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State of Minnesota
In Court of Appeals

JESSE WAYNE HARRISON, petitioner,

Appellant,

vs.

COMMISSIONER OF PUBLIC SAFETY,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Was the State required to obtain a search warrant prior to testing a blood sample for an alcohol concentration.

The trial court ruled in the negative.

PROCEDURAL HISTORY

- June 3, 2009:** District Court Denies Appellant's Motion to Rescind the Revocation of Appellant's Driver's License in District Court File 10-CV-09-310
- June 26, 2009:** District Court Denies Appellant's Motion to Rescind the Revocation of Appellant's Driver's License in District Court File 10-CV-09-490
- July 17, 2009:** District Court consolidated files 10-CV-09-310 and 10-CV-09-490
- August 3, 2009:** Appellant files Notice of Appeal

STATEMENT OF THE CASE AND FACTS

Appellant seeks review of a trial court order dated June 3, 2009 denying Appellant's motion to rescind the revocation of his driver's license and by an order filed on June 26, 2009, denying Appellant's motion to rescind the revocation of his driver's license. Each trial court decision involved a separate incident under the Implied Consent Law. There was no testimony in either proceeding. On July 17, 2009 the district court consolidated each file as the issue in both district court proceedings was whether a warrantless search of Appellant's blood was unconstitutional.

The trial courts held that under State v. Yang, 352 N.W.2d 127 (Minn. Ct. App. 1984) once the blood sample was lawfully seized no further warrant was required to have the sample analyzed.

This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW

The trial court's Findings of Fact are entitled to the same weight as a verdict of a jury and cannot be reversed if the court can reasonably make the findings. State v. Gardin, 251 Minn. 157, 86 N.W.2d 711 (1957). Conclusions of Law, on the other hand, can be overturned upon a showing that the trial court erroneously construed and applied the law to the facts of the case. State v. Olson, 342 N.W.2d 638 (Minn. Ct. App. 1984).

In the instant matter, the facts are uncontradicted and undisputed. The trial court erroneously construed and applied the law to the facts of this case. Thus, the trial court's decision should be reversed as a matter of law.

II. INTRODUCTION

This case is about the authority of the State to test a blood sample from a suspected drunk driver without a search warrant. A sample of Appellant's blood was taken shortly after his arrest for suspicion of drunk driving. After the blood sample was lawfully obtained the sample was placed in a preservative.

Provisions in both the United States and the Minnesota Constitutions expressly prohibit unreasonable searches or seizures for the protection and benefit of the people. U.S. Const. Amend IV; Minn. Const. Article I, Section 10. For this reason, generally, "a search [or seizure] conducted without a warrant issued upon probable cause is *per se* unreasonable." State v. Hanley, 363 N.W.2d 735, 738 (Minn. 1985). This general rule,

however, is subject “to a few specifically established and well delineated exceptions.”

Katz v. United States, 389 U.S. 347, 357 (1967).

There are two exceptions to the warrant requirement that could be applied here. They are the exigent circumstances exception and consent. Under United States Supreme Court precedent, Respondent cannot establish that either exception is applicable to this case.

Other general principles regarding searches are also worth noting as they underscore the jealousy with which the constitutional right to privacy must be guarded. All searches, even those with warrants, are to be limited narrowly, leaving nothing to the discretion of executing officers. Stanford v. Texas, 379 U.S. 476 (1965). The constitution cannot be subverted in the name of convenience or efficiency of law enforcement. Arkansas v. Sanders, 442 U.S. 753 (1979). The judgment of a neutral magistrate is always preferable to that of a police officer on the scene. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). The careful regulation of extra-judicial searches enhances the “moral and educative force of the law” and improves law enforcement as well as protecting basic privacy rights. United States v. Caceres, 440 U.S. 741 (1979). It is in the context of these time-honored fundamentals that this court must approach the present question: can a search performed weeks after evidence is preserved and secured in a preservative, ever be justified by any exception to the warrant requirement?

The taking of a blood test is a search as defined by constitution law. See, Skinner v. Railway Lab. Execs. Ass’n, 489 U.S. 602 (1989); State v. Hardy, 577 N.W.2d 212

(Minn. 1998) (intrusion beyond the body's surface constitutes a search). This position was reaffirmed in In Re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006). Citing the United States Supreme Court decision the Court of Appeals in C.T.L. held that the taking and analyzing of a biological specimen from a criminal suspect is a search that is entitled to the full protection of the Fourth Amendment. Id. at 488 (emphasis added)

There are two distinct actions that implicate the Fourth Amendment. First, Appellant's blood sample was seized under the Minnesota's Implied Consent Statute. Second, after the blood sample was seized the blood sample was mailed and then was searched for alcohol by the BCA laboratory.

The warrantless search of Appellant's blood sample violated his constitutional right to be free from unreasonable searches. As such, the decision of the trial court must be reversed and the revocation of Appellant's driver's license be reinstated.

III. THE WARRANTLESS SEARCH OF APPELLANT'S BLOOD SAMPLE VIOLTED APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH

A. THE EXIGENT CIRCUMSTANCE EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT APPLY AFTER APPELLANT'S BLOOD SAMPLE WAS EXTRACTED, PRESERVED, AND TESTED

The exigent circumstance exception rests on the notion that in very limited circumstances, it may be impossible to obtain a warrant prior to the destruction of the evidence. See, State v. Shriner, 751 N.W.2d 538, 541 (Minn. 2008). Under Shriner, this exception is justified by "emergency conditions" such as "hot pursuit of a fleeing felon, the destruction of evidence, an ongoing fire, and the rendering of emergency aid." Id.

None of these “emergencies” existed after the blood sample was extracted from Appellant, placed in a preservative, sent by mail to the BCA, and later searched. Both the BCA and law enforcement had ample time to obtain a warrant.

The Minnesota Supreme Court recently held that the seizure of a blood sample falls under the “exigent circumstances” exception to the warrant requirement: “. . . the rapid dissipation of blood-alcohol content caused by the body’s natural processes is a single factor that creates the exigent circumstances in the case of criminal vehicular operation to justify a warrantless blood draw.” State v. Shriner, *supra* at 546. Shortly thereafter, the court expanded this holding to include the seizure of a biological specimen in a DWI case. See, State v. Netland, 762 N.W.2d 202, 241 (Minn. 2009).

The initial warrantless seizure of Appellant’s blood sample is not the issue in this case. Appellant contends that the Netland court’s broad holding allowing for both (1) an initial search and seizure to recover and preserve the blood sample and (2) a subsequent search of the sample by testing for the presence of blood alcohol, strays far from the jurisprudence upholding warrantless searches based on the exigency of imminent destruction of evidence. Indeed, both the Minnesota and United States Supreme Court have long held that when faced with the exigency of destruction of evidence, police may stop and freeze the situation in order to prevent the evidence from being destroyed, but may not otherwise commence an invasive search without first obtaining a warrant. Vale v. Louisiana, 399 U.S. 30, 34-35 (1970) (holding that, where police had probable cause to believe drugs were present in home, a warrantless search

conducted after residence had been secured ran afoul of the Fourth Amendment); State v. Alayon, 459 N.W.2d 325, 330 (Minn. 1990) (holding that impoundment of home, along with brief sweep of house, to prevent destruction of drug evidence was justified to allow police opportunity to obtain a search warrant for more invasive search); State v. Olson, 436 N.W.2d 92, 98 (Minn. 1989) (finding no exigent circumstances to enter home in order to effectuate warrantless arrest of person suspected of being involved in a murder where police had adequately frozen situation by surrounding home preventing suspect's flee).

Appellant contends that, as in Vale, Alayon, and Olson, where it was held that police must obtain a warrant prior to conducting an invasive search of a home after evidence inside the home was preserved, the federal and state constitutions require police to obtain a search warrant prior to testing a driver's bodily fluids, which have been lawfully seized.

Given long-standing precedent, it is illogical to conclude that the Fourth Amendment protects a person's privacy interests in the contents of his/her home with greater force than a person's privacy interests in the contents of his/her body and bodily fluids. For this Court to reconcile the Netland holding with the holdings of Vale, Alayon, and Olson this Court must accept the conclusion that a person retains a privacy interest when concealing unlawful substances in his/her home, but loses the same or greater protected privacy interest when an unknown amount of alcohol is contained in his/her blood.

When law enforcement obtained a blood sample from a suspected drunk driver's body, this BAC evidence is required by statute to be preserved. Once a blood sample is preserved the exigency justification for the initial search evaporates. As does the judicial concern with the "rapid dissipation of blood-alcohol content caused by the body". In Walter v. United States, 447 U.S. 649 (1980), the United States Supreme Court held that when a package is lawfully in the possession of government agents to prevent destruction or loss of suspected contraband, the Fourth Amendment requires government agents to obtain a warrant before examining its contents. (emphasis added).

In Walter, private persons had made the seizure, so it was legal. But the subsequent search contained no exception to the *per se* warrant requirement. The Supreme Court wrote:

"Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances." (emphasis added).

"It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation – that is to say, a search of the contents of the films – was necessary in order to obtain the evidence which was to be used at trial."

"The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in *Ex parte Jackson*, 96 U.S. 727, established

that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents. See, United States v. Chadwick, 433 U.S. 1, 10 (1977) When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed." (emphasis added)

This concept was reaffirmed by the United States Supreme Court in Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009). In that case, Gant arrived at the scene of a narcotics arrest and was arrested for driving on a suspended license. He was placed in handcuffs and locked in the backseat of a squad car. Officers then conducted a search of his car, and narcotics were discovered. The state argued that the search was justified as a search incident to arrest. In rejecting that claim, the Court held that once Gant was secured, the underlying justification for a search incident to arrest (officer safety and preservation of destructible evidence) no longer existed, and the officers were required to obtain a warrant to conduct their search. (emphasis added).

The Supreme Court specifically noted the rationale justifying seizure without a warrant no longer supplied an exception to the search warrant requirement, and held:

"Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in Belton, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search."

What Gant case makes clear is that the holdings cited above, regarding the general principles that apply to searches and warrant exceptions, are just as important today as they were when they were announced.

Although the warrant exception at issue here is different, the same logic applies. Once the state had possession of Appellant's preserved blood sample, the underlying justification that warranted the immediate seizure does not end the inquiry as we still have privacy rights in our home and bodily fluids. See, In Re Welfare of C.T.L., supra. Here, the tube containing Appellant's blood was no different than the film in the Walter case, or the drug evidence in Vale, Gant, or Alayon.

The state will likely argue that requiring police to obtain a warrant prior to "searching" (or testing) a preserved sample of blood amounts to a needless inconvenience and/or an unreasonable procedural hurdle. See Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971) (noting that once lawful search is in progress, police are not required to ignore inadvertently discovered evidence, as it would often be a needless inconvenience and sometimes a danger to the evidence or officers for police to have to ignore the evidence until a warrant is obtained). (emphasis added). As applied to the facts here, such an argument is unpersuasive since there has never been a *de minimis* exception to the search warrant requirement; once it is determined that a person has a reasonable expectation of privacy in the item or thing to be searched, any intrusion, no matter how minimal, is unlawful unless supported by a search warrant or a specifically established exception to the warrant requirement. See Kyllo v. United States, 533 U.S.

27, 34 (2001) (police engaged in an unlawful “search” when they used a thermal imaging device without warrant to scan home to determine whether heat emanating from home was consistent with use of high-intensity lamps employed in indoor marijuana growing operation). Because Appellant had a reasonable expectation of privacy in the lawfully seized blood sample, irrespective of the burden, the police were required to apply for and obtain a warrant prior to conducting an invasive and scientific test of Appellant’s blood sample.

The United States Supreme Court has held that police may not search without a warrant merely because they were entitled to seize without a warrant. See, United States v. Jacobsen, 466 U.S. 109 (1984). Citing a long list of authority, the Jacobsen Court noted that even when a package is lawfully seized to prevent destruction or loss of suspected contraband, the Fourth Amendment requires government agents to obtain a warrant before examining its contents. Id. at 114. (emphasis added). In this case, although the state was entitled to seize Appellant’s blood without a warrant under Netland, the State was not entitled to search the blood for the presence of alcohol without first obtaining a warrant.

In rejecting Appellant’s argument the district court relied on State v. Yang, 352 N.W.2d 127 (Minn. Ct. App. 1984). In Yang the police were informed by the Postal Service that a package sent to Yang’s address from a refugee camp in Thailand contained opium. Subsequent law enforcement obtained a search warrant for Yang’s apartment authorizing the seizure of “opium, papers, invoices, billings, letters and other items that

indicate the owner/renter/occupant of the premises * * *” During the execution of the search warrant a letter in plain sight addressed to Yang at the address searched was seized. This letter was seized as evidence. Yang occupied the apartment. Four days after the search, the letter was given to translators who provided the police with a translation connecting Yang with a package of opium.

The issue in Yang was whether the State was required to obtain a second search warrant prior to having the body of the letter translated from Hmong to English and was brought before the court pursuant to Minn. R. Crim. P. 28.03. The Yang court held that a second warrant was not required, based upon the stipulated facts.

The district court incorrectly relied on a single misplaced statement in Yang which stated “once evidence is lawfully seized, tests such as chemical analysis, * * * and other interpretive tests may be run without a further warrant.”

The trial court’s reliance on the above statement has little if any authority to the resolution of the issues presented here. First, the statement is dictum and is contrary to the Fourth Amendment. In addition, Yang is not factually similar as Appellant was subject to a far more intensive search. Lastly, justification for the preservation of evidence was not discussed. Yang cannot be interpreted as binding precedent. Because of the very intrusive nature of extracting and then testing a preserved and secured blood sample law enforcement is required to obtain a warrant before conducting an examination of a blood sample.

B. THE CONCENT EXCEPTION DOES NOT APPLY WHEN APPELLANT DID NOT FREELY AND VOLUNTARILY CONSENT TO THE TESTING OF HIS BLOOD SAMPLE.

An individual's consent to search is an exception to the warrant requirement State v. Hanley, supra. Before the fruits of a search conducted pursuant to "consent" may be admitted, it must be determined whether the alleged consent was given voluntarily and without coercion. United States v. Dennis, 625 F.2d 782 (8th Cir. 1980); State v. George, 557 N.W.2d 575, 579 (Minn. 1997).

Consent is relevant if the implied consent statute is invoked. State, Dept. of Highways v. Beckey, 192 N.W.2d 441 (Minn. 1971). However, the "consent" has to be "actual" consent at the time the test is requested. Id. Consent cannot be implied and consent cannot be coerced. Indeed, because chemical testing under the implied-consent law constitutes a "search" within the meaning of the Fourth Amendment, any consent to be searched that is obtained "must be received, not extracted." State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994); see also In re Welfare of J.W.K., 583 N.W.2d 752, 755 (Minn. 1998) (applying Fourth Amendment protections to physical act of drawing blood and medical data obtained from subsequent chemical analysis). To be valid, such consent must be "freely and voluntarily" given. Id.

The Minnesota Court of Appeals recently had the opportunity to consider the voluntariness of "consent" obtained after the reading of the Implied Consent Advisory. The court held

“[b]ecause an individual does not have the right to say no to a chemical test and, indeed, is subject to criminal penalties for doing so, the “consent” implied is insufficiently voluntary for Fourth Amendment purposes.”

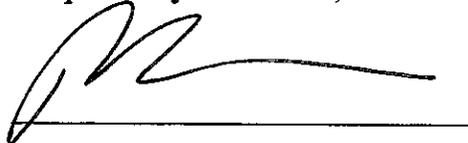
State v. Netland, 742 N.W.2d 207 (Minn. Ct. App. 2007) *reversed on other grounds* 762 N.W.2d 202 (Minn. 2009) (emphasis added).

CONCLUSION

The warrantless “search” of Appellant’s blood sample after the initial “seizure” was not justified by an exception to the warrant requirement and violates the Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota Constitution.

The Fourth Amendment cannot be effortlessly ignored, manipulated out of existence, suspended, or bypassed, by a statutory scheme compelling a driver to consent to an unlawful scientific search of his/her private biological fluids. For the reasons stated herein and because the Constitutions of the State of Minnesota and the United States of America pledge vigilant protection to the privacy interests of the people, this Court should reverse the decision of the trial court and reinstate Appellant’s driving privileges.

Respectfully submitted,



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This 30 day of October, 2009.