in this context, when the delay in securing a warrant permits the destruction of evidence. Pearson, 192 Wash.App. at 811 (citing State v. Tibbles, 169 Wash. 2d 364, 370, 236 P.3d 885 (2010)).

In Pearson, 192 Wash.App. 802, the defendant was arrested for DUI and vehicular assault after hitting a pedestrian and performing poorly on field sobriety tests, despite submitting to a portable breath test indicating that no alcohol was present. 192 Wash.App. at 807-08. She did admit, though, that she had smoked marijuana earlier that day. Id. at 808. The investigating officer transported her to Harborview Medical Center and ordered a warrantless blood draw about two and a half hours after the accident. Id. at 808-09.

The court held that “the city failed to satisfy its heavy burden to show by clear and convincing evidence that a warrant could not have been obtained in a reasonable time.” Id. at 815. There were eight other officers at the scene, it took an hour to get the warrantless blood draw, and only an estimated 60-90 minutes to secure a warrant. Id. at 816. Under the circumstances, another officer could have transported the defendant to the hospital to collect a blood sample while the investigating officer obtained a warrant. Id. “The delay – if any – would have been minimal.” Id.<sup>2</sup>

In Missouri v. McNeely, \_\_\_\_ U.S. \_\_\_\_, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the defendant was arrested for a routine DUI after

---

<sup>2</sup> Because the court found that exigent circumstances did not justify the warrantless blood draw, it did not reach the issue of whether exigent circumstances existed to justify the warrantless testing of the blood sample. Id. at 810, 817, n.7.

performing poorly on field sobriety tests. McNeely, 133 S.Ct. at 1556-57. The defendant refused to submit to a breath test, so the arresting officer took him to a hospital for blood testing. Id. On his refusal to submit to a voluntary blood test, despite adverse license consequences, the arresting officer conducted a warrantless blood draw. Id. The Court held that a blood draw in a DUI case requires a warrant, unless exigent circumstances exist. McNeely, 133 S.Ct. at 1558-59. Whether exigent circumstances justify a warrantless blood draw in a DUI case “must be determined case-by-case based on the totality of the circumstances.” McNeely, at 1563. “The natural dissipation of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” Id. at 1568.

Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id. at 1561.

The McNeely fact pattern concerned a warrantless blood draw at a hospital, which necessarily requires some delay, not on the side of the road. Id. at 1564. The majority and one dissenting opinion expressed concern about the constitutionality of roadside blood draws. Id. at 1563-

64 (majority opinion) and 1572, n.2 (dissenting opinion).

In this case, Deputy Przygocki ordered a roadside blood draw approximately 35 minutes after the accident was reported. RP 14, 82-83. At the time, he knew that Mr. Inman needed some sort of further medical attention would be airlifted to Harborview Medical Center shortly. RP 15-17, 32. Paramedic Manly testified that the deputy ordered the blood draw before he punctured Mr. Inman's skin to insert an I.V. RP 41. The blood draw was ordered during the I.V. process, making it easier for the paramedic, but there is no evidence that the deputy knew that one was going to be inserted. RP 15-17, 41. Inserting an I.V. into Mr. Inman's arm does not create an exigency without a showing that, given the facts of this particular case, it resulted in destruction of evidence.

Although a WSP Tox Lab scientist testified that if a large amount of saline solution is administered it will decrease blood alcohol content, that is not what happened here. RP 47-48, 66. The I.V. drip was slow, and no pain medications were administered. RP 47-48. The WSP Tox Lab scientist had no idea how much saline solution was administered to Mr. Inman. RP 64. Nor could she testify how blood alcohol content would be affected. RP 64, 66.

There were two other officers present, and two more arrived within the hour. RP 86. Despite the fact that the call reporting the accident came

from a cell phone, the deputy did not think that there was cell phone coverage. RP 23, 82-83. He did not even try to secure a telephonic warrant. RP 23. To do so would have likely taken 45 to 50 minutes. RP 19. Mr. Inman was likely at Harborview by 1845. RP 48, 50-51, 87. Not much of a delay at all had the blood been drawn at the hospital.

The interagency cooperation necessary for a Jefferson County Sheriff's Deputy to secure a telephonic warrant and have it served by a Washington State Patrol Trooper at Harborview Medical Center does not create an exigent circumstance. Interagency cooperation already exists in criminal investigations. Blood samples ordered by county deputies are routinely sent to the WSP Tox Lab for analysis. See CP 45, SCP Ex. 5,6. The fact that such a procedure can be "problematic" should not discourage the court from requiring that it at least be attempted; otherwise, as the Court warned in McNeely, law enforcement's incentives might become distorted. McNeely, 133 S.Ct. at 1563-64.

Therefore, the state has "failed to satisfy its heavy burden to show by clear and convincing evidence that a warrant could not have been obtained in a reasonable time." See Pearson, 192 Wash.App. at 815.

**III. The trial court erred in concluding that the blood evidence seized without a warrant due to exigent circumstances vitiates the need for a warrant to search/analyze it after the exigency had long passed.**

When Mr. Inman got into a motorcycle accident on May 30, 2015, Washington case law required a warrant, or valid exception, to draw the blood and a second warrant (unless specifically authorized in the first) to test it. See State v. Martines, 182 Wash.App. 519, 331 P.3d 105 (2014), reversed 184 Wash.2d 83, 355 P.3d 1111 (2015). In Martines, the arresting officer had secured a warrant to draw the defendant's blood during a DUI investigation, but it failed to authorize the testing of it. 182 Wash.App at 522.

In reversing the court of appeals, the Washington Supreme Court held that a common sense reading of "a warrant authorizing extraction of a blood sample necessarily authorizes testing of that sample for evidence of the suspected crime." State v. Martines, 184 Wash.2d 83, 93-94, 355 P.3d 1111, 1116 (2015). However, the Martines decision is narrowly written and applies only to situations where a judicial search warrant for the extraction of blood was actually obtained in the first instance.

Although the court of appeals' decision in Martines was reversed, its underlying reasoning about the privacy interest a person has in their blood is well reasoned. The court of appeals 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 court of appeals' conclusion in Martines that a defendant has a privacy interest in the testing of his 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," is well grounded in established law. See Martines, 182 Wash.App. at 530.

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, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (internal citations omitted).

In Robinson v. City of Seattle, 102 Wash.App. 795, 10 P.3d 452 (2000), the court held that in the context of government employment, the collection and testing of urine invades privacy at least twice:

[F]irst, 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 Wash.App. 795, 822 n. 105.

The Court in Missouri v. McNeely, 133 S.Ct. 1552 at 1558-59, decided that whether exigent circumstances exist to justify a warrantless blood draw must be determined on a case-by-case basis. The Court did not address whether the exigent circumstances that justify the initial warrantless intrusion vitiate the need for a warrant to subsequently test the blood sample. McNeely, 133 S.Ct. 1552; see also Scherber v.

California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (exigent circumstances justify warrantless blood draw, but no analysis regarding its subsequent testing). However, recent Supreme Court case law suggests that a warrant to test the blood sample legally obtained without one is necessary.

In Birchfield v. North Dakota, \_\_\_ U.S. \_\_\_\_, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), the Supreme Court held that a warrantless blood draw cannot be justified as a search incident to arrest for DUI, but breath tests are. Blood draws “‘require piercing the skin’ and extract a part of the subject’s body.” Birchfield, 136 S.Ct. at 2178, (quoting Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. at 625. Blood draws and subsequent testing “is significantly more intrusive than blowing into a tube.” Birchfield, 136 S.Ct. at 2178.

In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a sample BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

Birchfield, at 2178.

In a case cited by the Court in Birchfield, the U.S. Supreme Court held that it is unconstitutional to search the contents of a cell phone

without a warrant despite it being legally seized during an arrest. Riley v. California, \_\_\_ U.S. \_\_\_\_, 134 S.Ct. 2473, 189 L.Ed2d 430 (2014). In the opinion, the Court focused on the privacy interest at stake, both quantitatively (given the massive storage capacity of smart phones) and qualitatively (the type of records accessible), specifically referencing “an individual’s private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.” In Riley, the Court indicated that it was sensible for the petitioners to concede that the arresting officers could have “seized and secured their cell phones to prevent destruction of evidence while seeking a warrant.” Riley, 134 S.Ct. at 2486.

If “the police are truly confronted with a ‘now or never’ situation – for example, circumstances suggesting that a defendant’s phone will be the target of an imminent remote-wipe attempt – they may be able to rely on exigent circumstances to search the phone immediately [after lawfully seizing it pursuant to arrest].

Riley, 134 S.Ct. at 2487 (citing Missouri v. McNeely, 133 S.Ct. 1552, 1561-1562).

The Court in Birchfield, and Riley by analogy, recognizes the heightened privacy interest that people have in the information contained in their blood. It would be a legal fiction to justify the warrantless extraction of a blood on the grounds of exigent circumstances and ignore

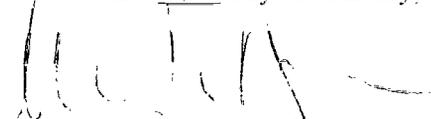
the lack of any such exigency as well as the continued privacy interest in the blood's contents at the time it is sent to the WSP Tox Lab for testing.

In this case, the trial court erred by holding that the blood sample "having been legally seized, a warrant to test it for evidence of DUI was not required" citing State v. Martines, 184 Wash.2d 83, 93 (2015). CP 46. There was no judicial warrant for the initial extraction of Mr. Inman's blood or its subsequent testing. The trial court held that exigent circumstances justified the initial warrantless blood draw. CP 46. However, to the extent any exigency existed at that time, it had long passed when the blood was sent to the WSP Tox Lab for testing days later. RP 25; SCP Ex. 5,6. Although the investigating deputy only suspected alcohol, the sample was tested for the presence of drugs, too, pursuant to an internal WSP protocol. RP 25. And the deputy testified that he could have tested the blood for the presence of any number of things. RP 26.

#### CONCLUSION

For the foregoing reasons, the decision of the trial court denying Mr. Inman's motion to suppress the blood draw and its subsequent testing should be reversed.

Respectfully Submitted this ~~2<sup>nd</sup>~~ day of January, 2017.

  
\_\_\_\_\_  
RICHARD L. DAVIES, WSBA No. 18502  
Attorney for Appellant

#### **PROOF OF SERVICE**

I, Richard Davies, certify that, on this date:

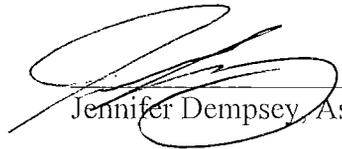
I filed Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the same through the Court's filing portal to: Michael Haas, Prosecuting Attorney, mhaas@co.jefferson.wa.us

I put a copy of appellant's brief in the mail to Appellant Bob Inman at 2709 Sunset Drive SE, Lacey, WA 98503.

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

Signed at Port Townsend, Washington, on January 2, 2017.

  
\_\_\_\_\_  
Jennifer Dempsey, Assistant

**JEFFERSON ASSOCIATED COUNSEL**

**January 02, 2017 - 3:11 PM**

**Transmittal Letter**

Document Uploaded: 1-491745-Appellant's Brief.pdf

Case Name: State v. Bob Inman

Court of Appeals Case Number: 49174-5

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

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

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Jennifer E Dempsey - Email: [jennifererindempsey@msn.com](mailto:jennifererindempsey@msn.com)

A copy of this document has been emailed to the following addresses:

[mhaas@co.jefferson.wa.us](mailto:mhaas@co.jefferson.wa.us)

[daviesrl@ptdefense.com](mailto:daviesrl@ptdefense.com)