IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 85595**
	)	
CAROL SUE SMITH,	**)**	
	)	
Respondent.	**)**	

Appeal from
The Associate Circuit Court of Cape Girardeau County
Division VI
Honorable Judge Michael Bullerdieck

APPELLANT'S SUBSTITUTE BRIEF

H. Morley Swingle
Prosecuting Attorney, Cape Girardeau County
100 Court Street
Jackson, MO 63755
Missouri Bar # 28764
Telephone (573) 243-2430
Fax (573) 204-2318

John N. Koester, Jr.
Assistant Prosecuting Attorney
Missouri Bar # 52177

Attorneys for Appellant

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JURISDICTIONAL STATEMENT

This is an appeal from the action of an Associate Circuit Court Judge of Cape

Girardeau County, Missouri, Division VI, sustaining a criminal defendant's motion to suppress evidence. The prosecution has appealed pursuant to Section 547.200.1(3), RSMo, which allows the State to appeal any order or judgment the substantive effect of which results in the suppression of evidence. Jurisdiction of this appeal lay originally in the Court of Appeals, Eastern District, as the issue raised on appeal did not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court under Article V, Section 3, Missouri Constitution (as amended 1982). After a unanimous decision by the Missouri Court of Appeals, Eastern District, the Supreme Court granted transfer of the case pursuant to Article V, Section 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

On August 12, 2002, Deputy Mark Winchester of the Cape Girardeau County Sheriff's Department arrested Carol Smith on a charge of driving while intoxicated (L.F. 18).

Deputy Winchester read the Missouri Implied Consent portion of the Alcohol Influence Report Form to Carol Smith, thereby advising her of her rights under the implied consent law (L.F. 18). At the Cape Girardeau County Sheriff's Department, while Carol Smith was under arrest, she was asked to submit to a breathalyzer test by Deputy Winchester. (L.F. 18). Carol Smith refused to submit to that test (L.F. 18).

Deputy Winchester then contacted the Cape Girardeau County Prosecuting Attorney's Office, and an application for a search warrant was made (L.F. 18). A search warrant was issued at approximately 12:50 a.m. on August 13, 2002 (L.F. 18). Thereafter, the search warrant was executed, and blood was drawn from Carol Smith by Cape County Private Ambulance paramedic Angela Hayden (L.F. 19).

At the time blood was drawn from Carol Smith pursuant to the search warrant, she had not consented to submit to any of the tests authorized under the implied consent law, and her refusal to submit to the breath analysis had not been withdrawn (L.F. 19).

The parties agreed to a Stipulation of Facts for Purposes of a Motion to Suppress on February 27, 2003 (L.F. 4, 18-19). Judge Michael Bullerdieck entered a written order sustaining the motion to suppress on March 3, 2003 (L.F. 4, 20-24). This interlocutory appeal followed. On July 22, 2003, the Missouri Court of Appeals issued its opinion reversing Judge Bullerdieck in a unanimous opinion written by the Honorable Kathianne

Knaup Crane. *State v. Carol Sue Smith*, Mo. App. E.D. #82604, July 22, 2003. This Court subsequently granted transfer.

POINTS RELIED ON

The trial court erred in suppressing the blood seized from the defendant's person by search warrant because the issuance of the search warrant was reasonable under the Fourth Amendment in that it was issued by a judge based upon an affidavit stating sufficient probable cause, and the evidence was lawfully seized under Section 542.271.1(1), RSMo, which allows search warrants to issue for "evidence of the commission of a criminal offense" in that the blood in the veins of the defendant constituted evidence of the crime of driving while intoxicated and under Section 577.037.1, RSMo, such evidence is specifically admissible in the prosecution of DWI cases, as well as manslaughter cases, and the Fourth Amendment jurisprudence and these statutes allowing search warrants for evidence are not "trumped" nor otherwise ruled invalid by the implied consent statutes, Sections 577.020 and 577.041, RSMo, which pertain to warrantless searches, in that the statement that when a person refuses to submit to a test "then none shall be given" refers only to warrantless searches and does not bar the seizure of evidence reasonably obtained by valid search warrant.

ARGUMENT

THE TRIAL COURT ERRED IN SUPPRESSING THE BLOOD SEIZED FROM THE DEFENDANT'S PERSON BY SEARCH WARRANT BECAUSE THE ISSUANCE OF THE SEARCH WARRANT WAS REASONABLE UNDER THE FOURTH AMENDMENT IN THAT IT WAS ISSUED BY A JUDGE BASED UPON AN AFFIDAVIT STATING SUFFICIENT PROBABLE CAUSE, AND THE EVIDENCE WAS LAWFULLY SEIZED UNDER SECTION 542.271.1(1), RSMO, WHICH ALLOWS SEARCH WARRANTS TO ISSUE FOR "EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE" IN THAT THE BLOOD IN THE VEINS OF THE DEFENDANT CONSTITUTED EVIDENCE OF THE CRIME OF DRIVING WHILE INTOXICATED AND UNDER SECTION 577.037.1, RSMO, SUCH EVIDENCE IS SPECIFICALLY ADMISSIBLE IN THE PROSECUTION OF DWI CASES, AS WELL AS MANSLAUGHTER CASES, AND THE FOURTH AMENDMENT JURISPRUDENCE AND THESE STATUTES ALLOWING SEARCH WARRANTS FOR EVIDENCE ARE NOT "TRUMPED" NOR OTHERWISE RULED INVALID BY THE IMPLIED CONSENT STATUTES, SECTIONS 577.020 & 577.041, RSMO, WHICH PERTAIN TO WARRANTLESS SEARCHES, IN THAT THE STATEMENT THAT WHEN A PERSON REFUSES TO SUBMIT TO A TEST "THEN NONE SHALL BE GIVEN" REFERS ONLY TO WARRANTLESS SEARCHES AND DOES NOT BAR THE SEIZURE OF EVIDENCE REASONABLY OBTAINED BY VALID SEARCH WARRANT.

Introduction

All search and seizure cases are governed by the Fourth Amendment to the United States Constitution, which reads as follows:

> The 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, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is a long-standing principle of Fourth Amendment jurisprudence that searches pursuant to a search warrant are reasonable and that when a search was based upon a search warrant, the court should give "great deference" to the validity of the warrant. *State v. Bowen*, 927 S.W.2d 463 (Mo. App. W.D. 1996); *State v. Berry*, 801 S.W.2d 64 (Mo. banc 1990). Thus, in a warrant case, the State's burden is usually met simply by showing that the search was conducted pursuant to a warrant. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). When the police have respected a person's constitutional rights by taking the time and trouble of getting a search warrant, the courts should not be hypertechnical in construing it because the larger purpose of having a neutral magistrate decide probable cause has been served. *Id*. With a warrantless search, on the other hand, "the burden is on the State to demonstrate that the search fell within a recognized exception to the warrant requirement." *State v. Burkhardt*, 795 S.W.2d 399 (Mo. banc 1990). The present case does not involve a warrantless search. Rather, it involves blood seized pursuant to a validly-issued search warrant. The trial court clearly erred by ordering the

suppression of the evidence. The State was merely required to show by a preponderance of the evidence that the motion to suppress should be overruled. *State v. Sanders*, 16 S.W.3d 349 (Mo. App. W.D. 2000); Section 542.296, RSMo. The State met that burden by the facts introduced through the stipulation.

Search Warrants For Evidence

Missouri law has long recognized that search warrants may issue for "evidence of the commission of a criminal offense." Section 542.271.1(1), RSMo. 2000. It is beyond dispute that the blood inside the veins of a drunk driver can constitute evidence of his intoxication and can thus constitute evidence of a criminal offense. In fact, a Missouri statute specifically provides as much:

> Upon the trial of any person for violation of any of the provisions of section 565.024 [involuntary manslaughter], or section 565.060 [assault second degree] or section 577.010 [DWI] or section 577.012 [BAC] . . . the amount of alcohol in the person's blood at the time of the act alleged as shown by any chemical analysis of the person's blood, breath, saliva or urine is admissible in evidence . . .

Section 577.037.1, RSMo. 2000. Missouri caselaw is replete with cases affirming the use of search warrants for the drawing of blood for alcohol analysis. *State v. Willis*, 97 S.W.3d 548 (Mo. App. W.D. 2003); *State v. Stottlemyre*, 752 S.W.2d 840 (Mo. App. W.D. 1988); *State v. Trice*, 747 S.W.2d 243 (Mo. App. W.D. 1988). It has specifically been held that "a

blood sample may be seized under a search warrant if it is evidence of the commission of a criminal offense . . . The test results of such samples are admissible in evidence." *State v. Waring*, 779 S.W.2d 736, 740-741 (Mo. App. S.D. 1989). No Missouri case has ever ruled that a search warrant cannot issue for the drawing of blood for an alcohol sample.

The blood in the veins of a drunk driver not only constitutes evidence of a crime, but the State clearly has a strong interest in admitting that evidence at trial. Missouri appellate courts have recognized that "there is no question that the state has a legitimate public interest in the safety upon our roadways. This safety includes the interception and removal of drunk drivers from the roadways." *State v. Welch*, 755 S.W.2d 624, 633 (Mo. App. W.D. 1988). The United States Supreme Court has eloquently described the magnitude of the tragedy caused by drunk drivers:

> No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.' [Citations omitted] For decades, this Court has 'repeatedly lamented the tragedy . . . The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'

Michigan State Police v. Sitz, 496 U.S. 444, 451, 110 L.Ed.2d 412, 110 S.Ct. 2481 (1990). Missouri's strong interest in promoting the use of blood alcohol evidence in drunk driving cases is shown by a specific statutory provision holding that even the doctor-patient privilege, available to prohibit the use of medical evidence about a criminal defendant in many cases, does not bar the admissibility of blood alcohol evidence at the trial of DWI or manslaughter cases. Section 577.037.1, RSMo. 2000.

In the present case, the blood sample was drawn after a search warrant was lawfully issued by a judge based upon an affidavit establishing probable cause for the issuance of the warrant. The affidavit read as follows:

AFFIDAVIT

I, Mark Winchester, being duly sworn, depose and state the following:

1. I am a law enforcement officer. Specifically, I am a Deputy Sheriff with the Cape Girardeau County Sheriff's Department. I have been with the department for 11 months.

2. In my career, I would estimate that I have worked approximately 30 cases of driving while intoxicated.

3. The blood and the urine in the person of Carol Sue Smith constitutes evidence of the commission of a crime. The person, Carol Sue Smith, is described as follows: a white female, DOB 12/20/60, SSN 497-72-7508, with blond hair, blue eyes, approx. 5' 02", approx. 106 lbs.

4. I have probable cause to believe the above-described blood sample and urine sample to be seized constitutes evidence of the crime of operating a motor vehicle while in an intoxicated condition and are now located within the said described person based upon the following facts:

a) Affiant is one of the officers in charge of the investigation of offense of DWI which occurred on 08/12/02 in the County of Cape Girardeau, State of Missouri, at approximately 10 o'clock P.M.;

b) I have established probable cause that Carol Sue Smith was the driver of a motor vehicle and was operating said motor vehicle while in an intoxicated or drugged condition, and this probable cause was established by my personal observations and /or statements of witnesses as follows: Our office received a 911 call that a teal Chrysler LeBaron convertible, MO license 324RLF, was driving erratically. Upon making contact with Ms. Smith, I observed her eyes to be bloodshot and glassy; she had the moderate odor of an alcoholic beverage on her breath. Ms. Smith admitted to drinking "two" beers prior to the traffic stop. I administered some field sobriety tests which, in my opinion Ms. Smith failed.

c) Observations as to the state of intoxication of the suspect were made as recently as 10:31 o'clock P.M.

d) When last seen, Carol Sue Smith was located at the Cape County Sheriff's Department, 216 N. Missouri, Jackson, MO.

5. For all of the above reasons, I believe that there is probable cause to believe that the blood and urine of the suspect contains an unknown quantity of alcohol and /or drugs which constitute evidence of the crime of DWI.

6. I have read this affidavit and the facts contained herein are true and correct to the best of my knowledge and belief.

[Signature of Deputy Mark Winchester]

(L.F. 10-11) The affidavit clearly established probable cause and the warrant issued thereon was unquestionably valid. As stated recently by the Western District while approving a search warrant issued for the drawing of blood and urine:

> The existence or nonexistence of probable cause is to be determined from the four corners of the application of the search warrant and any supporting affidavits . . . Probable cause is a 'fair probability that contraband or evidence of a crime will be found' . . . In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . Search warrants, therefore, should not be deemed invalid by interpreting affidavits in a hypertechnical rather than common sense manner . . . Rather, the judge issuing the warrant is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . .

> there is a fair probability that contraband or evidence of a crime will be found in a particular place . . . The affidavit need not prove beyond a reasonable doubt or by a preponderance of the evidence that criminal activity is afoot . . . Only the probability of criminal activity, not a prima facie showing, is the standard of probable cause.

State v. Willis, 97 S.W.3d 548, 554-555 (Mo. App. W.D. 2003). The search warrant issued in this case was validly issued.

Applicability of "Implied Consent" Statutes, Sections 577.020 & 577.041

The defense argued, and the trial judge apparently agreed, that the "implied consent law," Section 577.041, RSMo, 2000, has carved out a niche of evidence that is now immune from search warrant. This was not the intent of Section 577.020 and is a misinterpretation of the law pertaining to search warrants for blood alcohol evidence.

The implied consent law was passed with the purpose of increasing the use of blood alcohol evidence in drunk driving cases. The Missouri Supreme Court reaffirmed within the past year that the "object and purpose of Missouri's implied consent law is to rid the highways of drunk drivers." *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002). The implied consent law holds that by driving on the roadways of the State of Missouri, a driver has automatically given consent to the taking of a sample of his blood, breath or urine. Section 577.020, RSMo. 2000 reads in applicable part as follows:

> 577.020. Chemical tests for alcohol content of blood – consent implied, when – administered, when, how – videotaping of chemical or field sobriety

test admissible evidence.

> 1. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.020 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood . . . The test shall be administered at the direction of the law enforcement officer whenever the person has been arrested or stopped for any reason.

Under the implied consent law, a blood sample may be taken from an unconscious person without his explicit consent or knowledge because he has given implied consent for its taking merely by driving upon the roadways. Section 577.033, RSMo. 2000 states:

> Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusing to take a test as provided in sections 577.020 to 577.041 shall be deemed not to have withdrawn the consent provided by section 577.020 and the test or tests may be administered.

Both the express statutory terms and the exigent circumstances of the situation allow the taking of the sample. *State v. Lerette*, 858 S.W.2d 816 (Mo. App. W.D. 1993). On the other hand, when a person is awake, he can make the choice whether to consent to the search, just as any citizen asked by an officer for consent to a search of his home, office or car may refuse to give voluntary consent. In such a case, Section 577.041 provides as follows:

> If a person under arrest, or who has been stopped pursuant to . . . section 577.020 [implied consent law], refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then none shall be given and evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024 [manslaughter] or 575.060 [second degree assault] or section 577.010 [DWI] or 577.012 [BAC].

This statute is meant only to withdraw the "implied" consent. It does not "trump" the statute allowing for prosecutors to obtain search warrants to search for evidence [542.271.1(1)] nor does it "trump" the statute specifically holding that blood alcohol evidence is admissible in both manslaughter and DWI cases [577.037.1]. It merely holds that if a person refuses consent, the officer cannot then order the nurse or doctor to draw the blood pursuant to a warrantless search, even though the officer could otherwise have done so under the implied consent statute.

The Missouri Supreme Court Rules are instructive on the issue of whether a statute enacted under Chapter 577, RSMo, would overrule the statutes specifically dealing with searches and seizures under Chapter 542, RSMo. Supreme Court Rule 34 governs searches and seizures. It succinctly states: "The provisions of Chapter 542, RSMo, shall govern procedure in searches and seizures." Chapter 542.271(1) specifically provides that search warrants may issue for any "property, article, material or substance that constitutes evidence of the commission of a criminal offense." Rule 34 does not carve out an exception for 577

"implied consent" cases, making them immune from search warrant. Clearly, it is Chapter 542, and Rule 34.01, not Chapter 577, that answer the question whether law enforcement officers can seek a search warrant for a blood sample after a person has refused to voluntarily consent to the test. They can seek the warrants, because the blood is evidence of a crime.

A review of the development of the law pertaining to warrantless seizures of blood alcohol evidence is also helpful in understanding the issues involved.

In *Breithaupt v. Abraham*, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed. 448 (1957), the police took a blood sample from an unconscious person who had been involved in a fatal accident. The United States Supreme Court held that under the Fourth Amendment, it was reasonable to conclude that the interests in scientific determination of intoxication outweighed so slight an intrusion of a person's body. Similarly, Missouri cases have upheld the drawing of blood under the implied consent statute from an unconscious suspect. *State v Clark*, 55 S.W.3d 398, (Mo. App. S. D. 2001).

Subsequently, in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that exigent circumstances allowed a police officer to order a doctor to take a blood sample from an injured DWI suspect even without a search warrant, since the delay caused by getting a search warrant would have caused the destruction of the evidence since the suspect's bodily processes were busily removing the alcohol from his bloodstream. Thus, as a matter of Fourth Amendment law, even a warrantless seizure of blood evidence from a drunk driver can be considered

reasonable. The Missouri Court of Appeals has since ruled that under *Schmerber* it is constitutionally permissible for an officer arresting a Defendant for manslaughter to take a sample of the suspect's blood without his consent and without a warrant. *State v. Setter*, 721 S.W.2d 11 (Mo. App. W.D. 1986).

In *State v. Ikerman*, 698 S.W.2d 902 (Mo. App. E.D. 1985), the police were investigating a DWI-related accident case (the defendant was ultimately charged with the felony of assault in the second degree under Chapter 565) and they took a sample of blood from the injured drunk driver at the hospital over his objection and without his consent. The Court of Appeals, faced with this warrantless seizure, found it improper in light of the Missouri implied consent statute provision stating that "if a person under arrest refuses upon the request of the arresting officer to submit to a chemical test then none shall be given." It is important to note, however, that *Ikerman* did not involve a search warrant. Rather, it involved a seizure based upon exigent circumstances and "implied consent" from a person who specifically had not consented and who had specifically revoked his implied consent. The lesson of *Ikerman* is that if a drunk driver refuses to give consent, the better practice for the police is to stop and get a search warrant, instead of hoping to rely upon exigent circumstances. Significantly, Judge Paul J. Simon, who wrote the *Ikerman* decision, agreed with the State in this very appeal that the *Ikerman* case does not stand for the proposition that the implied consent law prohibits a judge from issuing a search warrant for a blood sample after a refusal to give voluntary consent. *State v. Carol Sue Smith*, Mo. App. E.D. #82604, July 22, 2003 (Kathianne Knaup Crane, Gary M. Gaertner, Sr. and Paul J. Simon,

concurring).

Just because a person has asserted his right not to consent to a search does not mean that a search warrant cannot be issued. Consent is an exception to the warrant requirement; it is not a prerequisite to the issuance of a search warrant. Search warrants are obtained every day in situations where a subject had first been asked for consent, but denied it. *See Illinois v. McArthur*, 531 U.S. 326, 148 L.Ed.2d 838, 121 S.Ct. 946 (2001); *State v. Edwards*, 36 S.W.3d 22 (Mo. App. W.D. 2000).

Another case dealing with a warrantless search for blood alcohol was *State v. Todd*, 935 S.W.2d 55 (Mo. App. E.D. 1996). In *Todd*, the police obtained samples of the drunk driver's blood that had been drawn at the hospital immediately after the crash. These samples were not taken pursuant to search warrant. Rather, they were drawn for medical reasons and were later obtained by subpoena for the hospital's medical records. The Court of Appeals found the blood evidence admissible, reasoning that the implied consent procedures "do not apply to all blood tests offered as evidence but only to those offered pursuant to Chapter 577." Significantly, the *Todd* case did not involve a blood sample taken pursuant to a validly-issued search warrant. The argument that it should be construed as a wide-sweeping ban upon the possibility of obtaining search warrants for blood in DWI cases ignores the intent of the legislature in passing the implied consent law, which was to remove drunk drivers from the roadways, not to give them a special immunity from search warrant not enjoyed by any other class of citizen. Judge Gary M. Gaertner, one of the judges who decided the *Todd* case, agreed with the State in this very appeal that the *Todd* case does not

stand for the proposition that the implied consent law prohibits a judge from issuing a search warrant for a blood sample from a DWI suspect after the suspect's refusal to give voluntary consent. *State v. Carol Sue Smith*, Mo. App. E.D. #82604, July 22, 2003 (Kathianne Knaup Crane, Gary M. Gaertner, Sr. and Paul J. Simon, concurring).

The fact remains: no Missouri court has ever held that drunk drivers are immune from search warrants for blood and urine samples. The defense argument that *Todd* stands for the proposition that search warrants are available in manslaughter cases but not in drunk driving cases is simply wrong. When seeking a search warrant for the drunk driver's blood, it should make no difference whether any victim has yet died, thereby making him a manslaughter suspect or a drunk driving suspect. Section 577.037.1 specifically holds that blood-alcohol evidence is admissible in prosecutions under both Chapter 565 (manslaughter and assault) and 577 (DWI and BAC). As to logical and practical application, the drunk driver's victim might not die for several hours, or even days. Thus, at the time the search warrant is being sought, the police and the prosecutor will not always know whether they are dealing with a DWI prosecution under Chapter 577 or a manslaughter prosecution under Chapter 565. A ruling that search warrants are allowed in manslaughter cases but not in DWI cases, which the trial court order in this case seems to suggest, is simply not correct under law or logic.

The issue of whether search warrants can be obtained when a person has refused to give consent under a State's implied consent statute, has come up in other states. A split of authority has developed. The proper analysis was applied in a Texas case in 2002:

> The Fourth Amendment prohibits unreasonable searches and seizures.

But searches conducted pursuant to a warrant 'will rarely require any deep inquiry into reasonableness.' There is a strong preference for searches conducted with a warrant because they are issued based on 'the informed and deliberate determination' of a neutral and detached magistrate. Without a warrant or probable cause, a search can still be reasonable under the Fourth Amendment if the police obtain consent.

[The defendant] argues that, despite the existence of a search warrant, this search was invalid because it violated our state's implied consent statute . . . But [defendant] misunderstands the nature of implied consent. The implied consent law does just that – it implies a suspect's consent to search in certain instances. This is important when there is no search warrant, since it is another method of conducting a constitutionally valid search. On the other hand, if the State has a valid search warrant, it has no need to obtain the suspect's consent.

The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant. But once a valid search warrant is obtained by presenting facts establishing probable cause to a neutral and detached magistrate, consent, implied or explicit, becomes moot.

> [The defendant] contends that, regardless of whether the Fourth Amendment is satisfied by the search warrant, the search is nevertheless invalid because it violates the statute. The State responds that construing the law in this manner results in giving DWI suspects more protection than other criminal suspects – an absurd result contrary to the statute's intent. We agree.

Beeman v. State, 86 S.W.3d 613, 615-616 (Tex. Crim. App. 2002) (citations omitted). Likewise, the Indiana Court of Appeals recognized the absurdity of twisting the implied consent law to make it harder to convict drunk drivers:

> We do not derive from the implied consent law a legislative intent to preclude a law enforcement officer . . . from obtaining judicial authorization in the form of a search warrant to obtain a sample of a person's blood once a chemical test has been refused. The provisions of the implied consent law do not act either individually or collectively to prevent a law enforcement officer from obtaining a blood sample pursuant to a search warrant. Proscribing the use of a search warrant as a means of obtaining evidence of a driver's intoxication 'would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them . . . Prohibiting the use of a search warrant once a driver has refused to consent to a chemical test

would be inconsistent with the implied consent law's underlying goal of protecting the public from the threat posed by the presence of drunk drivers on the highways.

Brown v. State, 774 N.E.2d 1001, 1007 (Ind. App. 2002). Similarly, the Wisconsin Supreme Court has sharply criticized an attempt to use the implied consent law to shield a drunk driver from the use of validly seized evidence:

> We conclude that the implied consent law is designed to facilitate, not impede, the gathering of chemical test evidence in order to remove drunk drivers from the roads. It is not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood or urine. It does not, however, prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the constitutionally obtained evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose.
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> * * *
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> The implied consent law is an important weapon in the battle against drunk driving in this State. Neither the law, its history or common sense allows this court to countenance its use as a shield by the defense to prevent

constitutionally obtained evidence from being admitted at trial.

State v. Zielke, 403 N.W.2d 427, 428-434 (Wis. 1987). Another court, while ruling that an implied consent law did not "impliedly repeal" the search warrant statute, made the important point that if the legislature meant to prohibit search warrants for blood after a refusal of consent, it should have expressly said so:

> [A] sweeping prohibition against the use of lawfully issued search warrants in all cases where a breathalyzer test has been refused would in essence amount to a ruling that [the Alaska implied consent statute] works a partial repeal by implication of [the Alaska search warrant statute], which expressly authorizes the issuance of warrants for the seizure of any property which 'constitutes evidence of a particular crime or tends to show that a certain person has committed a particular crime.' Yet under well-settled principles of statutory construction, implied repeal is disfavored; one legislative enactment will not be presumed to impliedly repeal another in the absence of clear legislative intent or inconsistency so fundamental as to be fatal.

Pena v. State, 664 P.2d 169, 175 (Alaska App. 1983), reversed 684 P.2d 864 (Alaska 1984). This same viewpoint was expressed by the Supreme Court of Maine in 1985:

> [W]e have repeatedly stated that the Legislature's overall purpose in enacting the implied consent statute was 'to increase the availability of

> reliable evidence as to the true state of a driver's sobriety.' . . . It would contravene this policy to infer an exclusionary rule . . . where none is expressly provided.

State v. Baker, 502 A.2d 489, 494 (Me. 1985). The most recent case holding that an implied consent statute does not prohibit the issuance of a search warrant is *Dye v. State*, 2003 WL 361289 (Tex. App. El Paso 2/20/03).

The Missouri legislature, by enacting the current version of the implied consent law did not intend to repeal the Missouri statute allowing for search warrants for evidence. The Missouri statute authorizing search warrants for evidence took effect on May 30, 1980. *See* Section 542.271.1(1), RSMo. Supp. 1981. The current version of the implied consent statute was passed in 1982. *See* Section 577.041, RSMo. Supp. 1982. The law clearly disfavors a repeal by implication:

> Courts have created a presumption against the repeal of prior laws by implication. The point of rules of interpretation is to give harmonious effect to all acts on a subject where reasonably possible. Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation. A court may examine legislative history to find whether repeal was intended. The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending

provisions rather than leave the repeal to arise by implication from the later enactment.

Sutherland On Statutory Construction (4th Ed.), Section 23.10 (1985), page 346. *See also: Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999) ("Repeals by implication are not favored. If by any fair interpretation both statutes may stand, there is no repeal by implication and both statutes must be given their effect."); *City of Nevada v. Bastow*, 328 S.W.2d 45, 49 (Mo. App. W.D. 1999) ("In so far as our purposes here are concerned it makes little difference which section was first enacted or which had the last legislative attention of our legislature by modification or by amendment . . . It will be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject; and, where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption, or the later statute revises the whole subject matter of the former."). The Missouri Supreme Court spoke as recently as 2002 on the intent of the legislature in passing implied consent laws: "The object and purpose of Missouri's implied consent law is to rid the highways of drunk drivers." *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002). One does not rid the highways of drunk drivers by making it impossible to get a sample of their blood by search warrant. The interpretation suggested by the defendant turns the intent of the legislature on its head. On the contrary, the reasonable interpretation that the phrase "then none shall be given" applies only to warrantless searches and not to searches pursuant to search warrant

under Section 542.271.1(1) gives a harmonious effect to both statutes and accomplishes the obvious intent of the legislature. The defense is advocating a repeal by implication, which is clearly not favored in Missouri. Had the legislature meant to prevent search warrants for blood alcohol after a refusal, it could have amended Section 542.271.1(1) at the same time it amended the implied consent law in 1982 to expressly say: "A search warrant may be issued to search for and seize any . . . property, article, material or substance that constitutes evidence of the commission of a crime <u>except blood of a person who has been arrested for drunk driving and who has refused a breath test under Section 577.041</u>." On the contrary, the legislature was certainly not intending to create a special class of citizens (drunk drivers) who are immune from search warrants for evidence when it passed the implied consent law.

Some cases from other states have adopted the flawed argument suggested by the defense in this case that an implied consent statute somehow trumps prohibits search warrants for the evidence of a crime. Significantly, none of these states have Missouri Supreme Court Rule 34.01, which expressly provides that it is the search warrant statute, Chapter 542, that controls searches, not Chapter 577. Some of the opinions accepting the flawed analysis of implied consent law prompted vigorous dissents from the more learned members of the court. *See Pena v. State*, 684 P.2d 864 (Alaska 1984); *State v. DiStefano*, 764 A.2d 1156 (R.I. 2000). Some cases from other jurisdictions were collected in an A.L.R. article twenty years ago. See Annotation, "Admissibility in Criminal Case of Blood Alcohol Test Where Blood Was Taken Despite Defendant's Objection or Refusal to Submit

to Test," 14 *A.L.R. 4th* 690 (1982). In several states where appellate courts mistakenly bought the argument that the legislature must have meant to prohibit search warrants by enacting an implied consent statute, the legislature immediately responded by enacting legislation rejecting the Court's mistaken interpretation of the legislative intent. *See Arizona v. Clary*, 196 Ariz. 610, 2 P.3d 1255 (2000) ("In what obviously was a response to the court's holding in *Collins*, the legislature amended the statute in 1990."); *State v. Chavez*, 96 N.M. 313, 629 P.2d 1242 (1981) ("This Court held that the Legislature gave the defendant more protection than was afforded by the Constitution, and that, after his refusal, the result of the blood alcohol test taken by means of a valid search warrant was properly excluded. Thereafter, the Legislature amended the statute."); *State v. DiStafano*, 764 A.2d 1156, 1166 (R.I. 2000) ("[T]he states of Alaska, Arizona, Iowa, Florida, Indiana, Michigan, and Texas all have statutes specifically authorizing the forcible seizure of blood in DUI cases. Further, in three states, these statutes specifically were revised in response to judicial decisions barring the forcible seizure of blood.").

The Missouri Court of Appeals was exactly right in its decision in this case when it held that the phrase "none shall be given" is directed only to law enforcement officers conducting warrantless searches, not to judges issuing search warrants upon valid probable cause. As Judge Crane wrote for the unanimous Court:

> [I]n construing this provision we must consider the context and related clauses of this statute. *State v. Campbell*, 564 S.W.2d 867, 869 (Mo. banc 1978). We therefore look at the context in which 'none shall be given' is

used to determine to whom this passive command is directed. *See State ex rel. Holterman v. Patterson*, 24 S.W.3d 784, 786 (Mo. App. 2000). When we read Section 577.041.1 with Section 577.020.1, as we must, *Eyberg v. Director of Revenue*, 935 S.W.2d 376, 379 (Mo. App. 1996), the only actor to whom this clause can be directed is a law enforcement officer. This is because the tests allowed pursuant to Section 577.020 are those "administered at the direction of the law enforcement officer." Section 577.020.1. We have interpreted the phrase 'none shall be given' to mean that a law enforcement officer is without authority to administer the test once it is refused, *Blanchard v. Director of Revenue*, 844 S.W.2d 589, 590 (Mo. App. 1993), and our courts have held that 'law enforcement officers are significantly limited' by this provision. *Trumble*, 844 S.W.2d at 24. To hold that this clause prohibits courts from issuing search warrants would introduce a new subject matter unrelated in kind to the remainder of the statute. *See Campbell*, 564 S.W.2d 870. The command that 'none shall be given' is addressed only to the authority of *law enforcement officers* to proceed with a warrantless test under Chapter 577.

The Missouri Implied Consent law was enacted to codify the procedures under which a law enforcement officer could obtain bodily fluids for testing by consent without a search warrant. It provides administrative and procedural remedies for refusal to comply. Because it is directed only to

> warrantless tests authorized by law enforcement officers, it does not restrict the state's ability to apply for a search warrant to obtain evidence in criminal cases pursuant to section 542.276 RSMo (2000) or a court's power to issue a search warrant under section 542.266 RSMo (2000).

State v. Carol Sue Smith, Mo. App. E.D. #82604, July 22, 2003, p. 7-8. The prohibition about drawing blood without a search warrant applies to police officers, not judges. The analysis of the three judges on the Missouri Court of Appeals gives reasonable and harmonious interpretation to both statutes.

Good Faith Exception

The seizure of this blood was based upon a search warrant issued by a judge upon clearly sufficient probable cause. It is clearly admissible. Even if the court should rule incorrectly that Section 577.041 prohibits the issuance of search warrants for blood alcohol evidence, the evidence in this case would still be admissible under the good faith exception to the exclusionary rule.

Under the well-established good faith exception to the exclusionary rule, when officers have seized evidence pursuant to a search warrant, that evidence will still be admissible even if it later turns out that the warrant was invalid, as long as the officer had an objective and reasonable belief in the warrant's validity at the time he executed it. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *State v. Pattie*, 42 S.W.3d 825 (Mo. App. E.D. 2001).

In the present case, the officer clearly had an objective and reasonable belief in the

validity of the warrant. Every court of appeals case ever considering the issue in Missouri has ruled that search warrants may issue for blood. No court has ever ruled otherwise. The unanimous panel of the Missouri Court of Appeals in this very case agreed that this search warrant was validly issued. *State v. Carol Sue Smith*, Mo. App. E.D. #82604, July 22, 2003. How could an officer on the street be expected to hold otherwise? It would be absurd to rule that the officer on the street should have decided that the prosecutor, the judge issuing the search warrant and the Missouri Court of Appeals judges past and present have all been wrong and that the search warrant was somehow invalid. The officer was undoubtedly acting in good faith. The trial court unquestionably committed reversible error by suppressing the evidence.

CONCLUSION

For the reasons stated above, the trial court's order suppressing the blood sample drawn pursuant to a search warrant should be reversed, and the case should be remanded for trial.

Respectfully submitted,

Office of the Prosecuting Attorney
Cape Girardeau County

H. Morley Swingle
Prosecuting Attorney

Mo. Bar # 28764
100 Court Street, Courthouse
Jackson, MO 63755
Telephone (573) 243-2430
Fax (573) 204-2318

John N. Koester, Jr.
Assistant Prosecuting Attorney
Mo. Bar # 52177
100 Court Street, Courthouse
Jackson, MO 63755
Telephone (573) 243-2430
Fax (573) 204-2318

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

John N. Koester, Jr., Assistant Prosecuting Attorney of Cape Girardeau County, Missouri, upon his oath, states as follows: (1) that seven copies of this brief have been mailed this date to the Missouri Supreme Court; (2) that this brief complies with Rule 55.03 and with the length limitations contained in Rule 84.06 of this Court and contains 7801 words, including the cover and this certification, as determined by WordPerfect software; (3) that the floppy disk filed with this brief contains a copy of this brief and has been scanned for viruses and is virus-free; and (4) that a floppy disk containing a copy of this brief has been mailed, postage prepaid, along with two copies of this brief, to opposing counsel, Stephen C. Wilson, Attorney at Law, P.O. Box 512, Cape Girardeau, MO 63702-0512, on this _____ day of _____, 2003.

John N. Koester, Jr.