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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G.D. Morgan, Circuit Court Judge
Appellate Case Tracking No. 2022-000374

State of South Carolina, Respondent,

vs.

Kathryn Martin Key, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant (Key) was found guilty of Driving Under the Influence (DUI) First Offense in violation of section 56-5-2930 of the South Carolina Code after a bench trial on November 8, 2016, wherein the State solely relied on implied consent[2] to justify the warrantless blood draw of Key while she was unconscious. On appeal to the circuit court, the State argued as an additional sustaining ground that *the record "is replete with exigent circumstances*, not the least of which was this was a wreck,"[3] (emphasis added) (11-04-17 T. p.11.15-16; R. __). The State further argued,

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[1] 11-04-17 T.11.15

[2] See S.C. Code Ann. § 56-5-2950(A) (2018) (providing a person arrested for DUI is considered to have given consent to certain chemical tests for the purpose of determining the presence of drugs or alcohol); id. (providing a blood test may be conducted if a breath test cannot be administered and stating the blood sample must be collected within three hours of the arrest); See § 56-5-2950(B)(1) (requiring the person suspected of DUI to be given a written copy and verbally informed that "the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court"); See § 56-5-2950(H) ("A person who is unconscious or otherwise in a condition rendering the person incapable or refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.").

[3] On appeal to the circuit court, the State additionally cited the interview with the victim, the officer's investigation at the wreck scene for close to two hours prior to being able to go to the hospital as proof of exigent circumstances. State's Brief 1-03-17 p.5. (2016-CP-23-06517) ; See

"The fact finder found Ms. Key guilty based upon direct and substantial circumstantial evidence including **but not limited to the toxicology analysis**." (State's Brief 1-03-17 p. 8 (2016-CP-23-06517) (emphasis in original)). The circuit court found that the blood evidence obtained from Key constituted an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution and Article 1 Section 10 of the South Carolina Constitution and therefore should have been suppressed. (Order 2-14-17).

The case ultimately came before the South Carolina Supreme Court on appeal wherein the State abandoned its previously relied upon implied consent argument to justify the warrantless blood draw and instead proceeded solely under an exigent circumstances argument.[4] State v. Key, 431 S.C. 336, 342-43, 848 S.E.2d 315 (2020). Because exigent circumstances was not an issue litigated at trial, the South Carolina Supreme Court remanded the case to East Greenville Summary Court for the determination of whether or not exigent circumstances existed to permit the warrantless blood draw. Id.

On or about February 8, 2021, the Thirteenth Circuit Solicitor's Office mailed defense counsel a proposed Order authorizing the release of Key's medical records from the hospital along

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Birchfield v. North Dakota, 579 U.S. 438, 2173, 136 S.Ct. 2160 (2016) "The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to see a warrant."

[4] "This case involved an automobile accident in which the intoxicated defendant was injured and taken to the hospital. Trooper Campbell remained at the accident location to investigate the accident for almost two hours, during which time he did not know the condition of [Key]. Upon arriving at the hospital and learning [Key] was unconscious and intubated, he placed her under arrest. Knowing he had implied consent under the statute, he obtained a blood draw due to the amount of time which had lapsed from when the accident occurred to when the blood was drawn. While a magistrate was on-duty somewhere in Greenville County, there is no indication in the record the time it would have taken to write up the affidavit for the warrant, find the on-duty magistrate, present the warrant and obtain the magistrate's signature, and then return to the hospital for the blood draw. Further, Trooper Campbell specifically indicated he could not obtain a warrant for a blood draw over the telephone." (State's Final Brief 3-27-18).

with a cover letter requesting any objection be filed with the court within ten (10) days. (HIPAA Order; R. ___). The proposed Order requested "any and all records in his/her custody and control relating to the examination and treatment of the below named individual(s) from on or about 12/10/2015 up to and including the date of the release of the below named individual(s) from the Greenville Memorial Hospital System/Prisma Health." (HIPAA Order; R. __). The proposed Order listed the driving under influence ticket number as well as the open container ticket which had been expunged following a directed verdict at trial. (HIPAA Order; R.__; See Magistrate's Return 11-17-16; R. ___).

On February 17, 2021, Key filed a Response in Opposition to the State's Proposed Order for Release of Medical Records which argued that the proposed Order violated Key's Fourth Amendment rights, right to Privacy under Art. 1 sec. 10 of the South Carolina constitution, and privacy rights under Health Insurance Portability and Accountability Act (HIPAA). (Def. Response in Opposition to HIPAA Order 2-17-21; R.__). On or about June 1, 2021, the State filed a Brief in Support of the State's Motion for Release of Medical Records citing the HIPAA and argued that the medical records were "to present those objective facts as part of the proof of exigent circumstances in this case." (State's Br. In Support of Motion 6-01-21; R.__). On June 10, 2021, Key filed a Brief in Opposition to the State's Motion for Release of Medical Records which argued that Key's medical records were not relevant to the issue of whether exigent circumstances existed at the time Key's blood was drawn at the direction of law enforcement and asserted that South Carolina Summary Courts lack authority to order documents. (Def. Br. in Opposition 6-10-21; R.

). The magistrate then issued an undated Decision[5] denying the State's request for Defendant's medical records. (Magistrate Undated Decision; R.__).

On July 8, 2021 the State filed a Notice of Motion and Motion to Reconsider. (State's Notice of Motion and Motion to Reconsider 7-8-21; R.__). On July 16, 2021, Key filed a Return to State's Notice of Motion and Motion to Reconsider and Vacate Decision. (Def. Return to State's Motion to Reconsider 7-16-21; R.___). On August 11, 2021, the magistrate denied the State's Motion to Reconsider after "careful review . . . with guidance from South Carolina Court Administration." (Magistrate Decision 8-11-21; R.__).

On September 10, 2021, the State filed a Notice of Intent to Appeal. (State's Notice of Intent to Appeal 9-10-21; R.___). On October 18, 2021, the magistrate issued an Appeal Answer in response to the State's Notice of Intent to Appeal (Appeal Answer; R.__). In the Appeal Answer, the magistrate stated that in consultation with a staff attorney at the South Carolina Court Administration, he concluded that South Carolina magistrates do not have authority to subpoena or order the release of medical records (documents). (Appeal Answer p. 1; R.__). Furthermore, in the Appeal Answer, the magistrate failed "to see justification or relevance to compel the release of private medical records of the defendant because the Trooper must prove to the existence of exigent circumstances at the time of the blood draw." (emphasis in original) (Appeal Answer p. 2; R.___). Key filed a Motion to Dismiss the State's Appeal on October 19, 2021 on the basis that the magistrate's decision is not immediately appealable. (Def. Motion to Dismiss 10-19-21; R.___). The State filed a Brief on November 23, 2021 (State's Brief 11-23-21; R.__). In the State's Brief, the

[5] To the best of undersigned counsel's knowledge, this decision would have been issued sometime between June 10, 2021 and July 8, 2021.

State argued that "[t]he denial of access to these records significantly impairs, and in fact *completely impairs, the State's ability to establish the exigent circumstances* that existed to support the warrantless blood draw." (State's Brief 11-23-21 p.2 ; R.__ (emphasis added)). Of note, the State set forth questions to be answered by obtaining Key's medical records to establish the exigency necessitating the warrantless blood draw - one of which was whether Key's blood was tested for alcohol by the hospital and if so, what were the results of that test[6]. (State's Brief 11-23-21 p.3; R.). Defendant filed a Brief on November 30, 2021 (Def. Brief 11-30-21; R.__).

The parties proceeded to a hearing before the Honorable G.D. Morgan on December 2, 2021. By Order dated January 24, 2022, Judge Morgan found the magistrate's denial of the State's Motion for medical records to be immediately appealable and further found the magistrate erred in denying the State's motion for medical records under the law enforcement exception to HIPAA. (Order on Appeal 1-24-22; R.___). The Order held that only records those encompassing Key's hospital admission and treatment the day of the accident were relevant to the issue of exigent circumstances. (Order on Appeal 1-24-22; R. __).

Key filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP on February 2, 2022, based on the circuit court applying an incorrect standard for immediate appealability in finding that the magistrate's denial of the State's motion was immediately appealable simply because it "significantly impaired the prosecution" as opposed to effectively determined the action

[6] The State's Brief also argued the medical records would contain "relevant information to establish exigency beyond [alcohol] dissipation" such as the time Key arrived at the hospital, Key's condition prior to Trooper Campbell arriving at the hospital, the names of medical personnel treating Key at the hospital, whether Key was given intravenous fluids or medications upon arrival at the hospital, whether Key was given or in need of a blood transfusion upon her arrival, whether Key was examined by a physician before Trooper Campbell arrived at the hospital, the name of that physician, Key's diagnosis, whether orders were given for Key to undergo immediate testing or surgery, and what time Key received any such testing or surgery. (State's Brief 11-23-21 p. 2-3).

(Motion to Alter or Amend 2-02-22; R. ____). Key's Motion to Alter or Amend further argued that the State failed to make the requisite showing that the magistrate's denial of the State's motion for medical records in effect determined the action given that the State previously argued that the record was "replete"[7] with exigent circumstances. (Motion to Alter or Amend 2-02-22; R. ___). Key's Motion also argued that the Order was incomplete in that it failed to define what in the medical records from the date of arrest was relevant to the determination of exigent circumstances. (Motion to Alter or Amend 2-02-22; R. __). Key's Motion to Alter or Amend cited privacy concerns and additionally argued that the release of medical records from the entire arrest date is overly broad for the determination of exigent circumstances given the impossibility of any exigency existing after Trooper Campbell left the hospital with Key's blood sample that was drawn without a warrant. (Motion to Alter or Amend 2-22-22; R. __). Key's Motion to Alter or Amend was denied by Order dated March 8, 2022. (Order denying motion 3-08-22; R.__). Key filed a timely Notice of Appeal on March 12, 2022 (Def. Notice of Appeal; R.__). This Brief follows.

STATEMENT OF FACTS

On December 10, 2015, Trooper Campbell was dispatched to a wreck on Muddy Ford Road in Greenville County. (11-08-16 T. 14-15; R.____). He received the call at 8:47 AM, and when he arrived, he saw two vehicle involved in the wreck. (11-08-16 T. 15 -16; R.___). Paramedics were loading the driver of one of the vehicles, Appellant Kathryn Key, into the ambulance when Trooper Campbell arrived. (11-08-16 T. 16-17; R. __). Trooper Campbell did not speak to or examine Key to determine the extent of her injuries, and he was not informed that she was unconscious. (11-08-16 8T. 17-18; R. ___). The driver of the other vehicle was not injured and spoke with Trooper Campbell about the incident. (11-08-16 T.20; R. __). Trooper Campbell took photographs of the

[7] 1-04-17 T. 11.15

scene. (11-08-16 T.26; R. ___). Before leaving the scene, he searched through Key's looking for registration insurance and other information, and in the process, located an open mini bottle of Jack Daniels in the glove box. (11-08-16 T.29; R. __).

Trooper Campbell left the scene and went to Greenville Memorial Hospital, where the Emergency Medical Technicians (EMTs) transported Key. (11-08-16 T.29-30; R.__). When Trooper Campbell arrived, Key was in the trauma bay and was intubated. (11-08-16 T.30-31; R. __). Trooper Campbell placed her under arrest for DUI and advised her of her Miranda rights and Implied Consent rights[8] while she remained unconscious. (11-08-16 T.38; R. ___). The time of Key's arrest was 10:35 AM. (11-08-16 T. 43; R.___).

Trooper Campbell instructed the nurse to take a blood sample from Key, the nurse then drew the blood at Trooper Campbell's direction, and he then collected the sample from the nurse. (11-08-16 T.33-34; State's Exhibit 9; R. ___). The blood sample was taken at 10:45 AM while Key was still unconscious. (11-08-16 T.38; R.). Trooper Campbell acknowledged he did not seek a search warrant prior to obtaining the blood sample, though there was a magistrate on duty in Greenville County. (11-08-16 T.39; 41; R. __). Trooper Campbell indicated he was approximately three miles from a magistrate's office. (11-08-16 T.43; R. ___). He also noted he had never called in for a search warrant telephonically and was not aware that could be done. (11-08-16 T.44; R. __). Key's blood sample was delivered to SLED for analysis. (11-08-16 T.72-73; R. __). Key's blood indicated a .213 percent blood alcohol level or ethanol level. (11-08-16 T. 101; State's Exhibit 11; R. ___).

[8] Under section 56-5-2950(B)(1) of the South Carolina Code, among other rights, defendants have the right to refuse to submit blood samples.

ARGUMENT

I. The circuit court erred in ruling that the magistrate's denial of the State's motion for medical records for the purpose of proving exigent circumstances was a proper interlocutory appeal when the State previously argued that the record was "replete"[9] with exigent circumstances.

The circuit court erred in finding that the magistrate's denial of the State's motion for medical records is immediately appealable. An appeal ordinarily may be pursued only after a party has obtained a final judgment. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923 (2010). The State's right to appeal is a judicially-created right. State v. Belviso, 360 S.C. 112, 115, 600 S.E.2d 68 (2004)[10]. It is well-settled that "a pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)." Belviso at 115, quoting State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). Section 14-3-330(a) of the South Carolina Code permits an immediate appeal from "an order affecting a substantial right made in an action *when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,* (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof of any pleading in any action." (emphasis added). "'The provisions of section 14-3-330, including subsection (2) have been narrowly construed, and the immediate appeal of orders issued before or

[9] 1-04-17 T. 11.15

[10] State v. Belviso, 360 S.C. 112, 114-15. 600 S.E.2d 68 (2004) (ruling that the State's appeal of a magistrate's dismissal of an open container charge and suppression of "critical evidence relating to the charge of driving with an unlawful alcohol concentration" was appealable. The Court found that circuit court had jurisdiction to entertain the State's appeal because the magistrate's ruling precluded prosecution of the open container charge and significantly impaired the State's ability to proceed with the prosecution of the unlawful driving charge).

during trial generally has not been permitted.'" State v. Ledford, 422 S.C. 244, 248, 810 S.E.2d 868 (2018), quoting State v. Wilson, 378 S.C. 597, 601, 693 S.E. 2d 923 (2010). The circuit court failed to consider the requirements of section 14-3-330 thereby applying an incorrect standard for appealability by only finding that the magistrate's denial of the State's request for medical records "significantly impaired" the prosecution. Furthermore, State's argument that the magistrate's denial of the medical records request amounts to a suppression order which significantly impairs the prosecution fails in light of the State's prior argument that the record is "replete"[11] with exigent circumstances.

A. Judicial Estoppel

The South Carolina Supreme Court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472(1997); see Quinn v. Sharon Corporation, *et al.*, 540 S.E.2d 474, S.E.2d 474 (2000). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. Id. at 251. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. Id. The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. State v. McCall, 364 S.C. 205, 612 S.E.2d 453 (2005).

[11] 1-04-17 T.11.15

Here, while the State initially relied upon the implied consent law of section 56-5-2950(H) of the South Carolina Code to justify the warrantless blood draw at trial, the State argued an additional sustaining ground on appeal to the circuit court and later to South Carolina Supreme Court. Key 431 S.C. 336, 848 S.E.2d 315 (2020). That argument was based on the premise that the record is "replete with exigent circumstances" and cited Appellant's unconscious state and wreck among those circumstances. (1-04-17 T.11.15 R.___; see also State's Notice of Motion and Motion to Reconsider and Vacate Order 2-22-17 R.___; see also Brief of Respondent pgs. 5-6 (2016-CP-23-06517) R.__; see also Final Brief of Respondent 3-27-18 R___). During the hearing on appeal to the circuit court, the State correctly argued that exigent circumstances must be evaluated based on the circumstances *as they appear to the trooper prior to the blood draw*." (emphasis added) (1-04-17 Transr. p. 13.4-6; R. __); see Schmerber, 384 U.S. 757, 767, 86 S.Ct. 1826 (1966). The State argued in its Final Brief, "This case is clearly distinguishable from Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552 (2013)[12], because exigent circumstances beyond the natural dissipation of alcohol in the blood did exist which required Trooper Campbell to obtain the blood sample without seeking a warrant." (Appellant's Final Brief 3-27-18 p. 5; R___). During oral argument in the South Carolina Supreme Court, the State abandoned its implied consent argument and proceeded solely under the exigent circumstances exception to the warrant requirement to justify the warrantless blood draw. Key, 431 S.C. at 342-44 (2020).

The South Carolina Supreme Court remanded this case to East Greenville Summary Court for the determination of whether exigent circumstances justified the warrantless blood draw. Key, 431 S.C. 336, 848 S.E.2d 315 (2020). The South Carolina Supreme Court did not express any

[12] In McNeely, the determination of whether a warrantless blood draw of a DUI suspect qualifies as an exigent circumstance involves a case-by-case analysis of the totality of the circumstances and the natural dissipation of alcohol in the bloodstream alone does not establish a per se exigency. McNeely, 569 U.S. at 165, 133 S.Ct. 1552.

opinion as to whether or not the exigent circumstances exception applied. Id. at 349-50. However, in a concurring opinion, Justice Few noted the following: "[I]t is not at all obvious that Key's unconsciousness played any role in hindering the officer's ability to obtain a warrant,"; "There is no evidence Trooper Campbell faced any 'urgent tasks,'"; and "[I]t hardly seems unreasonable for the South Carolina Highway Patrol to allocate its significant law enforcement resources in such a way as to accommodate Key's Fourth Amendment rights." Id. at 355.

Following the magistrate's denial of the State's medical records request, the State filed a Brief on Appeal to the circuit court which conversely argued, "The denial of access to these records significantly impairs, and in fact *completely impairs*, the State's ability to establish the exigent circumstances that existed to support the warrantless blood draw." (emphasis added) (11-23-21 Br. P. 2; R.___). The State further contended that the magistrate's denial of the State's medical records request under HIPAA is "tantamount to a suppression order." (12-02-21 T.3.20-21; R___). The State additionally argued on appeal to the circuit court, "[W]e believe that without those [medical] records, we cannot proceed," (12-02-21 Hearing T.5.17-18; R___). "Without the blood draw results and medical records establishing the exigent circumstances, *there is no prima facie DUI case*." (emphasis added) (11-23-21 Br. P. 3; R____). The State argued, "[i]f the magistrate's order in this case stands, *there will be no record of exigent circumstances* and the court will rule that the State has failed to prove sufficient exigent circumstances to admit the results of the warrantless blood draw." (emphasis added) (11-23-21 Br. P. 3; R___). Furthermore, during the hearing on appeal to circuit court, the State explained, "We tried this case a long time ago based on - - the State went forward under the implied consent exception for when an individual is unconscious. And that is the reason why we did not have any warrant for the blood draw in this particular case." (12-02-21 T.4.12-17 R___).

The State, by its own admission at this stage, cannot prove exigent circumstances. Therefore, the blood alcohol content result should be suppressed in accordance with the SC Supreme Court's directive. See Key at 349. The State simply failed to make the requisite showing that the magistrate's denial of the State's request for medical records in effect determines the action given that this case has already been tried without Key's medical records and that the State solely relied on exigent circumstances during the first appeal.

The elements of estoppel are met here: (1)The State has clearly taken two inconsistent positions in this case by first arguing that the record is "replete"[13] with exigent circumstances and then on remand arguing that "[t]he denial of access to these records significantly impairs, and in fact *completely impairs*, the State's ability to establish the exigent circumstances that existed to support the warrantless blood draw;"[14] (2) The State's positions were taken in the same case involving the same parties; (3) The State received a benefit by being successful in the first trial in magistrate's court under the theory of implied consent and receiving the opportunity for a second trial on the alternative theory of exigent circumstances. (4) The record is absent as to any innocent explanation for the State's different positions that would refute any possibility of an intentional effort to mislead the Court; (5) The State has done an about face to now claim that the exigencies which apparently once existed cannot now be proven without Key's medical records and therefore "there is no prima facie case."[15]

[13] 1-04-17 T.11.15
[14](11-23-21 Br. P. 2; R.___)
[15] 11-23-21 Br. P.3

II. The circuit court erred in ruling that the Health Insurance Portability and Accountability Act (HIPAA) applies in South Carolina summary courts to authorize the release of medical records for the State to investigate whether or not exigent circumstances existed to justify the warrantless blood draw.

This appeal from the circuit court's ruling presents a question of statutory interpretation. Because statutory interpretations are issues of law, this Court reviews such rulings *de novo* and under that standard of review, this Court is free to decide without any deference to the circuit court below. City of Greer v. Humble, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013).

A. HIPAA

HIPAA and the regulations promulgated thereafter established rules to protect a patient's private individual health information. See 45 CFR §§ 164.102 *et seq.* (2011). Further, the regulations set forth privacy standards with regard to the use and disclosure of patient's health information. See 45 CFR §§ 164.500 *et seq.* (2011). Significantly, HIPAA prevents a medical provider from disclosing a patient's private medical records health information, unless authorized by the patient, subject to certain exceptions. One of these exceptions is the "law enforcement exception" which allows law enforcement officials to request health information from a medical provider through a court-ordered warrant, subpoena, or summons issued by a judicial officer. 45 CFR § 164.512(f)(1)(ii)(A)(2011).The information requested must be (1) relevant and material to a legitimate law enforcement inquiry, (2) the request must be specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought, and (3) De-identified information could not reasonably be used. 45 CFR § 164.512(f)(1)(ii)(C)(1)-(3).

Here, the "legitimate law enforcement inquiry" at issue is whether Trooper Campbell reasonably believed he lacked time to obtain a search warrant prior to obtaining Key's blood. Given

that the State previously argued that the record is "replete"[16] with exigent circumstances and now claims that "there is no prima facie case,"[17] Key argues that the State should be estopped from arguing that there is any "legitimate law enforcement inquiry" here.

While the circuit court's Order limited the release of medical records to the date of arrest, these records are not relevant or material to the issue of exigent circumstances because Trooper Campbell's testimony is all that is needed.[18] The circuit court's Order did not define what in Key's medical records from the date of arrest is relevant to this determination. (Order on Appeal 2-02-22). Furthermore, even though the Order limited the disclosure of records to the arrest date, such authorization remains too broad given the impossibility of any exigency existing once Trooper Campbell left the hospital with Key's warrantless blood sample. Neither the State's request nor the circuit court's Order limiting the release of records from the arrest date comports with the disclosure exceptions to the federally-protected, private medical records. See 45 CFR § 164.512(f)(1)(ii)(C).

Regardless, HIPAA is a federal statute which provides for the preemption of state laws unless such laws are "more stringent" than HIPAA. See 45 CFR §§ 160.202 (2002). A state law is "more stringent" than HIPAA if it "provides greater privacy protection for the individual . . . ." Id. The Physician Patient Records Act, section 44-115-10 of the South Carolina Code, *et seq.,* addresses patient privacy and specifically "does not invalidate the authority of a court to issue a *subpoena* . . . to obtain these records as provided by law." (emphasis added).

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[16] 1-04-17 T.11.15
[17] 11-23-21 Br. p. 3
[18] See Schmerber, 384 U.S. 757, 86 S.Ct. 1826 (1966); see also McNeely569 U.S. 141, 133 S.Ct. 1552 (2013).

B. Authority of South Carolina Summary Courts

Rule 23 of the South Carolina Rules of Magistrate Court does not provide explicit authority from which a magistrate can issue a subpoena duces tecum to obtain documents[19]. Rather, Rule 23 of the South Carolina Rules of Magistrate Court only provides authority to issue subpoenas to require the presence of a person to testify in a summary court proceeding. Rule 13 of the South Carolina Rules of Criminal Procedure authorizes the clerk of court to issue subpoena duces tecum to any person or persons to attend as witnesses in any cause or matter in the General Sessions Court[20]. Currently there is no specific authority for a magistrate to issue such a writ. "If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute." See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578 (2000).

Although the State correctly noted that South Carolina Summary Courts are authorized to issue search warrants under section 17-13-140 of the South Carolina Code of Laws, there is no basis for a search warrant to prove exigent circumstances.[21] Under both the United States and

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[19] See SCRMC 13(a) Any magistrate, on the application of any party to a cause pending in the magistrates court, shall issue a subpoena citing any person whose testimony may be required in the cause to appear and give evidence. The Court may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place specified.

[20] See SCRCrimP 13(a)(1) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court.

[21] "Any magistrate . . having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1) stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being use or has been used in the commission of a criminal offense or is possessed with the intent to being used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense; (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to

South Carolina constitutions, search warrants may not be issued except "upon probable cause, supported by oath or affirmation." U.S. Const. and. IV; S.C. Const. Art. 1 § 10. During the hearing on appeal to the circuit court, the State claimed, "[E]xercising our right to ask a magistrate for a search warrant . . . would be unduly cumbersome" in this case (12-2-21 T. 3.23-4.1; R. ___). Furthermore, according to the State during the hearing on appeal to the circuit court, "It is our belief *if there is anything in those medical records - - which we, certainly, don't know*. . . There would be a — a valid - - a good faith reason for us to *assume* that there would be . . . evidence of exigency in those records." (emphasis added) (12-02-21 T 4.25-5.5). It is well settled that "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient [for a search warrant]." State v. Baccus, 367 S.C. 41, 51, 625 S.E.2d 216 (1006). While there is nothing in the record regarding the State attempting to obtain a search warrant, the State simply does not have grounds to do so for the purpose of investigating whether or not exigent circumstances existed at the time Key's blood was drawn at the direction of law enforcement without a warrant.

In the State's Brief on appeal to the circuit court, the State argued that it would be inconsistent to allow defendants the right to compulsory process for obtaining documents related to breath testing under 56-5-2934[22] and yet deny the State such process for private medical records

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sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any laws of this State or of the United States." S.C. Code Ann § 17-13-140.

[22] "Notwithstanding any other provision of law, a person charged with a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 who is being tried in any court of competent jurisdiction in this State has the right to compulsory process for obtaining witnesses, documents, or both, including, but not limited to, state employees charged with the maintenance of breath testing devices in this State and the administration of breath testing pursuant to this article. This process may be issued under the official signature of the magistrate, judge, clerk, or other officer of the court of competent jurisdiction. The term "documents" includes, but is not limited to, a copy of the computer

under HIPAA." (State's Brief 11-23-21 p. 3; R. _). Even if this Court finds that a magistrate is authorized to order documents other than documents related to breath testing devices, such authorization should not extend to private, federally-protected medical records under the guise of investigating whether exigent circumstances existed at the time evidence was seized by law enforcement.

C. Fourth Amendment

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." Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479 (2007). "'Evidence seized in violation of the Fourth Amendment must be excluded from trial.'" State v. Key, 431 S.C 336, 344, 848 S.E.2d 315 (2020), quoting State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456 (2002).

Article One Section Ten of the South Carolina Constitution similarly states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." See also State v. Forrester, 343 S.C. 637, 645, 541 S.C. 637 (2001) ("The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and

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software program of breath testing devices. SLED must produce all breath testing software in a manner that complies with any and all licensing agreements. This section does not limit a person's ability to obtain breath testing software directly from the manufacturer or distributor."

seizures, favors an interpretation offering a higher level of privacy protection than that of the Fourth Amendment.").

Search warrants protect privacy in two ways. See Birchfield v. North Dakota, 579 U.S. 438, 469, 136 S.Ct. 2160 (2016). First they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Id. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search. Id.

The United States Supreme Court has described blood tests as, "searches involving intrusion beyond the body's surface," which implicate important "interests in human dignity and privacy." Birchfield, at 472. Blood tests require piercing of the skin to extract a part of the subject's body, and unlike a breath test, place in the hands of law enforcement authorities a sample that can preserved and from which it is possible to extract information beyond a simple BAC reading. Id. As the Supreme Court noted in McNeely, a warrantless blood draw is such an invasion of bodily integrity that implicates an individual's "'most personal and deep-rooted expectations of privacy.'" McNeely, 133 S.Ct. 1552, 1558, quoting Winston v. Lee, 470 U.S. 753, 760, 105 S.Ct. 1611 (1985). The State is seeking information beyond a simple BAC reading by requesting her medical records. The State's request for Key's medical records similarly implicates her expectation of privacy under Article One Section Ten of the South Carolina Constitution in addition to her Fourth Amendment rights.

It is settled that the collection of a person's blood for blood alcohol content (BAC) testing is a search and a seizure under the Fourth Amendment. See Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826 (1966); Birchfield v. North Dakota, 579 U.S. 438, 136 S.Ct. 2160 (2016). "'Although the text of the Fourth Amendment does not specify when a search warrant must be

obtained, this Court has inferred that a warrant must generally be secured.'" Key at 344, quoting Kentucky v. King, 563 U.S. 452, 459, 131 S.Ct. 1849 (2011). "Because the touchstone of the Fourth Amendment analysis is reasonableness, the general presumption that a warrant is required may be overcome in certain situations." Id. This Court has emphasized that the burden is on the State to justify a warrantless search. See State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475 (1978). Consent and exigent circumstances are two of the recognized exceptions to the general warrant requirement. Id. citing State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); Missouri v. McNeely, 569 U.S. 141. 148-49, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

Here, consent was objectively not given, nor able to be given, due to Key's unconcious state at the time of the blood draw. Furthermore, the State abandoned its previously argued implied consent argument and proceeded solely under its exigent circumstances argument. State v. Key, 431 S.C. 336, 342-43, 848 S.E.2d 315 (2020). Necessarily, the consent exception does not apply which leaves exigent circumstances as the only possible exception to the general warrant requirement in this case.

D. Exigent Circumstances

'"The exigent circumstances exception [to the warrant requirement] allows a warrantless search when an emergency leaves police insufficient time to seek a warrant.'" Key at 344, quoting Birchfield, 136 S.Ct. at 2173. The United States Supreme Court has made clear that when officers in drunk-driving investigations can reasonably obtain a warrant before having a sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 1562 (2013).

In Mitchell v. Wisconsin, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019), the United States Supreme Court held that, generally, law enforcement is permitted to draw the blood of an unconscious

DUI suspect without a search warrant pursuant to the exigent circumstances exception to the warrant requirement. The Court remanded the case to provide the defendant the opportunity to establish the exception to the general rule in which (1) his blood would not have been drawn had police not been seeking BAC information and (2) police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Id.

After carefully considering the Mitchell holding in this case, South Carolina Supreme Court concluded that it would be improper to place the burden on the defendant to disprove the existence of exigent circumstances. Key at 348. The South Carolina Supreme Court concluded that applying Mitchell would result in unconstitutional burden-shifting given that such application would require a defendant to prove a Fourth Amendment right she already possesses exists in any given case. Id.

Now, the State requests Key's private medical records, specifically her BAC results from the hospital, under the guise of determining whether exigent circumstances existed to justify the warrantless blood draw at the direction of law enforcement. The State admittedly has "no prima facie DUI case" without these records. (State's 11-23-21 Br. p. 3; R. __). Put another way, the State seeks "another bite at the apple" to obtain the hospital toxicology results because the blood taken at the direction of law enforcement was done in violation of Key's Fourth Amendment rights, Article I Section 10 of the South Carolina Constitution, and HIPAA. The State's request for Key's medical records fails to follow the South Carolina Supreme Court's guidance in this case in parting ways with Mitchell based on unconstitutionally shifting the burden to prove that her blood would not have been drawn had police not been seeking her BAC information and therefore having to disprove exigent circumstances.

CONCLUSION

The State should be estopped from arguing the need for Key's private medical records after initially arguing that Key's conviction should be upheld based on the record being "replete"[23] with exigent circumstances. Ultimately, the consequences of unbridled access to private, federally-protected medical records by "crying" "exigent circumstances," allows the wolf-in-sheep's-clothing past the Fourth Amendment shepherd. Such a result runs afoul of the well-settled exigent circumstances exception and threatens the rights afforded to every citizen under the Fourth Amendment to the United States Constitution, Article I Section 10 of the South Carolina Constitution, and HIPAA. A natural consequence would be the dereliction of a law enforcement officer's duty to obtain a search warrant in accordance with constitutional protections when the State could simply access a defendant's medical records to determine ex post facto whether or not exigent circumstances existed at the time of a warrantless blood draw. Such unfettered access to medical records may also prevent law enforcement officers from seeking legal blood draws all together. Furthermore, defendants would be prevented from being able to exercise their right to refuse to submit to a testing of their blood under South Carolina Code Annotated section 56-5-2950[24]. Such authorization and natural consequences would circumvent the South Carolina Supreme Court's previous ruling in this case – that the burden of establishing exigent circumstances remains on the State. Based on the foregoing, including the State's admission that there is no prima facie case, this case should be dismissed with prejudice.

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[23] 1-04-17 T.11.15

[24] "No tests may be administered or samples obtained unless . . . the person has been given a written copy and verbally informed that: (1) the person does not have to take the test or give the samples . . . ." South Carolina Code Annotated 56-5-2950(B)(1).

Respectfully submitted,

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