

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Greenville County  
Honorable Edward W. Miller, Circuit Court Judge  
Appellate Case Tracking No. 2017-001013  
\_\_\_\_\_

RECEIVED

MAR 27 2018

SC Court of Appeals

Kathryn Marlin Key,

Respondent,

vs.

State of South Carolina,

Appellant.

\_\_\_\_\_  
**FINAL BRIEF OF APPELLANT**  
\_\_\_\_\_

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STATE OF SOUTH CAROLINA

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## STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in reversing Respondent's conviction and remanding for a new trial after finding the magistrate should have suppressed the blood alcohol level because Trooper Campbell did not obtain a warrant and instead relied upon the constitutionally valid implied consent law of section 56-5-2950 of the South Carolina Code. The circuit court improperly relied on Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552 (2013), to find a warrant was required to obtain a blood sample. Respondent validly consented under section 56-5-2950 to the blood sample and did not revoke her consent. Further, exigent circumstances did exist beyond the normal dissipation of the alcohol in her blood given the totality of the circumstances in this case.

## STATEMENT OF THE CASE

Respondent was ticketed for driving under the influence and open container related to an accident that occurred the morning of December 10, 2015. (Uniform Traffic Tickets; R.191): The magistrate court, Honorable Mark C. Edmonds, conducted a pre-trial hearing on August 8, 2016, related to Respondent's motion to suppress the blood sample and resulting blood alcohol results. (8/8T.3; 5; R.14; 16). The court denied the motion to suppress.

The parties proceeded to trial before Magistrate Edmonds on November 8, 2016. Respondent renewed her motions to suppress, which were again denied. After the bench trial, Magistrate Edmonds granted Respondent's motion for a directed verdict as to the open container charge. (11/8T.106; R.134). Respondent was found guilty of driving under the influence, sentenced to time served in the hospital and a fine. (11/8T.113; R.141).

Respondent appealed to the circuit court on November 8, 2016. (Notice of Appeal to Circuit Court; R.170). The magistrate filed a Return on November 18, 2016. (Magistrate's Return; R.8). The parties proceeded to a hearing before the Honorable Edward Miller on January 4, 2017. By Order dated February 14, 2017, Judge Miller found the blood alcohol results should have been suppressed, reversed Respondent's conviction, and remanded for a new trial. (Order on Appeal dated 2/14/17; R.1). The State filed a Motion to Reconsider and Vacate Order on February 24, 2017, which was denied by Order dated March 27, 2017. (Motion to Reconsider; Order denying motion 3/27/17; R.187; 6).

The State filed a timely Notice of Appeal on April 20, 2017. This Brief of Appellant follows.

## STATEMENT OF FACTS

On December 10, 2015, Trooper Campbell was dispatched to a wreck on Muddy Ford Road in Greenville County. (11/8T.14-15; R.42-43). He received the call at 8:47 AM, and when he arrived he saw two vehicles involved in the wreck. (11/8T.15-16; R.43-44). As he arrived, paramedics were loading the driver of one of the vehicles, Respondent Kathryn Key, into the ambulance. Trooper Campbell got her driver's license from the EMT. (11/8T.16-17; R.44-45). Trooper Campbell did not speak to or examine Respondent to determine the extent of her injuries, nor did anyone inform him that she was unconscious. (11/8T.17-18; R.45-46). Fortunately, the driver of the other vehicle was not injured and spoke with Trooper Campbell about what happened. (11/8T.20; R.48). Trooper Campbell documented the scene with photographs. (11/8T.26; R.54). Before leaving the scene, he searched through the vehicle of Respondent looking for registration, insurance and other information, and in the process located an open mini bottle of Jack Daniels. (11/8T.29; R.57).

Trooper Campbell left the scene and went to Greenville Memorial Hospital, where the EMTs transported Respondent. (11/8T.29-30; R.57-58). When Trooper Campbell arrived, Respondent was in the trauma bay and was intubated. (11/8T.30-31; R.58-59). Trooper Campbell placed her under arrest for driving under the influence and read her Miranda rights and the Implied Consent form. (11/8T.31; State's Exhibit 8; R.59; 192). Respondent was placed under arrest at 10:35 AM. (11/8T.38; R.66). Trooper Campbell instructed a nurse to take a blood sample from Respondent, which he collected once the procedure was completed. (11/8T.34; 36; State's Exhibit 9; R.62; 64; 193). The blood sample was performed at 10:45 AM. (11/8T.38; R.66).

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. (11/8T.39; 41; R.67; 69). Trooper Campbell indicated he was approximately three miles from a magistrate's office. (11/8T.43; R.71). He also noted he could not obtain a warrant telephonically in Greenville County at the time of this incident. (11/8T.44; R.72).

Respondent's blood sample was delivered to SLED for analysis. (11/8T.72-73; R.100-101). Respondent's blood indicated a .213 percent blood alcohol level or ethanol level. (11/8T.101; State's Exhibit 11; R.129; 195). The SLED toxicologist testified that at a .213 percent level a person's "ability to drive a motor vehicle would be materially and appreciably impaired." (11/8T.103; R.131).

After a bench trial before the Honorable Mark C. Edmonds, the court found Respondent guilty of driving under the influence. (11/8T.113; R.141).

## ARGUMENT

- I. **The circuit court erred in reversing Respondent's conviction and remanding for a new trial after finding the magistrate should have suppressed the blood alcohol level because Trooper Campbell did not obtain a warrant and instead relied upon the constitutionally valid implied consent law of section 56-5-2950 of the South Carolina Code. The circuit court improperly relied on Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552 (2013), to find a warrant was required to obtain a blood sample. Respondent validly consented under section 56-5-2950 to the blood sample and did not revoke her consent. Further, exigent circumstances did exist beyond the normal dissipation of the alcohol in her blood given the totality of the circumstances in this case.**

The circuit court erred in finding Trooper Campbell was required to obtain a warrant in order to take a blood sample from Respondent. This Case is clearly distinguishable from Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552 (2013), 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. Further, Respondent's implied consent under section 56-5-2950 of the South Carolina Code was constitutionally valid, and she never revoked the consent. This Court should reverse the circuit court and reinstate Respondent's conviction and sentence.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have

reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991).

“Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.” State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266, (2012) (internal citation and quotation marks omitted). “[W]arrantless searches are allowed when the circumstances made it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement.” Kentucky v. King, 563 U.S. 452, 462 (2011). There are several recognized exceptions to the warrant requirement. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Exceptions to the Fourth Amendment’s warrant requirement include, among other things, consent, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973), and exigent circumstances, Mincey v. Arizona, 437 U.S. 385, 393–94 (1978). “It is well-established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.” King, 563 U.S. at 455.

The South Carolina Constitution provides: “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 . . . .” S.C. Const. Art. I, § 10. The South Carolina Supreme Court has explained:

In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures. The relationship between the two constitutions is significant because “[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.”

State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). Further, South Carolina has recognized consent as a valid exception from a warrant requirement even under the South Carolina Constitution’s right to privacy. See id. at 648, 541 S.E.2d at 843.<sup>1</sup> There is no reason for South Carolina to not recognize an exigency exception which, like all the exceptions to the warrant requirement, is embedded in the concept of reasonableness included in our state constitution.

The circuit court relied on McNeely to find a warrant was required in order to secure a blood sample and perform a blood alcohol test. The circuit court made the following relevant holdings:

Recently, the Supreme Court specifically addressed the warrant requirements in cases involving blood draws collected pursuant to an informed consent statute. In McNeely, the Court declined to establish a per se exigency for the natural metabolism of alcohol. The Court held that the reasonableness of a warrantless blood draw must be addressed on a case-by-case basis using a totality of the circumstances analysis. More importantly, the Court noted that police officers should obtain a warrant for a blood draw if doing so does not “*significantly undermine* the efficacy of the search . . . .”

(Order on Appeal filed 2/14/2017; R.1) (footnotes omitted). The circuit court continued:

Here, the State argued that the blood draw was obtained lawfully pursuant to the informed consent statute. However, I do not find this argument compelling. In particular, the parties agreed that a magistrate judge was on-duty and available at the time of the blood draw. Therefore, Trooper Campbell had the opportunity to seek a search warrant, and a judge with the authority to issue such a warrant was readily available to him to issue such a warrant.

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<sup>1</sup> South Carolina has also recognized the automobile exception to a warrant requirement under the state constitution. See State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007).

However, Campbell did not obtain a search warrant even though the statute that he relied upon to obtain the blood sample provides a three hour time period in which blood samples may be obtained. Instead, Campbell waited only (10) minutes from the time of arrest before ordering Key's blood be drawn.

(Order on Appeal filed 2/14/2017; R.1) (footnotes omitted). Finally, the circuit court concluded:

“In light of McNeely, I hold that a search warrant should have been obtained prior to Campbell ordering a blood draw from Key.” The circuit court went on to conclude the blood evidence should have been suppressed as the result of an illegal search and seizure in violation of both the Fourth Amendment and the South Carolina Constitution, Article I, Section 10.

The circuit court committed an error of law in relying on McNeely to suppress the evidence. First, a warrant was not required because Trooper Campbell had valid, voluntary, unrevoked consent from Respondent. Second, McNeely only addressed a very narrow issue and was not dispositive in this case. Finally, this case is controlled by the holding of Schmerber v. California, 384 U.S. 757 (1966), and not McNeely.

### **Consent**

First, Trooper Campbell's taking of a blood sample for purposes of determining Respondent's blood alcohol concentration was reasonable and constitutional because he had consent. Respondent's implied consent pursuant to section 56-5-2950 is constitutionally valid, and she never revoked her consent. As a result, the blood draw was not done in violation of Respondent's Fourth Amendment rights.

Section 56-5-2950 states:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence

of alcohol, drugs, or a combination of alcohol and drugs. . . . If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. . . . A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. . . . Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

S.C. Code Ann. § 56-5-2950(A) (Supp. 2015). The statute also requires the person be informed:

[T]he 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 . . . .

S.C. Code Ann. § 56-5-2950(B)(1) (Supp. 2015). Finally, the statute provides: "A person who is unconscious or otherwise in a condition rendering the person incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section." S.C. Code Ann. § 56-5-2950(H) (Supp. 2015).

The circuit court erred in its conclusion McNeely was applicable to a determination of whether the implied consent law could be relied on as a basis for obtaining the blood sample. In McNeely, the United States Supreme Court considered the very narrow question of whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that justifies, on its own, an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases. McNeely, 133 S.Ct. at 1558. The Court did not address the continued viability of implied consent laws, or their application to a warrantless blood draw. In

actuality, the Court speaks with approval of the “legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws” which included “implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.” *Id.* at 1566. Accordingly, the circuit court erred in relying on *McNeely* to find the implied consent statute did not provide Trooper Campbell with an appropriate basis for conducting the blood draw.

More recently, in *Birchfield v. North Dakota*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 2160 (2016), the United States Supreme Court considered the constitutionality of blood draws pursuant to the search incident to arrest exception for a warrant and also addressed the validity of implied consent statute. While the Court found the search incident to arrest exception would not allow a blood draw to test for alcohol, it did find a breath test was constitutional. The Court also considered the validity of the consent exception under implied consent statutes. In North Dakota, unlike South Carolina, the implied consent statute imposed a criminal penalty for refusal to submit to the blood draw. It was a misdemeanor for someone to refuse. *Id.* at 2185-2186. The United States Supreme Court found “that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Id.* at 2186.

Significantly, the United States Supreme Court spoke approvingly of implied consent statutes which did not impose criminal penalties for refusal. The Court explained:

It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context. **Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.**

Id. at 2185 (emphasis added)(internal citations omitted). South Carolina's implied consent statute is the type which imposes civil penalties—loss of driving privileges—and evidentiary consequences—refusal can be used against a person in court. It does not criminalize a refusal to submit. As a result, the implied consent statute is entirely constitutional and, without an express revocation of that prior consent, a blood draw may constitutionally be performed.

### **Exigent Circumstances**

Further, the circuit court erred in finding McNeely required a warrant solely because one could have been obtained. McNeely continued to follow the prior decisions of the United States Supreme Court in determining whether, based on a totality of the circumstances, exigent circumstances existed.

In McNeely, the defendant was stopped around 2:08 am by highway patrol after he was observed speeding and repeatedly crossing the center line. McNeely, 133 S.Ct. at 1556. The officer observed several signs of intoxication, and the defendant admitted he had consumed beer. Id. After the defendant performed poorly on field-sobriety tests and declined a portable breath test, the officer arrested him. Id. at 1556-57. While being transported to the police station for a breath sample, the defendant told the officer he would again refuse to provide a sample. Id. At that point, without securing a warrant, the officer decided to take the defendant to the hospital for a blood test. Id. Reading from a standard implied consent form, the officer explained to the defendant that refusal to submit to the test would lead to revocation of his driver's license and could be used against him in a future prosecution. Id. The defendant still refused, and the officer directed hospital personnel to take a blood sample. Id. The sample was secured at 2:35 am. Id.

The Court ultimately determined that a *per se* exigency did not exist under the circumstances of McNeely's case – where the only “exigency” was the natural dissipation of alcohol in the defendant's blood – and instead upheld the “totality of the circumstances” analysis as applied in Schmerber. McNeely, 133 S.Ct. at 1559-61. The Court pointed out, however, that the dissipation of alcohol remains an essential factor to be considered in the totality of the circumstances because “a significant delay in testing will negatively affect the probative value of the results.” Id. at 1560-61. In conclusion, the Court stated: “In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically.” Id. at 1563.

In Schmerber, the defendant, who was intoxicated, crossed the road and drove into a tree. Schmerber, 384 U.S. at 758-59 & 768-69. Both the defendant and his passenger were injured in the accident and taken to the hospital. Id. at 759 n.2. Within about two hours of the accident, and after law enforcement observed several indicators he was intoxicated, the defendant was arrested at the hospital for driving under the influence of intoxicating liquor. Id. at 768-69. Then, at the direction of a police officer, the defendant's blood was drawn by a physician at the hospital. Id. at 758-59. The defendant **expressly refused** to consent to this blood draw on the advice of his attorney. Id. at 759. The subsequent chemical analysis revealed a blood-alcohol concentration consistent with intoxication, and the results of the analysis were admitted at trial over the defendant's objection. Id.

The Supreme Court stated the Fourth Amendment question squarely presented was “whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.” Id. at 766-67. After concluding the blood draw resulted from the seizure of a person and the blood test plainly constituted a search, the

Court held the issues to be determined were whether or not the police were justified in requiring the defendant to submit to the blood test and whether the means and procedures employed in taking his blood met Fourth Amendment standards of reasonableness. Id. at 768. Further, while it was clear there was probable cause for the defendant's arrest, and the blood test would likely produce relevant evidence, the question remained whether the officer was permitted to draw these inferences himself or whether he was required to procure a warrant first. Id. at 770.

The Court ultimately held the officer was not required to first obtain a warrant because he "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Id. (citation omitted). Therefore, the exigency exception applied since there was "no time to seek out a magistrate and secure a warrant" in light of the "special facts" presented: (1) the natural dissipation of alcohol in the defendant's system; (2) the fact time had to be taken to investigate the car accident; and (3) the fact time had to be taken to bring the accused to the hospital. Id. at 770-71. The United States Supreme Court reiterated this analysis in McNeely, explaining: the totality of the circumstances in Schmerber supported an exigency because the defendant was involved in a car accident which had to be investigated; the defendant suffered injuries in the accident and had to be taken to the hospital; and, under these circumstances, the officer might reasonably have believed he was confronted with an emergency and that the delay necessary to obtain a warrant threatened the destruction of evidence due to the natural dissipation of alcohol in the defendant's blood. McNeely, 133 S.Ct. at 1559-60. Accordingly, the Court concluded "the present record shows no violation of Petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." Id.

The facts of this case are significantly more similar to Schmeber than they are to McNeely. 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 Respondent. Upon arriving at the hospital and learning Respondent 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. (11/8T.44; R.72). As a result, factually this case is similar to Schmerber and the circuit court erred in finding McNeely conclusive on whether or not a warrant was required. Under the totality of the circumstances, including the amount of time which had already transpired since the accident, Trooper Campbell reasonably believed he needed to obtain the blood sample prior to any further dissipation of the blood alcohol level. Accordingly, the circuit court erred in not finding the magistrate properly admitted the blood alcohol results because the blood draw was constitutional under both the Fourth Amendment and the South Carolina Constitution.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court finding the magistrate should have suppressed the blood alcohol evidence as an illegal and unconstitutional warrantless search and seizure should be reversed and this Court should reinstate Respondent's conviction and sentence.

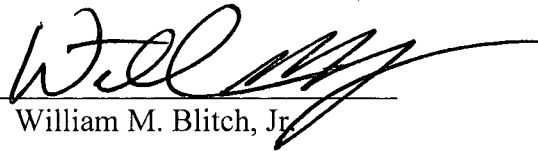
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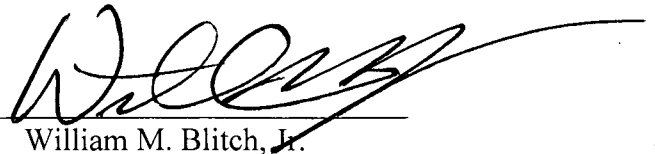
**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent 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."

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