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COA NO. 36320-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

EVAN D. SCHRODER,

Appellant.

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

The Honorable Gary Libey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE WARRANTLESS ARREST VIOLATED SCHRODER'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE AND REVERSAL OF THE CONVICTION.

The State argues the lawfulness of the initial DWLS arrest is not an issue preserved for appeal because defense counsel only challenged the subsequent DUI arrest. Brief of Respondent (BOR) at 2. Contrary to the State's argument, the issue is properly before the court on appeal. Both the State and the trial court recognized below that defense counsel's suppression challenge triggered consideration of whether there was probable cause for the arrest based on DWLS.

The State thus argued "[t]he Court should deny the Defendant's motion *because Deputy Cox had both probable cause to arrest the Defendant for driving on a suspended license in the third degree* (DWLS 3) and reasonable grounds to believe that the Defendant had been driving while under the influence of intoxicating liquor." CP 71 (emphasis added). It cited the implied consent statute, emphasizing the arrest could be made for "*any offense,*" such that the arrest "does not have to be for DUI or even alcohol related." CP 71 (quoting RCW 46.20.308).

The State cited State v. Avery, 103 Wn. App. 527, 536, 13 P.3d 226 (2000) in support. CP 71. Avery addressed the implied consent

statute's application to non-alcohol related offenses. Avery, 103 Wn. App. at 535-36. Avery concluded the arrest triggering the statute may be for "any offense," including a non-alcohol related offense, so long as the arrest is valid. Id. at 536-37 (citing Williams v. Dep't of Licensing, 46 Wn. App. 453, 455, 731 P.2d 531 (1986) (citing Fritts v. Dep't of Motor Vehicles, 6 Wn. App. 233, 237, 492 P.2d 558 (1971)). The State also quoted O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991), which made it clear that "[t]he requirement of reasonable grounds is separate from the requirement of probable cause to arrest." CP 71.

At the CrR 3.6 hearing, the State elicited from Deputy Cox that he arrested Schroder for DWLS and DUI. RP 11. On cross-examination, Cox clarified that Schroder was first placed under arrest for DWLS and that Cox smelled alcohol on Schroder only after that arrest. RP 12.

After taking evidence at the CrR 3.6 hearing, the State argued "It's been brought up that the original arrest here was for driving suspended, and the statute that allows officers to administer BACS -- it can be done for any arrest." RP 19. It again quoted the implied consent statute, concluding "So the arrest originally was for driving suspended and then -- after they started searching him, the other observations came to light, here." RP 19.

The State has the burden of proving probable cause supported a warrantless arrest. State v. Mance, 82 Wn. App. 539, 544-45, 918 P.2d 527 (1996). The State, however, either did not appreciate the legal ramifications of its own argument or simply did not bother to present the evidence needed to show the DWLS arrest was supported by probable cause and thus valid.

The trial court understood the CrR 3.6 hearing was to determine whether probable cause existed for Schroder's arrest. RP 18. The court read the briefing and the cases cited therein. RP 18. The court acknowledged Schroder was initially arrested for driving with a suspended license. RP 21. The court explained, "They found out he was suspended and then -- after further -- officers smelled alcohol and -- speech was slurred, his eyes were watery, so -- I mean, there was to me an abundance of probable cause in this case." RP 22. The court continued: "to me it's pretty clear-cut that there was probable cause to arrest him for -- at first for driving while license suspended and that evolved into a DUI upon -- further investigation by Dep. Cox." RP 23.

The court included the DWLS arrest as part of its analysis in determining whether the BAC result was admissible. The court concluded there was probable cause to arrest Schroder for DWLS. As argued on appeal, the State did not establish probable cause supported the DWLS

arrest and the court's conclusion is infirm. The issue is not being addressed for the first time on appeal. The issue was addressed in the trial court. There is therefore no need for Schroder to justify review under RAP 2.5(a)(3). Although defense counsel's argument focused on whether probable cause supported the subsequent DUI arrest, the State raised the issue of whether probable cause existed for DWLS as part of the implied consent analysis and the court ruled on it.

"While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992). That is precisely what happened here. The State identified the issue below and the court was given an opportunity, and in fact did, rule on it. The rule requiring presentation of an error at the trial level "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984). The trial court was given this opportunity. For this reason, Schroder need not meet the manifest constitutional error exception under RAP 2.5(a)(3) for this Court to review the error.

The State relies on State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) to argue the issue is not properly before the court. BOR at 3-4. Its reliance is misplaced. In that case, trial counsel challenged the State's efforts to obtain physical evidence on grounds that it violated McFarland's right against self-incrimination and that there was insufficient probable cause to believe it was material evidence. State v. McFarland, 73 Wn. App. 57, 62, 867 P.2d 660 (1994), aff'd, 127 Wn.2d 322, 899 P.2d 1251 (1995); McFarland, 127 Wn.2d at 329.[1] Counsel did not challenge the warrantless arrest or move to suppress any evidence based on an illegal arrest. McFarland, 127 Wn.2d at 329. McFarland challenged the warrantless arrest for the first time on appeal. Id. at 332. The alleged constitutional error was not manifest under RAP 2.5(a)(3) because the facts necessary to adjudicate the claimed error were not in the record. Id. at 333-34.

McFarland is distinguishable. In that case, the legality of the warrantless arrest was not raised as an issue in the trial court in any way, shape or form. But here, defense counsel directly challenged the lawfulness of the warrantless DUI arrest, and in connection with that challenge, the State and the court both recognized counsel's challenge

[1] Schroder cites to the Court of Appeals decision as well as the Supreme Court decision to clarify exactly what defense counsel moved to suppress and why.

required inquiry into whether the DWLS arrest was supported by probable cause. The State cited the controlling case law and argued probable cause supported the DWLS arrest. CP 71. The trial court concluded, erroneously, that probable cause supported the DWLS arrest. RP 23. Unlike in McFarland, the issue regarding the lawfulness of the DWLS arrest is not being addressed for the first time on appeal. Whether that arrest was based on probable cause was a necessary part of the legal analysis on whether the implied consent statute justified admission of the BAC result.

Established precedent shows a lawful arrest is an indispensable element triggering the motorist's implied consent to a breath or blood test. Avery, 103 Wn. App. at 534; O'Neill, 62 Wn. App. at 116; State v. Wetherell, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973). Here, the arrest for DWLS was unlawful because the State did not establish probable cause for it, having failed to establish the reliability of the database used by police as the basis for arrest. "[T]he burden is on the State to establish the reliability of the [information] when the validity of a warrantless search or seizure is at issue." State v. Sandholm, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999).

While the State seeks to hold defense counsel's lack of argument on the issue against Schroder on appeal, "[c]ourts should not be confined

by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970). Thus, "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." Optimer Int'l, Inc. v. RP Bellevue, LLC, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (quoting State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008)), aff'd, 170 Wn.2d 768, 246 P.3d 785 (2011). This Court has "an obligation to see that the law is correctly applied." Id.

The bottom line is that the State did not meet its burden of proving the lawfulness of the DWLS arrest, which must be considered in determining whether BAC result was admissible under the implied consent statute. The State's failure to meet its burden of proof on this issue requires suppression of all tainted evidence and reversal of the conviction.

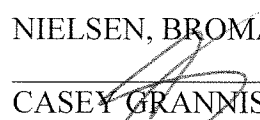
B. CONCLUSION

For the reasons stated above and in the opening brief, Schroder requests reversal of the conviction.

DATED this 28th day of May 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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