Summary of SC91850, *State of Missouri v. Tyler G. McNeely*
Appeal from the Cape Girardeau County circuit court, Judge Benjamin F. Lewis
Argued and submitted Nov. 10, 2011; opinion issued Jan. 17, 2012

Attorneys: The state was represented by John N. Koester Jr. of the Cape Girardeau County prosecuting attorney's office in Cape Girardeau, (573) 243-2430; and McNeely was represented by Stephen C. Wilson of Wilson & Mann LC of Cape Girardeau, (573) 651-1950.

Several organizations filed briefs as friends of the Court: the American Civil Liberties Union Foundation of Kansas and Western Missouri and the American Civil Liberties Union of Eastern Missouri were represented by Stephen Douglas Bonney of the ACLU foundation in Kansas City, (816) 994-3311; the Missouri Association of Criminal Defense Lawyers was represented by Talmage E. Newton IV of St. Louis, (314) 265-8198; and the attorney general's office was represented by James B. Farnsworth of the office in Jefferson City, (573) 751-3321.

Overview: The state appeals a trial court's ruling sustaining the motion of a man, charged with driving while intoxicated, to suppress the results of a warrantless, nonconsensual blood test. In a 7-0 per curiam opinion that cannot be attributed to any particular judge, the Supreme Court of Missouri affirms the ruling that the test violated the Fourth Amendment. The sole fact that blood-alcohol levels dissipate after drinking ceases is not a per se exigency, pursuant to the United States Supreme Court's decision in *Schmerber v. California*, sufficient to permit an officer to order a blood test without first obtaining a warrant. To allow a warrantless blood draw in the absence of additional "special facts" would be to ignore the Supreme Court's statement in *Schmerber* that the constitution in no way permits warrantless blood draws "under other circumstances." On remand, the state may proceed in prosecuting the DWI charges against the man based on other evidence not gathered in violation of the constitution.

Judge Jodie Capshaw Asel, a circuit judge in the 13th Judicial Circuit (Boone and Callaway counties), sat in this case by special designation in place of Judge George W. Draper III.

Facts: A state highway patrol officer stopped a truck driven by Tyler McNeely for speeding shortly after 2 a.m. As the officer spoke with McNeely, he noticed that McNeely displayed tell-tale signs of intoxication, which changed the nature of the investigation from a routine traffic stop to an investigation of driving while intoxicated. When McNeely performed standard field-sobriety tests, he did so poorly, and the officer arrested McNeely for driving while intoxicated. The officer placed McNeely in the patrol car and asked him to consent to a breath test, which McNeely refused. Although he previously had obtained warrants when he needed to test the blood of DWI suspects, this time the officer did not. He later testified he was influenced by an article by a traffic safety resource prosecutor that asserted that recent changes in Missouri's implied consent law meant that officers no longer needed to obtain a warrant before requiring DWI suspects to submit to nonconsensual blood tests. Based on this understanding, the officer did not seek a warrant and drove McNeely to a local hospital to test his blood to secure evidence

of his intoxication. When McNeely refused to consent to a blood draw, the officer directed a phlebotomist to draw McNeely's blood for alcohol testing. This occurred about 25 minutes after the officer stopped McNeely. The results of the blood test revealed that McNeely's blood-alcohol content was well above the legal limit. At trial, McNeely moved to suppress the results of the blood test as a violation of his Fourth Amendment right to be free from unreasonable search and seizure. The court sustained the motion. The state appeals.

AFFIRMED AND REMANDED.

Court en banc holds: The trial court properly granted the motion to suppress. The Fourth Amendment to the United States Constitution ensures the right of people to be free from unreasonable searches and seizures. The United States Supreme Court has held repeatedly – with only a few specifically established and well-delineated exceptions – that searches conducted without warrants approved by a judge are unreasonable per se under the Fourth Amendment. One exception to this general rule is when there are exigent circumstances under which the time needed to obtain a warrant would endanger life, allow a suspect to escape or risk the destruction of evidence. One such exigent circumstance involves a very limited exception allowing a blood sample to be taken in alcohol-related arrests, without a warrant and without the defendant's consent, when there are "special facts" giving an officer the reasonable belief that circumstances present an emergency in which the delay in obtaining a warrant might permit evidence to be destroyed. *Schmerber v. California*, 384 U.S. 757, 770-72 (1966). In *Schmerber*, the special facts supporting the threat of evidence destruction were that the percentage of alcohol in a person's blood begins to diminish shortly after a person stops drinking and that the officer had to take time both to investigate the scene of an accident and to transport the defendant to the hospital, giving the officer no time to seek out a judge to secure a search warrant.

The officer here, however, was not faced with the same kind of special facts. Unlike in *Schmerber*, here there was no accident to investigate, no need to arrange for the medical treatment of any occupants of the vehicle, no delay that would have permitted evidence to be destroyed before a warrant could be obtained, and no evidence for which the officer would have been unable to obtain a warrant had he attempted to do so. The sole special fact present here – that blood-alcohol levels dissipate after drinking ceases – is not a per se exigency pursuant to *Schmerber* sufficient to justify the officer to order a blood test without first obtaining a warrant. To allow a warrantless blood draw in the absence of such "special facts" would be to ignore the Supreme Court's statement in *Schmerber* that the constitution in no way permits warrantless blood draws "under other circumstances." 384 U.S. at 772. Accordingly, to the extent that *State v. Ikerman*, 698 S.W.2d 902 (Mo. App. 1985), and *State v. Setter*, 721 S.W.2d 11 (Mo. App. 1986), interpret *Schmerber* to allow a nonconsensual, warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they no longer should be followed. Similarly, to the extent that *State v. LeRette*, 858 S.W.2d 816 (Mo. App. 1993), can be read as permitting a warrantless blood draw based on the mere fact that alcohol diminishes in the blood stream over time, it no longer should be followed.

Affirming the trial court's decision granting the motion to suppress does not result in the dismissal of the case against McNeely. Instead, the state may proceed in prosecuting the DWI charge against McNeely based on other evidence not gathered in violation of the constitution.