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No. 71613-1-I

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

King County No. 12-1-01971-8 KNT

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ERIC ARMSTRONG,

Appellant.

APPELLANT'S OPENING BRIEF

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A. Assignments of Error

1. Where the State did not obtain a warrant in the first instance authorizing the seizure of the Defendant's blood following a fatal motor vehicle accident, the State was nevertheless required to obtain a search warrant authorizing the testing of Defendant's blood prior to having it tested and the BAC results must therefore be suppressed under the Fourth Amendment of the United States Constitution and Art. 1, section 7 of the Washington State Constitution.

2. The trial court erred in entering its Order on Defendant's CrR 3.6 Motion, which held that exigent circumstances excused the deputy's failure to obtain a warrant prior to having Defendant's blood drawn, which ruling denied Defendant's CrR 3.6 Motion to Suppress the Seizure of Defendant's Blood, thereby violating the Fourth Amendment of the United States Constitution and Art. 1, section 7 of the Washington State Constitution.[1]

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[1] The Court's Order on Defendant's CrR 3.6 Motion to Suppress Blood Draw for Failure to Obtain a Warrant, entered on August 21, 2013, (CP 23), is attached hereto as Appendix A.

3. There was no substantial evidence to support the following Findings of Fact that are contained in the Court's Order on Defendant's CrR 3.6 Motion (*see* Note 1, *supra* and Appendix A hereto):

3A. Finding of Fact 21.

3B. Finding of Fact 22.

3C. Finding of Fact 23.

4. It was error to enhance Defendant's sentence on the basis of a prior DUI that resulted in a deferred adjudication.

B. <u>Issues Pertaining to Assignments of Error</u>

1. Where the Defendant's blood was drawn at the scene of the accident without being authorized by a judicial warrant and where there were no exigencies requiring that the blood be tested immediately and where in fact the blood was not tested until eight days after it was drawn, was it a violation of the Fourth Amendment of the United States Constitution and Art. 1, sec. 7 of the Washington State Constitution to test the Defendant's blood without a judicial warrant? (Assignment of Error 1.)

2. Where the deputy did not obtain a warrant to draw the Defendant's blood following a fatal automobile crash, did exigent circumstances exist to justify that failure? (Assignment of Error 2.)

3. Where the deputy did not obtain a warrant for Defendant's blood following a fatal automobile crash, and where it was clear from the record that the deputy was negligent in not attempting to obtain a judicial warrant either due to his lack of experience or his failure to understand the procedures, can this create exigent circumstances? (Assignment of Error 2.)

4. Where the Defendant was going to be transferred from the scene to a nearby hospital by aid car which was a 10 minute drive at some point in the future and the deputy could have traveled there and used the hospital's phones or fax to contact an on-call judge to obtain a warrant to draw blood, as the deputy believed was necessary, and where the Defendant walked into the aid car under his own power and then was talking to paramedics while sitting upright on a bench in the aid car when the deputy first encountered him, which would indicate that he was either uninjured or any injuries were minor, and where the deputy stated that he had no reason to believe that the Defendant would be put on an IV at the hospital, could the court still rely upon exigent circumstances to justify the seizure of blood at the scene without a warrant? (Assignment of Error 2.)

5. Whether there was substantial evidence to support Findings of Fact 21, 22 and 23.[2] (Assignments of Error 3 A-C.)

6. By enhancing the Defendant's sentence based on a prior DUI deferred adjudication without alleging this as an enhancement in the Information as required by the Sixth and Fourteenth Amendments of the United States Constitution, and Art. 1, sec. 3 of the Washington State Constitution, did this violate the rule laid down by *Blakely v. Washington*? (Assignment of Error 4.)

7. Did the Court violate Washington state law by enhancing the Defendant's sentence based on a prior DUI deferred adjudication in that a deferred adjudication is not a conviction? (Assignment of Error 4.)

II. PROCEDURAL BACKGROUND

Defendant Michael E. Armstrong was charged in King County Superior Court on April 4, 2012 in a two-count Information. Count I charged Vehicular Homicide pursuant to RCW 46.61.520(1)(a) with the victim being Mary Ross, Sr. (b. 1951).[3] Count II charged Vehicular Assault pursuant to RCW 45.61.522(1)(b) with the victim being Mary Ross, Jr. CP 1-10.

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[2] The Findings contained in the Order on Defendant's CrR 3.6 Motion to Suppress Blood will be designated as "FF (CrR 3.6)." *See* Appendix A, hereto.

[3] The victims in this case were Mary Ross (b. 1951) and her daughter, also named Mary Ross (b. 1986). In the interest of clarity, the mother will be designated as Mary Ross, Sr., and the daughter, Mary Ross, Jr.

Defendant Armstrong filed motions to suppress the blood draw on multiple grounds (CP 11-14). The Court denied said motions and issued written orders as to the respective motions. CP 15-19; 23-33; 51-61.

Defendant Armstrong waived his right to a jury trial and agreed to have this matter tried as a stipulated facts trial. CP 64-68. Following the trial, the trial court issued its Order on Stipulated Facts – Findings of Fact and Conclusions of Law on January 24, 2014, finding the Defendant guilty of the crimes charged in Count I and Count II. CP 69-74.

Defendant Armstrong was sentenced on February 28, 2014. The Judgment and Sentence imposed a standard range concurrent sentence on Counts I and II of 41 months and additionally imposed an enhancement of 48 months based upon a prior DUI conviction and a deferred adjudication for DUI to run consecutive to the 41 month sentence, and remanded the Defendant to custody. CP 79-86.

The Defendant timely filed his Notice of Appeal to this Court. CP 87-88.

III. FACTUAL BACKGROUND

On February 19, 2012, at approximately 12:30 a.m., a two-car collision occurred at the intersection of 212th Ave. SE & SE 400th Street in

the City of Enumclaw. RP 14.[4] King County Sheriff's Deputies and medical units were dispatched. *Id.*

Defendant Armstrong, who was driving a black pickup truck southbound on 212th Avenue SE, was accompanied by a woman friend. The other vehicle, a passenger car, was driven by Mary Ross, Jr. accompanied by her mother, Mary Ross, Sr. Order on Stipulated Facts – Findings of Fact and Conclusions of Law 1, 2, 3, 4.[5]

The Defendant's Chevrolet pickup truck traveled southbound through the stop sign and struck the passenger side of the Ross vehicle. Trial FF 7. The impact to the Ross vehicle resulted in fatal injuries to Mary Ross, Sr., and she was pronounced dead at the scene. Trial FF 8. The driver, Mary Ross, Jr., was injured and taken to Auburn General Hospital. Trial FF 9.

Deputy Stanton testified at the CrR 3.6 suppression hearing on August 13, 2013 that he had been a King County Sheriff's Deputy for eight years and had specialized training in DUI enforcement. RP 7. In 2009 he became a Drug Recognition Expert (DRE) and additional

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[4] RP refers to the Verbatim Report of Proceedings prepared and filed in this case by the Appellant and includes motions hearings on August 13, 2013; October 9, 2013; the stipulated bench trial from January 13, 2014; and the sentencing hearing. Another hearing occurred on July 11, 2013, but was only recently located and transcribed because of an error in the Clerk's records, but is not referenced as to issues raised in this appeal.

[5] Findings of Fact and Conclusions of Law from Defendant's stipulated facts trial will be hereinafter designated as "Trial FF." CP 69-74.

advanced training which would assist him to identify if someone is impaired by alcohol or certain drugs. RP 8.

On February 19, 2012 at 12:31 a.m. he was dispatched to the accident in this case. RP 17. He arrived on scene at 12:43 a.m. RP 18. At the time he arrived, there were two deputies present who had been assigned to the nearby Muckleshoot Reservation. RP 18-19; RP 24. There were also several fire aid units present. *Id.*

Deputy Stanton spoke with Deputy Pritchett, who had preceded him to the accident scene. RP 25. Deputy Stanton learned from Deputy Pritchett that a witness had seen a male crawling out of the driver seat of the truck. RP 25.

Deputy Stanton testified that he first saw Defendant Armstrong walking to the ambulance and then saw him sitting upright on a bench seat in the ambulance. RP 26, lines 18-22.[6] There was also a female present, who he assumed was the passenger in Defendant's vehicle, who was likewise sitting upright on a jump seat in the ambulance. RP 26. The deputy observed that Defendant Armstrong was crying. RP 27-28. He heard the EMTs ask Mr. Armstrong questions about his medical status which he answered, although Deputy Stanton did not remember his

[6] *See also* Trial FF 17.

answers. RP 28. The deputy testified that he smelled the odor of alcohol on Defendant's breath. *Id.* at 29.

It was the deputy's understanding that the EMTs were going to take Mr. Armstrong to a hospital, but he did not know which hospital nor did he have any idea what injuries Mr. Armstrong may have had. His interaction with Mr. Armstrong lasted only "a few minutes." RP 29. Deputy Stanton did not recall any conversations with the EMTs as to the nature of Defendant's injuries. RP 38.

Deputy Stanton advised "radio" that he had felt he had probable cause to believe the Defendant was under the influence and that a blood draw needed to be done because he assumed that Defendant would be taken to the hospital "fairly soon." *Id.* at 29.

Sergeant Jencks arrived on the scene at 1:01 a.m. and he and Deputy Stanton had a conversation about doing a blood draw. According to Deputy Stanton, Sergeant Jencks asked him to do the draw while the Medic Unit was still on the scene. RP 33.

At 1:09 a.m. Deputy Stanton learned that one of the occupants of the other vehicle had died and he decided that he would do a "Special Evidence" blood draw under the implied consent statute. RP 34-35. Previously, he had done Special Evidence warnings approximately 20 or

30 times. He had obtained a search warrant prior to doing a Special Evidence warning only one time previously. RP 35.

Deputy Stanton read Defendant Armstrong his constitutional rights using a "DUI arrest packet" and asked if he understood. Defendant Armstrong did not answer. RP 37. According to Deputy Stanton, Defendant Armstrong was awake and appeared to be alert. RP 40. Defendant Armstrong was then put on a backboard and a paramedic was instructed to draw Mr. Armstrong's blood. RP 41-43.

Deputy Stanton testified that if a suspect is taken to the hospital and needs medical care, there is typically a delay of 30-40 minutes on "average" before a blood draw can be drawn. RP 48; 56.

Deputy Stanton explained that his cell phone, which operates on the Sprint network, did not get reception for most of the area where they were. RP 56-57. However, the deputy had radio reception through his dispatcher and could have asked the dispatcher to call a judge and speak with the judge over the radio for the purpose of obtaining a warrant. RP 57.

According to the deputy, the blood draw was done under the Special Evidence rules and procedures and not under exigent

circumstances. RP 63-64.[7] The blood draw was done at 1:19 a.m. The Defendant remained on the scene for 10 or 15 minutes after the blood draw, which would have been until about 1:30 a.m. when he was then taken by ambulance to St. Elizabeth's Hospital in Enumclaw, which is approximately a 10 or 15 minute drive. RP 65.

Deputy Stanton was asked by the prosecutor whether he was "thinking at all in terms of exigent circumstances with respect to the blood draw?" The deputy's confusing answer demonstrated that he did not understand the procedure:

> Well, Special Evidence I believe in itself is a exigent circumstances. You're trying to get a purist, closest blood draw to the time that the person was last behind the wheel, if possible. So the fact that he was still on scene, the medic on scene, allowed me to get, to get the blood while he was still there. If he had left prior to me, prior to the medics, or the medics were not available, um, I would have had to go to the hospital with him.

RP 65.

The deputy said he believed that he was authorized under "Special Evidence and the implied consent to take blood under certain circumstances, whether it was voluntary or involuntary." RP 66. When Deputy Stanton was asked again on redirect by the prosecutor whether he was thinking at all in terms of exigent circumstances with regard to blood

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[7] The trial court, however, ruled that exigent circumstances justified the seizure of the Defendant's blood. Order, CP 23, 32 (Appendix A, hereto).

draw, he replied: "Special Evidence I believe in itself is an exigent circumstance." *Id.* at 65. Otherwise, he would have had to go to the hospital with the Defendant to do the blood draw. *Id.*

In response to a question by the trial judge, Deputy Stanton admitted that at the time of this incident he had no information that would have indicated that Mr. Armstrong was likely to get an IV when he arrived at the emergency room. RP 69. Mr. Armstrong was not free to leave the scene once the officer decided to do a blood draw. RP 70. The deputy had no reason to suspect that Mr. Armstrong was under the influence of anything other than alcohol. RP 71.

The deputy claimed that it would take an hour and a half to two hours to get a search warrant. RP 71. Based on a prior experience, he claims that a judge made him scan his written request to a PDF format and email it to him, the judge then printed it out and signed it and emailed it back to him and he then printed it out. This took place at the Covington Precinct. RP 72. He does not have a scanner in his car and he claims he did not get "very good reception."[8] On the prior warrant, he had to talk to other deputies who helped walk him through it and had to also contact another DRE that evening to assist. RP 73. He claims he has had more training since then on obtaining a warrant. RP 73.

The trial judge asked the deputy about available judges to contact at night and he replied that there was a list mailed out by a paralegal which he had on his computer in his patrol car. RP 74. However, none of the warrants he ever obtained, either before or after this, were done from his police car, but instead at a police precinct. RP 76.

Defendant's blood was first tested at the WSP Toxicology Lab on February 27, 2012, eight days after it was seized, and the testing revealed a blood alcohol concentration of .17 g/100mL. Trial FF 20.

IV. ARGUMENT

A. A Warrant to Test Defendant's Blood Was Required (Assignment of Error 1)

This Court recently decided *State v. Martines,* ____ Wn.App. ____, 331 P.3d 105 (2014).[9] In *Martines*, the defendant was arrested after he was involved in a multi-vehicle car accident and a WSP trooper believed that he was under the influence. Unlike the instant case, the trooper first obtained a search warrant to extract a blood sample from Mr. Martines. The sample was later tested and showed that Mr. Martines' BAC was .121 within an hour after the accident and that he also had Valium in his system. He was charged and convicted of felony DUI.

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[8] It is assumed he was referring to his cell phone in that he never complained about radio reception.

[9] Appellant will cite to the page numbers from the P.3d opinion since the Wn.App. page numbers are not yet available on WestLaw.

The primary issue raised in *Martines* was whether a search warrant permitting the testing of a blood sample was required, in that the warrant which authorized the extraction of blood did not authorize blood testing. Because the issue was constitutional in nature, this Court reviewed it pursuant to RAP 2.5(a), although it was raised for the first time on appeal.

This Court held that even where the State has probable cause to suspect that the driver was under the influence "[b]ecause the testing of blood is a search, a warrant is required." *Id.* at 111. This Court explained that a:

> particularized warrant for blood testing will prevent the State from rummaging among the various items of information obtained in the blood sample for evidence unrelated to drunk driving.

Id.

This Court also wrote that the initial warrant obtained by the trooper could easily have been written to authorize testing the blood for evidence of alcohol and intoxication "but it contained no such language." Instead, "[a]s written, the warrant did not authorize testing at all." *Id.* Therefore,

> The testing that occurred in the toxicology lab was a warrantless search.

Id.

The facts of the instant case are even more compelling than those in *Martines*. Unlike *Martines*, where there was a judicially issued search warrant to draw the blood in the first instance, here there were absolutely no warrants at all prior to the testing of the Defendant's blood.

In this case, the trial court relied on an exigency to uphold the extraction of blood without a warrant. Blood testing, however, did not occur until February 27, 2012, eight days after the blood was drawn at the scene of the accident. *See*: Trial FF 18, CP 72. There were obviously no exigencies during the eight days between the drawing of the blood and its testing that would justify the State's failure to obtain a warrant to test Defendant Armstrong's blood.

That being the case, this Court must suppress evidence of the blood testing on the ground that it violated the Fourth Amendment of the United States Constitution and Art. 1, Sec. 7 of the Washington State Constitution. *Martines* at 112.

B. ***Missouri v. McNeely*** **Required a Warrant to Draw Defendant's Blood at the Scene (Assignment of Error 2)**

In *Missouri v. McNeely*, ____ U.S. ____, 133 S.Ct. 1552 (2013), a driver who declined to take a breath test to measure his BAC was arrested and taken to a nearby hospital for blood testing. The driver refused to consent to a blood test and the officer directed a lab technician to take a

sample. After being charged with "DWI," the defendant moved to suppress the blood test arguing that the failure of the officer to obtain a warrant violated his Fourth Amendment rights.

The prosecution proposed a *per se* rule establishing exigent circumstances in all DUI cases involving a blood alcohol concentration test (BAC) based on the fact that the BAC evidence dissipates over time. This was rejected by the Court:

> But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. **In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the ethicacy of the search, the Fourth Amendment mandates that they do so.** (Emphasis added.)

Id. at 1561.

This is especially so because unlike destruction of evidence cases where "police are truly confronted with a 'now or never' situation . . . BAC evidence from a drunk driving suspect naturally dissipates over time in a gradual and relatively predictable manner." *McNeely*, *id.* (*quoting* from *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973)).

The *McNeely* Court explained that the State's proposed *per se* rule did not recognize that since *Schmerber v. California*, 384 U.S. 757 (1966) was decided, there have been advances in

> the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple.

1561-62.

The Court wrote that since 1977 the Federal Rules of Criminal Procedure permitted a federal magistrate to issue a warrant based on sworn testimony communicated by telephone or other reliable electronic means and that

> Well over a majority of the states allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communications, electronic communications such as email, and video conferencing.

Id. at 1562.

Importantly, the foregoing passage from *McNeely* was footnoted (footnote 4) which referenced states that have statutes or rules permitting telephonic or other electronic warrant applications. This footnote specifically mentioned the Washington State's court rule on telephonic warrants "Wash. Super. Ct. Crim. Rule 2.3(c) (2002)." This Washington rule, CrR 2.3(c) "Search and seizure" provides that telephonic search warrants are authorized.[10]

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[10] Rule CrRLJ 2.3(c) applying to courts of limited jurisdiction is identical and permits a search warrant application to be electronically recorded.

Here, while Deputy Stanton claimed that he could not have obtained a search warrant in a reasonable amount of time before the alcohol in the Defendant's blood dissipated, this was not the case. The Court's various Findings of Fact on this issue are not supported by substantial evidence and should not be given any weight.[11]

Additionally, courts have routinely dealt with evidence of blood alcohol concentrations drawn many hours after an incident which "naturally dissipates in a gradual and relatively predictable manner." *McNeely*, *supra*, at 1555. For example, in *State v. Neher*, 112 Wn.2d 347 (1989) where the Defendant was charged with vehicular assault, the fact that the blood draw was 2-1/2 hours after the accident did not prevent the State from utilizing it, along with expert testimony, as to whether his driving would have been impaired at the time:

> At his trial, the State introduced evidence that two and one-half hours after the collision defendant's blood alcohol content was .11 percent. The State presented expert testimony to the effect that, with the blood alcohol content, an individual's driving, two and one-half hours earlier, would have been impaired by alcohol.

Id. at 349.

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[11] *See* Section C of this Brief, *infra*.

Another example is found in *State v. Hill*, 48 Wn.App. 344, 352-353 (1987). In rejecting an argument that there was insufficient evidence to prove intoxication in a vehicular assault trial, the Court explained:

> Finally, Ms. Hill's argument there was insufficient evidence to establish beyond a reasonable doubt she was intoxicated is without merit. The blood test results show Ms. Hill had a .18 percent blood alcohol level over 3 hours after the accident. A toxicologist testified she had a .23 percent at the time of the accident. Under RCW 46.61.502(1), such a reading is sufficient to establish guilt of driving while under the influence of intoxicating liquor, and in turn guilt of vehicular assault under RCW 46.61.522(1)(b).

State v. Hill, 48 Wn.App. 344, 352-53.

C. The Court Erred in Entering Findings of Fact 21, 22 and 23 in its Order on Defendant's CrR 3.6 Motion to Suppress (Assignment of Error 3)

1. Findings of Fact Must be Supported by Substantial Evidence

To be sustainable, findings must be supported by "substantial evidence." *Brighton v. Wash. D.O.T.*, 109 Wn.App. 855, 862 (2001). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644 (1994). The Court must review to determine whether the "findings are supported by substantial evidence. . . ." *Standing Rock Homeowner's Assoc. v. Wenatchee Pines*, 106 Wn.App. 231, 234 (2003). Where, as here, there was no substantial

evidence supporting a finding, it is invalid. *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306 (1980).

This Court must review the evidence presented to determine whether there is substantial evidence to support challenged Findings. *Brighton, supra.* A review will demonstrate that it is "insufficient to convince a fair-minded person of the truth of the finding." *Hill*, *supra* at 644.

2. Defendant Objects to the Court's Finding of Fact 21 in That it is Not Supported by Substantial Evidence[12]

FF (CrR 3.6) 21 states that:

> The area where the collision occurred was not covered by cell phone service for Deputy Stanton's cellular phone, so he was not able to call for a telephonic warrant from the scene, even if he had been able otherwise to prepare a warrant application. His radio worked, but Deputy Stanton testified that if he had attempted to use his radio to have dispatch attempt to contact a judge, this would require the tying up of a radio channel for an extended period of time, which he did not think would be feasible. There were only three other Sheriff Department officers, including Sgt. Jenks, at the scene. Deputy Stanton could not prepare a warrant application at the scene of the collision, and would have had to follow Mr. Armstrong to the hospital, as he had no information to indicate that any other officers were available to do so. Deputy Stanton did not know which hospital Mr. Armstrong would be transported to, and did not know whether that hospital would have facilities available that would permit him to draft a search warrant

[12] These Findings of Fact, which are contained in the Court's Order on Defendant's CrR 3.6 Motion (attached hereto as Appendix A), will be hereinafter referenced as "FF (CrR 3.6)."

affidavit (or declaration), before trying to contact a judge between 1 a.m. and 2 a.m.

CP 23.

There was insufficient evidence to support this finding of fact. The only evidence presented with regard to cell phone reception was the deputy testifying that he had a cell phone that did not get reception "right there." RP 56. However, there was no showing that the deputy actually tried it at that area. In fact, what he said was that he had a Sprint cell phone "and Sprint does not get reception **for most of that area out there**." RP 57 (emphasis supplied).

The deputy was in contact with his dispatcher by radio. His concern, however, was that it would tie up a "channel" for an extended period. RP 58. Since the deputy was never asked how many channels were on the radio, the record is devoid of this information. Nevertheless, from his answer it seems obvious that in 2012 police radios have more than one channel. The deputy's concern about a channel being occupied would not have prevented him from being connected with a judge.

The deputy also testified that there was no way he knew that he could be "patched" or talk directly on the radio to someone on a phone. RP 57. Again, it is hard to imagine that dispatch could not do this given the state of technology in the 21st century. Alternatively, as defense

counsel suggested, it could nevertheless have been done with a speaker phone. RP 57-58.

FF (CrR 3.6) 21 states "Deputy Stanton could not prepare a warrant application at the scene of collision . . . ." This begs the question in that a written "warrant application" is not required for an electronic warrant. The same is true of the last sentence of this Finding where the judge writes that the deputy "did not know whether a hospital would have facilities available that would permit him to draft a search warrant affidavit (or declaration), before trying to contact a judge between 1:00 a.m. and 2:00 a.m." in that the warrant could readily have been obtained to draw blood from the Defendant, who was not in serious distress, prior to him being transported to the hospital.

3. Defendant Objects to Finding of Fact 22

With regard to FF (CrR 3.6) 22, the trial judge found:

> While the Sheriff's Office does maintain a list of potential contact phone numbers for judges, Deputy Stanton was not aware of whether any judges would be available to consider a warrant application at that time of night.

This is in fact not a finding. It only repeats what Deputy Stanton testified he did not know. In fact, it demonstrates that he was negligent because someone in his position as a DRE expert is expected to know whether or not a judge would be available. And, based on judicial notice,

this Court should find that in King County District Court judges are always available for warrants, regardless of the time.

The trial judge asked the deputy whether there was a list of judges who would be available during non-court hours if a warrant was needed. He answered that a list was sent out by a paralegal which was on the computer in his patrol car. And, if necessary, he could reach them by phone. RP 74. Under further questioning he indicated that the list of judges is broken up as to where they are located in King County and their home numbers were provided. RP 75.

The deputy claimed that getting a warrant over the phone was a very complicated and time consuming procedure and the one time he did it, it took approximately two or two and a half hours. RP 75. He explained that length of time was necessary to "fumble" through paperwork needed to contact a judge; talking to the judge; reading the whole affidavit and then getting the person to the hospital for a blood draw. He also described the necessity of finding a place where he could write out the application and search warrant. RP 76.

This strains credulity. There is a very shortened and abbreviated process to obtain a warrant over the phone in that everything the officer says is recorded by dispatch or the judge which obviates the necessity for the deputy to write out the warrant.

In the instant case, it would have been very straightforward for the officer to have the dispatcher connect him to a judge;[13] for the judge to swear him under oath; for the deputy to inform the judge of his professional background and especially his training in a 16 hour class taught by the WSP entitled Advanced Roadside Impaired Driving Enforcement and a 10 day class to train him as a Drug Recognition Expert (DRE). *See* RP 7-8. The deputy could then have explained that Defendant Armstrong was the driver of a car involved in a fatality accident; that the deputy made an observation that Defendant Armstrong appeared to be under the influence based upon bloodshot eyes, slurred words and alcohol on breath.

It is hard to imagine the phone call to the judge would last more than 5 to 10 minutes or that it would take more than a few minutes for this very experienced and trained deputy to compose his thoughts prior to the phone call. At the end of the deputy's presentation, the judge could have instructed the officer to place his signature on a form warrant and to proceed with a blood draw. However, none of this was done because the officer either was unwilling or unable to follow through on this very straightforward procedure in order to obtain a warrant as required by the Constitution.

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[13] Certainly the dispatcher would also have had a list of judges or the deputy could have

4. Defendant Objects to Finding of Fact 23 Which Found That it was Not Feasible to Obtain a Search Warrant Within a Reasonable Period of Time

The deputy had specialized training in the area of DUI enforcement including an advanced roadside impaired driving enforcement class; he was trained as a Drug Recognition Expert (DRE) in November of 2009 which required 10 days of schooling; and DUI enforcement was a particular focus of his for the past two years. RP 7-10. For the reasons stated *supra*, FF (CrR 3.6) 23 is not supported by substantial evidence.[14]

D. It was Error for the Court to Enhance the Defendant's Sentence on the Basis of a DUI Deferred Adjudication Which Did Not Result in a Conviction (Assignment of Error 4)

The Defendant was found guilty following a stipulated facts trial of the crimes of vehicular homicide and vehicular assault, as charged in Counts I and II, respectively, of the Information. CP 69-74. The Court imposed a standard range sentence of 41 months on Count I and 14 months on Count II, to run concurrently. *See* Judgment & Sentence, p. 4, CP 82. The Court also imposed a 48 month enhancement based on a "DUI" to run consecutive with the 48 months. *Id.*

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located it on his own computer in his patrol car.

[14] FF (CrR 3.6) 23 is contained in Order on Defendant's 3.6 Motion (CP 29), attached as Appendix A, hereto, and incorporated by reference herein, pursuant to RAP 10.4(c).

Defendant had previously been convicted of DUI following a plea of guilty on June 25, 1993, in Whitman County District Court. In a second DUI, Defendant was granted a deferred adjudication on a pending DUI charge in Black Diamond Municipal Court on December 8, 2005.

At sentencing in the instant case, the trial court counted the Whitman County conviction and the Black Diamond deferred prosecution as two convictions and pursuant to RCW 46.61.502(2) imposed an additional 24 month sentence on each, to run consecutive to the 41 month sentence and also consecutive to each other. CP 82.

RCW 46.61.520(2) "Vehicular Homicide – Penalty" provides:

> Vehicular homicide is a class A felony punishable under Chapter 9A.20 RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055.

RCW 46.61.5055(14) "Definitions" provides that a prior offense is defined as a conviction for DUI under RCW 46.61.502:

> (14)(xii) a deferred prosecution under Chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502 . . . or an equivalent local ordinance.

While Defendant Armstrong does have a deferred prosecution for a violation of RCW 46.61.502 (DUI) the inquiry does not end there. In *Blakely v. Washington,* 542 U.S. 296 (2004), the Court reversed an enhancement which resulted in a sentence three years above the standard

range on the basis of the sentencing judge's finding that the defendant acted with deliberate cruelty. The United States Supreme Court, in an opinion written by Justice Scalia, held that this violated the defendant's Sixth Amendment right to a trial by jury in that any fact other than a prior conviction that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[15]

Blakely v. Washington followed the Court's earlier decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), where the Court reversed an enhancement based on the state's hate crime statute, which was not submitted to the jury, the Court holding that the Due Process Clause of the Fourteenth Amendment required the state to prove every element or every fact necessary to constitute a crime with which the defendant is charged.

More recently, in *Alleyne v. U.S.,* ___ U.S. ___, 133 S.Ct. 2151 (2013), the Court expanded the *Apprendi-Blakely* rule to not only require a trial on any fact which increases the maximum, but also any fact that increases the mandatory minimum for the sentence even in those cases where the ultimate sentence fell within the standard range.

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[15] For the purpose of this rule, the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted into evidence.

In cases preceding *Alleyne,* this Court and others in Washington held that the 24 month sentencing enhancement for a DUI deferred prosecution did not violate the defendant's Due Process rights. *See, e.g., State v. Preuett,* 116 Wn.App. 746 (2003); *City of Bremerton v. Tucker,* 126 Wn.App. 26 (2005). However, these holdings are no longer valid given the Supreme Court's pronouncement in *Alleyne.*

While the *Apprendi-Blakely* rule allows for an exception ". . . other than the existence of a prior conviction," this does not apply to deferred adjudications because under clear prior precedents they are not convictions.

In *City of Kent v. Jenkins,* 99 Wn.App. 287 (2000), this Court held that a:

> **Deferred prosecution is not equivalent to a guilty plea or a conviction**. It is a form of preconviction sentencing or probation under which an accused must allege under oath that the culpable conduct charged is the result of alcoholism, drug addiction or mental problems. The accused must execute a statement that acknowledges his or her rights, stipulates to the admissibility and sufficiency of the facts in the police report, and acknowledges that the statement will be entered and used to support a finding of guilt if the deferred prosecution is revoked. **In short, both the purposes and effects of deferred prosecutions differ from convictions.** *Cruz* is thus inapposite.

Id. at 290. (Emphasis added.)

This Court is therefore urged to hold that the Sixth and Fourth Amendment of the United States Constitution and Art. 1, sec. 3 of the Washington State Constitution were violated and to reverse the enhancement for the DUI deferred adjudication.

V. CONCLUSION

For the foregoing reasons, this Court is urged to reverse Defendant's convictions and remand for a new trial and resentencing.

RESPECTFULLY SUBMITTED this 17th day of October, 2014.

DAVID ALLEN, WSBA #500
Attorney for Appellant

PROOF OF SERVICE

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

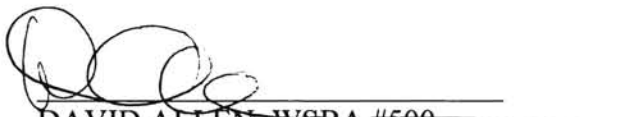
On the 17th day of October, 2014, I sent by email and messenger one true copy of Appellant's Opening Brief directed to attorney for Respondent:

King County Prosecutor's Office
Appellate Division
King County Courthouse
516 Third Avenue, W554
Seattle, WA 98104
paoappellateunitmail@kingcounty.gov

And mailed to Appellant:

Michael Armstrong, #372859
Monroe Corrections Center
Unit C115L
P.O. Box 777
Monroe, WA 98272

DATED at Seattle, Washington this 17th day of October, 2014.



DAVID ALLEN, WSBA #500
Attorney for Appellant

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL ERIC ARMSTRONG, Defendant.	No. 12-1-01971-8 KNT ORDER ON DEFENDANT'S CrR 3.6 MOTION TO SUPPRESS BLOOD DRAW FOR FAILURE TO OBTAIN A WARRANT

THIS MATTER came before the court on the defendant's motion pursuant to CrR 3.6 to suppress the results of the defendant's blood alcohol test on the ground that the blood draw was done without a warrant and without the defendant's consent, and therefore was done in violation of the Fourth Amendment's prohibition of warrantless searches and seizures, as made applicable to the State via the Fourteenth Amendment.

The court considered the defendant's motion, the state's response in opposition, and the defendant's reply. The court also received testimony from King County Sheriff Deputy Cory Stanton, and heard the arguments of counsel on August 13, 2013.

Based on the foregoing, this court now enters the following

I. FINDINGS OF FACT

1. On February 19, 2012, at approximately 12:25 a.m., the defendant was involved in a motor vehicle collision in a rural area of unincorporated King County, at the intersection of SE

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400th Street and 212th Avenue SE. The collision was a serious one, resulting in the death at the collision scene of a passenger in a vehicle that was struck by a pickup truck.

2. The pickup truck ended up upside down (resting on its roof) in the front yard of a nearby home. Based on the position of the involved vehicles, the damage to the vehicles, and the debris at the scene, the responding police officers believed that the pickup truck had been southbound on 212th, ran the stop sign, and T-boned the westbound blue passenger car, which had the right of way.

3. At 12:31 a.m., a call went out from the King County Sheriff Dispatch regarding this collision. Deputy Cory Stanton, an 8-year Sheriff Department veteran and a certified Drug Recognition Expert ("DRE") was assigned to patrol the Maple Valley area that night. Hearing the call go out, and knowing that the Sheriff's Office staffing in the area of the collision was very light, and that traffic control would likely be necessary, Deputy Stanton decided to respond to the collision scene. It took him approximately ten minutes to arrive at the scene.

4. When Deputy Stanton arrived, he saw a black pickup truck in the front yard of a house on the SW side of the intersection, lying on its roof with its front end facing the intersection, with one medic vehicle nearby. He also saw a smaller blue vehicle about 100 yards to the west, on the south side of the intersection, with a number of fire trucks and aid cars nearby, including a Medic One unit. Both vehicles were heavily damaged. The pickup truck was still smoking.

5. Immediately after he arrived, Deputy Stanton determined that it was necessary to ensure the safety of the collision scene. He therefore positioned his patrol car across SE 400th to block both lanes of traffic, and he placed flares as well.

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6. There were two other sheriff's deputies at the scene: Deputy Pritchett and Deputy Sherwood.[1] None of the other deputies who responded to the collision scene were DRE officers, and Deputy Stanton was the only one with extensive experience in investigating DUI cases.

7. Deputy Stanton contacted Deputy Pritchett, and asked him what was going on. Deputy Stanton learned that a witness had reported seeing the defendant, Mr. Armstrong, stumble out from the driver's side of the pickup truck, and that Deputy Pritchett had the defendant's Washington State Driver's License. Deputy Pritchett also reported to Deputy Stanton that Mr. Armstrong was being treated in the aid car closest to the pickup truck, and that there were injuries to the occupants of the other vehicle.

8. Deputy Stanton then went to the aid car nearest the pickup truck to contact the defendant. A woman who Deputy Stanton believed had been a passenger in the pickup truck was sitting in the jump seat just across from the driver's side of the aid car. The woman was sitting with a blank stare, and appeared to be in shock. The defendant Mr. Armstrong was sitting on a gurney in the back of the aid car near the back door, sobbing. An EMT was on the bench, interacting with the defendant. Mr. Armstrong was responding to questions posed by the EMT, although Deputy Stanton could not recall his words.

9. Deputy Stanton tried to talk with Mr. Armstrong, and asked him if he had been driving, and whether he had consumed any alcohol. The defendant did not respond to Deputy Stanton's questions, but kept repeating words to the effect of, "Don't help me, help them. I don't deserve it." Deputy Stanton noted that Mr. Armstrong had watery, bloodshot eyes, and that his

[1]Two other deputies responded within a minute or two of when Deputy Stanton arrived, but they were almost immediately dispatched to another call, and therefore were not present to assist with securing the scene, assisting the medics, or investigating the collision.

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speech was slightly slurred. When the EMTs moved Mr. Armstrong onto a gurney, Deputy Stanton was able to get close to his face and noted alcohol on Mr. Armstrong's breath.

10. Deputy Stanton's initial interaction with Mr. Armstrong lasted only a few minutes. Deputy Stanton then left the aid car, and at 12:52 a.m., he made a radio call advising that he had probable cause to believe that Mr. Armstrong had been driving under the influence, and would probably need to have a blood draw done. He also advised that he believed that Mr. Armstrong would be transported to a hospital soon.

11. After exiting the aid car where the defendant was being treated, Deputy Stanton returned to doing traffic control. A couple of vehicles had attempted to drive through the scene, and there were pedestrians in the vicinity as well. He therefore set up crime scene tape and flares on 212th to further block off the area of the collision and the debris field. Deputy Stanton also ran Mr. Armstrong's and his passenger's names through his dispatch system so he would have their information, and so he could return Mr. Armstrong's driver's license to him.

12. Sergeant Jenks arrived at the scene at 1:01 a.m. Deputy Stanton advised Sergeant Jenks of the situation, including his belief that the driver of the pickup truck[2] was impaired, that blood alcohol analysis would need to be done, and that he believed that Mr. Armstrong would be transported to a hospital very shortly. Sgt Jenks asked Deputy Stanton whether a blood draw from Mr. Armstrong could be accomplished at the scene, while paramedics were still there. At this point, Sgt. Jenks and Deputy Stanton had learned that one of the occupants of the smaller vehicle

[2]The evidence at the hearing established that the police at the scene received information from an eye witness that Mr. Armstrong crawled out the driver's side window of the pickup truck after it came to rest. For purposes of this motion, the court is assuming, without deciding, that the defendant was the driver of the pickup truck. The police had probable cause to believe that Mr. Armstrong was the driver of the pickup truck. The court is not making a finding that Mr. Armstrong was in fact the driver of the pickup truck.

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had died at the scene. Deputy Stanton believed that this triggered the "special evidence" rule justifying a nonconsensual blood draw under the Implied Consent statute.

13. Up to this time, Deputy Stanton had performed "special evidence" warnings on 20-30 prior occasions. He had only applied for a search warrant before having a blood draw done on one prior occasion, which was a routine DUI stop which did not involve any injuries or deaths. This process took more than two hours, although some of that time was due to Deputy Stanton's lack of familiarity with the process. Since the defendant's arrest, Deputy Stanton has obtained warrants to draw blood as a result of a DUI arrest twice. Both of these cases involved routine DUI traffic stops, and Deputy Stanton was able to prepare his affidavit for a search warrant at the police station. These warrants nevertheless took 90-120 minutes to obtain from the time Deputy Stanton began writing out his affidavit in support of a warrant.

14. Deputy Stanton spoke with a paramedic, Tony Smith, at the collision scene. Mr. Smith agreed to perform a blood draw on the defendant. Deputy Stanton and the paramedic walked back to the aid car by the pickup truck, where they found Mr. Armstrong talking to the aid crew, and answering questions from the EMTs. At this point, Mr. Armstrong was strapped to a back board, and was wearing a cervical collar.

15. Deputy Stanton advised Mr. Armstrong of his constitutional rights from his DUI Arrest Report form (Pretrial Ex. 7) and then read him the Special Evidence Warning (Pretrial Ex 8) at 1:17 a.m. Mr. Armstrong did not respond when Deputy Stanton asked him if he understood his rights, nor did he ask any questions. Deputy Stanton did not ask Mr. Armstrong to sign the acknowledgment of his rights because of Mr. Armstrong's lack of verbal response. Paramedic Smith then drew blood from Mr. Armstrong, using 2 grey-topped vials that Deputy Stanton already had in his possession, and which had been provided by the State Toxicologist's office.

16. The blood draw apparently was done in a reasonable manner by a qualified individual.

17. The defendant did not consent to the blood draw.

18. Prior to the blood draw, Deputy Stanton had probable cause to arrest Mr. Armstrong for vehicular homicide. Deputy Stanton testified that at the time of the defendant's arrest, he did not believe the law required him to obtain a search warrant before having a non-consensual blood draw done in a case of suspected vehicular homicide. Based on the implied consent statute and prior Washington Supreme Court decisions, Deputy Stanton believed that a warrantless blood draw was appropriate and lawful under the circumstances. Therefore, Deputy Stanton was not thinking about the presence or absence of any exigent circumstances.

19. Deputy Stanton was, however, aware of the importance of obtaining the purest blood sample as close in time to the collision as possible. It is well known to law enforcement personnel with DUI training that alcohol and drugs are metabolized and eliminated from a driver's body over the course of time.

20. Deputy Stanton knew from his training and experience handling DUI cases and as a DRE that it was important when obtaining a blood sample for alcohol or drug testing that the sample be obtained as close to the time of driving as possible, and to the extent possible, before the driver was administered IV fluids or medications which could affect testing for concentration of alcohol or drugs in the driver's blood. Deputy Stanton also knew from experience that once a suspect driver is transported to a hospital, medical staff will concentrate on diagnosing and treating the driver's injuries, and that obtaining a blood sample for forensic testing will usually be delayed substantially. Deputy Stanton's experience had been that delay at a hospital before a forensic blood draw can be obtained is generally 30-40 minutes or longer, in addition to the time it

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takes to transport a suspected driver to the hospital. He also knew that IV fluids and medications are commonly commenced before a forensic blood draw can occur.

21. The area where the collision occurred was not covered by cell phone service for Deputy Stanton's cellular phone, so he was not able to call for a telephonic warrant from the scene, even if he had been able otherwise to prepare a warrant application. His radio worked, but Deputy Stanton testified that if he had attempted to use his radio to have dispatch attempt to contact a judge, this would require the tying up of a radio channel for an extended period of time, which he did not think would be feasible. There were only three other Sheriff Department officers, including Sgt. Jenks, at the scene. Deputy Stanton could not prepare a warrant application at the scene of the collision, and would have had to follow Mr. Armstrong to the hospital, as he had no information to indicate that any other officers were available to do so. Deputy Stanton did not know which hospital Mr. Armstrong would be transported to, and did not know whether that hospital would have facilities available that would permit him to draft a search warrant affidavit (or declaration), before trying to contact a judge between 1 a.m. and 2 a.m.

22. While the Sheriff's Office does maintain a list of potential contact phone numbers for judges, Deputy Stanton was not aware of whether any judge would be available to consider a warrant application at that time of night.

23. Based on the foregoing, the court finds that under the circumstances as they existed at the time, it was not feasible to obtain a search warrant within a reasonable period of time. In addition, there was a substantial risk that evidence of the defendant's impairment or lack of impairment from drugs or alcohol would be lost, due both to the passage of time and to the potential need for administration of fluids and medication before a search warrant could feasibly be obtained.

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Having made the foregoing Findings of Fact, the court hereby enters its

II. CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter.

2. In Washington state, "a person under arrest for vehicular assault [or for vehicular homicide] is subject to a mandatory blood alcohol test" pursuant to RCW 46.20.308. *State v. Morales*, 173 Wn.2d 560, 563, 269 P.3d 263, 265 (2012). While the non-consensual drawing of blood for testing is a search and seizure under the Fourth Amendment and under Article I, §7 of the Washington Constitution, *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991), the Washington Supreme Court has held that in situations where a police officer has probable cause to believe that a driver is under the influence of alcohol, and has committed vehicular homicide, the warrantless extraction of blood pursuant to the implied consent statute does not violate Article I §7, if the blood draw is performed in a reasonable manner by a trained paramedic. *State v. Curran*, 116 Wn.2d at 185. See also, *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984).

3. Subsequent to Mr. Armstrong's arrest, the United States Supreme Court decided *Missouri v. McNeely,* __ U.S. __, 133 S. Ct. 1552, 1565 (2013), a case that was presented as a "routine" DUI traffic stop with no special circumstances such as an injury or death. In deciding the question of whether the natural dissipation of alcohol in the blood of a DUI suspect excused police from seeking a warrant before having the suspect's blood drawn for forensic testing, the Supreme Court held that it did not. Specifically, the Court held that, notwithstanding implied consent statutes, the police must obtain a warrant before requiring a motorist suspected of DUI to have blood drawn, "unless there are exigent circumstances that make securing a warrant impractical in a particular case." The Court further held:

> [W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber* [*v. Califor-*

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> *nia,* 384 U.S. 757, 88 S.Ct. 1826 (1966)], it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

McNeely at 1563.

4. The Court did not hold that the natural dissipation of alcohol in the blood over time was irrelevant to the question of whether the police were required to seek a warrant before having a suspect's blood drawn for forensic testing. "[T]he metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required." *McNeely,* 133 S.Ct. at 1568. However, "[t]he natural dissipation of alcohol in the bloodstream [over time] does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* Instead, police must

> make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances. Reviewing courts in turn should assess those judgments "'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'

McNeely at 1552, citations omitted.

5. Warrantless seizures may be justified where police officers are faced with emergencies or exigencies which do not permit reasonable time for a judicial officer to evaluate and act upon an application for a warrant. *See*, *State v. Swetz*, 160 Wn. App. 122, 132, 247 P.3d 802, 807 (2011); *State v. Burgess*, 43 Wn. App. 253, 259, 716 P.2d 948, 952 (1986). When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the U.S. Supreme Court has found that certain general or individual circumstances may render a warrantless search or seizure reasonable. *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 949 (2001).

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6. Here, while Deputy Stanton candidly admitted that at the time he requested the warrantless blood draw on Mr. Armstrong, he was relying on the informed consent statute and not on a consideration of exigent circumstances, this alone is not determinative. As with other search and seizure jurisprudence, the test should be an objective one: whether a reasonable person under the circumstances as they existed at the time in question would have believed that exigent circumstances existed to order a warrantless blood draw. *See, e.g., State v. Barber,* 118 Wn.2d 335, 349, 823 P.2d 1068, 1076 (1992); *State v. Leffler*, 142 Wn. App. 175, 183-184, 178 P.3d 1042, 1046 - 1047 (2007).

7. The time of day, the remoteness of the area, the lack of cell phone reception, the time that had already elapsed following the fatal collision, the fact that Deputy Stanton expected that Mr. Armstrong would be transported to a hospital imminently, the anticipated delay of at least an hour and a half, and perhaps much longer, before a warrant could be obtained (assuming a judge could be located who would consider the warrant application), and the very real risk that any blood test results would be adulterated by fluids and/or medications that Mr. Armstrong might be given at the hospital, created sufficient exigent circumstances in this case to permit the police to subject Mr. Armstrong to a warrantless blood draw.

Based on the foregoing Findings and Conclusions, it is hereby

ORDERED that the motion to suppress the blood draw on the grounds that the police did not obtain a warrant is DENIED.

Dated: August 21, 2013

s/_____
Judge Andrea Darvas

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King County Superior Court
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Case Number: 12-1-01971-8
Case Title: STATE OF WASHINGTON VS ARMSTRONG, MICHAEL ERIC

Document Title: ORDER ORD RE MOT TO SUPP BLD DRAW

Signed by Judge: Andrea Darvas
Date: 8/21/2013 11:38:13 AM

Judge Andrea Darvas

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