TEXAS YOUTH AND GOVERNMENT

2018-2019
APPELLATE CASE MATERIALS

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

PETITION FOR DISCRETIONARY REVIEW

We grant the State of Texas, appellant, request for review in this case as to the following issues:

(1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

(2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

It is further ordered that this case be set down for an expedited hearing in the January 2019 term of this court.

Amena Tep

Amena Tep, Chief Justice

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-01234-CR

The State of Texas, Appellee

v.

Cameron Shepard, Appellant

FROM THE COUNTY COURT AT LAW NO. 147 OF TRAVIS COUNTY NO. 18-1-12345, HONORABLE C. TYLER ATKINSON, JUDGE PRESIDING

OPINION

Justice Rodgers for the majority:

Appellant Cameron Shepard was charged with the offense of intoxication manslaughter. Before trial, Mr. Shepard filed a motion to suppress evidence of the results of a blood draw and a body camera video filmed by the arresting officer. After his motion was denied as to both pieces of evidence, Mr. Shepard entered a plea of guilty to the charge and filed this appeal. We will reverse the trial court's order and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which captured audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion

that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female.

Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

STANDARD OF REVIEW

We review a ruling on a motion to suppress evidence for an abuse of discretion using a two-step approach. First, we give almost total deference to a trial court's express or implied determination of the facts of the case. Second, review *de novo* (anew, as if for the first time) the court's application of the law to those facts. We view the evidence in the light most favorable to the trial court's ruling.

ARGUMENTS ON APPEAL

Mr. Shepard brought two points of error related to the trial court's denial of his Motion to Suppress. First, Mr. Shepard claims that the trial court should have suppressed the results of the blood draw because the blood draw violated the Fourth Amendment's warrant requirements. Second, Mr. Shepard claims that the trial court should have suppressed the body camera video because it contained inadmissible hearsay. We will analyze each of these arguments below.

(a) Results of Blood Draw.

The Fourth Amendment provides in part that "[t]he 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." The protections afforded by the Fourth Amendment apply equally to Officer Cole's action of forcibly extracting blood from Mr. Shepard's body as they do to an officer entering into a citizen's house without permission.

Over the years, the United States Supreme Court has created many exceptions to the warrant requirement. In this case, the State argues that the blood draw falls within the "exigent circumstance" exception to the warrant requirement. Under this exception, a warrantless seizure of evidence is justified if "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely,* 133 S.Ct. 1552 (2013). Whether exigency exists will be determined on a totality-of-circumstances approach.

Using this approach, we conclude that Mr. Shepard's warrantless blood draw was not justified by exigent circumstances. We acknowledge that some impediments led to a delay in procuring a blood sample. However, *McNeely* makes it clear that "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." *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The reviewing court should not use the benefit of hindsight to impose undue burdens on the officer. However, in this case, there were reasonable avenues for obtaining a warrant that Officer Cole chose not to explore.

The trial court record states that there was another judge available to review the search warrant. The fact that Officer Cole or his department had not prepared for this scenario and obtained contact information for the Travis County judges should not be held against Mr. Shepard. The State bears the burden of establishing sufficient facts to prove that exigent circumstances existed to justify the

warrantless search. We do know that Officer Cole failed to contact the other eight (8) judges despite the fact that the officer did have contact information for those judges. Also, we know from the body camera video that other officers were in the area when the accident occurred. Other officers might have been able to assist Officer Cole in locating a magistrate. The State failed to meets its burden and on this point of error, the results of the blood draw should be excluded.

(b) Officer's Body Camera Video.

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay. "An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative." Such a narrative constitutes a "speaking offense report" in which the "on-the-scene observations and narrations of a police officer conducting a roadside investigation . . . are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime."

In this case, Officer Cole's statements consist of a narration of what he was observing at the crime scene including his interviews with witnesses and the defendant. If this video were transcribed word-for-word and offered as evidence by the State, it would be properly excluded as an offense report under Rule of Evidence 803(8)(B). Thus, the trial court erred in admitting the portions of the video in which the officer was narrating the events that he perceived.

Even though his statements were made contemporaneously with the events described in the video and thus may possibly be considered a present sense impression, Rule 803(8)(B) controls and requires the video be excluded. The rules of construction dictate that when two conflicting laws appear to apply to a given circumstance, the law that more specifically applies to the circumstance controls. Here, Rule 803(1) is the general presence sense impression rule, whereas, Rule 803(8)(B) specifically references police officer offense reports. As such, Rule 803(8)(B) would control, and the video should be excluded as inadmissible hearsay.

CONCLUSION

On both grounds, we reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

Rodgers, Justice

DISSENTING OPINION

Justice Reyes, dissents:

The appellant has asserted two points of error related to the trial court's denial of his motion to suppress certain evidence. The first issue relates to the lab report of a blood draw taken from the defendant hours after his vehicle crashed into a bridge support column. The second relates to a body camera video which depicts the crash scene from the officer's point of view. Because I believe the trial court properly admitted both pieces of evidence, I dissent.

I will address the blood draw issue first.

McNeely provides that "No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed." *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

We know from the trial court record that Officer Cole followed the normal practice that was established in his jurisdiction for obtaining a blood warrant. Presumably this practice had been successful up until this point in providing an officer immediate access to a magistrate for the purpose of obtaining a blood warrant. However, circumstances outside the officer's control led to the process breaking down.

An officer need not exhaust every available avenue for obtaining a search warrant before exigency allows a warrantless blood draw. "[H]indsight distorts a proper exigency analysis' focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search." *Cole v. State,* 490 S.W.3d 918 (2016).

We also know that the blood draw was delayed by the following circumstances outside of the officer's control: (1) the accident involving a deceased individual,

(2) Mr. Shepard's initial consent and then withdrawal of consent for the blood draw, (3) the on call magistrate being unavailable, and (4) Mr. Shepard's request for medical intervention which would taint the blood test. All of these circumstances establish exigency such that the warrantless blood draw was proper.

Next, I turn to the concerns regarding the admissibility of the video.

The majority failed to examine whether the officer's statements in the video could constitute a present sense impression. If the statements were generally unreflective statements that described or explained the event, then the court should allow the statements to be admitted into evidence. Each of the statements from the officer was describing either the accident scene or the actions of Mr. Shepard. The officer made the statements immediately upon observing the situation or condition described by the statements. These statements should not be excluded merely because they were made by a police officer instead of a civilian. Further, the video contains highly probative evidence such as witness temperament and speech patterns and the vehicle and roadway layout.

On a side note, this second issue truly hinges on the appellate court's decision as to the first point of error. If the majority had decided that the warrantless blood draw was permissible but the admission of the video was in error, case law is clear that the error would be considered harmless error. Harmless error would not support a remand of the case for a new trial. *Evans v. State* (Tex.App—Houston [14th Dist.] 2006).

Finally, the video in question contains multiple statements from various declarants. The court has focused on the statements from the officer. However, if other parts of the video are admissible, then the court should allow those parts to be viewed by a jury upon remand.

In conclusion, based on the case law and the rules of evidence, I believe the trial court's rulings as to both pieces of evidence was proper and its order should be affirmed.

TRANSCRIPT OF EXHIBIT 1

STATE OF TEXAS §
COUNTY OF TRAVIS §

The following is a transcript of Officer Jordan Cole's body-worn camera video footage recorded on June 30, 2018:

AUDIO AND VIDEO BEGIN		
01:53:25	Dispatcher	We just got a major accident reported at 2901 North Interstate 35, Austin, Texas, 78722. Possible DWI. Are any units available to respond?
01:54:05	3749	3749. We are a few miles away on a traffic stop. I can release them if needed.
01:54:23	Dispatcher	Any other available units?
01:54:35	4011	4011. Show me in route.
01:54:53	Dispatcher	4011 responding.
01:55:01	4011	I am a few blocks away. Can you [*audio too quiet to decipher].*
01:55:12	Dispatcher	Yes, caller was following small car that was weaving across lanes, almost hit a few cars. Potential female ejected from vehicle. Caller still on scene.
02:00:06	4011	4011 on scene.
02:00:09	Imani Haines	She is over there. I don't think she is breathing. Oh my dear Jesus, help her. Dear Jesus.
	4011	Ma'am can you h [*indecipherable*]. I think she's gone. Dispatch can you check on the status of EMS.
02:00:23	Dispatcher	In route. They are close.
02:00:52	4011	[*running sounds*]
02:01:15	4011	Sir, is everyone alright in there. I'm going to try to get you out. [*response indecipherable*]. I can't get the door open, but the fire department will be here soon. Don't worry, we'll get you out.
02:02:27	4011	Vehicle left roadway. Collided into a bridge support column on the left side of the service road. Front end damage from that collision but no other damage around the sides of the car. Two males trapped inside.
02:03:03		[Fire Department and EMS arrive]
02:03:09	4011	Can we get medics to check on the female? I think she is gone. Fire, I couldn't get those two out of the car. Only three injured or involved. That's just a witness over there, no injuries.
02:04:01	EMS	Yeah, she is gone. We'll check on them and then take her downtown when you are done processing everything. DWI?
02:04:58	4011	Afraid so. I smell alcohol coming from the vehicle. The one in the driver seat is clearly the driver of the vehicle. We'll talk when he gets out. It'll be intox manslaughter.
AUDIO AND VIDEO END/BEGIN		
02:30:17	4011	Alright sir, can you please say your name out loud?
	Shepard	I am Cameron Shepard. Can I call my dad? I think I'd like to go home now.
	4011	No sir, once again, I am Officer Cole with the Austin Police Department. We are going to do some tests that are called SFSTs or Standardized Field Sobriety Tests. They help us determine what your current level of intoxication is.
	Shepard	I don't know if I want to do any tests.
	4011	They are really easy. For the first test I am going to look at your eyes. Do you have any eye problems? Do you wear glasses or contacts or have a medical condition that affects your eyes?
	Shepard	No.
	4011	Alright. Stand just right here, give me a second. Now you smell like alcohol, and your eyes are red and a little watery. Have you had anything to drink tonight?
	Shepard	Just a few drinks. Not very many. I can pass your tests.
	4011	Your speech is a little slow as well.

	Shepard	This is how I always talk.
	4011	Ok. For the eye test I need you to focus on this pen light while I move it from side to side. Keep your head very still. Just follow with your eyes. Try not to blink.
	Shepard	Uhhm, ok. Don't move head.
	4011	You gotta stop blinking, Mr. Shepard. I can't look at your eyes if you keep blinking. Just keep looking at the light. Don't blink. Do you understand the directions?
	Shepard	Absolutely. The Angels have the phone box.
	4011	I believe he understands the instructions and is refusing to cooperate with the HGN test. I will move on to the walk and turn test. Roadway is flat and free of debris. Alright, Cameron.
	Shepard	Did I pass that one?
	4011	We are going to try a new test. I will give you all of the instructions and then tell you when to begin. Don't start until I say "begin." For this test you will walk nine steps forward, then turn around and walk nine steps back, and you will count your steps out loud.
	Shepard	Like this [Shepard starts walking].
	4011	No. You cannot start until I say "begin." Come back to the start. Ok. You will walk nine heel-to-toe steps, keeping your arms at your side. Stay on this line on the roadway. Do you understand the instructions?
	Shepard	Yes.
	4011	You can begin. He stopped between steps 4 and 5. Turn. All steps back are not heel-to-toe. Stop between 5 and 6.
	Shepard	See, I am fine.
	4011	One final test. Stand with your feet together and your hands at your side. When I say "begin," you will lift one foot of your choice off the ground and point your toes toward the ground. Count to 30 in the following manner: "one thousand one, one thousand two, one thousand three" all the way to "one thousand thirty." Do you understand the instructions?
	Shepard	I am going to raise my left leg. Is that alright?
	4011	Yes. You may begin.
	Shepard	[*Counts under breath. Inaudible.*]
	4011	At his count of eight, he put his foot down on the ground for balance and picked it back up. He is swaying a lot. Uses arms for balance. Very unstable.
02:45:23	Shepard	Can I be done now?
02:45:45	4011	Mr. Shepard, you are going to come with me. We are going to run some tests on your blood to determine your blood alcohol content
AUDIO AND VIDEO END		

SELECTED CASE LAW

COURT OF CRIMINAL APPEALS OF TEXAS

WEEMS v. STATE

2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)

HONORABLE J. KEASLER

OPINION

At his felony driving-while-intoxicated trial, Daniel Weems moved to suppress the results of a warrantless blood draw. The trial judge denied his request. The court of appeals reversed, holding, among other things, that the State failed to establish that Weems' warrantless blood draw was justified by exigent circumstances. We agree and affirm the court of appeals' judgment.

I.

A. Trial

Around midnight in early June 2011, Weems drove himself and a friend back to his house from a nearby bar where the two had been drinking. On the way, Weems' car started to slowly veer off the road, flipped over on to its roof, and struck a utility pole. Shortly after the accident, a passing car stopped after seeing the car on its roof with its tires still spinning. The driver was the first on the scene. She saw Weems get out of the vehicle through the driver's side window. Weems got out of the car and tried to stand but was stumbling and having difficulty maintaining his balance. When she asked if he was okay or if he was drunk, Weems said he was drunk. He then ran from the scene. Weems' passenger was leaning against a post and was "beat up pretty bad from the accident." The driver of the passing car noticed a strong smell of alcohol coming from the inside of the car. She called 911.

Bexar County Sheriff's Deputy Munoz was dispatched to the scene, where, according to the caller, the driver left the scene of the accident. As he approached the area, Munoz stopped his car when a woman waved him down. She pointed to a parked car and told him that someone was under her car and that he did not belong there. When Munoz approached the parked car, he saw an injured man under the car matching the driver's description. Munoz detained Weems at 12:17 a.m. and noticed Weems' bloodshot eyes, slurred speech, bloodied face, and inability to stand on his own.

Deputy Bustamante took Weems into his custody where Munoz detained him roughly a quarter of a mile away from the accident scene. Bustamante immediately noticed the strong odor of alcohol on Weems' breath, his bloodshot eyes, his unsteadiness on his feet, and his slurred speech. Because Bustamante believed that Weems suffered injuries as a result of the accident, he did not conduct any field sobriety tests. Based on his observations, Bustamante concluded that Weems had lost the normal use of his mental and physical faculties due to alcohol and arrested Weems on suspicion of driving while intoxicated.

Weems refused to give a breath or blood sample after being read the statutory warnings about the consequences of refusal. Weems was treated by EMS at the scene. But because he complained about neck and back pain, EMS transported him to University Hospital. Bustamante followed the ambulance to the hospital. It took only a "couple of minutes" to get from the accident scene to the hospital.

Based on his injuries, Weems was placed in the hospital's trauma unit. Once Bustamante arrived at the hospital he filled out a form requesting a blood draw and gave it to the nurse in charge. Because the hospital was particularly busy that night, Weems' blood was taken at 2:30 a.m., over two hours after his arrest. Subsequent testing indicated a blood alcohol concentration of .18 grams per deciliter, well above the .08 gram per deciliter definition of intoxication.

Weems sought to suppress the blood-test results at trial, relying on the United States Supreme Court's opinion in *Missouri v. McNeely* decided in the middle of his trial. Without making any findings of fact or conclusions of law, the judge overruled Weems' objection and admitted the test results. The jury convicted Weems of felony DWI and, after finding the enhancement allegation true, assessed a sentence of eight years' confinement.

B. Court of Appeals

On appeal, Weems argued that the judge erred in failing to suppress the warrantless blood-draw results. The Fourth Court of Appeals agreed and found its admission harmful. In reaching its conclusion, the court held that a warrantless search of a person is reasonable only if it falls within a recognized exception to the Fourth Amendment's warrant requirement. In light of *Missouri v. McNeely*, the court held that Texas' implied consent and mandatory blood-draw schemes do not constitute warrant-requirement exceptions. The court further held that the record developed at trial did not support admitting the evidence under the exigency exception.

We granted the State's petition for discretionary review that asserted four grounds:

1. Are the "established exceptions" to the "warrant requirement" the exclusive way of determining whether a particular warrantless search or seizure is reasonable under the Fourth Amendment?

…

4. Did the court of appeals err in its conclusion that there were no exigent circumstances?

II.

We review a trial judge's ruling on a motion to suppress under a bifurcated standard of review. First, we afford almost total deference to a trial judge's determination of historical facts. The judge is the sole trier of fact and judge of witnesses' credibility and the weight to be given their testimony. When findings of fact are not entered, we view the evidence in the light most favorable to the judge's ruling and assume the judge made implicit findings of fact that support the ruling as long as the record supports those findings. Second, we review a judge's application of the law to the facts de novo. We will sustain the judge's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case.

A. The Fourth Amendment

The Fourth Amendment provides in pertinent part that "[t]he 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." A warrantless search of a person is reasonable only if it falls within a recognized exception. Bodily intrusions implicate an individual's "most personal and deep-rooted expectations of privacy" and therefore are considered searches that fall under the Fourth Amendment's warrant requirement. There are several exceptions to the warrant requirement, but the instant case involves only one: a warrantless search performed to prevent imminent evidence destruction. The delineated warrant-requirement exceptions are permitted because each is potentially reasonable and "there is a compelling need for official action and no time to secure a warrant."

…

B. Exigency and Warrantless Blood Draws

As Villarreal made plain, a warrantless search is per se unreasonable unless it falls within a well-recognized exception to the warrant requirement. The exigency exception operates "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Exigency potentially provides for a reasonable, yet warrantless search "because 'there is compelling need for official action and no time to secure a warrant.'" Whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.

In *Schmerber v. California*, the United States Supreme Court held that, based on the circumstances surrounding the search, a warrantless seizure of a driver's blood was reasonable. Schmerber and his companion were injured and taken to a hospital after Schmerber's car skidded,

crossed the road, and struck a tree. While Schmerber was at the hospital, a police officer directed a physician to take a sample of Schmerber's blood. Subsequent testing indicated a sufficient amount of alcohol in his blood to suggest intoxication. Although a bodily intrusion calls for the same individual protections that the warrant requirement provides for the search of a home and the seizure of one's papers, the *Schmerber* Court held that the seizing 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."

Adopting a totality-of-circumstances approach, the Court held that the circumstances surrounding the blood draw rendered the warrantless search reasonable: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body naturally dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time taken to transport Schmerber to a hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) venipuncture is a common procedure and usually "involves virtually no risk, trauma, or pain"; and (6) the test was performed in a reasonable manner.

The Supreme Court granted certiorari in *Missouri v. McNeely* to resolve a split of authority occurring in *Schmerber's* wake as to whether the body's natural metabolization of alcohol in the bloodstream creates a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." The Court unequivocally answered the question in the negative.

When McNeely moved to suppress the blood test results under the Fourth Amendment, the prosecution argued that alcohol's natural dissipation in the bloodstream alone created a per se exigency under the Fourth Amendment. In its petition for certiorari, Missouri relied exclusively on its argument that the body's natural dissipation of alcohol alone created an exigent circumstance; it did not challenge the lower court's holding by contending that the blood draw was reasonable under the exigency exception for other reasons. Rejecting Missouri's per se approach, the Court reaffirmed that a proper exigency analysis considers the totality of the circumstances—the approach it adopted in *Schmerber*.

By the Court's own admission, the *McNeely* opinion is decidedly narrow. The Court repeatedly noted that the record and Missouri's arguments "[did] not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant." Yet the *McNeely* majority opinion went on for some length about when exigency may be found in the blood-draw context.

…

While dissipation alone does not permit a warrantless search of a suspect's blood, there may be circumstances surrounding law enforcement's decision to forego obtaining a warrant that withstand Fourth Amendment scrutiny. In addition to natural dissipation, the Court noted circumstances relevant to an exigency analysis of a warrantless blood draw. They include "the procedures in place for obtaining a warrant," "the availability of a magistrate judge," and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." Although the Court's highlighted circumstances carry uncertain precedential value in light of the case's posture, we nonetheless consider them persuasive and applicable.

III.

On review of the totality of the circumstances found in the record, we conclude that Weems' warrantless blood draw was not justified by exigent circumstances. While there is an aspect of the circumstances surrounding Weems' blood draw weighing in favor of finding an exigency, the totality of the circumstances found in the record do not warrant an exigency finding.

The record establishes that Weems crashed his car around 11:30 p.m. and ran from the scene of the accident. It took law enforcement approximately forty minutes to locate Weems who actively hid from law enforcement under a car approximately a half a mile from the accident. Weems' own actions certainly delayed law enforcement's ability to take him into custody and consequently placed law enforcement at a temporal disadvantage. While evading law enforcement by fleeing the accident scene and hiding, Weems' blood alcohol concentration potentially continued to diminish, and with it, possible evidence to prove or disprove his level of intoxication at the time of driving. *Villarreal* does not, nor does *McNeely* itself, require us to turn a blind eye to alcohol's evanescence and the body's natural dissipation of alcohol in our calculus of determining whether exigency existed. Aside from Weems' own self-imposed delay and the forty minutes worth of alcohol dissipation, little else in the record lends support to finding exigency in this case.

The record is silent on whether Deputy Bustamante knew that, upon arriving at the hospital, it would take over two hours for hospital personnel to draw Weems' blood. And to charge the substantial actual delay in securing Weems' blood sample against Bustamante's decision to forego a warrant would impermissibly measure Bustamante's action against hindsight's omniscience. However, Deputy Bustamante did not express surprise over the delay in securing Weems' blood sample. He acknowledged that "since it was a Sunday morning, hospitals tend to get kind of busy, kind of packed due to the fact that there's crashes, you know, people getting sick all the time," and that "[w]e have no control over—normally when we request a form, depending how busy they are, sometimes it takes a long time just—just to draw someone's blood." The deputy's testimony suggests that substantial delay in obtaining Weems' blood was at least forseeable.

Bustamante described that the routine practice is to transport DWI arrestees to the San Antonio Magistrate's Office where they are asked to consent to a blood draw. If they do, the draw is performed immediately at that location. If arrestees do not consent, the officers will draft an affidavit and present it to a magistrate to obtain a warrant. The record does not reflect how long this process normally takes. But in this instance, Bustamante testified that, because Weems complained of neck and back pain, Weems was transported to the hospital, and the hospital decided it was best to keep him there for observation. The record does not reflect what procedures, if any, existed for obtaining a warrant when an arrestee is taken to the hospital or whether Bustamante could have reasonably obtained a warrant, and if so, how long that process would have taken. We are therefore left with the inability to weigh the time and effort required to obtain a warrant against the circumstances that informed Bustamante's decision to order the warrantless blood draw. Although the record does not definitively establish that a magistrate was available at the time Weems' blood was drawn, Bustamante's testimony suggests that a magistrate is normally available to review Bexar County Sheriff's deputies' search-warrant requests.

Although both this case's record and that presented in *Schmerber* involved an alcohol-involved accident, the similarity of the two records end there. In *Schmerber*, the Court noted "where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." This passage does not accurately describe the circumstances surrounding Weems' blood draw. First, Deputy Bustamante testified that the hospital was only a "couple of minutes" away. So transporting Weems to the hospital did not necessarily make obtaining a warrant impractical or unduly delay the taking of Weems' blood to the extent that natural dissipation would significantly undermine a blood test's efficacy. Second, Bustamante was not alone charged with both investigating the scene of the accident and escorting Weems to the hospital for treatment. Deputy Shannon—Bustamante's instructor—waited with Bustamante and Weems at the hospital until Weems' blood was taken. Once the blood was drawn, Shannon left the hospital to place the blood sample in the evidence locker at the Magistrate's

Office for subsequent testing. Another officer's presence or the "hypothetically available officer" that, in theory, could have secured a warrant in the arresting officer's stead will certainly not render all warrantless blood draws a Fourth Amendment violation, nor do we suggest it is a circumstance that the State must disprove in every case to justify a warrantless search under an exigency theory. But this record establishes that Shannon was with Bustamante and Weems throughout the investigation and while they were at the hospital waiting for Weems' blood to be drawn. On this particular record, Shannon's continued presence distinguishes *Schmerber* from the present case and militates against a finding that practical problems prevented the State from obtaining a warrant within a time frame that preserved the opportunity to obtain reliable evidence.

IV.

McNeely commands that "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." … The State failed to meet its burden and establish that exigency circumstances existed to satisfy the Fourth Amendment's reasonableness standard.

The court of appeals' judgment is affirmed

SUPREME COURT OF THE UNITED STATES

MISSOURI v. MCNEELY

133 S.Ct. 1552 (2013)

JUSTICE SOTOMAYOR

OPINION

In *Schmerber v. California*, 384 U. S. 757 (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because 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." *Id*., at 770 (internal quotation marks omitted). The question presented here is 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. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

I.

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar, App. 20, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. See Mo. Ann. Stat. §§577.020.1, 577.041 (West 2011). McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m.

Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent. See §577.012.1.

McNeely was charged with driving while intoxicated (DWI), in violation of §577.010.1 He moved to suppress the results of the blood test, arguing in relevant part that, under the circumstances, taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. The trial court agreed. It concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact that "[a]s in all cases involving intoxication, [McNeely's] blood alcohol was being metabolized by his liver," there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. No. 10CG–CR01849–01 (Cir. Ct. Cape Giradeau Cty., Mo., Div. II, Mar. 3, 2011), App. to Pet. for Cert. 43a. On appeal, the Missouri Court of Appeals stated an intention to reverse but transferred the case directly to the Missouri Supreme Court. No. ED 96402 (June 21, 2011), id., at 24a.

The Missouri Supreme Court affirmed. 358 S. W. 3d 65 (2012) (*per curiam*). Recognizing that this Court's decision in *Schmerber v. California*, 384 U. S. 757, "provide[d] the backdrop" to its analysis, the Missouri Supreme Court held that "*Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw." 358 S. W. 3d, at 69, 74. The court further concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." 358 S. W. 3d, at 70. According to the court, exigency depends heavily on the existence of additional "'special facts,'" such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital, as had been the case in *Schmerber*. 358 S. W. 3d, at 70, 74. Finding that this was "unquestionably a routine DWI case" in which no factors other than the natural dissipation of blood-alcohol suggested that there was an emergency, the court held that the nonconsensual warrantless blood draw violated McNeely's Fourth Amendment right to be free from unreasonable searches of his person. Id., at 74–75.

We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.2 See 567 U. S. ___ (2012). We now affirm.

II.

A.

The Fourth Amendment provides in relevant part that "[t]he 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." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., *United States v. Robinson*, 414 U. S. 218, 224 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U. S. 753, 760 (1985); see also *Skinner v. Railway Labor* Executives' Assn., 489 U. S. 602, 616 (1989).

We first considered the Fourth Amendment restrictions on such searches in *Schmerber*, where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the

influence of alcohol. 384 U. S., at 758. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. *Id*., at 770. We explained that the importance of requiring authorization by a "'neutral and detached magistrate'" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." Ibid. (quoting *Johnson v. United States*, 333 U. S. 10, 13–14 (1948)).

As noted, the warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U. S. ___, ___ (2011) (slip op., at 6) (internal quotation marks and brackets omitted). … As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. See *Cupp v. Murphy*, 412 U. S. 291, 296 (1973); Ker v. California, 374 U. S. 23, 40–41 (1963) (plurality opinion). While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant." Tyler, 436 U. S., at 509. To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances.

…

Our decision in *Schmerber* applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. 384 U. S., at 758. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. Id., at 758–759. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because 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.'" Id., at 770 (quoting Preston v. United States, 376 U. S. 364, 367 (1964)). In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U. S., at 770. We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." Id., at 770–771. "Given these special facts," we found that it was appropriate for the police to act without a warrant. Id., at 771.

We further held that the blood test at issue was a reasonable way to recover the evidence because it was highly effective, "involve[d] virtually no risk, trauma, or pain," and was conducted in a reasonable fashion "by a physician in a hospital environment according to accepted medical practices." Ibid. And in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based "on the facts of the present record." Id., at 772. Thus, our analysis in Schmerber fits comfortably within our case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in Schmerber, we considered all of the facts and circumstances of the particular case and

carefully based our holding on those specific facts.

B.

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances. Brief for Petitioner 28–29. But the State nevertheless seeks a per se rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. See Skinner, 489 U. S., at 623; Schmerber, 384 U. S., at 770– Cite as: 569 U. S. ____ (2013) 9 Opinion of the Court 771. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. App. 47. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed. See Stripp, Forensic and Clinical Issues in Alcohol Analysis, in Forensic Chemistry Handbook 437–441 (L. Kobilinsky ed. 2012).

Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in Schmerber, as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. 384 U. S., at 770–771. But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its amici. 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. … We do not 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. That, however, is a reason to decide each case on its facts, as we did in Schmerber, not to accept the "considerable overgeneralization" that a per se rule would reflect. Richards, 520 U. S., at 393.

…

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that

preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." State v. Rodriguez, 2007 UT 15, ¶46, 156 P. 3d 771, 779. In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

…

III.

The remaining arguments advanced in support of a per se exigency rule are unpersuasive. The State and several of its amici, including the United States, express concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant.

Because "[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction," post, at 8 (opinion of ROBERTS, C. J.), we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances. Reviewing courts in turn should assess those judgments from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

…

Finally, the State and its amici point to the compelling governmental interest in combating drunk driving and contend that prompt BAC testing, including through blood testing, is vital to pursuit of that interest.

…

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." Michigan Dept. of State Police v. Sitz, 496 U. S. 444, 451 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).

But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. To the extent that the State and its amici contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.

IV.

The State argued before this Court that the fact that alcohol is naturally metabolized by the human body creates an exigent circumstance in every case. The State did not argue that there were exigent circumstances in this particular case because a warrant could not have been obtained within a reasonable amount of time. In his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. App. 40. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. Id., at 39, 41– 42. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. Id., at 42. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to

obtain a warrant. Id., at 39–40. Based on this testimony, the trial court concluded that there was no exigency and specifically found that, although the arrest took place in the middle of the night, "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant." App. to Pet. for Cert. 43a.11

…

The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case. …No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed. But that inquiry ought not to be pursued here where the question is not properly before this Court. Having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision, we affirm its judgment.

* * *

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. The judgment of the Missouri Supreme Court is affirmed. It is so ordered.

…

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE ALITO join, concurring in part and dissenting in part.

A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's "totality of the circumstances" approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us.

In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant.

The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.

…

For exigent circumstances to justify a warrantless search, however, there must also be "no time to secure a warrant." Tyler, 436 U. S., at 509; see Schmerber, 384 U. S., at 771 (warrantless search legal when "there was no time to seek out a magistrate and secure a warrant"). In this respect, obtaining a blood sample from a suspected drunk driver differs from other exigent circumstances cases. Importantly, there is typically delay between the moment a drunk driver is stopped and the time his blood can be drawn. …The police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction.

…

The question presented is whether a warrantless blood draw is permissible under the Fourth Amendment "based upon

the natural dissipation of alcohol in the bloodstream." Pet. for Cert. i. The majority answers "It depends," and so do I. The difference is that the majority offers no additional guidance, merely instructing courts and police officers to consider the totality of the circumstances. I believe more meaningful guidance can be provided about how to handle the typical cases, and nothing about the question presented prohibits affording that guidance.

…

Simply put, when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one. Schmerber itself provides support for such an analysis. The Court there made much of the fact that "there was no time to seek out a magistrate and secure a warrant." 384 U. S., at 771. It did so in an era when cell phones and e-mail were unknown. It follows quite naturally that if cell phones and e-mail mean that there is time to contact a magistrate and secure a warrant, that must be done. At the same time, there is no need to jettison the well-established exception for the imminent destruction of evidence, when the officers are in a position to do something about it.

* * *

Because the Missouri courts did not apply the rule I describe above, and because this Court should not do so in the first instance, I would vacate and remand for further proceedings in the Missouri courts.

JUSTICE THOMAS, dissenting. This case requires the Court to decide whether the Fourth Amendment prohibits an officer from obtaining a blood sample without a warrant when there is probable cause to believe that a suspect has been driving under the influence of alcohol. Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.

…

The Court, therefore, held that dissipation of alcohol in the blood constitutes an exigency that allows a blood draw without a warrant. The rapid destruction of evidence acknowledged by the parties, the majority, and *Schmerber's* exigency determination occurs in every situation where police have probable cause to arrest a drunk driver. In turn, that destruction of evidence implicates the exigent-circumstances doctrine. See *Cupp v. Murphy*, 412 U. S. 291 (1973).

In *Cupp*, officers questioning a murder suspect observed a spot on the suspect's finger that they believed might be dried blood. Id., at 292. After the suspect began making obvious efforts to remove the spots from his hands, the officers took samples without obtaining either his consent or a warrant. Id., at 296. Following a Fourth Amendment challenge to this search, the Court held that the "ready destructibility of the evidence" and the suspect's observed efforts to destroy it "justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." Ibid. In this case, a similar exigency is present. Just as the suspect's efforts to destroy "highly evanescent evidence" gave rise to the exigency in *Cupp*, the natural metabolization of blood alcohol concentration (BAC) creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.

A hypothetical involving classic exigent circumstances further illustrates the point. Officers are watching a warehouse and observe a worker carrying bundles from the warehouse to a large bonfire and throwing them into the blaze. The officers have probable cause to believe the bundles contain marijuana. Because there is only one person carrying the bundles, the officers believe it will take hours to

completely destroy the drugs. During that time the officers likely could obtain a warrant. But it is clear that the officers need not sit idly by and watch the destruction of evidence while they wait for a warrant. The fact that it will take time for the evidence to be destroyed and that some evidence may remain by the time the officers secure a warrant are not relevant to the exigency. However, the ever-diminishing quantity of drugs may have an impact on the severity of the crime and the length of the sentence. … Conducting a warrantless search of the warehouse in this situation would be entirely reasonable. The same obtains in the drunk-driving context. Just because it will take time for the evidence to be completely destroyed does not mean there is no exigency.

Congress has conditioned federal highway grants on states' adoption of laws penalizing the operation of a motor vehicle "with a blood alcohol concentration of 0.08 percent or greater." … As a result, the level of intoxication directly bears on enforcement of these laws. Nothing in the Fourth Amendment requires officers to allow evidence essential to enforcement of drunk-driving laws to be destroyed while they wait for a warrant to issue.

…

A rule that requires officers (and ultimately courts) to balance transportation delays, hospital availability, and access to magistrates is not a workable rule for cases where natural processes inevitably destroy the evidence with every passing minute. The availability of telephonic warrant applications is not an answer to this conundrum. See ante, at 10–12, and n. 4. For one thing, Missouri still requires written warrant applications and affidavits, Mo. Ann. Stat. §§542.276.2(1), 542.276.2.3 (West Supp. 2012), rendering the Court's 50-State survey irrelevant to the actual disposition of this case. Ante, at 11, n. 4. But even if telephonic applications were available in Missouri, the same difficulties would arise. As the majority correctly recognizes, "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." Ante, at 12. During that time, evidence is destroyed, and police who have probable cause to believe a crime has been committed should not have to guess how long it will take to secure a warrant. * * *

For the foregoing reasons, I respectfully dissent.

TEXAS COURT OF APPEALS
FIRST DISTRICT, AT HOUSTON

FEARS v. STATE

2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.)

HONORABLE E.V. KEYES

OPINION

Following the trial court's denial of his motion to suppress evidence of his blood sample, appellant pleaded guilty to driving while intoxicated ("DWI") with two prior convictions, and the trial court assessed his punishment at ten years' confinement. In his sole issue, appellant argues that the trial court erred in denying his motion to suppress. We reverse and remand.

Background

At 11:02 p.m., appellant was stopped for speeding by an officer with the Hitchcock Police Department. That officer noted several signs of intoxication, such as the smell of alcohol and appellant's slurred speech, and requested assistance from the Texas Department of Public Safety ("DPS") for a possible DWI suspect. Trooper M. Guerra, with the DPS, arrived on the scene at approximately 11:27 p.m. and conducted field sobriety testing, which appellant failed. Appellant was arrested for DWI, and, after he refused to give a breath specimen, he was subjected to a warrantless blood draw.

At trial, appellant moved to suppress the evidence from the blood draw. He argued that there was no statutory or other justification for obtaining his blood sample without a warrant. He also argued specifically that there were no exigent circumstances in his case that justified the taking of a warrantless blood sample.

Trooper Guerra testified that the Hitchcock Police Department, located in Galveston County, was "a smaller department [with] less manpower" and that he did not believe all of its officers were certified to administer field sobriety tests. Trooper Guerra testified that it took him approximately fifteen to twenty minutes to drive to the location where appellant was stopped.
Trooper Guerra testified that, when he arrived on the scene, appellant was handcuffed and waiting in the back of the patrol car. He stated that appellant had "become belligerent" and had had to be placed in handcuffs "for officer safety." Trooper Guerra testified that he performed the horizontal gaze nystagmus ("HGN") test, and appellant demonstrated all six clues of intoxication. Trooper Guerra attempted to administer the walk-and-turn test and the one-leg-stand test, but the ground was too gravelly to allow appellant to complete the tests. Based on the HGN test and his own observations of appellant's behavior, Trooper Guerra arrested appellant for DWI.

Trooper Guerra testified that, upon being placed under arrest, appellant became "very verbally abusive" and that he "was one of the more belligerent people I've had to arrest." He testified that appellant's extreme belligerence affected his investigation, causing him to be more cautious and slowing down the investigation. Trooper Guerra transported appellant to the Hitchcock police station, read him statutory warnings, and requested a sample of his breath, which appellant refused. He also discovered that appellant had at least two prior DWI convictions, which he testified obligated him to collect a blood sample. Trooper Guerra transported appellant to Mainland Medical Center where the blood draw was done at 12:15 a.m. Appellant continued to be "uncooperative" and "verbally abusive," and he had to be restrained so that the blood sample could be taken.

Trooper Guerra also testified regarding the warrant process. He testified that during a "no-refusal" weekend a district attorney, judge, and nurse are all on call to process DWI suspects, and it can take "upwards of an hour to two hours" to complete the warrant process. However, appellant was not arrested during a no-refusal weekend. Trooper Guerra also testified that, on one occasion, he had sought a search warrant for a blood sample in a DWI case during business hours on a week day, and the entire process took approximately three hours. He testified that, at the time of appellant's arrest, the district attorney's office was closed, but there was an assistant district attorney on call. He also testified that there was no judge on call. Due to these factors, Trooper Guerra believed that it "would have taken considerably longer than three hours" to complete the warrant process in appellant's case.

Assistant District Attorney James Haugh testified at the suppression hearing regarding DWI investigations and the process for obtaining a search warrant. He testified that the first step is for the officer to complete the probable cause affidavit and that the amount of time it takes to complete this step "varies a lot." Haugh testified that it can take forty-five minutes to an hour, or even longer, depending on the officer. After he receives the affidavit from the officer, he reviews it and discusses any necessary changes with the police officer. His own review usually takes between thirty and forty minutes.

Haugh testified that he would then have to find a judge who could review the affidavit and sign a search warrant. Haugh stated that Galveston County does not have a judge on call and that he would have to use a list of judges' phone

numbers and call until he found one who was available. Once a judge has been located, Haugh informs the police officer of the judge's location, and the officer takes the necessary documents to the judge for review. Haugh testified that no-refusal weekends happen several times each year, but that during the rest of the year, there is no procedure to expedite the search-warrant process. He stated that there is no electronic system allowing the department to scan the search warrant and e-mail it to a judge. He also testified that his office's policy was not to procure search warrants unless there was an accident or someone was hurt.

The trial court denied appellant's motion to suppress, finding that "exigent circumstances existed which made the warrantless blood draw reasonable." In separate findings of fact and conclusions of law, the trial court found specifically that appellant "was extremely belligerent and this belligerence slowed down the DWI investigation because Trooper Guerra had to act with extra caution." The trial court also cited Trooper Guerra's testimony that it would have taken "considerably longer than three hours" to obtain a warrant for appellant's blood specimen. The trial court concluded that exigent circumstances existed because, "based on the facts, it would take an excessive amount of time to obtain a search warrant during which time evidence would be destroyed." Appellant subsequently pleaded guilty to the DWI offense, and the trial court assessed his punishment at ten years' confinement. Motion to Suppress Appellant argues that the trial court erred in denying his motion to suppress because the police did not obtain a warrant prior to collecting his blood sample and there was no evidence of exigent circumstances or other justification for the warrantless blood draw.

Standard of Review

We review a ruling on a motion to suppress evidence for an abuse of discretion. … When we review a trial court's ruling on a motion to suppress, we give "almost total deference to a trial court's express or implied determination of historical facts and review de novo the court's application of the law of search and seizure to those facts." Id. We view the evidence in the light most favorable to the trial court's ruling. …

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV; *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). The taking of a blood specimen is a search and seizure under the Fourth Amendment. *McNeely*, 133 S. Ct. at 1558; *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966).

The Fourth Amendment requires that a search of a person as part of a criminal investigation be conducted pursuant to a search warrant or a recognized exception to the warrant requirement and that it be reasonable under the totality of the circumstances. *McNeely*, 133 S. Ct. at 1558, 1563; see also *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967) (holding that warrantless search or seizure is per se unreasonable unless it falls under recognized exception to warrant requirement).

One well-recognized exception to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." … The Supreme Court has also recognized "that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *Id*. at 1559.

We must look to the "totality of circumstances" to determine whether a law enforcement officer faced an emergency that justified acting without a warrant. *Gutierrez v. State*, 221 S.W.3d 680, 686–87 (Tex. Crim. App. 2007). Specifically, to validate a warrantless search based on exigent circumstances,

the State must satisfy a two-step process. *Id*. at 685. First, probable cause to search must exist— that is, "reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead a man of reasonable prudence to believe that the instrumentality . . . or evidence of a crime will be found." *Id*. Second, the State must establish the existence of an exigent circumstance justifying the warrantless search. *Id*. Without establishing probable cause and exigent circumstances, a warrantless search will not stand. *Id*. …

Analysis

It is undisputed that the police did not obtain a warrant prior to taking appellant's blood sample, and appellant does not challenge the existence of probable cause. Rather, appellant argues that the State failed to establish the existence of exigent circumstances sufficient to justify its failure to obtain a warrant. Appellant argues that Trooper Guerra did not attempt to contact a judge or ascertain if one was available, and he argues that Trooper Guerra's and Haugh's testimony about warrant procedures was not particularized to the facts of this case and does not support the trial court's finding of exigent circumstances. Appellant also argues that "[t]he evidence does not support [a]ppellant's non-cooperation as an exigent circumstance." We agree with appellant.

Looking to the totality of the circumstances of this case, we observe that no accident or complicated investigation occurred. Although Trooper Guerra testified, and the trial court found, that appellant's arrest happened late in the evening when there was no judge on call to issue a search warrant, Haugh also testified that there were approximately thirteen magistrate judges in Galveston County who could have signed a warrant. Trooper Guerra testified that he did not attempt to obtain a warrant because, based on one previous experience, it had taken three hours to obtain a search warrant, and he believed it would take "considerably longer" to obtain a warrant for appellant. He also testified that appellant "was one of the more belligerent people [he had] had to arrest" and that appellant's conduct delayed and slowed down his investigation. However, the evidence also indicated that appellant's blood was drawn forty-five minutes after Trooper Guerra first arrived at the scene of appellant's arrest, and Trooper Guerra admitted he did not try to obtain a warrant to have appellant's blood drawn in those forty-five minutes.

Haugh testified generally regarding the process for obtaining a warrant when no judge was on call, as was the case on the night appellant was arrested. He also testified that there were no procedures that could have expedited that process and that Galveston County did not have any means to transfer the required documents between the judge and the police electronically. However, Haugh was not consulted regarding appellant's case, and he presented no testimony specific to the circumstances surrounding appellant's case.

We conclude that neither the potential delay required to obtain a warrant from one of thirteen magistrate judges in the county nor appellant's belligerence created an emergency that justified the State's acting without a warrant. See *Gutierrez*, 221 S.W.3d at 685. In *McNeely*, the Supreme Court recognized a variety of circumstances that may give rise to an exigency sufficient to justify conducting a warrantless search, including entering a home to provide emergency assistance, engaging in hot pursuit of a fleeing suspect, entering a burning building to put out a fire and investigate its cause, or taking actions to prevent the imminent destruction of evidence. 133 S. Ct. at 1558–59. The State failed to demonstrate the existence of any such emergency or imminent destruction of evidence in this case.

This case is similar to the circumstances in *Gore v. State*, in which this Court held that the State did not establish the

existence of exigent circumstances. 451 S.W.3d 182, 197–98 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). In *Gore*, the arresting officer did not testify regarding why he felt he did not have time to get a warrant, and instead, "the record [made] clear that he did not believe he needed a warrant." Id. at 197. Here, Trooper Guerra likewise testified that he did not believe he needed a warrant, and his only testimony regarding why he felt he did not have time to obtain one was based on one previous experience when it had taken him three hours to obtain a warrant.

Likewise, in Gore, an assistant district attorney testified generally regarding the length of time involved in obtaining a warrant, but there was "no evidence of whether that would have been true in this particular case." *Id*. Here, Haugh testified generally about the procedures for obtaining a warrant, but he offered no testimony regarding appellant's particular case and acknowledged that he was not the attorney on call the night appellant was arrested. Thus, neither Trooper Guerra's nor Haugh's testimony demonstrated "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence" as it related to the totality of the circumstances in appellant's case. See *McNeely*, 133 S. Ct. at 1568.

And, as we observed in *Gore*, to accept general testimony "that it usually takes two or three hours to get a warrant as sufficient evidence of exigency in every DWI case would be to create a per se exigency rule, which *McNeely* expressly prohibits." See 451 S.W.3d at 197. Here, as in *Gore*, nothing in the record explains why officers did not have time to obtain a warrant when "BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner," thus making it "likely that the BAC evidence would have nonetheless been available" even if it took three hours to obtain the warrant. See id. (quoting *McNeely*, 133 S. Ct. at 1561).

After implying all findings of historical facts in favor of the trial court's ruling, we conclude that the State failed to show the existence of an exigent circumstance justifying police action without obtaining a warrant.

We further conclude that the trial court's erroneous denial of appellant's motion to suppress evidence of his blood alcohol level obtained in violation of the Fourth Amendment contributed to his decision to plead guilty and to his subsequent punishment. See *Holmes v. State*, 323 S.W.3d 163, 173–74 (Tex. Crim. App. 2009) (applying Rule 44.2 and concluding that trial court's erroneous ruling "contributed in some measure to the State's leverage in the plea bargaining process"); *Gore*, 451 S.W.3d at 198; see also TEX. R. APP. P. 44.2(a) ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.").

We sustain appellant's sole issue on appeal.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

COURT OF CRIMINAL APPEALS TEXAS

COLE v. STATE

490 S.W.3d 918 (2016)

HONORABLE J. KEASLER

OPINION

At Steven Cole's intoxication-manslaughter trial, the judge overruled Cole's motion to suppress evidence

obtained by a warrantless blood draw. Holding that the record did not establish exigent circumstances, the court of appeals reversed the trial court's judgment. We conclude that the record established circumstances rendering obtaining a warrant impractical and that the warrantless search is justified under the exigency exception to the Fourth Amendment's warrant requirement. We accordingly reverse and remand the case to the court of appeals.

I.

A. Trial

At 10:30 p.m. in early December 2011, Steven Cole drove his large pickup truck 110 miles per hour down a city street in Longview. Running the red light at a busy intersection, Cole struck Jim Hightower's pickup truck causing an explosion and engulfing Hightower's truck in flames. Hightower was killed instantly.

Longview Police Department Officer Castillo was the first officer to arrive at the accident scene. He approached the burning truck and saw Hightower in the driver's seat, but he was not sure if Hightower was dead or alive. At the other end of the accident scene, he saw Cole's truck against a nearby building with fire approaching it. Cole was in the driver's seat yelling for help, but Castillo could not open the doors. By this time, other officers arrived on the scene and began attempting to put out the fires. With the help of the other officers, Castillo was able to remove Cole from his heavily damaged truck's driver's seat. Castillo then started to secure the area to make sure nobody entered the accident scene.

Even at that time of night, there was still considerable activity and traffic in the area of the accident. Because of the traffic and activity, Castillo testified that, from a law enforcement and public safety perspective, they needed as many officers on the scene as they could possibly get. The fire and its continued explosions required keeping people away for their own safety. The fire's danger required blocking off several major intersections around the area. Castillo testified that the accident occurred around a shift change, when officers would be leaving evening shifts and others arriving for the late-night shift. This further complicated satisfying the manpower needed to secure the scene, conduct an investigation, and maintain public safety.

When Officer Wright arrived at the scene, she spoke to Cole who was sitting on the ground away from the burning truck and wreckage. Cole was confused and did not know where he was. EMS arrived and started evaluating Cole's injuries. While being evaluated, Cole told EMS that he had taken "some meth." At the hospital, Wright described Cole as mumbling incoherently to himself and experiencing involuntary leg and hand movements. Wright described this behavior as "tweaking" — a condition consistent with methamphetamine intoxication.

Officer Higginbotham was the lead accident investigator and officer investigating whether a crime was committed. That night he had finished his shift, but was called back out into the field to coordinate and lead the accident investigation. At the time he arrived, Cole had already been transported to the hospital. He discovered a large debris field that spread beyond the intersection and nearly a full block long. He noted extensive damage to Hightower's truck's driver side. The damage indicated that the truck was broadsided or "T-boned" that bent the frame of the truck into a crescent shape. As the accident investigator, Higginbotham spent approximately three hours investigating the scene of the accident. He testified that fourteen officers were dispatched to assist with the scene. Like Officer Castillo, Higginbotham testified that securing the accident scene required a significant number of officers. According to Higginbotham, those officers were needed because the accident scene's location was in a large, busy downtown intersection and that the accident investigation could become compromised

if the area was not blocked off. The entire accident scene was not cleaned up and cleared until 6:00 the following morning.

At the direction of her superior officer, Wright arrested Cole at 11:38 p.m. and attempted to obtain a sample of his blood by first reading the statutory warning to Cole. Cole frequently interrupted Wright's reading of the warnings, insisting that he used "meth" and was not drunk, every time she read the word "alcohol" or "intoxication" in the statutory warning. Cole refused to provide a blood sample. Wright then requested hospital staff to draw Cole's blood. His blood was drawn at 12:20 a.m., forty-two minutes later. Subsequent testing and trial testimony revealed that Cole's blood contained intoxicating levels of amphetamine and methamphetamine.

At trial, Cole moved to suppress the results of the blood sample and the testimony concerning the warrantless search. In a hearing outside the jury's presence, Higginbotham testified that, before he arrived and conducted his investigation, there was no one else who could have determined the nature and cause of the accident or who was at fault. Although he did not try to get a warrant with an on-call judge, Higginbotham testified that he was unable to leave the scene to go to the courthouse and speak to a prosecutor to secure a warrant for Cole's blood. According to Higginbotham, the warrant process takes an hour to an hour-and-a-half "at best," and it was not feasible to wait until the accident investigation was entirely complete before securing a warrant. Higginbotham also expressed concern that medical intervention and treatment — specifically the administration of medicine and especially narcotic medicines — could affect the integrity of a blood sample. To assign another officer at the scene the responsibility to obtain a warrant, Higginbotham asserted, would leave an essential duty unfulfilled.

The judge overruled Cole's motions to suppress during trial and made several verbal findings and conclusions. … Second, the judge concluded that exigent circumstances justified the warrantless seizure[.] … The jury convicted Cole of intoxication manslaughter, found "true" Cole's two prior felony convictions, and assessed a life sentence.

B. Court of Appeals

The court of appeals held that the judge erred in failing to suppress Cole's blood sample evidence. … The court [] found that the record failed to establish that an exigency existed to justify the warrantless search. Specifically, the court noted that Higginbotham made no attempt to obtain a warrant even though a magistrate was available, there was no indication that another officer was not available to obtain a warrant, and the record contained no evidence of the elimination rate of methamphetamine. The court held that, based on the totality of the circumstances, the State failed to satisfy its burden that an exigency existed and the warrantless seizure was justified under the Fourth Amendment.

We granted the State's petition for discretionary review to evaluate these holdings.

II.

We review a trial judge's ruling on a motion to suppress under a bifurcated standard of review. First, we afford almost total deference to a trial judge's determination of historical facts. … Second, we review a judge's application of the law to the facts *de novo.* …

A. The Fourth Amendment

The Fourth Amendment provides in pertinent part that "[t]he 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." A warrantless search of a person is reasonable only if it falls within a recognized exception. **...**

C. Exigency and Warrantless Blood Draws

As *Villarreal* made plain, a warrantless search is *per se* unreasonable unless it falls within a well-recognized exception to the warrant requirement. Whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.

…

The body's natural metabolism of intoxicating substances is distinguishable from the potential destruction of easily disposable evidence when the police knock on the door. Contrary to the court of appeals' conclusion, the principles animating exigency cases addressing physical evidence destruction does not directly answer the issue before us.

…

[T]he Supreme Court has previously found sufficient exigent circumstances, such as in *Schmerber* where the record established that the officer had probable cause to believe Schmerber was driving under the influence of alcohol and "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."

Nearly fifty years later, the Court in *McNeely* held that the natural dissipation of alcohol in the bloodstream did not create a *per se* exigency justifying an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing. … However, the Court provided insight on the issue by identifying a few relevant circumstances that may establish exigency in this context. In addition to the body's metabolization, they include "the procedures in place for obtaining a warrant, `the availability of a magistrate judge,' and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence."

III.

The court of appeals' exigency analysis first suggested that, had the warrant process started when Wright received the instruction to arrest Cole and obtain his blood sample, law enforcement could have been able to draw Cole's blood pursuant to a warrant before 2:00 a.m. This time line, the court suggests, demonstrates that an exigency did not exist. The court's analytical approach in constructing a time line containing a hypothetical warrant obtained at a particular point followed by the potential timeliness of the search's results impermissibly views law enforcement action though the lens of hindsight. Through reasoned deliberation free from tense, uncertain, and rapidly evolving circumstances, there is a tempting draw for a reviewing court to pronounce what law enforcement ideally should have done in a particular case after all the facts are known. But hindsight distorts a proper exigency analysis' focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search.

…

We do not disagree with the court of appeals' conclusion that "[t]here is no indication that officers not on the scene were unavailable to help obtain a warrant." We do disagree, however, that an exigency finding cannot be made without the record establishing — and by extension, the State proving — that there was no other officer available to get a warrant in the lead investigator's stead. In all but the rarest instances, there will theoretically be an officer somewhere within the jurisdiction that could assist the

lead investigator. … It further reduces the exigency exception to an exceedingly and inappropriately small set of facts, and would defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires. Nonetheless, the availability of other officers is a relevant consideration in an exigency analysis.

This record establishes that fourteen officers were present and who, in Higginbotham's estimation, were all performing important law enforcement or public-safety duties. Taking any one of them away, according to Higginbotham, would have left a necessary duty unfulfilled. …
Even had Higginbotham attempted to secure a warrant from an on-call magistrate, the issuance of a warrant would have taken an hour to an hour and a half "at best." … According to EMS, Cole reported having "pain all over." Higginbotham was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity.

In addition to the logistical obstacles of securing a warrant, Higginbotham knew that during the hour to an hour and a half necessary to obtain a warrant Cole's body would continue to metabolize the methamphetamine and other intoxicating substances he may have ingested.

…

IV.

From our review of the totality of the circumstances, we conclude that law enforcement reasonably believed that obtaining a warrant in this case would have significantly undermined the efficacy of searching Cole's blood. … We therefore conclude that exigent circumstances justified Cole's warrantless blood draw.

The court of appeals' judgment is reversed, and the case is remanded to the court of appeals to address Cole's remaining issue on appeal.

JOHNSON, J., filed a dissenting opinion.

The issue on appeal is whether a warrant was required before the state could obtain a blood draw from appellant without his consent. At issue is whether sufficient exigent circumstances existed … to relieve [the officer] of the constitutional requirement to obtain a search warrant before obtaining a blood sample without consent. I would hold that the circumstances and testimony at trial indicate that a warrant was required.

…

The state presented fourteen witnesses-the lead investigator, and five persons who had contact with appellant on the night of the collision. … Officer Higginbotham, the lead investigator, testified at length about the measurements and calculations he had performed in order to determine how the wreck happened.
Officer Castillo testified that he was on patrol when, at about 10:23 p.m., he heard a loud noise and saw smoke. He went to investigate. Officer Castillo's testimony makes clear that, from the very first, it was known that there had been a collision with a fatality Officer Wright responded to the scene after hearing a call from Officer Castillo for officers with fire extinguishers. She testified that she sat with appellant until EMS arrived, then followed the emergency vehicle to the hospital. She maintained contact with her sergeant both at the scene and at the hospital. Before she left the scene, she had informed her sergeant of what she had heard from appellant.

...

Clearly, by 10:38 p.m., appellant was being treated at the hospital, and the officers at the scene knew about both the fatality and appellant's use of methamphetamine.
Officer Higginbotham testified that he was the traffic investigator on call. He got a call to return to duty at about 10:30 p.m. because there had been a collision with a fatality. He estimated that it took 30 minutes for him to reach the scene. He

conceded that there were magistrates on call.

…

Officer Higginbotham named fourteen other officers at the scene, yet not one of fifteen officers contacted the magistrate on call to ask for a warrant. When questioned about how many officers he needed, Higginbotham answered that four or five officers to block east-west traffic and at most six officers to block north-south traffic, plus Officer Wright at the hospital and two shift supervisors. III R.R. 193-94. This left at least two officers free. Still, no one attempted to get a warrant. No one even discussed getting one.

Higginbotham conceded that, on occasion, in the middle of a traffic-accident investigation, he had taken time out of working the accident to obtain a warrant. And although he knew that there was a rotation of judges "on call" and available at any time of for purposes of issuing a warrant, at no time during his investigation did he discuss with any other police personnel the possibility of getting a warrant to draw Cole's blood. III R.R. 190-91.

…

He knew before he reached the scene, as did numerous other officers, that a blood sample was desirable. If he had begun the process when he was called at 10:30 p.m., or even when he arrived at about 11:00 p.m., he could have had the warrant in hand by about 12:00 a.m. or 12:30 a.m. Officer Wright could have asked for a warrant at any time after 10:38 p.m. when she arrested him at the hospital. There were two shift supervisors on scene; either could have requested a warrant. No one even discussed the issue.

…

I agree with the court of appeals that this was not a "now or never" situation that would relieve the state of its burden. I would affirm its judgment. Because the Court does not do so, I dissent.

TEXAS COURT OF APPEALS, FOURTEENTH DISTRICT, AT HOUSTON

EVANS v. STATE

(Tex.App.-Houston [14th Dist.] 2006)

HONORABLE RICHARD H. EDELMAN

David Joseph Evans appeals a conviction for driving while intoxicated ("DWI") on the grounds that: (1) the trial court erred in denying his motion to suppress the audio portion of a videotape recording; (2) the prosecution failed to correct a misrepresentation made by the arresting police officer on cross-examination; and (3) the trial court erroneously excluded an expert witness' testimony. We affirm.

Appellant's first issue contends that the audio portion of the roadside videotape recording was inadmissible because: (1) it was hearsay; (2) the arresting officer's verbal narrative on the videotape is the functional equivalent of an offense report, which is excluded from the public records exception to the hearsay prohibition; and (3) the narrative was not admissible under the present sense impression exception to the hearsay rule. We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Shuffield v. State*, **____ S.W.3d ____, 2006 WL 335911, at *9** (Tex.Crim.App. 2006). However, the admission of inadmissible evidence does not require reversal if the same facts are proved by other proper testimony. *Ramon v. State*, 159 S.W.3d 927, 931 (Tex.Crim.App. 2004). Here, the only portion of appellant's brief specifying the objectionable narrative statements is in the statement of facts:

The tape shows that, several times during the interview, Trooper Martinez [the arresting officer] stepped away from the appellant and narrated his conclusions about the appellant's performance. After the abortive attempt at the HGN test,

Martinez stated on tape that the appellant "refuses to submit to the HGN" (Tape 1:53:27). He added that the appellant "won't follow directions" (Tape 1:53:34). After the "walk and turn" test, Martinez said, "Let me just narrate here" (Tape 1:56:58). Instead of simply stating the number of steps the appellant took, Martinez stated his conclusion that "subject took wrong number" of steps (Tape 1:57:01). Following the one-leg stand, Martinez dictated the appellant's perceived failures on that test (Tape 1:59:54). He added that the appellant "staggers as he walks," a debatable conclusion which did not appear to relate to a particular test (Tape 2:00:30).

However, the videotape was admitted at trial after the jury had already heard Martinez testify to virtually the same matters on direct examination without objection. [FTN 1] Because the complained-of narrative on the videotape was therefore merely cumulative of Martinez's testimony on direct examination, any error in its admission does not require reversal. *See id.* Accordingly, appellant's first issue is overruled.

…
Accordingly, … the judgment of the trial court is affirmed.

1. For example, when questioned by the State about his inability to perform the HGN test on appellant, Martinez stated, "The [appellant] was uncooperative. He would not follow the instructions. He would not follow the tip of the pen with his eyes. He just looked straight ahead." In answering questions about appellant's performance on the walk and turn test, Martinez indicated that appellant "took the wrong number of steps." Martinez also stated that appellant had difficulty balancing when being instructed about the test, could not walk heel to toe, stepped off the line, and used his arms for balance. Finally, Martinez testified that appellant failed both the walk-and-turn test and the one-leg stand test.

TEXAS COURT OF CRIMINAL APPEALS

FISCHER v. STATE

252 S.W.3d 375 (Tex. Crim. App. 2008)

HONORABLE J. COCHRAN

OPINION

This case presents a novel question in Texas evidentiary law: Are a law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, admissible as a present sense impression exception to the hearsay rule under TEX.R. EVID. 803(1)? They are not. An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. This calculated narrative in an adversarial setting was a "speaking offense report." It was not the type of unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow. We therefore agree with the Fourteenth Court of Appeals, which had held the same.

I.

At about 1:40 a.m. on May 29, 2004, DPS Trooper Martinez turned on his dashboard-mounted video camera and announced, on tape, that he was pulling over a driver who wasn't wearing a seatbelt. After the driver, appellant, parked his truck in his apartment complex parking lot, Trooper Martinez approached appellant and began questioning him. All of that questioning was recorded through Trooper Martinez's body microphone and captured on camera.

Trooper Martinez asked for appellant's driver's license and insurance; appellant responded that he had just moved. The trooper then asked appellant whether he had "any alcohol in the car," and quickly added, "I smell alcohol." Trooper Martinez then asked appellant, "How much alcohol have you had this evening?" And appellant replied, "Three wines." Trooper Martinez told appellant to stay where he was, and the trooper walked back to his patrol car and dictated into his microphone that appellant had "glassy, bloodshot eyes" and "slurred speech." The trooper stated that he had smelled "the strong odor of alcoholic beverage."

Trooper Martinez then walked back to appellant and asked him if there was any reason why he was not wearing a seatbelt. Appellant said that he was "depressed" over his recent divorce. Trooper Martinez asked appellant if he had any weapons or drugs. Appellant said "No," but Trooper Martinez opened the driver's door of appellant's truck and got inside to make a cursory search. Finding nothing, the trooper got back out and told appellant, "I'm going to conduct a small exam of your eyes." He directed appellant to stand outside the range of the video camera and administered a horizontal gaze nystagmus (HGN) test.

After the HGN test was completed, Trooper Martinez again left appellant and returned to his patrol car and recorded the following observations: "Subject has equal pupil size, equal tracking, has a lack of smooth pursuit in both eyes, and has distinct nystagmus at maximum deviation in both eyes. Subject also has onset of nystagmus prior to forty-five degrees in both eyes."

Trooper Martinez also dictated into his microphone: (1) he stated that he had seen a "wine opener" in appellant's truck; (2) he repeated that there was a strong odor of alcohol on appellant's breath; and (3) he again noted that appellant had glassy, bloodshot eyes and "slurred speech."

The trooper then told appellant to stand in front of the patrol car and asked him to perform field sobriety tests. After appellant performed the heel-to-toe test, Trooper Martinez again told appellant to "stay right here," while he returned to his patrol car and dictated on tape that "subject gave several clues," including the fact that appellant had started too soon, lost his balance while being given instructions, failed to touch his heel to his toe, "stepped off the line two times," made an "improper turn," and used his hands for balance.

Trooper Martinez returned to where appellant was standing and told him to perform a "one-leg stand" test. After that test was completed, the trooper told appellant to remain where he was, and the trooper once again returned to his patrol car where he verbally recorded that appellant "gave several clues" to intoxication and noted that appellant swayed, hopped, and put his foot down twice. Trooper Martinez recorded that he had given appellant "a second chance to do it," but appellant "indicated the same clues." Trooper Martinez then dictated: "Subject is going to be placed under arrest for DWI." The videotape then shows Trooper Martinez returning to appellant, saying, "I believe you are drunk," and arresting him.

After appellant was charged with DWI, he filed a motion to suppress the audio portion of the patrol-car videotape, claiming that it contained Trooper Martinez's "bolstering, self-serving statements about what he was allegedly doing and seeing." It was "a highly prejudicial and inflammatory narrative" of what Trooper Martinez would have the viewer believe was taking place. The trial judge denied appellant's motion and concluded that the audio narrative was admissible as a "present sense impression." Appellant then pled nolo contendere and appealed the trial court's ruling on his motion to suppress Trooper

Martinez's orally recorded factual observations during his DWI investigation.

The court of appeals concluded that the trial court had erred. It held that Trooper Martinez's recorded commentary did not qualify as a present sense impression: "Instead, his comments are a calculated narrative statement in which Martinez does not merely explain or describe events, but participates in and even creates some of the events he reports in the course of collecting evidence. ... It therefore appears that Martinez recorded his comments not as an objective observer, but as a law enforcement officer, as a lay witness, and as an expert witness cataloging evidence and opinions for use in [appellant's] prosecution. Put bluntly, "Martinez's narrative is the functional equivalent of a police offense report[.]"

We granted the State's petition for review to decide this important issue of state evidentiary law which, we understand, has arisen in several other cases as well.

II.

The hearsay doctrine, codified in Rules 801 and 802 of the Texas Rules of Evidence, is designed to exclude out-of-court statements offered for the truth of the matter asserted that pose any of the four "hearsay dangers" of faulty perception, faulty memory, accidental miscommunication, or insincerity. The numerous exceptions to the hearsay rule set out in Rules 803 and 804 are based upon the rationale that some hearsay statements contain such strong independent, circumstantial guarantees of trustworthiness that the risk of the four hearsay dangers is minimal while the probative value of such evidence is high. The twenty-four hearsay exceptions listed in Texas Rule 803 may be roughly categorized into (1) unreflective statements, (2) reliable documents, and (3) reputation evidence. The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy.

The first set of hearsay exceptions, unreflective statements, are "street corner" utterances made by ordinary people before any thoughts of litigation have crystallized. These unreflective statements used to be called "res gestae," an imprecise Latin legalese term, because the speaker was not thinking about the legal consequences of his statements. In most instances, the speaker was not thinking at all; the statement was made without any reflection, thought process, or motive to fabricate or exaggerate.

One of those "unreflective statements" exceptions to the hearsay rule is defined in Rule 803(1), the present sense impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Statements that qualify under this exception are not excluded by the hearsay rule, even though the declarant is available.

…

The rationale for the exception is that the contemporaneity of the statement with the event that it describes eliminates all danger of faulty memory and virtually all danger of insincerity. This Court has previously explained that rationale: "If a person observes some situation or happening which is not at all startling or shocking in its nature, nor actually producing excitement in the observer, the observer may yet have occasion to comment on what he sees (or learns from other senses) at the very time that he is receiving the impression. Such a comment, as to a situation then before the declarant, does not have the safeguard of impulse, emotion, or excitement, but there are other safeguards. In the first place, the report at the moment of the thing then seen, heard, etc., is safe from any error from defect of memory of the declarant. Secondly, there is little or no time for

calculated misstatement, and thirdly, the statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement. Consequently, it is believed that such comments, strictly limited to reports of present sense-impressions, have such exceptional reliability as to warrant their inclusion within the hearsay exception for Spontaneous Declarations."

…

Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious "thinking-it-through" statements enter the picture, the present sense impression exception no longer allows their admission. "Thinking about it" destroys the unreflective nature required of a present sense impression.

The State's first ground for review claims that the court of appeals in this case held that Rule 803(8)(B), which explicitly excludes investigative reports by law enforcement from the public records exception to the hearsay rule, "trumps" Rule 803(1) and disallows any out-of-court factual observations by police officers. The court of appeals did not say this. Of course police officers, like the rest of humanity, may make spontaneous, unreflective, contemporaneous present sense impression statements that qualify for admission under Rule 803(1). But the court of appeals appropriately looked to the rationale for excluding law enforcement reports under Rule 803(8)(B) by analogy.

…

Although Rule 803(8)(B) does not "trump" Rule 803(1), the basis for exclusion of police reports and investigative recordings is exactly the same under both rules. The recorded factual observations made by police officers investigating a suspected crime are not the type of "non-reflective" street-corner statements of objective observers that the present sense impression exception is designed to allow. Courts admit present sense impression statements precisely because they are non-narrative, off-hand comments made without any thought of potential litigation by a neutral and detached observer without any motive to fabricate, falsify, or otherwise exaggerate his observations.

Conversely, on-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime. Calculation and criminal litigation shimmer in the air; the officer is gathering evidence, he is not making an off-hand, non-reflective observation about the world as it passes by. Similarly, factual observations, narrations, opinions, and conclusions made by a citizen or bystander that might be intended by the declarant to be made with an eye toward future litigation or evidentiary use are inadmissible under the rule.

III.

In this case, Trooper Martinez turned on his patrol-car video camera and microphone even before he detained appellant. He did this to accurately record his investigation and preserve that interaction for possible trial. He continuously referred to appellant as "the Subject" — the subject of his investigation. He made four separate trips back to his patrol car for the specific purposes of narrating what he had seen, smelled, and heard during his investigatory stop. He offered his opinions and conclusions about what his investigation of appellant had revealed. He narrated his impressions of how appellant had performed on various investigatory field tests and then announced his conclusion: "Subject is going to be placed under arrest for DWI." The entire tape-recorded narrative is, as the court of appeals concluded, a speaking offense report.

Throughout this incident, Trooper Martinez was professionally and politely "engaged

in the competitive enterprise of ferreting out crime." One applauds him for that worthy endeavor, but the adversarial nature of this on-the-scene investigation of a potential crime is entirely at odds with the unreflective, instinctive comments of a "street-corner" speaker who was not thinking about the legal consequences of his statements.

The State argues that "[h]earsay may be admissible under one hearsay exception even if it is inadmissible under another hearsay exception." That is correct, just as Justice Yates concluded in her concurring opinion in this case. Here, however, the rationale for excluding Trooper Martinez's recorded oral narrative of his on-the-scene investigation as a present sense impression under Rule 803(1) is precisely the same as the rationale for excluding that evidence under Rule 803(8)(B): the presumed unreliability of law enforcement observations in an adversarial, investigative setting. Thus, Rule 803(1) cannot be used "as a `back door' to admit evidence explicitly inadmissible under Rule 803(8)(B)."

…

In sum, most of the statements made by Trooper Martinez on the videotape constituted a calculated narrative in an adversarial, investigative setting. These particular statements may be entirely reliable ones, but the setting is one that human experience and the law recognizes is brimming with the potential for exaggeration or misstatement.

We therefore agree with the court of appeals which had held that Trooper Martinez's recorded investigation narrative did not qualify for admission as a present sense impression under Rule 803(1). At trial, Trooper Martinez may testify to exactly what he saw and heard during his investigative detention of appellant, and his words might be the very same as those he used during his on-the-scene narrative, but they must be given under oath and subject to cross-examination.

We affirm the judgment of the court of appeals.

HONORABLE HERVEY, J., filed a dissenting opinion

The State claims that the court of appeals erroneously decided that Rule 803(8)(B) "trumps" Rule 803(1). The Court decides that Rule 803(8)(B) does not "trump" Rule 803(1)[1] and also states that the court of appeals did not say this. The court of appeals and this Court have, however, essentially decided that Rule 803(8)(B) "trumps" Rule 803(1).

The following hypothetical illustrates how the Court's opinion does, in fact, decide that Rule 803(8)(B) "trumps" Rule 803(1). Suppose that a police officer and a private citizen come upon the scene of a traffic accident involving two cars. The police officer and the private citizen walk to one of the wrecked cars and observe an open container of alcohol inside. It takes the police officer and the private citizen a few seconds to walk over to another bystander at the accident scene. Having had the opportunity of "thinking about it" during this brief period of time, the police officer and the private citizen immediately state to the bystander that they observed an open container of alcohol inside one of the wrecked cars. Even though the police officer's and the private citizen's out-of-court declarations to the bystander were based on their observations of the same event at the same time and were made under identical circumstances, the Court's opinion apparently would allow the private citizen's out-of-court declaration to be admitted as a present sense impression, but would exclude the police officer's out-of-court declaration as a "speaking offense report." By admitting the former while excluding the latter, the Court's opinion really does decide that Rule 803(8)(B) "trumps" Rule 803(1).

I disagree with the Court that, in analyzing whether Martinez's out-of-court statements qualify as present sense impressions, it is appropriate to look "to

the rationale for excluding law enforcement reports under Rule 803(8)(B) by analogy." This case would present a "speaking offense report" scenario under Rule 803(8)(B) had Martinez, in accordance with how offense reports are usually prepared, dictated his on-the-scene observations as part of an offense report some time after the events in question after having had the opportunity of "[t]hinking about it." But, that is not what occurred here. The brief period of time (a few seconds) between Martinez's observation of the events and his description of them on the audiotape provided him with very little opportunity of "[t]hinking about it" and does not present a setting "brimming with the potential for exaggeration or misstatement." And, though Martinez may have been "engaged in the competitive enterprise of ferreting out crime," this short time interval provided little or no time for calculated misstatement[10] and it still eliminated the four "hearsay dangers" of faulty perception, faulty memory, accidental miscommunication, or insincerity. The contemporaneity and "immediately thereafter" requirements of Rule 803(1) remove any analogy between cases like this and Rule 803(8)(B).

…

And, in *Illinois Central R.R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 953 (1913), the Alabama Supreme Court described the spontaneity requirement as follows: "The mere fact that a declaration is contemporaneous with the transaction in issue, and even relates to and is prompted by it in a general way, does not render it admissible in evidence. Such a declaration, to have testimonial verity and value, and hence to be admissible by way of exception to the rule that excludes hearsay in general, must directly relate to and in some degree illustrate and explain the occurrence in question; and essentially, it must be the apparently spontaneous product of that occurrence operating upon the visual, auditory, or other perceptive senses of the speaker. The declaration must be instinctive rather than deliberative — in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action. These are the indicia of verity which the law accepts as a substitute for the usual requirements of an oath and opportunity for cross-examination."

Martinez's out-of-court factual assertions satisfy the contemporaneity requirement because they describe or explain events, which Martinez (the declarant) was observing at the time that he made the out-of-court statements or immediately thereafter. … Martinez's out-of-court factual assertions also satisfy the spontaneity requirement because they are "instinctive rather than deliberative-in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action."

…

Finally, the "[t]hinking about it" rationale in the Court's opinion does not apply to all of Martinez's out-of-court statements such as his out-of-court statement, "I smell alcohol," when Martinez asked appellant if he had any alcohol in the car. In addition, the Court's opinion seems to suggest that the entire audiotape is inadmissible, when both appellant and the court of appeals have acknowledged that some portions of the audiotape "would be admissible." See Fischer, 207 S.W.3d at 850. For example, appellant's statement to Martinez that he had "Three Wines" should not be excluded by anything that the Court's opinion says.
I respectfully dissent.

ARIZONA COURT OF APPEALS
DIVISION 2

STATE v. WRIGHT

370 P.3d 1122 (2016)

HONORABLE M. MILLER

MEMORANDUM OPINION

After a jury trial, appellant Arthur Wright was convicted of two counts of possession of a narcotic drug for sale and one count of possession of drug paraphernalia, and sentenced to concurrent prison terms of 10.5 years for the first two charges and 2.25 years for the paraphernalia offense. Wright argues the trial court erred by admitting into evidence a redacted audio recording made by police officers during the undercover operation leading to his arrest. Finding no abuse of discretion, we affirm.

Factual and Procedural Background

We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Nelson,* 214 Ariz. 196, ¶ 2, 150 P.3d 769, 769 (App.2007). In June 2013, Tucson Police Officer J.D. was working undercover as part of a drug interdiction team that focused on street sales of narcotics. He approached a man near a convenience store who was later identified as Wright's co-defendant, Richard Davis. J.D. asked if Davis could help him buy methamphetamine and Davis said he could. Davis climbed into J.D.'s unmarked truck. The truck had a one-way radio transmitter and digital audio recorder hidden inside it. Other police officers were listening to everything that was happening in the truck through the one-way radio and were prepared to move in if they believed J.D. was in danger.

J.D. gave Davis two $20 bills—one as his payment and the other to use to buy the methamphetamine. He testified they also talked about "possibly partying that night," and stated he had offered Davis a hotel room for the evening. Davis made a telephone call using J.D.'s cell phone and then directed J.D. to an apartment, but when they arrived Davis was unable to obtain methamphetamine.

Davis then directed J.D. to drive to a particular gas station. Davis got out of the truck and went into the gas station's convenience store. Shortly thereafter, a car pulled into the parking space immediately adjacent to J.D.'s truck. A man later identified as Wright was in the passenger seat of that car. The driver of the car called J.D. on his cell phone. J.D. explained to the driver of the car that Davis was inside the store and would be out shortly. Davis came out of the store and got into the driver's-side rear seat of the car. J.D. saw Wright reach down under his seat, and then "do [ ] something back and forth" with Davis.

Davis got back in J.D.'s truck, showed him a baggie that contained what appeared to be methamphetamine, and said, "See, I got it." When J.D. realized Davis planned to hold onto the baggie until J.D. had booked the hotel room they had talked about, he made a prearranged arrest signal so other officers would stop the car. They did so and arrested Davis.

Another Tucson Police officer stopped the car in which Wright was riding as a passenger. As the officer approached the car, he saw Wright trying to conceal something between the center console and the seat. It turned out to be a digital scale. As the officer removed Wright from the car, the officer saw six small baggies on the passenger seat where Wright had been sitting. Two of the baggies contained crack cocaine; the other four contained heroin.

At trial, a redacted version of the audio recording from J.D.'s truck was admitted into evidence over Wright's objection as Exhibit 49. Wright was convicted and sentenced as described above and now appeals. We have jurisdiction under A.R.S. §§ 13–4031 and 13–4033(A)(1).

Analysis

Wright argues the trial court prejudicially erred by admitting Exhibit 49 over his objection. We review the trial court's evidentiary rulings for an abuse of discretion. *State v. Johnson,* 212 Ariz. 425, ¶ 25, 133 P.3d 735, 743 (2006).

The portion of Exhibit 49 to which Wright objected covered the moment Davis got

out of J.D.'s truck and went into the convenience store, until the moment he got back into the truck. It consists of the following statements:

"Two–Five, he's getting out and he's, uh, looks like going in the store. He's got the twenty in his right hand. And again, he's got whatever it is. He hasn't moved it. It's still in his left shoe. Inside the store I think he's buying a beer or something. Got a, no, that's probably just some U of A people. Next to us. Just in case you guys can't see, I'm parked, uh, just in front of the store, facing south, kind of over towards the car wash and in front. He's still at the counter right now. And there's a car pulling up. Looks like it's a Ford or something. This might be our delivery right here. It's a Ford Taurus, it looks like, uh, gray. There's a number three and a number five in the car. A number three male passenger, and a number five female driver. [phone rings] She's calling me right now. It's the car next to us. Hello? Hey, uh, he's, uh, he's in the store right now, uh, just getting a drink. He should be coming out here in a sec. Oh, is that you? Hey, hey, I'll wait 'til he comes out and you guys can talk to him or whatever. Cool. Later. Bye. Yeah, she was on the phone. Looks like he's coming out now. Looks like he just bought a beer or something. And he's walking over to her. He's getting in the left rear. Looks like the number three male front right, he's got a gray cap and like a black cut-off jersey kind of thing on. He's reaching up kind of under the seat. Looks like he's messing with something. Maybe he's got product with him. The driver's on the phone again. Our guy's getting out, it looks like. He's gonna get back in with me."

Wright argues Exhibit 49 essentially was a police report and inadmissible under the general rule precluding the admission of hearsay. *See* Ariz. R. Evid. 801(c) (defining hearsay); *State v. Smith,* 215 Ariz. 221, ¶ 28, 159 P.3d 531, 539 (2007) (police report inadmissible unless hearsay exception applies). Hearsay generally is inadmissible if no exception applies. Ariz. R. Evid. 802. The state argues here, as it did below, that the recording was admissible as a present sense impression—"[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it," Ariz. R. Evid. 803(1).

The present-sense-impression exception to the hearsay rule "is based on the notion that 'substantial contemporaneity of event and statement' negates the likelihood of fabrication or misrepresentation." *State v. Damper,* 223 Ariz. 572, ¶ 16, 225 P.3d 1148, 1152 (App.2010), *quoting State v. Tucker,* 205 Ariz. 157, ¶ 42, **68 P.3d 110, 118** (2003). "We assume, as a general matter, that when the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable." *Tucker,* 205 Ariz. 157, ¶ 42, **68 P.3d at 119**. Accordingly, to qualify as an admissible present sense impression, a statement "require[s] ... immediacy." *State v. Thompson,* 146 Ariz. 552, 557, 707 P.2d 956, 961 (App.1985). For example, a witness' statement, "There goes your Fast and Furious movie," comparing her observation about two cars racing past her to scenes in a movie about street racing, was admissible as a present sense impression. *State v. Sucharew,* 205 Ariz. 16, ¶¶ 24–26, 66 P.3d 59, 67 (App.2003). In the same vein, a recording of a 9–1–1 call in which the caller described the appearance of two burglars and their actions as she watched them load her neighbor's property into their truck, was a proper present sense impression. *State v. Rendon,* 148 Ariz. 524, 526, 528, 715 P.2d 777, 779, 781 (App.1986).

Wright admits that "[a]t first glance," Exhibit 49 "seems to fall within" the present-sense-impression exception. *See* Ariz. R. Evid. 803(1). We agree that Exhibit 49 falls within the plain language of Rule 803(1). The exhibit consists of descriptions of events (such as the suspects' activities and movements) and conditions (such as descriptions of people and vehicles and their relative

locations) made as the declarant was observing those events and conditions or immediately thereafter. *Id.; accord* *Sucharew,* 205 Ariz. 16, ¶¶ 24–26, 66 P.3d at 67; *Rendon,* 148 Ariz. at 528, 715 P.2d at 781. Wright nevertheless contends the hearsay exception must be disregarded here because J.D. "was making the recording for the specific purpose of creating evidence to be used at trial," and had a motive and an opportunity to reflect or fabricate. As a result, he argues, the statements in Exhibit 49 lack the assurances of reliability that justify admission of the typical present sense impressions of disinterested bystanders like the declarants in *Sucharew* and *Rendon.* In his reply brief, Wright suggests *Fischer v. State,* 252 S.W.3d 375 (Tex.Crim.App.2008) is "a case much more on point."

In *Fischer,* a state trooper turned on his dashboard-mounted video camera and body microphone, and then announced his intention to pull a vehicle over because the driver was not wearing a seatbelt. *Id.* at 376–77. After stopping Fischer's truck, the officer asked him whether he had any alcohol in the truck, adding, "I smell alcohol." *Id.* at 377. The officer proceeded with an investigation for driving while under the influence of alcohol. *See id.* At four different points during the course of the investigation, he returned to his patrol car to record his findings on camera. *Id.* at 377, 385. He dictated to the camera that the " 'subject [had given] several clues' " during a heel-to-toe test, such as starting the test too soon, losing his balance, " 'stepp[ing] off the line two times,' " making an " 'improper turn,' " and using his hands to balance. *Id.* at 377. He added that Fischer had " 'indicated the same clues' " during a one-leg stand test, even though the officer noted he had given the defendant " 'a second chance to do it.' " *Id.* He dictated the following observations after conducting a horizontal gaze nystagmus test: " 'Subject has equal pupil size, equal tracking, has a lack of smooth pursuit in both eyes, and has distinct nystagmus at maximum deviation in both eyes. Subject also has onset of nystagmus prior to forty-five degrees in both eyes.' " *Id.* He also noted for the recording that Fischer's eyes were glassy and bloodshot, his speech was slurred, his breath smelled strongly of alcohol, and he had a wine opener in his vehicle. *Id.* Ultimately, the officer dictated to the camera, " 'Subject is going to be placed under arrest for DWI,' " and then he arrested Fischer, telling him " 'I believe you are drunk.' " *Id.*

Fischer filed a motion to suppress the videotape of the traffic stop, but the trial court denied the motion, reasoning the tape constituted a present sense impression. *Id.* at 377–78; *see also* Tex. R. Evid. 803(1) (textually identical to Ariz. R. Evid. 803(1)). The Texas Court of Criminal Appeals affirmed the court of appeals, reversing the trial court. *Fischer,* 252 S.W.3d at 387. The court reasoned that "reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious 'thinking-it-through' statements" are not proper present sense impressions, because " '[t]hinking about it' destroys the unreflective nature required of a present sense impression." *Id.* at 381; *accord* *Thompson,* 146 Ariz. at 557, 707 P.2d at 961(present sense impression requires immediacy). The court concluded the officer's statements to the camera amounted to "a speaking offense report." *Fischer,* 252 S.W.3d at 385.

Fischer is distinguishable from the present case. Unlike the officer's "reflective narratives" memorialized for the camera in *Fischer,* 252 S.W.3d at 381, J.D.'s real-time descriptions of the suspects' appearance, vehicle, and movements were not primarily designed to chronicle earlier investigative findings. Rather, the statements described the events of a crime as it unfolded, and provided law enforcement officers with information they could use to disrupt that crime and

successfully apprehend the perpetrators. In that respect, Exhibit 49 closely parallels the recording of the 9–1–1 call the court found admissible as a present sense impression in *Rendon,* in which the caller provided descriptions of burglary suspects, their vehicle, and their activities in real time as she watched the crime unfold. 148 Ariz. at 526, 528, 715 P.2d at 779, 781. As in *Rendon,* the statements were virtually contemporaneous with the ongoing crime they described. *Id.*

The fact that the declarant in the present case was a law enforcement officer, unlike the caller in *Rendon,* does not change the analysis. *See* Ariz. R. Evid. 803(1); *Tucker,* 205 Ariz. 157, ¶ 42, **68 P.3d at 119** (contemporaneity of statement and event ensures reliability of present sense impression). The problem with the statements the trial court erroneously admitted in *Fischer* was not that they were made by a law enforcement officer, but that they were made *reflectively,* "with an eye toward future litigation." *See* 252 S.W.3d at 383–85. In contrast, the totality of the circumstances reveals that J.D.'s primary reason for making the statements was to ensure his own safety during a potentially dangerous undercover operation. *See Tucker,* 205 Ariz. 157, ¶ 45, **68 P.3d at 119** (admissibility of statement as present sense impression determined in view of totality of circumstances). J.D. testified other officers were listening to him over the one-way radio "[d]uring this entire time ... so that if I ... give signals that I'm in danger, they can move in." "I'm constantly watching for people, you know, pulling knives on me, pulling guns on me," he continued. By providing details about the situation as it unfolded, such as the positions of relevant vehicles, physical descriptions of suspects and their car, and a description of Wright reaching under the seat where a weapon could have been stored, J.D. sought to ensure the other officers listening to him would be prepared to intervene quickly and effectively if the situation deteriorated.

...

In sum, the trial court did not abuse its discretion in determining Exhibit 49 was admissible as a present sense impression. Ariz. R. Evid. 803(1); *see, e.g., Rendon,* 148 Ariz. at 526, 528, 715 P.2d at 779, 781; *Campbell,* 782 F.Supp. at 1261–62. Accordingly, we need not address the state's alternative argument that it was also admissible under the residual hearsay exception of Rule 807(a), Ariz. R. Evid.

Disposition

For the foregoing reasons, we affirm Wright's convictions and sentences.

TEXAS COURT OF APPEALS
THIRD DISTRICT, AT AUSTIN

THOMPSON v. STATE

NO. 03-12-00519-CR

HONORABLE J.M. MISCHTIAN

MEMORANDUM OPINION

Michael Wayne Thompson was arrested for the offense of driving while intoxicated. See Tex. Penal Code Ann. § 49.04 (West Supp. 2012). Using his dashboard camera, the arresting officer videotaped his pursuit of Thompson's vehicle and the subsequent traffic stop, during which he administered field sobriety tests to Thompson. Thompson moved to exclude several portions of the video. The trial court granted Thompson's motion as to some portions and denied it as to others. On appeal, Thompson contends the trial court committed reversible error by admitting one portion of the video he had objected to. We will affirm.

Background

On the evening of May 23, 2011, Trooper Steven Royal was on patrol on Interstate Highway 35 in Bell County. While patrolling, Royal observed Thompson

driving a green Mustang convertible at a speed of over 111 miles per hour on the highway. Royal testified that he activated his in-car video recorder and pursued Thompson. Royal said he did not immediately activate his lights or siren because he had not yet identified the make of the vehicle and he did not want to give the driver an opportunity to blend in with the other traffic. After a mile or two, Royal activated his lights when Thompson's vehicle moved to the outside lane and continued at up to 115 miles per hour.

According to Royal, Thompson exited the highway, at which time Royal activated his siren and exited behind Thompson. Royal testified that although there were places to pull over, Thompson proceeded along the frontage road at 90 to 100 miles per hour. Royal described the frontage road as a two-lane two-way road on which Thompson was traveling northbound, making no effort to slow down. Royal testified that Thompson ran three stop signs without braking and passed a vehicle pulling a trailer in a no passing zone. After Thompson passed the vehicle, Royal was able to get close enough to Thompson's vehicle to read its license plate and identify it as a green Mustang convertible. Royal stated that after he activated his lights and siren, Thompson traveled two more miles along the frontage road before finally turning onto a side street and coming to a stop.

Royal testified that he had pursued Thompson for approximately four miles at speeds of more than 100 miles per hour, with his lights and siren activated for two of those miles, before Thompson pulled over. Royal stopped behind Thompson's vehicle and conducted a "felony stop," which differs from a regular stop; rather than approach the vehicle and talk to the driver, the officer has his weapon drawn and gives the driver instructions loudly from a distance. Royal described how he instructed Thompson to get out of the Mustang and secured him with handcuffs. Royal testified that he gave Thompson Miranda warnings and conducted three field sobriety tests. Royal testified that Thompson exhibited several signs of intoxication and smelled of alcohol. Royal arrested 2 Thompson and took him to the Bell County Jail. Thompson was charged with the offense of driving while intoxicated.

Before trial, Thompson moved to exclude several portions of Royal's dashboard video recording of the pursuit and sobriety tests. The trial court granted the motion with respect to numerous segments of the video, but denied several. At trial, the prosecution played the portions of the video permitted by the trial court, during which Royal was on the stand describing what was happening in the video. After the close of evidence, the jury returned a guilty verdict. Thompson elected to have the jury set punishment, which it assessed at 180 days in jail and a $2,000 fine. Thompson perfected this appeal. In a single issue, Thompson complains that the trial court erred in denying his motion to exclude the first five and a half minutes of the video, which depict the video and audio of the officer's pursuit of Thompson from its initiation until Thompson pulled over. In his motion, Thompson contends that the officer's statements in that portion of the video are an inadmissible "narrative," making the audio portion inadmissible and, as a consequence, making the video portion irrelevant. Although he moved to exclude both the audio and video of that portion of the videotape, the focus of his objection, and the basis for excluding it, was the audio component.

Discussion

In his brief, Thompson states that the specific objection he contends the court erroneously overruled can be found on page six of the reporter's record of the hearing on to exclude. It is evident from the reporter's record that this objection was to the first five and a half minutes of the video, which consists of the following:

10:00 Royal's car parked on shoulder with

traffic passing.
01:08 Thompson's car is observed, and Royal begins pursuit with no audio.
02:05 Audio commences consisting of nonspecific police radio traffic.
03:29 Royal activates his siren as he catches up to Thompson.
03:56 Royal advises the dispatcher that he is in pursuit, gives his location, and tells the dispatcher that the car he is pursuing looks like a convertible.
04:26 Royal again advises the dispatcher of his location.
04:43 Royal again advises the dispatcher of his location.
05:03 Royal tells the dispatcher the vehicle is a "ragtop" but he cannot see the license plate.
05:11 Royal gets close enough to read the license plate and provides the dispatcher with the license plate number and a description of the vehicle.
05:33 Thompson's vehicle is stopped on the side street, and Royal commences the "felony stop."

Thompson's stated objection to this portion of the video was: "Judge, as it's stated in the Motion, narrative by the trooper. He's dictating into the video machine what's happening as it's happening, which is—as Paragraph 6 explains, is not allowed under Fisher [sic] v. State, an Austin case."
The "narrative" that Thompson apparently refers to consists of Royal's statements to the dispatcher regarding his location and the description of the vehicle he is pursuing. Royal does not say anything else during this portion of the video. Relying on Fischer v. State, 207 S.W.3d 846 (Tex. App.—Houston [14th Dist.] 2006), aff'd, 252 S.W.3d 375 (Tex. Crim App. 2008), Thompson complains that it was error to permit the jury to hear this narrative. See id. at 859-60 (officer's recording of his factual observations of DWI suspect contemporaneously dictated on his patrol-car videotape not admissible as it was functional equivalent of inadmissible offense report and did not constitute unreflective statement falling within present sense impression exception to hearsay rule). The State counters, first, that Royal's statements in the video do not rise to the level of the "narrative" found in Fischer to be the functional equivalent of an offense report and, second, that the officer's words are admissible under the present-sense impression exception to the hearsay rule.

The State further argues that, even if it was error to admit that portion of the video, any such error was harmless. See Tex. R. App. P. 44.2(b).

Although it is not clear that Royal's remarks regarding his location are hearsay (since they do not appear to have been offered to prove the truth of the matters asserted), nor that they are in substance the functional equivalent of an offense report so as to be inadmissible under rule 803(8)(B) of the rules of evidence, we need not decide these questions because we agree that any error in admitting this portion of the video was harmless.

The admission of inadmissible hearsay constitutes non-constitutional error. Lee v. State, 21 S.W.3d 532, 538 (Tex. App.—Tyler 2000, no pet.) (citing Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)). An appellate court must disregard non-constitutional errors that do not affect substantial rights of the defendant. Tex. R. App. P. 44.2(b); see Lee, 21 S.W.3d at 538. A substantial right is affected when the error has a substantial and detrimental effect or influence on the jury's verdict. King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). The error is harmful if there is a reasonable likelihood that the evidence, either alone or in context, moved the jury from a state of nonpersuasion to one of persuasion beyond a reasonable doubt. Cardenas v. State, 971 S.W.2d 645, 651 (Tex. App.—Dallas 1998, pet. ref'd) (citing Jones v. State, 833 S.W.2d 118, 127 (Tex. Crim. App. 1992)). If the error did not influence or had only a slight influence on the verdict, the error is harmless because it did not affect substantial rights

of the defendant. Lee, 21 S.W.2d at 539. Further, if the fact to which the hearsay pertains is sufficiently proved by other competent and unobjected-to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error. Anderson v. State, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986); see Matz v. State, 21 S.W.3d 911, 912-13 (Tex. App.—Fort Worth 2000, pet. ref'd) (concluding that any error in admitting videotape must be disregarded because video was "cumulative" of alleged victim's properly admitted testimony on same issue).

As set forth above, Royal testified, without objection, in great detail regarding the events depicted and the statements he made in the objected-to portion of the videotape. There is nothing material to Thompson's guilt or innocence contained in this portion of the videotape that was not included in Royal's live testimony. Consequently, the admission of that portion of the videotape had no affect on Thompson's substantial rights, and any error in its admission was harmless and does not constitute reversible error. We overrule Thompson's sole appellate issue.

Conclusion

We affirm the trial court's judgment.