IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Appellant,

vs. **No. SC 91850**

TYLER G. McNEELY,

Respondent.

Appeal from the Circuit Court of Cape Girardeau County

Honorable Benjamin F. Lewis - Division II

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the action of a Circuit Court Judge of Cape Girardeau County, Missouri, Division II, sustaining a criminal defendant's motion to suppress evidence. The prosecution has appealed pursuant to Section 547.200.1(3), RSMo. 2000, 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). The Missouri Court of Appeals, Eastern District, issued a unanimous decision reversing the ruling of the trial court. The Appellate Court then transferred this case to the Missouri Supreme Court in light of the general interest and importance of the issues involved.

STATEMENT OF FACTS

Corporal Mark Winder (hereinafter, "Winder") of the Missouri State Highway Patrol was on routine patrol in Cape Girardeau, Missouri, in Cape Girardeau County, in the early morning hours of October 3, 2010 (Tr. 3). At approximately 2:08 A.M., Winder conducted a traffic stop on a Ford F-150 truck after observing it exceeding the posted speed limit (Tr. 3-4, 11). Tyler McNeely (hereinafter, "Defendant") was identified as the driver and sole occupant of the truck (Tr.4).

Upon making contact with Defendant, Winder noticed various signs of impairment, including a strong odor of alcohol on his breath, slurred speech, and bloodshot eyes (Tr. 5). Winder then had Defendant step out of the truck to perform standard field sobriety tests (Tr.5-7). After performing poorly on the tests, Winder concluded Defendant was under the influence of alcohol (Tr.7). Winder placed Defendant under arrest for driving while intoxicated at approximately 2:18 A.M., placing him inside his patrol car (Tr.7, 11).

Inside the patrol car, Winder asked Defendant if he would consent to a breath test upon arrival at the Cape Girardeau County Sheriff's Department (Tr.7). Defendant told Winder that he would refuse to submit to a breath test (Tr.7). Winder then drove Defendant directly to St. Francis Medical Center, a local hospital, in order to obtain a blood sample (Tr.7-8).

At the hospital Winder read the Missouri Implied Consent portion of the Alcohol Influence Report Form to Defendant and requested he submit a sample of his blood (Tr.8-9) (L.F. 25). Defendant refused to consent to the blood test at 2:33 A.M. (Tr.9) (LF 25). After Defendant refused to consent to the test, Winder instructed a hospital lab technician to withdraw a blood sample, which was seized as evidence (Tr.9).

Prior to collecting the blood sample, Winder did not attempt to contact a prosecuting attorney or a judge in order to obtain a search warrant (Tr. 13-17). Winder had no reason to believe that such an attempt would have been unsuccessful (Tr. 16). Sgt. Blaine Adams, a 23 year veteran of the Missouri State Highway Patrol, testified at the suppression hearing that he has applied for search warrants in driving while intoxicated cases on numerous occasions. (Tr. 25). In his experience, obtaining a search warrant in driving while intoxicated cases usually takes approximately two hours (Tr. 26-27).

After collecting the blood sample, Winder transported Defendant to the Cape Girardeau County Sheriff's Department (Tr.9). Winder once again read Defendant the Missouri Implied Consent portion of the Alcohol Influence Report Form, this time requesting a breath sample (Tr.9-10) (L.F. 25). Defendant refused to provide a breath sample at 2:55 A.M. (Tr. 10) (L.F. 25).

Winder sent the blood sample to the Missouri State Highway Patrol Crime Laboratory for chemical analysis, where it was determined the blood alcohol content of the sample was 0.154% (Tr.10) (L.F. 26).

On December 6, 2010, the Cape Girardeau County Prosecuting Attorney's Office filed an Information in the Circuit Court of Cape Girardeau County charging Defendant with the class D felony of driving while intoxicated under Sections 577.010 and 577.023, RSMo. (L.F. 8).

On December 23, 2010, Defendant filed a "Motion to Suppress Evidence" seeking to suppress the results of the blood sample collected from Defendant (L.F. 12). On January 14, 2011, a hearing was held on the Motion to Suppress (Tr.). On March 3, 2011, Judge Benjamin F. Lewis entered a written order sustaining the Motion to Suppress, ruling that evidence obtained from a nonconsensual and warrantless blood withdrawal violated the Fourth Amendment and was therefore inadmissible (L.F.14-19). This interlocutory appeal followed. On June 21, 2011, the Missouri Court of Appeals, Eastern District, issued a unanimous opinion written by the Honorable Robert G. Dowd, Jr., reversing the ruling of Judge Benjamin F. Lewis. *State v. Tyler G. McNeely*, Mo. App. E.D. #96402, June 21, 2011. However, in light of the general interest and importance of the issues involved, the Appellate Court transferred the case to the Missouri Supreme Court.

POINTS RELIED ON

The trial court erred in suppressing the blood sample seized from the defendant's person after he was arrested for driving while intoxicated without his consent and without a search warrant because under the Fourth Amendment it has been recognized that a nonconsensual and warrantless blood withdrawal from a person suspected of driving while intoxicated is a valid and reasonable search and seizure under both the "search incident to arrest" and "exigent circumstances" exceptions to the warrant requirement, and the Missouri legislature eliminated the only prohibition under Missouri law that prevented law enforcement officers from obtaining nonconsensual and warrantless blood samples when it amended the "refusal" provision of the Missouri Implied Consent law under Section 577.041.1, RSMo, to remove the words "*none shall be given,*" effective August 28, 2010.

Schmerber v. California, 384 U.S. 757 (1966)

State v. Ikerman, 698 S.W.2d 902 (Mo.App. E.D. 1985)

State v. Lerette, 858 S.W.2d 816 (Mo.App. W.D. 1993)

State v. Smith, 134 S.W.3d 35 (Mo.App. E.D. 2003)

Fourth Amendment to the United States Constitution

Section 577.041 RSMo. Cum. Supp. 2010

ARGUMENT

The trial court erred in suppressing the blood sample seized from the defendant's person after he was arrested for driving while intoxicated without his consent and without a search warrant because under the Fourth Amendment it has been recognized that a nonconsensual and warrantless blood withdrawal from a person suspected of driving while intoxicated is a valid and reasonable search and seizure under both the "search incident to arrest" and "exigent circumstances" exceptions to the warrant requirement, and the Missouri legislature eliminated the only prohibition under Missouri law that barred law enforcement officers from obtaining nonconsensual and warrantless blood samples when it amended the "refusal" provision of the Missouri Implied Consent law under Section 577.041.1, RSMo, to remove the words "*none shall be given,*" effective August 28, 2010.

STANDARD OF REVIEW

The State appeals challenging the trial court's ruling on a motion to suppress evidence. Appellate review of a motion to suppress evidence is limited to a determination of whether the trial court's decision is supported by substantial evidence. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. banc 2006); *State v. Ross*, 254 S.W.3d 267, 272 (Mo. App. E.D. 2008). The appellate court considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id*. The appellate court will reverse the trial court's ruling only if it is clearly erroneous, that is, if the appellate court is left with a definite and firm impression that a mistake has been made. *State v.*

Dixon, 218 S.W.3d 14, 18 (Mo. App. W.D. 2007). The appellate court will give deference to the trial court's factual findings and credibility determinations, but reviews questions of law, including whether the Fourth Amendment has been violated, *de novo*. *State v. Martin*, 79 S.W.3d 912, 916 (Mo.App. E.D. 2002); *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007).

INTRODUCTION

This case presents the issue of whether law enforcement officers in the State of Missouri may obtain a blood sample from a person suspected of driving while intoxicated without a search warrant after the person expressly refuses to voluntarily submit to a chemical test. We are confronted with a two-prong inquiry: (1) *Is a nonconsensual and warrantless blood draw a reasonable search and seizure under the Fourth Amendment?*; and, if so, (2) *Does the Missouri Implied Consent law prohibit such nonconsensual and warrantless tests?*

A NONCONSENSUAL AND WARRANTLESS BLOOD WITHDRAWAL IS A REASONABLE SEARCH AND SEIZURE UNDER THE 4th AMENDMENT

The Fourth Amendment to the United States Constitution guarantees that citizens will not be subject to unreasonable searches and seizures. U.S. Const. Amend. IV. [1] Fourth Amendment jurisprudence has long recognized the State may obtain a nonconsensual and warrantless blood sample from a person suspected of driving while intoxicated under the "search incident to arrest" and "exigent circumstances" exceptions to the warrant requirement.

"Search incident to arrest" exception to the warrant requirement

In the landmark case of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966), the United States Supreme Court held that taking a blood sample from a person suspected of driving while under the influence of intoxicating liquor without their consent and without a search warrant was not an unreasonable search and seizure.

In *Schmerber*, the defendant was involved in a single vehicle accident. A police officer arrived on the scene and noticed that the defendant appeared to be intoxicated.

[1] Article I, Section 15 of the Missouri Constitution provides the same guarantees against unreasonable search and seizures. Thus, the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009).

The officer later met defendant at the hospital and placed him under arrest for driving under the influence of intoxicating liquor. The officer requested that defendant consent to a chemical test in order to determine the alcohol content of his blood. After the defendant refused to consent to the test, the officer directed a physician to withdraw a blood sample. The results of this blood sample were admitted at trial, over defendant's objection, and defendant was convicted of driving under the influence of intoxicating liquor. *Id.* at 758-759.

On appeal, Schmerber complained that taking his blood without his consent and without first securing a search warrant was an unreasonable search and seizure that violated the Fourth Amendment. The United States Supreme Court disagreed. In affirming the conviction, the Court recognized that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. "The officer in the present case, however, 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.* at 770-771. The Court concluded that, in light of the evidence that a test must be given promptly to secure evidence of blood alcohol content and that there was insufficient time to obtain a warrant, "the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest." *Id.* at 770-771.

The Supreme Court also noted that the test was performed in a reasonable manner, taken in a hospital environment according to accepted medical practices. "Such tests are

commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.* at 771.

Relying upon *Schmerber*, Missouri courts have consistently approved warrantless blood draws. "*Schmerber* supports the general principle that the warrantless extraction of a blood sample without consent but incident to a lawful arrest is not an unconstitutional search and seizure and that the results of a blood test performed thereon are admissible in evidence." *State v. Ikerman*, 698 S.W.2d 902, 904-905, (Mo.App. E.D. 1985); citing *Schmerber*, at 771. "Thus, under the aegis of *Schmerber*, the implied consent statute authorizing a 'search,' i.e., the extraction of blood for a blood alcohol test, without a warrant or actual consent does not offend the constitutional guarantees of due process or of freedom from unreasonable search and seizure of one who has first been arrested." *Ikerman* , at 906.

Other Missouri cases have likewise recognized the constitutionality of warrantless blood draws. "Upon his arrest and as an incident to his arrest without a warrant, a person is subject to having a sample of his blood taken without his consent or a warrant, and said blood sample is admissible in evidence." *State v. Setter*, 721 S.W.2d 11, 16 (Mo.App. W.D. 1986); "Further, even had Trice been under arrest at the time the sample was taken and refused to submit to a test, he would have been subject to having a sample of his blood taken without his consent or a warrant." *State v. Trice*, 747 S.W.2d 243, 246 (Mo.App. W.D. 1988); citing *Setter*, at 16; "The admissibility of blood samples retrieved

through a warrantless search without consent comports with constitutional due process where defendant has first been arrested." *State v. Trumble*, 844 S.W.2d 22, 23 (Mo.App. W.D. 1992); "Therefore, under the aegis of *Schmerber*, obtaining blood from an arrestee on probable cause without a warrant and without actual consent does not offend the constitutional guarantees of due process or Fourth and Fourteenth Amendment right of freedom from unreasonable search and seizure." *Id.* at 23-24.

"Exigent circumstances" exception to the warrant requirement

While *Schmerber* casts its decision in terms of the "search incident to arrest" exception to the warrant requirement, it has since been read as an application of the "exigent circumstances" exception. In *U.S. v. Berry*, 866 F.2d 887 (6th Cir.1989), the Sixth Circuit United States Court of Appeals applied the "exigent circumstances" exception to the warrant requirement, approving a warrantless blood sample taken from an unconscious defendant who was involved in a motor vehicle accident. "Because evidence of intoxication begins to dissipate promptly, it is evident in this case that there were exigent circumstances indicating the need to take such action." *Id.* at 891.

Shortly after the *Berry* decision, the Fourth Circuit United States Court of Appeals applied the "exigent circumstances" exception to allow warrantless breath tests in driving while intoxicated cases in *U.S. Reid*, 929 F.2d 990 (4th Cir. 1991). "Alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible." *Reid*, at 993; citing

Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 623 (1989). "Time is of the essence when testing for alcohol in the bloodstream. The combination of these factors sets out exigent circumstances which are sufficient to require that the police be allowed to test drunk drivers without first having to obtain a warrant." *Reid*, at 994.

The Ninth Circuit United States Court of Appeals reached a similar conclusion, recognizing the "exigent circumstances" exception in *U.S. v. Chapel*, 55 F.3d 1416 (9th Cir. 1995). "Before a law enforcement officer may lawfully take a blood sample without consent or a warrant, he or she must have probable cause to believe that the suspect has committed an offense of which the current state of one's blood will constitute evidence." *Id.* at 1419.

In *State v. Lerette*, 858 S.W.2d 816 (Mo.App.W.D. 1993), Missouri recognized the "exigent circumstances" exception to reverse the trial court's suppression of a blood sample taken without consent, following the reasoning of *Berry* and *Reid*. In *Lerette*, defendant was involved in a single vehicle accident and taken to the hospital. Defendant was unconscious and thereby unable to communicate. The police directed hospital personnel to draw a blood sample prior to his arrest, without consent or a search warrant. In reversing the trial court's suppression of the blood test, the Court ruled, "Although the *Schmerber* ruling was primarily couched in terms of the 'search incident to arrest' exception, there were also exigent circumstances present in that any delay caused by having to obtain a warrant would have 'threatened the destruction of evidence.'" *Id.* at

818. The Court found the reasoning of *Berry* and *Reid* to be persuasive in recognizing the "exigent circumstances" exception:

> Considering that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence, this court finds that there were exigent circumstances warranting [police officer's] actions and, as such, it would have been unreasonable to require him to take the time to obtain a search warrant.

Lerette, at 819.

The exigency involved in driving while intoxicated cases was discussed once again in *Murphy v. Director of Revenue*, 170 S.W. 3d 507 (Mo.App. W.D. 2005):

> In *Lerette* we recognized that the warrantless draw of blood, without consent, does not violate the Fourth Amendment's prohibition of unreasonable seizure when exigent circumstances exist. Exigent 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." [citing *Lerette*, at 819] This judicially crafted exception to traditional Fourth Amendment protections is necessary to ensure that the purpose of the criminal law being enforced is not frustrated - the purpose being to punish drunk drivers with criminal sanctions of imprisonment and fines.

Murphy, at 514.

In his Treatise on the Fourth Amendment, Professor Wayne LaFave discussed the exigency involved in quickly obtaining blood alcohol evidence. Professor LaFave points out that the Court in *Schmerber* concluded that while a search warrant is ordinarily required "where intrusions into the human body are concerned," no warrant was needed under the facts presented because the officer quite reasonably believed there was a need to take the test before the percentage of alcohol in the blood diminished. "This means, of course, that if the purpose of the test were merely to determine the arrestee's blood type, then a search warrant would be required." *2 W. LaFave, Search and Seizures Sec. 5.3(c)* (2d ed. 1987).

Professor LaFave compared the exigency involved in securing blood alcohol evidence to the situation involved in *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000 (1973), where the United States Supreme Court approved a warrantless and nonconsensual search for fingernail scrapings. In that case, Murphy voluntarily appeared at the police station for questioning in connection with the strangulation murder of his estranged wife. The police noticed a dark spot on Murphy's finger, which they suspected was dried blood. Murphy refused a police request to take fingernail scrapings. The police then proceeded to take the sample without his consent and without a search warrant. Tests of the scrapings ultimately revealed the presence of skin and blood cells from the victim, and Murphy was later arrested and convicted of murder. The Court ruled the search was constitutionally permissible because of the "ready destructibility of

the evidence." The Court held that the circumstances "justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." *Id.* at 296.

In comparing the two situations, Professor LaFave concluded that the case for permitting the taking of a blood sample upon probable cause that the defendant is intoxicated is stronger than the case for the search conducted in *Cupp*. In the blood sample case the "evanescent character of the evidence is inherent in its nature and does not depend upon any motive of the defendant to destroy it." *2 W. LaFave, Search and Seizures Sec. 5.4(b)* (2d ed. 1987).

Trial court erred in applying a narrow interpretation of Schmerber

In granting the defendant's motion to suppress, the trial court ruled that exigent circumstances did not exist because this was a routine driving while intoxicated case where the "special facts" of *Schmerber* were not present. (L.F. 17). Specifically, the trial court ruled that since the defendant was not involved in an accident that resulted in injuries requiring emergency medical treatment, *Schmerber* is not applicable. (L.F. 17). The trial court erred in applying an extremely narrow interpretation of *Schmerber*.

While no Missouri court has ever addressed this precise issue, the proper analysis was applied by the Wisconsin Supreme Court. The Wisconsin Supreme Court confronted the issue of how best to interpret *Schmerber* in *State v. Bohling,* 494 N.W.2d 399 (Wis. 1993), where the Court explained that *Schmerber* could be interpreted in one of two

ways. A broad interpretation would be that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related crime. Alternatively, a narrow interpretation would be that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw. The Wisconsin Supreme Court determined that the more reasonable interpretation of *Schmerber* was the broad interpretation:

> A logical analysis of the *Schmerber* decision indicated that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's blood stream diminishes over time. The fact that an accident occurred and that the defendant was taken to the hospital did not increase the risk that evidence of intoxication would be lost. A hospital trip to another location at which a medically qualified person is present is standard procedure for taking a blood sample in a drunk driving case, regardless of whether an accident occurred.

Bohling, at 402-403.

In *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), the Wisconsin Supreme Court approved nonconsensual and warrantless blood draws in routine driving while intoxicated cases, even in situations where the defendant voluntarily submits to a breath test. In that case, the defendant was pulled over in a routine traffic stop. After the police officer noticed signs of intoxication, the defendant was arrested for operating a motor vehicle

while intoxicated. At police headquarters the defendant agreed to voluntarily submit a sample of his breath, which revealed a blood alcohol level of .09%. After the defendant voluntarily provided the breath sample, the officer then asked for a blood sample. The defendant refused to voluntarily provide a sample of his blood. After the refusal, the officer transported defendant to the hospital and obtained a sample of his blood without his consent and without a search warrant. The undisputed facts were that the officer did not attempt to obtain a search warrant. *Id.* at 374.

The Wisconsin Supreme Court held that the dissipation of alcohol from the bloodstream constituted sufficient exigency to justify the warrantless draw of defendant's blood, even though the officer had already obtained a breath sample. The Court ruled the breath sample did not change the fact that alcohol continued to dissipate from defendant's bloodstream, and the officer might have reasonably believed that it was necessary to secure additional evidence of defendant's level of intoxication without a warrant in order to prevent needed evidence from being destroyed. Thus, it is the nature of the evidence sought that determines the exigency to allow for a warrantless search. *Id.* at 376- 379.

In *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), the Minnesota Supreme Court agreed with the Wisconsin Supreme Court's analysis of *Schmerber*. "While the Supreme Court noted other facts in *Schmerber*, such as the fact that an accident occurred and that the defendant was taken to a hospital, the other facts 'did not increase the risk that evidence of intoxication would be lost.'" *Shriner* at 548, citing *Bohling* at 402. The Minnesota Supreme Court stated that the language of *Schmerber* is "properly analyzed as

indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving." *Shriner* at 547, FN9.

The Missouri Court of Appeals correctly applied the most reasonable interpretation of *Schmerber* in this case. In reversing the trial court's ruling, Judge Dowd wrote for the unanimous Court:

> In *Faust*, *Berry*, and *Lerette*, where the courts followed *Schmerber* in applying the exigent circumstances exception to the warrant requirement, the courts did not require any "special facts" to justify the application of the exigent circumstances exception. Instead, they merely rely on the evanescence of blood alcohol concentrations as creating exigent circumstances such that no warrant is needed to conduct a search. We note both *Berry* and *Lerette* involved defendants who were unconscious or unable to give consent, but with respect to getting consent while evidence of alcohol is metabolized, an inability to give consent is effectively the same as a refusal of consent; the police are forced to either get a warrant or justify a blood test under exigent circumstances. We have no reason to require "special facts" in addition to the facts that the officer had ample cause to reasonably believe defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

State v. Tyler G. McNeely, Mo. App. E.D. #96402, June 21, 2011, p.8-9. (Robert G. Dowd, Jr., Kurt S. Odenwald and Gary P. Kramer, concurring.) The Missouri Court of Appeals applied the correct analysis. "Special facts" are not required to justify a warrantless blood draw.

Police officer's ability to apply for a search warrant does not diminish the exigency

In ruling that exigent circumstances did not exist to justify the warrantless search, the trial court relied on the fact that "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant." (L.F. 17). The trial court acknowledged that the alcohol in defendant's blood was being metabolized. (L.F. 19). However, the trial court concluded that since a search warrant could have been procured in a timely manner, no exigency existed. (L.F. 18-19). This raises a troubling issue, as it would then logically follow that if, for whatever reason, a search warrant **could not** have been obtained in a timely manner (i.e.; prosecutor or judge not immediately available), exigent circumstances would then suddenly exist. Nevertheless, the trial court's focus on the possibility of obtaining a search warrant was misplaced.

Recently, the Oregon Supreme Court flatly rejected an approach that would have required the prosecution to prove the arresting officer could not have obtained a warrant in a timely fashion. In *State v. Machuca*, 227 P.3d 729 (Or. 2010), the Oregon Supreme Court ruled that "when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been

obtained without sacrificing that evidence." *Id.* at 736. The Court pointed out the inescapable fact that "evidence is disappearing and minutes count." *Id.* The Oregon Supreme Court correctly held that the court's focus should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.*

The Minnesota Supreme Court reached a similar conclusion, rejecting a "totality of the circumstances" approach to determining whether exigent circumstances exist to support warrantless blood draws in *State v. Shriner (supra).* Rejecting the contention that exigent circumstances are not present if it is possible to get a warrant before all the evidence is destroyed, the Court "recognized that a warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant." *Id.* at 548. The Court further held that requiring police officers to predict how much time it may take to obtain a search warrant would place an unreasonable burden on law enforcement, noting that a police officer has no control over a judge's availability. *Id.* at 549.

The Minnesota Supreme Court also rejected an argument that exigent circumstances did not exist because there was a procedure available to obtain a search warrant over the telephone. The Court ruled that an officer facing the need for a telephonic search warrant cannot be expected to know how much delay will be caused by following the procedures necessary to obtain such a warrant. *Id.* at 549. "And during the

time taken to obtain a telephonic warrant, it is undisputed that the defendant's body is rapidly metabolizing and dissipating the alcohol in the defendant's blood." *Id.*

The Fourth Circuit United States Court of Appeals reached the same conclusion in *U.S. v. Reid* (*supra)*. *Reid*, which was cited with approval in the Missouri case of *State v. Lerette (supra)*, likewise held that even if there is a procedure available to obtain a search warrant over the telephone, exigency still exists. "At first blush, this argument is convincing. However, analysis of the intricate requirements of [the procedure] shows that the existence of the rule does not alter the exigency of the situation." *Reid*, at 993. The Court detailed the procedures involved in applying for a warrant over the telephone, including preparing documents and reading the documents verbatim to a magistrate judge. "Obviously, compliance with these rules takes time. Time is what is lacking in these circumstances." *Id.*

Turning to the case at bar, it could also appear at first glance that since a search warrant could be obtained over a fax machine, no exigency existed. However, Sgt. Blaine Adams, a 23 year veteran of the Missouri State Highway Patrol, testified that he has applied for search warrants in driving while intoxicated cases on numerous occasions. (Tr. 25). In his experience, obtaining a search warrant in driving while intoxicated cases usually takes approximately two hours (Tr. 26-27). Sgt. Adams also testified that with a driving while intoxicated arrest, evidence is being destroyed with each passing minute. (Tr. 24). Sgt. Adams testified that the generally accepted elimination rate of alcohol is approximately .015% - .020% per hour. (Tr. 20).

Obviously, obtaining a search warrant in the middle of the night takes time, even with fax machines. After a person suspected of driving while intoxicated refuses a breathalyzer test, the arresting officer has to call a prosecutor. The prosecutor then has to arrange to meet with the arresting officer in order to fill out the necessary paperwork for the search warrant. The prosecutor then must call a judge and explain the situation. Next, the search warrant must be faxed to the judge. The judge must then read, approve, and sign the search warrant. After signing the warrant, the judge must fax it back to the prosecutor. The arresting officer must then take the search warrant, along with the defendant, to the hospital. Finally, the officer will direct medical personnel to draw the blood. Just as the Court in *Reid* stated, "Obviously, compliance with these rules takes time. Time is what is lacking in these circumstances." *Id.* at 993.

James Chenault, Senior Attorney for the Missouri Department of Revenue, commented on this topic in a recent article. Mr. Chenault points out that experience has revealed that there can be wide discrepancies from county to county concerning how quickly a warrant can be obtained, if at all. However, the exigency of the circumstances is determined not on the basis of whether a warrant could be obtained, but rather by the fact that getting a warrant will cause a delay in obtaining a sample. *"The Propriety of Warrantless Blood Draws and the 'Right to Refuse' in Light of Amendments to Section 577.041," James Chenault, March 2011.*

Fourth Amendment was not violated

There can be no dispute that Winder had probable cause to arrest the defendant for driving while intoxicated. The alcoholic content of the defendant's blood was relevant and necessary evidence. At the time of Winder's initial encounter, the alcohol was quickly dissipating from the defendant's bloodstream. The defendant's blood was drawn in a hospital environment in a medically approved manner. Under these circumstances, this was certainly a reasonable search and seizure under the Fourth Amendment.

MISSOURI IMPLIED CONSENT LAW DOES NOT PROHIBIT NONCONSENSUAL AND WARRANTLESS BLOOD DRAWS IN DRIVING WHILE INTOXICATED CASES

Purpose of Missouri Implied Consent Law

Sections 577.020 through 577.041, RSMo. 2000, consist of what is commonly referred to as the "Missouri implied consent" law. The theory behind the implied consent law is "that the use of public streets and highways is a privilege and not a right, and that a motorist by applying for and accepting an operator's license 'impliedly consents' to submission to a chemical analysis of his blood alcohol level when charged with driving while intoxicated." *Gooch v. Spradling*, 523 S.W.2d 861, 865 (Mo.App.1975).

The implied consent law was passed with the purpose of increasing the use of blood alcohol evidence in driving while intoxicated cases. The Missouri Supreme Court has stated 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). 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 (1990).

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 or her blood, breath, or urine. Section 577.020 states, in relevant part:

> 1. Any person who operates a motor vehicle upon the highways of this state shall be deemed to have consented to, subject to the provisions of sections 577.019 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 persons blood, pursuant to the following circumstances:

(1) If the person is arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition;…

The test shall be administered at the direction of the law enforcement officer whenever the person has been arrested or stopped for any reason.

Section 577.020.1(1), RSMo. Cum. Supp. 2009.

This means that if a person is arrested for driving while intoxicated in the State of Missouri, a blood sample may be taken without consent ***unless*** the provisions of Sections 577.019 through 577.041 prohibit it. Prior to the amendment in the last legislative session, Section 577.041 included such a prohibition. In what is commonly referred to as the "refusal" provision of the implied consent law, Section 577.041 stated, in relevant part:

If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, 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... (emphasis added)

Section 577.041.1 RSMo. Cum. Supp. 2009.

This "refusal" provision further provides for the revocation of a driver's license for failure to submit to a chemical test. The purpose of this provision is to punish drunk drivers for refusing a test. "Therefore, this section is more consistently read as providing a resource for the state in the prosecution of drunk driving cases rather than creating a 'right' for an arrested motorist to refuse the test." *Trumble (supra)*, at 24.

Susan Glass, Traffic Safety Resource Prosecutor, recently discussed the purpose of the implied consent law in an article that appeared in *Traffic Safety News*, September, 2010. "There is a common misconception that implied consent statutes were enacted in response to the *Schmerber* decision. It is argued that states enacted these provisions to protect their citizens from the warrantless blood draws that *Schmerber* allowed. This is simply incorrect." Susan Glass points out that the first implied consent provision in the nation was enacted by New York in 1953 - thirteen years before the *Schmerber* decision. By the time Missouri adopted the implied consent law in 1965, and still a year before *Schmerber*, fourteen other states had enacted similar provisions. "*Warrantless Blood Draws: Are They Now Authorized in Missouri?"* Susan Glass, Traffic Safety News, September, 2010.

Clearly, the overall purpose of the Missouri implied consent law is to curtail drunk driving. The purpose of the "refusal" provision of the Implied Consent law is to punish drunk drivers for refusing a chemical test.

Effect of removal of words "none shall be given" from Section 577.041

In 2010 the statute was amended to remove the words **"none shall be given and,"** effective on August 28, 2010. The statute now simply reads:

> If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then evidence of the refusal shall be admissible...

Section 577.041.1 RSMo. Cum. Supp. 2010.

The significance of the "refusal" provision of Section 577.041, and specifically the words **"none shall be given,"** has been addressed by Missouri courts on many occasions. The courts have concluded that the words "none shall be given" prohibited law enforcement officers from obtaining warrantless blood tests after a person expressly refuses a chemical test.

In *State v. Ikerman*, 698 S.W.2d 902 (Mo.App. E.D. 1985), the Court upheld the suppression of a blood test because it was obtained in violation of the "refusal" provision of Section 577.041. The Court first examined the text of Section 577.020, and found that the "implied consent" statute would allow a warrantless and nonconsensual blood test without offending constitutional guarantees. The Court then directed its attention to the effect of the "refusal" statute. The Court noted that the language of Section 577.041

specifically states that if a person refused a test, "then none shall be given." The Court ruled it was this very provision that allows a driver to expressly refuse to take a chemical test. "Thus we conclude that a blood sample may be taken without a warrant to test for intoxication without offending federal constitutional guarantees and Missouri statutes where the defendant is under arrest and has not negated his implied consent under Section 577.020 by invoking his right of refusal under Section 577.041." *Id.* at 906.

In *State v. Trumble*, 844 S.W.2d 22 (Mo.App. W.D. 1992), the Court recognized the language "none shall be given" has been interpreted to mean that a motorist has the "present, real option either to consent to the test or refuse it." *Id.* at 24, citing *Gooch*, *supra* at 865. "Furthermore, law enforcement officers are significantly limited by Section 577.041 which states that when a motorist declines to comply with the request for a test, none shall be given." *Trumble,* at 24.

Other Courts have followed the same rationale: "Section 577.041 provides that if an arrestee makes an informed refusal to submit to a chemical test, 'then none shall be given.' Accordingly, an officer is without authority to administer the test once it is refused." *Blanchard v. Director of Revenue,* 844 S.W.2d 589 (Mo.App. E.D. 1993); "It is well-settled that once a driver makes an informed refusal to submit to a breath test or other chemical test, 'none shall be given.'" *Phillips v. Wilson,* 66 S.W.3d 176 (Mo.App. W.D. 2002); "Once implied consent is negated by an arrested driver's invocation of the right of refusal under Section 577.041, law enforcement's authority to draw blood is expressly cut off by the legislative directive that 'none shall be given.' In other words,

the driver's express refusal vitiates implied consent." *Murphy v. Director of Revenue*, 170 S.W.3d 507 (Mo.App. W.D. 2005).

In *State v. Smith*, 134 S.W.3d 35 (Mo.App. E.D. 2003), the defendant was arrested for driving while intoxicated after a routine traffic stop. After the defendant refused to voluntarily submit a breath sample, the arresting officer obtained a search warrant for a blood sample. The trial court suppressed the results of the blood test, ruling that the words "none shall be given" precluded the state from obtaining a search warrant. In reversing the ruling of the trial court, the Eastern District Court of Appeals held the clause "none shall be given" prohibited warrantless tests authorized by law enforcement officers, but did not preclude a court from issuing a search warrant to obtain a blood sample. Reading Section 577.020 with Section 577.041, the Court concluded that the only actor to whom this clause is directed is a law enforcement officer. "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." *Id.* at 40.

The holding in *Smith* could not be clearer. The words "none shall be given" were directed to law enforcement officers. It was this phrase that precluded law enforcement officers from obtaining warrantless blood tests after a suspected drunk driver refused a chemical test. Now that the legislature has removed the words "none shall be given" from Section 577.041, the only reasonable interpretation is that warrantless blood draws are now authorized.

In the Order and Judgment, the trial court concluded that the effect of the legislative amendment simply removes any doubt that a blood test can now be compelled by search warrant after a refusal, making the statute consistent with the holding in *Smith* (L.F. 18). In the very next paragraph, however, the trial court acknowledges that removal of the words "none shall be given" would reverse the ruling in *Ikerman*, thereby allowing the nonconsensual and warrantless blood draw in that case. (L.F. 18). The trial court's reasoning is flawed. On the one hand, the trial court acknowledges the significance of the amendment - that deleting the words "none shall be given" has the legal effect of allowing the police to obtain a warrantless blood draw without consent. But at the same time, the trial court maintains, in effect, that the amendment was simply a legislative housekeeping exercise to make the statute consistent with the holding in *Smith.*

The legislature is presumed to know the state of the law when it enacts a statute. *State v. Prince*, 311 S.W.3d 327, 334 (Mo.App.W.D. 2010). The legislature is also presumed to be aware of existing case law. *Hudson v. Director of Revenue*, 216 S.W.3d 216, 222-223 (Mo.App. W.D. 2007). Moreover, the legislature is presumed to have intended its statutory enactments to have meaning and purpose. *State v. Condict*, 65 S.W.3d 6, 13 (Mo.App. S.D. 2001). Given the state of the law, the only reasonable interpretation of the amendment was to authorize warrantless blood draws.

Now that the legislature has amended Section 577.041 to specifically remove the words, "none shall be given," there is no longer a barrier which prohibits law

enforcement officer from obtaining warrantless blood draws after a person refuses to consent to a chemical test.

CONCLUSION

Obtaining a nonconsensual and warrantless blood sample from a person suspected of driving while intoxicated is not an unreasonable search and seizure under the Fourth Amendment. The only prohibition under Missouri law that prevented law enforcement officers from obtaining such samples was eliminated when the legislature amended Section 577.041 RSMo, to remove the words "none shall be given." The Eastern District Court of Appeals was correct in reversing the trial court's order granting Respondent's motion to suppress. The order of the trial court should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, John N. Koester, Jr., hereby certify the following. The original and nine copies of this brief have been mailed this date to the Missouri Supreme Court. The brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7890 words, which does not exceed the words allowed for an appellant's brief.

The CD filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus - free.

Two true and accurate copies of the attached brief and a disk containing a copy of the brief were mailed, postage prepaid, this 8th day of July, 2011, to the attorney for Respondent:

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APPENDIX

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