No. SC91850

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

TYLER G. MCNEELY,

Respondent.

Appeal from the Cape Girardeau County Circuit Court
32nd Judicial Circuit
The Honorable Benjamin F. Lewis, Judge

BRIEF OF MISSOURI ATTORNEY GENERAL IN SUPPORT OF APPELLANT AS *AMICUS CURIAE*

CHRIS KOSTER
Attorney General

JAMES B. FARNSWORTH
Assistant Attorney General
Missouri Bar No. 59707

P.O. Box 899
Jefferson City, MO 65102
(573) 751 3321
Fax: (573) 751-5391
jim.farnsworth@ago.mo.gov

Attorneys for Amicus Curiae

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ARGUMENT

In its substitute brief, Appellant argues that a blood sample may be taken from a person suspected of drunk driving, even without a warrant, because the fact that evidence of intoxication—the driver's blood-alcohol content—begins to dissipate promptly is an exigent circumstance permitting the warrantless search. App. Sub. Br. at 17-29. The Attorney General agrees with Appellant's analysis. The purpose of this *amicus* brief is to emphasize that, due to the evanescence of blood-alcohol evidence, it is objectively reasonable to allow law enforcement officers to order warrantless chemical tests on persons who the officers have probable cause to believe have been drinking and driving.

The United States Supreme Court recently reaffirmed that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." *Kentucky v. King*, 131 S.Ct. 1849, 1858 (2011). The test for reasonableness is objective—irrespective of an individual officer's subjective beliefs or motives, a warrantless search is constitutional if the circumstances, viewed objectively, justify the action. *See id.* at 1859. Respondent's argument leans heavily on Corporal Winder's (the arresting officer's) "thought process" and the fact that Winder did not, according to

Respondent, believe that an emergency existed. Resp. Sub. Br. at 9-10, 25-29. But, as *King* plainly teaches, Cpl. Winder's subjective belief was irrelevant. The relevant question is whether, objectively speaking, it was reasonable to order a blood test without first applying for and obtaining a warrant.

"[T]he need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search." *King*, 131 S.Ct. at 1856; *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (holding that a warrantless search was permitted when "the delay necessary to obtain a warrant . . . threatened the destruction of evidence."). Missouri courts have recognized that, in the context of a drunk-driving investigation, "[e]xigent circumstances arise from the need to move quickly because the percentage of alcohol in the bloodstream diminishes with time and. . . the delay caused by having to obtain a warrant might result in the destruction of evidence." *State v. Dowdy*, 332 S.W.3d 868, 870 (Mo. App. S.D. 2011) (quoting *Murphy v. Director of Revenue*, 170 S.W.3d 507, 514 (Mo. App. W.D. 2005)); *State v. Lerette*, 858 S.W.2d 816, 819 (Mo. App. W.D. 1993) (same).

Respondent argues that the inevitable degradation of blood-alcohol evidence does not qualify as a sufficient exigent circumstance to permit a warrantless search because alcohol in the bloodstream dissipates at a predictable rate and one can "easily estimate the blood alcohol level at the time of operation of the motor vehicle" if the test is delayed. Resp. Sub. Br. at

24-25.[1] As Appellant argued in the substitute reply brief, the science behind the retrograde extrapolation of blood-alcohol evidence is subject to criticism, and thus Respondent's reliance on this process to attack the reasonableness of prompt chemical testing is misplaced. App. Sub. Reply Br. at 5-14. But Respondent's argument fails for two additional, more fundamental reasons.

First, Respondent's argument asks this Court to adopt a rule that would *require* officers to allow evidence to degrade in favor of obtaining less reliable evidence later. To prove the offense of driving while intoxicated, the State must show that the defendant operated his vehicle while in an intoxicated or drugged condition. § 577.010, RSMo 2010. Missouri courts have held that "time is an element of importance" that the State must establish in proving that the defendant was drunk when he drove, rather than before or after the operation of his vehicle. *See e.g. State v. Davis*, 217 S.W.3d 358, 360 (Mo. App. W.D. 2007). To that end, the courts have noted, "the longer the interval between driving and testing, the less accurately the test reflects the state of the driver at the time of the arrest." *State v. Varnell*, 316 S.W.3d 510, 514 (Mo. App. W.D. 2010). Thus, a chemical test to measure a driver's BAC, conducted three hours after he was observed driving will less accurately reflect his level of intoxication at the time he was driving than would a test conducted just one hour after he was observed driving. It is not objectively

[1] The ACLU makes this same argument in its *amicus* brief.

reasonable to require officers to allow reliable evidence to degrade while they seek to obtain a warrant.

Second, Respondent's proposed rule would require officers to speculate about facts that are not available to them in trying to determine whether an exigency exists. In evaluating whether an officer's action is reasonable for Fourth Amendment purposes, courts must examine whether "the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Hudson v. Michigan*, 547 U.S. 586, 623 (2006) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)) (describing "reasonable suspicion" standard); *see also Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (noting that, "[a]s with other determinations bearing upon search and seizure," an officer's determination that he received consent to search must be based on the facts available to the officer at the moment).

Respondent and his supporting *amici* argue that a warrantless chemical test is unreasonable if a magistrate is available to issue a warrant or if scientists could use retrograde extrapolation to estimate the driver's BAC from a delayed test. But these facts will seldom be readily apparent to officers in the field. An officer, conducting a DWI stop in the middle of the night, may not know whether a magistrate can be expeditiously reached or whether the prosecutor will be able to find an expert to estimate the driver's

BAC if the officer waits to conduct the test. What the officer does know is that the driver appears to be intoxicated and that, with every minute that passes, the chemical evidence of intoxication is dissipating. These circumstances in themselves make it objectively reasonable for a police officer who has probable cause to believe that a driver is intoxicated to order an immediate chemical test without first delaying the investigation by seeking a warrant. Respondent's suggestion that an officer might be able to wait a few hours, obtain a warrant, and conduct the test later without seriously compromising the evidence is speculative at best and does not render an officer's determination to proceed with the warrantless search objectively unreasonable.

CONCLUSION

The trial court clearly erred in granting Respondent's motion to suppress. The suppression order should be reversed and the case remanded for trial.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ James B. Farnsworth
JAMES B. FARNSWORTH
Assistant Attorney General
Missouri Bar No. 59707

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
jim.farnsworth@ago.mo.gov

ATTORNEYS FOR *AMICUS CURIAE*
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1,134 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. The undersigned counsel hereby certifies that a copy of this notification was sent through the eFiling system on September 15, 2011, to:

Stephen C. Wilson
Wilson & Mann L.C.
2907 Independence, Ste. C
Cape Girardeau, Missouri 63703
Attorney for Respondent

John N. Koester, Jr.
Assistant Prosecuting Attorney
100 Court Street
Jackson, Missouri 63755
Attorney for Appellant

/s/ James B. Farnsworth
JAMES B. FARNSWORTH
Assistant Attorney General
Missouri Bar No. 59707
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEY FOR *AMICUS CURIAE*
STATE OF MISSOURI