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Supreme Court
Washington State Supreme Court

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

APR 01 2015
Ronald R. Carpenter
Clerk
by h.

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

WASHINGTON STATE PATROL'S AMICUS CURIAE BRIEF

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Patrol (Patrol) is the exclusive public provider of forensic science services for criminal justice agencies in the state of Washington. Each month the Patrol's Forensic Laboratory Services Bureau conducts scores of forensic analyses on evidence from crime scenes. The Court of Appeals holding that a warrant must contain specific language authorizing forensic testing of a blood sample, obtained pursuant to a search warrant, raises a host of logistical and legal issues that impact the delivery of forensic services to criminal justice agencies, participants in criminal proceedings, and courts. Thus, the Patrol has a substantial interest in ensuring the correct interpretation of warrant requirements as they relate to scientific testing, and in informing the Court of the practical impacts of the erroneous Court of Appeals decision. In particular, the Patrol is concerned that the Court of Appeals decision will be highly impractical given the nature of the forensic laboratories' procedures as described below, which often involve numerous steps, with results of a particular test often determining the subsequent tests to be conducted.

The Patrol's Forensic Laboratory Services Bureau comprises two divisions - the Toxicology Laboratory Division and the Crime Laboratory Division (forensic laboratories). The forensic testing of blood samples

conducted by these laboratories depends on the specific circumstances of each case.

The Toxicology Laboratory Division is responsible for testing blood samples for impaired driving offenses. Once this laboratory receives a blood sample for testing, the assigned toxicologist will conduct a screen for alcohol, and then a screen for nine different drug classes. Based on the results from the drug screen, the toxicologist may conduct further testing to confirm the presence of specific drugs in the blood sample. The toxicologist may also conduct specific drug screens based on information in the officer's report. For example, if the officer reported that the suspect admitted to taking Ambien, the toxicologist would conduct a specific screen to detect the presence of that drug.

The Crime Laboratory Division provides crime scene investigations for law enforcement agencies and forensic analysis of evidence submitted by government agencies throughout the State. Forensic testing of evidence includes DNA analysis, analysis of trace evidence, chemical analysis, latent fingerprint analysis, and firearms analysis. Similar to toxicology testing of a blood sample, the type and extent of DNA testing depends on a host of factors. In general, a law enforcement agency may submit a piece of evidence, such as clothing or a biological sample from a victim, for DNA testing. The assigned forensic

scientist must first locate the biological stain. The forensic scientist conducts an extraction and quantification on the sample from the biological stain. These analyses determine the amount and type of DNA present (i.e., male/female and total human DNA), which in turn determines the particular, subsequent tests. For example, if the quantification test shows a high amount of male or human DNA, the forensic scientist will conduct a standard short tandem repeat (STR) test. In contrast, if the quantification test shows a low amount of male DNA, the forensic scientist may conduct Y-STR testing to obtain a DNA profile from just the male DNA. Additionally, if the sample does not yield sufficient DNA for STR or Y-STR testing, the forensic scientist may, depending on the circumstances, subcontract mitochondrial DNA testing.

Given that the precise testing depends on the specific evidence and results from the preliminary test, the Patrol is concerned that a rule that a warrant is required for each stage of testing is unworkable.

II. ISSUE ADDRESSED BY AMICUS

Whether a blood sample obtained pursuant to a warrant authorizing that blood be drawn for evidence of the crime of driving under the influence of alcohol or drugs may be tested for the presence of alcohol or drugs, or must an additional warrant be obtained for each test of the blood sample.

III. STATEMENT OF THE CASE

A Washington State Patrol Trooper responded to a roll over collision on State Route 167. *State v. Martines*, 182 Wn. App. 519, 522, 331 P.3d 105 (2014). At the scene, the Trooper observed that the respondent “smelled of intoxicants, had bloodshot and watery eyes, and stumbled while walking.” *Id.* Based on these observations, the Trooper applied for a search warrant for the respondent’s blood. *Id.* The reason the Trooper applied for a warrant was to obtain the respondent’s blood sample specifically for “test[ing] to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive.” *Id.* (internal quotation marks omitted).

A neutral and detached magistrate issued the warrant and a medical facility drew the respondent’s blood. *Id.* Toxicological testing was performed on this blood sample, and the toxicology report found that the respondent “had a blood alcohol level of .121 within an hour after the accident and that the drug diazepam (Valium) was also present.” *Id.*

IV. ARGUMENT

The Court of Appeals below held that a separate, specific instruction, or a separate warrant entirely, is needed to conduct forensic tests on blood lawfully obtained by warrant for investigation of driving under the influence of alcohol or drugs. *Id.* at 530-31. Among the

rationales cited by the Court of Appeals was concern that a blood sample can reveal highly personal information such as pregnancy, disease, and genetic family relationships. *Id.* at 530. This Court should reverse the Court of Appeals because a warrant to seize blood for investigation of driving under the influence authorizes testing designed to uncover evidence of that crime. The concerns of the Court of Appeals regarding blood tests that reveal other personally sensitive information do not arise in this case or in other investigations of driving under the influence because of the Patrol's practice and procedures, and the legal limitations on search warrants that allow only reasonable tests – i.e., tests related to the crime for which the warrant was issued.

A. The Patrol's Forensic Laboratories Conduct Reasonable Forensic Tests Of Biological Samples That Respect The Profound Privacy Interests In Physiological Information

The Legislature created the forensic laboratories to “[p]rovide laboratory services for the purpose of analyzing and scientifically handling any physical evidence relating to any crime.” RCW 43.43.670(1)(a). The Toxicology Laboratory Division serves to “[p]rovide all necessary toxicology services requested by all coroners, medical examiners, and prosecuting attorneys.” RCW 43.43.670(1)(c). The forensic laboratories are subject to oversight by the Forensic Investigations Council. RCW 43.43.670(2); RCW 43.103.030; RCW 43.103.090.

In terms of blood testing for impaired driving offenses, the toxicology laboratory has promulgated administrative rules outlining the approved methods for analyzing a blood sample and reporting the results therefrom. *See* WAC 448-14-010; -020. Noticeably absent from these regulations is any reference to testing for genetic diseases, paternity, or other information unrelated to an impaired driving offense. *See id.*

Given the toxicology laboratory's prerogatives, the concerns expressed by the Court of Appeals should not determine whether the toxicology testing in this case violated the respondent's privacy. In a challenge to the California arrestee DNA statute, the Ninth Circuit rejected the "slippery-slope arguments [that contend] not only what California actually does with the DNA samples, but what it *could* do with the information." *Haskell v. Harris*, 669 F.3d 1049, 1061 (9th Cir. 2012) (emphasis is original), *affirmed en banc* 745 F.3d 1269 (9th Cir. 2014).

In this case, the Court of Appeals suggested that blood obtained by a warrant could be used for nefarious purposes. These apprehensions, "while valid, are not present in this case." *State v. Athan*, 160 Wn.2d 354, 368, 158 P.3d 27 (2007). The blood was tested in accordance with the warrant's purpose - to find evidence of drugs or alcohol. The Patrol's forensic laboratories serve narrow purposes - to test for evidence of a crime - not to conduct paternity testing or testing for genetic deficiencies.

The forensic laboratories are not in the business of testing blood samples from impaired driving cases for paternity or genetic deficiencies. Not only would such a practice offend constitutional principles, it is a waste of limited public resources for toxicology testing. Even if a rogue analyst decided to conduct such testing, “future courts will be available to consider actual facts and applications, and determine whether the [action at issue] violates the Constitution.” *Haskell*, 669 F.3d at 1062. Consequently, this Court should find that reasonable forensic tests conducted on a blood sample obtained by a warrant are constitutional.

B. A Search Warrant Ordering The Seizure Of Blood For Evidence Of Impaired Driving Authorizes Reasonable Tests To Find Evidence Of Alcohol Or Drug Concentration

The facts of this case do not demonstrate any unreasonable search or unreasonable execution of a validly obtained search warrant, but instead describe a routine police investigation. A law enforcement officer responding to the scene of an accident observed indicia of a driver’s impairment. The officer applied for a search warrant based on his observations. A neutral and detached magistrate agreed that based on the officer’s observations there was probable cause that the respondent had driven a vehicle while under the influence. A sample of the respondent’s blood was drawn pursuant to that warrant. Toxicological testing was

performed on that sample *only for evidence of intoxicating substances*. This is not an unreasonable search.

Given the limited privacy protections advanced by the Court of Appeals holding, the prophylactic remedy of a separate warrant or specific instructions in the initial warrant to authorize toxicological testing causes more harm than help to the criminal justice system. As such, the Court of Appeals ruling places the laboratories in a state of uncertainty without furthering any privacy interest.

1. A Limited Alcohol And Drug Screen Of Blood Collected Pursuant To A Search Warrant For An Impaired Driving Offense Is Reasonable And Does Not Unreasonably Intrude Into A Person's Private Affairs

The Patrol recognizes and respects the concerns articulated by the Court of Appeals that a blood sample contains a wealth of highly sensitive information. Nonetheless, the testing at issue in this case - and thousands of other impaired driving cases - does not invade those sensitive interests.

It is well settled that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law” and that “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.” Const. Art. I, § 7; U.S. Const. amend. IV. These constitutional provisions are rooted in the concern that a

government agent should not have unfettered discretion to search a person's personal effects or private affairs. *See Chimel v. California*, 395 U.S. 752, 760-61, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

A forensic test for evidence of impaired driving from a blood sample - obtained for the precise purpose of gathering evidence of impaired driving - is not the "rummaging" that the Founders experienced at the hands of the British. Under Article I, section 7, "[t]he ultimate inquiry is whether the government has unreasonably intruded into a person's private affairs." *Robinson v. City of Seattle*, 102 Wn. App. 795, 812, 10 P.3d 452 (2000) (citing *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998)).

Undoubtedly, a blood draw "implicates an individual's most personal and deep-rooted expectations of privacy." *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013) (citations omitted) (internal quotation marks omitted). Absent an exigency, an officer must seek consent or a search warrant for a suspected impaired driver's blood sample to determine alcohol or drug content. *See id.* at 1561; accord *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). A law enforcement officer applying for a search warrant for a suspected impaired driver's blood "protect[s] privacy interests by assuring citizens . . . that such intrusions are not the random or

arbitrary acts of government agents.” *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602, 621-22, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

Limited testing on a blood sample (obtained by a warrant) solely to obtain evidence of the crime for which the warrant was sought is not unreasonable since it does not further violate a person’s privacy. Under our state constitution, the inquiry is whether Washingtonians “have held or should be entitled to hold a privacy interest” in alcohol or drug concentration in a blood sample seized pursuant to a search warrant for an impaired driving investigation. *See State v. Cheatam*, 150 Wn.2d 626, 643, 81 P.3d 830 (2003).

A suspected impaired driver’s privacy is pierced when a court authorizes seizure of his or her blood for evidence of drugs or alcohol. The ensuing toxicological screens for drug or alcohol concentration are merely ministerial functions inherent in the issuance of the warrant, not additional invasions of privacy. Consequently, toxicological testing of the blood in this case did not further invade the respondent’s privacy.

2. A Probable Cause Finding Of Impaired Driving Provides Particularity For A Toxicologist To Only Test For Evidence Of Alcohol Or Drug Concentration In The Blood Sample

A search warrant finding probable cause of an impaired driving offense provides particular direction to a toxicologist to test the blood only

for evidence of alcohol or drugs. “Search warrants are to be tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense.” *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992) (citations omitted). Search warrants must describe with particularity the places to be searched and the evidence to be seized. *Id.* at 545. “The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate’s authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact.” *Id.* (citations omitted). “The requirements of particularity are met if the substance to be seized is described with reasonable particularity which, in turn, is to be evaluated in light of the rules of practicality, necessity and common sense.” *Id.* at 546 (citations omitted) (internal quotation marks omitted).

Simply put, a “warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.” *Id.* at 546 (citation omitted) (internal quotation marks omitted). Probable cause and particularity are “closely intertwined.” *Id.* at 545. For a magistrate to issue a search warrant for a suspect’s blood sample, “there must be a clear indication that in fact the desired evidence will be found.” *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006) (citations omitted)

(internal quotation marks omitted), *overruled on other grounds*, *State v. W.R. Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

In this case, there was no “danger of unlimited discretion in the executing [toxicologist’s] determination of what” substances to test for in the blood sample. *Perrone*, 119 Wn.2d at 546 (citations omitted). The warrant affidavit requested a blood sample “to determine [respondent’s] current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive.” *Martines*, 182 Wn. App at 522. The assigned toxicologist conducted screenings consistent with this warrant authorization. This is a common sense reading. On the other hand, a paternity or genetic test would be a nonsensical reading of the warrant. Consequently, common sense dictates that a warrant authorizing a seizure of blood for evidence of impaired driving limits the toxicological testing to evidence of drug or alcohol concentration.

3. The Seizure Of Blood And Testing Of Blood For Evidence Of Drugs Or Alcohol Concentration Is A Single Event That Requires One Warrant Or Exception To The Warrant Requirement

Splitting the taking of the blood and testing of the blood for evidence of impaired driving as two separate searches - each requiring a separate warrant authorization - does not further any privacy interest. Rather, a person has lost any privacy interest in his or her blood alcohol or

drug concentration once the blood has been legally seized based on a warrant supported by probable cause of impaired driving. This is a single event requiring a single warrant.

The United States Supreme Court has recognized that “where, as here, the Government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels.” *Skinner*, 489 U.S. at 616 (citation omitted). In this context, the Supreme Court combined “[o]btaining and examining the evidence [as] a search[.]” *Id.* (citations omitted); *see also Gregory*, 158 Wn.2d at 827 (“blood was drawn for the very purpose of conducting DNA analyses and the resulting DNA profile was lawfully in the possession of police”). While the Supreme Court noted that “[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests”, *Skinner*, 489 U.S. at 616 (citation omitted), the Court did not discuss the issue here, and thus did not hold that a separate warrant must be obtained for each step of the process, nor that a warrant specifically state what tests are to be conducted on collected samples. And in a case such as the present, where a warrant to seize blood for evidence of the crime of driving under the influence encompasses the privacy interest a person may have in the concentration of intoxicants in one’s blood, the distinction is immaterial.

The point of seeking judicial authorization for the invasive search of drawing a person's blood is to obtain evidence of drug or alcohol usage. Additionally, "it is generally understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value." *State v. Grenning*, 142 Wn. App. 518, 532, 174 P.3d 706 (2008) (citation omitted). As such, the taking of blood and testing the blood for evidence of drugs or alcohol is one event that requires one warrant or exception to the warrant requirement.

Under our state constitution, courts engage in "a two-step analysis: was there a disturbance of one's private affairs and, if so, was the disturbance authorized by law." *Athan*, 160 Wn.2d at 366 (citation omitted). Here, the disturbance is one event - the taking of blood for the specific purpose of drug and alcohol screening. *See United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988).

The disturbance of taking and testing the blood for evidence of intoxicants was authorized by law when the Trooper obtained a warrant authorizing seizure of the blood for evidence of intoxicants. "[T]he right to seize the blood [includes] the right to conduct a blood-alcohol test at some later time." *Id.* at 474. "[S]o long as blood is extracted [pursuant to a warrant] based on probable cause to believe that the suspect was driving

under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significant for fourth amendment purposes[.]” *Id.* “[O]f course, . . . the test chosen to measure [the] blood-alcohol level [must be] a reasonable one and was performed in a reasonable manner[.]” *Id.* at n. 2 (citation omitted) (internal quotation marks omitted).

The reasonable toxicological tests for evidence of intoxicants are the logical result of a warrant authorizing the drawing of blood for evidence of intoxicants. Both the draw and the toxicological tests are a single disturbance that requires a single authorization of law. Accordingly, the search warrant in this case authorized both the drawing of the respondent’s blood and the subsequent toxicological tests for evidence of intoxicants.

C. A Separate Warrant Authorization For Each Stage Of Forensic Testing Clogs The Courts Without Further Protecting Privacy Interests

The logical result of requiring a separate warrant authorization for toxicological testing is requiring a warrant for each stage of forensic testing, or alternatively requiring a warrant that micromanages the forensic testing of evidence by explicitly reciting the particular tests to be conducted. Requiring a warrant authorizing a forensic test of a blood sample is not a simple matter of adding an additional sentence or two to a

warrant application. “[T]he government’s interest in dispensing with the warrant requirement is at its strongest when, as here, the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.” *Skinner*, 489 U.S. at 623 (citations omitted) (internal quotation marks omitted). As discussed above, the precise forensic tests performed on a biological sample depend upon the nature of the evidence. A drug screen of a blood sample may require additional tests if a particular drug is present. In the DNA context, the precise testing - STR, Y-STR, or mitochondrial - will depend on the amount of DNA recovered from a biological sample and other factors.

Consequently, the Court of Appeals holding may require an officer to obtain a new search warrant at each stage of the testing - a warrant for the first drug and alcohol screen, and then another warrant for more precise tests depending on what initial screen shows. This requirement slows the testing process without a cognizable benefit to a person’s privacy or furthering constitutional principles.

Apart from the “starts and stops” associated with getting a warrant for each type of forensic test, the current court rules do not contemplate a search warrant authorizing testing (as opposed to seizure) of the biological sample. Among other things, the court rules require a search warrant to be executed within ten days, returned to a court, and have “a receipt for the

property taken” given to the suspect. *See* CrR 2.3(c) and CrR 2.3(d). These requirements raise the questions of whether forensic tests must be conducted within 10 days, whether the forensic scientist must return the warrant to the magistrate, and whether the forensic scientist needs to provide a list of the tests performed and drugs detected in the suspect’s blood.

It is true that “[a]bsent a showing of prejudice to the defendant, procedural noncompliance with the rules governing execution and return of a valid search warrant does not compel invalidation of the warrant or suppression of the evidence.” 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice & Procedure With Forms* § 3018 (3d ed. 2004) (citations omitted). But requiring a warrant for each stage of forensic testing nevertheless creates a new avenue of litigation with little benefit for privacy. “[P]rejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent the error.” *State v. Aase*, 121 Wn. App. 558, 566, 89 P.3d 721 (2004) (citation omitted) (internal quotation marks omitted).

It is foreseeable that defendants would argue that the toxicologist’s failure to test a sample within ten days of execution of the warrant, or to return an inventory of all the drugs tested for, somehow resulted in a more intrusive search. While forensic testing of computer “[h]ard drives [that]

store permanent, static, and unchanging data” may occur beyond ten days, it is unclear whether a court would find the same for blood testing. *See Grenning*, 142 Wn. App. at 532. Consequently, a requirement for a separate search warrant for each type of forensic test invites litigation without further protecting privacy.

V. CONCLUSION

For these reasons, the Patrol respectfully requests this Court to find that the taking and testing of blood for evidence of intoxicants is a single disturbance requiring a single warrant.

RESPECTFULLY SUBMITTED this 28rd day of March, 2015.

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NO. 90926-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

DECLARATION OF
SERVICE

I, Lissa Treadway, declare as follows:

On the 23 day of March, 2015, pursuant to the agreement for electronic service, I sent via electronic mail a true and correct copy of the Motion for Leave to File Amicus Curiae Brief; Washington State Patrol's Amicus Curiae Brief; and Declaration of Service addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23 day of March, 2015, at Seattle, Washington.


LISSA TREADWAY

OFFICE RECEPTIONIST, CLERK

To: Treadway, Lissa (ATG)
Cc: Williams, Shelley (ATG); Burbank, Brooke (ATG)
Subject: RE: State of Washington v. Jose Figeroa Martines Case No. 90926-1

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From: Treadway, Lissa (ATG) [mailto:LissaT@ATG.WA.GOV]
Sent: Monday, March 23, 2015 12:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Williams, Shelley (ATG); Burbank, Brooke (ATG)
Subject: State of Washington v. Jose Figeroa Martines Case No. 90926-1

Good afternoon. Attached for filing in Case No. 90926-1 (State v. Martines) is the following:

- Washington State Patrol's Amicus Curiae Brief
- Motion for Leave to File Amicus Curiae Brief
- Declaration of Service

Filed on behalf of AAG Shelley A. Williams
WSBA# 37035 / OID# 91093
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Please do not hesitate to contact our office with any questions.

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