

FILED
JULY 15, 2015
Court of Appeals
Division III
State of Washington

33088-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GISELA M. SEDANO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding the blood draw was justified by exigent circumstances.

B. ISSUES

1. Forty-five minutes after the troopers had sufficient information to establish probable cause for a search warrant for a blood draw the State had made no effort to obtain a search warrant. The trooper then learned that the suspect might be transported to a distant hospital and after an additional 45 minutes the trooper obtained a blood draw performed by hospital nurses. Was the warrantless search justified by exigent circumstances.

C. STATEMENT OF THE CASE

Trooper Anthony Witney told the court he was following a vehicle when it suddenly swerved to the right, and Trooper Witney found himself stopped with an Oldsmobile Valero stopped next to him. (RP 40-41) The driver's side door was sheared off, and the only thing holding the driver inside was her seatbelt. (RP 42) Trooper Witney had not seen the vehicle he had been following travel into the oncoming lane at any point prior to the collision. (RP 42)

The driver of the Oldsmobile appeared to be severely injured, but was conscious. (RP 41, 43) Trooper Witney smelled intoxicants and asked the driver if she had had anything to drink. (RP 43) She said she had had two tequilas. (RP 43)

Several other troopers arrived at the scene shortly after the collision, including Troopers Stratton and Kottong. (RP 44-45) Trooper Stratton told Trooper Witney that the occupant of the other vehicle appeared to have a broken leg. (RP 44)

The collision occurred at 10:42 p.m. (RP 7) Trooper Kottong arrived at the scene at 11:29 p.m. (RP 8) The driver of the Oldsmobile, later identified as Ms. Sedano, was receiving medical treatment when he arrived. (RP 8) Trooper Witney told Trooper Kottong the driver of the Oldsmobile appeared to have caused the collision by crossing the center line, that she had admitted consuming tequila earlier, and that due to the victim's injuries the resulting charges could be for vehicular assault. (RP 9)

Ms. Sedano was taken to Othello Community Hospital. (RP 9) Trooper Kottong drove to the hospital, but was unable to contact Ms. Sedano until 12:21 a.m., at which time he arrested her. (RP 10) The hospital staff then told him they were awaiting some test results but that a helicopter had arrived and could be taking Ms. Sedano to another hospital

at any time. (RP 11) At that time Trooper Kottong decided he did not have enough time to obtain a search warrant, so he arranged to have Ms. Sedano's blood drawn and this was done at 1:03 a.m. (RP 13-14)

Trooper Kottong explained that the process of getting a search warrant would take 40 minutes to an hour. (RP 11-12) This process includes time to prepare the warrant using a computer in his car; go to a telephone and arrange to contact a judge by telephone, obtain the judge's permission to sign the warrant; and go to a hospital where a licensed professional can perform the blood draw. (RP 12-13)

At the pre-trial suppression hearing, the trial court found that "the fact that the defendant was potentially going to be transported to a distant hospital formed an exigency sufficient to excuse the warrantless blood draw and concluded the results of the blood test would be admissible at trial. (CP 79-80)

D. ARGUMENT

1. THE CIRCUMSTANCES DO NOT SUPPORT THE CONCLUSION THAT A WARRANTLESS SEARCH WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

In reviewing the denial of a suppression motion, the appellate court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. *State v.*

Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The Fourth Amendment protects against unreasonable searches:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

“While the language of the Amendment is ‘general,’ it ‘forbids every search that is unreasonable;’” *Ker v. State of Cal.*, 374 U.S. 23, 33, 83 S. Ct. 1623, 1629, 10 L. Ed. 2d 726 (1963) (*quoting Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374 (1931)). A search warrant may be issued only upon a determination of probable cause. *State v. Gore*, 143 Wn.2d 288, 296, 21

P.3d 262 (2001). Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The recent Supreme Court decision in *Missouri v. McNeely*, -- U.S. --, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) reviewed whether the use of a warrantless blood alcohol test was reasonably justified by the “exigent circumstances” exception to the warrant requirement. *Id.* at 1559. The Court noted that the supposed exigency resulted from the historic delay in obtaining a search warrant and the dissipation of alcohol from the blood over time. *133 S Ct.* at 1561. But under current technology a warrant may usually be obtained very quickly, some delay in administering the test is generally unavoidable, and the rate of dissipation is readily determined. *Id.* at 1560. Accordingly, the Court concluded that absent unusual circumstances, exigent circumstances do not justify a warrantless BAC test. *Id.* at 1561.

In *Schmerber*, the United States Supreme Court upheld a warrantless, non-consensual blood test in a drunk-driving case, concluding the officer “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.” *Schmerber v. California*, 384 U.S. at 759, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (internal quotation marks omitted).

In *McNeely*, the Court clarified the scope of *Schmerber*, considering the issue of “whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.” *McNeely*, 133 S. Ct. at 1556. The Court held that such a *per se* exigency does not exist, and that “consistent with Fourth Amendment principles . . . exigency in this context must be determined case by case based on the totality of the circumstances.” *Id.* at 1556, 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. 133 S. Ct. at 1561. Here, the troopers’ testimony establishes that the facts necessary to support a search warrant were known even before Trooper Kottong arrived at the scene of the crime at 11:29 p.m., and that he believed he had probable cause to arrest Ms. Sedano when he left the scene of the collision at approximately

11:45 p.m. en route to the hospital. (RP 10-11) Nevertheless, he made no effort to secure a warrant. During this time, he had no reason to believe he would not find his suspect at the hospital, and thus no exigency existed that would justify his foregoing a warrant application.

The totality of the circumstances does not support the trial court's conclusion that "the fact that the defendant was potentially going to be transported to a distant hospital formed an exigency sufficient to excuse the warrantless blood draw." (CP 79)

E. CONCLUSION

The conviction should be reversed.

Dated this 15th day of July, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33088-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
GISELA M. SEDANO,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on July 15, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on July 15, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 15, 2015.


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