PD-0981-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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ABEL ACOSTA
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No. PD-0981-16

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

KEITH BALKISSOON
Petitioner

v.

The State of Texas
Respondent

On Appeal In Case Number 11-1434-K26
From the 26th District Court of Williamson County
The Hon. Billy Ray Stubblefield, Judge Presiding
Third Court of Appeals No. 03-13-00382-CR

Petition for Discretionary Review

Submitted by:

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FILED IN
COURT OF CRIMINAL APPEALS

September 27, 2016

ABEL ACOSTA, CLERK

Oral Argument Requested

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Certificate of Parties

Pursuant to Rule 68, Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

Petitioner

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State Prosecuting Attorney
Lisa C. McMinn

Trial Counsel:

Jana McCowen
Geoffrey Puryear
Deni Garcia

Index of Authorities

Federal Cases:

Texas Cases:

Federal Constitution:

Statement Regarding Oral Argument

Oral Argument is requested and would assist the Court in answering questions regarding the division in the courts of appeals on the issue of exigent or emergency circumstances.

Statement of the Case

Pursuant to Tex.R.App.Pro. 68.4(d), the following is a brief general statement of the case:

> Petitioner, Keith Balkissoon, was charged by indictment with the offense of DWI 3rd, a felony, in Cause No. 11-1434-K26 in the 26st District Court of Williamson County, Texas. He was convicted in said cause and was sentenced to 4 and one half years incarceration, and a $10,000 fine. The Court of Appeals modified the judgement below to delete the deadly weapon finding, but affirmed the judgment.

Statement of Procedural History

Pursuant to Tex.R.App.Pro. 68.1(d), Petitioner would show the following:

> The Third Court of Appeals denied Petitioner's appeal on April 13, 2016. The Third Court denied the Motion for Rehearing on July 26, 2016.
>
> The Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.
>
> The Third Court of Appeals decision in this case conflicts with another court of appeals' decision on the same issue.

The Third Court of Appeals has decided an important question of state and federal law that has not been, but should be, settled by this Court.

The Third Court of Appeals has misapplied a statute in deciding this case.

Grounds for Review

Pursuant to Tex.R.App.Pro. 68.4(f), the following are the reasons this petition should be heard:

1) Must the court of appeals make an express finding of 'abuse of trial court discretion' to ignore explicit fact findings made by the trial judge in the record?

2) Did the court of appeals err in finding exigent circumstances existed?

3) Can law enforcement create their own exigent circumstances?

No. PD-0981-16

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On Appeal In Case Number 11-1434-K26
From the 26th District Court of Williamson County
The Hon. Billy Ray Stubblefield, Judge Presiding
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Petition for Discretionary Review

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Keith Balkissoon, Petitioner in the above styled and numbered cause, by and through Ariel Payan, his undersigned attorney of record, and respectfully files this "Petition for Discretionary Review," filed pursuant to Tex.R.App.Pro. 68.

Argument

1) Must the court of appeals make an express finding of 'abuse of trial court discretion' to ignore explicit fact findings made by the trial judge in the record?

The opinion issued by the Third Court of Appeals in this case relies entirely on a finding that exigent circumstances existed to substantiate Trooper Reisen's actions in conducting an invasive search of Petitioner without his consent or a warrant to do so. The Third Court stated, "On this record, the district court would not have erred in concluding that exigent circumstances were present here that justified Reisen's decision to proceed without a warrant and in denying the motion to suppress on that ground." Slip op. At 11. At no point in the opinion does the Third Court state or find that the trial judge abused his discretion in making any of his fact findings in the record. This decision denies the most basic of appellate review tenets, to give almost total deference to the factual decisions made by the trier of fact below. In so doing the Third Court has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States, and the court of appeals decision in this case conflicts with another court of appeals' decision on the same issue.

A reviewing court looks at a trial court's denial of a motion to suppress under a bifurcated standard of review. Turrubiate v. State, 399 S.W.3d 147, 150 (Tex.Cr.App. 2013). The appellate court reviews the trial court's factual findings for an abuse of discretion but reviews the trial court's application of the law to the facts de novo. Id. In reviewing the trial court's decision, the courts do not engage in their own factual review; rather, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. St. George v. State, 237 S.W.3d 720, 725 (Tex.Cr.App. 2007). Therefore, the appellate court gives almost total deference to the trial court's rulings on (1) questions of historical fact, especially when based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. See Ford v. State, 158 S.W.3d 488, 493 (Tex.Cr.App. 2005). Appellate courts review de novo "mixed questions of law and fact" that do not depend upon credibility and demeanor. Id. If the trial court's decision is correct under any theory of law applicable to the case, it will be sustained. Armendariz v. State, 123 S.W.3d 401, 404 (Tex.Cr.App. 2003) (en banc). Additionally, the legal question whether the totality of circumstances justified the officer's actions is reviewed de novo. Hudson v. State, 247 S.W.3d 780, 784 (Tex.App.-Amarillo 2008, no pet.).

Here, the issue of whether any evidence was presented to the trial court on an issue in controversy is a question of fact, not a purely legal question, or a mixed question of law and fact. The trial judge stated at the conclusion of the hearing:

> COURT: And I have read Davis, and actually find Ms. Garcia's arguments, together with the previous arguments by Mr. Puryear, to be persuasive. I believe that, obviously, these constitutional rulings are retroactive; however, I believe the exclusionary rule is intended to have a punitive or corrective effect. And in this case, where the officer was acting under the statutory mandate in drawing the blood, there would be no purpose served to apply the exclusionary rule, therefore, I deny the Motion to Suppress. Other results may have occurred depending on where the events transpired; in other states where it's discretionary, for instance, there may be other results.
>
> And are you all –
>
> DEFENSE: Just to clarify, Your Honor. You are not -- *your ruling is not based upon exigent circumstances but, rather, up*on good faith. Is that correct?
>
> COURT: *That's correct.*
>
> DEFENSE: Thank you, Your Honor.
>
> COURT: *I specifically asked the Trooper whether there were any circumstances other than the ones he had stated, and he said no.*

RR Vol. 4, pg 44. [Emphasis added]. The finder of fact made a specific finding on the record that no exigent circumstances existed in this case. A reviewing court abuses its discretion when it overturns a specific finding by the trial court without substantiation. Duff

v. State, 546 S.W.2d 283 (Tex.Cr.App. 1977); Moore v. State, 826 S.W.2d 775, 777 (Tex.App.—Houston [14th Dist.] 1992, pet. ref'd); Morris v. State, 696 S.W.2d 616, 620 (Tex.App.—Houston [14th Dist.] 1985), aff'd, 739 S.W.2d 63 (Tex.Crim.App.1987).

2) Did the court of appeals err in finding exigent circumstances existed?

The court of appeal's opinion found that exigent circumstances existed at the time Trooper Reisen decided not to get a warrant to secure Petitioner's blood sample. As the basis for this, the court noted that Williamson County does not have 24 hour magistration service, that the stop happened after 2a.m., and that the trial judge could reasonable infer that no magistrate would be on duty. Therefore, Reisen would have to go through the 'lengthy process' of obtaining a warrant, and that this process took him 4 hours 'one time.' The appellate court went on to compare that 'lengthy process' to the warrantless process and therefore conclude that obtaining a warrant would have 'significantly increase the delay' in the blood draw. Slip op. 9-10.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, the reviewing court should look to the totality of circumstances. See Missouri v. McNeely, ---U.S. ----, 133 S.Ct. 1552, 1559 (2013). The court applies this "finely tuned approach" to Fourth Amendment reasonableness in this context because the

police action at issue lacks "the traditional justification that ... a warrant ... provides." See id. (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 347 n. 16, 121 S.Ct. 1536 (2001)). In the absence of a warrant, "the fact-specific nature of the reasonableness inquiry" demands that [the court] evaluate each case of alleged exigency based "on its own facts and circumstances." Id. (quoting Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417 (1996), and Go-Bart Imp. Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153 (1931)).

As the Supreme Court stated in McNeely. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." McNeely, 133 S.Ct. 1561. But, in McNeely, the Supreme Court held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." McNeely, 133 S.Ct. at 1568.

The "exigent circumstances" exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Kentucky v. King, 563 U.S. ----, 131 S.Ct. 1849, 1856 (2011) (internal quotations omitted). A variety of scenarios may give rise to circumstances sufficiently exigent to justify a warrantless search, the one most relevant to the

instant case being the prevention of the imminent destruction of evidence. See McNeely, 133 S.Ct. at 1558–59 (citing Cupp v. Murphy, 412 U.S. 291, 296, 93 S.Ct. 2000 (1973), and Ker v. California, 374 U.S. 23, 40–41, 83 S.Ct. 1623 (1963) (plurality opinion)).

In the instant case, the suppression hearing was held during the first day of the jury trial. The State called one witness, the trooper, and the defense called one witness a Williamson County Magistrate. On direct exam of the trooper the only information regarding the metabolization of alcohol presented was the following:

> Q: What's your understanding of alcohol concentrations in the blood? Is that something that's static, or is that something that you lose as time goes on?
>
> A I'll lose it as time goes on.
>
> Q Is that just the body metabolizing the alcohol?
>
> A Yes, sir.

R.R. Vol. 4 pg. 12-13. And at the end of his direct the prosecutor asked the following:

> Q Okay. And again, is it your understanding that this whole time blood evidence in the form of an alcohol concentration, is it staying static or is it being lost?
>
> A It's depleting.

R.R. Vol. 4 pg. 17. This is all the evidence that the trial judge had regarding this issue, in addition the State did not ask for the trial court to take judicial notice of anything. This is

insufficient evidence to prove the rate of loss over time, and how pressing the issue was to collect Appellant's blood. In addition, no evidence was presented of the amount of time that had actually passed in the collecting of Petitioner's blood, or how long it took to get a blood sample at the time the arrest took place (June of 2010), or how long it would take to get a warrant. The State acknowledged in its own brief the lack of clarity in Riesen's testimony about the length of time it takes to secure a warrant. See Appellee's Brief pg. 10, FN 2.

When the State attempted to produce evidence to substantiate the exigent circumstances that they were arguing existed, they produced the following evidence:

Q So at the time you took Mr. Balkissoon's blood, you were under the understanding that the law commanded you to do so in his specific circumstance. Is that what I'm hearing you say?

A Yes. Yes, sir.

Q Okay. And that's because he had two prior convictions?

A He did.

Q Okay. And at this point, you could have gotten a search warrant. Correct?
A I could have.

Q Why didn't you?

A There was no need to. The law -- the law was behind me taking the blood sample without a search warrant.

R.R. Vol. 4 pg. 14-15. At no point does Trooper Reisen say there were exigent circumstances. No evidence was ever produced that some emergency existed that kept him from securing a warrant. Indeed on cross examination the trooper stated:

> Q . . .You made no effort at any time to obtain a search warrant.
>
> A No, I did not.

R.R. Vol. 4 pg. 20. Finally, the trial judge asked:

> COURT: Okay. So, Trooper, there were no other -- or perhaps I misunderstood your testimony. There were no other circumstances that would have caused you to seek a warrant or caused you to immediately take the blood other than what you've stated?
>
> WITNESS: No. No, sir. No, there wasn't.

R.R. Vol. 4 pg. 20.

The defense went on to present Magistrate Wayne Porter in order to substantiate that a method existed for the trooper to secure a timely warrant. The magistrate testified:

> Q All right. And as part of your duties in that employment, have you had occasion to be approached by law enforcement -- and I'll just narrow it -- by the Department of Public Safety concerning search warrants for blood draws?
>
> A Yes, I have.
>
> Q And is it your experience -- we've already had some testimony, I don't know if you heard it, that covered a lot of this, but -- these requests can come day or night?

A That's right.

Q And you, to the extent that you are able to, have made yourself available for these -- for these reviews for the search warrant?

A That's correct. I don't remember exactly how that started, but I am available.

Q And was that in place in October of 2011?

. . . .

A I'm sure it was, yeah.

Q And you're not the only magistrate. Is that correct?

A I'm not the only jail magistrate. That's correct.

R.R. Vol. 4, pg. 21-22. Even if there was no 24 hour magistrate 'on duty', there was a procedure in place to contact a magistrate. Porter was available to review a warrant request on the night of the incident. In addition, two other magistrates were also working at the time, and procedures were in place to call upon them to review a warrant at all hours. The State presented no evidence of how long this process actually took, only that the trooper did not attempt to utilize it.

Here the facts are not in dispute. No emergency existed, or if there was an emergency no evidence of an emergency was presented to the trial court. There is nothing in the record

which supports the trial judge's findings of exigency or the Third Court of Appeals' decision in affirming it. It is the State's burden to prove the exigent circumstance. Russell v. State, 717 S.W.2d 7, 10 (Tex.Cr.App. 1986). The traffic stop was routine, the investigation was routine, the only delay in processing Petitioner was an unknown time delay while the vehicle was being towed. The processing of a vehicle in a DWI is also routine. The state did not present any evidence of how long the delay was, and if this delay was substantial enough to warrant an 'emergency' situation for the exigency review. Therefore, without evidence there is nothing the trial judge can base his ruling on.

The fact that alcohol dissipates in the blood once drinking has ceased is not an exigent circumstance on its own. See, McNeely, 133 S.Ct. at 1568. Therefore, there must be some other factor which constitutes exigency. An exigent circumstance is an emergency situation, which allows law enforcement to bypass the need for an impartial magistrate to review the probable cause supporting the request for a warrant to conduct a search. No emergency existed, this was business as usual in Williamson County and as such, a finding of exigency in a routine procedure would create a 'small county' exception to the 4th amendment.

Two cases handed down by this Court on the same day exemplify the issue troubling the lower courts. In Cole, this Court found that an emergency existed that qualified as an exigent circumstance. In that case the defendant was involved in a automobile wreck that

included a fatality, and took multiple officers three hours to clear, before being able to take the suspect to get his blood drawn. See Cole v. State, 490 S.W.3d 918, 920-1 (Tex.Cr.App. 2016). "Law enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded." Cole, 490 S.W.3d at 927. This Court recognized the actual emergency that faced law enforcement.

In Weems v. State, – S.W.3d –, PDc0635c14 (Tex.Cr.App. May 25, 2016), this Court reached the opposite conclusion. In Weems, the defendant was involved in an accident, where witnesses saw him flee the scene. Defendant was found 40 minutes later hiding under another vehicle. Due to his injuries he was transported to a nearby hospital and law enforcement requested a blood draw from the hospital staff. The blood draw was not done until three hours after the accident. Weems, slip op., at 2. This Court held that no exigent circumstances existed due to the lack of evidence presented by the State. "We are therefore left with the inability to weigh the time and effort required to obtain a warrant against the circumstances that informed [law enforcement's] decision to order the warrantless blood draw." Weems, slip op., at 5.

Although both cases deal with an accident and a three hour delay in getting to a location where a blood draw was possible, Cole and Weems reach very different conclusions. Whereas, Cole shows through its facts that an 'all hands on deck' emergency existed in trying to process and reopen a road, Weems does not. Like the instant case, a 'routine' police matter does not equal an exigent circumstance. Here the State failed to prove exigency, and the Third Court of Appeals applied an incorrect standard in finding an emergency situation existed in this case.

3) Can law enforcement create their own exigent circumstances?

One of the factors enumerated in McNeely is whether there is other law enforcement able to provide assistance to the arresting officer to help speed up the process. The court of appeals decision relies, in part, upon a determination that there were no other officers available to assist the trooper with the arrest; and, therefore under a totality of the evidence he was justified in not attempting to get a warrant. Slip op. at 10. The other factors in McNeely require a determination of, "the procedures in place for obtaining a warrant", "the availability of a magistrate judge," and, "the practical problems of obtaining a warrant within a time frame that still preserves the opportunity to obtain reliable evidence." See McNeely, at 1568; Cole, 490 S.W.3d at 926.

The police may not create their own exigency to make a warrantless arrest or search. See Parker v. State, 206 S.W.3d 593, 598 n. 21 (Tex.Cr.App. 2006). Exigent circumstances do not meet Fourth Amendment standards if the government deliberately creates them. Id; and, Bonsignore v. State, --- S.W.3d ----2016 WL 3571274 (Tex.App. Ft. Worth June 30, 2016). The evidence presented at trial was that the trooper can call for local assistance, but he does not indicate whether he did this or not, nor what the response was.

> Q Okay. Can you describe for the Court how you typically conduct your DWI investigations?
>
> A Usually, it's by myself. I may or may not – Williamson County may or may not come back me up. But even if someone does come, it's my investigation. I do everything, myself.
>
> Q Okay. So nobody helped you out with warrant paperwork?
>
> A No.
>
> Q You wouldn't have a backup officer to, say, take the suspect to the hospital while you go procure the warrant?
>
> A No, I do not.

R.R. Vol. 4, pg. 16-17. The trooper works alone. The video of the trooper's interaction with Petitioner is in evidence. In the video, the trooper meets with a Williamson County Sheriff's officer during the arrest and sends them on their way. See State's Exhibit 1. Regardless of local assistance, the trooper would do all the work himself and not utilize

additional local resources. Therefore, this particular arrest is no different from his normal arrest procedures, it is not an emergency.

Other courts of appeals have determined that exigent circumstances did not justify a warrantless blood draw because the officer never tried to get a warrant and, there was no evidence that the officer could not have taken steps to obtain a warrant expeditiously. See, e.g., Burcie v. State, No. 08-13-00212-CR, 2015 WL 2342876, at 3 (Tex.App.—El Paso May 14, 2015, pet. filed) (not designated for publication); Bowman v. State, No. 05-13-01349-CR, 2015 WL 557205, at 11 (Tex.App.-Dallas Feb. 10, 2015, no pet.) (not designated for publication); Douds v. State, 434 S.W.3d 842, 855-56 (Tex.App.-Houston [14th Dist.] 2014) (en banc op. on reh'g), rev'd, 472 S.W.3d 670 (2015) (holding that appellant did not preserve Fourth Amendment complaint); Weems v. State, 434 S.W.3d 655, 666 (Tex.App.—San Antonio 2014, pet. granted, aff'd). Such is the case here, Trooper Reisen never even attempted to procure a warrant, relying solely on the Transportation Code and was unable to articulate any exigent circumstances to justify his actions. There was no evidence presented at trial or in the current record that substantiates a finding of exigency.

In addition, the Third Court focuses on the lack of 24 hour magistration and the testimony of Judge Porter that there were no magistrates on duty at the jail after hours. This is not a unique occurrence. An exigent or emergency situation (not to be confused with the

'emergency doctrine'), is required to prove an exception to the warrant requirement demanded by the Fourth Amendment. U.S. CONST. amend. IV; Riley v. California, --- U.S. ----, 134 S.Ct. 2473, 2482 (2014). The exigency exception operates cwhen the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.c McNeely, 133 S.Ct. at 1568. Exigency potentially provides for a reasonable, yet warrantless search cbecause cthere is compelling need for official action and no time to secure a warrant.c c A search "without prior judicial evaluation" may be reasonable "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime." Roaden v. Kentucky, 413 U.S. 496, 505, 93 S.Ct. 2796 (1973). No such emergency situation existed or was shown by the State in this case. Judge Porter testified that he was available at the time to provide assistance if asked, and there were two other magistrates who were also available to respond to these routine requests for warrants. R.R. Vol. 4, pg. 21-22.

Prayer

WHEREFORE, PREMISES CONSIDERED, KEITH BALKISSOON, Petitioner in the above styled and numbered cause respectfully prays that this Court grant this Petition for Discretionary Review, set this cause for oral argument so that this Court may grant any and all relief to which Petitioner is entitled.

Respectfully submitted,

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by: /s/ Ariel Payan
Ariel Payan
State Bar No. 00794430

Attorney for Petitioner

Certificate of Delivery

This is to certify that a true and correct copy of the above and foregoing "Petition for Discretionary Review" was hand-delivered, mailed postage pre-paid or transmitted via telecopier (*fax*) to the office of the District Attorney of Williamson County, Texas, and to the State Prosecuting Attorney's Office.

/s/ Ariel Payan

Ariel Payan

Certificate of Compliance

I hereby certify pursuant to T.R.A.P. 9.4(i)(3), the word count for this document, as determined by the word processing program is 3451 .

/s/ Ariel Payan
Ariel Payan

APPENDIX

2016 WL 1576240
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.
DO NOT PUBLISH
Court of Appeals of Texas,
Austin.

Keith Balkissoon, Appellant
v.
The State of Texas, Appellee
NO. 03–13–00382–CR
|
Filed: April 13, 2016

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT NO. 11–1434–K26, HONORABLE BILLY RAY STUBBLEFIELD, JUDGE PRESIDING

Attorneys and Law Firms
Keith Balkissoon, pro se.

Jana Duty, Lisa C. McMinn, for The State of Texas.
Before Justices Pemberton, Goodwin, and Field

MEMORANDUM OPINION

Bob Pemberton, Justice
***1** A jury convicted appellant Keith Balkissoon of the felony offense of driving while intoxicated and assessed punishment at four and one-half years' imprisonment and a $10,000 fine.[1] The district court rendered judgment on the verdict, which included an affirmative finding that Balkissoon had used or exhibited a deadly weapon during the commission of the offense. In two issues on appeal, Balkissoon asserts that the district court abused its discretion in denying his motion to suppress evidence related to the results of a warrantless blood draw and that the evidence is insufficient to support the jury's deadly-weapon finding. We will modify the district court's judgment to delete the deadly-weapon finding and affirm the judgment as modified.

BACKGROUND

At the hearing on the motion to suppress, the district court heard evidence that at approximately 2:00 a.m. on the night of October 7, 2011, Trooper Michael Reisen of the Texas Department of Public Safety had initiated a traffic stop on Balkissoon's vehicle after observing the vehicle "fail[ ] to yield [the] right of way out of a private drive" located along the access road of Highway 620 in Williamson County. During the course of the stop, Reisen explained, he concluded that Balkissoon had been driving while intoxicated and arrested him for that offense. Reisen subsequently asked Balkissoon for a sample of his breath or blood. According to Reisen, Balkissoon refused, and Reisen proceeded to have Balkissoon's blood drawn without his consent, based on Reisen's understanding that Balkissoon had two prior DWI convictions and that Texas law required Reisen to obtain a blood sample under those circumstances.[2] Reisen further testified that he "could have" obtained a search warrant for Balkissoon's blood but decided not to do so. When asked why he made this decision, Reisen testified that "[t]here was no need to. The law—the law was behind me taking the blood sample without a search warrant." Reisen added that it likely would have taken him "awhile" to obtain a warrant if he had decided to do so. He explained:

> It's a lengthy process because we have to book them in [to jail]; we have to do the paperwork; we have to e-mail the paperwork to a—we have to get a hold of a prosecutor; e-mail the paperwork to the

> prosecutor, who's got to e-mail it back to me. I've got to drive to the Judge's house; got to get him to read over it, sign it. Drive back to the jail; sign some paperwork to get him out of the jail to drive him to the hospital; wait at the hospital for a little bit in triage until a qualified technician comes down. They take the blood. I fill out the paperwork for the blood warrant, to seal it properly; put him back in my car, and get him back to the jail, and re-book him in.

When asked to estimate how long the above process took, Reisen testified that, on one occasion, it took him approximately four hours.

***2** Reisen also testified that "everything was prolonged" in this case because of what he characterized as Balkissoon's refusal to cooperate during the stop. For example, Reisen explained, Balkissoon refused to cooperate with Reisen regarding the disposal of Balkissoon's vehicle following his arrest. According to Reisen, the vehicle had to be either parked in a proper location, picked up by a friend, or towed, but Balkissoon "just would never answer the question." Eventually, Reisen testified, he had to "call[ ] a tow truck to pick it up."

Reisen further testified that he usually conducts DWI investigations without a partner and that during his investigations, personnel from "Williamson County may or may not come back me up." "But," Reisen added, "even if someone does come, it's my investigation. I do everything myself." Therefore, Reisen explained, when he needs to obtain a warrant, there is no one to help him complete the warrant paperwork and no other officer available to take custody of the suspect while he procures a warrant. According to Reisen, at the time of Balkissoon's arrest, he was aware that a DWI suspect's blood-alcohol concentration begins to diminish "as time goes on" and that, during the time that he would have spent obtaining a warrant in this case, the alcohol-concentration level in Balkissoon's blood would have been "depleting." When asked to describe how long it took him to obtain a sample of Balkissoon's blood without a warrant, Reisen testified, "Not long. As soon as I walked in [to the Williamson County Jail], we went right to the medical—I mean, after he got patted down and secured, we went right to the medical unit and took his blood right then and there."

Judge Wayne Porter, a magistrate in Williamson County, also testified during the suppression hearing. According to Porter, he works at the jail between 7:30 a.m. and 1:00 p.m. and is on call after hours to sign search warrants if requested by an officer. However, Porter explained that, after he leaves the jail for the day, "[t]here's nobody in the jail until the next morning." When the State asked Porter to confirm whether, after hours, "there is nobody on duty that is available for [officers] to go to for warrants," Porter testified, "That's correct." The State also asked Porter whether Williamson County had a "24–hour magistration service," similar to the one that exists in Travis County. Porter testified that it did not.

After hearing argument, the district court denied the motion to suppress. Acknowledging the applicability of *Missouri v. McNeely*, the case in which the United States Supreme Court held that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant,"[3] the district court nevertheless concluded that the evidence should not be suppressed because Officer Reisen had acted in good-faith reliance on the law as it existed at the time of Balkissoon's arrest. The district court explained: "I believe the exclusionary rule is intended to have a punitive or corrective effect. And in this case, where the officer was acting under the statutory mandate in drawing the blood, there would be no purpose served to apply the exclusionary rule, therefore, I deny the Motion to Suppress."

The evidence related to Balkissoon's blood-alcohol content was subsequently admitted at trial. According to the evidence presented, Balkissoon's blood-alcohol content at the time it was tested was .22 grams of alcohol per 100 milliliters of blood, almost three times the legal limit. Based on this and other evidence, which we discuss in more detail below, the jury convicted Balkissoon of driving while intoxicated and assessed punishment as indicated above. The district court rendered judgment on the verdict, and this appeal followed.

ANALYSIS

Constitutionality of warrantless, mandatory blood draw

***3** In his first issue, Balkissoon argues that the drawing of his blood without a warrant violated his Fourth Amendment right to be free from unreasonable searches and seizures and should have been suppressed for that reason.[4] In response, the State

argues that there were exigent circumstances in this case that justified the officer's decision to draw Balkissoon's blood without a warrant and that the district court's decision to deny the motion to suppress should be sustained on that ground.

Standard of review

We review a trial court's ruling on a motion to suppress for abuse of discretion.[5] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.' "[6] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[7] "The appellate court must apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations."[8] In this case, we review de novo the trial court's application of the law of search and seizure to the facts.[9]

The Fourth Amendment and exigent circumstances

The drawing of a person's blood is considered a search under the Fourth Amendment.[10] Consequently, a blood draw generally requires a search warrant, unless a "recognized exception" to the warrant requirement applies.[11] " 'One well-recognized exception,' and the one at issue in this case, 'applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.' "[12] One such exigent circumstance is preventing the destruction of evidence or contraband.[13] In DWI cases, the evidence that is at risk of destruction is a suspect's blood-alcohol content, which "begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[14] Accordingly, the Supreme Court held in *Schmerber v. California* that the warrantless collection of blood from a DWI suspect does not violate the Fourth Amendment in cases "when the officer 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.' "[15]

***4** More recently, however, the Supreme Court has clarified its holding in *Schmerber*, rejecting the argument that "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases."[16] Instead, the Court has held, "exigency in this context must be determined case by case based on the totality of the circumstances."[17] Although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," in other cases, "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[18] This is because "some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant."[19] If, under the circumstances of the case, "the warrant process will not significantly increase the delay before the blood test is conducted," there can be "no plausible justification for an exception to the warrant requirement."[20]

Cases in which a warrantless blood draw might be justified include those "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident" and "there was no time to seek out a magistrate and secure a warrant."[21] The Supreme Court has characterized such circumstances as "special facts" that could justify a warrantless blood draw.[22] However, the Supreme Court has also cautioned that "special facts" are not always required to justify a warrantless blood draw:

> [T]he fact that a particular drunk-driving stop is 'routine' in the sense that it does not involve " 'special facts,' " such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.[23]

As with other warrantless searches, the burden is on the State to prove that the warrantless blood draw was reasonable under the totality of the circumstances.[24] "We apply an objective standard of reasonableness in determining whether a warrantless search is justified, taking into account the facts and circumstances known to the police at the time of the search."[25]

In this case, the record supports a conclusion by the district court that the State satisfied its burden to prove that a warrantless blood draw was reasonable under the totality of the circumstances. These circumstances included the fact that, at the time of the offense, Williamson County did not have a "24–hour magistration service." What this meant, according to the testimony of Judge Porter, was that there was no magistrate on duty at the jail after hours. The record reflects that the traffic stop in this case occurred at approximately 2:00 a.m. Thus, the district court could have reasonably inferred that no magistrate would have been available at the jail to sign a search warrant for Balkissoon's blood and that, in order to obtain a warrant, Reisen would have needed to call the judge and arrange for a meeting. As Reisen explained in his testimony, obtaining a warrant was a "lengthy process." According to Reisen, it would have required him to: (1) transport Balkissoon to the county jail, where Balkissoon would first need to be "booked in" to the jail; (2) complete paperwork to obtain a warrant and have that paperwork reviewed and approved by a prosecutor via email; (3) "drive to the Judge's house; got to get him to read over it, sign it"; (4) "drive back to the jail; sign some paperwork to get [Balkissoon] out of the jail to drive him to the hospital"; and (5) "wait at the hospital for a little bit in triage until a qualified technician comes down" and draws the blood. Reisen testified that on one occasion, this process took him approximately four hours. In contrast, Reisen testified that the process for drawing Balkissoon's blood without a warrant was "[n]ot long. As soon as I walked in [to the Williamson County Jail], we went right to the medical—I mean, after he got patted down and secured, we went right to the medical unit and took his blood right then and there." Thus, the district court could have reasonably inferred from Reisen's testimony that the "lengthy process" for obtaining a warrant would have "significantly increased the delay" prior to the blood draw in this case.

***5** Additionally, the record reflects that Trooper Reisen stopped, investigated, and arrested Balkissoon without the assistance of other officers. Consequently, Reisen testified, if he had attempted to secure a warrant, there would have been no other officers available to assist him with completing the warrant paperwork or with taking custody of Balkissoon while Reisen began the process of securing a warrant. The record also reflects that Balkissoon's vehicle needed to be towed, and there was no other officer to assist Reisen with that task. The district court could have reasonably inferred that the absence of other officers to assist Reisen, combined with the then-existing difficulties of obtaining a warrant in Williamson County after hours, including the absence of a magistrate on duty at the jail, made obtaining a warrant impractical in this case.[26] On this record, the district court would not have erred in concluding that exigent circumstances were present here that justified Reisen's decision to proceed without a warrant and in denying the motion to suppress on that ground.[27]

We overrule Balkissoon's first issue.

Deadly-weapon finding

In addition to finding Balkissoon guilty of the offense of driving while intoxicated, the jury also found that Balkissoon had used or exhibited a deadly weapon—his motor vehicle—during the commission of the offense. In his second issue, Balkissoon argues that the evidence is insufficient to support the jury's deadly-weapon finding.

A "deadly weapon" is defined in the Texas Penal Code as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."[28] In making the determination of whether the evidence is sufficient to support a deadly-weapon finding, "[a]ppellate courts 'review the record to determine whether, after viewing the evidence in the light most favorable to the [verdict], any rational trier of fact could have found beyond a reasonable doubt that the [vehicle] was used or exhibited as a deadly weapon.' "[29] "In order to sustain a deadly-weapon finding, the evidence must demonstrate that: 1) the object meets the definition of a deadly weapon; 2) the deadly weapon was used or exhibited during the transaction on which the felony conviction was based; and 3) other people were put in actual danger."[30] " 'Others' connotes individuals other than the actor himself, and danger to the actor alone does not meet the requisite standard of deadly-weapon use."[31] There must be evidence presented that the defendant's "use of his motor vehicle placed other people in actual danger of death or serious bodily injury."[32]

***6** In this case, Trooper Reisen testified that as he was "driving west on 620 towards 183," he "noticed this vehicle coming out of the parking lot" and "traveling pretty fast." Reisen added that the vehicle "didn't yield" as Reisen was approaching the parking lot and, as a result, Reisen "took [his] foot off the gas and watched him." According to Reisen, the vehicle then made

a wide right turn across multiple traffic lanes and "[w]ent over to the turn lane, went around the turn, the 'turn only [lane],' the round-about, and started traveling east on 620." Immediately thereafter, Reisen activated his signal lights and Balkissoon pulled into a nearby parking lot and parked his vehicle. A video recording of the stop, taken from Reisen's dashboard camera, was admitted into evidence and played for the jury. According to the recording, Balkissoon's vehicle was on the road for approximately 30 seconds before being pulled over. No other traffic could be seen near Balkissoon's vehicle while it was on the road.

On cross-examination, Reisen acknowledged that there was no stop sign or other traffic-control device at the location where Balkissoon entered onto the roadway. Reisen also acknowledged that Balkissoon was not speeding as he pulled out of the parking lot or when he was on the road, nor was Balkissoon weaving, swerving, or drifting while on the road. When asked if there was "any other traffic ... in that vicinity" at the time of the stop, Reisen testified, "Besides me, no." Reisen also agreed with defense counsel that "nobody had to take evasive action" or "honk, jump to get out of the way" as Balkissoon's vehicle entered the roadway.

On this record, even when viewing the above evidence in the light most favorable to the verdict, we cannot conclude that a rational jury could have found beyond a reasonable doubt that Balkissoon's use of his motor vehicle placed other people in actual danger of death or serious bodily injury. According to Trooper Reisen, his patrol car was the only other vehicle in the vicinity of Balkissoon's vehicle at the time of the stop, and the video recording of the stop, which showed no other vehicles near Balkissoon's vehicle, does not support a contrary finding. Moreover, there is nothing in the record to support a finding that Reisen himself was placed in "actual danger of death or serious bodily injury" as a result of Balkissoon's driving. Reisen testified that as Balkissoon's vehicle entered the roadway, Reisen did not have to "slam on [his] brakes" or take any other type of evasive action in order to avoid Balkissoon. Instead, Reisen testified, he merely had to "take [his] foot of the gas." Reisen also testified that Balkissoon's vehicle was not speeding, weaving, swerving, or drifting on the road. The video recording of the stop also does not support a finding that Reisen was placed in actual danger. Although the recording showed Balkissoon enter the roadway without yielding to Reisen, there is nothing on the recording to suggest that Reisen was in any "actual danger" of colliding with Balkissoon's vehicle either at the time the vehicle entered the roadway or at any time thereafter. Because there is no evidence to support the jury's finding that Reisen or any other person was in any "actual danger of death or serious bodily injury" as a result of Balkissoon's driving, we conclude that the evidence is insufficient to support the jury's deadly-weapon finding.[33] We sustain Balkissoon's second issue.

CONCLUSION

***7** When the evidence is insufficient to support a deadly-weapon finding, the appropriate remedy is to delete the deadly-weapon finding.[34] Accordingly, we modify the judgment to delete the deadly-weapon finding. As modified, the judgment of conviction is affirmed.

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Footnotes

1 *See* Tex. Penal Code §§ 49.04(a), 49.09(b)(2).

2 *See* Tex. Transp. Code § 724.012(b)(3)(B).

3 133 S.Ct. 1552, 1568 (2013).

4 *See* U.S. Const. amend. IV.

5 *State v. Story*, 445 S.W.3d 729, 732 (Tex.Crim.App.2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex.Crim.App.2006)).

6 *Id.* (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391–92 (Tex.Crim.App.1991) (op. on reh'g).

[7] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990)).

[8] *Martinez v. State*, 348 S.W.3d 919, 922–23 (Tex.Crim.App.2011) (citing *Guzman v. State*, 955 S.W.2d 85, 87–89 (Tex.Crim.App.1997)).

[9] *See Valtierra v. State*, 310 S.W.3d 442, 447 (Tex.Crim.App.2011); *Thompson v. State*, 408 S.W.3d 614, 621 (Tex.App.–Austin 2013, no pet.); *see also State v. Villarreal*, 475 S.W.3d 784, 798 (Tex.Crim.App.2014) ("[B]ecause the facts are undisputed and the questions before us are matters of law, we apply a de novo standard of review."); *Kothe v. State*, 152 S.W.3d 54, 62 (Tex.Crim.App.2004) ("On appeal, the question of whether a specific search or seizure is 'reasonable' under the Fourth Amendment is subject to de novo review. Despite its fact-sensitive analysis, 'reasonableness' is ultimately a question of substantive Fourth Amendment law.").

[10] *See Schmerber v. California*, 384 U.S. 757, 769 (1966).

[11] *See McNeely*, 133 S.Ct. at 1558.

[12] *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

[13] *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex.Crim.App.2007) (citing *McNairy v. State*, 835 S.W.2d 101, 107 (Tex.Crim.App.1991)).

[14] *Schmerber*, 384 U.S. at 770.

[15] *Id.* (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

[16] *McNeely*, 133 S.Ct. at 1556.

[17] *Id.*

[18] *Id.; see also McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot ... excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative")

[19] *McNeely*, 133 S.Ct. at 1561.

[20] *Id.*

[21] *Schmerber*, 384 U.S. at 770–71.

[22] *See id.* at 771.

[23] *McNeely*, 133 S.Ct. at 1568.

[24] *See Amador v. State*, 221 S.W.3d 666, 672–73 (Tex.Crim.App.2007); *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Crim.App.2005).

[25] *Colburn v. State*, 966 S.W.2d 511, 519 (Tex.Crim.App.1998); *State v. Anderson*, 445 S.W.3d 895, 910 (Tex.App.–Beaumont 2014, no pet.).

[26] *See McNeely*, 133 S.Ct. at 1568; *Schmerber*, 384 U.S. at 770–71; *see also Garcia v. State*, No. 14–14–00387–CR, 2015 Tex.App. LEXIS 4756, at *20–21, 2015 WL 2250895 (Tex.App.–Houston [14th Dist.] May 12, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that exigent circumstances were present when officer testified "that he was familiar with the procedure for obtaining a warrant and that it was a complicated and lengthy process" that would have required him to "type up a warrant, locate a judge to sign it, and return to the hospital" where suspect's blood could be drawn); *Pearson v. State*, No. 13–11–00137–CR, 2014 Tex.App. LEXIS 2514, at *10–11, 2014 WL 895509 (Tex.App.–Corpus Christi Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (concluding that there were exigent circumstances present when officer testified that he was "the only officer on duty," was "solely responsible for securing the scene of the accident," and had to wait "at least three hours to obtain a warrant from a judge").

[27] In its brief, the State does not address the district court's stated reason for denying the motion to suppress—that the exclusionary rule should not apply in this case because Trooper Reisen acted in good-faith reliance on a "statutory mandate." As the State correctly notes, addressing that issue is unnecessary to the resolution of this appeal because this Court is "obligated to uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case .... even if the trial court gave the wrong reason for its ruling." *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex.Crim.App.2003) (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex.Crim.App.2000); *Romero*, 800 S.W.2d at 543); *see State v. Munoz*, 474 S.W.3d 8, 12–13 (Tex.App.–El Paso 2015, pet. ref'd); *Martinez v. State*, 220 S.W.3d 183, 185 (Tex.App.–Austin 2007, no pet.).

[28] Tex. Penal Code § 1.07(a)(17)(B).

[29] *Brister v. State*, 449 S.W.3d 490, 493 (Tex.Crim.App.2014) (quoting *Cates v. State*, 102 S.W.3d 735, 738 (Tex.Crim.App.2003)).

[30] *Id.* at 494 (citing *Drichas v. State*, 175 S.W.3d 795, 797–98 (Tex.Crim.App.2005)).

[31] *Id.*

[32] *Id.*

[33] *See Brister*, 449 S.W.3d at 495; *Cates*, 102 S.W.3d at 738–39; *see also Pointe v. State*, 371 S.W.3d 527, 532 (Tex.App.–Beaumont 2012, no pet.) (concluding that evidence was insufficient to support deadly-weapon finding and observing that, "[w]hile a jury may draw multiple reasonable inferences from the evidence, it cannot draw conclusions based on speculation"); *Foley v. State*, 327 S.W.3d 907, 917 (Tex.App.–Corpus Christi 2010, pet. ref'd) ("Although Foley's driving may have been reckless or dangerous, it could not cause death or serious bodily injury to others because no other persons or vehicles were in the immediate vicinity of Foley's crash."); *Williams v. State*, 946 S.W.2d 432, 434–36 (Tex.App.–Fort Worth 1997), *rev'd on other grounds*, 970 S.W.2d 566 (Tex.Crim.App.1998) (concluding that evidence was insufficient to support deadly-weapon finding because no other vehicles were on the highway "at the time and place that Williams drove in an intoxicated condition" and trooper who followed defendant's vehicle "took precautions for his own safety, as he was trained to do, and was not actually endangered").

[34] *See Williams*, 970 S.W.2d at 566; *see also Boes v. State*, No. 03–03–00326–CR, 2004 Tex.App. LEXIS 6806, at *8, 2004 WL 1685244 (Tex.App.–Austin July 29, 2004, no pet.).

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