

No. A09-1419

STATE OF MINNESOTA

IN COURT OF APPEALS

Jesse Wayne Harrison,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUE

Does a warrant requirement arise in order to analyze a blood sample already lawfully obtained pursuant to the Implied Consent Law?

The trial courts ruled in the negative.

State v. Netland, 762 N.W.2d 202 (Minn. 2009);

State, Dept. of Public Safety v. Wiehle, 287 N.W.2d 416 (Minn. 1979); and

State v. Yang, 352 N.W.2d 127 (Minn. Ct. App. 1984).

STATEMENT OF THE CASE AND FACTS

This is a consolidated appeal from two trial court decisions sustaining the revocations of Appellant's driving privileges under Minn. Stat. § 169A.51-.53 (2008), the Implied Consent Law. It arises out of Appellant's DWI arrests on January 24, 2009, and February 28, 2009, and the subsequent revocations of his driving privileges for driving a motor vehicle with an alcohol concentration of .08 or more. By petitions dated March 5, 2009 and April 3, 2009, Appellant sought judicial review of the revocation orders.

These matters came on for separate implied consent hearings on April 24, 2009 and May 29, 2009; the Honorable Philip Kanning and Kevin Eide, Judges of Carver County District Court (respectively), presided. At both hearings, Appellant narrowed his issue to whether a search warrant was required to analyze his blood samples lawfully obtained pursuant to the Implied Consent Law. *See* T. 2¹

The parties did not present testimony at these hearings but stipulated to the exhibits, including the Implied Consent Advisory form read in each case and the BCA Certificate of Analysis of the blood sample taken in each case (the first result being a .23 alcohol concentration and the second being a .18 alcohol concentration). The parties

¹ "T." references are to pages of the transcript of the proceedings held on May 29, 2009, before the Honorable Kevin Eide. The transcript from the April 24, 2009 hearing was not obtained but in his request for consolidation, Appellant stipulated that the issues are the same.

were then given time to submit written legal arguments, which in each case was done simultaneously.²

By an Order filed June 3, 2009, Judge Kanning sustained the revocation of Appellant's driving privileges. *See generally* Trial Court's Order and Memorandum, reproduced at RA1-RA3.³ By an Order filed June 26, 2009, Judge Eide sustained the revocation of Appellant's driving privileges. *See generally* Trial Court's Order and Memorandum, reproduced at RA4-RA5. From those Orders, Appellant takes the instant appeal.

The facts of these matters are not in dispute. Appellant does not challenge probable cause for the arrests or that he verbally consented to the blood tests during the Implied Consent Advisory. Appellant also agrees that his blood samples were lawfully taken based upon the exigency exception to the warrant requirement. Appellant's sole claim at trial was that another warrant requirement exists for the *analysis* of the samples once they were taken since the exigency based upon the rapid dissipation of alcohol ended after the blood was collected and preserved.

The trial courts rejected this argument relying mainly on *State v. Netland*, 762 N.W.2d 202 (Minn. 2009) (holding that the exigency exception to the warrant requirement exists for tests obtained in DWI cases due to the evanescent nature of alcohol

² Appellant's written argument did not address the only issue raised at the hearing (the second warrant requirement), but only whether his consent was coerced given the language of the Implied Consent Advisory. Respondent's Memorandum, which was due simultaneously, only addressed the issue raised at the hearing. Further, the trial court only ruled on the issue raised at the hearing.

³ "RA" references are to pages of Respondent's Appendix.

in the body), and *State v. Yang*, 352 N.W.2d 127 (Minn. Ct. App. 1984) (holding that chemical analysis and other interpretive tests may be conducted without further warrant on lawfully seized evidence which is reasonably related to the suspected crime). As a result, both trial courts ordered that the revocation of Appellant's driving privileges be sustained. From those Orders, Appellant takes the instant appeal.

ARGUMENT

I. STANDARD OF REVIEW.

Findings of fact of the trial court are entitled to the same weight as the verdict of a jury and cannot be reversed if the court could reasonably make the findings of fact based upon the evidence adduced at trial. *See State v. Gardin*, 251 Minn. 157, 86 N.W.2d 711 (1957); *State v. Thurmer*, 348 N.W.2d 776 (Minn. Ct. App. 1984); *State v. Nash*, 342 N.W.2d 177, 179 (Minn. Ct. App. 1984). Conclusions of law, on the other hand, can be overturned upon a showing that the trial court has erroneously construed and applied the law to the facts of the case. *See Berge v. Commissioner of Public Safety*, 374 N.W.2d 730, 732 (Minn. 1985); *State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983).

In this appeal, Appellant does not challenge the facts as found by the trial court, but challenges the legal conclusion that no warrant was required to analyze the samples taken from Appellant pursuant to the Implied Consent Law. Because the trial courts properly relied on established precedent when concluding no warrant was required to analyze the blood samples, the decisions should be affirmed.

II. A WARRANT WAS NOT REQUIRED TO ANALYZE THE BLOOD SAMPLES FOR ALCOHOL CONCENTRATION BECAUSE THEY WERE ALREADY LAWFULLY OBTAINED UNDER THE FOURTH AMENDMENT FOR THAT SPECIFIC PURPOSE.

Under the Fourth Amendment, warrantless searches and seizures are *per se* unreasonable unless they fall under an established exception to the warrant requirement. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1997)). If a warrantless search does not fall within a proper exception, its fruits must be suppressed. *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 415 (1963)).

In *State v. Netland*, 762 N.W.2d at 213-14, the Minnesota Supreme Court held that the warrantless taking of an alcohol concentration test pursuant to the DWI laws is lawful under the Fourth Amendment based upon probable cause to arrest and the exigency created by the evanescent nature of alcohol in a suspect's body.

Appellant concedes that his blood samples were lawfully taken under the Fourth Amendment given *Netland*. See Appellant's Brief (App. Br.) at 5. Appellant, however, argues that once the samples were taken and preserved, the exigency ended and a second warrant requirement arose in order to analyze the samples.⁴ See *id.* This claim is without merit. Once the evidence was lawfully obtained pursuant to the Fourth Amendment for the specific purpose of alcohol concentration analysis, Appellant had no remaining privacy interest in the sample and the subsequent analysis was reasonable.

⁴ Notably, this argument could not apply to breath samples, since they are provided and analyzed almost simultaneously with no preservation of said samples. Therefore, if this Court were to adopt Appellant's argument, those arrested drivers who provide fluid samples would be afforded greater protections than those providing breath samples.

A. A Warrant Was Not Required For Analysis Because Appellant Had No Subjective Expectation of Privacy In The Drawn Blood Samples And, Even If He Did, Such An Expectation Would Not Be Reasonable.

“The Fourth Amendment’s protection is personal and individual,” and “[a] defendant who cannot demonstrate a legitimate expectation of privacy relating to the area searched or the item seized will not have standing to contest the legality of the search or seizure.” *See State v. Richards*, 552 N.W.2d 197, 204 (Minn. 1996). Determining the scope of a person’s protected privacy interest involves a two-step inquiry: (1) what was the defendant’s subjective expectation of privacy; and (2) was that subjective expectation reasonable, i.e., one that is recognized by society. *See In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003). In determining whether one possessed a subjective expectation of privacy, the Minnesota Supreme Court has focused its inquiry on the individual’s conduct and whether he or she sought to conceal the seized item as private. *See id.* Appellant has the burden of establishing that the challenged search violated his reasonable expectation of privacy. *State v. Gail*, 713 N.W.2d 851, 859 (Minn. 2006).

In the instant matters, Appellant was arrested upon probable cause for DWI, was read the Implied Consent Advisory, and was asked to provide a blood test “to determine if he was under the influence of alcohol.” Appellant agreed to do so. *See Exs. 1* reproduced at RA6 and RA7. Indeed, Appellant does not dispute that the officers had probable cause to arrest him or that the blood samples were lawfully taken for the purpose of alcohol analysis. Appellant was transported to the hospital on each occasion and cooperated in providing his blood samples. There is no evidence that he expressed

any concern about the samples once they were drawn. Accordingly, Appellant has not established a subjective expectation of privacy in the drawn samples.

Even assuming *arguendo* that Appellant had established a subjective expectation of privacy in an already-drawn blood sample, Appellant has not shown that it is one that society is prepared to recognize as reasonable. Minnesota law already provides that a driver must submit to testing to determine the presence of alcohol or drugs upon probable cause and arrest for DWI. *See* Minn. Stat. § 169A.51 (2008).⁵ Further, as stated above, *Netland* establishes that obtaining such a test under the DWI laws does not violate the Fourth Amendment. Finally, it has long been held that a driver's rights under the Implied Consent Law are limited by reasonableness so as not to interfere with the evidence-gathering purposes of the statute. *See State, Dept. of Public Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979) (rejecting driver's argument that the Implied Consent Law provided rights he should be allowed to assert after waking up from unconsciousness based upon limitation of reasonableness); *Yokoyama v. Commissioner of Public Safety*, 356 N.W.2d 830, 831 (Minn. Ct. App. 1984) (holding that, although

⁵ Minn. Stat. § 169A.51, subd. 1 states:

(a) Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 168A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

making an interpreter is desirable, Implied Consent Law limited by reasonableness and it should not interfere with evidence-gathering purposes).

It should be quite apparent to a DWI arrestee, particularly given language of the Implied Consent Advisory, that a test is being administered for the specific purpose of analyzing it for the presence of alcohol or controlled substances. It would be an unreasonable interference with the evidence-gathering purpose of the statute to require two warrants and/or exceptions after the point of arrest for that to occur. In short, the public's interest in effective and efficient enforcement of the DWI laws easily outweighs any remaining subjective privacy interest Appellant may have had in blood samples already lawfully taken under the Implied Consent Law and the Fourth Amendment.

B. A Warrant Was Not Required For Analysis Of The Lawfully-Drawn Samples Because There Was A Direct Connection Between The Lawfully Obtained Evidence And The Suspected Crime.

This Court ruled on the need for a second warrant to analyze lawfully obtained evidence in *State v. Yang*, 352 N.W.2d 127 (Minn. Ct. App. 1984). In *Yang*, police received information that a package sent to defendant's address contained opium. 352 N.W.2d at 128. The police obtained a search warrant authorizing them to seize "invoices, billings, and letters," among other things. *See id.* During the search, police seized a letter addressed to the defendant. The letter was written in Hmong, except for two lines of the return address, which matched the address on the package of opium. *See id.* Four days later, the letter was translated from Hmong to English and connected the defendant with the package of opium. *See id.*

This Court considered the question of whether another search warrant was required for the police to have the letter translated from Hmong to English. Applying the requirement set forth in *Warden v. Hayden*, 387 U.S. 294, 304 (1967)⁶ that there be a “sufficient nexus” between the evidence seized and the suspected criminal behavior, this Court found that there was a sufficient nexus given the similar return address. *See id.* at 129. This Court further found that the fact that the evidence was lawfully obtained under the Fourth Amendment made another warrant for the translation unnecessary. This Court noted that the letter could have been translated on the spot had an investigator on the scene read/spoken Hmong, and specifically stated that, “[o]nce evidence is lawfully seized, tests such as chemical analysis, ballistics, and other interpretive tests may be run without a further warrant,” *See id.*, citing *Schmerber v. California*, 384 U.S. 757 (1966). This Court also noted that no significant Fourth Amendment policy would be served by requiring a second warrant. Probable cause had already been found, and once the letter was lawfully seized, requiring a second warrant would have been a “pro forma requirement which would serve no purpose.” *See id.*

Just as in *Yang*, a sufficient nexus plainly existed between the blood samples lawfully obtained in the present case and the alleged criminal activity because the samples here were *specifically taken* for the purpose of alcohol analysis. Therefore, just as in *Yang*, requiring a warrant would amount to a pro forma requirement serving no

⁶ The Court in *Hayden* specifically stated that, “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” *See id.*

significant Fourth Amendment purpose. Indeed, at the point of the test requests in this case, the officers had already investigated and arrested Appellant for a DWI offense and followed the proper procedure in requesting and obtaining a blood sample to find out the actual level of alcohol in his system. Given these protections, there would be no reason for another warrant to be obtained for analysis.

Appellant attempts to distinguish *Yang* factually, noting that the officers in *Yang* had probable cause and an actual warrant. This distinction is without merit. The officers in the present case had probable cause and a recognized exception to the warrant requirement, making obtaining an actual warrant unnecessary. Appellant cites no authority to suggest that evidence obtained pursuant to an exception to the warrant requirement is somehow less lawfully obtained than evidence obtained pursuant to a warrant.

Appellant also argues that it is “illogical to conclude” that the Fourth Amendment protects a person’s privacy interests in the contents of his home with greater force than the contents of his body, and attempts to distinguish *Yang* by stating that he was subjected to a “far more intensive search.” *See App. Br.* at 6, 11. However, precedent states otherwise. Indeed, the Fourth Amendment implicates entry into one’s home as the “principal evil.” *See State v. Thompson*, 578 N.W.2d 734, 741 (Minn. 1998) (citing *Payton v. New York*, 445 U.S. at 573, 585 (1980)). Moreover, our courts have recognized the routine and unobtrusive character of blood testing in DWI-related investigations where probable cause to arrest for the offense has been established. *See State v. Oevering*, 268 N.W.2d 68, 73 (Minn. 1978) (citing *Schmerber*, 384 U.S. at 771).

Appellant cites various cases for the alleged proposition that, although officers may seize evidence and “freeze the scene” to prevent destruction, they may not commence a more invasive search without first obtaining a warrant. *See* App. Br. at 5-6. However, none of these cases really stand for that proposition. The first case cited by Appellant is *Vale v. Louisiana*, 399 U.S. 30 (1970). In this case, Mr. Vale had been engaged in some drug activity on the street, but he hurriedly headed towards home after he spotted police officers who had viewed the activity, and who also possessed two warrants for his arrest. The officers arrested Vale on his front steps. The officers, based upon their observations on the street, entered the home and searched it, finding more drugs. *See Vale*, 399 U.S. at 32-33. The Supreme Court found the search of the home illegal under the Fourth Amendment because it could not be justified under any of the warrant exceptions, specifically “incident to arrest,” unless it was “substantially contemporaneous with the arrest and confined to the area within the arrestee’s reach at the time of his arrest.” *See id.* at 33. The Court found that the search did not meet those conditions and reversed and remanded the case based upon the illegal search of the home. *See id.*

Appellant next cites *State v. Alayan*, 459 N.W.2d 325 (Minn. 1990) which is factually similar to *Vale* in that officers entered the appellant’s home for the limited purpose of searching for drug evidence, but arguably without probable cause (making it a Terry-type search). However, exigency arguably existed and consent was given to enter the home in this matter and therefore, the entry and cursory search were deemed lawful under established exceptions. *See Alayan*, 459 N.W.2d at 331. Finally, Appellant relies

on *State v. Olson*, 436 N.W.2d 92 (Minn. 1989), but in that case, the officer's arrest of the defendant in a duplex lacked probable cause and a warrant or exception, so the entry into the home was unlawful. *See Olson*, 436 N.W.2d at 99.

None of these cited cases stands for the proposition that officers may only "freeze situations" under the exigency exception and then must obtain a warrant for a more invasive search. Instead, they stand for the basic proposition that a search must be supported by both probable cause and a warrant or a recognized exception. Because Appellant recognizes that evidence in his cases was lawfully obtained, his reliance on these cases is misplaced.

Appellant then cites two additional cases for the proposition that police may seize items without a warrant, but not search those items. *See App. Br.* at 7, 10. These cases do not support Appellant's claim. The first, *United States v. Jacobsen*, 466 U.S. 109 (1984), held that the Fourth Amendment did not require a DEA agent to obtain a warrant before testing the white powder found by employees of a private freight carrier in the innermost of a series of four plastic bags that had been concealed in a tube inside the package. *See Jacobson*, 466 U.S. at 125. Because the chemical test was found to not constitute a search, and because there was a de minimis impact on any protected property interest, the officer's conduct was not actionable. *See id.* Notably, the officer himself

was never in a position to conduct a search or seizure; it was only because of the actions of private citizens that the officer was in possession of the subject white powder.⁷

Likewise, in *Walter v. U.S.*, 447 U.S. 649 (1980), FBI agents came into possession of some videotapes from private sources and the Court held that, under those circumstances, the government may not exceed the scope of the private search. *See Walter*, 447 U.S. at 653-65. Moreover, the subject films had initially been packaged privately in the mail such that there was a legitimate expectation of privacy and the Court had serious First Amendment concerns. *See id.*

This is not a case in which unsuspecting law enforcement officers received Appellant's blood sample through a sealed package from a private party. Indeed, law enforcement directly and lawfully obtained the evidence through its own DWI investigations of Appellant in which probable cause was developed, Appellant was arrested, and the Implied Consent Law invoked. The samples were expressly requested by law enforcement and provided by Appellant for chemical analysis. There are no Fourth Amendment concerns similar to those raised in *Jacobsen* or *Walter*. As such, these cases are inapposite and *Yang* is controlling.

⁷ Appellant argues that the concept in *Walter* was reaffirmed in *Arizona v. Gant*, 129 S.Ct. 1710, 1716 (2009). *See App. Br.* at 8-9. But the purpose of requiring a warrant in *Gant* to search the vehicle was because the defendant had been arrested for driving on a suspended license. A search of his vehicle was not related to the offense, might have revealed evidence of a completely unrelated crime, and the defendant posed no immediate threat to officer safety because he had been physically separated from his vehicle and thus, a warrant was required. Here, by contrast, Appellant's blood was collected *for the express purpose of testing it for alcohol concentration*, thus the purpose served in *Gant* for requiring a warrant simply does not apply here.

Given the fact that the lawfully obtained evidence was directly related to the suspected crime, no further warrant requirement arose in order to analyze Appellants' blood samples.

III. EVEN IF THE WARRANT REQUIREMENT WAS VIOLATED, THE EVIDENCE RESULTING FROM THE ANALYSIS OF THE BLOOD SAMPLES IS ADMISSIBLE GIVEN THE DOCTRINE OF INEVITABLE DISCOVERY.

This Court should reject Appellant's second-warrant claim. But even assuming *arguendo* that the samples were obtained or analyzed in violation of the warrant requirement, Appellant's alcohol concentration would have been inevitably discovered because the officers surely would have been able to get a warrant based on the admitted probable cause they had that Appellant was engaged in the criminal activity of driving while impaired. Under the inevitable discovery doctrine, seized evidence is admissible even if the search violated the warrant requirement if the State can establish that the fruits of a challenged search "ultimately and inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). The inevitable discovery doctrine "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quoting *Nix*, 467 U.S. at 444 n.5, 104 S. Ct. at 2509). The test set out in *Nix* has been interpreted to include two elements: (1) there must be an "ongoing line of investigation that is distinct from the impermissible or unlawful technique"; and (2) there must be a "showing of a reasonable probability that the permissible line of investigation would have led to the independent discovery of the evidence." *United States v. Villalba-Alvarado*, 345 F.3d 1007, 1019-20 (8th Cir. 2003).

In this case, Appellant has never disputed that the officers had probable cause to arrest Appellant for DWI. Thus, they would have been successful in obtaining a warrant to collect and analyze the blood sample. As a result, the officers inevitably would have discovered the fact that Appellant had an alcohol concentration exceeding the legal limit in both cases.

IV. THE ISSUE OF WHETHER APPELLANT'S CONSENT WAS FREELY AND VOLUNTARILY GIVEN NEED NOT BE CONSIDERED BECAUSE IT WAS NEVER PROPERLY RAISED BELOW AND IS NOT GERMANE TO THE ANALYSIS.

Appellant never raised the issue of his consent to testing and whether it was freely and voluntarily given under the Fourth Amendment at the hearings below.⁸ Indeed, his stated issue implicated only the exigency exception to the warrant requirement and whether a second warrant requirement existed given his position that the exigency ended once the samples were extracted and preserved. *See* T. 2. Neither court addressed the issue of consent in its written order; only whether a second warrant was required for analysis in relation to the exigency exception. *See* RA1-5. Given the fact that this issue was not properly raised, this Court need not and should not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this Court will generally not consider matters not argued to and considered by the trial court).

⁸ Even though Appellant submitted written legal arguments on the issue of "coerced consent" (interestingly, more in a due process context than a Fourth Amendment one), and did not even address his stated argument of the exigency exception and need for a warrant to analyze his blood samples, the submissions of the parties were done simultaneously, never giving Respondent the opportunity to clarify the issues or respond. T. 3. Neither trial court addressed the "coerced consent" claim.

Further, this Court need not address the issue because Appellant has already stipulated that the evidence was lawfully obtained upon probable cause. Therefore, whether it was obtained under the exigency exception or the consent exception, the subsequent analysis of the evidence was reasonable given the direct connection it had to the suspected crime. *See State v. Netland*, 762 N.W.2d at 212, n. 8, 213 (stating that the Court need not address the issue of free and voluntary consent because the search was lawful under the exigency exception); *Ersfeld v. Commissioner of Public Safety*, A08-1856 (Minn. Ct. App. Aug. 25, 2009) (unpublished opinion)⁹ (stating it is irrelevant whether consent for testing was coerced or criminal liability for refusal imposed since the warrantless search was reasonable under the exigency exception). Appellant's attempt to somehow extricate the exigent-circumstances exception from this case and argue that his consent was "coerced" under the Implied Consent law has been repeatedly and consistently rejected by this Court. *See State v. Mellett*, 642 N.W.2d 779, 785 (Minn. Ct. App. 2002). *See also Duncan v. Commissioner of Public Safety*, No. A08-2237 (Minn. Ct. App. Aug. 4, 2009) (unpublished opinion) (applying *Netland* and specifically rejecting unconstitutional coercion argument); *State v. Miller*, No. A08-1304 (Minn. Ct. App. June 23, 2009) (unpublished opinion) (same); *McGowan v. Commissioner of Public Safety*, No. A08-1462 (Minn. Ct. App. June 30, 2009) (unpublished opinion) (same).¹⁰ Accordingly, a determination of whether the consent exception applies is extraneous and not germane to the presented issue.

⁹ A copy of this unpublished opinion is reproduced at RA8.

¹⁰ A copy of these unpublished opinions are reproduced at RA18.

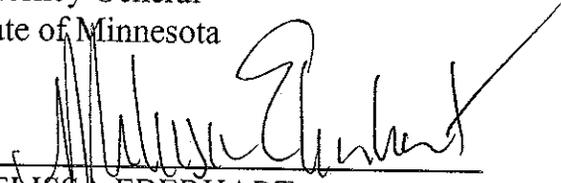
CONCLUSION

The trial courts properly concluded that a warrant requirement did not arise in order to analyze the lawfully obtained blood samples. Accordingly, Respondent respectfully requests that this Court affirm the trial courts' orders sustaining the revocations.

Dated: 11/19/09

Respectfully submitted,

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