IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

Washington Supreme Court No. 98444-1

Court of Appeals No 36268-0-III

City of Richland,

Respondent,
v.
Dean Stenberg
Appellant.

Consolidated with
Court of Appeals No 36337-6-III

City of Pasco,

Respondent,
v.
Jason Shergur
Appellant.

ANSWER TO APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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I. ISSUES DISCUSSED

Should this court grant discretionary review of the Court of Appeals affirmation that a law enforcement officer may obtain a search warrant for blood without first seeking evidence through less intrusive methods of obtaining similar evidence such as a breath test?

II. STATEMENT OF THE CASE

Appellant Shergur was arrested and charged with Driving Under the Influence of Intoxicating Liquor (DUI) on March 27, 2016. On March 28, 2016, Appellant was arraigned on a charge of DUI. On March 10, 2017, Appellant filed a motion to suppress evidence. On May 22, 2017, the City of Pasco filed its response. On May 26, 2017, Judge Petersen heard Appellant's motion to suppress and denied the motion. On August 30, 2017, Judge Petersen entered written findings of fact and conclusions of law.

On February 16, 2018, Appellant submitted his case to Judge Craig Stilwill upon stipulated facts. Judge Stilwill found Appellant guilty of DUI and imposed sentence. On February 16, 2018, Appellant was granted a motion to stay his sentence pending appeal. Thereafter, Appellant filed a notice of appeal on February 16, 2018 with Franklin County Superior Court.

On August 27, 2018, oral argument on the Franklin County Superior Court Appeal was taken. On August 30, 2018, Superior

Court Judge Joseph Burrowes issued his ruling denying Appellant's appeal. On March 10, 2020 Division III of the Court of Appeals affirmed the superior court. The Appellant seeks discretionary review of that decision.

Appellant Stenberg was arrested and charged with Driving Under the Influence of Intoxicating Liquor (DUI) on October 14, 2016. On October 17, 2016, he was arraigned on the DUI charge. On May 17, 2017, Appellant filed a motion to suppress evidence. On June 8, 2017, the City of Richland responded. On June 22, 2017, Judge K. Butler heard the motion to suppress and denied the motion. On September 13, 2017, Judge Butler entered written findings of fact and conclusions of law.

On February 1, 2018, Appellant submitted his case to Judge T. Tanner upon stipulated facts. Judge Tanner found Appellant guilty of DUI and imposed sentence. Judge Tanner entered written findings of fact and conclusions of law on February 15, 2018. On February 16, 2018, Appellant was granted a motion to stay his sentence pending appeal. Thereafter, Appellant filed his notice of appeal to Benton County Superior Court on February 16, 2018.

On June 21, 2018, oral argument on the Benton County Superior Court Appeal was taken. On July 17, 2018, Superior Court Judge Joseph Burrowes issued his ruling denying Appellant's appeal. On March 10, 2020 Division III of the Court

of Appeals affirmed the superior court. The Appellant now seeks discretionary review of that decision.

III. ARGUMENT

Initially, RAP 2.3(d) governs this court's exercise of discretionary review. Thereunder, this court will accept review of a case where the decision (1) is in conflict with established case law, (2) involves a significant, unresolved question of law, (3) involves an issue of public interest, or (4) is completely outside the course of usual judicial proceedings.

Appellant's primary argument addressing acceptance of discretionary review centers around the assertion that the Court of Appeals decision is in conflict with controlling law. The Appellant argues that the lower courts misapplied the holding in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). Specifically, the Appellant argues that if it is possible to obtain evidence of impairment through a breath test it is unreasonable for the government to seek comparable evidence of intoxication in the suspect's blood via a search warrant.[1]

However, the United States Supreme Court in *Birchfield v. North Dakota* specifically stated that "[w]e reach a different conclusion with respect to blood tests. Blood tests are significantly

[1] Motion at 8-9.

more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant."[2] The plain meaning of the *Birchfield* holding is that the reasonableness of obtaining a blood test, without a warrant, must be judged in light of the availability of the less invasive breath test. This interpretation is supported by the *Birchfield* Court's determination that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstance exception to the warrant requirement when there is not."[3]

Additionally, the Washington State Supreme Court in *State v. Kalikosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993), noted that probable cause is the standard for the taking of a suspect's blood. Further, in *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973), the Washington Supreme Court held that "[r]easonableness is the

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[2] *Birchfield* at 2184. Cf. *State v. Figeroa Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015). "The Fourth Amendment to the United States Constitution provides that warrants may be issued only upon a showing of 'probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' Probable cause exists if the affidavit supporting the warrant describes facts and circumstances sufficient to establish a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." (quoting *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

[3] *Birchfield* at 2184.

key ingredient in the test for issuance of a search warrant. That is precisely what the federal constitution says and our state constitution necessarily implies." Rather than looking at whether the evidence sought or method used by the government to obtain evidence was reasonable, the *Patterson* Court looked at whether "… the documents or testimony supporting the warrant give a fair-minded, independent judicial officer …" a good reason to issue the search warrant.[4] It is clear that the case law attaches reasonableness, under the United States and Washington State Constitutions, to whether a warrant was properly issued and not to the type of evidence sought by the government.[5] The type of blood draw conducted in the Appellants' cases was found to be reasonable by the United States Supreme Court in *Schmerber v. California*.[6]

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[4] *State v. Patterson*, at 52.

[5] *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). "In the context of searches that intrude into the body, the United States Supreme Court has held that the " interests in human dignity and privacy which the Fourth Amendment protects" require three showings in addition to a warrant. First, there must be a " clear indication" that the desired evidence will be found if the search is performed. Second, the method of searching must be reasonable. Third, the search must be performed in a reasonable manner." (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).

[6] *Schmerber* 771. "Similarly, we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination, and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain. … Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a

Appellants have provided no supporting authority that the decision in *Schmerber* was wrongly decided, has been overturned by subsequent United States Supreme Court decisions, or that *Schmerber* is inapplicable under the Washington State Constitution.

Appellants also assert that the Court of Appeals ruling was contrary to law in regards to the implied consent statute.[7] The issue of whether the implied consent warnings prelude a blood draw via a search warrant was addressed in *City of Seattle v. St. John*.[8] There, the Washington State Supreme Court held in reviewing RCW 46.20.308 that "… the legislative intent is plain on the face of the statute that an officer may obtain a blood alcohol test pursuant to a warrant regardless of the implied consent statute."[9] The Washington State Supreme Court went on to state that "[t]he legislature made its intention regarding blood alcohol tests pursuant to a warrant quite clear: '*Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.'* RCW 46.20.308(1) (emphasis added)."[10] Conspicuously absent

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physician in a hospital environment according to accepted medical practices." (citations omitted).

[7] Motion at 10.

[8] *City of Seattle v. St. John*. 166 Wn.2d 941 (Wash. 2009).

[9] City of Seattle v. *St. John*, at 946.

[10] *State v. Goggin*, 185 Wn.App. 59, 69 (Wash.App. Div. 3 2014). "Our conclusion is supported by *City of Seattle v. St. John*, 166 Wn.2d 941, 946, 215 P.3d 194 (2009), in which the Washington Supreme Court held that the plain language of RCW 46.20.308 (1) allows officers to '*obtain a search warrant for blood alcohol tests regardless of the implied consent statute*.' (Emphasis added.)"

from the appellant's motion for review is any reference to RCW 46.20.308(4) which specifically provides that an officer may apply for a search warrant for a person's blood … "when the officer has reasonable grounds to believe that the person is in physical control or driving a vehicle under the influence or in violation of RCW 46.61.503."[11] Here, the cities obtained search warrants for the Appellants' blood and as such the blood tests were conducted pursuant to other authority rather pursuant to the implied consent statute.

Turning back to the standard for discretionary review, the Court of Appeals did not contravene the ordinary course of judicial proceedings, nor is its decision in conflict with any established law, or decision of the Supreme Court. Lastly, any argument addressing reasonableness has been decided by the Washington Supreme Court and thus is not a legal issue of public interest that would support discretionary review under RAP 2.3(d), subsection (3).

IV. CONCLUSION

For the above stated reasons, Respondents respectfully asks this court to deny discretionary review

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[11] RCW 46.20.308(4). *See also*, *State v. Inman*, 2 Wn.App.2d 281, 293, 409 P.3d 1138, 1145 (Div. 2 2018) (citing *City of Seattle v. St. John* at 946-47) "However, the implied consent statute applies to blood alcohol tests conducted under only the implied consent statute and has no effect on blood tests conducted pursuant to other authority."

Dated this 22nd day of June, 2020

Michael J. Rio #31981
Pasco Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 22, 2020, I e-mailed a copy of the response in this matter, pursuant to the parties' agreement, to:

Gary Metro
garymetrolawfirm@gmail.com;
garymetro@outlook.com

6-22-2020	Kennewick, WA	
(Date)	**(Place)**	**(Signature)**

BELL BROWN RIO PLLC

June 22, 2020 - 12:33 PM

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Appellate Court Case Title:	City of Richland v. Dean Stenberg
Superior Court Case Number:	18-1-00224-2

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