

FILED
Court of Appeals
Division II
State of Washington
2/15/2019 11:48 AM

No. 52344-2-II

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

STATE OF WASHINGTON, Respondent

v.

RACHEL RAWLEY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY
THE HONORABLE JUDGE JEFFREY P. BASSETT

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

| | |
|---|----|
| I. ASSIGNMENTS OF ERROR | 1 |
| II. STATEMENT OF FACTS..... | 2 |
| III. ARGUMENT..... | 6 |
| A. Exigent Circumstances did not Justify the Warrantless Blood Draw..... | 6 |
| IV. CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

Federal Cases

Missouri v. McNeely, 599 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).....7, 8, 10, 14

Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)..... 13

Washington State Cases

City of Seattle v. Pearson, 192 Wn. App. 802, 369 P.3d 194 (2016) 8

Harper v. State 110 Wn.2d 873, 759 P.2d 358 (1988)..... 13

State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016) 8, 9, 12

State v. Bliss, 153 Wn. App. 197, 222 P.3d 107 (2009)..... 6

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 7

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 7

State v. Inman, 2 Wn. App. 2d 281, 409 P.3d 1138 (2018)... 1, 7, 10

State v. Smith, 165 Wn.2d 511, 199 P.3d 386 (2009)..... 8

State v. Smith, 2018 WL6310104 (Smith II)..... 12, 13

York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008)..... 7

Constitutional Provisions

U.S. Const. Amend. IV..... 1, 7, 13

Wash. Const. art. 1, § 7 1, 7

Statutes

RCW 46.30.408(4) (2015)..... 8

Other Authorities

| | |
|---|----|
| GR 14.1 | 12 |
| Li, J., Mills, T., Erato, R. "Intravenous saline has no effect on blood ethanol clearance." 1999. https://www.ncbi.nlm.nih.gov/pubmed/9950378 | 12 |
| Perez, Siegfried Rs, Gerben Keijzers, Michael Steel, Joshua Byrnes, and Paul A Scuffham. 2013. Intravenous 0.9% sodium chloride therapy does not reduce length of stay of alcohol-intoxicated patients in the emergency department: randomized controlled trial. <i>Emergency Medicina Australia: EMA</i> , no. 6 (Nov. 8). http://www.ncbi.nlm.nih.gov/pubmed/24308613 | 12 |

I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it entered finding of fact 15:

That, on average, it can take up to 45 minutes to obtain a telephonic blood draw warrant. CP 123.

- B. The trial court erred when it entered conclusion of law 4:

That no legal authority requires Deputy Aman to inquire what IV fluids or medications paramedics would introduce in the defendant. CP 124.

- C. The trial court erred when it entered conclusion of law 3:

That the warrantless blood draw was lawful under exigent circumstances based on *State v. Inman*, 2 Wn. App. 2d 281, 409 P.3d 1138 (2018). CP 124.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The taking of a blood sample constitutes a search and seizure within the meaning of U.S. Const. Amend. 4 and Wash. Const. art. 1, § 7. Under U.S. law and Washington State law, a blood draw requires a search warrant or an exception to that requirement. Where the State relies on exigent circumstance to justify a nonconsensual warrantless

blood draw, does it bear the burden to show the introduction of an IV solution would have altered the alcohol blood content result?

- B. Did the trial court err when it denied the motion to suppress the results of the blood draw?

II. STATEMENT OF FACTS

Kitsap County prosecutors charged Rachel Rawley by third amended information with theft of a motor vehicle, felony driving under the influence, driving while license suspended or revoked in the second degree, operation of a motor vehicle without ignition interlock device, reckless driving and tampering with a witness. CP 101-104. Prior to trial, Ms. Rawley pleaded guilty to driving with a suspended driver's license second degree and driving without an ignition interlock device. CP 63, 73.

a. Motion To Suppress

Ms. Rawley moved to suppress the results of a warrantless blood draw obtained from her at the scene of the accident. (CP 75-81).

On May 7, 2018, at about 2:55 pm police and EMT personnel responded to a two-car accident in Kitsap County. (CP

118-119; 7/16/18 RP 21). Ms. Rawley's car had crossed the centerline, and as a result of the front-end collision, she was trapped in the driver's seat of her vehicle. (CP 118; 7/16/18 RP 22-23, 35).

Deputy Aman spoke to Ms. Rawley and smelled a strong odor of intoxicants, and observed she had repetitive and slurred speech. (7/16/18 RP 24). He concluded she was under the influence of alcohol and unable to safely drive a car. (7/16/18 RP 24-25). He did not ask her to submit to a portable breath test or participate in a field sobriety test, because the firefighters were trying to remove her from the car and he thought there might be a medical issue. (7/16/18 RP 25).

Before her extrication, the paramedic told Aman the goal was to transport Ms. Rawley to the hospital. The paramedic said he would know whether he would start an IV for Ms. Rawley once she was in the medic van. (7/16/18 RP 27). Deputy Aman went to his patrol car and retrieved a blood draw kit. (7/16/18 RP 27).

When he returned to the medic van, the paramedic told him he was going to start an IV. (7/16/18 RP 28). Aman did not ask what kind of solution the IV bag contained. (7/16/18 RP 37). The paramedic report stated that Deputy Aman "talks with patient to

gain consent from patient.” (Exh. 1; 7/16/18 RP 42). Deputy Aman had no recollection if he said that to the paramedic and did not believe he had obtained consent and that he proceeded under an exigent circumstance prong. (7/16/18 RP 43). Deputy Aman said, “So as soon as he said he was going to introduce IVs on her, I developed basically exigent circumstances in my mind to get her blood prior to that IV administered.” (7/16/18 RP 29).

Aman reported that at 3:07 pm the paramedic drew the blood. (7/16/18 RP 29, 37). He initially testified the medic began the IV immediately after the blood draw, but later stated he saw the IV but did not know when it was started. (7/16/18 RP 30, 40). The paramedic report stated the medic did not begin the IV, a water saline solution, until 3:23. (Exh. 1 p.3); (7/16/18 RP 15).

Deputy Aman testified the factors “in terms of the length that it takes to obtain a warrant” were whether the blood would “be changed while en route. Are there going to be medications? Are there going to be fluids that are going to dilute the blood? What is the time frame from the time that the incident happened to the time you can actually get somebody to the hospital to obtain that blood sample or serve the search warrant?” (7/16/18 RP 32).

Aman testified it would *not* have been difficult to speak with a prosecutor, “then the prosecutor to get ahold of an available judge, and then the ability for us to connect and be able to –for me to give that information over the phone to them.” (7/16/18 RP 32). He thought a warrant could take 20 to 45 minutes to obtain. (7/16/18 RP 32). He also “believed that the time frame for them to start adding IVs was going to cause a change in the blood, which, based on my training and experience so far, creates an exigent circumstance.” (7/16/18 RP 31, 37, 40).

Defense counsel argued that if the officer relied on the exigent circumstance exception to the warrant, it was the State’s burden to establish the IV saline solution would have destroyed evidence. (7/16/18 RP 53). Citing to confirmed scientific studies, defense counsel pointed out that saline solution does not affect alcohol concentration. (CP 79). The court held:

There’s nothing in the case law that has been provided to me that imposes any duty on Officer Aman to obtain knowledge from the EMT as to exactly what course of medications or treatment he’s going to provide to Ms. Rawley before he makes a decision as far as whether he’s got an exigent circumstance.

(7/16/18 RP 54).

The court denied the motion to suppress, and the matter proceeded to a stipulated facts trial. (CP 100,121-125; 7/16/18 RP 55). The court found Ms. Rawley guilty of reckless driving, and felony driving under the influence. (CP 111-117; 7/20/18 RP 4-5). The State dismissed the prosecution for the theft of a motor vehicle and tampering with a witness. (7/16/18 RP 72).

The court found Ms. Rawley indigent and imposed only the mandatory \$500 assessment fee, and a \$1,050 emergency response fee. (CP 170, 176-177; 8/3/18 RP 21). Ms. Rawley filed a timely notice of appeal. (CP 178).

III. ARGUMENT

A. Exigent Circumstances did not Justify the Warrantless Blood Draw.

a. Standard Of Review

A trial court's order on a suppression motion is reviewed to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State*

v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A challenged conclusion of law from a suppression hearing is reviewed de novo. *Inman*, 2 Wn. App. 2d at 290.

b. Article 1, § 7 Of The Washington Constitution Provides That No Person Shall Be Disturbed In His Private Affairs, Or His Home Invaded, Without Authority Of Law

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution prohibit warrantless searches and seizures. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The “authority of law required by Article I, section 7 is satisfied by a valid warrant.” *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008). If the State intrudes into a person’s body to draw blood, it is an invasion which constitutes a search and seizure, triggering constitutional protections. *Missouri v. McNeely*, 599 U.S. 141, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013); *Garvin*, 166 Wn.2d at 249.

Under Washington law, a blood draw may be conducted without consent only if there is a (1) search warrant, a (2) valid waiver of the warrant requirement, (3) when exigent circumstances

exist, or (4) under any other authority of law. RCW 46.30.408(4) (2015).

In this case, the State relied on the warrant exception of exigent circumstances to justify the warrantless blood draw. The State bears the burden to show the existence of exigent circumstances justify a warrantless search. *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016). Whether an exigency existed is a legal question reviewed *de novo*. *City of Seattle v. Pearson*, 192 Wn. App. 802, 811-12, 369 P.3d 194 (2016).

The reviewing Court looks to the totality of circumstances to determine “whether a law enforcement officer faced an emergency that justified acting without a warrant.” *McNeely*, 569 U.S. at 150. An exigent circumstance exists where “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).

In this case, the purported exigent circumstance was the amount of time it would have taken to obtain a telephonic warrant and the deputy’s erroneous belief that introduction of an IV solution would alter or destroy evidence of the blood alcohol content.

c. The Time To Obtain The Warrant Did Not Justify A Warrantless Search

The warrant exception requires a *compelling* need for the officer to act and circumstances that make the time necessary to secure a warrant *impractical*. *Baird*, 187 Wn.2d at 221.

The trial court entered finding of fact 15: “That on average, it can take up to 45 minutes to obtain a telephonic blood draw warrant.” CP 122. The deputy testified the *longest* it had ever taken him to get a warrant was 45 minutes to an hour (7/16/18 RP 31); the shortest time it had taken was 20 minutes (7/16/18 RP 32) and, it would take between 20 and 45 minutes to get a warrant for blood in Kitsap County (7/16/18 RP 38-39). The officer did *not* testify 45 minutes was the average time to obtain a telephonic blood draw warrant. Substantial evidence does not support this finding. Further, even if it took 45 minutes to obtain a warrant, the time itself does not support a conclusion that it was impractical.

d. Under A Totality Of The Circumstances Test There Was No Exigent Circumstance Justifying The Warrantless Blood Draw

Courts determine exigency under a totality of the circumstances on a case-by-case basis. *McNeely*, 569 U.S. at 150.

The *Inman* Court outlined a series of factors in that case which led to its ruling that exigent circumstances justified not obtaining a warrant for a blood draw. *Inman*, 2 Wn. App. 2d at 291-293.

Inman caused a high trauma motorcycle accident that rendered him unconscious for about five minutes. *Id.* at 284. Officers provided emergency treatment and determined he needed transport via medivac helicopter to the nearest trauma center. In the process of assisting Inman, officers smelled alcohol on him, and he admitted he had been drinking alcohol before driving. *Id.* at 284-85.

The Court reasoned that given the challenges of (1) severe injuries requiring a helicopter to emergency medical services, (2) the lack of cell phone coverage, (3) the 45 minute process for obtaining a warrant, which had not worked in the past, and (4) the natural dissipation of alcohol in the blood, obtaining a warrant was not practical. *Inman*, 2 Wn. App. 2d at 285, 292.

Such justifications are not present in this case. The injuries from this accident warranted medical attention but were never characterized as severe injuries requiring extraordinary transport to a hospital. The medic record established the IV was not started for

almost 20 minutes after the blood draw. The medical attention Ms. Rawley received was neither extraordinary nor immediate.

The deputy testified it would *not* have been difficult to contact the court personnel to start the warrant process. Nevertheless, he did not attempt to get a warrant. The 20-45 minute timeframe to get a warrant was not impractical.

Finally, the deputy testified he thought the use of an IV solution would alter the blood alcohol content, and the potential destruction of evidence justified the warrantless blood draw. The deputy's belief was based on an assumption and without substantiation.

The court entered conclusion of law 4: "That no legal authority requires Deputy Aman to inquire what IV fluids or medications paramedics would introduce in the defendant." (CP 124). Whether it is always pragmatic for an officer to ask about the contents of the IV solution in a non-traumatic EMT response is debatable. Regardless of whether an officer makes an inquiry, the State bears the burden to show evidence would be destroyed or significantly altered while waiting for a warrant. *Baird*, 187 Wn.2d at 218. The State cannot meet its burden.

In this case, there was time and opportunity for the officer to ask about the solution. The defense counsel presented the trial court with the report that the IV consisted of 50 milliliters of "0.9% NSS" (CP 77, Exh.1). It was a saline solution. Counsel cited to scientific studies to show saline solution does not affect alcohol concentration¹. (CP 80). Additionally, the introduction of 50 milliliters of .9% NSS was de minimis, representing less than 1 percent of Ms. Rawley's total blood. (CP 81). In short, any risk of destruction of evidence with the introduction of the saline solution was virtually non-existent.

In a recent Division One unpublished case, *State v. Smith*, 2018 WL6310104², officers took the defendant to the hospital for a blood draw after a suspected vehicular homicide. Police secured a warrant to draw Smith's blood. *Id.* at *2. Smith resisted efforts and

¹ Li, J., Mills, T., Erato, R. "Intravenous saline has no effect on blood ethanol clearance." 1999. <https://www.ncbi.nlm.nih.gov/pubmed/9950378>; Perez, Siegfried Rs, Gerben Keijzers, Michael Steel, Joshua Byrnes, and Paul A Scuffham. 2013. Intravenous 0.9% sodium chloride therapy does not reduce length of stay of alcohol-intoxicated patients in the emergency department: randomized controlled trial. *Emergency Medicina Australia: EMA*, no. 6 (Nov. 8). <http://www.ncbi.nlm.nih.gov/pubmed/24308613>.

² GR 14.1 provides that unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

medical personnel eventually sedated with Haldol³ and a second injection of either Ativan or Benadryl to facilitate the blood draw. *Id.* at *3.

At trial, the defense moved to suppress the results of the blood test, claiming among other things, that how the blood was drawn, including the sedation, violated the defendant's rights under the Fourth Amendment. The trial court found the results of the blood draw admissible. *Id.* at *3.

The significance of *Smith* is that neither the court nor the parties questioned the *results* of the blood/alcohol content test even *after* Haldol had been injected. "The purpose of the [antipsychotic] drugs is to alter the chemical balance in a patient's brain...the drugs can have serious, even fatal, side effects." *Washington v. Harper*, 494 U.S. 210, 229, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

Where the State relies on the introduction of a solution to justify a warrantless blood draw, it bears the burden of showing that solution would alter the blood test results. It is a scientific fact that saline does not change, or at least not appreciably, the results.

³ Haldol is an antipsychotic medication. *Harper v. State* 110 Wn.2d 873, 876 n.3, 759 P.2d 358 (1988).

The United States Supreme Court has held the risk of natural alcohol dissipation in routine DUI cases does not create per se exigent circumstances and does not justify a warrantless blood draw. *McNeely*, U.S. 569 U.S. at 165. The State did not meet its burden of showing an exigent circumstance in this case, and the trial court erred when it denied the motion to suppress.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Rawley asks this Court to suppress the evidence and remand to the trial court to act consistently with its opinion.

Respectfully submitted this 15th day of February 2019.



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on February 15, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Kitsap County Prosecuting Attorney at kcpa@co.kitsap.wa.us and to Rachel Rawley/DOC#371963, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332.

Marie Trombley

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

February 15, 2019 - 11:48 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52344-2
Appellate Court Case Title: State of Washington, Respondent v. Rachel C. Rawley, Appellant
Superior Court Case Number: 18-1-00669-2

The following documents have been uploaded:

- 523442_Briefs_20190215114724D2256523_2058.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Rawley AOB .pdf
- 523442_Motion_20190215114724D2256523_5932.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was 2-15-19 Rawley MTE FINAL.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Valerie Greenup - Email: valerie.mtrombley@gmail.com

Filing on Behalf of: Marie Jean Trombley - Email: marietrombley@comcast.net (Alternate Email:)

Address:
PO Box 829
Graham, WA, 98338
Phone: (253) 445-7920

Note: The Filing Id is 20190215114724D2256523