696603-7

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No. 69663-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSE MARTINES,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. REPLY ARGUMENT

THE RESPONDENT CONCEDES THAT THE SEARCH WARRANT DID NOT AUTHORIZE BLOOD TESTING, AND ALSO CONCEDES THAT THERE WAS NO PROBABLE CAUSE FOR ANY DRUG TESTING OF MR. MARTINES' BLOOD.

a. The State therefore rests its response on the contention that post-collection testing of blood is not a "search" under the Fourth Amendment, or the State Constitution. First, the Respondent concedes (1) that the search warrant in this case did not authorize any blood testing. The State argues that in lieu of a grant of warrant authority, warrants for the taking of blood from a person should be automatically implied to authorize any desired forensic testing of collected blood samples, for any thing, substance, condition, or anything else that can be detected by blood test technology. The State essentially asserts that no warrant authority is required in the first place. See Brief of Respondent, at p. 1 (asserting that "although the warrant did not specifically authorize forensic examination of the blood . . . [n]o Washington case requires judicial authorization"); at p. 8 (asserting that "no such search warrant is required").

Next, the State also concedes (2) that there was no probable cause for the testing that occurred of Mr. Martines' blood for the

presence of drugs. See Brief of Respondent, at pp. 4-6 (noting facts as establishing probable cause and warrant application for alcohol). The State's reliance is placed squarely on its assertion that no probable cause is required, similar to its assertion that no authority of law warrant is even required. See Brief of Respondent, at p. 10 (asserting that "no such specific probable cause" or warrant authorization was necessary to test blood for any other thing, in addition to alcohol).

b. The State's "no privacy, no search" argument. The State therefore rests its defense of the inadequate warrant documentation below on the contention that the testing of blood is not a "search" under the Fourth Amendment, no or under the State Constitution, Article 1, section 7. The State relies for this proposition on a comparison to cases which involve examination of physical evidence in police custody.

Thus, for example, the State argues that testing a blood sample without probable cause or warrant authorization is simply akin to a detective looking at a suspect's seized shoes to see if their soles are similar to shoeprints found on the ground, or akin to testing the DNA identity of saliva abandoned on a mailed envelope, looking at the files on a seized computer, or translating or reading

seized documents. See Brief of Respondent, at pp. 11-18 (citing cases).

The State's argument is that warrantless testing of seized blood for any matter is like the aforementioned examinations, as they are all merely the act of looking at or assessing the quantity of "evidentiary value" that is carried by certain items in evidence, a procedure which requires no specific authority of law or quantum of cause. See Brief of Respondent, at pp. 13, 17.

c. The State's assertions fail based on established federal and state case law. The cases and authorities cited in the Appellant's Opening Brief indicate that the State's argument is untenable, and these cases support the rule that a search occurred.[1]

(i) Fourth Amendment. The application of the Fourth Amendment depends upon whether the person invoking its

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[1] The testing of biological samples such as blood from an individual constitute a search for purposes of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed. 2d 205 (2001); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993); State v. Dunivin, 65 Wn. App. 501, 507, 828 P.2d 1150 (1992). Such actions also implicate the privacy interests protected by Article I, section 7 of the Washington Constitution. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991). Under both the federal and state constitutions, the collection and subsequent analysis of biological evidence from a person is not a single search, but rather, are two separate invasions of privacy. Robinson v. Seattle, 102 Wn. App. 795, 822 n.105, 10 P.3d 452 (2000); see Skinner, 489 U.S. at 617.

protection can claim a legitimate, objectively justifiable expectation of privacy that has been invaded by the State. Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); U.S. Const. amend. 4. Because the analysis of biological samples, such as blood, urine, or other bodily fluids, can reveal "physiological data" and a "host of private medical facts," such analyses may intrude "upon expectations of privacy that society has long recognized as reasonable." Skinner, 489 U.S. at 616–17. Therefore, such analyses often qualify as a search under the Fourth Amendment. See Skinner, at 618. Similarly, an analysis required to obtain a DNA profile, like the chemical analysis of blood for drugs at issue here in Mr. Martines' case, generally qualifies as a search, because an individual retains a legitimate expectation of privacy in the information contained in the blood. See, e.g., United States v. Mitchell, 652 F.3d 387, 407 (3d Cir.2011) (en banc) (after discussing the Fourth Amendment search that occurs when a DNA sample is collected directly from a person's body, discussing separately "[t]he second 'search' at issue," which was, "of course, the processing of the DNA sample and creation of the DNA profile for CODIS").

(ii) Washington Constitution. Under Article 1, it is guaranteed that "[n]o person shall be disturbed in his private affairs . . . without authority of law." Wash. Const. art. 1 sec. 7. If no search occurs, then article I, section 7 is not implicated. State v. Cheatam, 150 Wn.2d 626, 642, 81 P.3d 830 (2003) (citing State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). Whether a search has occurred depends upon " 'whether the State has unreasonably intruded into a person's "private affairs." ' " Cheatam, at 642 (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). The inquiry is broader under the state constitution than under the Fourth Amendment. Cheatam, at 642. Here, intrusion into a person's "private affairs" occurs when testing of blood for any matters at the State's discretion, without a probable cause warrant, is conducted, as occurred in Mr. Martines' case.

Notably, the State's cited case of State v. Gregory, 158 Wn.2d 759, 820-29, 147 P.3d 1201 (2006), is not to the contrary. There, the State had validly and lawfully obtained blood specifically for a DNA comparison blood draw, including under the previous doctrine of inevitable discovery. Gregory, 158 Wn.2d at 822. Gregory asserted that he had an ongoing privacy interest in the characteristics of his DNA such that the State was required to

obtain a warrant to compare that profile with material collected in connection with a different, unrelated crime. Gregory, at 825.

> Gregory's blood was drawn for the very purpose of conducting DNA analyses and the resulting DNA profile was lawfully in the possession of police, regardless of which [crime] that DNA profile was being compared against[.]

Gregory, 158 Wn.2d at 827. Thus the Gregory Court reasonably relied on a case like State v. Cheatam, 150 Wn.2d 626, 638, 81 P.3d 830 (2003) (comparing Cheatam's tennis shoes taken from a jail property bag with shoeprints, in connection with investigation of an unrelated crime, holding the comparison does not violate the constitution as no privacy is invaded). But see United States v. Weikert, 504 F.3d 1, 16 (1st Cir.2007) (suggesting that "it may be time to reexamine the proposition that an individual no longer has any expectation of privacy in information seized by the government [that she in fact] retains an expectation of privacy in the future uses of her DNA profile"). The suppression issue facts and legal questions in Gregory are completely different from those in Mr. Martines' case, since the State in that case obtained the DNA by authority of a probable cause warrant authorizing such testing.

The present case of course does not involve any probable cause warrant authorization for testing for drugs. The Respondent

therefore inappositely cites United States v. Snyder, 852 F.2d 471 (9th Cir. 1998), wherein the pertinent facts were also entirely different. Snyder, 852 F.2d at 474 ("so long as blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes").

In Mr. Martines' case, blood was drawn pursuant to a warrant, in execution of a search. See generally Missouri v. McNeely, 133 S.Ct. 1552, 185 L.Ed.2d 696, ___ U.S. ___ (2013). The testing of Mr. Martines' blood for drugs was another search, under the Fourth Amendment and the State Constitution. Robinson v. Seattle, 102 Wn. App. 795, 810-13, 822 n.105, 10 P.3d 452 (2000) (testing of bodily fluids is a search under Article 1, section 7, including based on pre-existing state law protecting the freedom to oppose blood tests including most HIV testing without consent).

As the State now concedes, Trooper Tardiff's search warrant affidavit fails to set forth facts establishing probable cause that Mr. Martines was driving under the influence of drugs, and the search warrant fails to grant authority of law for a search for drugs in Mr. Martines' blood. Further, the trial court below erred in concluding

that the existence of probable cause to test blood for alcohol somehow per se establishes probable cause to test for the presence of drugs. See 11/5/12RP at 54-55.

(iii) Suppression. Evidence obtained illegally must be suppressed. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); see also Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984); U.S. Const. amend. 4; Wash. Const. art. 1, § 7. The unauthorized blood testing for drugs in the present case required suppression of the drug test results, and Mr. Martines' conviction for DUI must be reversed.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Martines requests that this Court reverse the trial court's denial of his CrR 3.6 motion, and reverse his conviction.

Respectfully submitted this 18 day of September, 2013.

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **REPLY 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:

[X] ERIN BECKER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF SEPTEMBER, 2013.

X_____

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