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Court of Appeals
Division III
State of Washington

NO. 33088-5-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GISELA M. SEDANO, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

Appellant Gisela M. Sedano caused a serious-injury head-on collision on a rural road in south Grant County late Friday night of the July 4, 2013 holiday weekend. Debris from the wreck closed the two-lane highway in both directions. Law enforcement resources were stretched thin investigating the collision and handling the road closure. State troopers knew a helicopter was waiting at the local hospital to transport Ms. Sedano and that she could leave at any moment. Ms. Sedano's injuries were serious: she was convulsing and was intermittently incoherent and disoriented. A trooper directed hospital personnel to draw a sample of Ms. Sedano's blood without first obtaining a warrant. Does substantial evidence in the record support the trial court's conclusion that exigent circumstances justified the warrantless seizure of Ms. Sedano's blood? (Assignment of Error No. 1)

II. STATEMENT OF THE CASE

Washington State Trooper Anthony Witney was near the end of his shift and heading back to his office, traveling westbound on Highway 26 in Grant County at 10:45 p.m., July 5, 2013. RP 40¹. He was about ten

¹ The Verbatim Report of Proceedings submitted in this appeal consists of three volumes, one covering the May 7, 2014 and June 2, 2014 suppression hearing, one for the trial, and one for the sentencing hearing. All citations in this Response are to the volume transcribing the suppression hearing.

miles west of Othello. RP 10. Highway 26 is one lane either direction. RP 42. There are no street lights and the road was dark. RP 47.

Trooper Witney was traveling one hundred yards behind a Nissan Xterra when he “saw it swerve to the right and drive down into an orchard.” RP 41. Trooper Witney did not see the Xterra swerve into the eastbound lane before it went off the road into the orchard. RP 42. Before he could fully comprehend what was happening he found himself driving through a collision scene. *Id.* Debris spread across both lanes, damaging his tire. RP 42. He stopped, still westbound, beside a burgundy Oldsmobile. RP 41. The collision had rotated the Oldsmobile, which was in the eastbound lane facing northwest. RP 45. The Oldsmobile was damaged from “the driver-side headlight back through the driver’s compartment. The driver’s side door was completely sheared off and gone” RP 42.

Ms. Sedano was unconscious in the driver seat, held in place only by her seatbelt. RP 41. The dash column was directly in her chest. *Id.* Her breathing was shallow and labored. *Id.*

Trooper Witney repositioned his patrol car to protect Ms. Sedano from eastbound traffic. *Id.* He flagged down a westbound semi-truck and asked the driver to check the occupants of the Xterra. *Id.*

Trooper Witney held Ms. Sedano’s neck stable as he waited for

emergency responders. *Id.* He assessed her injuries as serious, if not critical. RP 43. She went in and out of consciousness, waking to say she was “so tired,” losing consciousness again, then waking back up. *Id.* When she ground her teeth, Trooper Witney could feel a grinding sensation in the backside of her neck, indicating her neck might be broken. *Id.*

Once smoke from the airbag dissipated, Trooper Witney could smell intoxicants in the vehicle and on Ms. Sedano’s breath as she spoke. RP 43. He asked Ms. Sedano if she had been drinking. *Id.* Ms. Sedano told him she had “two tequilas.” *Id.* Trooper Witney stopped asking questions and waited for the responders. *Id.*

Meanwhile, Trooper Tim Stratton arrived, checked the occupants of the Xterra, and told Trooper Witney one of them had a broken leg. RP 44.

Debris covered the road from fog line to fog line, completely shutting down both lanes. RP 45. All gouge marks from the head-on collision were in the westbound lane. RP 44. Law enforcement from Adams County and possibly Grant County arrived to assist with the road closure but personnel were stretched thin on this late Friday night of the July Fourth holiday weekend. RP 46. Trooper Witney did not recall seeing any Grant County sheriff deputies. RP 48. Although the troopers on scene could have radioed for additional law enforcement assistance on the road

closure, the other agencies have a standing request that their officers be cleared as soon as Department of Transportation personnel arrive. RP 48.

Trooper Stratton was in charge of the scene. RP 46. A State Patrol collision reconstructionist arrived. *Id.* Once the medical responders took control of Ms. Sedano, Trooper Witney was assigned the tasks of securing the scene: marking and measuring the placement of the evidence, and measuring the roadway itself to determine the pattern of impact. RP 45. Trooper Christopher Kottong arrived about forty-five minutes after the collision. RP 8. Trooper Kottong has specialized training in impaired driving and had been called to the scene to investigate that aspect of the collision. RP 10.

Ms. Sedano was still at the scene when Trooper Kottong arrived. RP 9. Trooper Witney told him he had smelled the odor of alcohol on Ms. Sedano's breath and that Ms. Sedano had admitted drinking tequila. *Id.* Trooper Kottong was told she was believed to be at fault for crossing the center line. RP 9. By the time Trooper Kottong had been given the initial information necessary to his impaired-driving investigation, medical responders had transported Ms. Sedano from the scene to Othello Community Hospital, approximately ten miles to the east. RP 9 – 10. Trooper Kottong left for the hospital, a fifteen-to-twenty minute drive from the collision scene. RP 10. The nature of the collision—serious

injuries, a presumed vehicular assault with damage and obstruction in the roadway—precluded any of the other three troopers from accompanying him. RP 16. Trooper Witney testified he would have been too tied up with the “nonstop investigation, evidence marking and measurements” to have assisted in obtaining a warrant. RP 49. Other than Trooper Kottong, all other on-duty troopers were at the scene. *Id.* They did not clear the scene until around 2:30 a.m. *Id.*

En route, Trooper Kottong spoke by cellphone with his Detective Sergeant, discussing the logistics of getting a blood draw warrant in light of information that a MedStar helicopter was standing by to transport Ms. Sedano away from Othello. RP 23. A key issue was whether they had the personnel resources to even draft the warrant and apply for it. *Id.* Trooper Kottong had been all over Grant County that night, working an overtime shift with the traffic safety administration and traffic safety task force for impaired driving emphasis. RP 6. The Detective Sergeant was off-duty and available only for telephonic assistance. RP 61.

Hospital personnel require a physical copy of any warrant authorizing a blood draw. RP 34. A trooper’s statement that a warrant had been obtained is insufficient. *Id.* Trooper Kottong had a computer in his patrol vehicle on which to draft the warrant documents, but once drafted those documents needed to be transferred to a “thumb drive” so that paper

copies could be made. RP 27. Had there been time, Trooper Kottong would have printed the documents at the Othello Police Department a few blocks from the hospital. RP 33. However he or another officer would have to witness Ms. Sedano's blood being drawn. RP 33. As the officer investigating Ms. Sedano's impairment, Trooper Kottong knew he needed to make contact with her before she was transported out of the area. RP 34. He also had to go to the Othello hospital to determine her condition and how much time he had. *Id.* Had he gone first to the Othello Police Department, another law enforcement officer would have to go to the hospital to get the necessary information. *Id.* The State Patrol did not have a trooper available. *Id.* Trooper Kottong would have had to call for outside agency assistance, and because a supervising officer's approval must be obtained for a police officer assist, such requests take time. *Id.*

Trooper Kottong arrived at Othello Community Hospital at 11:55 p.m. RP 25. Medical personnel told him he had a "very narrow" window in which to interview Ms. Sedano and obtain a sample of her blood. RP 27 – 28. He was given to understand that the window was so narrow he would not have time to obtain a warrant regardless of whether he or another officer had immediately started the application process. RP 28.

Trooper Kottong had to wait about 25 minutes to interview Ms. Sedano (RP 10) who was intermittently incoherent and suffering

“convulsions where she was shaking dramatically” (RP 31). He detected the odor of alcohol on her breath. RP 11. She was not certain where she was. RP 22. She could not maintain a conversation. RP 30. None of the staff gave the trooper an explanation for her seizures and nobody could tell him whether Ms. Sedano would be all right. RP 31. All he was told was that a nurse was overseeing Ms. Sedano and that the hospital staff was “working on it.” *Id.*

A MedStar air-ambulance helicopter was already at the hospital, waiting. RP 38. Medical staff was awaiting test results to make the final determination whether to transport Ms. Sedano, and if so, to which hospital. RP 38. Because the situation was so uncertain, Trooper Kottong was unable to determine whether she would remain in Othello for further testing or would be “going straight on the helicopter.” *Id.* He understood that “at a moment’s notice” they could decide to send her out. *Id.*

There was no assurance Ms. Sedano would be available for a blood draw at whichever hospital she ended up. RP 35 – 36. Staff at Othello Community Hospital told the trooper once she was taken in by the receiving hospital for treatment, it would be hours “with the scans and such,” and that if she were to go immediately into surgery upon arrival or require a blood transfusion, the ability to draw her blood for the criminal investigation would have been lost. RP 36.

At approximately 00:23 a.m., Trooper Kottong informed medical personnel he intended to draw Ms. Sedano's blood. RP 29. As it turned out, the blood was drawn about 40 minutes later, at 1:03 a.m. RP 28. Trooper Kottong had spent that interval trying to get the sample. RP 29. Ms. Sedano's veins were collapsing and the nurse who initially tried to draw her blood was unable to do so. *Id.* Eventually, a phlebotomist was located to assist. RP 37. It took both the nurse and the phlebotomist to obtain the sample. *Id.* Trooper Kottong left the hospital after he obtained the blood sample and did not know at what time Ms. Sedano was eventually flown out. RP 36.

On September 18, 2013 Ms. Sedano was charged in Grant County Superior Court with a single count of Vehicular Assault-Under the Influence, RCW 46.61.522(1)(b). CP 1 – 2. Ms. Sedano moved to suppress the results of the blood test, arguing the absence of exigent circumstances made the warrantless seizure of her blood illegal.² CP 6 – 8, RP 58 – 60. Following testimony from Troopers Witney and Kottong at the May 7, 2014 suppression hearing, the court deferred argument to allow counsel “an opportunity to specifically brief the exigent circumstances exception in light of this evidence.” RP 54. Ms. Sedano filed a supplemental memorandum (CP 29 – 33) and the court heard argument

² Ms. Sedano also moved to suppress the blood test results on other grounds not relevant to the issues on appeal. CP 9 – 14.

June 2, 2014 (RP 58). The court denied Ms. Sedano's motion to suppress the blood test results, stating the court

is specifically not called upon to try to imagine some way in which the officer could have finessed this situation in order to bring in other people or go other places or do other things to, to get a warrant because if that were the standard there would be no such thing as an exigent circumstances exception.

RP 66. The court found significant the trooper's obligation to know "the latest breaking news" on a suspect's condition when considering whether to proceed with trying to get a warrant. RP 68. The court found it "compelling" that in the process of gathering that information about Ms. Sedano, Trooper Kottong learned that at any moment she would be transported beyond his ability to obtain the blood sample. RP 68 – 69. This fact "formed an exigency sufficient to excuse the warrantless blood draw." CP 79 (Conclusion of Law 3.4).

A jury found Ms. Sedano guilty of Vehicular Assault-Under the Influence. CP 105. On January 5, 2015 the court sentenced Ms. Sedano to a six month mid-standard-range sentence. CP 105 – 123. Ms. Sedano now appeals. CP 124.

III. ARGUMENT

The trial court properly concluded exigent circumstances justified the warrantless seizure of Ms. Sedano's blood.

Ms. Sedano has not challenged the trial court's findings of fact.

“Unchallenged findings are accepted as verities on appeal.” *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009). This Court reviews de novo whether facts of Ms. Sedano’s collision—her precarious physical condition, her subsequent emergency care in Othello and her imminent MedStar evacuation to another hospital support the trial court’s conclusion that exigent circumstances justified the warrantless seizure of her blood. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

The nonconsensual drawing of blood is a search and seizure under both the Fourth Amendment and Const. art. 1, § 7. *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991). Article 1, section 7 of the Washington State Constitution is explicitly broader than the Fourth Amendment to the United States Constitution, expansively protecting private affairs and requiring legal authorization for those affairs to be disturbed. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). Legal authorization generally requires a warrant, absent one of the few “jealously guarded exceptions” to that requirement. *In re Pers. Restraint of Nichols*, 171 Wn.2d 370, 379, 256 P.3d 1131 (2011). “Exigent circumstances” is one such exception and applies where “obtaining a warrant is not practical because the delay inherent in securing a warrant would . . . permit the destruction of evidence.” *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009).

In 2013, the United States Supreme Court established that, absent exigent circumstances, a nonconsensual blood draw is a compelled physical intrusion beneath a person's skin that must be authorized by a search warrant. *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 – 59, 185 L. Ed. 2d696 (2013). Exigency is determined case-by-case, based on the totality of the circumstances. *Id.* at 1559. Although natural metabolism of alcohol in the blood stream is not a *per se* exigency, the body's natural ability to absorb alcohol and the consequent loss of evidence are appropriate factors to consider when determining whether exigent circumstances justify warrantless seizure of a person's blood. *Id.* at 1561. The "biological certainty" that alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.25 percent per hour means "[e]vidence is literally disappearing by the minute." *Id.* at 1570 – 71 (Roberts, J., concurring in part and dissenting in part). Delay inherent in the warrant application process is also a factor:

Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late night arrest.

McNeely, 133 S. Ct. at 1562 (internal citations omitted). Additionally, the longer the interval between the time of the offense and the time when a

suspect's blood sample is taken, the more questions may be raised about the accuracy of an extrapolated blood-alcohol calculation. *Id.* at 1563.

“For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. *Id.*

McNeely involved a routine driving-while-intoxicated arrest. *McNeely*, 133 S. Ct. at 1557. This case involves a violent motor vehicle collision resulting in serious injury to both Ms. Sedano and the driver of the other vehicle. It occurred in a remote area of Grant County at 10:45 p.m. on the Friday night of a Fourth of July holiday weekend while law enforcement was stretched thin throughout the county. Damage to the vehicles and roadway required three of the four investigating state troopers to remain at the scene, processing evidence and supervising closure of the highway. Undeniably present here were the factors of metabolic dissipation of the alcohol in Ms. Sedano's blood stream and logistical barriers to obtaining a warrant without adequate law enforcement personnel. But these factors were only two among the myriad of considerations facing Trooper Kottong that night as he tried to maintain the integrity of his investigation into Ms. Sedano's suspected impairment.

Trooper Kottong had to interview Ms. Sedano and talk with hospital staff to assess her condition before applying for a warrant. The

trial court correctly observed that in the course of obtaining this necessary information, the trooper learned of Ms. Sedano's imminent transport. It is irrelevant that she was kept at Othello Community Hospital somewhat longer than originally estimated. A reviewing court looks at the facts and circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *McNeely*, 133 S. Ct. at 1564 n. 7 (quoting *Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 992, 181 L. Ed. 2d 966 (2012) (*per curiam*)). "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Ryburn v. Huff*, 132 S.Ct. at 992 (internal quotation omitted).

At the hospital, Ms. Sedano appeared to be in extreme physical distress, was intermittently incoherent and disoriented, and suffered convulsions. Hospital staff was continuously monitoring the severity of her condition and had not made a final transport determination. Trooper Kottong had been told upon arrival his window was "very narrow." Although he decided to obtain a warrantless blood sample before a final transport decision was made, it would have been unreasonable for him to have left the hospital for even half an hour knowing Ms. Sedano might very well be gone when he returned.

Neither could the trooper rely on having a blood sample drawn at whichever hospital Ms. Sedano ended up. He was told obtaining the sample would be delayed for hours “with the scans and such” and that if she were to go immediately into surgery or require a blood transfusion, ability to draw her blood for the criminal investigation would be lost.

In “the 20/20 vision of hindsight,” Trooper Kottong may have had sufficient time to obtain a warrant. From his perspective at the hospital, however, amidst on-going medical uncertainty, a helicopter waiting in the parking lot, and law enforcement resources tied up elsewhere, his decision to obtain blood without a warrant was reasonable and prudent.

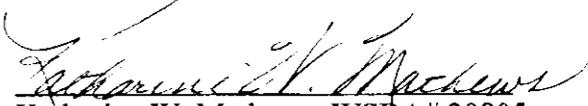
IV. CONCLUSION

This Court should affirm the trial court’s conclusion that exigent circumstances justified the warrantless draw of Ms. Sedano’s blood. Her conviction and sentence should be affirmed.

DATED this 11th day of September, 2015.

Respectfully submitted,

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Attorneys for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

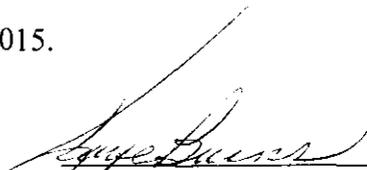
STATE OF WASHINGTON,)
)
 Respondent,) No. 33088-5-III
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 vs.)
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GISELA M. SEDANO,) DECLARATION OF SERVICE
)
 Appellant.)
_____)

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
parties' agreement:

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Dated: September 11, 2015.



Kaye Burns