

No. 72230-1-I

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

FILED  
Mar 26, 2015  
Court of Appeals  
Division I  
State of Washington

---

CITY OF SEATTLE,

Respondent,

v.

TAMISHA PEARSON,

Appellant.

---

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

---

APPELLANT'S OPENING BRIEF

---

RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT ..... 7

    1. The superior court erred in affirming the denial of the defendant’s motion to suppress blood evidence because the blood was drawn without a warrant or exigent circumstances. . 7

        a. The dissipation of alcohol or drugs in a person’s blood does not create a per se exigency. .... 7

        b. The government failed to meet its burden proving exigent circumstances authorized the warrantless extraction of the defendant’s blood..... 9

        c. The error is not harmless beyond a reasonable doubt.. 14

    2. The superior court erred in affirming the denial of the defendant’s motion to suppress blood evidence because the blood was analyzed without a warrant. .... 14

        a. Subjecting a person’s extracted blood to analysis is a search requiring a warrant..... 14

        b. No exigency justified the warrantless analysis of Ms. Pearson’s blood. .... 17

        c. The error is not harmless beyond a reasonable doubt.. 18

    3. The superior court erred in affirming the municipal court’s refusal to instruct the jury that it is not unlawful for a person to consume drugs and drive..... 19

4. The superior court erred in affirming the decision that admitted evidence of a per se THC blood limit of 5 nanograms, when this law was not applicable to the case. .... 23

F. CONCLUSION..... 26

**TABLE OF AUTHORITIES**

**United States Supreme Court Cases**

Missouri v. McNeely, \_\_ U.S. \_\_, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)..... 8, 9, 13

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 14

Skinner v Ry. Labor Exec’s Ass’n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) ..... 16

**Washington Supreme Court Cases**

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) ..... 17

State v. Carter, 151 Wn.2d 118, 85 P.3d 887 (2004)..... 17

State v. Edwards, 104 Wn.2d 63, 701 P.2d 508 (1985)..... 25

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)..... 25

State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982)..... 19

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009)..... 8

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940)..... 19

State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984)..... 8

State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984) ..... 18

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)..... 9

State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980)..... 22

State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010)..... 8, 9, 17

State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998) ..... 22

State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007) ..... 14

**Washington Court of Appeals Cases**

Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000)..... 16  
State v. Bessette, 105 Wn. App. 793, 21 P.3d 318 (2001)..... 18  
State v. Hansen, 15 Wn. App. 95, 546 P.2d 1242 (1976)..... 19  
State v. Hinshaw, 149 Wn. App. 747, 205 P.3d 178 (2009)..... 9, 12, 13  
State v. Martines, 182 Wn. App. 519, 331 P.3d 105 (2014)..... 15, 17, 18  
State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007)..... 22

**Other Cases**

Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939 (2014)..... 8, 13

**Constitutional Provisions**

Const. art. I, § 7..... 8  
U.S. Const. Amend. IV ..... 8

**Statutes**

RCW 46.61.502 ..... 19  
RCW 46.61.502(1)(b) ..... 23

**Other Authorities**

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 92.10 (3d Ed)..... 19

## **A. INTRODUCTION**

Absent exigent circumstances, the government must have a warrant before drawing a person's blood. The government must also obtain a warrant before analyzing that blood. During a mid-afternoon drive, Tamisha Pearson<sup>1</sup> accidentally struck a pedestrian who darted out into the street. Ms. Pearson told police that she had used medical marijuana earlier that morning. Without seeking a warrant, police had Ms. Pearson's blood drawn. This blood was later analyzed in the absence of a warrant. Charged with driving under the influence, Ms. Pearson's motion to exclude the blood results was denied. Because the government was required to obtain a warrant authorizing the blood draw and analysis of the drawn blood, this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. The superior court erred in affirming the municipal court's denial of Ms. Pearson's motion to suppress evidence obtained from the warrantless blood draw and warrantless testing of the withdrawn blood.

2. The superior court erred when it held that the municipal court properly refused to instruct the jury that a person may lawfully consume drugs and drive.

---

<sup>1</sup> Some of the filings incorrectly spell Ms. Pearson's first name as "Tamesha."

3. The superior court erred when it held that the municipal court properly admitted evidence of the current per se THC<sup>2</sup> blood limit.

### **C. ISSUES**

1. Absent an exception, such as exigent circumstances, warrantless searches are unconstitutional. That alcohol or drugs may naturally dissipate in a person's body does not present a per se exigency. After an accident, police suspected that Ms. Pearson drove while under the influence of marijuana. Without seeking a warrant, police brought Ms. Pearson to a hospital and had a nurse extract her blood. An officer later testified that he could generally obtain a warrant by e-mail or telephone. Did the government meet its burden to establish that exigent circumstances justified the warrantless blood draw?

2. Extraction of blood from a suspect is an intrusion requiring a warrant. Analysis of the withdrawn blood is a distinct intrusion requiring a warrant. The State did not get a warrant authorizing the testing of Ms. Pearson's blood. Were the test results inadmissible due to the warrantless testing of Ms. Pearson's blood?

3. The law recognizes that a person may have consumed drugs and yet not be under the influence. Thus, a pattern instruction states that it is not unlawful for a person to consume drugs and drive a motor vehicle.

---

<sup>2</sup> Tetrahydrocannabinol.

Ms. Pearson, whose theory of the case was that she was not under the influence of marijuana and that her driving had not been affected, requested the jury be so instructed. The court refused, reasoning that the instruction applied only to alcohol, not drugs. Did the court err in denying this essential instruction?

4. Ms. Pearson was tried under the law as it existed in February 2012. At that time, there was no per se THC blood limit. By the date of the trial, however, Washington voters had legalized small amounts of marijuana through an initiative (I-502), and created a per se limit. Ms. Pearson elicited testimony that there was no set limit in February 2012. Over Ms. Pearson's objection, the State elicited testimony that the current limit was 5 nanograms. Ms. Pearson's THC level was about 20 nanograms. Did the court err in admitting this irrelevant and highly prejudicial evidence?

#### **D. STATEMENT OF THE CASE**

Ms. Pearson suffers from systemic lupus erythematosus (lupus),<sup>3</sup> fibromyalgia,<sup>4</sup> and intractable pain. CP 621 (RP 385).<sup>5</sup> She is authorized

---

<sup>3</sup> Lupus is an autoimmune disease where the immune system attacks the body. CP 622 (RP 386). Symptoms include chronic pain, muscle aches and pains, and joint stiffness. CP 622 (RP 386).

<sup>4</sup> Fibromyalgia is a disorder that can cause muscle pain, muscle stiffness, inflammation, irritable bowel syndrome, sleep disorder, fatigue, and general pain. CP 623 (RP 387).

to use cannabis, commonly called marijuana, to help relieve her pain and symptoms. CP 529, 531 (RP 293, 295). Cannabinoids, found in marijuana, have anti-inflammatory properties. CP 625 (RP 389). Ms. Pearson regularly uses marijuana. CP 631 (RP 395). As a regular user, her tolerance of marijuana is different from that of an irregular user. See CP 633-34 (RP 397-98).

Around 3:00 p.m., February 3, 2012, Ms. Pearson was driving westbound on Fisher Place, a road in south Seattle. CP 346, 358-59, 380 (RP 110, 122-23, 144). Close by were a Safeway and other stores. CP 359-60 (RP 123-24). She stopped at the “T” intersection at Rainier Avenue South. CP 102; 380 (RP 144). Rainier Avenue has five lanes. CP 102; 360 (RP 124). Across the street from Ms. Pearson was a library. CP 102; 347 (RP 111). A resident in the area testified this was a “very tricky intersection” when trying to turn from Fisher Place onto Rainier Avenue. CP 364 (RP 128). When turning from Fisher Place onto Rainier Avenue, there is no traffic light. CP 364 (RP 128).

Ms. Pearson turned left onto Rainier Avenue. CP 360 (RP 124). About the same time, a woman darted out into the street from the west side of the street near the library. CP 348, 406 (RP 112, 170). The

---

<sup>5</sup> Unless otherwise noted, the “RP” citations refer to trial volumes dated July 30, 31, and August 1, 2, 2013. The reports of proceedings are contained within the clerk’s papers. Parallel citations are provided.

woman did not use the crosswalk, and the crosswalk signal did not say walk. CP 355, 364 (RP 119, 128). Ms. Pearson's car collided with the woman. CP 350, 361, 406 (RP 114, 125, 170). Ms. Pearson pulled over and called 911. CP 363, 376-77 (RP 127, 140-41).

Because this was a serious accident, the police called Officer Michael Jongma, a "drug recognition expert" (DRE), to the scene. CP 382, 388 (RP 146, 152). Officer Jongma spoke with Ms. Pearson. CP 404 (RP 168). Ms. Pearson told Officer Jongma about her medical condition and said she smoked marijuana that morning around 8:30 to 9:00 a.m. CP 407, 430, 432 (RP 171, 194, 196). She showed him unused marijuana products that she had in her car. CP 432 (RP 196). Ms. Pearson participated in field sobriety tests. CP 411-18 (RP 175-82). Based on a combination of Ms. Pearson's admission of smoking marijuana earlier, the presence of unused marijuana products, and the field sobriety tests, Officer Jongma believed Ms. Pearson drove while impaired and arrested her. CP 433-34, 441 (RP 197-98, 205).

Without trying to get a warrant, Officer Jongma transported Ms. Pearson to a hospital to have her blood drawn. CP 434, 442 (RP 198, 206). It took Officer Jongma about half an hour to travel to the hospital. CP 206, 211 (7/18/13RP 36, 41). After arriving, Ms. Pearson's blood was drawn without her consent. CP 212 (7/18/13RP 42).

Officer Jongma then took Ms. Pearson to a police precinct. CP 472 (RP 236). Ms. Pearson participated in a DRE exam. CP 567 (RP 331). As with the field sobriety examination, some of the tests did not indicate impairment. CP 568-69 (RP 332-33). Still, Officer Jongma concluded that Ms. Pearson was impaired. CP 564 (RP 328).

Without a warrant, toxicologists analyzed Ms. Pearson's blood. CP 575 (RP 339). The blood had a THC concentration level of 20 nanograms. CP 576-77, 579, 611, 693 (RP 340-41, 343, 375, 457). THC is the active component in marijuana that produces effects in people. CP 505-06 (RP 269-70).

The City of Seattle charged Ms. Pearson in municipal court with driving under the influence. CP 37. Ms. Pearson moved to suppress the blood evidence. CP 17; 67-72. The court initially granted the motion. CP 17; 162-63 (6/13/13RP14-15). However, the court granted the City's motion for reconsideration, determining exigent circumstances justified the warrantless intrusion. CP 17; 242, 245 (RP 6, 9). The court denied Ms. Pearson's motion to reconsider. CP 18; 244 (RP 8).

At trial, over Ms. Pearson's objection, the State was permitted to elicit that the current per se limit of THC is 5 nanograms. CP 585-86 (RP 349-50). The court denied Ms. Pearson's request that the court give the pattern instruction telling the jury that a person can consume a drug, drive,

and not be guilty of driving under the influence. CP 668 (RP 432). The jury convicted Ms. Pearson as charged. CP 728 (RP 492).

Ms. Pearson appealed in superior court. CP 1, 135-48. The superior court affirmed. CP 761. The superior court determined that that the trial court had not “abused its discretion” on any of the challenged rulings, including the trial court’s ruling that exigent circumstances existed. CP 761.

Ms. Pearson sought discretionary review in this Court, raising the four issues outlined earlier in this brief. CP 763. Commissioner Neel granted discretionary review on the first two issues, which concern the admissibility of the blood test results. App. A. (commissioner’s ruling). Commissioner Neel did not grant review on the remaining two issues, but ruled that the parties may brief these issues and that the panel will decide whether to address them. App. A.

## **E. ARGUMENT**

- 1. The superior court erred in affirming the denial of the defendant’s motion to suppress blood evidence because the blood was drawn without a warrant or exigent circumstances.**
  - a. The dissipation of alcohol or drugs in a person’s blood does not create a per se exigency.**

Article 1, section 7 of the Washington constitution commands that “No person shall be disturbed in his private affairs, or his home invaded,

without authority of law.” Const. art. 1, § 7. The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. Const. amend. IV.

The State’s intrusion into a person’s body to draw blood triggers these constitutional provisions. Missouri v. McNeely, \_\_ U.S. \_\_, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013); State v. Judge, 100 Wn.2d 706, 711, 675 P.2d 219 (1984). Absent a recognized exception, warrantless blood draws are unlawful. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). One exception is exigent circumstances. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). This exception applies where delay caused by securing a warrant would permit the destruction of evidence. Tibbles, 169 Wn.2d at 370. The natural metabolization of alcohol or marijuana in a person’s bloodstream does not present a per se exigency. McNeely, 133 S. Ct. at 1556; Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 942 (2014) (“the natural dissipation of marijuana in the blood stream does not constitute a per se exigent circumstance justifying a warrantless search.”). An exigency must exist based on the totality of the circumstances. McNeely, 133 S. Ct. at 1556; Tibbles, 169 Wn.2d at 370.

In determining whether exigent circumstances exist, the availability of a telephonic warrant must be considered. State v. Ringer, 100 Wn.2d 686, 702, 674 P.2d 1240 (1983). Noting the availability of telephonic warrants, the United States Supreme Court held in McNeely that in a driving under the influence investigation, if police “can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search,” the police must do so. McNeely, 133 S. Ct. at 1561-63. As with all exceptions to the warrant requirement, under article 1, section 7, the State bears the burden of proving an exigency. Tibbles, 169 Wn.2d at 372; State v. Hinshaw, 149 Wn. App. 747, 754, 205 P.3d 178 (2009) (“The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action.”).

**b. The government failed to meet its burden proving exigent circumstances authorized the warrantless extraction of the defendant’s blood.**

Citing McNeely, Ms. Pearson moved to suppress the blood test results. CP 151-52, 157-60 (6/13/13RP 3-4, 9-12). The court granted the motion. CP 162 (6/13/13RP 14). After the City moved to reconsider, the court held an evidentiary hearing.

At the hearing, a forensic toxicologist testified that when a person smokes marijuana, the person’s THC blood concentration level quickly

peaks. CP 186 (7/18/13RP 16). The toxicologist asserted that afterwards, the person's blood THC level will decrease below the detection limit of her laboratory, which was 2.5 nanograms per milliliter, in about three to five hours. CP 186-87 (7/18/13RP 16-17). The toxicologist acknowledged, however, that the time actually depends on the dose the person smokes. CP 195 (7/18/13RP 25). She was also aware of a study showing that regular users of marijuana still had THC in their blood after seven days. CP 200 (7/18/13RP 30).<sup>6</sup>

Officer Jongma testified that the collision time was at 3:23 p.m. and that he arrived at 4:06 p.m. CP 203 (7/18/13RP 33). Besides himself, there were about seven or eight other officers at the scene. CP 215 (7/18/13RP 45). At 4:57 p.m., he took Ms. Pearson to Harborview Medical Center to have her blood drawn. CP 206 (7/18/13RP 36). He arrived at 5:26 p.m., where Ms. Pearson's blood was drawn without her consent. CP 211-12 (7/18/13RP 41-42).<sup>7</sup>

---

<sup>6</sup> In contrast to smoking, when marijuana is orally consumed, such as through baked goods, it takes longer to reach peak THC levels because the marijuana enters a person's stomach. See CP 195-96, 198 (7/18/13RP 25-26, 28).

<sup>7</sup> There was no testimony about when the blood was actually drawn. A declaration in the record, however, indicates that the blood was drawn around 5:50 p.m. CP 35. It is unclear from the record whether this declaration was before the trial court when it made its ruling on the motion to suppress.

Officer Eric Michl, a Seattle police officer on the driving under the influence squad, testified about his experience in obtaining search warrants. CP 219-227 (7/18/13RP 49-57). He testified that in 2012, there was an e-mail process that “worked pretty well” in driving under the influence investigations. CP 221-22 (7/18/13RP 51-52). On average, it took about 60 to 90 minutes to obtain a warrant. CP 224 (7/18/13RP 54). CP 224 (7/18/13RP 54). Officer Michl also recounted that he had obtained warrants by going to court. CP 224 (7/18/13RP 54). Officer Michl testified that he could also use a telephone to obtain a warrant. CP 227 (7/18/13RP 57). He testified that officers generally used Seattle Municipal Court judges to get warrants and that until recently, some of these judges provided personal phone numbers that could be used to contact them directly. CP 225 (7/18/13RP 55). He had gotten warrants from both district court and superior court judges. CP 225-26 (7/18/13RP 55-56).

After hearing argument from the parties, the court reserved its ruling, expressing a desire to reread McNeely. CP 233-34 (7/18/13RP 63-64). The court later concluded that exigent circumstances justified the blood draw. CP 242, 245 (RP 6, 9). Ms. Pearson moved for reconsideration. CP 241 (RP 5). The court denied her motion, adhering to its ruling. CP 244 (RP 8).

In its one page affirmance, the superior court held that “the trial court did not abuse its discretion in determining that exigent circumstances existed to justify the warrantless blood draw.” CP 761.

Contrary to the superior court’s ruling, which applied an abuse of discretion standard, whether exigent circumstances exist is a legal question reviewed de novo. Hinshaw, 149 Wn. App. at 752. Applying this standard, the trial court erred in finding that the State met its burden to prove exigent circumstances.

Despite the option of getting a warrant through e-mail or over the phone, the police did not try.<sup>8</sup> The testimony established that an officer could get a warrant via e-mail in about 60 to 90 minutes. An officer could also use the phone to get a warrant. There were many officers at the scene. CP 215 (7/18/13RP 45). It was the middle of the afternoon. The courts were open. Further, it took Officer Jongma about half an hour to travel to the hospital. CP 206, 211 (7/18/13RP 36, 41). Additional time was expended waiting for a nurse to draw Ms. Pearson’s blood. Given these facts, any delay caused by securing a warrant first would have been minimal. The City failed to prove that waiting to get a warrant would

---

<sup>8</sup> This was consistent with the police practice at the time. Officer Michl admitted that prior to the United States Supreme Court’s decision in McNeely, his Department did not obtain search warrants for blood samples of people under arrest for vehicular assault or vehicular homicide. CP 220 (7/18/13RP 50).

have significantly undermined the efficacy of the search. McNeely, 133 S. Ct. at 1561-63.

Moreover, the City's evidence was based on generalizations about how long it took to get a warrant and how fast THC might possibly dissipate in one's blood. The police did not actually try to get a warrant. Absent some evidence of an effort on the police, the City failed to meet its burden to prove that the THC in Pearson's blood would have dissipated significantly before a warrant could be obtained. See Hinshaw, 149 Wn. App. at 747 (State failed to meet its burden to prove exigent circumstances when it failed prove that a warrant could not be obtained before alcohol in the defendant's blood dissipated).

The Nevada Supreme Court's opinion in Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939 (2014) supports this conclusion. There, the defendant was pulled over for speeding. Byars, 336 P.3d at 942. The defendant admitted to police that he smoked marijuana about five hours earlier. Byars, 336 P.3d at 942. Police took him to the hospital and had his blood drawn without a warrant. Byars, 336 P.3d at 942. The Nevada Supreme Court concluded that "the natural dissipation of THC from the blood does not create a per se exigency" and that the totality of the circumstances did not justify the warrantless blood draw. Byars, 336 P.3d at 944. The court reasoned that the State failed to show that waiting for a

warrant would result in losing evidence of the defendant's intoxication. Byars, 336 P.3d at 944. The court noted that the officer waited about 30 minutes before driving the defendant to a hospital for the blood draw, which was a lengthy process. Byars, 336 P.3d at 944.

The circumstances were substantially the same here. As in Byars, the government failed to meet its burden to prove exigent circumstances.

**c. The error is not harmless beyond a reasonable doubt.**

Error in admitting evidence obtained through an unconstitutional search is subject to the constitutional harmless error test. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Constitutional error is presumed to be prejudicial and the government bears the burden of proving that the error was harmless beyond a reasonable doubt. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The test results were a major focus of the trial and the prosecutor relied on the results in closing. The City cannot meet its burden.

**2. The superior court erred in affirming the denial of the defendant's motion to suppress blood evidence because the blood was analyzed without a warrant.**

**a. Subjecting a person's extracted blood to analysis is a search requiring a warrant.**

Regardless of whether exigent circumstances existed to justify the warrantless blood draw, the evidence still should have been suppressed

because the City failed to get a warrant authorizing the analysis of Ms. Pearson's blood.<sup>9</sup> As this Court recently held, this is a distinct search that requires a warrant:

The extraction of blood from a drunk driving suspect is a search. Testing the blood sample is a second search. It is distinct from the initial extraction because its purpose is to examine the personal information blood contains. We hold that the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested.

State v. Martines, 182 Wn. App. 519, 522, 331 P.3d 105 (2014), review granted, 339 P.3d 634.<sup>10</sup>

Martines involved a warrant that authorized the extraction of blood, but did not authorize the testing of the blood for the presence of drugs or alcohol. Martines, 182 Wn. App. at 522. This Court held that the failure of the warrant to authorize testing meant that the later testing of the extracted blood was a warrantless search. Martines, 182 Wn. App. at 522-23.

---

<sup>9</sup> As the commissioner recognized, this issue may be raised for the first time on appeal under RAP 2.5(a). Martines, 182 Wn. App. at 532; App. A. That this issue was not raised in the superior court on appeal is also not a bar. City of Bellevue v. Acrey, 37 Wn. App. 57, 63-64, 678 P.2d 1289 (1984) (rejecting argument that failure to raise constitutional issues in appeal in superior court waived issues), reversed on other grounds, 103 Wn.2d 203, 691 P.2d 957.

<sup>10</sup> Our Supreme Court is set to hear oral argument in Martines on May 7, 2015.

This Court's decision was premised in part on Skinner v Ry. Labor Exec's Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) and Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000). In Skinner, the United State Supreme Court recognized that collection and testing of bodily fluids are "searches" under the Fourth Amendment. Skinner, 489 U.S. at 618. The Court recognized that two distinct searches occurred:

[I]t 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, 489 U.S. at 616. This Court recognized the same in Robinson:

The invasion in fact is twofold: first, the taking of the [urine] 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.

Robinson, 102 Wn. App. at 822 n.105. Applying this precedent, this Court in Martines properly recognized that the testing of blood is a second intrusion that must be authorized by a warrant or an exception to the warrant requirement.

Nevertheless, the City may argue that Ms. Pearson had no legitimate privacy interest in the contents of her extracted blood because it

was exposed upon its withdrawal. This Court correctly rejected this sort of argument. See Martines, 182 Wn. App. at 530. Ms. Pearson did not knowingly expose her privacy interest in her blood's hidden physiological data. Cf. State v. Carter, 151 Wn.2d 118, 126-27, 85 P.3d 887 (2004) (by placing gun in view of public and inviting others to handle it, defendant did not have privacy interest in interior mechanism of gun). Thus, Ms. Pearson did not lose this legitimate privacy interest. See State v. Boland, 115 Wn.2d 571, 573, 800 P.2d 1112 (1990) (contents of closed trash container left outside home on curb is a private affair).

**b. No exigency justified the warrantless analysis of Ms. Pearson's blood.**

This case is different from Martines in that there was no warrant at all. But the absence of a warrant does not support admission of the evidence. See Tibbles, 169 Wn.2d at 368 (“We begin with the presumption that warrantless searches are per se unreasonable under our state constitution.”). Thus, this difference favors suppression, not admission. Even if the City's extraction of Ms. Pearson's blood was justified under an exception to the warrant requirement, this does not mean that the warrantless testing of the extracted blood was justified by that exception. Restated, if the City was justified in drawing Ms. Pearson's blood due to an exigency, that exigency did not justify the warrantless

testing of Ms. Pearson's blood. "The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant." State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). While the presence of THC in Ms. Pearson's blood dissipated while it was in her body, the THC did not dissipate after extraction. Thus, the City had plenty of time to obtain a warrant.

The focus under article 1, section 7 is "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). This Court correctly recognized that the personal information in a person's blood is hidden and very sensitive. Martines, 182 Wn. App. at 530. "Citizens of this state have traditionally held, and should be entitled to hold, this kind of information safe from governmental trespass." Martines, 182 Wn. App. at 530. Because the government conducted a warrantless search of Ms. Pearson's blood, the evidence was inadmissible and should have been suppressed. Martines, 182 Wn. App. at 523.

**c. The error is not harmless beyond a reasonable doubt.**

For same reasons as argued earlier, the erroneous admission of the blood test results is prejudicial error requiring reversal.

**3. The superior court erred in affirming the municipal court's refusal to instruct the jury that it is not unlawful for a person to consume drugs and drive.**

“[O]ne can legally drink and drive . . . .” State v. Franco, 96 Wn.2d 816, 825, 639 P.2d 1320 (1982) (citing State v. Hansen, 15 Wn. App. 95, 546 P.2d 1242 (1976)). Under the “affected” prong of the driving under the influence statute, RCW 46.61.502, the State must prove that the defendant was “‘affected in some appreciable degree’ by the use of alcohol or drugs or their combination.” Franco, 96 Wn.2d at 835 (citing State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940)); Hansen, 15 Wn. App. at 95). Accordingly, a pattern instruction for driving under the influence cases provides that it is not unlawful to consume alcohol or drugs and drive:

[It is not unlawful for a person to consume *[intoxicating liquor]* *[or]* *[drugs]* and drive a motor vehicle. The law recognizes that a person may have consumed *[intoxicating liquor]* *[or]* *[drugs]* and yet not be under the influence of it.]”

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 92.10 (3d Ed). The comment in WPIC 92.10 cites to Franco, Hansen, and Hurd.

Ms. Pearson’s theory of the case was that while she had consumed marijuana, she was not under the influence of it and that it had not appreciably lessened her ability to drive. Thus, consistent with the law

and the pattern instruction, Ms. Pearson requested the following instruction:

It is not unlawful for a person to consume a drug and drive. The law recognizes that a person may have consumed a drug and yet not be under the influence of it. It is not enough to prove merely that a driver had consumed a drug.

CP 39. Ms. Pearson cited Franco, Hansen, and Hurd in support. CP 39.

The municipal court rejected the instruction as a misstatement of the law. CP 193 (RP 429). In discussing the instruction with defense counsel, Mr. Arganian, the court narrowly read the caselaw to apply to alcohol only:

THE COURT: Now, Mr. Arganian, the big issue here is whether State v. Hurd and those cases can be modified to include drugs rather than alcohol.

...

THE COURT: But that's not what State v. Hurd and Franco states.

MR. ARGANIAN: They talk about alcohol.

THE COURT: Yeah, they talk about alcohol, and we can't even just take that alcohol out and stick in the word "drug."

MR. ARGANIAN: Oh, I think we can.

THE COURT: No, no.

...

THE COURT: No. We would be changing Hansen, Hurd and Franco if we do that.

MR. ARGANIAN: Well, we – they’re appropriate by analogy, Your Honor. There haven't been too many drug cases that have gone up on appeal, but the same principle applies.

THE COURT: No, it doesn't.

CP 660-61 (RP 424-25). Counsel and the court discussed the issue further. CP 661-68 (RP 425-32). Defense counsel maintained the instruction was accurate and that it went to the heart of his defense:

MR. ARGANIAN: . . . the point is this, you consume something, they can't just say, "Oh, you consumed this, you're guilty." They've got to prove you're under the influence of it and that's what I'm trying to get across. We all agree that --

THE COURT: That is true.

MR. ARGANIAN: -- you agreed that it was a true statement.

THE COURT: We do not -- we do not disagree with what the ultimate outcome is.

MR. ARGANIAN: Right. We agree. I think the jury should just be told that that's got the imprint of the law behind it, because that's the heart of my case, Your Honor. That's the whole theme of what I am arguing here: "Yes, we consumed something. No, we are not under the influence of it."

CP 662-63 (RP 426-27). Nevertheless, the court refused to give the instruction because Franco, Hansen, and Hurd involved alcohol and not drugs. CP 665 (RP 429) ("I think that would be a misstatement on the law

if we included - - changed that word from ‘liquor’ to ‘drug.’”), 668 (RP 432).

A defendant is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). A trial court’s refusal to give an instruction based upon a ruling of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, the trial court plainly made an error of law in refusing to give the instruction. While the cited caselaw involved alcohol and not drugs, there is no valid reason for excluding drugs, as the pattern instruction recognizes. Ms. Pearson’s proposed instruction was not a misstatement of the law.

The error was prejudicial. An instructional error is harmless only if it is trivial, formal, or merely academic and did not affect the outcome. State v. Woods, 138 Wn. App. 191, 202, 156 P.3d 309 (2007). Here, the instruction went to the heart of Ms. Pearson’s defense. It clarified that, absent additional evidence, merely consuming drugs and driving is inadequate to prove driving under the influence. This Court should reverse.

**4. The superior court erred in affirming the decision that admitted evidence of a per se THC blood limit of 5 nanograms, when this law was not applicable to the case.**

Ms. Pearson was charged with driving under the influence on February 3, 2012. CP 37. Thus, the applicable law was the law in effect on that date. Ms. Pearson was tried on the charge before a jury in mid-2013. By that time, Washington voters had passed initiative measure 502 (I-502), legalizing possession of small amounts of marijuana. I-502 also established a per se THC level, making it crime for a person to drive with a blood THC concentration level of 5 nanograms. RCW 46.61.502(1)(b).

Defense counsel elicited testimony from a witness that there was no per se THC level in February 2012. CP 539 (RP 303). He did not elicit what the current limit was. Based on this testimony, the court ruled that Ms. Pearson had “opened the door” for the City to explore the issue. CP 541-42 (RP 305-06). Per the court’s ruling and over Ms. Pearson’s objection, the City elicited from a toxicologist that the current level was 5 nanograms:

Q. Do we currently have a limit on marijuana under the law?

A. Yes. There is now currently a per se level with THC.

Q. What's that limit now?

MR. ARGANIAN: Your Honor, I'm going to object as to --

THE COURT: Overruled.

MR. ARGANIAN: -- the amount –

THE WITNESS: 5 nanograms per milliliter.

Q. (By Ms. Sala) So that 5 nanograms -- the defense was talking about the per se limit for alcohol [sic], at 5 nanograms would be similar to the per se limit in alcohol.

A. From a legal standpoint, yes.

CP 585-86 (RP 349-50). During closing, the State emphasized that Ms. Pearson's THC blood level was 20 nanograms. CP 593 (RP 457).

The court erred in overruling Ms. Pearson's objection. Informing the jury that the law has established a limit is different from telling the jury what that limit is. The purpose of eliciting the former was to clarify for the jury that it must apply the law in effect at the time of the alleged offense. This made the evidence relevant. The jurors likely participated as citizen legislators in the vote on I-502 during the previous November. As such, they might have recalled that the law imposed a per se limit and wondered why that was not an issue at trial. The testimony clarified that I-502 was not in effect in February 2012 and was inapplicable.

In contrast, telling the jury the numerical per se limit invited the jury to speculate that the number of 5 nanograms was based on some scientific consensus. The jury would then inevitably conclude that Ms. Pearson must have been impaired based on her test result of 20

nanograms. The error also invited the jury to apply a law that was not in effect when the crime was alleged, violating constitutional prohibitions against ex post facto laws. See State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985). Thus, this evidence was irrelevant and unfairly prejudicial. ER 401, 403.

Ms. Pearson did not “open the door” to this evidence. “Where the defendant ‘opened the door’ to a particular subject, the State may pursue the subject to clarify a false impression.” State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). Here, eliciting testimony that it is now unlawful to drive with a certain blood THC level was not a “half-truth.” See Fisher, 165 Wn.2d at 750. The testimony did not leave the jury with a false impression. It did not imply that Ms. Pearson’s blood THC level was below any limit. Telling the jury that the limit was 5 nanograms did not rebut anything and was irrelevant. See Fisher, 165 Wn.2d at 736-37, 749-50 (in child molestation prosecution, defendant did not open the door to evidence that he physically abused his own children when he testified he had a good relationship with his family; evidence irrelevant). Instead, it invited the jury to speculate and convict Ms. Pearson based on an inapplicable law.

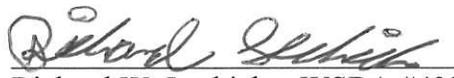
The admission of this evidence was prejudicial and not harmless. While the prosecutor did not explicitly mention the current per se limit during closing, the prosecutor emphasized that Ms. Pearson's blood THC level was 20 nanograms. CP 693, 712, 715-16 (RP 457, 476, 479-80). This alluded to the per se level of 5 nanograms. The prosecutor's argument implicitly invited the jury to find that Ms. Pearson's driving had been affected based on a law that was not in effect. This Court should reverse.

#### **F. CONCLUSION**

Exigent circumstances did not justify the warrantless extraction of Ms. Pearson's blood. Additionally, the warrantless testing of the extracted blood violated article 1, section 7. The test results should have been suppressed. The trial court also committed two separate prejudicial errors at trial. For these reasons, this Court should reverse the conviction for driving under the influence.

DATED this 26th day of March, 2015.

Respectfully submitted,

  
Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant

# Appendix A

---

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

CITY OF SEATTLE,	)	
	)	No. 72230-1-I
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	GRANTING DISCRETIONARY
TAMISHA PEARSON,	)	REVIEW
	)	
Petitioner.	)	
_____	)	

In this matter Tamisha Pearson seeks discretionary review of the superior court decision on RALJ appeal affirming her conviction for driving under the influence of marijuana. Review is granted to address whether the superior court erred in affirming the denial of Pearson's motion to suppress.

The essential facts appear to be undisputed. Tamisha Pearson is authorized to use marijuana to relieve pain and symptoms related to lupus, fibromyalgia, and intractable pain. On February 3, 2012, around 3:23 p.m. Pearson was driving when she hit a pedestrian who darted across the street. Pearson stopped her car and called 911. Multiple police officers arrived at the scene, including a drug recognition expert, Officer Michael Jongma, who arrived at 4:06 p.m. Pearson initially denied that she had consumed alcohol or drugs. Officer Jongma had Pearson perform several field sobriety tests and believed that her performance was consistent with someone who had been using drugs. When the officer again asked about drug use, Pearson admitted to smoking medical marijuana approximately six hours earlier.

At 4:57 p.m., Officer Jongma arrested Pearson for driving under the influence and left the scene to drive her to Harborview Medical Center so that a blood sample could be taken. Pearson's blood was drawn after she arrived at the hospital at 5:36 p.m. Officer Jongma did not seek a warrant for either the blood draw or the blood test. Later, toxicologists analyzed Pearson's blood and found a THC concentration level of 20 nanograms. Next, Officer Jongma drove Pearson to a police precinct where she agreed to participate in a Drug Recognition Evaluation (DRE). After conducting the DRE, Officer Jongma concluded that Pearson was impaired.

Pearson was charged with driving under the influence in municipal court. She moved to suppress the blood evidence, and the court initially granted the motion. However, the court granted the State's motion for reconsideration, determining exigent circumstances justified the search. The court denied Pearson's motion to reconsider. At trial, over Pearson's objection, the court permitted the state to elicit that the current per se limit of THC is 5 nanograms. The court denied Pearson's request to instruct the jury that a person can take a drug, drive, and not be guilty of driving under the influence. A jury found Pearson guilty of DUI.

Pearson appealed the conviction to the superior court under RALJ.<sup>1</sup> On June 20, 2014 the superior court affirmed the district court's ruling of guilt, finding that 1) the trial court did not abuse its discretion<sup>2</sup> by determining that exigent circumstances existed to justify the warrantless blood draw, 2) the trial court did not abuse its discretion by admitting evidence regarding the current THC limit, 3) the trial court did not abuse its

---

<sup>1</sup> Rules for Appeal of Decisions of Courts of Limited Jurisdiction.

<sup>2</sup> Contrary to the superior court's ruling, questions of law are reviewed de novo. State v. Hinshaw, 149 Wn. App. 747, 752, 205 P.3d 178 (2009).

discretion by admitting Officer Jongma's testimony that Pearson was impaired, and 4) the trial court did not abuse its discretion by refusing Pearson's proposed instruction.

This court will accept discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction only:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

In her motion for discretionary review, Pearson first argues that the superior court erred in affirming the denial of the motion to suppress blood evidence because the blood was drawn without a warrant or exigent circumstances. Pearson argues that the dissipation of marijuana in her blood is not a sufficient exigency to justify a warrantless search. In McNeely, the court held that the natural dissipation of alcohol in a person's bloodstream does not present a per se exigency. Missouri v. McNeely, 133 S.Ct. 1552, 1563, 185 L. Ed. 2d 696 (2013). An exigency must be based on the totality of the circumstances. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). Pearson argues that the risk of the evidence of marijuana dissipating in her blood was not an exigency because the officers could have obtained a warrant quickly. She notes that despite there being eight officers on the scene, approximately an hour and thirty minutes passed from the time the officers arrived on the scene until Pearson's blood

No. 72230-1-I/4

draw at the hospital. Pearson asserts that the officers likely could have obtained a warrant by phone or by email during this time.

Pearson argues that review is warranted under RAP 2.3(d)(1), RAP 2.3(d)(2), and RAP 2.3(d)(3). Here, the court's decision that the warrantless blood draw was a reasonable search under the 4<sup>th</sup> amendment is not in direct conflict with McNeely, which involved a warrantless breath test for alcohol. But the issue of whether evidence of marijuana dissipating in the blood is an exigency that justifies a warrantless search raises a significant constitutional question and an issue of public interest. RAP 2.3(d)(2). Therefore, review of the issue of whether superior court erred in affirming the denial of the defendant's motion to suppress blood evidence is granted.

Second, Pearson argues that the superior court erred in affirming the denial of her motion to suppress because her blood was analyzed without a warrant. Pearson argues that even if an exigency existed for the warrantless blood draw, the exigency ended because dissipation was no longer possible. This court recently held that testing a blood sample is a distinct search that requires a warrant.

Consistent with *Skinner* and *Robinson*, we conclude the testing of blood intrudes upon a privacy interest that is distinct from the privacy interests in bodily integrity and personal security that are invaded by a physical penetration of the skin. It follows that the testing of the blood is itself a search, and we so hold.

State v. Martines, 182 Wn. App. 519, 331 P.3d 105, 107 (2014).

Here, officers did not obtain a warrant to test Pearson's blood. While this constitutional issue was not raised in superior court, it may be raised for the first time on appeal. RAP 2.5(a), Martines, 331 P.3d at 108. The issue of whether the warrantless blood test for marijuana was reasonable under the 4<sup>th</sup> Amendment is a significant question of

No. 72230-1-I/5

constitutional law and involves an issue of public interest that warrants review by an appellate court. RAP 2.3(d)(2), RAP 2.3(d)(3). Review on this issue is granted.

Additionally, Pearson argues the superior court erred in affirming the denial of her proposed instruction telling the jury that it is not unlawful for a person to consume drugs and drive and erred in affirming the decision that admitted evidence of a per se THC blood limit of 5 nanograms. Pearson has not demonstrated a basis to grant review under RAP 2.3(d). However, the parties may brief these issues. The panel that considers the appeal on the merits will determine whether to address them.

Therefore, it is

ORDERED that discretionary review of the superior court's affirmation of the denial of the defendant's motion to suppress blood evidence is granted. The clerk shall issue a perfection schedule.

Done this 9<sup>th</sup> day of December, 2014.

*Mary S. Neel*

\_\_\_\_\_  
Court Commissioner

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2014 DEC -9 PM 2:05

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

---

CITY OF SEATTLE,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 72230-1-I
	)	
TAMESHA PEARSON,	)	
	)	
PETITIONER.	)	

---

**DECLARATION OF SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	RICHARD GREENE ATTORNEY AT LAW PO BOX 94667 SEATTLE, WA 98124-4667	<input checked="" type="checkbox"/>	U.S. MAIL
		<input type="checkbox"/>	HAND DELIVERY
		<input type="checkbox"/>	_____
<input checked="" type="checkbox"/>	TAMISHA PEARSON 20402 106 <sup>TH</sup> AVE SE C-102 KENT, WA 98031	<input checked="" type="checkbox"/>	U.S. MAIL
		<input type="checkbox"/>	HAND DELIVERY
		<input type="checkbox"/>	_____

**SIGNED** IN SEATTLE, WASHINGTON, THIS 26<sup>TH</sup> DAY OF MARCH, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710