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Court of Appeals
Division I
State of Washington

No. 72230-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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 REPLY BRIEF

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A. ARGUMENT

1. The City failed to meet its heavy burden proving that the warrantless seizure of Ms. Pearson's blood was justified by clear and convincing evidence of exigent circumstances.

Exigent circumstances may justify a warrantless search or seizure.

The natural metabolization of a substance in a person's bloodstream, however, does not present a per se exigency. Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 1556, 185 L. Ed. 2d 696 (2013); Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939 (2014). Ms. Pearson admitted to consuming marijuana during the morning before the accident. Making no effort to secure a warrant, police transported her to a hospital and had her blood drawn without her consent. Indisputably, police could obtain warrants relatively quickly by telephone or e-mail. It also took over half an hour for the police to actually have Ms. Pearson's blood drawn after the formation of probable cause. Still, the municipal court ruled exigent circumstances justified the warrantless intrusion. Improperly applying an abuse of discretion standard, rather than *de novo* review, the Superior Court affirmed. Because the City did not prove exigent circumstances justified the warrantless seizure of Ms. Pearson's blood, this Court should reverse.

The City does not disagree that the proper standard of review is *de novo*, not abuse of discretion. State v. Hinshaw, 149 Wn. App. 747, 752,

205 P.3d 178 (2009). The City also does not contest that it had the “heavy burden” to prove an exigency by clear and convincing evidence.

Hinshaw, 149 Wn. App at 754 (“The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action.”); State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (government bears the heavy burden to prove by clear and convincing evidence an exception to the warrant requirement). Ms. Pearson had no burden to show a lack of exigent circumstances.

In arguing exigent circumstances justified the warrantless blood draw, the City relies primarily on evidence that THC dissipates from a person’s blood relatively quickly, purportedly within three to five hours. Br. of Resp’t at 9. The City, however, admits that the amount of marijuana consumed affects dissipation. Br. of Resp’t at 9-10. Moreover, the City incorrectly represents that the dissipation of THC is not affected by other factors, such as the person’s sex and whether the person is a regular or irregular user. Br. of Resp’t at 9-10 (citing CP 193-95). The forensic toxicologist did not so testify. What the forensic toxicologist actually testified to was that she did not know if these factors caused any differences. CP 193-95. Further, the toxicologist admitted that there was a study showing that chronic daily cannabis smokers still had a detectible level of THC in their blood after seven days. CP 194.

Accepting the toxicologist's testimony, the City still did not prove that obtaining a warrant would have significantly undermined the City's ability to obtain the evidence. Contrary to the City's representations, the record does not show that the trial court found that securing a warrant would have taken at least an additional 90 minutes and that any THC would have become undetectable in three to five hours. Br. of Resp't at 11 (citing CP 240-43).¹

Telephonic warrants were available. CP 227. The City, which had the heavy burden to prove exigent circumstance by clear and convincing evidence, failed to elicit evidence showing that getting a warrant by phone would have caused significant delay. Indeed, the City failed to establish how long it would generally take to get a warrant by phone. CP 227 (City did not conduct redirect examination of officer after Ms. Pearson established during cross-examination that telephonic warrants were available). Warrants by e-mail were also available at that time and could be obtained in about 60 to 90 minutes. CP 222-24.

When Officer Jongma determined there was probable cause, there were many officers on the scene. CP 215. It took Officer Jongma about

¹ Because this case originates in municipal court, the trial court was not required to enter written findings of fact and conclusions of law. CrRLJ 3.6(b); State v. McLean, 178 Wn. App. 236, 243, 313 P.3d 1181 (2013).

half an hour to transport Ms. Pearson to the hospital. CP 206, 211.

Another officer could have driven her while Officer Jongma secured a warrant. Because it was the middle of the afternoon and the courts were open, it likely would not have been difficult to get ahold of a judge. CP 224 (officer testified he had gone to court during the day to get a warrant before). Officer Jongma, however, did not even bother with trying to get a warrant. Given these circumstances, the City failed meet its burden proving that obtaining a warrant would have significantly undermined its effort to secure the evidence.

The City argues that it is irrelevant that Officer Jongma did not seek a warrant because police do not have to seek a warrant first for exigent circumstances to exist. See Br. of Resp't 15. It is not necessary to seek a warrant first in order prove exigent circumstances. Nevertheless, if police do not seek a warrant first, this will make it more difficult for the government to carry its burden proving an exigency. In Tibbles, a case where our Supreme Court held the State failed to prove exigent circumstances justified the warrantless search of the defendant's car, the court cited to a lack of evidence on whether the police officer could have procured a warrant:

The State has not established that obtaining a warrant was otherwise impracticable. For example, we do not know whether Larsen could have used a cell phone or radio to

procure a telephonic warrant or whether he could have called backup to secure the scene while Larsen went to procure a warrant. The record contains no evidence of what Larsen would have had to do to procure a warrant at the time of the search.

State v. Tibbles, 169 Wn.2d 364, 371, 236 P.3d 885 (2010). Other courts have reasoned similarly in rejecting government claims of exigent circumstances. See, e.g., Byars, 336 P.3d at 944 (2014) (“There is no indication in the record that Trooper Murwin was prevented from seeking a warrant telephonically”); State v. Lovig, 675 N.W.2d 557, 567 (Iowa 2004) (“there was no evidence concerning any efforts by police to seek a warrant or to determine the amount of time it would take to secure a warrant.”). Thus, that Officer Jongma did not seek a warrant supports the conclusion that the City failed to prove exigent circumstances.

The City maintains that it is not seeking a per se exigency rule in cases involving marijuana. Br. of Resp’t at 15-16. The City’s argument, however, would go a long way to creating one in all but name. The City complains that THC dissipates rapidly, that it cannot calculate THC dissipation rates like in can with alcohol, and that the state laboratory cannot detect THC if it drops below a certain level.² Br. of Resp’t at 13, 15. Therefore, until science and the State’s laboratory improves, the City

² The toxicologist testified her lab could not detect levels below 2.5 nanograms. CP 186.

argues it must be given leeway to intrude into people's bodies without seeking a warrant. See Br. of Resp't at 15 ("The science regarding THC dissipation undoubtedly is in its infancy"). The City's argument creates the bizarre incentive not for scientific advancement, but for scientific cessation, or worse, scientific retrogression. Article one, section seven, and the Fourth Amendment are not susceptible to this kind of analysis. See State v. Jones, 111 Nev. 774, 776, 895 P.2d 643 (1995) (rejecting State's argument it proved exigent circumstances because obtaining a warrant in specific county would take more than six hours; "Under this reasoning, the slower the jurisdiction is to issue search warrants, the more 'exigent' circumstances arise, and the fewer warrants are needed. The Fourth Amendment is simply not susceptible to this type of reasoning.").

This Court should hold that the City failed to prove exigent circumstances and reverse.

2. Independent of the warrantless seizure of Ms. Pearson's blood, the warrantless search of her blood violated article one, section seven of the Washington constitution.

Subjecting Ms. Pearson's blood to chemical analysis was an intrusion separate from the seizure of her blood. State v. Martines, 182 Wn. App. 519, 530, 331 P.3d 105 (2014) reversed on other grounds, No. 90926-1 (August 27, 2015). Even if exigent circumstances justified its seizure, that exigency vanished once the blood was extracted and safely in

the government's control. While any exigency no longer existed (because there was no longer any destruction of evidence), the potential for governmental abuse and invasion into Ms. Pearson's privacy did not. See Martines, 182 Wn. App. at 530-31 (explaining that a person's blood can reveal personal information that is highly sensitive and that requiring a warrant ensures the government cannot rummage through this information or engage in a routine practice of adding people's DNA profiles to its data banks). Accordingly, the City was required to get a warrant to analyze Ms. Pearson's blood or prove an exception to the warrant requirement. Martines, 182 Wn. App. at 532. The government did neither. Thus, the evidence obtained through the warrantless testing of Ms. Pearson's blood should have been suppressed.

In Martines, the government sought and obtained a search warrant to extract a blood sample from the defendant. State v. Martines, No. 90926-1, slip. op. 3 (August 27, 2015). The warrant indicated probable cause existed to believe evidence of the crime of driving under the influence was in the defendant's blood. Martines, slip. op. at 4. This Court held that the language in the warrant was imprecise and did not authorize the testing of the blood. Martines, 182 Wn. App. at 531. Our Supreme Court disagreed on this point, reasoning that it was not sensible to read the warrant this way and that the particularity requirement was

satisfied. Martines, slip. op. at 9-11. Accordingly, the Supreme Court held this Court erred in concluding that the warrant was fatally deficient and reversed. Martines, slip. op. at 10-11.

Importantly, the Supreme Court did not repudiate this Court's analysis concerning whether the extraction of blood and the testing of blood are two separate intrusions which must be authorized either by a warrant or exception to the warrant requirement. Rather, the Supreme Court simply held the extraction and testing of the defendant's blood was authorized by the warrant. Martines, slip. op. at 10-11. Otherwise, this Court's reasoning and interpretation of article one, section seven remains sound.

This case is fundamentally different than Martines because the government did not obtain a warrant in this case. Thus, it is materially distinguishable. The Supreme Court's opinion does not resolve the issue in this case: whether exigent circumstances which justify the warrantless extraction of a person's blood also justifies the warrantless testing of that blood. Under article one, section seven, the answer is that it does not.

The reasoning by this Court in Martines, which was not repudiated by our Supreme Court, compels this conclusion. The cases cited by the City in support of its argument that no warrant is required if blood is seized under exigent circumstances involve non-Washington cases

interpreting the Fourth Amendment, not article one, section seven of the Washington Constitution. Br. of Resp't at 25 n.25.³ They are not controlling.

Moreover, these cases all rest on a defunct analysis of the Supreme Court's opinion in Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), where the Supreme Court appears to have treated the seizure and search of the defendant's blood as a singular event under the Fourth Amendment. See, e.g., United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988). This Court rejected this analysis. Martines, 182 Wn. App. at 529 (explaining that subsequent precedent clarified that chemical analysis of blood is an independent invasion of privacy). Moreover, this analysis ignores the rule that, absent a warrant or exception to the warrant requirement, the government may not search a container even if the container is lawfully seized. United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (“[e]ven when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.”). The same

³ Citing State v. Riedel, 259 Wis. 2d 921, 929-31, 656 N.W.2d 789 (2002); United States v. Snyder, 852 F.2d 471, 473-74 (9th Cir. 1988); Dodd v. Jones, 623 F.3d 563, 568-69 (8th Cir. 2010).

rule should also logically be applied to blood which is lawfully seized from a person's body.

As for Franklin, where an officer searched a rucksack without a warrant, it does not support the City's argument. Br. of Resp't at 18-19. Franklin involved an investigative detention of a man in bathroom who was reported to have had a gun. State v. Franklin, 41 Wn. App. 409, 411, 704 P.2d 666 (1985). The man told the officer his gun was in his rucksack. Franklin, 41 Wn. App. at 411. Declining to adopt any bright-line rule, this Court held the search of the rucksack was lawful because of the potential danger and the reality that the rucksack would have to be returned to the suspect. Franklin, 41 Wn. App. at 415.

In contrast, unlike a rucksack containing a gun, there was no danger posed by Ms. Pearson's blood. Moreover, this holding in Franklin is limited and Washington courts have rejected the State's attempt to expand it. See Russell, 180 Wn.2d at 871 ("The State argues that the search was justified because the officer had to return the container at the end of the encounter. While it is true that the officer had to return the container, it does not follow that the officer may always search it first.")

The City is simply wrong that requiring a warrant to analyze a person's blood is inconsistent with cases upholding a warrantless search of a person incident to an arrest or investigative detention. Br. of Resp't at

19-20. These exceptions do not justify bodily intrusions. Schmerber, 384 U.S. at 769-70. Relatedly, the City fails to recognize that these exceptions have officer safety rationales. State v. Valdez, 167 Wn.2d 761, 769, 224 P.3d 751 (2009) (explaining that during an arrest, “if the officer delays the search to first secure a warrant, the purpose of the search—to protect the safety of the officer or to prevent the loss of evidence—would be frustrated.”); Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (officer engaged in stopping a person pursuant to reasonable suspicion of criminal activity may engage in a limited search for weapons if there are reasons to believe person is armed and dangerous). The State’s analogy to these circumstances is unconvincing. An officer searching an arrested or detained person in the field is a far cry from a forensic scientist analyzing blood in laboratory.

The City’s argument that the exigent circumstances exception justifies the warrantless testing of a person’s blood is similar to previous arguments contending that the search of an arrested person’s automobile is always justified under the search incident to arrest exception. Both of our high courts recognized that this stretched the rationale for the search incident to arrest exception too far. Valdez, 167 Wn.2d at 774; State v. Patton, 167 Wn.2d 379, 395-96, 219 P.3d 651 (2009); Arizona v. Gant, 556 U.S. 332, 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Likewise,

here the government wants this Court to stretch the exigent circumstances far beyond its rationale. This is inconsistent with article one, section seven. See Valdez, 167 Wn.2d at 777. Thus, the City's citation to State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013), where our Supreme Court affirmed the ability of police to search containers which are on a person incident to arrest, does not help its argument. Br. of Resp't at 19. In that kind of case, the exception remains tethered to its rationale. Here, it is not.

Ms. Pearson can raise this issue for first time under the manifest constitutional error exception. RAP 2.5(a)(3); Martines, 182 Wn. App. at 532. Contrary to the State's suggestion, Ms. Pearson does not have to show compliance with the Robinson rule for this issue to be addressed for the first time on appeal. Br. of Reps't at 17. In Robinson, the defendants did not object to the evidence they contended was inadmissible under a change in law that occurred after their convictions. State v. Robinson, 171 Wn.2d 292, 296-301, 253 P.3d 84 (2011). Our Supreme Court crafted a rule to provide relief in such circumstances. Robinson, 171 Wn.2d at 307-08.⁴ Here, Ms. Pearson moved to suppress the test results from the

⁴ Principles of issue preservation under RAP 2.5(a) do not apply where (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

analysis of her blood and there was a hearing on the issue. Thus, the record is adequately developed and resort to Robinson is unnecessary.⁵

The City should have obtained a warrant authorizing the testing of Ms. Pearson's blood. It did not. Following this Court's reasoning in Martines, this Court should hold the test results should have been suppressed and reverse.

3. Ms. Pearson's requested instruction that it is lawful to consume drugs and drive was a proper statement of the law and essential to her case. The trial court's refusal to give this instruction was based on a misunderstanding of the law.

Ms. Pearson asked that the jury be instructed that it is not unlawful for a person to consume a drug and drive:

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. This instruction was an accurate statement of the law. See State v. Franco, 96 Wn.2d 816, 825, 639 P.2d 1320 (1982); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 92.10 (3d Ed). The trial court, however, held it was not. CP 665, 668.

⁵ Regardless, the Robinson requirements are met. While this Court's opinion in Martines did not purport to overrule any precedent, neither did the Supreme Court's decision in Gant, which was the impetus for the Robinson rule.

The City would have this Court believe that the “trial court declined to submit [Ms. Pearson’s] proposed instruction because it questioned whether it accurately stated the law, especially without a THC legal limit, and believed that the other instructions allowed [Ms. Pearson] to argue her theory of the case.” Br. of Resp’t at 22. Do not be fooled. The trial court’s sole reason for rejecting the instruction was its misunderstanding of the law. CP 665 (“I think that would be a misstatement on the law if we included - - changed that word from ‘liquor’ to ‘drug.’”).

The City cites no authority in support of its contention that Ms. Pearson’s instruction “erroneously claimed that a person could lawfully drive after consuming any drug.” Br. of Resp’t at 22-23. The likely reason the City fails to cite to authority is because authority does not support its claim. Malstrom v. Kalland, 62 Wn.2d 732, 733, 384 P.2d 613 (1963) (when counsel does not provide citation to authority, the court may assume, that after a diligent search, counsel found none).

While the abuse of discretion standard applies to the refusal to give an instruction, refusal to give an instruction based on legal error is reviewed *de novo*. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Further, a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. Washington State Physicians Ins.

Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054

(1993). Accordingly, because the trial court's decision was based on an erroneous view of the law, it abused its discretion in denying the instruction.

Given the legal error committed by the trial court, Seattle v. Urban, 32 Wn. App. 634, 648 P.2d 922 (1982) is materially distinguishable. Urban would support affirmance if the trial court had properly exercised its discretion and determined the instruction was not helpful given the circumstances of the case. That is not what happened.

This instruction went directly to Ms. Pearson's defense that her use of marijuana had not affected her driving. If the jury had been properly instructed, the outcome may have been different. Intuitively, the jury would think that is not lawful to consume drugs and drive. This instruction would have corrected this erroneous intuition. Further, the evidence showing that Ms. Pearson's driving was "affected" by her use of marijuana was weak. Ms. Pearson got into an accident not because her driving was erratic or unusual, but because a pedestrian unexpectedly darted out into the road. Moreover, as a regular user of marijuana, Ms. Pearson's tolerance of marijuana was greater than that of an irregular user. See CP 633-34 (explaining that people can develop a tolerance for marijuana and other substances); Paul J. Larkin, Jr., Medical or

Recreational Marijuana and Drugged Driving, 52 Am. Crim. L. Rev. 453, 484 (2015) (“some parties who repeatedly use certain drugs develop a tolerance to their neurocognitive effects, requiring users to increase their dose over time in order to obtain the same pleasurable effect, which means that the effect a drug may have on a driver’s motor skills will vary from driver to driver.”). Accordingly, the City’s argument that the instruction was not prejudicial should be rejected.

4. Ms. Pearson did not “open the door” to evidence of the current non-applicable per se THC limit.

“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). The trial court erred in ruling that Ms. Pearson “opened the door” to “evidence” of the current per se THC limit. Contrary to the City’s argument, Ms. Pearson’s eliciting that there was no applicable limit at the time of the alleged offense did not leave the jury “hanging” or suggest that Ms. Pearson’s THC level was below the current legal limit. Br. of Resp’t at 26. It simply focused the jury on the task at hand and clarified that the recent legalization of marijuana and creation of a per se limit by Washington voters had not been in effect.

There was no need to tell the jury that the per se limit voters had approved of was five nanograms. Contrary to the State's suggestion, this did not alleviate any "false impression" that Ms. Pearson's THC level was below the per se limit. Rather, it created a substantial risk that the jury would have speculated that the five nanogram number had some basis in science and that Ms. Pearson's driving must have been affected because her THC level was at 20 nanograms. Such reasoning is faulty because, among other things, "there is no medical or scientific consensus regarding the amount of THC that would impair the average driver." Larkin, 52 Am. Crim. L. Rev. at 483. Moreover, as explained earlier, people like Ms. Pearson may develop a tolerance for marijuana. Drivers who are under the influence of marijuana may also compensate by driving more carefully:

unlike alcohol users, who *underestimate* the effect of alcohol on driving skills and engage in risky driving behavior, such as driving faster and more aggressively, marijuana users *overestimate* the drug's effect and compensate by driving more slowly, passing less frequently, and spacing their cars further from other vehicles by increasing their following distance.

Larkin, 52 Am. Crim. L. Rev. at 476.

While the prosecutor did not mention the current THC limit during closing argument, the prosecutor emphasized that Ms. Pearson's THC level was 20 nanograms. CP 693, 712, 715-16. This alluded to the five

nanogram per se limit. The plain implication of the argument was that Ms. Pearson's driving must have been affected based on this number. Moreover, there was no evidence showing that Ms. Pearson's driving was erratic or unusual. Thus, given the prosecutor's argument and the evidence at trial, the error was prejudicial.

B. CONCLUSION

The City failed to meet its heavy burden to prove by clear and convincing evidence that exigent circumstances justified the extraction of Ms. Pearson's blood. The City also failed to procure a warrant authorizing the testing of Ms. Pearson's blood. For these two separate reasons, the test results should have been suppressed. Legal errors also deprived Ms. Pearson of her right to a fair trial. Accordingly, this Court should reverse.

DATED this 27th day of August, 2015.

Respectfully submitted,

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