SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2878-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND C. GRAVATT, JR.,

Defendant-Appellant.

Argued May 24, 2017 – Decided July 13, 2017

Before Judges Accurso and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Accusation No. 13-01-00146.

Thomas Cannavo, argued the cause for appellant (The Hernandez Law Firm, P.C., attorneys; Mr. Cannavo, of counsel and on the brief).

John C. Tassini, Assistant Prosecutor, argued the cause for respondent (Joseph D. Coronato, Ocean County Prosecutor, attorney; Samuel Marzarella, Chief Appellate Attorney, of counsel; Mr. Tassini, on the brief).

PER CURIAM

Defendant, Raymond C. Gravatt, Jr., was the driver of a vehicle involved in a two-car accident at 12:11 a.m. on May 7, 2011. Defendant was seriously injured, as were the three occupants of the other vehicle. Defendant was charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50. He was also charged in an accusation with three counts of third-degree assault by auto by recklessly driving a vehicle in violation of N.J.S.A. 39:4-50 and causing serious bodily injury to each of the three occupants in the other vehicle. N.J.S.A. 2C:12-1c(2).

Following the accident, defendant was taken to a hospital for medical treatment. The police obtained a blood draw from him without his consent and without the issuance of a search warrant. Evidence of defendant's blood alcohol content (BAC) derived from this blood draw was used as evidence against him. Defendant does not dispute that probable cause existed for a blood draw or that the blood was drawn in a medically reasonable manner and within a reasonable time after his operation of the vehicle.

Defendant moved to suppress evidence of his BAC derived from the warrantless blood draw. He contended the State failed to prove that sufficient exigent circumstances existed to allow the blood draw to be conducted without the prior issuance of a warrant. After an evidentiary hearing on December 4, 2013, Judge James M.

Blaney issued a written decision on December 5, 2013, denying defendant's motion.

In denying the motion, the judge applied the principles enunciated by the United States Supreme Court in Missouri v. McNeely, ____ U.S. ____, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), which had been decided on April 17, 2013. In that decision, the Court made clear that probable cause that a driver had consumed alcohol and may have been driving while intoxicated, and the resulting natural metabolism of alcohol in the bloodstream, standing alone, does not constitute a per se exigent circumstances exception to the warrant requirement; instead, it is a factor to be considered in a totality of circumstances test. Id. at ____, 133 S. Ct. at 1568, 185 L. Ed. 2d at 715.

On May 4, 2015, the New Jersey Supreme Court decided State v. Adkins, 221 N.J. 300 (2015), in which it held that McNeely must be followed in New Jersey under the Supremacy Clause of the United States Constitution, and it should be given pipeline retroactivity to cases such as this one, where the blood draw was conducted prior to McNeely and the case is still under direct review. Id. at 313. The Court also set forth guidelines to be followed by courts considering suppression motions in these pipeline cases. Id. at 317.

On June 4, 2015, defendant moved for reconsideration of the denial of his suppression motion based upon the guidelines set forth in Adkins. The parties appeared before Judge Blaney on July 7, 2015. Both counsel advised the court that they did not wish to produce any further testimony or other evidence to supplement the record that had already been established in the evidentiary hearing initially conducted on the suppression motion. After hearing oral argument, the judge denied the reconsideration motion. In a brief supplemental oral opinion, he stated that in his prior decision he had applied all of the factors required by McNeely and, even though the New Jersey Supreme Court had not yet decided Adkins at that time, his analysis complied with the guidelines which Adkins later prescribed.

On December 1, 2015, defendant pled guilty to all of the charges. He was sentenced on February 19, 2016, to three years' probation on the three indictable offenses, together with forfeiture of his employment as a corrections officer, a $500 fine, and all mandatory assessments and penalties. For DWI, defendant received a three-month driver's license suspension and was ordered to pay all mandatory fines and penalties.

Defendant now appeals the denial of his suppression motion and reconsideration motion. He argues:

> THE LAW DIVISION ERRED IN DENYING THE RECONSIDERATION MOTION AND FINDING EXIGENT CIRCUMSTANCES TO JUSTIFY A WARRANTLESS SEARCH OF DEFENDANT'S BLOOD PURSUANT TO MISSOURI V. McNEELY AND STATE V. ADKINS.

We reject defendant's argument and affirm.

The accident happened in a rural area on Route 539 in Little Egg Harbor Township (LEH). The State's sole witness at the suppression hearing was Sergeant Scott A. Nino, a twenty-one-year veteran of the LEH Police Department. Nino served as the traffic safety investigator and traffic safety sergeant in the department. He was not on duty when the accident happened. At the time of the accident, only four LEH officers were on duty. An off-duty member of the department, Sergeant Wallace, came upon the accident scene by happenstance as he was driving home, and called 911. The recorded call-in time was 12:11 a.m.

Nino received a call at home at about 12:24. He immediately got dressed and proceeded to the accident scene, arriving there at about 12:33. By that time, six other officers had responded, including Wallace, who, as we have stated, was the first person to come upon the accident scene while he was driving home. Two other on-duty LEH officers responded, as well as two officers from nearby Stafford Township and one from nearby Barnegat Township.

This was a very serious accident resulting from a head-on collision. Initial reports indicated that there was one fatality,

which turned out not to be the case. However, all four occupants of the two vehicles were seriously injured.

Some of the responding officers immediately set up and staffed detours on Route 539. Others went to assist in setting up a landing area for medical helicopters. At the time of Nino's arrival, all four injured parties had already been removed from the scene by ambulances. One was transported by ambulance directly to a hospital. The other three, including defendant, were flown by helicopters to different hospitals in the region. Defendant was flown to Atlantic City Medical Center Trauma Unit.

When Nino arrived at the crash site, he was advised that emergency medical personnel informed officers that they detected an odor of alcohol emanating from defendant's breath while they were treating and transporting him. It was stipulated by the parties that this advice was given to the police at about 12:20.

Based upon this information, Nino determined that an officer should take a blood kit and drive to Atlantic City Medical Center and obtain a blood draw from defendant. That medical facility was about a thirty-five minute drive from the accident scene. Nino had a blood kit in his car and provided it to Officer McNally, who left the scene at about 12:35.

With respect to defendant's injuries, personnel at the scene informed Nino "that [defendant's] ankle -- foot was hanging off

of his leg" and "that he may have had some chest or head injuries." It was also believed that defendant was awaiting surgery at the hospital.

Police records contained an entry reflecting that McNally was still en route to the Atlantic City Medical Center at 1:16. His exact time of arrival there is not disclosed in the record. However, it is documented that the blood was ultimately drawn at 2:05.

Without going through all of the details reflected in the testimony and documentary evidence presented in the evidentiary hearing, we summarize the activities that were taking place at the accident scene. In addition to the detour on Route 539, personnel at the scene also detoured traffic from Route 554. They also shut down traffic on Stafford Forge Road.

Calls unrelated to this accident were also coming in. Two LEH officers had to leave the accident scene at 1:37 to respond to a CPR first aid call. Another first aid call came in, but the decision was made not to send anyone "because everyone was tied up." When the two officers returned from the CPR call, they were sent to respond to another call, regarding loud music, at 2:06.

Officers at the scene placed a call to the Fatal Accident Support Team (FAST), an entity composed of members of local departments and the county prosecutor's office, which assists

local departments with serious crashes involving death or serious bodily injury. Repeated calls were made to other off-duty officers in an effort to obtain additional assistance needed to direct traffic, respond to unrelated calls, and assist with the accident scene. Some of these efforts were unsuccessful; in some cases officers said they would come as soon as possible. At some point, the officers who had come in from Barnegat Township and Stafford Township had to return to their home jurisdictions, where they were needed. The FAST unit did not promptly respond. A second call was made to that unit at 1:10 to ascertain the status of their expected arrival. At 2:03, Nino received a call from a representative of the county prosecutor's office advising that the FAST unit was on its way. At 1:17, Nino called the Criminal Investigation Unit (CIU) to come to the scene to take photographs and look at the scene.

An officer was sent to Southern Ocean County Hospital with a blood kit for the purpose of obtaining a blood draw from the driver of the other vehicle. Records reflect that he was en route to that medical facility at 1:17. Records further reflect that he had arrived there by 1:51.

Needless to say, the LEH police spent the time immediately following this accident in a diligent and persistent effort to do the things that were required following such a serious accident

causing serious injuries to four individuals. This included tending to the injured, arranging for their emergency medical care and transport to appropriate medical facilities, securing the accident scene, conducting a thorough investigation of the accident and recording the results, detouring traffic, calling in outside units and agencies to assist with their specialized expertise, and seeking to preserve critical evidence, including obtaining blood draws from both drivers.

They performed these tasks while severely understaffed. The outside units did not arrive promptly, most notably the FAST unit which would include representatives from the county prosecutor's office who might have been of assistance in dealing with legal matters such as advice regarding a need for a search warrant to obtain blood draws. Additionally, officers were required to respond to unrelated calls occurring within their jurisdiction.

Nino provided the following testimony, explaining why neither he nor other supervising officers at the scene sought a search warrant before obtaining a blood draw from defendant:

> Q Now, was any request made by you or any other individual, to your knowledge, telephonically, in person or otherwise to any judge for a warrant to withdraw the blood from the defendant?
> A No, Sir.
> Q Based on everything going on that night, did you -- in looking back in retrospect sitting here now, did you have the

ability to sit down, prepare an affidavit, get the --
A No, Sir.
Q -- number of the judge, contact an assistant prosecutor, get all that information done --
A No.
Q -- present it to a judge, get a warrant done ahead of time?
A No, sir.
Q As a practical matter, was that the procedure in place back then --
A No, it was not.
Q -- in May of 2011?
A No, sir.
Q Okay. You know that's in place now, correct?
A Yes, I do.
Q And that's since May of this year when the McNeely case came out?
A That's correct.
Q But that wasn't done back in May of 2011?
A Not in May of 2011. No, sir.
Q But even if it were, given everything that was going on here and the timing involved that you just told the judge about, do you feel there was an appropriate amount of time to ask for a telephonic warrant or any other type of warrant?
A No, sir, I do not.

Under cross-examination, Nino confirmed that there was no procedure in place in 2011 in the traffic unit for seeking telephonic warrants. When asked how many warrants he had applied for in 2011, he answered, "Zero." When asked about the prior year, he answered, "None." Nino said he didn't know if the detective division had a procedure set up, "but as far as my protocol, no. I had nothing set up." He explained that the

detective division is separate from his traffic unit, and that he was not aware of what the detective division does in terms of their warrants.

In his written decision, Judge Blaney summarized the evidence and made his factual findings. As we previously stated, defendant does not dispute that the police had probable cause to request a blood draw. The sole issue before us, as it was before Judge Blaney, is whether sufficient exigent circumstances had been proven to justify a blood draw without a warrant under the exigent circumstances exception to the warrant requirement.

After discussing the facts, Judge Blaney discussed the relevant criteria for establishing exigent circumstances, with particular reference to Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and McNeely. As we have stated, at the time of his decision, the New Jersey Supreme Court had not yet decided Adkins.

The judge prefaced his ultimate conclusions by stating that McNeely made clear that there is no per se exception resulting from the natural dissipation of alcohol in an individual's blood in cases such as these, and that the totality of the circumstances must be assessed. The judge therefore implicitly acknowledged that one of the circumstances, indeed the central one, was that obtaining a blood draw promptly was necessary to preserve evidence.

He then listed the totality of the factual circumstances which, in addition to the inherent dissipation of alcohol in the blood, supported his conclusion that sufficient exigent circumstances existed to justify a warrantless blood draw:

> 1. This case involved life threatening and serious public safety issues. Four seriously injured motorists were involved. Three had to be airlifted by helicopters to area hospitals. Traffic had to be rerouted, and the accident scene had to be investigated, protected, and secured for evidence.
>
> 2. There was clearly a shortage of police manpower because of the time of the accident, the extent of the injuries and the complicated logistics.
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> 3. Defendant himself had been airlifted to a hospital in another county. He was to have surgery performed and an officer had to be dispatched to the hospital that was approximately thirty-five minutes away from the accident by car.
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> 4. The blood test was taken within a reasonable time under all of the conditions.
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> 5. This accident occurred in May of 2011 and no procedure existed in the Little Egg Harbor Police Department for obtaining a telephonic warrant.

When the matter again came before Judge Blaney on July 7, 2015, after our Supreme Court's May 4, 2015 decision in Adkins, the judge denied defendant's reconsideration motion in light of that case. As we previously stated, neither counsel wished to supplement the record with additional evidence. Therefore, the

judge reconsidered his earlier decision based on that record and the holding in Adkins and the guidance it provided for analyzing McNeely pipeline cases.

The judge was satisfied that his prior written decision fully complied with the further principles set forth in Adkins because he had analyzed the requirements under McNeely. He stated: "And I find that I have considered without having had the benefit of the Adkins decision those standards enumerated and proffered by the Supreme Court at the present time in Adkins."

Our review of a trial court's decision on a suppression motion is circumscribed. We must defer to the trial court's factual findings as long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). A reviewing court should especially "give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Those findings should only be disregarded when they are clearly mistaken. State v. Hubbard, 222 N.J. 249, 262 (2015) (citing Johnson, supra, 42 N.J. at 162). "A trial court's findings should not be disturbed simply because an appellate court 'might have reached a different conclusion were it the trial tribunal.'"

State v. Handy, 206 N.J. 39, 44-45 (2011) (quoting Johnson, supra, 42 N.J. at 162). However, a reviewing court owes no deference to the trial court's legal conclusions or interpretation of the legal consequences flowing from established facts. State v. Watts, 223 N.J. 503, 516 (2015).

Applying these principles, it is clear to us that Judge Blaney's factual findings are more than amply supported by the record, and we defer to them. Although we owe no deference to the judge's legal conclusion that the totality of the circumstances made it impractical for the police to obtain a warrant before obtaining a blood draw from defendant, we do agree with that conclusion.

In McNeely, the United States Supreme Court made clear the rationale it had applied forty-seven years earlier in Schmerber:

> Our decision in Schmerber applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because 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.'"
>
> In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." "Given these special facts," we found that it was appropriate for the police to act without a warrant.
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> [McNeely, supra, ___ U.S. at ___, 133 S. Ct. at 1559-60, 185 L. Ed. 2d at 705-06. (citations omitted) (alteration in original).]

Notably, the Schmerber Court did not elaborate on the "special facts" upon which it rested its decision, saying nothing more than the McNeely Court set forth in the passage quoted above.

In McNeely, the Court discussed why there should be no per se exception, but instead an analysis of the totality of the circumstances, and commented: "We do not doubt that 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." Id. at ____, 133 S. Ct. at 1561, 185 L. Ed. 2d at 707. The Court provided an example to illustrate why a per se exception should

not be adopted, even in cases where an accident causes injury to the suspected drunk driver, namely "a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." Id. at ____, 133 S. Ct. at 1561, 185 L. Ed. 2d at 708.

The Court also acknowledged the significant advances that had transpired in the decades since Schmerber was decided allowing for the more expeditious processing of warrant applications through telephonic or other reliable electronic means. Id. at ____, 133 S. Ct. at 1561-63, 185 L. Ed. 2d at 708-09. Along these lines, New Jersey has adopted a Rule authorizing telephonic warrants upon compliance with a set of specific procedures. R. 3:5-3(b).

However, the Court went on to acknowledge that the availability of a telephonic warrant procedure does not create a panacea eliminating the need for warrantless searches when time is of the essence to preserve evidence, in cases like this one:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an

> adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4:1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.
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> [Id. at ____, 133 S. Ct. at 1562, 185 L. Ed. 2d at 709.]

The Court went on to note that although the facts in the McNeely case might be categorized as a "routine DWI case," even in such a case that

> 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.
>
> [Id. at ____, 133 S. Ct. at 1568, 185 L. Ed. 2d at 714 (citation omitted).]

Thus, McNeely instructs that there is no per se exception, that additional special facts must be present, and those additional special facts, combined with the fact of inherent dissipation, must make it impractical for the police to have time to obtain a warrant to avoid the destruction or compromise of the evidence sought, namely a blood draw to determine the BAC of a driver as close in time as possible to the time of operation. These special

facts may include procedures in place for obtaining a warrant, which we take to mean the time required to comply with those procedures or, by implication, the absence of such procedures.

In Adkins, the New Jersey Supreme Court held that pipeline retroactivity must be applied to McNeely for blood draws that occurred before McNeely was decided in cases that were still active in the trial court or on direct appeal. Adkins, supra, 221 N.J. at 313. In McNeely, the United States Supreme Court noted a broad split of opinion among the states as to whether Schmerber had authorized a per se exception. McNeely, supra, ___ U.S. at ____, 133 S. Ct. at 1558, 185 L. Ed. 2d at 703-04. Although New Jersey courts never expressly announced that Schmerber authorized a per se exception, significant New Jersey "case law contains language that provides a basis for such a belief." Adkins, supra, 221 N.J. at 316. The Adkins Court provided a number of examples. Ibid. Accordingly, the Court "accept[ed] that our case law played a leading role in dissuading police from believing that they needed to seek, or explaining why they did not seek, a warrant before obtaining an involuntary blood draw from a suspected drunk driver." Id. at 317.

In light of that background, the Court laid down some guidelines to be applied in the totality-of-the-circumstances analysis in these pipeline cases. Ibid. Among these are that

"the exigency in these circumstances should be assessed in a manner that permits the court to ascribe substantial weight to the perceived dissipation that an officer reasonably faced." Ibid. Further, reviewing courts should "focus on the objective exigency of the circumstances that the officer faced," recognizing that the "police may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from our Court that did not dwell on such an obligation." Ibid.

Applying the principles enunciated in McNeely and Adkins, we are firmly convinced that the additional "special facts" in this case, combined with the inherent fact of natural dissipation of alcohol in an individual's blood, provided a totality of circumstances justifying a warrantless search. The police here were grossly understaffed in dealing with this very serious accident. They acted reasonably and expeditiously in trying to bring in additional manpower to assist in doing all that needed to be done. Defendant had been promptly flown from the scene to a suitable medical facility, where he was awaiting surgery for his very serious injuries. The police could not wait until his surgery was completed, both because of time and because his BAC might have been distorted through the surgical process.

Unlike the example the United States Supreme Court provided in McNeely, there was no "other" officer available who could simply

obtain a telephonic warrant while McNally was driving to Atlantic City to obtain the blood draw. All officers were tasked beyond their capacities in dealing with the accident scene and other required police work.

Further, no procedures were in place for the traffic unit in the LEH Police Department to seek telephonic warrants. This was recognized as a justifiable consideration in McNeely, as well as in Adkins. Our acknowledgment of this circumstance does not constitute application, in whole or in part, explicitly or implicitly, of a good faith exception, which our Supreme Court has rejected. See State v. Novembrino, 105 N.J. 95 (1987). However, the absence of procedures in 2011 is a fact, and it is appropriate to consider it as one of the "special facts" in the totality of the circumstances calculus.

Further, the diligent efforts of the local police to bring in specialized units were met with delays. Notably, the FAST unit would have included representatives of the county prosecutor's office, who would have been equipped to provide legal guidance on the potential need for a search warrant. Their absence until after the blood draw was actually performed is another fact to be considered, the fault for which cannot not be laid at the feet of the local police.

Finally, of course, is the substantial weight that should be ascribed to the perceived dissipation faced by Nino and the other LEH officers in this case. This is particularly significant because of the very serious nature of the case, involving very serious injuries, the potential for a fatality, and the serious criminal consequences that could (and did) result.

As expressed in Schmerber, this was a case in which Nino and his fellow officers "might reasonably have believed that [they were] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Schmerber, supra, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919-20 (citation omitted). The exigency existing under the totality of circumstances here rendered impractical the obtaining of a warrant in time to prevent the dissipation of alcohol from defendant's bloodstream, thus justifying the warrantless blood draw.

Affirmed.