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Court of Appeals
Division III
State of Washington

32653-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN J. STORMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding that, “Driving at a high rate of speed, Mr. Storms accelerated into and failed to stop at the stop sign at the intersection of Helena and Empire.” (CP 732)
2. The court erred in finding that “Officer Raleigh believed Mr. Storms was impaired by drug use based upon his training and experience.” (CP 733)
3. The court erred in finding that, “Shortly after the extrication of the two passengers from the suspect vehicle, Officer Paul Taylor observed a plastic baggie in the front passenger area of the suspect vehicle in open view.” (CP 733-34)
4. The court erred in finding that:

If the officers had attempted to obtain a search warrant at the time, Officer Curtis estimated based upon his training and experience it would have taken an additional two hours to drive to the County/City Public Safety Building, prepare and gather the information for the search warrant application, drive to the on-call magistrate’s

house, await the review of the search warrant application by the magistrate and for the officers to return to the hospital for execution of the signed search warrant.

(CP 735-36)

5. The court erred in finding that “No telephonic or other electronic application process was known by the officers at the time. The court takes judicial notice that no electronic warrant application process was available at the time.” (CP 736)

6. The court erred in concluding:

Here, there was probable cause to draw blood based upon the totality of the facts and circumstances known to the officers at the time of arrest. Mr. Storms was driving erratically at a high rate of speed; he accelerated into and he failed to stop at a controlled intersection. Officers observed a baggie of methamphetamine in Mr. Storms’ car shortly after his passengers were extricated. Officer Raleigh observed Mr. Storms’ tremors and sweating and he believed the defendant may have been impaired because of drug use. When DRE Trooper Pichette arrived at the hospital almost two hours after the collision, he observed Mr. Storms’ face appeared flush and the tremors about his body. This behavior was an indicator to Trooper Pichette that the defendant had potentially ingested a stimulant.

(CP 736-37)

7. The court erred in concluding:

Based upon the foregoing, the court finds that under the totality of the circumstances as they existed at the time, it was not feasible to obtain a search warrant within a reasonable period of time. In addition, there was a substantial risk that evidence of the defendant's impairment or lack of impairment from drugs would be lost, due both to the passage of time and to the potential need for the administration of medical care to the defendant based upon the defendant's complaints and the scene medic's statement that defendant would need x-rays. The delay of potentially four hours, and perhaps 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 could be delayed due to medical treatment, created sufficient exigent circumstances in this case to permit the police to subject Mr. Storms to a warrantless blood draw.

(CP 740

B. ISSUES

1. The officers who took the suspect to the hospital and arranged for a warrantless blood draw testified they were not familiar with an electronic warrant. They were not asked whether they were aware of telephonic warrants. Did

the court err in finding “No telephonic or other electronic application process was known by the officers”?

2. The officers who arranged the blood draw were told to do so by other officers. There is no evidence as to the other officers’ awareness of telephonic warrants. Did the court err in finding “No telephonic or other electronic application process was known by the officers”?
3. Absent any evidence regarding the awareness of telephonic warrant among the numerous officers involved in the investigation, did the State carry its burden of proving the warrantless blood draw was justified under the “exigent circumstances” exception to the warrant requirement?
4. The officer who allegedly ordered the warrantless blood draw did not testify to having done so, nor did he identify any probable cause for such a search. Did the warrantless blood draw satisfy the probable cause requirement of the Fourth Amendment?
5. The court’s findings in support of the conclusion that probable cause supported the warrantless blood draw were not supported by the evidence. Did the court err in denying

the defendant's motion to suppress the results of the blood draw?

C. FACTS

Officer Erin Raleigh was attempting to follow a Honda driven by Bryan Storms, who appeared to be speeding and accelerating. (RP 9) As Mr. Storms turned from Gordon onto Helena Street he again accelerated. (RP 9) When Officer Raleigh turned onto Empire a few moments later, he came upon the scene of a collision between Mr. Storms's Honda and a green Ford Ranger two blocks north of Gordon. (RP 10) Officer Raleigh pursued Mr. Storms, who had fled the scene. (RP 12) When found nearby, Mr. Storms appeared "to be kind of excited" and "very sweaty." (RP 13, 22) "He had a very difficult time kind of maintaining his body and being still. He moved around. He was very active when he was just kind of laying on the ground" (RP 22) When asked whether Mr. Storms appeared to be on some kind of stimulant, the officer replied: "As far as actual to classify what he was on, I can't make that judgment call, but it just appeared to be that he was not acting as a kind of somebody that was just normal I guess" (RP 22)

Officer Raleigh released Mr. Storms to Officers Chris Brasch and James Curtis, who had joined the pursuit. (RP 14) Officer Brasch placed

Mr. Storms in his patrol car and remained with him at the scene for some time while various witnesses identified him. (RP 33) During this time, one witness mentioned to Officer Brasch that he believed Mr. Storms was impaired. (RP 40) Officer Curtis noticed “he seemed nervous, his legs and arms were moving constantly and he wouldn’t make eye contact.” (RP 58) Officer Curtis considered some of these signs indicative of methamphetamine or other stimulant use. (RP 59)

Around 1:20 p.m., Officers Brasch and Curtis transported Mr. Storms to the hospital for treatment to his injuries and administration of a blood test. (RP 34-35, 41-43, 49) Sergeant Huddle initially told the officers to take Mr. Storms to the hospital for a blood draw, and this request was later confirmed by Sergeant Storment. (RP 49) The blood was drawn at 2:16 p.m. (RP 58)

Sergeant Huddle had called for a drug expert as part of standard operating procedure based on the circumstances of “extreme reckless driving and a fatality.” (RP 72) He had neither seen, nor talked to other officers who had seen, Mr. Storms. (RP 72)

Sergeant Storment advised Officer Curtis to get a blood draw based on recommendations he received from Corporal Carr and Officer Taylor. (RP 84) They told him they “believed it was prudent and necessary.” (RP 85) While examining Mr. Storms’s car, Officer Taylor

noticed what appeared to him to be a baggie of methamphetamine in the map packet of the passenger side door. (RP 101) Neither Officer Taylor nor Corporal Carr had any contact with Mr. Storms that day. (RP 99) Indeed, by the time Officer Taylor arrived on the scene, Mr. Storms had been transported to the hospital. (RP 99-100)

D. ARGUMENT

1. THE COURT ERRED IN ADMITTING RESULTS OF A WARRANTLESS BLOOD DRAW UNDER THE EXCEPTION FOR EXIGENT CIRCUMSTANCES.

The Fourth Amendment protects against unreasonable searches:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. A warrantless search is per se unreasonable under article 1, section 7 of the Washington Constitution “unless the State proves that one of the few ‘carefully drawn and jealously guarded exceptions’ ” to the warrant requirement applies. *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) (quoting *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)). The State bears the burden of demonstrating that a warrantless

search or seizure falls within an exception to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

One recognized exception allows a warrantless search and seizure 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).

- a. Officers Must Obtain A Warrant Where They Can Reasonably Do So Without Delay.

“[T]he taking of blood samples constitutes a ‘search and seizure’ within the meaning of U.S. Const. amend. 4 and Const. art. 1, § 7.” *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) (nonconsensual blood test for suspected commission of vehicular homicide is a search), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). “[W]here police officers can reasonably obtain a warrant before a

blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *McNeely*, 133 S. Ct. at 1561.

In *McNeely*, the Supreme Court reviewed whether the use of a warrantless blood alcohol test was reasonably justified by the “exigent circumstances” exception to the warrant requirement. *Id.* at 1559. The Court noted that the supposed exigency resulted from the historic delay in obtaining a search warrant and the dissipation of alcohol from the blood over time. *Id.* at 1561. But under current technology a warrant may usually be obtained very quickly, some delay in administering the test is generally unavoidable, and the rate of dissipation is readily determined. *Id.* Accordingly, the Court concluded that absent unusual circumstances, exigent circumstances do not justify a warrantless BAC test. *Id.*

b. The State Presented No Testimony As To
The Availability Of A Telephonic Warrant.

Here, in concluding that the warrantless blood draw was justified by exigent circumstances, the court relied on its findings that none of the officers knew of any available telephonic or electronic warrant application process and, in the absence of such a process, obtaining a search warrant could result in a delay of four hours or more. (RP 152-53, 154) In making

these findings, the court apparently also relied on personal knowledge that no electronic warrant process was available. (CP 736)

The deputy prosecutor asked Officer Chris Brasch whether he was aware of any type of electronic warrant process; he said he knew there was one now but did not recall whether there was one available at the time of the incident. (RP 43-44) Asked whether he was aware of any type of electronic process to apply for a search warrant, Officer James Curtis stated that he was not. (RP 59) Neither of these officers, nor any other officers, was asked whether he was aware of a telephonic process for obtaining a warrant.

Several reported cases have referred to the availability of a telephonic warrant in Spokane County beginning at least as early as 1989. See *State v. Tarter*, 111 Wn. App. 336, 338-39, 44 P.3d 899 (2002); *State v. Reeb*, 63 Wn. App. 678, 679-80, 821 P.2d 84 (1992); *State v. Stanphill*, 53 Wn. App. 623, 629, 769 P.2d 861 (1989); *McNeely*, 133 S. Ct. at 1562.

In *McNeely*, the court referred to both “[t]elephonic and electronic warrants.” CrR 2.3(c). This court has held that the “issuance of telephonic warrants is constitutionally permissible. See CrR 2.3(c).” *State v. Garcia*, 140 Wn. App. 609, 620, 166 P.3d 848 (2007). The rule may be read as expressly limiting the issuance of such warrants based on evidence provided by telephone: “But CrR 2.3 requires some form of recording of

the telephonic hearing as evidence in support of the finding of probable cause.” *Id.* Accordingly, the term “telephonic warrant” has been used in Washington’s courts for several decades. See 32 Wash. Prac., Wash. DUI Practice Manual § 27:17 (2015-16 ed.)

The term “electronic warrant” does not appear in any reported cases in Washington, nor is such a warrant expressly authorized by the rules. The officers’ testimony that they were unaware of electronic warrants is consistent with the case law and court rules, which do not suggest the existence of such procedures. The court’s finding, however, was that “no telephonic . . . application or process was known by the officers.”

The court’s written findings include the statement that the court “takes judicial notice that no electronic warrant application process was available at that time.” (CP 736) “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b); *Fusato v. Washington Interscholastic Activities Ass’n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999). If it is generally known, or readily ascertainable, that no electronic warrant process was available, that is because the trial court

clearly distinguished between electronic and telephonic warrants. In light of that distinction, the State's failure to elicit any testimony as to the officers' knowledge of the availability of a telephonic warrant process has no relevance in determining whether such a procedure was available.

The record does not support the court's findings that no telephonic warrant application was known by the officers and any attempt to obtain a search warrant would have resulted in an unreasonable delay of four hours. Neither the record nor the findings support the court's conclusions that the warrantless blood draw was justified by exigent circumstances. The State failed to sustain its burden of demonstrating that the warrantless search fell within the exception for exigent circumstances.

2. NEITHER THE RECORD NOR THE COURT'S FINDINGS SUPPORTS THE CONCLUSION THE WARRANTLESS BLOOD DRAW WAS BASED ON PROBABLE CAUSE.

The probable cause required to satisfy the reasonableness requirement of the Fourth Amendment must be based on "facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place." *State v. Werth*, 18 Wn. App. 530, 536,

571 P.2d 941 (1977). In ruling that such facts and circumstances existed in Mr. Storms's case, the court concluded:

Mr. Storms was driving erratically at a high rate of speed; he accelerated into and he failed to stop at a controlled intersection. Officers observed a baggie of methamphetamine in Mr. Storms' car shortly after his passengers were extricated. Officer Raleigh observed Mr. Storms' tremors and sweating and he believed the defendant may have been impaired because of drug use. When DRE Trooper Pichette arrived at the hospital almost two hours after the collision, he observed Mr. Storms' face appeared flush and the tremors about his body. This behavior was an indicator to Trooper Pichette that the defendant had potentially ingested a stimulant.

(CP 76-37) The record does not support the first two statements of fact.

Officer Raleigh's testimony states Mr. Storms was driving at a high rate of speed, and accelerated when he turned onto Helena. But the testimony makes it clear that Officer Raleigh then lost sight of Mr. Storms's car until after the collision. The speed and acceleration are the only evidence Mr. Storms was driving erratically. There is no evidence Mr. Storms accelerated into the intersection in which the collision occurred.

Although Officer Taylor testified he saw what appeared to be a baggie of methamphetamine in Mr. Storms's car, no other officer did so, and Officer Taylor did not determine the substance was in fact methamphetamine. The record is silent as to the time when Officer Taylor

saw the baggie but it was well after the passengers had been extricated since they had been taken to the hospital around 1:00 p.m. and he testified he arrived at the scene after Mr. Storms had been transported to the hospital around 1:30 p.m. (RP 28)

More significantly, none of these “facts” was known to the officers who obtained the blood draw, nor to the officer who allegedly ordered them to obtain the blood draw.

The Court of Appeals has adopted the “fellow officer” rule, which has been summarized as follows:

Whether the arresting officer had personal knowledge of the information amounting to probable cause is not crucial. The important fact is that the arresting officer acted on a directive made by another officer who had probable cause to arrest. *See* 2 W. LaFare, *Search and Seizure*, § 3.5(b) at 10 and n. 40 (2d ed. 1987).

State v. Alvarado, 56 Wn. App. 454, 457-58, 783 P.2d 1106 (1989); see *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971). In *Alvarado*, two officers saw the defendant commit a drug offense, radioed that information to another officer and saw that officer arrest the defendant. 56 Wn. App. at 457. The court concluded “the circumstances of *Alvarado*’s arrest demonstrate that he was arrested based on a communication from two officers possessing probable cause.” *Id.* at 457.

In an earlier decision, the court identified two variants of the fellow officer rule. *State v. Maesse*, 29 Wn. App. 642, 646, 629 P.2d 1349 (1981). The first, quoting LaFave, limited its application to cases where the arresting officer is directed to make the arrest by another officer who has probable cause for an arrest:

Thus, under the Whiteley rule (or, as it is sometimes termed, the “fellow officer” rule) police are in a limited sense “entitled to act” upon the strength of a communication through official channels directing or requesting that an arrest be made.... (W)hen the question arises in the context of an effort to exclude evidence obtained as a consequence of action taken pursuant to the communication, then the question legitimately is whether the law enforcement system as a whole had complied with the requirements of the Fourth Amendment, which means that the evidence should be excluded if facts adding up to probable cause were not in the hands of the officer or agency which gave the order or made the request....

Maesse, 29 Wn. App. at 646 (quoting 1 W. LaFave, *Search and Seizure*, § 3.5 at 623-27 (1978)).

A second alternative permits an arresting officer to rely on the collective knowledge of all the officers in an agency requesting the arrest:

Other cases, again by way of dictum, indicate that it will suffice that the directing or requesting agency possessed all the facts needed to show probable cause. Should a choice between these two positions become critical, it seems likely a court would more readily opt for the latter and broader proposition, for it squares with the oft-stated notion that “in determining whether probable cause existed we must evaluate the collective information of all the officers.”

Id. An Oregon court declined to apply the second alternative, reasoning that when an officer having possession of facts establishing probable cause has not conveyed that information to a fellow officer, the fellow officer's search nevertheless lacked probable cause. *State v. Mickelson*, 18 Or. App. 647, 526 P.2d 583 (1974).

The broader rule should not be applied in the circumstances present here, where the record shows that Sergeant Huddle did not observe Mr. Storms, did not receive information from other officers regarding their observation of Mr. Storms's alleged impairment, and acted in reliance on a standard operating procedure of calling for a drug recognition expert. (RP 71) Sergeant Huddle did not testify that he ordered Officers Brasch and Curtis to obtain a blood draw and thus did not indicate any additional grounds for doing so.

Certainly, at the time Sergeant Curtis said he was told to obtain a blood draw, prior to transporting Mr. Storms to the hospital at 1:30, Officer Taylor and Corporal Carr had not yet observed the suspicious baggie in Mr. Storms's car.

Sergeant Storment testified that he advised Officer Curtis to get a blood draw based on recommendations he received from Corporal Carr and Officer Taylor. He did not, however, testify that either of them provided information about the suspected drugs Officer Taylor had seen in

the car, only that they told him they “believed it was prudent and necessary.”

There is no evidence Officer Raleigh ever shared his observation of Mr. Storms’s possible impairment with anyone prior to the blood draw. Likewise, although Trooper Pichette testified his observations suggested Mr. Storms might have ingested a stimulant, there is no evidence he made these observations or shared them with Officers Brasch and Curtis prior to the time of the blood draw.

The circumstances cited by the court in support of the conclusion that the warrantless blood draw was supported by probable cause are not supported by the record. The evidence of Mr. Storms’s possible impairment by drug or alcohol use was minimal and was not communicated to the officer or officers who ordered the blood draw.

3. ERROR IN ADMITTING THE FRUITS OF THE WARRANTLESS SEARCH WAS NOT HARMLESS.

Improper denial of the motion to suppress the fruits of a warrantless search is constitutional error. *See State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Constitutional error is harmless if the court is “convinced beyond a reasonable doubt that any reasonable jury

would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Mr. Storms was convicted of vehicular homicide after the jury was instructed that this verdict would be supported by a determination that he operated a motor vehicle while under the influence of any drug. (Gipson RP 141; CP 716) Mr. Storms was convicted of two counts of vehicular assault after the jury was instructed that this verdict would be supported by a determination that he operated a motor vehicle while under the influence of any drug. (Gipson RP 143-44; CP 716)

The alternatives to a finding of drug influence were recklessness or disregard for the safety of others. (CP 141-44) Evidence as to the manner in which Mr. Storms was operating the vehicle at the time of the collision was limited to the testimony of bystanders who had a brief opportunity to observe his driving, and expert testimony that at the time of impact Mr. Storms’s vehicle was traveling at about 45 to 47 miles per hour. (RP 35, 42, 48, 52, 62) In light of the limited evidence as to the manner of Mr. Storms’s driving, the evidence of blood levels of amphetamine and methamphetamine were by far the most probative evidence supporting his conviction. Absent evidence of levels of drugs in Mr. Storms’s blood,

there exists a reasonable doubt that any reasonable jury would have reached the same result.

E. CONCLUSION

The results of the illegal blood draw should have been excluded. Their erroneous admission was highly prejudicial and requires reversal of the homicide and assault convictions.

Dated this 24th day of February, 2016.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32653-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BRYAN J. STORMS,)	
)	
Appellant.)	

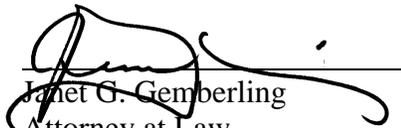
I certify under penalty of perjury under the laws of the State of Washington that on February 24, 2016, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 24, 2016, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

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Signed at Spokane, Washington on February 24, 2016.


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