

IN THE SUPREME COURT OF MISSOURI

No. SC91850

STATE OF MISSOURI

Appellant,

v.

TYLER G. MCNEELY,

Respondent.

On Appeal from the Circuit Court of Cape Girardeau County, Missouri
Cause No. 10CG-CR01849

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED96402

BRIEF OF THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF RESPONDENT, AS AMICUS CURIAE

Respectfully submitted:

MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

Talmage E. Newton IV, Mo. Bar #56647
8000 Maryland Ave., Ste. 610
St. Louis, Missouri 63105
(314) 265-8198 – Telephone
(314) 725-5755 – Facsimile
tenewton@wmlaw.com

Counsel for Amicus Curiae

IN THE SUPREME COURT OF MISSOURI

No. SC91850

STATE OF MISSOURI

Appellant,

v.

TYLER G. MCNEELY,

Respondent.

On Appeal from the Circuit Court of Cape Girardeau County, Missouri
Cause No. 10CG-CR01849

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED96402

BRIEF OF THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENT, AS AMICUS CURIAE

Respectfully submitted:

MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

By:



Talmage E. Newton IV, Mo. Bar #56647
8000 Maryland Ave., Ste. 610
St. Louis, Missouri 63105
(314) 265-8198 – Telephone
(314) 725-5755 – Facsimile
tenewton@wmlaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
STATEMENT OF INTEREST OF AMICUS CURIAE.....	5
STATEMENT OF JURISDICTION AND STATEMENT OF FACTS	6
INTRODUCTION AND SUMMARY OF ARGUMENT.....	7
DISCUSSION	8
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

United States Constitutional Provisions

U.S. Constitution, Fourth Amendment	7, 8
---	------

Missouri Constitutional Provisions

Missouri Constitution, Article I, Section 15	8
--	---

Missouri Supreme Court Rules

Missouri Supreme Court Rule 55.03	13
Missouri Supreme Court Rule 84.05(f)(2)	6
Missouri Supreme Court Rule 84.06	13

Missouri Revised Statutes

Section 542.296 R.S.Mo.	9
Section 577.041 R.S.Mo.	10

Missouri Cases

<i>State v. Burkhardt</i> , 795 S.W.2d 399 (Mo. banc 1990)	9
<i>State v. Cook</i> , 273 S.W.3d 562 (Mo. App. E.D. 2008)	9, 10
<i>State v. Damask</i> , 936 S.W.2d 565 (Mo. banc 1996)	8
<i>State v. Deck</i> , 994 S.W.2d 527 (Mo. banc 1999)	9
<i>State v. Franklin</i> , 841 S.W.2d 639 (Mo. banc 1992)	9
<i>State v. Gilpin</i> , 836 S.W.2d 49 (Mo.App. 1992)	8, 10
<i>State v. Howard</i> , 540 S.W.2d 86 (Mo.banc 1976)	8, 9
<i>State v. Kimbrough</i> , 166 S.W.2d 1077 (1943)	9
<i>State v. Malone</i> , 39 S.W.2d 786 (1931)	9

State v. Wiley, 522 S.W.2d 281 (Mo.banc 1975) 8, 10

Non-Missouri Cases

Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002) 9

Roaden v. Kentucky, 413 U.S. 496 (1973) 9

United States v. Marshall, 157 F.3d 477 (7th Cir. 1998) 9

United States v. Wicks, 995 F.2d 964 (10th Cir. 1993) 9

United States v. Williams, 354 F.3d 497 (6th Cir. 2003) 9

STATEMENT OF INTEREST OF AMICUS CURIAE

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference the jurisdictional statement and statement of facts set forth in Appellant's substitute brief and the brief of Amici Curiae American Civil Liberties Union, previously filed with this court.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), amicus curiae certifies that consent to file this brief was granted by all parties.

INTRODUCTION

Amicus curiae writes in support of Respondent Tyler G. McNeely urging this Court to affirm the trial court's suppression of evidence in the underlying D.W.I. case on the grounds that the seizure of Respondent's blood was a violation of his Fourth Amendment right against illegal search and seizure.

In criminal prosecutions the burden of proof rests with the State at all times. The State must be required to conclusively establish that exigent circumstances exist before being allowed to avail itself of a warrantless blood draw. To hold otherwise will impair the rights of the accused in this State to a fair trial.

The existence of exigent circumstances should be determined on a case by case basis and should not be subject to a bright line rule.

DISCUSSION

To declare a bright-line rule finding that the evanescence of alcohol in the blood stream alone creates an exigent circumstance will remove a burden of proof which rests with the State.

a. Citizens have a right to be free from illegal search and seizure.

The Fourth Amendment of the United States Constitution guarantees citizens the right to be free from "unreasonable searches and seizures." The Missouri constitution offers the same level of protection; the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. Missouri Constitution, Article I, Section 15. See also: *State v. Damask*, 936 S.W.2d 565, 570 (Mo. banc 1996).

"The unvarying command of the Fourth Amendment is that searches and seizures [must] be reasonable, but what is reasonable depends upon the context within which a search takes place." *State v. Gilpin*, 836 S.W.2d 49, 53 (Mo.App. 1992). The Fourth Amendment only protects against unreasonable searches and seizures. *State v. Wiley*, 522 S.W.2d 281, 294 (Mo.banc 1975). Consequently, there has developed a body of law, under the heading "exigent circumstances," which holds that there needs to be no warrant as a predicate to a search if a swift response is indicated by the circumstances. *Id.*

b. The burden of proof always rests with the prosecution.

It is axiomatic that the burden of proof in a criminal prosecution rests with the State. In any criminal prosecution, the burden of proof rests with the State to establish by evidence the guilt of the accused beyond a reasonable doubt. *State v. Howard*, 540

S.W.2d 86, 88[3] (Mo.banc 1976); *State v. Kimbrough*, 616, 166 S.W.2d 1077, 1081[4] (1943); *State v. Malone*, 39 S.W.2d 786, 790-793[6] (1931).

This burden of proof exists at all stages of a criminal prosecution, including the suppression of arguably suppressible evidence: "The burden of going forward with the evidence and the risk of non-persuasion [in a motion to suppress] shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled. Section 542.296 R.S.Mo.; *State v. Franklin*, 841 S.W.2d 639, 644 (Mo. banc 1992). See also: *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999); *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990)(At a motion to suppress hearing, the State bears the burden of proving that [a] seizure was constitutionally proper).

c. Exigent Circumstances

"Exigent circumstances exist when there is a compelling need for official action and no time to secure a warrant." *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998). "Exigent circumstances are situations where 'real immediate and serious consequences will certainly occur if a police officer postpones action to obtain a warrant.'" *United States v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003) (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002)). "Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). The government bears the burden of proving the existence of an exigent circumstance to justify a warrantless search. *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1993). "[T]he determination of whether

exigent circumstances are present is individually analyzed on a case-by-case basis." *State v. Cook*, 273 S.W.3d 562, 570 (Mo. App. E.D. 2008).

Missouri courts have often been reluctant, however, to apply the doctrine of exigent circumstances as a justification for a warrantless search. *Wiley*, 522 S.W.2d at 295. As explained by the Gilpin court:

"The mere claim of exigency ... does not suffice. The scope of any exception to the warrant requirement is limited by a real exigency [including] the immediate need to assist in the protection of human life. The warrantless ... intrusion may not be the pretext for search or arrest The burden is on the prosecution to show that under the circumstances of the case such an exigent intrusion was necessary." 836 S.W.2d at 53 (emphasis added) (citations omitted).

State legislation cannot erode the protections offered by the U.S. and Missouri Constitutions. While exigent circumstances allowing a warrantless search under §577.041 R.S.Mo. may exist in certain cases, it is and must remain the burden of the State to prove such.

CONCLUSION

The State's burden in establishing exigent circumstances so as to allow a warrantless search should be decided on a case by case basis.

Establishing a bright-line rule that evanescence of alcohol in the system, in all instances, creates an exigent circumstance which allows a warrantless seizure will improperly remove a burden of proof which rests with the State in DWI prosecutions and suppression proceedings.

The order of the circuit court suppressing the evidence of the defendant's blood alcohol level should be affirmed and this matter should be remanded to the circuit court for further proceedings consistent with the opinion of the Court.

Respectfully submitted:

MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

By:



Talmage E. Newton IV, Mo. Bar #56647
8000 Maryland Ave., Ste. 610
St. Louis, Missouri 63105
(314) 265-8198 – Telephone
(314) 725-5755 – Facsimile
tenewton@wmlaw.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

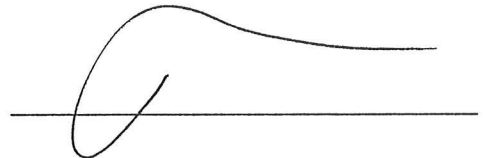
The undersigned hereby certifies that a true and accurate copy of the foregoing
was sent via U.S. mail on this 10th day of August, 2011 to:

Mr. John N. Koester
Attorney for Appellant
100 Court St.
Jackson, Missouri 63755

Mr. Stephen C. Wilson
Attorney for Respondent
2907 Independence, Ste. C
P.O. Box 512
Cape Girardeau, Missouri 63702
(573) 651-1950 – Telephone

Mr. Doug Bonney
ACLU of Kansas & Western Missouri
3601 Main Street
Kansas City, MO 64111
(816) 756-3113 - Telephone

Mr. Anthony E. Rothert
ACLU of Eastern Missouri
454 Whittier St.
St. Louis, Missouri 63108
(314) 652-3114 - Telephone

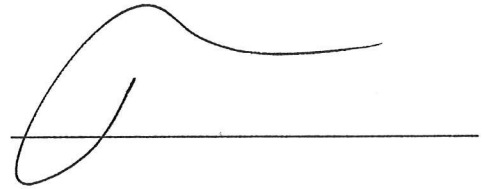
A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Amicus Curiae includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of amicus Curiae is 1,080 exclusive of the cover, signature block and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Amicus Curiae was scanned for viruses and was found virus-free through the McAfee Virus Scan anti-virus program.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.