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COURT OF APPEALS
DIVISION III

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Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN J. STORMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred in finding that, "Driving at a high rate of speed, Mr. Storms accelerated into and failed to stop at the stop sign at the intersection of Helena and Empire." (CP 732)

2. The court erred in finding that "Officer Raleigh believed Mr. Storms was impaired by drug use based upon his training and experience." (CP 733)

3. The court erred in finding that, "Shortly after the extrication of the two passengers from the suspect vehicle, Officer Paul Taylor observed a plastic baggie in the front passenger area of the suspect vehicle in open view." (CP 733-34)

4. The court erred in finding that:

If the officers had attempted to obtain a search warrant at the time, Officer Curtis estimated based upon his training and experience it would have taken an additional two hours to drive to the County/City Public Safety Building, prepare and gather the information for the search warrant application, drive to the on-call magistrate's house, await the review of the search warrant application by the magistrate and for the officers to return to the hospital for execution of the signed search warrant.

(CP 735-36)

5. The court erred in finding that "No telephonic or other electronic application process was known by the officers at the time. The

court takes judicial notice that no electronic warrant application process was available at the time.” (CP 736)

6. The court erred in concluding:

Here, there was probable cause to draw blood based upon the totality of the facts and circumstances known to the officers at the time of arrest. Mr. Storms was driving erratically at a high rate of speed; he accelerated into and he failed to stop at a controlled intersection. Officers observed a baggie of methamphetamine in Mr. Storms’ shortly after his passengers were extricated. Officer Raleigh observed Mr. Storms’ tremors and sweating and he believed the defendant may have been impaired because of drug use. When DRE Trooper Pichette arrived at the hospital almost two hours after the collision, he observed Mr. Storms’ face appeared flush and the tremors about his body. This behavior was an indicator to Trooper Pichette that the defendant had potentially ingested a stimulant.

(CP 736-37)

7. The court erred in concluding:

Based upon the foregoing, the court finds that under the totality of 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 would be lost, due both to the passage of time and to the potential need for the administration of medical care to the defendant based upon the defendant’s complaints and the scene medic’s statement that defendant would need x-rays. The delay of potentially four hours, and perhaps 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 could be delayed due to medical treatment, created sufficient exigent circumstances in this case to

permit the police to subject Mr. Storms to a warrantless blood draw.

(CP 740)

II. ISSUES PRESENTED

1. Does substantial evidence support the trial court's finding of fact number 2 that the defendant drove at a high rate of speed, failed to stop, and then accelerated into the intersection of Helena and Empire?

2. Does substantial evidence support the trial court's finding of fact number 4 that Officer Raleigh believed the defendant was impaired by drug use based upon his training and experience?

3. Does substantial evidence support the trial court's finding of fact number 9 that Officer Taylor observed a plastic baggie in the defendant's car?

4. Does substantial evidence support the trial court's finding of fact number 22 that officers would have spent an additional two hours to apply for and seek a search warrant for the defendant's blood?

5. Has the defendant established that a telephonic warrant application procedure was available at the time of the blood draw, and, if so, was that process in place and available for the officer's use on the date of the incident?

6. Does substantial evidence support the trial court's conclusion of law number 5 that the aggregate information acquired by all of the officers investigating the crimes of vehicular homicide and vehicular assault established probable cause to believe the defendant was under the influence of a drug necessitating a blood draw from the defendant without a search warrant?

7. Does substantial evidence support the trial court's conclusion of law number 9 that the totality of the circumstances surrounding the investigation of these serious offenses created an exigency justifying a warrantless blood draw of the defendant at the hospital?

8. Whether the trial court erred in denying the defendant's suppression motion for the warrantless blood draw under article I, section 7, of the Washington State Constitution and under the Fourth Amendment to the United States Constitution?

III. STATEMENT OF THE CASE

The defendant was charged by amended information in the Spokane County Superior Court on February 13, 2013, with vehicular homicide, two counts of vehicular assault, failure to remain at the scene of an accident - fatality, and third degree driving while license suspended.

The homicide and assault charges were accompanied by several aggravating circumstance allegations.¹ CP 56-57.

The jury found the defendant guilty as charged, absent the DWLS charge. CP 64-71; (2/18/14) RP 183-185.

After a suppression hearing on February 3, 2014, regarding the warrantless blood draw of the defendant at the hospital after the collision, the trial court entered findings of fact and conclusions of law denying suppression of the subsequent testing of the blood, and the obtained results. CP 731-741.²

Once the appeal was filed, and the related briefing submitted by the parties, the defendant raised an issue in his statement of additional grounds. Thereafter, this Court directed the parties to address: “Whether the trial court erred in denying Mr. Storm’s motion to suppress the results of a warrantless blood draw under Art. 1, Section 7, of Washington’s Constitution or the Fourth and Fourteenth amendments of the U.S. Constitution.”

¹ The defendant pleaded guilty to the driving while license suspended charge before trial. CP 62.

² In addition to the various officers who testified at the hearing, the trial court also considered and relied on the police reports attached to the defendant’s brief in the trial court supporting his motion to suppress the blood test results. CP 31–142 (police reports), 731.

Facts established at the suppression hearing.³

On Sunday, February 10, 2013, at approximately 12:25 p.m., the defendant's vehicle (a Honda) travelled past Spokane Police Officer Erin Raleigh's patrol car and the defendant, who was the driver of the car, appeared startled. RP 9;⁴ CP 39. The vehicle accelerated and travelled at a high rate of speed away from the officer. RP 9. The defendant's vehicle turned northbound on Helena Street. RP 9. The officer turned his car around, and within a short amount of time, observed a large plume of smoke in the intersection, approximately one to two blocks north of his location. RP 10-11; CP 40.

Arriving at the collision at Empire Avenue and Helena Street,⁵ the Honda was unrecognizable to the officer due to the amount of damage incurred as a result of the collision with a Ford Ranger pickup. RP 10.⁶ The Honda had extreme damage to the front, top, rear, and passenger side. CP 41. The front male passenger inside the Honda had extensive head

³ A comprehensive summary of the facts, as developed at trial, are contained in the respondent's opening brief.

⁴ The referenced verbatim report of proceedings is taken from the February 3, 2014 suppression hearing.

⁵ Empire is an arterial, and Helena is a residential street. RP 29-30. Helena is posted at 25 m.p.h., in northeast Spokane. RP 30, 83.

⁶ The Honda "T-boned" the pickup.

injuries and injuries to his upper torso. CP 41. He appeared to be turning gray, with labored breathing. RP 19. The female passenger also had extensive injuries. CP 41. Both passengers were unconscious, and they had to be extricated from the defendant's vehicle by the fire department. CP 41.

The driver of the pickup was deceased, trapped inside his vehicle, with serious head and body trauma. CP 41-42. A telephone pole had been struck and knocked down by the pickup. CP 41. Avista responded to the scene during the initial cleanup to repair the power pole. RP 114. Officer Raleigh described the collision as: “[e]xtremely horrific and graphic and very violent.” RP 22.⁷ Sergeant Kevin Huddle described the scene as “extremely chaotic.” RP 74. Officer Anthony Lamana, with 16 years’ experience, described the crime scene as follows:

It was obvious to me that there had been a pretty massive number of people that were fairly well frantic with what was going on there, and the people that were assisting the

⁷ With respect to the number of police officers needed for the scene, Officer Raleigh remarked: “It was a crime scene that was extremely manpower intensive, and I remember as it unfolded and took place, I remember in my kind of thinking that we need more police officers here like ten minutes ago, and as far as the witnesses and the bystanders and everyone that was crowding into the crime scene and then the injured parties, themselves, and the[n] contacting Mr. Storms at a separate location, it required a lot of manpower.” RP 22-23.

two in the Honda thought they were possibly dying at that moment. It was just very chaotic.

RP 64-65.⁸

Mapping the collision scene, for later reconstruction, took approximately three and one-half hours. RP 100.⁹ Corporal Michael Carr, police department collision reconstructionist, responded to the scene. RP 109. After the initial investigation was completed, Corporal Carr estimated the defendant's vehicle was travelling between 45 and 47 m.p.h. when it struck the victim's vehicle. RP. 112. Witnesses had placed the defendant's vehicle over 50 m.p.h. as it entered the intersection, and before striking the victim vehicle. RP 113. Corporal Carr described the crime scene as complicated. RP 114-15.

⁸ The police department was short-staffed on this particular day. RP 73. As described by Sergeant Huddle: "[A] single major incident like that takes up a lot of officers, and if we have one more than that, we don't have anybody in the whole city to respond, but I think we had twelve officers that day from north and south on swing shift, and I can't remember the exact number because my computer quit working on me the minute I got on scene. It was a dead spot, but I believe there was at least eight to ten officers involved in this." RP 73. Officers from other sectors of the city had to be called in to assist. RP 73. Sergeant Huddle further remarked: "Well, first of all, there weren't other officers on scene, and the crash was so intensive and people in the scene, I had to try to control the scene as best I could with very few resources." RP 74.

⁹ "[T]he intersection was blocked off at Perry to the west and just past Helena to the east, north to Garland and then south about a half a block maybe to the alleyway..., and there was obviously all the debris and vehicles that were at the intersection." RP 110-11.

At the crime scene, Officer Paul Taylor, with 23 years' experience as a police officer, observed a small white baggie in the mat pocket of the defendant's car. RP 101. Based upon the officer previously buying illegal narcotics as a police officer and on his Drug Enforcement Agency training, it appeared to be a controlled substance. RP 97, 101. The drugs were in small packaging, the same used for distribution of a controlled substance on the street. RP 101. It appeared to be methamphetamine. RP 101. Officer Taylor and Officer Amy Ross advised Corporal Carr of the baggie. RP 111.

The defendant ran from the scene and was ultimately apprehended by Officer Raleigh, with the aid of several onlookers. RP 11-13. A witness, Sean Blevins, observed the defendant run through his back yard after the collision. CP 54. Mr. Blevins believed the defendant was "on drugs" by the manner in which he was moving. CP 54; RP 40.

Officer Raleigh, with 15 years' experience, was instructed at the basic law enforcement academy regarding intoxicated parties, driving under the influence (DUI) arrests, and signs of intoxicants. RP 8, 21. In the course of his employment, Officer Raleigh had observed many people impaired by drug use. RP 21. Officer Raleigh stated the defendant had physical signs of impairment. RP 22. The defendant was not acting normally, as he had a difficult time maintaining his body movements,

while lying on the ground. RP 22. He was also very sweaty. RP 22. However, Officer Raleigh remarked that he could not “classify” what drug the defendant actually “was on.” RP 22.

After the defendant was apprehended and detained around 12:27 p.m., officers conducted witness show ups at 1:09 p.m. RP 34, 41. Medics at the scene advised officers that the defendant needed to go to the hospital for x-rays. RP 58. The defendant was subsequently transported by Officers James Curtis and Christopher Brasch to Sacred Heart Medical Center at 1:37 p.m. RP 35, 56-57. During the entire contact, Officer Curtis observed the defendant’s legs and arms were constantly moving, and the defendant was very nervous. RP 55. The physical signs were indicative to Officer Curtis of methamphetamine or other stimulants use based upon his 16 years as a police officer. RP 59.

Corporal Carr and Sergeant Huddle contacted Washington State Patrol Drug Examination Expert (DRE), Trooper David Pichette, to respond to the hospital. RP 46, 94-95.¹⁰ The trooper arrived at the hospital at 1:54 p.m. RP 87; CP 103. Officers Curtis and Brasch were at the hospital when the trooper arrived. RP 89. The defendant’s blood had not

¹⁰ At the time, Trooper Pichette had over 19 years’ experience as a state trooper, with 7 years as a drug recognition expert. RP 86, 93. He had to respond from Ritzville to Spokane because Spokane did not have an available DRE. RP 92.

been taken prior to the trooper's arrival. RP 90. The trooper was present when the defendant was advised of his constitutional rights and special evidence warning. CP 103. Trooper Pichette viewed the defendant constantly moving his legs at the hospital, as though he could not keep them still, indicating stimulant or other drug use. RP 90, 92. His face was also flush, suggesting possible ingestion of a stimulant or other drug. RP 90, 92.

Officer Brasch had previously written search warrants in the field, but he had never applied for a search warrant by electronic means. RP 43. The officer estimated it would have taken approximately two additional hours from start to finish for the search warrant process. RP 43-44. Although Officer Curtis had previously participated in the process of applying for search warrants, he had not previously written a search warrant in the field. RP 59-60. He was not aware of any electronic means to apply for a search warrant. RP 59.

Blood was drawn from the defendant without a warrant at the hospital at 2:16 p.m. RP 58.

The defendant was escorted to the x-ray room at the hospital because of his complaint of sore ribs, and hip and leg pain. RP 42, 58.

IV. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Overall, the defendant contends officers did not have probable cause for the warrantless search of the defendant's blood. Moreover, he argues a warrant was required under the Supreme Court's holding in *Missouri v. McNeely* deciding "the natural dissipation of alcohol in the blood" is not a per se exigency justifying a warrantless blood draw. *Missouri v. McNeely*, --- U.S. ---, 133 S.Ct. 1552, 1563, 185 L.Ed.2d 696 (2013). The defendant also assigns error to several of the trial court's findings of fact and conclusions of law.

Standard of review of findings of fact and conclusions of law.

Great deference is given to the trial court's factual findings. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Accordingly, where the trial court has weighed the evidence and denied a motion to suppress the evidence, an appellate court limits its review to determine whether substantial evidence supports the challenged findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Where substantial, but disputed, evidence supports the findings of fact and conclusions of law, an

appellate court will not disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974).

Substantial evidence exists when it is enough “to persuade a fair-minded person of the truth of the stated premise.” *Russell*, 180 Wn.2d at 866-67. Stated differently, substantial evidence is “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). If the standard is satisfied, an appellate court does not substitute its judgment for that of the trial court even though the appellate court might have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist.*, 149 Wn.2d at 879-80; *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Circumstantial evidence is as reliable as direct evidence when viewing the sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In addition, an appellate court defers to the trial court on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

Conclusions of law from an order on a suppression motion are reviewed de novo. *Russell*, 180 Wn.2d at 866-67.¹¹

¹¹ The defendant does not challenge findings of fact 1, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21. Unchallenged findings of

1. Substantial evidence supports the trial court's finding of fact number 2: "Driving at a high rate of speed, Mr. Storms accelerated into and failed to stop at the stop sign at the intersection of Helena and Empire." CP 732.

The defendant argues there is no evidence the defendant accelerated into the intersection prior to the collision because Officer Raleigh did not physically observe the collision as it occurred. *See* Suppl. Br. of Appellant at 13.

Finding of fact number 2 finds evidentiary support from Officer Raleigh, who observed the defendant accelerate away from his patrol car at a high rate of speed. Within a block or two of the Helena and Empire intersection, and in a short amount of time, the defendant struck the victim's vehicle.

There is further evidentiary support from Corporal Carr. Based upon his reconstruction, Corporal Carr estimated the defendant's vehicle moved between 45 m.p.h. and 47 m.p.h., over twice the speed limit, when it struck the victim's car. There was no evidence to the contrary at the hearing.

It can be reasonably inferred that the defendant did not stop at the intersection because of the speed and force his vehicle struck the victim vehicle. It would have been physically impossible for the defendant to

fact are verities on appeal. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

have stopped, and gained the approximate 45 m.p.h. to 47 m.p.h., when it travelled the several feet from area of the stop sign to when it struck the victim's pickup, causing it to elevate six feet, forcing the pickup to slide sideways into a utility pole, and knocking the pole down.

Substantial evidence supports the court's finding of fact number 2.

2. Substantial evidence supports the trial court's finding of fact number 4 which, in part, states: "Officer Raleigh believed Mr. Storms was impaired by drug use based upon his training and experience." CP 733.

Ample evidence supports the above cited portion of finding of fact number 4. With 15 years' experience as a police officer, trained in impairment and intoxication through basic law enforcement training, and having witnessed numerous people on the job impaired by drug use, the defendant's constant movement of his limbs and body and his profuse sweatiness, support Officer Raleigh's belief that the defendant was impaired by drug use. The fact that Officer Raleigh was not able to pinpoint the exact drug ingested by the defendant does not negate this finding of fact.

In *State v. Rangitsch*, 40 Wn. App. 771, 700 P.2d 382 (1985), a trooper found the defendant in a nearby home after several people were killed in a collision. The trooper observed the defendant shaking, mumbling, and sniffing, but he did not seem under the influence of

alcohol. *Id.* at 772. The trooper became suspicious that the defendant was under the influence of drugs based upon her four years as a trooper and her training in drug recognition symptoms. *Id.* at 772. On the way to the hospital, the trooper observed the defendant's mood fluctuate from detached to agitated and hyperactive. *Id.* at 772.

The trooper had not previously seen persons under the influence of cocaine. *Id.* at 772. Based on her experience, training, and observations of the defendant's appearance and mood swings, she believed Rangitsch was under the influence of drugs. *Id.* at 772.

Division One of this court found the trooper's testimony regarding her training, experience, and observations supported the trial court's finding and conclusion that probable cause existed to believe the defendant was under the influence of drugs at the time of the collision. *Id.* at 772.

Here, substantial evidence supports the trial court's finding of fact number 4.

3. Substantial evidence supports the trial court's finding of fact number 9: "Shortly after the extrication of the two passengers from the suspect vehicle, Officer Paul Taylor observed a plastic baggie in the front passenger area of the suspect vehicle in open view." CP 733-34.

It was uncontroverted at the time of hearing that Officer Paul Taylor observed a small white baggie in the mat pocket of the defendant's

car in plain view. It appeared to be a controlled substance based upon the officer's 23 years as a police officer, his previous experience buying illegal narcotics as a police officer, and his Drug Enforcement Agency training. In addition, the drugs were in a small package. The officer recognized the packaging to be the same used for distribution of a controlled substance on the street. It appeared to be methamphetamine to the officer based on his training and experience.

In *State v. Alvarado*, 56 Wn. App. 454, 456-58, 783 P.2d 1106 (1989), *review denied*, 114 Wn.2d 1015 (1990), officers observed the defendant exchange a bundle for a large sum of money. *Id.* at 457. The officers testified that based on their training and experience, they believed the defendant was engaging in a drug transaction. *Id.* The court found probable cause to arrest for unlawful delivery of a controlled substance. *Id.*

In *State v. Huff*, 64 Wn. App. 641, 643, 826 P.2d 698 (1992), an officer observed a swerving car and initiated a traffic stop. The driver did not immediately respond, and the officer observed the front seat passenger looking back and making furtive movements. *Id.* When Huff, the driver, finally pulled to a stop, the officer approached the car and smelled methamphetamine coming from the car. *Id.* The deputy testified the smell was quite distinctive, "like a cross between cat urine and a chemical

smell,” that he had been trained to recognize it, and that he had come in contact with it 50-75 times in the course of his duties. *Id.* at 648.

After arresting Huff, the officer arrested Morley, the passenger. *Id.* at 644. The court found that the officer had sufficient probable cause to arrest the passenger for possession of a controlled substance, based on her furtive gestures, the smell of methamphetamine coming from her and the car, and her lies about her identity. *Id.* at 648. Division Two of this court held the arrest of the defendant was valid because the deputy had objectively sufficient probable cause to believe that she was in possession of a controlled substance. *Id.*

Similarly, in *State v. Fore*, 56 Wn. App. 339, 783 P.2d 626 (1989), *review denied*, 114 Wn.2d 1011 (1990), officers were using binoculars to watch a park for drug transactions. They saw Fore walk up to a car and exchange a small plastic bag for money with a person in the car. Fore did the same thing again with a person in a different car. A man who appeared to be with Fore did the same. Finally, an officer saw Fore go to a truck, remove a large bag containing smaller packets with green vegetable matter

in it, and remove some packets. *Id.* at 340-41. Division One of this court found probable cause existed for the arrest of Fore. *Id.* at 343-44.¹²

Here, substantial evidence supports the trial court's finding of fact number 9.

¹² See also, *United States v. Rosario*, 638 F.2d 460, 462 (2d Cir. 1980) (officer's observation of suspect furtively carrying plastic bag containing white substance to vehicle supported probable cause to arrest for possession of cocaine); *Blackmon v. United States*, 835 A.2d 1070, 1075 (D.C. 2003) (experienced officer had probable cause to arrest for possession of cocaine upon observing bag in vehicle containing white rock-like substance, and was not required to field test substance before arrest); *State v. Gordon*, 646 So.2d 1005, 1010 n. 6 (La.Ct.App. 1994) (officer's three years of experience and several hundred narcotics arrests relevant to probable cause determination); *People v. Coleman*, 183 A.D.2d 840, 584 N.Y.S.2d 89, 90 (N.Y.App.Div. 1992) (eighteen-year veteran could identify a plastic bag containing vials as cocaine); *State v. Jackson*, 778 So.2d 23, 28-29 (La.Ct.App. 2000) (finding probable cause based on experienced officer's conclusion that plastic bag containing white powder on floor of suspect's car was cocaine); *Commonwealth v. Santana*, 420 Mass. 205, 649 N.E.2d 717, 722 (1995) (trained officer had probable cause to seize clear plastic bag containing white substance observed during traffic stop where "its incriminating character was immediately apparent" (quotation omitted)); *State v. Flores*, 996 A.2d 156, 162-64 (R.I. 2010) (finding probable cause to arrest where, during traffic stop, officer observed two clear plastic bags containing white substance in car's center console).

4. Substantial evidence supports finding of fact number 22, which, in part, states: “If the officers had attempted to obtain a search warrant at the time, Officer Curtis estimated based upon his training and experience it would have taken an additional two hours to drive to the County/City Public Safety Building, prepare and gather the information for the search warrant application, drive to the on-call magistrate’s house, await the review of the search warrant application by the magistrate and for the officers to return to the hospital for execution of the signed search warrant.” CP 735-36.

This crime occurred on a Sunday when the court was closed for business. (Unchallenged finding of fact number 1). At the time of motion and when the court orally ruled denying the motion, the court stated:

Officer Brasch testified, in fact two officers testified, it does normally take a couple hours to do a warrant. They would have had to write out a warrant, find a magistrate, drive to that magistrate’s house and have them sign it.

At that time, they were not doing electronic search warrants. They were driving to the Judge’s house and doing search warrants. It was shortly after *McNeely* came out that the Court started doing electronic search warrants. Most of the officers that testified still said they weren’t aware of any electronic search warrant process.

RP 152-53.¹³

For the first time on appeal, the defendant cites *State v. Tarter*, 111 Wn. App. 336, 338-39, 44 P.3d 899 (2002); *State v. Reeb*,

¹³ The defendant chides the trial court for using the term “electronic warrant.” *See*, Suppl. Br. of Appellant at 11. However, the 2013 and 2014 versions of the Washington Court Rules, CrR 2.3(c), in part, with regard to issuance of a search warrant, state: “The sworn testimony may be an electronically recorded telephonic warrant.” The defendant’s disagreement with the use of the court’s terminology is trifling.

63 Wn. App. 678, 679-80, 821 P.2d 84 (1992); *State v. Stanphill*, 53 Wn. App. 623, 629, 769 P.2d 861 (1989), for the proposition, and by analogy, that telephonic warrants were available in Spokane County on the date of the collision in the present case. The only conclusion one can draw from these cases is that a telephonic warrant process presumably was available in 2002, 1992, and 1989, for officers who applied for a warrant telephonically in those specific cases, on those days, in those locations. It is unknown as to the day of week, or time of day those warrants were requested by officers.

At the time of hearing in the present case, it was uncontroverted that a telephonic or electronic warrant application was not available on the date of the incident. The above mentioned cases cited by defendant have no application to the trial court's analysis and are outside the record.

When a claim is brought on direct appeal, the reviewing court considers only the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991), *cert. denied*, 501 U.S. 1237 (1991); *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982). As this Court observed in *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977), matters referred to in a brief, but not included in the record, cannot be considered on appeal. *Accord United States v.*

Wilson, 215 F.3d 1323 (4th Cir. 2000) (any remedy for alleged errors based on facts first submitted in appellant's supplemental brief would not be available on direct appeal and factual issues should not be made for the first time in the court of appeals).

Moreover, there was no evidence presented by the defendant at the time of the motion that was contrary to the evidence presented by the State and to the court's finding of fact that no electronic means was available to apply for a warrant on the day of the collision. The defendant offered no evidence at the time of hearing as to what process was available on the day of the collision and, if available, how it was implemented by the court and available to law enforcement.

The defendant should not be allowed to argue facts not in evidence and brought to this Court's attention for the first time on appeal. Moreover, the facts as outlined above in the cases cited by the defendant are not relevant as to whether a telephonic warrant process was available during this investigation on the date of this incident. Substantial evidence supports the trial court's finding of fact number 22.

5. The trial court's findings of fact support its conclusions of law 5 and 9.

Here, there was probable cause to draw blood based upon the totality of the facts and circumstances known to the officers at the time of arrest. Mr. Storms was driving erratically at a high rate of speed; he accelerated into and he failed to stop at a controlled intersection. Officers observed a baggie of methamphetamine in Mr. Storms' car shortly after his passengers were extricated. Officer Raleigh observed Mr. Storms' tremors and sweating and he believed the defendant may have been impaired because of drug use. When DRE Trooper Pichette arrived at the hospital almost two hours after the collision, he observed Mr. Storms' face appeared flush and the tremors about his body. This behavior was an indicator to Trooper Pichette that the defendant had potentially ingested a stimulant.

CP 740.

Warrantless searches are presumptively unconstitutional under article 1, section 7, of the Washington State Constitution and the Fourth Amendment to the United States Constitution. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). A “compelled intrusio[n] into the body for blood to be analyzed for alcohol content” is a search. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984); *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991) (nonconsensual blood test for suspected commission of vehicular

homicide is a search), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

- a. Probable cause existed to draw blood from the defendant at the hospital.

“Probable cause exists when the arresting officer has knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed at the time of the arrest.” *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). “Probable cause ‘boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.’” *State v. Fisher*, 145 Wn.2d 209, 220 n. 47, 35 P.3d 366 (2001) (quoting *State v. Klinker*, 85 Wn.2d 509, 521, 537 P.2d 268 (1975)).

In *State v. Cottrell*, 86 Wn.2d 130, 542 P.2d 771 (1975), the court found the standard for probable cause considers an officer’s special expertise in identifying criminal behavior sufficient to support probable cause. As explained by our Supreme Court in *State v. Scott*, 93 Wn.2d 7, 11, 604 P.2d 943, 945 (1980):

Probable cause is based upon the totality of facts and circumstances within the knowledge of the arresting officer. It is not necessary that the knowledge or evidence establish guilt beyond a reasonable doubt, “for in this area the law is concerned with probabilities arising from the

facts and considerations of everyday life on which prudent men, not legal technicians, act.” (Citation omitted).

The test is one of reasonableness considering the Time, the Place, and the Pertinent circumstances. (Citation omitted). The standard of probable cause ... is to be applied in the light of everyday experience, rather than according to strict legal formulae. (Citations omitted).

Furthermore, the arresting officer’s special expertise in identifying criminal behavior must be given consideration.

(P)robable cause for arrest should be examined in the light of the arresting officer’s special experience, and ... the standard should be, not what might appear to be probable cause to a passerby, but what would be probable cause to a reasonable, cautious, and prudent officer. (Citation omitted).

Accordingly, an appellate court makes this determination in a “practical, nontechnical manner.” *State v. Gillenwater*, 96 Wn. App. 667, 671, 980 P.2d 318 (1999), *review denied*, 140 Wn.2d 1004 (2000). “A tolerance for factual inaccuracy is inherent to the concept of probable cause.... Probable cause requires more than suspicion or conjecture, but it does not require certainty.” *State v. Chenoweth*, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007).

In *Gillenwater, supra*, the defendant argued that the facts were not sufficient to show probable cause to arrest because there was no evidence that he caused a fatal collision, or he was driving erratically at the time. He argued further that in every accident case where the trooper had not

performed field sobriety tests and had not observed bloodshot eyes or slurred speech, probable cause had been found only where the accident was caused by a suspected drunk driver.

Even though Gillenwater did not cause the collision, the officer on the scene noticed a cooler of beer in his car and three empty beer cans on the floorboard. Additionally, an officer noticed the car smelled of alcohol and a paramedic treating the defendant at the scene told the officer the defendant had an odor of alcohol. *Gillenwater*, 96 Wn. App. at 669.

Division One of this court found the defendant's reasoning would require proof of erratic driving in any collision where the trooper is unable to employ the customary field tests. The court declined to read probable cause so narrowly. Ultimately, the court found although the facts did not prove beyond a reasonable doubt that the defendant had consumed enough alcohol to affect his driving, the facts did raise "a reasonable ground of suspicion ... to warrant a cautious [person] in believing...." him to be guilty. *Id.* at 671.

b. Fellow officer rule.

In the seminal case of *State v. Maesee*, 29 Wn. App. 642, 629 P.2d 1349 (1981), *review denied*, 96 Wn.2d 1009 (1981), the court adopted the "fellow officer" rule, which permits a trial court to determine whether probable cause to arrest exists based on the information that the police

possessed as a whole. In *Maesee*, several officers investigating an arson obtained information implicating the defendant. *Id.* at 43-44. One of the officers instructed another officer, who was unaware of all of the information known to other officers involved in the investigation, to arrest the defendant. *Id.* at 644.

The *Massee* court observed two forms of the rule. In the narrow form: “it is necessary to trace the action of the arresting officer back to some other specific person ... and show that the latter individual had brought together a sufficient collection of underlying facts to add up to probable cause.” *Id.* at 646. In the broader form “it will suffice that the directing or requesting agency possessed all the facts needed to show probable cause.” *Id.* at 646.

Contrary to the defendant’s assertion that the boundaries of the “fellow officer” rule are unsettled,¹⁴ Division One of this court affirmatively adopted the broad form of the rule, holding in *Massee* that “in those circumstances where police officers are acting together as a unit, cumulative knowledge of all the officers involved in the arrest may be

¹⁴ See Suppl. Br. of Appellant at 15-16.

considered in deciding whether there was probable cause to apprehend a particular suspect.” *Id.* at 647.¹⁵

The *Massee* holding does not require an officer who possesses probable cause to expressly communicate with or direct the officer conducting the warrantless search. *See, State v. Wagner-Bennett*, 148 Wn. App. 538, 542, 200 P.3d 739 (2009) (under the fellow officer rule, the information known to one officer may be considered in deciding whether or not there was probable cause to arrest, even if it was not expressly communicated to the arresting officer); *State v. Harrell*, 83 Wn. App. 393, 400, 923 P.2d 698 (1996) (it is the cumulative information possessed by all the officers in a joint investigation that should be considered in assessing whether the police had probable cause to arrest); *State v. Stebbins*, 47 Wn. App. 482, 484, 735 P.2d 1353 (1987), *review denied*, 108 Wn.2d 1026 (1987) (all the information known by the officers of an investigating agency is to be considered in determining probable cause).

¹⁵ The defendant further posits *Alvarado, supra*, adopted the narrow construction of the fellow officer rule, as rejected by the *Massee* court. *See*, Suppl. Br. of Appellant at 14. It did not. The court stated “[C]ooperation between investigating officers *or* an arrest directive made by an officer possessing probable cause is sufficient to justify an arrest by an officer lacking knowledge of the facts which form the basis of probable cause.” *Alvarado*, 56 Wn. App. at 456-57(emphasis added).

In the present case, Officers Curtis and Brasch, who ultimately ordered hospital staff to draw blood samples, did not have to possess information amounting to probable cause to justify the search for blood. Rather, the officers acted pursuant to a coordinated investigation, and all officers investigating the crime, as a group, possessed the necessary information amounting to probable cause at the time of the search of the defendant's blood for possible drug impairment.

Overall, Officer Raleigh observed the defendant drive his vehicle at a high rate of speed, and within a short amount of time, cause a horrendous collision. Shortly after the collision, Officer Raleigh observed the defendant, and based upon his training and experience, believed the defendant was under the influence of a drug.¹⁶ Officer Taylor, based upon his training and experience, observed what appeared to be a controlled substance in the defendant's vehicle at the crime scene prior to the blood draw. During Officer Curtis' entire contact with the defendant, the defendant constantly moved his legs and he was very nervous. These physical signs were indicative of ingestion of some form of stimulant

¹⁶ The phrase "under the influence" means "any influence which lessens in any appreciable degree the ability of the accused to handle his automobile." *State v. Hansen*, 15 Wn. App. 95, 96, 546 P.2d 1242 (1976) (italics omitted) (quoting *State v. Hurd*, 5 Wn.2d 308, 315, 105 P.2d 59 (1940)).

based upon the officer's training and experience. DRE Trooper Pichette also observed the defendant at the hospital. The defendant's constant leg movement and his flushed face suggested possible stimulant ingestion.

Therefore, the police, as a whole, could reasonably believe that the defendant was under the influence of a stimulant constituting probable cause to believe the defendant had committed a vehicular homicide while under the influence of a drug at the time of his blood draws. Notwithstanding the knowledge of the police as a whole, Officer Curtis, who, in part, ordered the blood draw, had sufficient information constituting probable cause to search for the defendant's blood.

Accordingly, the record supports the trial court's conclusion of law that probable cause existed for the search.

c. Exigent circumstances justified taking a sample of the defendant's blood at the hospital without a warrant.

Because the taking of blood constitutes a search, law enforcement must obtain a warrant unless the search meets one of the exceptions to the warrant requirement. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *State v. Terronova*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

One recognized exception allows a warrantless search and seizure if exigent circumstances exist. *Terrovona*, 105 Wn.2d at 644. “The rationale behind the exigent circumstances exception ‘is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.’” *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). A court must evaluate the totality of the circumstances in determining whether exigent circumstances existed. *McNeely*, 133 S.Ct. at 1556; *Smith*, 165 Wn.2d at 518.

To support a finding of exigency, the circumstances must clearly demonstrate that the officer needed to act quickly. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 1156 (2002). Relevant circumstances include “the natural and inexorable dissipation of blood alcohol” levels over time, the gravity of the offense, and the relative availability of telephonic warrants. *State v. Komoto*, 40 Wn. App. 200, 211-14, 697 P.2d 1025 (1985), *review denied*, 104 Wn.2d 1009 (1985), *cert. denied*, 474 U.S. 1021 (1985). The natural dissipation of blood alcohol does not constitute a per se exigency, but rather is one factor in assessing the

reasonableness of a warrantless blood draw. *McNeely*, 133 S.Ct. at 1561-63.

On several occasions, the United States Supreme Court has addressed whether a warrantless blood test in a DUI case violated the Fourth Amendment.

In *Schmerber v. California*, 384 U.S. 757, 758-59, 86 S.Ct. 1826, 1829 (1966), the defendant was involved in an auto accident. The patrolman arriving at the scene shortly after the accident smelled liquor on defendant's breath and noticed his eyes appeared bloodshot. The defendant was taken to a hospital for treatment. While in the hospital, the defendant was arrested for driving under the influence. After the arrest, a sample of the defendant's blood was taken by a doctor at the officer's request. The officer did not obtain a search warrant. Schmerber objected to the admission in evidence of the blood alcohol test results at trial, asserting the results were the product of an unconstitutional search and seizure.

The Supreme Court ultimately upheld the admission of evidence obtained from this warrantless search. The Court concluded the arresting officer in *Schmerber* "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of

evidence.”” *Id.* at 770-71. The Supreme Court was particularly concerned with the body’s natural metabolization of alcohol, and it noted that the arresting officer had brought the accused to a hospital and there was no time to secure a warrant before the evidence disappeared. *Id.* at 770. The Supreme Court also held that blood tests are “commonplace” and a reasonable method to test blood-alcohol level, as they extract minimal amounts of blood and the procedure involves almost no risk or pain. *Id.* at 771. “Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner’s arrest.” *Id.* The court concluded that (1) admission of the test results did not violate his Fifth Amendment privilege against self-incrimination because they were neither testimonial nor communicative and (2) although the Fourth Amendment ordinarily requires a warrant for a blood draw, the natural dissipation of alcohol in blood can invoke the emergency exception to the warrant requirement. *Id.* at 760-65.

More recently, in *McNeely*, the defendant refused to take a Breathalyzer test during a routine DUI investigation, and again when being transported to the police station, in order to measure his blood-alcohol concentration (BAC), so the arresting officer transported the defendant to a nearby hospital. *McNeely*, 133 S.Ct. at 1556-1557.

At the hospital, the arresting officer read an admonition to the defendant under the Missouri implied consent law, and told a laboratory technician to draw a blood sample. *Id.* at 1557.

The Court held that the natural dissipation of alcohol in the bloodstream does not create per se exigent circumstances in every DUI case. *Id.* at 1563, 1568. “In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *Id.* at 1561. Although the court had no “doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test,” the high court held that the state was required to make such a showing under the totality of the circumstances and on a case-by-case basis. *Id.* at 1561, 1563. The Court also recognized the facts supporting probable cause in that case were simple. *Id.*

Importantly, the Supreme Court recognized in *McNeely* that breath or blood *alcohol* content naturally dissipates in a gradual and relatively predictable manner, allowing an officer time to apply for a search warrant in routine cases. *Id.* at 1555.

There is an important distinction when evaluating exigent circumstances where officers are investigating a suspected impaired driver, when circumstances suggest the driver has ingested a controlled substance.¹⁷ The dissipation rate of a controlled substance is uncertain and it begins immediately. For example, in *State v. Baity*, 140 Wn.2d 1, 6, 991 P.2d 1151 (2000), the Supreme Court was asked to determine whether the DRE protocol is generally recognized in the relevant scientific community. In *Baity*, the Court commented: “The effect of any given drug can vary from drug to drug, primarily in terms of intensity and duration of action, and is dependent on many factors, including the amount ingested, the user’s tolerance to the drug, and the drug’s purity.” *Id.* at 6.

Similarly, the Oregon Supreme Court was asked to determine in a DUI controlled substance case whether the warrantless administration of field sobriety tests was constitutionally permissible under *McNeely, supra*. In doing so, the court recognized with respect to exigency that “‘over time the body filters drugs and they dissipate in one’s body,’ that various drugs can dissipate at different rates and that the effects of drugs wear off over time.” *State v. Mazzola*, 345 P.3d 424, 435 (Or. 2015).

¹⁷ This Court recognized in *State v. Baldwin*, 109 Wn. App. 516, 524-25, 37 P.3d 1220 (2001), *review denied*, 147 Wn.2d 1020 (2002), that any number of drugs with a different number of half-lives might be present in a suspect’s blood.

The predictability of alcohol dissipation is unlike the fluctuating dissipation rate of different controlled substances. The officers in the present case were faced with the same uncertainty regarding what drug or drugs the defendant may have ingested and the dissipation rate of one or all of those potential controlled substances.¹⁸ The totality of the circumstances in this case justified a warrantless blood draw. It is undisputed that the blood drug evidence began dissipating after the defendant's collision. It is also undisputed that the police were investigating serious offenses, a potential vehicular homicide and several vehicular assaults. The defendant's flight from the scene, his apprehension, and later identification by witnesses initially delayed the taking of a blood sample. The defendant's claim of injury at the scene required his transport to a hospital, causing additional delay and a need for treatment. His treatment included the necessity for x-rays and potential medication. The investigation was also delayed when officers awaited the arrival of the DRE trooper from Ritzville to determine the level of the

¹⁸ This Court observed in *Baldwin* that "requiring an arresting officer to determine the nature of an ingested drug and its speed of dissipation places a 'completely unreasonable' and 'unnecessary' burden on the prosecution. It would be ludicrous to expect an officer, even an officer with drug recognition training, to be able to diagnose in the field what precise drug has been ingested in a particular case." *Id.* at 525.

defendant's impairment. Officers estimated it would have taken an additional two hours to apply for and have a judge authorize a search warrant.

Overall, officers faced an exigency because the potential for valuable drug intoxication evidence could have been lost or compromised with the potential for medical treatment of the defendant and the potential additional two hours to obtain a search warrant.

The findings of fact support the trial court's conclusion that the officers faced an exigency obviating the need to apply for a search warrant.

The trial court did not err by denying the defendant's suppression motion.

V. CONCLUSION

The respondent respectfully requests this Court affirm the trial court's order denying suppression of the blood test results.

Dated this 21 day of March, 2016.

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN JACOB STORMS,

Appellant,

NO. 32653-5-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 21, 2016, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Janet G. Gemberling

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3/21/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)