

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 13 2015

SC Court of Appeals

Appeal from Allendale County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MCKENZIE L. DAVIS,

APPELLANT

APPELLATE CASE NO. 2014-001550

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge erred by denying defense counsel's motion to suppress Appellant's blood analysis results where Corporal Gates had no probable cause to arrest Appellant for felony driving under the influence, since there was no probable cause Appellant was the driver of the automobile and no probable cause Appellant was under the influence of alcohol?

II. Whether the trial judge erred by denying defense counsel's motion to suppress Appellant's blood analysis results where Corporal Gates was required to obtain a search warrant before taking Appellant's blood sample, since there were no exigent circumstances to justify the warrantless search and seizure?

STATEMENT OF THE CASE

On March 22, 2012, an Allendale County Grand Jury indicted Appellant for felony driving under the influence resulting in great bodily injury, felony driving under the influence resulting in death, child endangerment, and driving under suspension. R. 521 On July 8, 2014, Appellant's case proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., and a jury. R. 1, July 8, 2014. Stephen T. Plexico represented Appellant. Assistant Attorney General Megan B. Burchstead and Assistant Attorney General David Fernandez represented the State. R. 2, July 8, 2014.

After a four-day trial, Appellant was found guilty of driving under the influence, a lesser-included offense of felony driving under the influence resulting in great bodily injury.¹ Appellant was also found guilty of driving under suspension. R. 508 – 509, July 10, 2014. Judge Kinard sentenced Appellant to thirty days' time served for the driving under suspension. Appellant was sentenced to one year imprisonment suspended to 165 days' time served, with two years of probation. R. 517-518, July 10, 2014.

Appellant appealed his conviction and sentence. This brief follows.

¹ Appellant was found not guilty of felony DUI resulting in death, not guilty of felony DUI resulting in great bodily injury, and not guilty of child endangerment. R. 508-509, July 10, 2014. Defense counsel stipulated that Appellant's license was suspended on the day of the accident. R. 9, July 8, 2014.

ARGUMENT

I. The trial judge erred by denying defense counsel's motion to suppress Appellant's blood analysis results where Corporal Gates had no probable cause to arrest Appellant for felony driving under the influence, since there was no probable cause Appellant was the driver of the automobile and no probable cause Appellant was under the influence of alcohol.

Motion to Suppress Appellant's Urine and Blood Test Results

According to S.C. Code Ann. Section 56-5-2946 (A),

“[n]otwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.”

Prior to trial, defense counsel moved to suppress Appellant's urine and blood tests administered pursuant to section 56-5-2946 (A), quoted above. R. 10, July 8, 2014. Counsel cited the Fourth Amendment and article I, section 10 of the S.C. Constitution and argued that there was no probable cause to arrest Appellant on the day of the car accident. R. 10, lines 16 – 17, July 8, 2014.

Counsel explained that there was no evidence that would justify the belief that Appellant was driving under the influence of alcohol except the fact that there was an automobile accident and Corporal Gates claimed he smelled alcohol on Appellant. R. 10, lines 17 – 21, July 8, 2014. Counsel explained that there was “none of the usual verbiage about glassy eyes, bloodshot eyes, or anything else.” R. 10, lines 21 – 23, July 8, 2014. Counsel contended that there were no facts given that would “justify the arrest, which [was] a prerequisite for the taking of the blood and urine.” R. 11, lines 10 – 13, July 8, 2014.

Defense counsel further argued that even if there was probable cause to arrest Appellant at the hospital, Corporal Gates should have obtained a search warrant to obtain Appellant's blood and urine samples pursuant to S.C. Code Section 17-13-140. R. 11, lines 14 – 18, July 8, 2014. Counsel asserted that there were no exigent circumstances to support the warrantless search and seizure. R. 11, lines 19 – 23, July 8, 2014. According to counsel, the magistrate lived within one mile of the hospital, however, the trooper made no effort to obtain a search warrant.² R. 12, lines 4 – 15, July 8, 2014.

The prosecutor argued that there was probable cause to arrest Appellant at the hospital. The prosecutor asserted that Corporal Gates' training and experience led him to believe that Appellant had been intoxicated at the time he was driving. Further, Corporal Gates believed that "there was exigency" due to the fact there had been an automobile accident involving a death and major injuries, and Appellant had changed his story "about whether he was driving or not driving." R. 20, line 21 – R. 21, line 11, July 8, 2014.

Pre-trial Testimony of Corporal Denard Theotricus Gates

Corporal Gates testified during the pre-trial hearing to suppress Appellant's blood and urine test results. Gates stated that he was "notified of the collision at 2:52 p.m." on November 1, 2008. R. 30, lines 1 – 25, July 8, 2014. When Gates arrived at the scene of the accident, he learned that the occupants of the vehicle had been taken to the hospital. R. 31, lines 20 – 25, July 8, 2014. After spending "15 minutes, 20 minutes at the most" at the scene, Gates drove to the hospital.

When he arrived at the hospital, he was directed to the room where Valandrea Bing, one of the persons involved in the accident, was located. While Corporal Gates was in the room with Bing, Appellant walked in. R. 34, lines 18 – 24, July 8, 2014. Gates asked Appellant for his driver's

² This issue will be fully addressed in Issue II, *infra*.

license or identification card. R. 34, lines 24 – 25. Gates claimed that when Appellant handed him his identification card, he “smelled the odor of alcoholic beverage come from [Appellant’s] breath.” R. 37, lines 11 – 13, July 8, 2014. However, Gates acknowledged that Appellant “voluntarily answered” his questions and “wasn’t confrontational.” R. 36, lines 15 – 18, July 8, 2014.

Corporal Gates stated that when he asked Appellant whether he was driving, Appellant said he was not driving. R. 35, lines 10 – 12, July 8, 2014. When Gates asked Bing whether she was driving, she also stated she was not driving. R. 35, lines 10 – 12, July 8, 2014. Corporal Gates asserted that when he gathered Appellant and Bing into the hospital room, Bing admitted to being the driver. However, after medical personnel escorted Bing out of the hospital room, Appellant allegedly admitted that he was the driver. R. 39, lines 2 – 7, July 8, 2014.

Gates stated that because there was a confirmed death in the accident, he smelled alcohol on Appellant’s breath, and Appellant initially told him he was not driving but then admitted to driving, he ordered that blood and urine samples be taken to test for blood alcohol concentration. R. 39, line 20 – R. 40, line 4, July 8, 2014.

On cross-examination, Corporal Gates stated that he placed Appellant under arrest and had ordered that blood and urine samples be taken at **4:20 p.m.** R. 50, lines 3 – 12. However, he admitted that Bing signed a statement at **6:30 p.m.** maintaining that she was the driver. R. 50, lines 13 – 23, July 8, 2014.

Gates told Appellant he was under a “technical” arrest, not a “custodial” arrest. R. 50, line 25 – R. 51, line 1, July 8, 2014. Gates conceded that he did not call a magistrate to obtain a search warrant before ordering Appellant’s blood and urine samples. R. 45, lines 8 – 13, July 8, 2014. Gates also conceded that Appellant told him he was not driving **after** Gates had ordered the blood and urine samples. R. 52, line 19 – R. 53, line 8, July 8, 2014.

Critically, upon further probing by defense counsel, Gates admitted that he **did not know** whether Bing or Appellant was driving when he collected the samples. R. 53, lines 21 – 25, July 8, 2014. According to SLED’s forensic toxicologist, Appellant’s blood alcohol concentration was 0.106 percent. R. 166, lines 11 – 13, July 10, 2014.

Judge’s Ruling on Motion to Suppress

Judge Kinard denied defense counsel’s motion to suppress Appellant’s blood test results but excluded Appellant’s urine test results. The trial judge acknowledged that Corporal Gates “[s]hould have given him some sobriety test or something” and “[e]verybody ought to know how to call up a magistrate.” R. 67, lines 2 – 3; 19 – 20, July 8, 2014. The judge stated that “based on what’s presented, the highway policy was not at an even minimal standard.” R. 67, lines 1 – 2, July 8, 2014.

Judge Kinard allowed Appellant’s blood test results to be admitted into evidence “based on the officer’s experience” and “[w]hat would a reasonable officer have done.” R. 67, lines 11 – 13; R. 68, lines 8 – 12.

Discussion

The trial judge erred by denying defense counsel’s motion to suppress Appellant’s blood analysis results. Corporal Gates had no probable cause to arrest Appellant for felony driving under the influence. Gates had no probable cause Appellant was under the influence of alcohol and no probable cause Appellant was driving the automobile involved in the accident.

The Fourth Amendment to the U.S. Constitution protects “against unreasonable searches and seizures” unless “probable cause” exists. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Therefore, the fundamental question in determining whether a defendant’s warrantless arrest was lawful is whether there was “probable cause” to make the arrest. State v. Cuevas, 365 S.C. 198,

203, 616 S.E.2d 718, 721 (Ct. App. 2005) (citing Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)).

Probable cause to arrest without a warrant generally exists ‘where the facts and circumstances within the arresting officer’s knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.’ State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006); State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting U.S. v. Miller, 925 F.2d 695, 698 (4th Cir. 1991)). In determining whether probable cause to arrest existed, ‘all the evidence within the arresting officer’s knowledge may be considered, including the details observed while responding to information received.’ State v. Manning, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012) (quoting State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)).

Probable cause “turns on . . . whether facts within the officer’s knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime.” Manning, 400 S.C. at 267, 734 S.E.2d at 319. See Lapp v. South Carolina Dept. of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010) (finding the officer had probable cause to arrest defendant where the officer arrived at scene of automobile accident and defendant was sitting in her vehicle, smelled strongly of alcohol, admitted to the officer that she hit two vehicles, and refused to perform a field sobriety test); see also State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005) (finding the officer had probable cause to make an arrest where defendant left the scene of the accident, had a strong smell of alcohol on his breath, had an open beer container in his vehicle, and had a bruise on his chest from deployment of the air bag).

A. Corporal Gates had no probable cause Appellant was under the influence of alcohol or drugs.

Here, Corporal Gates met Appellant at the hospital, not at the scene of the accident in his vehicle. Although Gates claimed that he smelled alcohol on Appellant's breath, Gates did not administer any field sobriety tests. As defense counsel argued, Gates did not assert that Appellant had "glassy eyes" or "bloodshot eyes". Gates did not state that Appellant was acting belligerent or incoherent. In fact, Gates acknowledged that Appellant was not confrontational. See Handley v. State, 294 Ga.App. 236, 668 S.E.2d 855 (Ga. Ct. App. 2008) (finding that the officer had no probable cause to arrest defendant for driving under the influence where the only evidence presented was that the officer smelled alcohol on defendant's breath, and the "alco-sensor" test revealed the presence of alcohol).

Because Corporal Gates had **no** probable cause that Appellant was under the influence of alcohol or drugs, he had **no** probable cause to arrest Appellant for felony DUI.

B. Corporal Gates had no probable cause Appellant was the driver.

Although the passenger's death had been confirmed, Appellant denied driving the vehicle. In fact, Valandria Bing had already admitted to driving during the accident and had given a statement. Gates admitted during his pre-trial testimony that he did not know who was driving **at the time** he seized Appellant's blood and urine. See Castaneda v. State, 292 Ga.App. 390, 394, 664 S.E.2d 803, 807 (Ga. Ct. App. 2008) (quoting State v Sledge, 264 Ga.App. 612, 614 (Ga. Ct. App. 2003)) ("To authorize an arrest for DUI, 'an officer need only have knowledge or reasonably trustworthy information that the suspect was actually in physical control of a moving vehicle . . . to a degree which renders him incapable of driving safely.'").

Because there was **no** probable cause Appellant was driving the vehicle during the accident, Corporal Gates had **no** probable cause to arrest him for felony DUI.

II. The trial judge erred by denying defense counsel’s motion to suppress Appellant’s blood analysis results where Corporal Gates was required to obtain a search warrant before taking Appellant’s blood sample, since there were no exigent circumstances to justify the warrantless search and seizure

Relevant Facts

In addition to arguing that there was no probable cause to arrest Appellant for felony DUI, defense counsel argued that there was no exigency which justified the warrantless seizure of Appellant’s blood. Citing Schmerber v. California, 384 U.S. 757 (1966), defense counsel argued that there was no emergency which “would have threatened the destruction of evidence.” R. 14, lines 9 – 11, July 8, 2014. Counsel emphasized that Appellant was “already at the hospital” and “there was no time to be taken to investigate the scene . . . [t]here were troopers already there.” R. 14, lines 16 – 20, July 8, 2014.

Counsel asserted that because the magistrate lived “a mile from the hospital,” and the hospital and the law enforcement center were “four miles apart,” the time delay in getting a warrant would be minutes. R. 15, lines 7 – 10, July 8, 2014. Citing Missouri v. McNeely, 133 S.Ct. 1552, 1563 (2013), counsel explained that the “dissipation of alcohol” is only a consideration in determining whether exigency exists. Since the trooper **could have** gotten a search warrant signed by a magistrate, he **should have** done so. R. 15, lines 11 – 17, July 8, 2014.

Discussion

The trial judge erred by denying defense counsel’s motion to suppress Appellant’s blood alcohol test results. Corporal Gates was required to obtain a search warrant before ordering

Appellant's blood taken, since there were no exigent circumstances to justify the warrantless search and seizure.

“A lawful arrest does not in itself justify a warrantless search which requires bodily intrusion.” Gantt v. State, 354 S.C. 183, 187, 580 S.E.2d 133, 135 (2003). Fourth Amendment protections apply even when a defendant has been arrested. State v. Baccus, 367 S.C. 41, 54, 625 S.E.2d 216, 223 (2006). “[U]nless there are exigent circumstances such as the imminent destruction of evidence,” intrusions into the human body for the taking evidence requires a warrant. Schmerber v. California, 384 U.S. 757 (1966). However, in determining whether exigent circumstances exist to support a warrantless search, a court must consider all of the facts and circumstances of the particular case before it. See Schmerber, 384 U.S. at 768 – 770 (“[T]he Fourth Amendment’s proper function is to constrain . . . against intrusions which are not justified in the circumstances.”).

In Missouri v. McNeely, 133 S.Ct. 1552, 1563 (2013), the United States Supreme Court held that “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . [w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.” In McNeely, the defendant was stopped by a Missouri police officer at 2:08 a.m. for speeding and repeatedly crossing the centerline. Id. at 1556. The officer noticed that McNeely had “bloodshot eyes,” “slurred speech,” and “the smell of alcohol on his breath.” Id. In addition, McNeely admitted to drinking ‘a couple of beers’ at a bar and appeared unsteady on his feet. Id.

After performing poorly on field-sobriety tests and refusing to provide a breath sample, McNeely was placed under arrest. Id. at 1557. While the officer transported McNeely to the police station, McNeely “indicated that he would again refuse to provide a breath sample.” Id. The officer then transported McNeely to a nearby hospital to have his blood taken. However, McNeely

refused to consent to have his blood drawn. Id. The officer ordered a hospital lab technician to take a blood sample, which was taken at 2:35 a.m. Id. McNeely's blood alcohol was tested as 0.154 percent, which was above Missouri's legal limit of 0.08 percent. Id.

Applying Schmerber, the Court looked at the totality of the circumstances to determine whether the Missouri officer faced an emergency that justified ordering McNeely's blood to be taken without a warrant. McNeely, 133 S.Ct. at 1559. The Court acknowledged that "an individual's alcohol level gradually declines soon after he stops drinking" and "a significant delay in testing will negatively affect the probative value of the [test] results." Id. at 1561.

However, the Court rejected the State's contention that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessary exist because BAC evidence is inherently evanescent." Id. at 1560. The Court also rejected the State's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant." Id.

Specifically, the Court noted

"We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case. By contrast, the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry." (citations omitted)

Id. at 1560.

The Court further explained

"[T]he general importance of the government's interest in [combating drunk driving] does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case."

Id. at 1565 – 66.

The Court declined to adopt a “bright-line rule” and, after applying Schmerber, held that “in drunk-driving investigations, the natural dissipation of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” Id. at 1568. Where police officers “can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” Id. at 1561.

It is readily apparent from McNeely that the warrant requirement, where no exigent circumstances were present, applied in this case. Again, there existed no such exigency to justify the warrantless seizure of Appellant’s blood and urine. Appellant did not consent to have his blood drawn by Corporal Gates. The fact that Appellant was already at the hospital when Gates met him eliminated any need to have Appellant transported to a hospital for testing.

Furthermore, Gates acknowledged that the magistrate only lived **one mile** from the hospital. There were multiple officers at the scene of the accident who could have aided in getting a search warrant signed by a “neutral and detached” magistrate. Gates admitted that he made **no effort** to obtain a search warrant. He said that he relied on S.C. Code Ann. Section 56-5-2946 (A), which authorized police officers to take “breath, blood and urine” samples without a warrant “if there is probable cause to believe that the person violated or is under arrest for” felony DUI.

In fact, defense counsel asked Corporal Gates

“I just want to be clear. You relied on the statute, is that correct, that you did not have to get a search warrant in order to order the defendant to give you a urine and blood sample? Is that correct?”

R. 43, lines 12 – 16, July 8, 2014.

Gates replied "Yes, sir." R. 43, lines 16 – 18.

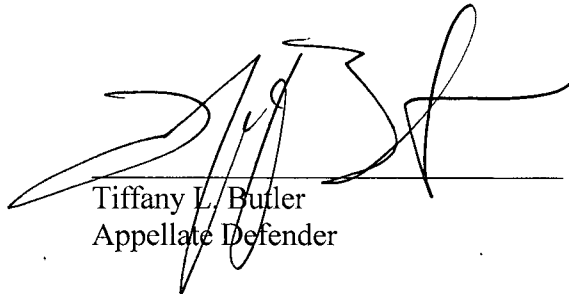
There was no evidence that Corporal Gates faced an emergency which would have threatened the destruction of evidence, other than the dissipation of alcohol from Appellant's blood. Gates never contended there were exigent circumstances. Instead, he asserted the statute allowed him to obtain Appellant's blood and urine samples. To the extent Corporal Gates opined the statute abrogated the warrant requirement, he was wrong. See Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (holding that under the Supremacy Clause, a state statute cannot trump the requirements of the U.S. Constitution). Note that defense counsel presented the unconstitutionality of the statute in his motion to suppress. R. 9 – 10, July 8, 2014.

The trial judge's deferment to the judgement of Corporal Gates that he did not need a warrant was without support in the law and had the effect of condoning and illegal, warrantless search. Gates should have obtained a search warrant, signed by a magistrate, before ordering that Appellant's blood be drawn to test for blood alcohol concentration. Because the trooper did not obtain a search warrant, Appellant's Fourth Amendment rights were violated and the seizure of his blood was unconstitutional.

CONCLUSION

For the reasons argued above, Appellant McKenzie Davis respectfully requests this Court to reverse his conviction and sentence for driving under the influence and remand to the lower court for a new trial with an order to suppress Appellant's blood alcohol concentration test results.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of October, 2015.

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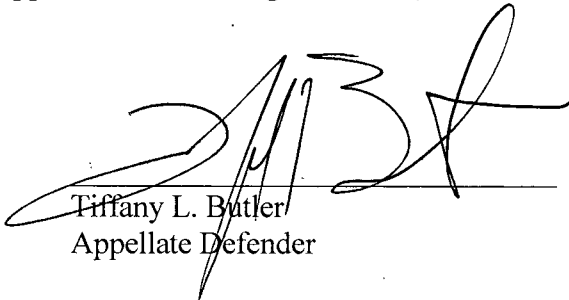
OCT 13 2015

SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 13, 2015



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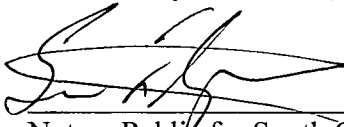
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina C. Bigelow, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of October 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of October, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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SC Court of Appeals