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No. 90926-1

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

Filed
Washington State Supreme Court

APR 01 2015

Ronald R. Carpenter
Clerk

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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 ORIGINAL

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting interference in private affairs without authority of law. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

ISSUES TO BE ADDRESSED BY *AMICUS*

- 1) Whether a blood test is a disturbance of private affairs separate from the blood draw used to gather the sample tested.
- 2) Whether the State is entitled to, without limits, search, test, and otherwise analyze items, including blood samples, lawfully in its possession.

STATEMENT OF THE CASE

The parties have presented the case thoroughly. The only facts relevant to this brief are that officers lawfully obtained a blood sample from Martines pursuant to a warrant, and subsequently tested that sample for the presence of alcohol and other drugs. The Court of Appeals held that the test results must be suppressed because the warrant did not specify that the blood could be tested after it was drawn. *See State v. Martines*,

182 Wn. App. 519, 331 P.3d 105 (2014). This case therefore asks the Court to determine the appropriate limits on what the State may do with a lawfully obtained blood sample.

ARGUMENT

Amicus takes no position on most of the issues raised and debated by the parties, including whether the blood test was authorized by the warrant, whether the affidavit was incorporated into the warrant, and whether probable cause existed to test for drugs other than alcohol. Instead, this brief addresses only two of the arguments made by the parties. First, *amicus* agrees with Martines and the Court of Appeals that “testing of Mr. Martines’ blood for physiological data was a search, additional to and separate from the physical intrusion of the blood draw itself.” Supplemental Brief of Respondent at 4. And *amicus* strenuously disagrees with the State’s claim that “Martines no longer had a constitutionally protectable privacy interest in his blood” once the blood sample had been removed from his body. Brief of Respondent at 12. Each of those propositions is discussed in more detail below.

A. Drawing Blood and Testing Blood Are Distinct Invasions of Privacy That Each Require Authority of Law Under Article 1, Section 7

It has been recognized for decades that multiple different invasions of privacy occur in the process of determining a person's blood alcohol level:

The initial detention necessary to procure the evidence may be a seizure of the person, if the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search, if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable. We have long recognized that a "compelled intrusio[n] 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 a *further* invasion of the tested employee's privacy interests.

Skinner v. Railway Labor Exec's. Ass'n, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (citations omitted) (emphasis added); *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000) ("The invasion in fact is twofold: first, 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.") (discussing analogous tests of urine).

Despite this recognition of multiple privacy invasions, the courts have rarely considered them separately, but have instead treated them as a bundle. *See, e.g., Skinner*, 489 U.S. at 618-33 (holding that, under the Fourth Amendment, “special needs” allow warrantless blood draws and tests of railroad employees for alcohol and drugs after accidents); *State v. Kalakosky*, 121 Wn.2d 525, 532-36, 852 P.2d 1064 (1993) (holding that an ordinary search warrant is sufficient for blood draws and tests). This may well be because the same underlying facts will typically justify both a blood draw and a blood test. For example, the same special need of “ensuring the safety of the traveling public and of the employees themselves” is sufficient under the Fourth Amendment to justify both drawing and testing blood of railroad employees for the presence of alcohol and drugs after accidents. *Skinner*, 489 U.S. at 621.

Similarly, one set of facts is likely to create probable cause for a warrant authorizing both a blood draw and test. Even in the present case, Martines does not argue that a warrant could not have been issued authorizing a blood test, based on the same probable cause used to justify the blood draw. Nor does he claim that the magistrate did not intend to authorize a blood test. He only claims that the warrant actually issued did not meet the particularity requirement by explicitly stating that the blood

collected could be tested for alcohol and/or drugs. Supplemental Brief of Respondent at 10-13.

In fact, there is only one situation in which it is likely necessary to analyze the authorization for a blood draw and the authorization for a subsequent blood test separately: instances where the blood draw is justified by an exigency. Although the natural metabolism of alcohol and drugs in the bloodstream does not create a *per se* exigency, *see Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), there will nonetheless be some occasions where that metabolism justifies the *collection* of a blood sample before a warrant may be obtained. It is difficult, however, to imagine a scenario where that blood sample must be immediately *tested*. Instead, it is both practical and constitutionally required to obtain a warrant before the test, which typically is not performed until days or weeks after the sample is collected.

The State claims that requiring specific authorization for a blood test has been rejected by a variety of courts, Supplemental Brief of Petitioner at 9-11, with the “leading case” being *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988) (allowing a blood alcohol test without further authorization when blood was drawn pursuant to exigent circumstances). As the Court of Appeals noted, reliance upon *Snyder* is questionable in

light of later decisions; “*Skinner* had not yet been decided and the *Snyder* court did not have a precedent indicating that chemical analysis of blood is an independent invasion of privacy.” *Martines*, 182 Wn. App. at 529-30.

More importantly, however, all of the cases cited by the State as rejecting specific authorization were decided under the Fourth Amendment. This is thus a case of first impression under Article 1, Section 7. Even if one believes *Snyder* remains good law under the Fourth Amendment, there are compelling reasons to reach a different conclusion under Article 1, Section 7.

First and foremost, the logic underlying *Snyder* simply doesn’t apply to Article 1, Section 7. The Ninth Circuit found *Snyder*’s situation indistinguishable from that decided by the United States Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (allowing a blood draw due to exigency). *Schmerber* did not separately discuss the subsequent blood test, but affirmed the admission of the results. The Ninth Circuit thus felt bound by *Schmerber*; “if *Snyder*’s argument were correct, the results of the blood test in *Schmerber* would have been excluded because no exigent circumstances remained by the time the test was actually conducted.” *Snyder*, 852 F.2d at 473. All of the constitutional analysis, therefore, is to be found not in *Snyder*, but in *Schmerber*.

That analysis revolves almost entirely around the “relevant Fourth Amendment standards of reasonableness.” *Schmerber*, 384 U.S. 768. It considers whether the officer “might *reasonably* have believed that he was confronted with an emergency,” *id.* at 770, whether the test “was a *reasonable* one,” *id.* at 771, and whether “test was performed in a *reasonable* manner,” *id.*, and concludes that there was no violation of the Fourth Amendment right “to be free of *unreasonable* searches and seizures,” *id.* at 772 (emphases added).

As such, the analysis has little relevance to Article 1, Section 7. “As [this Court has] so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual’s private affairs without authority of law.” *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). It might be “reasonable” to treat a blood test as intertwined with the preceding blood draw, but it is a separate disturbance of private affairs, and must be independently supported by authority of law (e.g., a warrant). This is especially true because the nature of the two disturbances are quite different; the blood draw is a physical intrusion into a person’s body, whereas the blood test implicates informational privacy, by revealing details about a person that cannot otherwise be observed.

In addition, this Court has interpreted exceptions to the warrant requirement—including exigency—more narrowly under Article 1, Section 7 than the Fourth Amendment. Most instructive in this regard is *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984). In *Chrisman*, an officer arrested a college student for underage possession of alcohol. The student said his ID was in his dorm room, so the officer accompanied the student upstairs to his room. The officer initially stayed in the hallway, but entered the room when he saw what he believed to be drug paraphernalia. This Court held the entry into the room violated the Fourth Amendment, since there was no exigency requiring entry. *State v. Chrisman*, 94 Wn.2d 711, 619 P.2d 971 (1980). The United States Supreme Court reversed, in essence holding that there is a *per se* exigency of possible danger or escape inherent in all arrests, authorizing the arresting officer “to remain literally at [the arrestee’s] elbow at all times.” *Washington v. Chrisman*, 455 U.S. 1, 6, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982). This Court then revisited the case under Article 1, Section 7, and again found there was no actual danger, risk to evidence, or likelihood of escape; accordingly, “entry into the room was not justified.” *State v. Chrisman*, 100 Wn.2d at 821. And this Court also stated that “the officer was justified in accompanying [the student] upstairs. . . . The possibility of escape loomed large.” *Id.*

The conclusion from *Chrisman* is clear; a warrantless disturbance of private affairs is only allowed under Article 1, Section 7 to the extent necessitated by the exception to the warrant requirement that justifies it. Just as the officer was justified to accompany to accompany the student upstairs to prevent escape but not allowed to enter his room without a warrant, the exigency of destruction of evidence might allow officers to draw blood—but not test it without a warrant.

Justice Marshall perhaps best summarized this:

Although the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow “exigent circumstances” exception, no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain. Blood and urine do not spoil if properly collected and preserved, and there is no reason to doubt the ability of railroad officials to grasp the relatively simple procedure of obtaining a warrant authorizing, where appropriate, chemical analysis of the extracted fluids. It is therefore wholly unjustified to dispense with the warrant requirement for this final search.

Skinner, 489 U.S. 642-43 (Marshall, J., dissenting) (citation omitted).¹ Just as a warrant requirement would be practical for railroad officials

¹ The State claims that the *Skinner* majority “rejected this model” and considered the blood draw and test to be a single event. Supplemental Brief of Petitioner at 18-19. Not surprisingly, there is no citation to the rejection, because no such rejection exists. Instead, the point of disagreement between the majority and the dissent was whether the “special needs” exception to the Fourth Amendment applied. Since the majority held that special needs justified the program, it had no reason to distinguish between the blood draw and blood test; the same special needs justified both of them. We

investigating accidents, such a requirement equally poses no significant burden for law enforcement officials investigating intoxicated driving. In situations where they are already obtaining warrants to draw blood, it is easy to rewrite the standard warrant form to specifically authorize a blood test for intoxicants as well as a blood draw. And in situations where blood is drawn pursuant to an exigency, officers are easily capable of obtaining a warrant for the test for intoxicants at their leisure, supported by the same probable cause that was necessary to allow the blood draw pursuant to exigency.

B. People Retain Privacy Interests in Their Blood Even After a Sample Has Been Lawfully Seized

At the Court of Appeals, the State claimed that once the blood sample was lawfully taken from Martines, he “no longer had a constitutionally protectable privacy interest in his blood.” Brief of Respondent at 12; *see also* Petition for Review at 11. The breadth of this assertion is simply astonishing. If it were true, that would mean the State could do whatever it wished with Martines’ blood. In addition to the basic toxicology tests at issue here, it would justify more comprehensive analysis, including extracting DNA and sequencing Martines’ complete genome. It is hard to imagine a larger intrusion into Martines’ private

simply do not know how the majority would have decided the case without the special needs exception.

affairs than that—the genome reveals not only information about a variety of medical conditions, but also personality traits, familial relationships, racial and ethnic background, and maybe even political ideology, *see, e.g.*, Peter K. Hatami et. al., *A Genome-Wide Analysis of Liberal and Conservative Political Attitudes*, 73 *The Journal of Politics* 271 (2011). Surely such a massive intrusion requires more authority of law than probable cause to believe that Martines was driving while intoxicated.

The only support the State finds for its position is an overbroad reading of two decisions by this Court, *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006). Both of these cases are far narrower than the State contends. In the first, a suspect was arrested and booked in connection with one investigation, and his shoes were inventoried and stored in the jail's property room. An officer later looked at those shoes in conjunction with another investigation. This Court held that there was no violation of Article 1, Section 7 because the officer only saw what had already been "exposed to police view" during the booking process. *Cheatam*, 150 Wn.2d at 643. In the second case, police compared a DNA profile lawfully obtained from the defendant's blood in the investigation of one crime against evidence obtained from the scene of a different crime. Again, this Court found no violation of Article 1, Section 7 because the

“DNA profile had already been lawfully exposed to the police.” *Gregory*, 158 Wn.2d at 828.

Neither of these cases stands for the proposition that *any* privacy interest in an item is extinguished when police lawfully seize that item—let alone *all* privacy interests. It is not the fact of possession that extinguishes privacy; it is only the exposure to view which *may* occur in conjunction with the seizure that causes privacy to be lost, and only in what is viewed. In fact, a better reading of the cases leads to the far narrower, and straightforward, proposition that officers are not constitutionally required to forget what they lawfully learn in one investigation when conducting a second investigation. But none of that is relevant to the present case; prior to the blood test, officers did not have any information about the blood’s contents, nor had those contents been exposed to view. All that had been exposed was the external appearance of the blood, and Martines would presumably raise no objection to testimony that his blood was red and liquid.

It is instructive to look at recent cases this Court and the United States Supreme Court have decided regarding cell phones. *See State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014); *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In both cases, officers lawfully seized cell phones from arrestees, and then searched or used the

phones without a warrant, discovering evidence of criminal activity.

Under the view of *Cheatam* argued by the State here, there would be no constitutional problem with this, since all privacy would have been lost when the phones were lawfully seized. Yet not a single justice on either Court adopted that position.

The United States Supreme Court unanimously held that the rule under the Fourth Amendment to search that lawfully seized phone “is accordingly simple—get a warrant.” *Riley*, 134 S. Ct. at 2495. This Court was divided, but only on the question of standing; even the dissenting justices did not argue that there was no privacy interest at issue. The majority found that Article 1, Section 7 was violated by use of the phone, and the concurrence concisely stated that Article 1, Section 7 permits the search of a lawfully seized phone “only with a warrant, a valid exception to the warrant requirement, or the phone owner's express consent.” *Hinton*, 179 Wn.2d at 881 (C. Johnson, J., concurring).

There is no doubt, then, that privacy in a cell phone is not lost when that phone is lawfully seized. The same reasoning should apply to blood and other biological samples. With today’s modern technology, the quantity of information that can be derived from a biological sample and its associated DNA is immense. Moreover, as discussed above, much of that information is highly sensitive, implicating medical, behavioral, and

other personal characteristics. Article 1, Section 7 continues to protect this private information even when the source sample has been lawfully seized.

Perhaps the State has come to accept this. Its most recent briefing here barely mentions *Cheatam*, and no longer relies on the loss of privacy in an item in police custody; the State instead argues more narrowly that a warrant inherently authorizes testing of evidence once it has been seized. Supplemental Brief of Petitioner at 12-14. Similarly, *amicus* Washington Association of Prosecuting Attorneys (WAPA) recognizes that privacy interests remain, and “will limit the testing performed pursuant to the warrant to procedures that will identify evidence of the crime under investigation.” Brief of *Amicus Curiae* WAPA at 6.

The foregoing discussion demonstrates that all privacy is not lost simply because an item is lawfully seized. *Amicus* fears, however, that some language in *Cheatam* and *Gregory* will again be misinterpreted without further guidance from this Court. We therefore respectfully suggest that this Court clarify those holdings, recognizing their limited nature. We hope this will avoid future confusion among law enforcement and the lower courts, and ensure that privacy is fully protected even with respect to seized items.

In summary, although Martines' blood was lawfully seized by the State, he retained a significant privacy interest in the contents of his blood. Article 1, Section 7 protects that privacy interest and does not allow the State to disturb it without authority of law.²

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to hold that a blood test is a disturbance of private affairs that must be authorized by law (e.g., a warrant), regardless of whether the blood sample was itself collected pursuant to authority of law.

Respectfully submitted this 23rd day of March 2015.

By



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² *Amicus* takes no position on whether the warrant issued in this case supplied the necessary authority of law.

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I hereby certify that on March 23, 2015, I caused to be served the foregoing *Motion for Leave to File Amicus Brief* and *Amicus Curiae Brief of American Civil Liberties Union of Washington* to the parties below, in the manner noted:

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Dear Clerk,

Please accept for filing in State v. Martines (No. 90926-1) the attached documents:

1. *Motion for Leave to File Amicus Curiae Brief*
2. *Brief of Amicus Curiae American Civil Liberties Union of Washington*
3. *Certificate of Service*

Thank you.

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