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Supreme Court No. 90926-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE MARTINES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Mariane C. Spearman

RESPONDENT MARTINES' SUPPLEMENTAL BRIEF

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 ORIGINAL

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A. IDENTITY OF RESPONDENT

Jose Martines is the Respondent in this Court, and was the prevailing party in the Court of Appeals in No. 69663-7-I.

B. COURT OF APPEALS DECISION

This Court granted the State's Petition for Review of the Court of Appeals decision reversing Mr. Martines' DUI conviction.

C. ISSUES ON REVIEW

1. Mr. Martines' blood was drawn pursuant to a search warrant obtained by a state trooper after a vehicle crash. As judicially issued, the warrant specified the drawing of blood, but said nothing whatsoever about testing of the blood. COA Decision, at pp. 2, 12. Was the testing of Mr. Martines' blood for alcohol and drugs a "search," including of Mr. Martines' private affairs, requiring a warrant? Was the search warrantless?

2. Did the search warrant fail to particularly describe the thing to be searched for, where it could easily have specified testing of the blood, under the circumstances of the case?

3. Can the defective warrant be cured by reference to the affidavit, where the affidavit was not adequately incorporated into the warrant, and where it was not attached to the warrant and did not accompany it during execution of the search?

4. Was there probable cause for testing of Mr. Martines' blood for drugs, where the affidavit neither made out, nor purported to make out, any facts and circumstances showing that Mr. Martines was under the influence of a drug, as opposed to alcohol?

D. FACTS

A search warrant was issued to draw Mr. Martines' blood after the car he was driving was involved in an accident. CP 100-01 (search warrant, attached as Appendix A). At the scene, a state trooper had made observations suggesting Mr. Martines was inebriated by alcohol. CP 95-99 (application and affidavit for search warrant, attached as Appendix B). Subsequently, the drawn blood was tested by the Washington State Patrol Crime Laboratory, and this testing was conducted not just for alcohol, but also for drugs, locating markers of alcohol and valium. 11/8/12RP at 43-58.

At his jury trial, Mr. Martines was found guilty of felony DUI based on the prosecutor's argument that the defendant was driving under the combined alcohol/drug effects alternative of DUI, RCW 46.61.502(1). CP 45 ('to-convict' instruction); 11/8/12RP at 157 (State's closing argument). The trial court had denied Mr. Martines' CrR 3.6 motion to suppress the drug results, in which he argued

that the search warrant lacked any probable cause showing that Mr. Martines was under the influence of a drug. 11/5/12RP at 1-61.

The Court of Appeals acknowledged the probable cause issue, but reversed based on Mr. Martines' argument that the search warrant failed to authorize any testing of the drawn blood at all. The Court rejected the State's sole argument -- that testing of drawn blood for physiological data is not a "search" violating any reasonable expectation of privacy, and is not an intrusion into any private affair. Decision, at pp. 1-14. The State then sought reconsideration and petitioned for review to this Court, offering a new argument: that the warrant should be viewed as granting authority for blood testing, because the trooper's *application* for the warrant was plainly drafted in anticipation of testing. PFR, at p. 1.

E. ARGUMENT

1. **The laboratory testing of Mr. Martines' drawn blood to locate physiological data hidden within it was a warrantless "search."**

Article 1, section 7 of our state constitution provides that searches conducted by law enforcement require authority of law, by virtue of its language stating "[n]o person shall be disturbed in his private affairs . . . without authority of law." Const. art. 1, § 7. The United States Constitution protects the people from unreasonable

searches and seizures, and provides that no warrants may issue except when they are based on a showing of probable cause, and “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. Const. amend. 4.

The testing of Mr. Martines' blood for physiological data was a search, additional to and separate from the physical intrusion of the blood draw itself. Under state law, a search occurs when the State has intruded into a person's "private affairs." State v. Young, 123 Wn.2d 173, 181, 183, 867 P.2d 593 (1994). This inquiry includes, but is broader than, the Fourth Amendment's reasonable expectation of privacy test that defines whether a search has occurred under federal analysis. State v. Goucher, 124 Wn.2d 778, 782, 881 P.2d 210 (1994); see Katz v. United States, 389 U.S. 347, 351–52, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In general, Article I, section 7 and the concept of an illegal search is not grounded in notions of reasonableness or balancing, as is the Fourth Amendment. State v. Snapp, 174 Wn.2d 177, 194, 275 P.3d 289 (2012).¹

¹ When a defendant challenges a search under both the state and federal constitutions this Court examines the permissibility of the search under the Washington Constitution first, and if the search is invalid thereunder, the inquiry necessarily ends. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

In this case, the Court of Appeals correctly deemed the testing of Mr. Martines' drawn blood to be a search under the Fourth Amendment and the state constitution. A "search" within the protection of the Fourth Amendment requires that the person have a reasonable, and subjective expectation of privacy in the thing examined. State v. Carter, 151 Wn. 2d 118, 127, 85 P.3d 887, 891 (2004). The United States Supreme Court has stated that, while taking urine or blood from a person's body is a search, the subsequent testing of that fluid is a second search. Skinner v. Ry. Labor Exec's Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests [and] must be deemed [a] Fourth Amendment search[.]"). The Washington Court of Appeals, also in the context of testing in the area of employment, has held that the collection, and testing, of urine invades private affairs twice - by the taking of the sample, and second, by the chemical analysis of its contents. Robinson v. City of Seattle, 102 Wn. App. 795, 822 and n. 105, 10 P.3d 452 (2000).

Of course, the Fourth Amendment does not protect what a person knowingly exposes to the public. Katz, 389 U.S. at 351;

State v. Myrick, 102 Wn. 2d 506, 688 P.2d 151 (1984). In the present case, however, as the Court of Appeals stated, the medical data in drawn blood is not exposed to the public.² And certainly, testing for that data involves more than merely turning one's gaze upon the blood -- in contrast to looking at the tread pattern on the sole of sneakers properly taken from an arrested person, which is not a "search." Decision, at pp. 4-5 (discussing State v. Cheatam, 150 Wn.2d 626, 638, 642, 81 P.3d 830 (2003)).

The Court of Appeals also correctly classified the testing of blood to be a search under Article 1, section 7. The Washington constitutional focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Myrick, 102 Wn.2d at 511; see also State v. Hinton, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (looking to the "nature and extent of the information which may be obtained as a result of the government conduct" and whether the matter involves "intimate details about a person's activities and associations" to determine if search occurred); see, e.g., State v. Young, 123 Wn.2d at 183 (use of infrared device to

² This case does not involve material abandoned or exposed to the public, such as saliva on a licked, and then mailed, envelope. State v. Athan, 160 Wn. 2d 354, 367, 158 P.3d 27, 33 (2007) ("when a person licks an envelope and places it in the mail, that person retains [no] privacy interest in his saliva at all").

detect heat patterns inside a home was an intrusion into private affairs under state constitution); State v. Boland, 115 Wn. 2d 571, 800 P.2d 1112 (1990).

The State contends that Skinner and Robinson and like cases are inapplicable because they arose in the “special needs” context. PFR, at pp. 21-22. But special needs cases involve the issue of whether a special need (such as preventing and investigating rail collisions) allows some searches to be conducted without any probable cause. The question whether there is a “search” in the first place is answered by using the very same Fourth Amendment and state constitution definitions as in individual criminal cases. Robinson v. City of Seattle, 102 Wn. App. at 812-13; Skinner v. Ry. Labor Exec’s Ass’n, 489 U.S. at 617-18 (stating that it “is not disputed [that the] chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic” and holding that both “the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable [and] we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).

The State also appears to argue that Mr. Martines had no reasonable expectation of privacy in his blood's physiological data, once the blood was drawn from him. Petition for Review, at pp. 7-9. But Mr. Martines did not lose his privacy interest in the blood's hidden physiological data simply because the blood itself had been removed from his arm. State v. Boland, 115 Wn.2d at 579-81 (person has a reasonable expectation of privacy in items placed in a trash can outside his home); cf. State v. Carter, 151 Wn.2d at 126-27 (defendant lost privacy interest in the inside workings of gun when he voluntarily displayed those workings to the public).

Cases such as Utah v. Price, 270 P.3d 527 (Utah, 2012), cited in the Petitioner, are not comparable. Price held that a defendant had no Fourth Amendment privacy interest in "contraband" in his blood and rejected the appellant's argument that a THC (marijuana) test of his drawn blood, in addition to the alcohol test administered based on probable cause of alcohol-impaired driving as set out in the affidavit, was a search without probable cause. Price, 270 P.3d at 529-31. The court stated that the THC testing was not a search at all, because there is no reasonable expectation of privacy in contraband inside lawfully drawn blood. Price, at 529. But the presence of legal drugs such as valium in a

person's blood is not susceptible to the Price analysis, which depended on analogy to dog sniffs, that only reveal inherent contraband. Price, at 530 (citing Illinois v. Caballes, 543 U.S. 405, 408-09, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005)). And in any event, compared to a blood test, a dog sniff is minimally intrusive. State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (approving dog sniff of safe deposit box). Blood is not tested by smelling its emanations from a person, or a vial.

Additionally, Price would not be well-reasoned under the state constitution, which protects private affairs (Price had failed to preserve a Utah state constitutional challenge. Price, 270 P.3d at 529 n. 2). The Price analysis, dependent on a notion of reasonableness of a test for inherent contraband in a driver's seized blood, is incompatible with the data in blood being a private affair for which a warrant should be required, and may easily be obtained. Under Article 1, section 7, if testing of blood did not require a warrant, there would be no limitation on the State's ability to employ such testing. See Young, at 186-87 (concerning infrared devices aimed at the home). Promises of reasonableness – assurances that the State will look only for contraband -- are no protection of privacy.

The physiological data that is contained in a person's blood is a matter that citizens of this state have held, and are entitled to hold, free from governmental trespass absent a warrant. See Robinson, 102 Wn. App. at 810 (cataloging Washington protections of the private information in blood) (citing State v. Farmer, 116 Wn.2d 414, 429, 805 P.2d 200 (1991), and RCW 70.24.330). The testing of Mr. Martines' blood was a warrantless search; it was without authority of law under Article 1, section 7. The Court of Appeals correctly held that the blood testing results in Mr. Martines' case had to be suppressed.

2. **The warrant failed for lack of particularity, in not specifying a blood testing search, for alcohol or drug markers.**

Law enforcement must execute a search warrant strictly within the bounds set by the warrant. State v. Kelley, 52 Wn. App. 581, 585, 762 P.2d 20 (1988); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 n. 7, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Importantly, the Fourth Amendment also mandates that warrants describe with particularity the things to be seized. State v. Riley, 121 Wn. 2d 22, 28, 846 P.2d 1365, 1369 (1993) (citing State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). The purposes of the particularity requirement primarily

include the prevention of “general searches,” in which law enforcement searches and seizes for whatever it wishes without regard to the scope of authority granted. Perrone, at 546-47 (citing 2 W. LaFave, Search and Seizure § 4.6(a), at 234–36 (2d ed. 1987), and Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927)). The question whether a warrant meets the particularity requirement is reviewed *de novo*. State v. Clark, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001).

Citing Perrone, the State argues that it was “hypertechnical” of the Court of Appeals, and a violation of the rule of common sense, to decline to read into the search warrant a judicial grant of authority to test the drawn blood. PFR, at pp. 6-7. But Perrone actually provides a different, although generous standard for particularity, which the warrant here nonetheless failed to meet:

[The requirements of particularity are met if the substance to be seized is described with “reasonable particularity” which, in turn, is to be evaluated in light of “the rules of practicality, necessity and common sense.” State v. Withers, 8 Wn. App. 123, 126, 504 P.2d 1151 (1972). See United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).

Perrone, at 546-47; see also State v. Jackson, 150 Wn.2d 251, 268, 76 P.3d 217 (2003) (description of the place to be searched and items to be seized is adequately particular if it is as specific as

the nature of the activity under investigation permits).

These cases make clear that the warrant in this case abjectly failed the particularity requirement. The search warrant was the commencement of an investigation into alleged driving under the influence of alcohol. The warrant plainly could have, and should have, specified blood testing, and since the blood was to be immediately collected under the warrant, there was no urgency that precluded the warrant from specifying testing; yet it completely failed to do so. See also 2 W. LaFave, Search and Seizure § 4.6(a), at 613 (4th ed. 2004) (“[s]ome leeway [in the particularity requirement] will be tolerated where it appears additional time could have resulted in a more particularized description”). The State’s arguments regarding “common-sense” only magnify the degree to which the warrant failed for lack of particularity. Perrone, at 547.³

Notably, not even under the “good faith” reasoning of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), applying that federal-court exception to the exclusionary

³ The State also argues that law enforcement did not abuse the lack of particularity in the warrant by searching the blood for material lacking a nexus to the warrant affidavit, such as the Court of Appeals’ “hypothetical concerns” regarding testing for other private sensitive physiological data such as disease markers. PFR, at pp. 15-16. But this contention fails. As this Court stated in Riley, “an overbroad warrant is invalid whether or not the executing officer abused his discretion.” Riley, 121 Wn.2d at 29 (citing In re Lafayette Academy, Inc., 610 F.2d 1, 5 (1st Cir.1979)). And of course, law enforcement did search for matters extraneous to the investigation, when the laboratory tested the blood for drugs, a matter not even suspected. See Part E.5, infra.

rule, could any reasonable police officer possibly read this warrant to grant authority for the blood-testing search that was conducted. See 2 W. LaFave, Search and Seizure § 4.5, at 563 (4th ed. 2004). The blood testing in this case was not conducted as a result of a reasonably 'mistaken' reading of the warrant language, but the State's position, in its essence, is a request that this Court endorse the blood testing search because these warrants, so written, have reasonably been "understood" by the police, in a 'hundred' past instances, to authorize testing. PFR, at pp. 7-9. This argument is inconsistent with Washington's nearly categorical protection of privacy, and the requirement of authority of law – actual warrant authority. See State v. Afana, 169 Wn. 2d 169, 177-80, 233 P.3d 879 (2010) (no good faith exception to exclusionary rule).

Finally, this particular case does not concern issues of timely execution under CrR 2.3(c) of a search validly authorized by the search warrant, as in State v. Grenning, 142 Wn. App. 518, 174 P.3d 706 (2008), aff'd, 169 Wn.2d 47 (2010) (cited in State's PFR, at pp. 10-11). The blood testing results must be suppressed.

3. The warrant's defects cannot be cured by incorporation of the warrant affidavit.

The State's new contention is that the warrant affidavit in this case cures the warrant's defects. PFR, at pp. 8-9; see Appendix B

(warrant affidavit). The Petitioner now contends that it is enough that the affidavit for the warrant plainly contemplates testing of the blood, and in effect, asks this Court to determine that the authority to search for particular things may be determined, not by the judicial grant of authority which is the warrant, but instead by the scope of law enforcement's *application* for that authority. PFR, at pp. 1-2, 7.

This argument on its face departs from the fundamental principle that a warrant represents a grant of judicial authority by a magistrate who is interposed *in between* law enforcement, and the privacy of citizens. See, e.g., State v. Byrd, 178 Wn.2d 611, 629-30, 310 P.3d 793, 802 (2013). The United States Supreme Court has stated that “[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.” Groh v. Ramirez, 540 U.S. 551, 557–58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (and stating, “The fact that the *application* adequately described the ‘things to be seized’ does not save the *warrant* from its facial invalidity.”) (Emphasis in original.).

However, federal and Washington decisions do indicate that deficiencies in a warrant document may potentially be cured by the

affidavit – if certain criteria are met. Groh, 551 U.S. at 557-58.

This Court has stated the criteria as follows:

[A]n affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with “suitable words of reference”. Bloom v. State, 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973). See generally W. LaFare, § 4.6(a), at 241 (discussing question whether description in affidavit can save defective description in warrant). If the affidavit is not attached to the warrant and expressly incorporated therein, it may not cure generalities in the warrant even if some of the executing officers have copies of the affidavit.

State v. Riley, 121 Wn.2d 22, 29-30, 846 P.2d 1365 (1993); see also State v. Stenson, 132 Wn.2d 668, 696-97, 940 P.2d 1239, certiorari denied, 118 S.Ct. 1193 (1997).

Similarly, the Ninth Circuit applies a clear rule that defects in a search warrant may only be cured by reference to the search warrant application if certain, although slightly less stringently stated, conditions are met. United States v. Kahre, 737 F.3d 554, 566 (2013) (citing United States v. SDI Future Health, Inc., 568 F.3d 684, 699 (9th Cir. 2009)). Under federal decisions, the rule that the affidavit is “potentially curative” applies only if (1) the warrant expressly incorporated the affidavit and (2) the affidavit either is attached physically to the warrant or at least accompanies

the warrant while agents execute the search. Kahre, 737 F.2d at 566.

Words of incorporation. A warrant expressly incorporates an affidavit when it uses “suitable words of reference.” United States v. Towne, 997 F.2d 537, 545 (9th Cir.1993). In Mr. Martinez’ case, the warrant uses language referencing a warrant affidavit, but merely describes the warrant as “filed.” Appendix A (search warrant, stating that it is issued “upon the sworn complaint heretofore made and filed and/or the testimonial evidence given in the above-entitled Court and incorporated herein by this reference”). The warrant did not attest to the affidavit being attached. See United States v. Tracey, 597 F.3d 140, 144 (3rd Cir. 2010) (box on search warrant was checked indicating attachment of affidavit and its number of pages).

The warrant affidavit was not attached to the warrant, and did not accompany its execution. The potential argument that a warrant may in some circumstances be cured by reference to the warrant affidavit was acknowledged by the defendant himself, in the trial court as part of his probable cause challenge, and the doctrine was again noted in the Appellant’s Opening Brief. CP 7-12 (Motion to Suppress, at p. 5); AOB, at p. 9. Yet even in its Petition

to this Court, the State of Washington does not argue that the search warrant affidavit was ever physically attached to the warrant, nor does it attempt to show that the affidavit ever accompanied the warrant, either during the taking of Mr. Martines' blood, or at the time the blood was tested.

Instead, the State's argument is that the search warrant and the affidavit were admitted under a "single exhibit" number at the CrR 3.6 suppression hearing, and that this Court should, on this basis, assume any facts needed to uphold the warrant. See PFR, at p. 8. But the suppression hearing was held months after the warrant's execution, which is the pertinent time when attachment and accompaniment are required. 11/5/12RP at 1-61 (suppression hearing). State v. Riley, 121 Wn.2d at 30 ("The affidavit for the Riley warrant was not attached to the search warrant Therefore . . . it cannot validate the overbroad warrant.").

The State also contends that Mr. Martines was obligated to prove a negative – non-attachment of the affidavit to the warrant, and non-accompaniment. PFR, at p. 9. But these criteria for "cure" of a defective warrant are factual showings that the *proponent* of the search's proceeds must undertake to make. United States v. McGrew, 122 F.3d 847, 849–50 (9th Cir. 1997) (affidavit did not

cure warrant because government “offered no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search”); Stenson, at 697.

The warrant affidavit in this case cannot be considered to even potentially cure the defective warrant, as the conditions for potential cure are not met. See also Millender v. County of Los Angeles, 620 F.3d 1016, 1026 (9th Cir. 2010) (“there is no evidence in the record, nor do the deputies argue, that the affidavit was physically attached to the warrant or accompanied the warrant on the search . . . [t]herefore, we cannot consider its effect.”).

Finally, even if the State had proved attachment and accompaniment, the courts have emphasized that there is a fine line between clarifying a warrant’s particularity with reference to an incorporated affidavit, and expanding the authority of the warrant wholly beyond that granted by the issuing judge. United States v. Sedaghaty, 728 F.3d 885, 910-14 (9th Cir. 2013) (“We have never held that an affidavit could expand the scope of a legitimate warrant beyond its express limitations nor do we do so here.”).

The State's position in the present case, to the extent it seeks to enlarge the warrant's authority to include a further, additional search, threatens a dramatic upending of the

constitutional requirement that a warrant applicant is limited by the judicial grant of search authority ultimately obtained. See Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835 (1966). It is inconsistent with this protection to allow two searches, invasions, or intrusions -- A and B -- to be conducted by police, when the affidavit sought authority for A and B, but the warrant's language, for whatever reason, specifies only A. See Sedaghaty, at 914 ("while an [incorporated] affidavit can be used to cure an otherwise overbroad warrant by narrowing its scope, an affidavit cannot be relied upon to authorize a search beyond the scope of a judicially authorized warrant") (citing Doe v. Groody, 361 F.3d 232, 240 (3d Cir. 2004)); see Decision, at p. 2 ("The warrant did not say anything about testing of the blood sample."). The State is asking this Court for a rule allowing just that. Certainly, where such intimate private information as that contained within blood is concerned, such a rule should be rejected.

4. **The State constitution's "authority of law" requirement compels the strictest possible application, if any, of the "incorporation" doctrine as a means of curing a defective search warrant.**

Article 1, section 7 is more protective than the Fourth Amendment, and at a minimum the Fourth Amendment sets a "floor" of protection below which the state constitution cannot sink.

State v. Carter, 151 Wn. 2d 118, 125-26, 85 P.3d 887, 890-91 (2004) (citing City of Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988)); see State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986) (noting that the state constitution guards against unauthorized invasions of privacy rather than merely “unreasonable” searches).

In this case, Division One of the Court of Appeals accurately described the search warrant in this case as containing no judicial grant of authority whatsoever to search Mr. Martines’ blood in any way. It is therefore accurate to say that the blood testing in this case was a search conducted in the absence of any warrant authority whatsoever. But in Washington, searches require authority of law. Considering the greater protections of Article 1, section 7, this Court should be hesitant to determine that the required authority of law may reside in the application for the search warrant – especially where the warrant could so easily have specified blood testing.

Any rule leniently allowing the application for the search warrant to constitute the required authority of law would risk elevating the author of the warrant affidavit over the judge issuing the warrant. The warrant requirement’s core is that it interposes, in

advance, a neutral and detached judge between the citizenry and law enforcement. State v. Byrd, 178 Wn.2d 611, 629-30, 310 P.3d 793 (2013); cf. Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948); McDonald v. United States, 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

In this case, the Court of Appeals' decision made clear that the brief, simple, and uncomplex language of the search warrant in the present case simply granted no authority to test the drawn blood whatever. Decision, at pp. 12 ("As written, the warrant did not authorize testing at all."). The search that was conducted in this case was beyond what was authorized in the warrant, and the blood testing in this case was not conducted as a result of a reasonably 'mistaken' reading of the warrant's language.

Further, this Court has stated that it reviews a warrant describing physical objects with less scrutiny than it uses for a warrant for documents -- because the former involves less potential for intrusion into personal privacy. Stenson, 132 Wn.2d at 692; see also State v. Chambers, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997) (citing Stenson). If warrants that risk intrusion into areas protected by the First Amendment should be accorded greater scrutiny for warrant authority, then it seems also that warrants

which risk discovery of the private medical, physiological data in a person's blood should receive at least similarly heightened protection. Particularly where the warrant could so easily have specified blood testing, but did not, the state constitution should not permit "authority of law" for the search to be found in the application for the warrant, rather than in the warrant itself.

5. **There were no "facts and circumstances" amounting to probable cause set forth in the affidavit for the issuance of any search warrant for testing of Mr. Martines' blood for drugs.**

A search warrant that is not issued upon probable cause is invalid. Wash. Const. art. 1, § 7; State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003); U.S. Const. amend. 4; United States v. Grubbs, 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006). If this Court decides that the required "authority of law" under Article 1, section 7 can be found in the *application* for a search warrant, Mr. Martines' DUI conviction should still be reversed, because the search by blood testing was illegal as to drugs, where the affiant did not set forth any probable cause for drug testing.

Probable cause exists when the affidavit in support of the search warrant sets forth facts and circumstances that establish a reasonable inference that the defendant is probably involved in suspected crime, and that evidence of the crime may be found at a

certain location. State v. Ollivier, 178 Wn. 2d 813, 846-47, 312 P.3d 1, 20 (2013), cert. denied, 135 S. Ct. 72 (2014); Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

In his affidavit, Trooper Tardiff did not attest to any probable cause suspicion that Mr. Martines was driving under the influence of drugs. For example, when assessing probable cause for an arrest in narcotics cases, the court at a CrR 3.6 hearing considers the totality of the facts and circumstances within the officer's knowledge at the time of the arrest, including any special experience and expertise of the officer. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); State v. Chavez, 138 Wn. App. 29, 34, 156 P.3d 246 (2007). In one case, the Court of Appeals has stated that although a DRE (Drug Recognition Expert) officer need not be able to specify what drug the suspect is under the influence of, the DRE officer must have cause to believe the driver was under the influence of some drug. See State v. Baldwin, 109 Wn. App. 516, 524-25, 37 P.3d 1220 (2001), review denied, 147 Wn.2d 1020 (2002).

In this case, Trooper Tardiff – despite *being* a DRE -- did not state that he suspected that Mr. Martines was under the influence of a drug, some drug, or any drug. The trooper placed not a single

statement, fact, or suspicion of suspected intoxication with drugs into his affidavit, and certainly did not set forth facts amounting to probable cause for the forensic testing of the blood for the presence of any drug. Hypothetically, the trooper could have stated that he made observations of the defendant which, in his training and experience, were signs of a person being under the influence of some drug – but he simply did not do so.

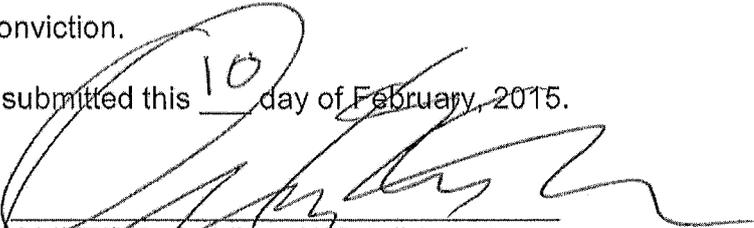
The Petitioner therefore can only argue that probable cause to test blood for alcohol somehow also 'automatically' establishes probable cause to test blood for drugs. Motion for Reconsideration, at p. 8, n. 5 pp. 23-25. But probable cause requires an actual factual showing. Thus, for example, an arresting officer who has special expertise or training in the form of being a DRE can certainly set forth facts, which in turn amount to probable cause suspicion, that a person is under the influence of drugs. Chavez, 138 Wn. App. at 34. *Facts* are required, because it is facts that are the components of probable cause suspicion. State v. Ollivier, 178 Wn. 2d at 846-47; Illinois v. Gates, 462 U.S. at 238. Further, the desire of some state agent to also test Mr. Martines' blood for drugs, as a matter of hunch, or custom in DUI cases, cannot be legitimized by bootstrapping onto the existence of actual probable

cause for alcohol testing. See State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999) (pretextual intrusions -- when a police officer relies on some legal authorization as "a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement" -- violate the state constitution). The only intrusion authorized is the intrusion the officer intends, where it is supported by probable cause and carries authority of law. See State v. Arreola, 176 Wn. 2d 284, 291-93, 290 P.3d 983 (2012). The blood testing for drugs in this case was not supported by any showing of facts amounting to probable cause, and was without authority of law.

F. CONCLUSION.

This Court should affirm the Court of Appeals, and reverse Mr. Martines' DUI conviction.

Respectfully submitted this 10 day of February, 2015.



OLIVER R. DAVIS WSBA # 24560
Washington Appellate Project – 91052
Attorneys for Jose Figueroa Martines

Appendix A – application for search warrant

Appendix B – search warrant

12008882

STATE OF WASHINGTON
King COUNTY District COURT

STATE OF WASHINGTON,

Plaintiff,

v.

Martinea, Jose Figueroa,

Defendant.

NO. BUR 125812

SEARCH WARRANT FOR EVIDENCE OF
A CRIME, TO WIT:

- DRIVING WHILE UNDER THE
INFLUENCE, RCW 46.61.502
- PHYSICAL CONTROL OF
VEHICLE WHILE UNDER THE
INFLUENCE, RCW 46.61.504
- DRIVER UNDER TWENTY-ONE
CONSUMING ALCOHOL,
RCW 46.61.503
-

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

WHEREAS, upon the sworn complaint heretofore made and filed and/or the testimonial evidence given in the above-entitled Court and incorporated herein by this reference, it appears to the undersigned Judge of the above-entitled Court that there is probable cause to believe that, in violation of the laws of the State of Washington, evidence of the crime(s) of:

- Driving While under the Influence, RCW 46.61.502
- Physical Control of Vehicle While under the Influence, RCW 46.61.504
- Driver under Twenty-one Consuming Alcohol, RCW 46.61.503
-

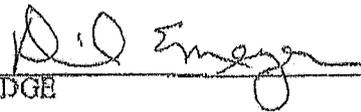
12008882

is concealed in, about or upon the person of Martinez, Jose Figueroa, who is currently located within the County of King.

NOW, THEREFORE, in the name of the State of Washington, you are hereby commanded with the necessary and proper assistance of a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood, to extract a sample of blood, consisting of one or more tubes, from the person of Martinez, Jose Figueroa, within 4 hours of the issuance of this search warrant and to ensure the safe keeping of the same and to make a return of said warrant within three (3) days; with a particular statement of all the articles seized and the name and title of the person who extracted the sample of blood. A copy of said warrant shall be served upon the person from whom the blood is to be extracted and upon the person who extracted the sample of blood together with a receipt for the blood that was extracted.

GIVEN UNDER MY HAND this 17th day of June, 2012.

@ 4:05 AM


JUDGE

DAVID R. MEYER
Printed or Typed Name of Judge

This warrant was issued by the above judge, pursuant to the telephonic warrant procedure authorized by CrR 2.3 and CrRLJ 2.3 on 17th day of June, 2012, at _____ (time).

Trooper Dennis R. Tardiff WSP # 596
Printed Name of Peace Officer, Agency, and Personnel
Number


Signature of Peace Officer Authorized to Affix Judge's
Signature to Warrant

Distribution—No copies made until after Judge signs or approves an officer signing in the judge's stead after the entire warrant is read to the judge. Original (Court Clerk); 1 copy (Prosecutor), 1 copy (Officer); 1 copy to give to person from whom the blood is extracted, 1 copy to give to person who extracted the blood.

12008882

STATE OF WASHINGTON
King COUNTY District COURT

STATE OF WASHINGTON,
Plaintiff,

v.

Martines, Jose Figueroa
Defendant.

NO. BLR 01255102
AFFIDAVIT / DECLARATION

SEARCH WARRANT FOR EVIDENCE OF A
CRIME, TO WIT:

- DRIVING WHILE UNDER THE INFLUENCE, RCW 46.61.502
- PHYSICAL CONTROL OF VEHICLE WHILE UNDER THE INFLUENCE, RCW 46.61.504
- DRIVER UNDER TWENTY-ONE CONSUMING ALCOHOL, RCW 46.61.503
-

I, Dennis R. Tardiff, being duly sworn and upon oath, depose and say--

I am a duly appointed, qualified, and acting law enforcement officer for the Washington State Patrol.

I am charged with responsibility for the investigation of criminal activity occurring within King County and the State of Washington, and have probable cause to believe, and do, in fact, believe, that

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evidence of the crime(s) of:

- Driving While under the Influence, RCW 46.61.502
- Physical Control of Vehicle While under the Influence, RCW 46.61.504
- Driver under Twenty-one Consuming Alcohol, RCW 46.61.503
-

is concealed in, about or upon the person of Martinez, Jose Figueroa, who is currently located within the County of King, my belief being based upon information acquired through personal interviews with witnesses and other law enforcement officers, review of reports and personal observations, said information being as further described herein

My training and experience regarding investigations of the above- crime(s) is as follows:

The facts supporting the initial contact with Martinez, Jose Figueroa are as follows:

I have been a Trooper with the Washington State Patrol for 13 years. In the academy I was trained in DUI detection and enforcement. I was trained to administer Standardized Field Sobriety tests per NHSTA standards at the Washington State Patrol Academy. I took part in a wet lab where I was trained to detect the effects of alcohol and or drug impairment in a controlled environment. I have arrested approximately 400 DUI's in my career and assisted in many other arrests by other Troopers. I have attended numerous refresher trainings in my career including BAC recertification. I have completed all required training to this date.

At approximately 2251 hours, I was advised of a 2 car rollover collision North SR 167 just north of SR 18. While in route to the collision I was advised by WSP communications of a possible verbal altercation in progress between the defendant and others at the scene. At approximately 2256 hours, I arrived at the scene and observed the two vehicles involved in the collision. The defendant vehicle was a White Toyota 4 Runner bearing Washington State registration ACF2196. The 4 runner was overturned and facing east in the northbound lanes blocking lane 1 of 3. The victim vehicle was a Green 1997 Ford Escort bearing Washington registration

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THE WITNESSES ARE:
STEVEN GOLOIR - WELLS, MICHAELLE FRANCIS, ALAN
PAWITT.

The defendant was identified by his Washington State License as Martinez, Jose Figueroa DOB:
1972-07-06. DOL indicated the defendant had a prior conviction for Vehicular Assault.

The defendant, Martinez, Jose Figueroa:

- declined to take a breath alcohol test on an instrument approved by the State Toxicologist.
- is at a location that lacks an instrument approved by the State Toxicologist for performing breath testing and the defendant has refused to submit to a blood test.
- was not offered an opportunity to take a breath alcohol test on an instrument approved by the State Toxicologist because:
 - the available instrument is currently out of order.
 - the defendant does not speak English and the implied consent warnings are not available in a language that the defendant understands.
 - a low alcohol concentration reading on a portable breath test device makes it probable that any impairment is the result of a substance or drug other than alcohol.
 - The person has ever previously been convicted of:
Vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.022
- submitted to a breath test on an instrument approved by the State Toxicologist but the breath alcohol concentration reading of _____ is not consistent with the defendant's level of impairment suggesting that the defendant is also under the influence of a drug.

A sample of Martinez, Jose Figueroa's blood, if extracted within a reasonable period of time after he/she last operated, or was in physical control of, a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive. This search warrant is being requested 4 hours after Martinez, Jose Figueroa ceased driving/was found in physical control of a motor vehicle.

The Legislature has specifically authorized the use of search warrants for blood in cases in which the implied consent statute applies. See RCW 46.20.308(1) ("Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or

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ADU7881. Facing north SR 167 cleared to the right shoulder. Just prior to my arrival communications advised of an off duty Tukwila officer and a King County Deputy were passing by and stopped to assist with the collision. The deputy observed a verbal altercation in progress. The altercation was between the defendant and the occupants of the victim vehicle the Green Ford Escort. The deputy stopped the altercation by placing the defendant into custody. Upon arrival I observed the defendant and the Deputy standing next to the over turned 4 Runner.

THE TUKWILA OFFICER DANIEL LINDSTROM. ^{Shaw}
WHO WITNESSED THE ACCIDENT, INCLUDING DEFENDANT'S DRIVING
~~FROM~~ AT TIME OF THE ACCIDENT
I contacted the deputy and he advised me he detected a strong odor of alcohol coming from the defendant in custody. The Deputy released custody of the defendant to me. While taking custody of the defendant I detected a strong odor of alcohol coming from his breath and observed his blood shot watery eyes. The defendant had a flush face and a fresh wound on his nose from the collision. I asked the defendant what he had to drink. The defendant said he had one Blue Moon. I advised him he was in custody for DUI. I escorted the defendant to my patrol car. While walking back to my car the defendant walked in a slow and deliberate manner. I placed the defendant into my car. As the defendant was attempting to get into my car he seemed off balance and struck the door frame as he entered the car.

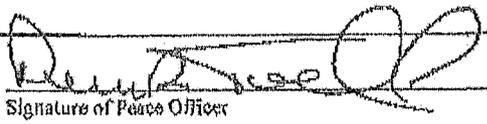
At 2330 hours I advised the defendant of constitutional rights. The defendant responded to his rights by saying he did not understand. I attempted to clarify what he did not understand about his rights and he continued to stare straight ahead and stated he didn't understand.

Once the defendant was secured in my car I continued my investigation of the collision. During my investigation I contacted the occupants of the Green Ford Escort. I was advised by the witnesses that the defendant kicked his window out and crawled out of his vehicle. The witnesses claimed the defendant climbed back into his vehicle and retrieved a bag and threw it into the bushes. I recovered the bag from the bushes on the shoulder and observed a full Blue Moon Beer bottle in a 6 pack container.

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blood.”). The Legislature has also specified specific classes of people as being qualified to withdraw blood for alcohol testing. See RCW 46.61.506(5).

Therefore, I request authority to cause a sample of blood, consisting of one or more tubes, to be extracted from the person of Martines, Jose Figeroa by a physician, a registered nurse, a license practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood.

Trooper Dennis R. Tardiff, Washington State Patrol# 396 Printed Name of Peace Officer, Agency, and Personnel Number	 Signature of Peace Officer
---	--

SUBSCRIBED AND SWORN to before me this 17th day of June, 2012.


JUDGE DAVID C. MEYER

Distribution if warrant obtained in person—Original (Court Clerk); 1 copy (Prosecutor); 1 copy (Officer). Distribution if warrant obtained telephonically—If search warrant was obtained telephonically, this complaint must be read in its entirety to the judge after the officer is placed under oath. Original (Prosecutor); 1 copy (Officer).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

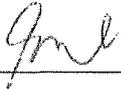
STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	NO. 90926-1
v.)	
)	
JOSE MARTINES,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> JAMES WHISMAN, DPA	() U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	() HAND DELIVERY
[jim.whisman@kingcounty.gov]	(X) E-MAIL
KING COUNTY PROSECUTOR'S OFFICE	
APPELLATE UNIT	
516 THIRD AVENUE, W-554	
SEATTLE, WA 98104	

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF FEBRUARY, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: 909261-MARTINES-BRIEF

I do not show it came through yesterday. Only the motion did. I have now received it. 2-11-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Wednesday, February 11, 2015 10:16 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: FW: 909261-MARTINES-BRIEF
Importance: High

To the Clerk of the Court,

I did not receive receipt for this filing (supplemental brief of respondent).

I only received the receipt for the motion for overlength brief submitted separately.

Kindly confirm receipt of the brief.

Thank you,

Maria

From: Maria Riley
Sent: Tuesday, February 10, 2015 4:07 PM
To: supreme@courts.wa.gov
Cc: paoappellateunitmail@kingcounty.gov; 'Jim.Whisman@kingcounty.gov'; Oliver Davis
Subject: 909261-MARTINES-BRIEF

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Respondent

Oliver R. Davis - WSBA #24560
Attorney for Respondent
Phone: (206) 587-2711
E-mail: oliver@washapp.org

By

Maria Arranza Riley

Staff Paralegal

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