IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAP 2021 NO. 27

COMMONWEALTH OF PENNSYLVANIA,
Appellant

VS.

AKIM SHARIF JONES-WILLIAMS,
Appellee

BRIEF AMICI CURIAE OF THE DEFENDER ASSOCIATION OF PHILADELPHIA AND THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE AKIM SHARIF JONES-WILLIAMS

Commonwealth Appeal From The Order Of The Superior Court, dated 8-11-2020 at No. 1428 MDA 2017, That Reversed An Order Denying Suppression Of Evidence, And Vacated The Judgment Of Sentence Of April 5, 2017 Of The York County Court Of Common Pleas, Criminal Division, CP-67-CR-0002824-2015.

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STATEMENT OF INTEREST OF THE AMICI CURIAE

Defender Association of Philadelphia

The Defender Association of Philadelphia is a private, non-profit corporation which represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to insure a high standard of representation and to prevent the abridgement of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

Pennsylvania Association of Criminal Defense Lawyers

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As amicus curiae, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for defendants. PACDL includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

The Association and the PACDL state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part. Pa.R.A.P. 531(b)(2).

SUMMARY OF ARGUMENT

This case involves the police obtaining blood test results from an unconscious DUI suspect without a warrant. The Commonwealth does not dispute, nor could it, that a warrant was necessary unless an exception to the warrant requirement applies. Commonwealth Brief, 27.

The Commonwealth – appellee first contends that the exigent circumstances exception applies. That claim is meritless because no evidence was offered to support such a finding. Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019), the sole case it relies on, did not adopt a per se constitutional rule of exigent circumstances for all unconscious DUI suspects. The Court remanded to give Mitchell the opportunity to show that there were no exigent circumstances in his case.

In this case, the officers freely admitted that they could have obtained a warrant, but that they chose to proceed to get the defendant's blood test results pursuant to an implied consent statute. Further, the record indisputably shows that there was ample time to obtain a warrant.

The Commonwealth acknowledges that the consent exception to the warrant requirement is not present in this case because the defendant was unconscious and could not voluntarily agree to anything. It also admits that its claim that the implied consent statute justified the search "as an independent basis for constitutionality is in doubt . . . ." Commonwealth Brief, 25. However, the claim is not in doubt, because

of this Court's binding precedential decision, Commonwealth v. Myers, 164 A.3d 1163 (Pa. 2017). A majority of the Court in Myers held that only actual consent, not an implied consent statute, would constitutionally suffice to justify a warrantless search of an unconscious DUI suspect.

Whatever civil or evidentiary consequences may be permissible pursuant to Pennsylvania's DUI implied consent statutes, blood test results obtained unconstitutionally without a warrant may not be admitted as evidence in a criminal case against a defendant. A state statute may not diminish constitutionally guaranteed search and seizure rights nor may it eliminate the suppression remedy for a violation of those rights. E.g., Mapp v. Ohio, 367 U.S. 643 (1961); Commonwealth v. Myers, supra.

ARGUMENT

1. The Claim That The Exigent Circumstances Exception Justified The Warrantless Search In This Case Is Meritless Because It Lacks Any Factual Support.

The Commonwealth relies on a single case, Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019), for its claim that exigent circumstances justified the police testing of the defendant's blood for marijuana. It can prevail only if Mitchell held that in all DUI cases under all circumstances testing after an accident of an unconscious defendant is per se an exigency that excuses a warrant. It did not. The Court held that in such circumstances because alcohol dissipates from the bloodstream rapidly (id. at 2535-36), and "an officer's duty to attend to more pressing needs may leave no time to seek a warrant" (id. at 2535), police "may almost always order a warrantless blood test" (id. at 2539).

The Court made clear that it was only ruling generally under the Fourth Amendment, and not establishing a per se rule. It did not decide "whether the exigent circumstances exception covers the specific facts of this case." Id. at 2534. The case was remanded to give Mitchell the opportunity to show that there were no exigent circumstances. Id. at 2539. See Missouri v. McNeely, 569 U.S. 141, 152-56 (2013) (rejecting per se exigency exception for warrantless blood draws in DUI cases)). See also, e.g., Commonwealth v. Alexander, 243 A.3d 177, 208 (Pa. 2020) (The exigent circumstances "inquiry is not amenable to per se rules and requires a consideration

of the totality of the circumstances."). The Supreme Court in Mitchell did not change the test for determining in an individual case whether there are exigent circumstances. "The only question left, under our exigency doctrine, is whether this compelling need (for a blood test) justifies a warrantless search because there is furthermore no time to secure a warrant." Mitchell, 139 S.Ct. at 2537.

The facts in this case preclude a finding of any exigency. Police had information, found to amount to probable cause, that the defendant was the driver of a car involved in a fatal accident with a train on July 5, 2014, and that he may have been under the influence of marijuana. The commanding officer in charge of the investigation, Lutz, told Officer Farren to go to York hospital where the defendant was being treated, and to obtain a "legal" blood draw for marijuana testing, meaning one pursuant to the implied consent statute. See, e.g., R.R. 174a-175a, 184a, 186a, 202a (N.T.M.S. 56-57, 66, 68, 84).

In Commonwealth v. Trahey, 228 A.3d 520 (Pa. 2020), this Court explained that under Pennsylvania law and factually, the need for a rapid blood draw from a DUI suspect for controlled substances is significantly less than when alcohol is involved.[1] Id. at 537-38. "Had the investigating officers developed probable cause

[1] The Commonwealth weakly argues that some forensic testimony at trial undermines this Court's conclusions in Trahey. Commonwealth Brief, 36 n.143. As it acknowledges, however, the scope of review is the suppression hearing, and the Commonwealth may not rely on the trial record. Commonwealth Brief, 3. E.g., In Re L.J., 79 A.3d 1073, 1085 (Pa. 2013).

to suspect the presence of controlled substances in Trahey's blood, they could have obtained a search warrant for a blood draw subject to no timing limitations." Id. at 539.

The exigent circumstances claim should be rejected here because the officers testified at the suppression hearing that they could have obtained a warrant before Officer Farren left for the hospital, but instead chose to rely on an implied consent statute.

> Q. It was possible to obtain a search warrant though before you went to York Hospital?
> A. (Officer Farren) It could be, yes.

R.R. 184a (N.T.M.S. 66).

The officer in charge of the investigation, Lutz, testified as follows:

> Q. Now, prior to you requesting I believe it was Officer Farren to seek a legal blood draw from York Hospital, you did not request him to obtain a search warrant before doing so?
> A. That's correct.
> Q. You could have?
> A. If it was needed.
> Q. You could have?
> A. Yes, I could have.

R.R. 202a (N.T.M.S. 84).

Officer Farren did not recall when he went to York Hospital on the evening of the accident. R.R. 182a (N.T.M.S. 64). But when he got there, he learned that the hospital had already obtained two vials of Mr. Williams' blood at 5:56 p.m. R.R.

178a (N.T.M.S. 60), R.R. 71a (N.T.P.H. 51). At Officer Farren's request, pursuant to an implied consent statute, the hospital packaged the vials for shipment to a lab used by the police for forensic testing. R.R. 178a-181a (N.T.M.S. 60-63).

Although the initial blood draw was non-governmental action by the hospital taken for an unknown medical reason (no testimony or hospital records were introduced), it is the state action seizure of Mr. Williams' blood by police, and the subsequent warrantless search of that blood for incriminating evidence that violated his privacy search and seizure rights.

This invasion of privacy rights is even greater than that condemned as unconstitutional in Commonwealth v. Shaw, 770 A.2d 295 (Pa. 2001), where the hospital had already tested the defendant's blood for blood alcohol content, and the police without a warrant obtained a copy of the hospital report showing the results. Id. at 296. In Shaw, the Court held that this warrantless obtaining of the hospital's blood test results violated privacy rights guaranteed by Article I, Section 8.[2] Shaw's holding was recently discussed and re-affirmed in Commonwealth v. Alexander, 243 A.3d 177 (Pa. 2020), where this Court held that warrantless searches of cars violate Article I, Section 8 in the absence of exigent circumstances. Id. at 206-07.

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[2] Shaw is consistent with past cases of this Court that have held that Article I, Section 8 requires a warrant for police to obtain a person's records from a private business. Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989) (pen register records); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) (bank records).

Once blood is drawn from a defendant's body there is no danger of dissipation of blood alcohol or drug content in the sample before the blood is subjected to toxicological testing. The substance ceases to further metabolize. Thus, there is no conceivable argument for not obtaining a warrant before testing. The facts of this case illustrate that. After police made sure the hospital packaged the blood vials for shipment to the police designated lab, the lab did not receive the vials from the hospital until three days later, July 8th, and the analysis of the blood was done some time after that. R.R. 70a-74a (N.T.P.H. 50-54).

Therefore, in similar circumstances, the Court in Shaw held that police obtaining the BAC test results "without a warrant and in the absence of exigent circumstances, violated Article I, Section 8 of the Pennsylvania Constitution." Shaw, 770 A.2d at 299.

> The reason for this is obvious. Due to the evanescent nature of the evidence of blood alcohol content, there is an immediate need to obtain samples of blood for testing. When blood samples have been drawn for medical purposes and the results of blood alcohol content tests are part of a patient's medical record, the evidence will not have dissipated during the time that application for a search warrant is being made.

Id. (quoting Commonwealth v. Riedel, 651 A.2d 135, 143 (Pa. 1994) (concurring opinion)).[3]

[3] In Riedel, the Court considered facts identical to those in Shaw, but the defendant did not raise an Article I, Section 8 claim. The majority therefore did not consider the issue, while the

This case is far afield both factually and legally from Mitchell v. Wisconsin. The lower court did not err in belatedly concluding that there "was no urgent and compelling reason for Sgt. Farren to not leave the hospital and attempt to secure a warrant before returning to have the blood samples transferred to NMS labs." R.R. 442a (Pa.R.A.P. 1925 opinion, 13). Nor did the Superior Court err in its carefully reasoned opinion finding no exigency to excuse the warrant requirement.

> The blood draw occurred at 5:56 p.m., approximately one hour and 20 minutes after the accident. As of 5:56 p.m., then, Appellant's blood sample, including all of the intoxicants contained therein, was preserved. Thus, the extraction of Appellant's blood shortly before 6:00 p.m. on the date of the accident literally stopped the clock on any concern that the further passage of time could result in dissipation of evidence since the withdrawal of Appellant's blood by hospital personnel ceased all metabolic activity that might influence a toxicological assessment of the sample. As a result, any argument that an exigency existed at the time Sergeant Farren submitted his request to test Appellant's blood sample was no longer viable.

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concurrence on behalf of three Justices noted that if the state claim had been raised they would have found a violation. Relevant here, the Justices unanimously agreed that there were no exigent circumstances. The majority stated:

> We recognize that in the absence of the implied consent scheme, the actions of Trooper Travis would constitute an unreasonable search and seizure. As appellant cogently argues in his brief, there was no danger that his blood alcohol content would evanesce because it was preserved by the medical purposes blood test. Thus, the exigent circumstances exception to the Fourth Amendment warrant requirement is not applicable.

Riedel, 651 A.2d at 141.

Commonwealth v. Jones-Williams, 237 A.3d 528, 544 (Pa. Super. 2020) (Exhibit A).

In Trahey, supra, the Court held that the Commonwealth failed to sustain its burden to show that there was a "compelling need for official action and no time to secure a warrant" before blood was drawn from a DUI suspect involved in a fatal accident. Trahey, 228 A.3d at 538 (quoting McNeely, 569 U.S. at 149). The factual lack of exigent circumstances is even more apparent in this case.

The Commonwealth contends that requiring a warrant "creates the absurd situation" where a second blood draw would have been necessary "creating an additional intrusion into the skin . . . ." Commonwealth Brief, 40. The "absurd" situation is non-existent since no second intrusion is factually or legally necessary. All that was required constitutionally was a warrant before the police took the vials of blood from the hospital and had them analyzed.

2. The Implied Consent Statutes Permitting Police To Obtain Blood Test Results Without A Warrant And To Admit Them As Evidence In A Criminal Prosecution Violate State And Federal Constitutional Rights.

The DUI implied consent statutes, 75 Pa.C.S. §§ 1547 and 3755, are a fiction having nothing to do with actual consent. When an individual applies for and receives his driver's license he is not asked in return to waive his search and seizure

warrant rights with respect to future searches.[4] Nor does the Commonwealth claim that the unconscious defendant here actually consented to anything while at the hospital after the accident. Commonwealth Brief, 14.

The Commonwealth incorrectly attempts to blend two separate and distinct exceptions to the warrant requirement, consent and exigent circumstances, while acknowledging that its defense of the constitutionality of the implied consent statute is questionable. "Even if the validity of implied-consent statutes as an independent basis for constitutionality is in doubt, Section 3755(a) is also facially constitutional as a codification of the exigency rule in Mitchell." Commonwealth Brief, 25 (Summary Of Argument).[5]

The Commonwealth's concession of doubtful validity does not go far enough because there is a binding precedential decision of this Court, just four years old,

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[4] In any event, such an agreement would not be constitutionally enforceable. See infra 16-17.

[5] In very recently holding that its implied consent statute was unconstitutional in a case involving a blood draw from an unconscious driver without a warrant, the Wisconsin Supreme Court emphasized that Mitchell addressed only exigent circumstances and could not be relied on to sustain the statute. State v. Prado, 960 N.W.2d 869, 880-881 (Wis. 2021). "We begin with the premise that consent and exigent circumstances are two separate and distinct exceptions to the Fourth Amendment's warrant requirement." Id. at 878. "The constitution requires actual consent, not deemed consent." Id. at 879 (footnote omitted). The Court held that the evidence need not be suppressed only because, unlike Pennsylvania, Wisconsin has a good faith exception that it held applied. Id. at 883-84.

Curiously, the Commonwealth at great length relies on an Illinois case, People v. Eubanks, 160 N.E.3d 843 (Ill. 2019), that provides no support for its position. Commonwealth Brief, 44-46. Eubanks held that the statute was unconstitutional as applied because there were no exigent circumstances justifying the warrantless blood draw, and ordered suppression. Id. at 866, 875.

and directly on point, Commonwealth v. Myers, supra. In Myers, two opinions, a plurality, authored by Justice Wecht (164 A.3d at 1173-1182), and a concurring opinion by Justice Saylor (164 A.3d at 1183-1184), on behalf of five Justices, concluded that an implied consent statute could not be applied constitutionally in a criminal case to admit blood test results where an unconscious DUI defendant did not actually consent.[6]

This majority holding in Myers is binding precedent. E.g., Commonwealth v. McClelland, 233 A.3d 717, 732-733 (Pa. 2018) (constitutional ruling and result in a case joined in by a majority of the Court in majority and concurring opinions constituted binding precedent); Commonwealth v. Haefner, 373 A.2d 1094, 1095 (Pa. 1977) (Superior Court bound by result that Supreme Court majority agreed on in a prior case even though "a nondecisional opinion"). In Myers, "[a] majority of this Court also held . . . that a warrantless blood draw from an unconscious DUI suspect violates the Fourth Amendment. Id. at 1173-1182 (plurality); 1183-84 (Saylor, C.J., concurring)." Commonwealth v. Bell, 211 A.3d 761, 773 (Pa. 2019).[7]

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[6] Justice Todd concurred on statutory grounds and did not address the constitutional issue, (id. at 1184), while Justice Mundy was the lone dissenter. Id. at 1184-89.

[7] Bell acknowledged, as has the United States Supreme Court, that a refusal to submit to a blood test may justify certain limited civil or evidentiary consequences under an implied consent law. But Bell held only that evidence of a refusal of a blood test is admissible for the limited purpose of the prosecutor explaining the absence of blood test evidence in a DUI case. Bell, 211 A.3d at 774-77. "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." Birchfield v. North Dakota, 136 S.Ct. 2160, 2185 (2016). Those limits need not be explored here because this is a criminal case

There is no reason to reconsider Myers. As it did in Myers, the Commonwealth seeks again here to rely on statements in decisions of this Court from the 1990's, rejected in Myers, "which suggest that implied consent may serve as an exception to the warrant requirement." Myers, 164 A.3d at 1173 (plurality opinion). Commonwealth Brief, 42, 47. What the Commonwealth fails to acknowledge is that the 2013 decision in Missouri v. McNeely, supra, changed the constitutional landscape. The Court acknowledged "the magnitude of the drunk driving problem . . . (and) the States' interest in eradicating it," but held that the warrant requirement and suppression remedy applied in DUI blood draw cases. And, only where the state can show an applicable exception, like exigent circumstances, may the evidence be admitted despite the warrantless search or seizure. McNeely, 569 U.S. at 160.

As serious as drunk driving is, the McNeely decision is consistent with the holdings in past cases of this Court and the United States Supreme Court that there cannot be a diminishing of constitutional search and seizure rights because of the severity of the offense at issue. See, e.g., Mincey v. Arizona, 437 U.S. 385 (1978) (rejecting state's argument for a homicide exception to the warrant requirement); Commonwealth v. Rodriguez, 614 A.2d 1378, 1383 (Pa. 1992) ("seriousness of the

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requiring the suppression remedy for violations of constitutional rights. E.g., Mapp v. Ohio, 367 U.S. 643 (1961) (suppression remedy binding on the states); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (Article I, Section 8 does not provide for a good faith exception to the suppression remedy).

criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime" is not a justification for ignoring constitutional search and seizure rights).

Three years after McNeely, in Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), the Court reaffirmed the warrant requirement for DUI blood draws and testing, holding in three consolidated cases, that coercive warnings threatening criminal punishment pursuant to an implied consent statute violated the Fourth Amendment. Id. at 2184-86. Of the three cases, only one involved an individual, Beylund, who had agreed to take the blood test. The Court remanded, holding that whether consent is voluntary must be determined by the totality of the circumstances pursuant to Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Id. at 2186.

Mitchell v. Wisconsin affords no support for a claim that an implied consent statute permits the state without a warrant to obtain blood test results and then admit them in a criminal prosecution. "Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule." Mitchell, 139 S.Ct. at 2533. Mitchell considered one, exigent circumstances. See supra pp. 4-10. Another is voluntary consent, discussed in Myers, where the state establishes that an individual, without any coercion, agreed to the intrusion on his privacy. Myers, 164 A.3d at 1173 (plurality opinion). See, e.g., Schneckloth, supra.

In Mitchell, as here, the DUI suspect was unconscious and could not give actual consent. The Court granted certiorari in Mitchell to decide the constitutionality of Wisconsin's implied consent statute. See, e.g., Mitchell, 138 S.Ct. at 2551 (Gorsuch, J. dissenting). The lead plurality opinion never addressed this issue, instead offering only this cautionary note about the reach of DUI implied consent statutes. "[O]ur decisions have not rested on the idea that these laws do what their popular name might seem to suggest – that is, create actual consent to all the searches they authorize." Id. at 2553. Justice Sotomayor, with two Justices joining her opinion, addressed the issue of the constitutionality of implied consent DUI statutes.

> The plurality does not rely on the consent exception here. See *ante*, at 2532. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires.

Id. at 2545 (Sotomayor, J., dissenting).

As Justice Wecht's opinion in Myers emphasized, "[t]he statute cannot authorize what the Fourth Amendment or Article I, Section 8 would prohibit." Id. at 1173 (plurality opinion). "Simply put, statutorily implied consent cannot take the place of voluntary consent." Id. at 1178 (plurality opinion).

Driving may be a privilege, but a legislature cannot rely on this as a basis for curtailing search and seizure rights.[8] Significantly, this Court has already rejected actual signed advance consent to searches as having any binding validity or relevance in assessing the constitutionality of any subsequent searches. The cases have involved agreements signed by the defendant in return for receiving the discretionary benefit of probation or parole. See, e.g., Commonwealth v. Arter, 151 A.3d 149, 155 (Pa. 2016); Scott v. Pennsylvania Board of Probation and Parole, 698 A.32, 36 (Pa. 1997), rev'd on other grounds, 524 U.S. 357 (1998).[9] Automobile drivers with licenses, unlike probationers and parolees, have not been convicted of crimes, and therefore do not have diminished search and seizure rights. Thus, such "consent" to unconstitutional searches, whether express or implied by statute, should be even more constitutionally unacceptable.

It would be a dangerous novel rule of law that the legislature could override the warrant requirement here, or with other constitutional search and seizure

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[8] For example, the United States Supreme Court refused to carve out an exception to the usual reasonable suspicion requirement for pedestrian and car stops simply because the government has a right to regulate driving and insure highway safety. In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that the minor intrusion of a brief stop of a vehicle to check driver's license and registration could not be routinely done, enforcing the Fourth Amendment's reasonable suspicion standard. "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." Id. at 662 (footnote omitted).

[9] The United States Supreme Court has also repeatedly refused to permit states to condition privileges and discretionary benefits on the individual relinquishing constitutional rights. E.g., Koontz v. St. John's Riverwater Management District, 570 U.S. 595, 606-07 (2013).

protections. Recently, for example, in Commonwealth v. Alexander, supra, this Court addressed a situation where police lawfully stopped a car for a traffic offense, and probable cause for a search of the car developed because police smelled marijuana and the driver admitted he "had just smoked a blunt." Alexander, 243 A.3d at 181. This Court held that under Article I, Section 8 a warrant is required for a car search under such circumstances unless the exigent circumstances exception applies in an individual case. Id. at 207-08. It would not be difficult for the legislature to craft an implied consent statute to permit warrantless searches of cars where probable cause suddenly develops to believe that the driver possesses drugs in the car he is driving, thus nullifying Alexander's holding.

> [T]o interpret the implied consent statute such that the voluntariness of one's consent to a chemical test is predetermined is to imbue the legislature with the power to curtail substantially the essential protections of the Fourth Amendment.

Myers, 164 A.3d at 1176 n. 17 (plurality opinion).

The amicus brief from the District Attorneys Association focuses on the fact that the defendant in Myers was under arrest while the defendant here was a DUI suspect who had not yet been arrested. The implied consent statute that gives defendants a right to refuse a blood test after an arrest and warnings, 75 Pa.C.S. §1547, does not apply here. The Commonwealth relies on 75 Pa.C.S. §3755, an implied consent statute that does not provide for a right to refuse the testing. The

amicus brief posits that this statutory difference with the right of refusal is dispositive. District Attorney Association Amicus Brief, 6, 18-21. It is not. Whether there is a statutory right of refusal is constitutionally irrelevant, as is whether the DUI suspect is under arrest or not.

Every DUI suspect has the same constitutional rights with respect to blood testing. The constitutional right at issue here is not one of refusal if the defendant is asked to consent to a search. The defendant always has the constitutional right to refuse consent regardless of whether there is a statute or he is under arrest. E.g., Schneckloth, supra. The constitutional issue in a case like this where a defendant was not asked to consent to a search for whatever reason (e.g., unconscious) is whether the warrantless intrusion was permissible. The state cannot utilize blood test result evidence in a criminal prosecution unless police obtained the evidence with a warrant, or the Commonwealth can show that either the exigent circumstances or actual consent warrant exception applies.

The amicus brief fails to mention that in circumstances almost identical to this case its argument concerning a non-arrested DUI suspect was accepted by the Superior Court in Commonwealth v. March, 154 A.3d 803 (Pa. Super. 2017), and that this Court summarily reversed, and ordered a remand for reconsideration in light of Myers and Birchfield. Commonwealth v. March, 172 A.3d 582 (Pa. 2017). This Court's decision in Myers is only four years old, and the Commonwealth has

asserted no special circumstance for this Court to now ignore principles of stare decisis and reconsider that ruling. This Court applies the stare decisis doctrine because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Stilp v. Commonwealth, 905 A.2d 918, 954 n. 31 (2006) (quoting Randall v. Sorrell, 548 U.S. 230, 243 (2006)).

Myers correctly decided the constitutional issue, rejecting an implied consent statute as a basis for sustaining a warrantless search. This Court should hold that the warrantless search here was unconstitutional, and that the blood test results must be suppressed.

CONCLUSION

The order of the Superior Court, vacating the judgment of sentence and reversing the denial of a motion to suppress evidence, should be affirmed.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 531

I do hereby certify on this 7th day of September, 2021, that the Brief Of Amicus Curiae filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 4,658 as counted by Microsoft Word.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/S/

AARON MARCUS, Assistant Defender
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EXHIBIT A

KeyCite Yellow Flag - Negative Treatment
Appeal Granted by Commonwealth v. Jones-Williams, Pa., April 28, 2021

237 A.3d 528
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Alim Sharif JONES-WILLIAMS Appellant

No. 1428 MDA 2017

Argued May 7, 2019

Filed August 11, 2020

Reargument Denied October 14, 2020

Synopsis

Background: Following accident in which defendant's vehicle collided with a train, defendant was charged with homicide by vehicle while driving under the influence (DUI) and related offenses. Defendant moved to suppress results of test of blood sample drawn by hospital without his consent while he was not fully conscious and requested by police officer without warrant. The Court of Common Pleas, York County, Criminal Division, No. CP-67-CR-0002824-2015, Michael E. Bortner, J., denied motion, finding exigent circumstances, and defendant was convicted of several DUI offenses. After the Court of Common Pleas denied defendant's post-trial motion alleging error in failing to suppress, defendant appealed, and the Court issued opinion in support of order, stating that it incorrectly found exigent circumstances.

Holdings: The Superior Court, No. 1428 MDA 2017, Olson, J., held that:

[1] officer had probable cause to believe that defendant was driving under the influence (DUI) of marijuana, and thus the Commonwealth satisfied statutory requirements to obtain results of defendant's blood test;

[2] statute providing for release of blood test results to law enforcement did not require officer to request test prior to extraction of blood;

[3] warrantless request to test blood sample violated defendant's constitutional rights, and thus results were inadmissible; and

[4] given that hospital obtained blood sample prior to police officer's arrival at hospital, no exigency permitted officer to request a test of defendant's blood without obtaining a warrant.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Post-Trial Hearing Motion.

West Headnotes (15)

[1] **Criminal Law** ⚖ Presumptions and burden of proof

Criminal Law ⚖ Degree of proof

Once a motion to suppress evidence is filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights. Pa. R. Crim. P. 581(H).

[2] **Automobiles** ⚖ Grounds or cause; necessity for arrest

Police officer had probable cause to believe that defendant was driving under the influence (DUI) of marijuana when his vehicle collided with a train, and thus the Commonwealth satisfied statutory requirements for probable cause to obtain results of test of defendant's blood sample, even if it did not show that hospital personnel, at the time they drew defendant's blood, made an independent finding of probable cause or were privy to any determination of probable cause made by police officers; although the statute

did not specify who was required to determine probable cause, precedent indicated that a police officer's determination was adequate, and officers at accident scene received multiple reports from emergency personnel that they detected an odor of marijuana about defendant's person. U.S. Const. Amend. 4; 75 Pa. Cons. Stat. Ann. § 3755(a).

[3] **Automobiles** ⚖ Grounds or cause; necessity for arrest

Governmental officials may obtain an individual's blood test results if, after a motor vehicle accident, the driver requires emergency medical treatment and there is probable cause to believe that a driving under the influence (DUI) violation occurred. U.S. Const. Amend. 4; 75 Pa. Cons. Stat. Ann. § 3755(a).

[4] **Automobiles** ⚖ Grounds or cause; necessity for arrest

Statute providing for release of results of blood testing to law enforcement did not require police officer to request testing of defendant's blood sample prior to hospital personnel's extraction of such sample, in order to be entitled to test sample. 75 Pa. Cons. Stat. Ann. § 3755(a).

[5] **Searches and Seizures** ⚖ Necessity of and preference for warrant, and exceptions in general

A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies. U.S. Const. Amend. 4; Pa. Const. art. I, § 8.

[6] **Automobiles** ⚖ Consent, express or implied

Searches and Seizures ⚖ Necessity of and preference for warrant, and exceptions in general

Established exceptions that permit a search without a warrant include actual consent, implied consent, search incident to lawful arrest, and exigent circumstances. U.S. Const. Amend. 4; Pa. Const. art. I, § 8.

1 Cases that cite this headnote

[7] **Automobiles** ⚖ Right to take sample or conduct test; initiating procedure

Automobiles ⚖ Consent, express or implied

Statutes providing for chemical testing to determine the alcoholic content of blood or the presence of a controlled substance and reporting of such by emergency room personnel do not independently support implied consent on the part of a driver suspected of or arrested for a DUI violation, and thus do not dispense with the need to obtain a warrant; a driver's statutorily implied consent cannot take the place of voluntary consent. 75 Pa. Cons. Stat. Ann. §§ 1547(a), 3755(a).

[8] **Automobiles** ⚖ Right to take sample or conduct test; initiating procedure

Automobiles ⚖ Consent, express or implied

Automobiles ⚖ Grounds or cause; necessity for arrest

In order for the Commonwealth to request a driver's blood test results, it must obtain a warrant or it must proceed within a valid exception to the warrant requirement. U.S. Const. Amend. 4; Pa. Const. art. I, § 8; 75 Pa. Cons. Stat. Ann. §§ 1547(a), 3755(a).

[9] **Automobiles** ⚖ Consent, express or implied

If government officials rely upon a driver's consent to request his blood test results, the Commonwealth must demonstrate that the driver's consent is voluntary, which means the driver had a meaningful opportunity to make a knowing and conscious choice of whether to

undergo chemical testing or exercise his right of refusal. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8; 75 Pa. Cons. Stat. Ann. §§ 1547(a), 3755(a).

[10] **Automobiles** ⇐ Motorist unconscious or incompetent

Warrantless request to test blood sample drawn while defendant was fading in and out of consciousness violated defendant's constitutional rights, and thus results were inadmissible in trial for homicide by vehicle while driving under the influence (DUI), even though requesting police officer had probable cause to believe that defendant was under the influence of marijuana when his vehicle collided with a train; defendant did not have opportunity to choose whether to exercise the right of refusal or provide actual consent to blood draw. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8; 75 Pa. Cons. Stat. Ann. §§ 1547(a), 3755(a).

[11] **Searches and Seizures** ⇐ Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Exigent circumstances, as an exception to the requirement for a warrant to conduct a search, exist when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8.

[12] **Searches and Seizures** ⇐ Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

The existence of an exigency that overcomes the requirement for a warrant to conduct a search is determined on a case-by-case basis after an examination of the totality of the circumstances. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8.

[13] **Automobiles** ⇐ Grounds or cause; necessity for arrest

Given that hospital had obtained blood sample from defendant prior to police officer's arrival at hospital following accident, no exigency permitted officer to request a chemical test on defendant's blood without obtaining warrant, even though the Commonwealth established that police had confronted a chaotic scene involving a collision between defendant's vehicle and a train, at which one person was declared dead, defendant and another required emergency treatment, and there was probable cause to believe defendant was driving under the influence (DUI); no further dissipation of evidence could occur, as defendant's blood was already preserved, and police officers admitted at suppression hearing that police could have obtained a warrant before requesting a chemical test on defendant's blood. U.S. Const. Amend. 14; Pa. Const. art. 1, § 8.

[14] **Searches and Seizures** ⇐ Private persons

A blood draw by hospital personnel does not trigger constitutional protections against unreasonable searches and seizures, absent evidence that hospital personnel acted at the direction of the police or as an agent of the police. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8.

[15] **Criminal Law** ⇐ Evidence wrongfully obtained

Criminal Law ⇐ Ordering new trial

Vacatur of judgment, reversal of order denying suppression, and remand for new trial were required in prosecution for homicide by vehicle while driving under the influence (DUI), where trial court failed to suppress results of test of defendant's blood drawn by hospital without his consent and obtained by police without a warrant. U.S. Const. Amend. 4; Pa. Const. art. 1, § 8.

*531 Appeal from the Judgment of Sentence April 5, 2017, in the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0002824-2015, Michael E. Bortner, J.

Attorneys and Law Firms

Shawn M. Dorward, Harrisburg, for appellant.

Timothy J. Barker, Assistant District Attorney, York, for Commonwealth, appellee.

BEFORE: ROWES, J., OLSON, J., and STABILE, J.

Opinion

OPINION BY OLSON, J.

Appellant, Akim Sharif Jones-Williams, appeals from the judgment of sentence entered on April 5, 2017, as made final by the denial of his post-sentence motion on September 11, 2017, following his jury and bench trial convictions for various crimes arising from a motor vehicle accident. After careful review, we vacate Appellant's judgment of sentence, reverse the order denying suppression, and remand for a new trial.

The facts and procedural history of this case are as follows. On July 5, 2014, Appellant was driving a red 2014 Mitsubishi Outlander accompanied by his fiancé, Cori Sisti, and their daughter, S.J. At approximately 4:42 p.m., Appellant's vehicle collided with a train at Slonekers Landing, near the 1100 block of Cly Road, York Haven, Pennsylvania.

Officer Michael Briar and two paramedics, Leslie Garner and Lisa Gottschall, were first to arrive at the scene. Upon arrival, they found Appellant outside of the vehicle, but Sisti and S.J. still inside. Garner and Gottschall immediately began treating Appellant, while Officer Briar attempted to assist Sisti and S.J. Ultimately, emergency personnel declared Sisti dead at the scene, but transported Appellant and S.J. to the hospital for medical treatment.[1] Subsequently, various individuals informed the officer in charge, Lieutenant Steven Lutz, that they detected an odor of burnt marijuana emanating from Appellant. Therefore, at approximately 6:00 p.m., Lieutenant Lutz directed Sergeant Keith Farren to go to the hospital to interview Appellant and obtain a blood sample.

When Sergeant Farren arrived at York Hospital, he discovered Appellant lying in a hospital bed, restrained, and fading in and out of consciousness. As such, Sergeant *532 Farren could not interview Appellant or request that he consent to a blood draw. Later, however, Sergeant Farren learned that hospital personnel drew Appellant's blood at 5:56 p.m., before his arrival.[2] This prompted Sergeant Farren to request that the hospital's laboratory transfer Appellant's blood sample to National Medical Services ("NMS") laboratory for testing to determine the presence of alcohol or controlled substances. Sergeant Farren filled out the requisite forms at 7:30 p.m. He did not obtain a warrant prior to submitting the request to test Appellant's blood sample. The hospital laboratory transferred Appellant's blood sample on July 8, 2014 (three days after the collision) and NMS laboratory issued its toxicology report analyzing Appellant's blood sample on July 15, 2014. The results revealed that Appellant's blood contained Delta-9 THC, the active ingredient in marijuana, at a concentration of 1.8 ng/ml and Delta-9 Carboxy THC, a marijuana metabolite, at 15 ng/ml.

Thereafter, on June 9, 2015, the Commonwealth filed a bill of information against Appellant. Specifically, the Commonwealth charged Appellant with one count each of the following offenses: homicide by vehicle while driving under the influence ("DUI"); homicide by vehicle, endangering the welfare of a child ("EWOC"); recklessly endangering another person ("REAP"); DUI: controlled substance – schedule I; DUI: controlled substance – schedule I, II, or III; DUI: general impairment; careless driving; careless driving – unintentional death; aggravated assault while DUI; and aggravated assault by vehicle. Bill of Information, 6/9/15, at *1-3 (un-paginated).

On October 26, 2015, Appellant filed an omnibus pre-trial motion. In his motion, Appellant moved to suppress the blood test results obtained by police. Appellant's Omnibus Pre-Trial Motion, 10/26/15, at *1-14 (un-paginated). Appellant argued that the police violated his constitutional rights by requesting to test his blood sample without a warrant. *Id.* at *9-14 (un-paginated); *see also* Appellant's Brief in Support of Omnibus Pre-Trial Motion, 1/29/16, at 29-39. Appellant

also asserted that, notwithstanding the statutory provisions set forth at 75 Pa.C.S.A. § 3755(a) (Reports by Emergency Room Personnel), if the police "can obtain a warrant ... without affecting the efficacy of the investigation," the Fourth Amendment of the United States' Constitution and Article I, Section 8 of Pennsylvania's Constitution require them to do so. Appellant's Omnibus Pre-Trial Motion, 10/26/15, at *11 (un-paginated).

The trial court held a suppression hearing on December 21, 2015, and subsequently denied Appellant's motion to suppress on April 27, 2016. Trial Court Order, 4/27/16, at 1. In doing so, the trial court held that Appellant's blood test results were admissible because exigent circumstances existed and, as such, the warrantless search did not violate Appellant's constitutional rights. Trial Court Opinion, 4/27/16, at 7-11.

Appellant's jury trial commenced January 9, 2017. The Commonwealth admitted at trial the report documenting the presence of Delta-9 THC and Delta-9 Carboxy THC in Appellant's bloodstream. N.T. Trial, 1/10/17, at 261. On January 13, 2017, Appellant was found guilty of homicide by vehicle while DUI,[3] homicide by vehicle,[4] *533 BWOC,[5] REAP,[6] DUI: controlled substance – schedule I,[7] DUI: controlled substance – metabolite,[8] aggravated assault while DUI,[9] aggravated assault by vehicle,[10] and careless driving.[11] On April 5, 2017, the trial court sentenced Appellant to four to eight years' imprisonment followed by 12 months' probation.

"On April 17, 2017, Appellant filed a post-sentence motion alleging that the trial court erred in denying suppression of Appellant's blood test results and that the trial court erred in finding that the weight of the evidence was met in [five] of the [nine] counts. [Through oversight, the trial court] granted the motion on May 10, 2017. On May 19, 2017, the trial court vacated its [May 10, 2017] order [ ] and ordered the parties to schedule a hearing [on] the post-sentence motion. [Thereafter, t]he trial court allowed Appellant to file a supplemental post-sentence motion on June 21, 2017[, and] held a hearing on the post-sentence motion on July 25, 2017. The trial court then denied [Appellant's] post-sentence motion [by] operation of [ ] law on September 11, 2017." Trial Court Opinion, 4/13/18, at 3.

On September 14, 2017, Appellant filed a notice of appeal to this Court. Appellant's Notice of Appeal, 9/14/17, at 1-2. On October 5, 2017, the trial court entered an order directing Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b)(1). Trial Court Order, 10/5/17, at 1. Appellant timely complied.

The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 13, 2018. Trial Court Opinion, 4/13/18, at 1-32. In its Rule 1925(a) opinion, the trial court stated that it incorrectly determined that exigent circumstances existed to permit the warrantless search. *Id.* at 12. In view of its error, the trial court asked this Court to "suppress Appellant's blood test results" and "affirm [Appellant's convictions for EWOC and REAP] based upon the circumstantial evidence." *Id.* at 32.

On appeal, Appellant raises the following issues for our review:[12]

I. [Did the trial court err in denying Appellant's motion to suppress when the Commonwealth failed to comply with 75 Pa.C.S.A. § 3755(a) of the Motor Vehicle Code?]

II. [If the Commonwealth did comply with Section 3755(a)'s requirements, did the trial court still err in denying Appellant's motion to suppress because statutory compliance is insufficient to overcome the warrant requirement of the Fourth Amendment of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution in light of the recent decisions in *Birchfield v. North Dakota*, — U.S. —, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *Commonwealth v. Myers*, 640 Pa. 653, 164 A.3d 1162 (2017), and *534 *Commonwealth v. March*, 643 Pa. 95, 172 A.3d 582 (2017)?]

III. Did the trial court err in denying [Appellant's] [m]otion for [s]uppression of [e]vidence [when] there were not exigent circumstances [and] the police officers could have reasonably obtained a search warrant before [requesting the transfer of Appellant's blood sample to NMS laboratory for testing] without significantly undermining the efficacy of the search?

IV. Did the trial court err in finding that, as a matter of law, the Commonwealth provided sufficient evidence to meet its burden of proof regarding [the following convictions: homicide by vehicle while DUI, aggravated assault by vehicle while DUI, EWOC, and REAP?]

V. Did the trial court abuse its discretion in denying [Appellant's] [p]ost-[s]entence [m]otion where the jury's verdict [was against the weight of the evidence for the following convictions: homicide by vehicle while DUI, aggravated assault by vehicle while DUI, EWOC and REAP?]

Appellant's Brief at 1-2.

[1] In Appellant's first three issues, he argues that the trial court erred in denying his motion to suppress. Appellant's Brief at 45-58. "Once a motion to suppress evidence has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights." *Commonwealth v. Wallace*, 615 Pa. 395, 42 A.3d 1040, 1047-1048 (2012); *see also* Pa.R.Crim.P. 581(H). With respect to an appeal from the denial of a motion to suppress, this Court has declared:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains un[-]contradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.
>
> *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa. Super. 2006) (citation omitted). Although we are bound by the factual and the credibility determinations of the trial court which have support in the record, we review any legal conclusions *de novo*. *Commonwealth v. George*, 878 A.2d 881, 883 (Pa. Super. 2005), *appeal denied*, [] 586 Pa. 735, 891 A.2d 730 (2005).

Commonwealth v. Wells, 916 A.2d 1192, 1194–1195 (Pa. Super. 2007) (parallel citations omitted).

[2] First, Appellant argues that the trial court erred in denying his motion to suppress because the Commonwealth did not comply with the requirements of 75 Pa.C.S.A. § 3755(a) of the Motor Vehicle Code when Sergeant Farren requested chemical testing of Appellant's blood. Relying solely on this Court's decision in *Commonwealth v. Shaffer*, 714 A.2d 1035 (Pa. Super. 1998), Appellant claims that a valid blood draw occurs pursuant to Section 3755(a) only when hospital personnel make a probable cause determination that a driver was DUI. Here, Appellant argues that the Commonwealth did not adhere to Section 3755(a)'s requirements because it did not show that, at the time hospital personnel *535 drew Appellant's blood, they "made an independent finding of probable case" or that they were "privy to any determinations of probable cause made by any of the police officers." Appellant's Brief at 55. Thus, Appellant argues that the Commonwealth failed to demonstrate compliance with Section 3755(a). We disagree.

[3] Section 3755(a) of the Motor Vehicle Code reads as follows:

> **§ 3755. Reports by emergency room personnel**
>
> (a) General rule.—If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of [] section 3802 (relating to driving under influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

75 Pa.C.S.A. § 3755(a). Thus, pursuant to the language of the statute, governmental officials may obtain an individual's blood test results if, after a motor vehicle accident, the driver requires emergency medical treatment and there is probable cause to believe that a DUI violation occurred.

Setting aside, for a moment, the issue of whether statutory compliance, by itself, continues to support an independent basis for obtaining blood test results without a warrant and consistent with constitutional concerns, we conclude that the Commonwealth, in this case, proved adherence with the requirements of Section 3755(a). In *Commonwealth v. Riedel*, 539 Pa. 172, 651 A.2d 135, 139 (1994), the appellant was involved in a single vehicle accident and sustained injuries. *Id.* at 137. Subsequently, emergency personnel arrived and began treating the appellant in an ambulance. *Id.* A Pennsylvania State Trooper later arrived and observed that the appellant exhibited signs of intoxication. *Id.* As such, the trooper followed medical personnel to the hospital to request a blood draw from the appellant for chemical analysis. *Id.* The trooper, however, learned that medical personnel already drew the appellant's blood for medical purposes and, as such, did not request a blood draw. *Id.* The trooper later wrote to the hospital requesting the results of the appellant's blood test. *Id.* "Based on this information, [the] appellant was charged with [DUI], 75 Pa.C.S.[A.] §§ 3731(a)(1) and (a)(4), [and later] convicted in a non-jury trial." *Id.* After this Court affirmed the appellant's judgment of sentence, he appealed to our Supreme Court. *See Commonwealth v. Riedel*, 425 Pa.Super. 649, 620 A.2d 541 (1992) (unpublished memorandum).

On appeal, the appellant argued that "the police violated his Fourth Amendment rights against unreasonable searches and seizures when, in the absence of exigent circumstances, they obtained the results of his medical purposes blood test without a warrant." *Riedel*, *supra* at 137. In response, the Commonwealth argued that the trooper properly obtained the appellant's blood test results because he complied with Section 3755(a). *Id.* at 139. *536 Agreeing with the Commonwealth, our Supreme Court in *Riedel* explained that the facts established that the appellant was in a motor vehicle accident, was transported to the hospital for emergency medical treatment, and that the officer had probable cause to believe he was DUI. *Id.* at 140. Accordingly, the Court concluded that, even though the officer "chose to wait[ ] and obtain [the] appellant's test results by mailing a request to the director of the hospital's laboratory," he still complied with the terms of Section 3755(a). *Id.*

This Court reached a similar conclusion in *Commonwealth v. Keller*, 823 A.2d 1004 (Pa. Super. 2003). Like *Riedel*, *Keller* involved a motor vehicle accident, emergency medical treatment, and the existence of probable cause to believe that the appellant was DUI. As such, an officer went to the hospital where the appellant was transported and "filled out a Toxicology Request form." *Id.* at 1007. The hospital then "mailed a report of the blood test results to the State Police." *Id.* Prior to trial, the appellant moved to suppress his blood test results and the trial court granted suppression. *Id.* at 1008.

On appeal, the Commonwealth argued that the trial court erred in suppressing the appellant's blood test results. *Id.* This Court agreed. In reaching this conclusion, we noted that the "police officer specifically requested that a BAC test be performed at [the hospital]" and the appellant "never disputed that [the trooper] had probable cause to believe that [he] was [operating a motor vehicle under the influence] of alcohol." *Id.* at 1010. As such, this Court concluded that hospital personnel "were required to withdraw blood from [the appellant] and release the test results" pursuant to Section 3755(a). *Id.* Accordingly, per *Riedel* and *Keller*, the Commonwealth demonstrates compliance with Section 3755(a) if, following a motor vehicle accident, a driver seeks emergency medical treatment, an officer has probable cause to believe that the driver operated his or her vehicle under the influence of alcohol or a controlled substance, and the officer subsequently requests the driver's blood test results from the hospital.

[4] The facts of the instant case are nearly identical to both *Riedel* and *Keller*. Indeed, after Appellant's vehicle collided with the train, emergency personnel transported Appellant to the hospital for emergency medical treatment, during which, the hospital extracted a sample of Appellant's blood. Following Appellant's transport, the officers at the scene of the accident developed probable cause to believe that Appellant was DUI after multiple emergency personnel who responded to the accident reported to Lieutenant Lutz that they detected an odor of marijuana about Appellant's person. Thereafter, at the request of Lieutenant Lutz, Sergeant Farren responded to the hospital and requested Appellant's blood test results.[13] Based upon the foregoing, we conclude that the Commonwealth complied with Section 3755(a).

Appellant's position, which asserts that there was non-compliance with Section 3755(a) because hospital personnel lacked *537 probable cause, is unavailing because he recognizes only one of the possible ways the Commonwealth may adhere to Section 3755(a) in seeking blood test results for an individual who requires emergency medical treatment following a motor vehicle accident. Indeed, our Supreme Court previously recognized at least two pathways for achieving compliance with Section 3755(a):

> Section 3755(a) is, to say the least, inartfully drafted. For some vague and curious reason, the legislature has required a probable cause determination without specifying who is to make such determination, or how such an abstract requirement is to be met. The request of a police officer, based on probable cause to believe a violation of Section 3731, would seem to satisfy the probable cause requirement and therefore mandate that hospital personnel conduct BAC testing. Likewise, a determination by hospital personnel familiar with Section 3755(a), that probable cause existed to believe that a person requiring treatment had violated Section 3731, would also seem to mandate that hospital personnel conduct BAC testing.

Commonwealth v. Shaw, 564 Pa. 617, 770 A.2d 295, 299 n.3 (2001).[14] Herein, the officers had probable cause to believe that Appellant was DUI when they asked the hospital to conduct chemical testing. As we have stated, this is sufficient to show that the Commonwealth complied with the requirements of Section 3755(a).

Next, Appellant argues that, even if the Commonwealth established compliance with Section 3755(a), the trial court erred in denying his motion to suppress because Section 3755(a) is unconstitutional. Upon review, we conclude that, in light of the United States Supreme Court's decision in *Birchfield*, *supra*, and our Supreme Court's decision in *Myers*, *supra*, Section 3755(a) and its counterpart, Section 1547(a), no longer serve as independent exceptions to the warrant requirement. As such, the search of Appellant's blood test results violated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

[5] [6] The Fourth Amendment and Article I, Section 8 prohibit unreasonable searches and seizures. *Commonwealth v. McAdoo*, 46 A.3d 781, 784 (Pa. Super. 2012). "A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies." *Commonwealth v. Strickler*, 563 Pa. 47, 757 A.2d 884, 888 (2000). Established exceptions include actual consent, implied consent, search incident to lawful arrest, and exigent circumstances. *Commonwealth v. Livingstone*, 654 Pa. 27, 174 A.3d 609, 625 (2017) (citation omitted).

At issue in the present case is the implied consent scheme set forth in Sections 1547 and 3755 of the Motor Vehicle Code. Previously, Pennsylvania courts concluded that the aforementioned statutes obviated "the need to obtain a warrant in DUI cases." *March*, *supra* at 808; *see Riedel*, *supra* at 143; *Keller*, *supra* at 1009; *Commonwealth v. Barton*, 456 Pa.Super. 290, 690

A.2d 293, 296 (1997). Indeed, both this Court and our Supreme Court have explained that,

> "[t]ogether, [S]ections 1547 and 3755 comprise a statutory scheme which, under *538 particular circumstances, not only imply the consent of a driver to undergo chemical or blood tests, but also require hospital personnel to withdraw blood from a person, and release the test results, at the request of a police officer who has probable cause to believe the person was operating a vehicle while under the influence.

Burton, *supra* at 296, *citing* *Riedel*, *supra* at 180. Thus, our courts previously held that compliance with the aforementioned statutory scheme independently negated the need to obtain a warrant because a "driver's implied consent under the statute satisfie[d] the consent exception to the warrant requirement." *March*, *supra* at 808. In recent years, however, Pennsylvania's so-called implied consent scheme has undergone judicial scrutiny, especially in the wake of decisions by the United States Supreme Court and the Pennsylvania Supreme Court that suggest that consent, as an exception to the warrant requirement, can only be inferred consistent with constitutional imperatives where it is voluntarily given under the totality of the circumstances.

We begin by looking at Section 1547 of the Motor Vehicle Code, which our Supreme Court recently examined, and which states, in relevant part, as follows:

> **§ 1547. Chemical testing to determine amount of alcohol or controlled substance**
>
> (a) General rule.—Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:
>
> (1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock).

75 Pa.C.S.A. § 1547(a)(1).

Until our Supreme Court's decision in *Myers*, *supra* "[t]he [i]mplied [c]onsent [l]aw, 75 Pa.C.S.[A.] § 1547(a), assume[d] acquiescence to blood testing 'absent an affirmative showing of the subject's refusal to consent to the test at the time that the testing is administered.'" *Riedel*, *supra* at 141, *citing* *Commonwealth v. Eisenhart*, 531 Pa. 103, 611 A.2d 681, 683 (1992). This view seems to have emerged from the language of Section 1547(b), which was said to "grant[ ] an explicit right to a driver who is under arrest for [DUI] to refuse to consent to chemical testing." *Riedel*, *supra* at 141. Section 1547(b) states, in pertinent part:

> (b) Suspension for refusal.—
>
> (1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer[.]

75 Pa.C.S.A. § 1547(b)(1). Pennsylvania courts interpreting this provision traditionally limited the right to refuse blood testing to those individuals who were both conscious and under arrest for a violation of Section 3802.

Our Supreme Court addressed this issue in *Eisenhart*, *supra*. In *Eisenhart*, after a "vehicle crashed into the cement wall of a residence," a police officer arrived and observed that the appellant, Eisenhart, displayed *539 signs of intoxication, including pupil dilation, difficulty maintaining balance, and a general dazed demeanor. *Id.* at 681-682. Eisenhart also failed two field sobriety tests. *Id.* at 682. As such, the officer placed him under arrest. *Id.* While the officer transported Eisenhart to the hospital for a blood test, he "alternatively agreed and refused to submit to a blood test." *Id.* "At the hospital, [Eisenhart] refused to

consent to a blood alcohol test." *Id.* Nonetheless, hospital personnel conducted a blood test, which revealed an alcohol level over the legal limit. *Id.*

The Commonwealth ultimately charged Eisenhart with various crimes, including DUI. *Id.* Thereafter, Eisenhart attempted to suppress the blood test results. He argued "that once the operator of a vehicle refuses to submit to a blood test ... 75 Pa.C.S.[A.] § 1547[ ] prohibits the testing of blood for alcohol level and the subsequent evidentiary use of such test results." *Id.* at 682. Eventually, our Supreme Court granted *allocatur* to consider "whether the appellant has the right to refuse to submit to blood alcohol testing under the Motor Vehicle Code." *Id.*

Ultimately, the Court concluded that "[t]he statute grants an explicit right to a driver who is **under arrest** for [DUI] to refuse to consent to chemical testing." *Id.* at 683 (emphasis added); *see also* 75 Pa.C.S. § 1547. Notably, the Court limited its holding to "conscious driver[s]." *Id.* at 684. Indeed, it declined to opine on an unconscious driver's statutory right to refuse consent and stated that the "conscious driver has the right under 1547(b) to revoke that consent and once that is done, 'the testing shall not be conducted.' " *Id.* (citation omitted).

The Supreme Court later reaffirmed *Eisenhart*'s holding in *Riedel*, the facts of which we explained above. The *Riedel* Court not only addressed the Commonwealth's compliance with Section 3755(a), but also discussed whether the appellant in *Riedel* "was denied the right to refuse blood alcohol testing under 75 Pa.C.S.A. § 1547, the [i]mplied [c]onsent [l]aw." *Riedel, supra* at 138. Indeed, Riedel claimed that he possessed "an absolute right to refuse testing" and "any other interpretation would result in an impermissible distinction between drivers under arrest and those, like [Riedel], who are not requested to consent because they are unconscious or are receiving emergency medical treatment." *Id.* at 141.

The Supreme Court disagreed. Instead, the Court held that because Riedel was "not under arrest at the time the blood test was administered[, he could not] claim the explicitly statutory protection of [S]ection 1547(b)." *Id.* Moreover, the Court explained that it would "not reformulate the law to grant an unconscious driver or [a] driver whose blood was removed for medical purposes the right to refuse to consent to blood testing" because the "decision to distinguish between classes of drivers in the implied consent scheme is within the province of the legislature." *Id.* Thus, pursuant to *Eisenhart* and *Riedel*, the implied consent statute found at Section 1547 operated as an independent exception to the warrant requirement. At this time, however, the right to refuse consent to a blood draw or chemical testing did not extend to unconscious drivers who may have been under suspicion for DUI but who had not yet been arrested.

Recently, however, our Supreme Court altered the reading of the implied consent statute in *Myers, supra*. In *Myers*, the Philadelphia Police responded to a call stating that an individual was "screaming" in a vehicle. *Id.* at 1165. An officer arrived at the scene and observed a vehicle matching the call description with an individual, Myers, in the driver seat. *Id.* The officer *540 pulled up behind the vehicle and activated his siren and emergency lights. *Id.* Myers subsequently exited the vehicle and "stagger[ed]" toward the officer. *Id.* Myers tried to speak "but his speech was so slurred that [the officer] could not understand [him]." *Id.* The officer detected alcohol about Myers' person and observed a bottle of brandy in the vehicle's front seat, as the driver's door was open. *Id.* Because the officer believed that Myers needed medical attention due to his state of inebriation, the officer placed Myers under arrest and called for a wagon to transport him to the hospital. *Id.*

Thereafter, another Philadelphia police officer arrived at the hospital where Myers was taken. *Id.* "A few minutes before [the officer] arrived, however, the hospital staff administered four milligrams of Haldol" to Myers, rendering him unconscious. *Id.* As such, Myers was unresponsive

when the officer attempted to communicate with him. *Id.* Nonetheless, the officer read the *O'Connell*[15] warnings to Myers, who did not respond, and then directed a nurse to draw Myers's blood. *Id.* The officer did not have a warrant. *Id.* The Commonwealth later charged Myers with DUI. Myers then moved to suppress his blood test results, which the trial court subsequently granted. The Commonwealth appealed.

After agreeing to review the case, our Supreme Court first addressed whether an unconscious arrestee possesses the statutory right to refuse blood testing pursuant to Section 1547(b) of the Motor Vehicle Code. Ultimately, the Court explained that "the statute [contains] unambiguous language [that] indicates that the right of refusal applies without regard to the motorist's state of consciousness." *Id.* at 1172. Thus, the Court held that Section 1547(b)'s right of refusal applies to all arrestees, conscious or unconscious. *Id.*

Next, the Court addressed whether "75 Pa.C.S.[A.] § 1547(a) [which] provid[es] that a DUI suspect 'shall be deemed to have given consent' to a chemical test [constitutes] an independent exception to the warrant requirement of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution." *Id.* at 1180 (citation omitted). Although unable to garner majority approval,[16] the Court concluded that "the language of 75 Pa.C.S.[A.] § 1547(a) ... does not constitute an independent exception to the warrant requirement." *Id.*

In reaching this conclusion, the Court recognized that consent, as an exception to the warrant requirement, must be voluntary. *541 *Id.* at 1176-1177. Per the Court, this is true even if consent is implied. *Id.* Indeed, the *Myers* Court concluded that, "despite the existence of an implied consent provision, an individual must give actual, voluntary consent at the time that testing is requested." *Id.* at 1178. In reaching this conclusion, the *Myers* Court relied upon the United States Supreme Court's decision in *Birchfield v. North Dakota*, ——U.S. ——, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). It stated:

> Of particular salience for today's case, the *Birchfield* Court addressed the circumstance in which a DUI suspect is unconscious when a chemical test is sought. The [United States Supreme] Court explained:
>
> > It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.
>
> *Id.* at 2184–85. Lest anyone doubt what the Supreme Court meant when it stated that police officers in such circumstances "may apply for a warrant if need be," the Court emphasized that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id.* at 2184. Noting that all fifty states have enacted implied consent laws, *id.* at 2169, the Court nowhere gave approval to any suggestion that a warrantless blood draw may be conducted upon an unconscious motorist simply because such a motorist has provided deemed consent by operation of a statutory implied consent provision. Rather, the Supreme Court indicated that a warrant would be required in such situations unless a warrantless search is necessitated by the presence of a true exigency.

Id. at 1178–1179. Based upon the foregoing, the *Myers* Court concluded that, "[l]ike any other searches based upon the subject's consent, a chemical test conducted under the implied consent statute is exempt from the warrant requirement only if consent is given voluntarily under the totality of the circumstances." *Id.* at 1180. As such, the Court held that because the appellant in *Myers* was unconscious, he did not have the opportunity to "make a 'knowing and conscious choice' regarding whether to undergo chemical testing or to exercise his right of refusal."

Id. at 1181 (citation omitted). Thus, the totality of the circumstances demonstrated that he did not voluntarily consent to the blood draw. *Id.*

In *Myers*, a majority of our Supreme Court held that an individual arrested for DUI, whether conscious or unconscious, possessed a statutory right to refuse chemical testing. A mere plurality of the *Myers* court held, however, that Section 1547(a), by itself, does not establish an independent exception to the warrant requirement. Following *Myers*, the issue of whether compliance with Section 1547(a) or Section 3755(a), standing alone, serves as an independent exception to the warrant requirement remains unsettled, especially for individuals who are unconscious and not under arrest at the time of a blood draw.

Despite this uncertainty, the subsequent history of a recently-published decision by a panel of this Court offers insight as to how our Supreme Court would address these issues in future cases. The facts in *542 *Commonwealth v. March*, 154 A.3d 803 (Pa. Super. 2017) are nearly identical to the facts of the instant case. On July 14, 2015, a single vehicle accident occurred. *Id.* at 805. When police arrived at the scene, emergency medical personnel were treating March, the driver, who was unresponsive and subsequently transferred to the hospital for treatment. *Id.* After investigating the scene of the accident, the officer learned information that provided probable cause to believe that March was under the influence of a controlled substance at the time of the accident. *Id.* The officer then traveled to Reading Hospital to request a sample of March's blood. *Id.* A request was made, without a warrant, and a blood draw was subsequently taken which later revealed the "presence of several Schedule I controlled substances in March's blood." *Id.* at 806. Notably, at the time of the blood draw, March was unconscious but not under arrest. *Id.* at 805. Thereafter, the Commonwealth charged March with various crimes, including DUI (controlled substance). *Id.* at 806. March filed an omnibus pre-trial motion seeking to suppress the blood evidence based upon an allegedly illegal blood draw. *Id.* The trial court granted March's motion. *Id.* The Commonwealth then appealed to this Court.

On appeal, this Court concluded that the "interplay" between Section 1547(a) and Section 3755(a) "allowed for [March's] warrantless blood draw and release of the results." *Id.* at 813. In reaching this conclusion, this Court in *March* made the distinction that, unlike the appellant in *Myers*,[7] March was not under arrest at the time of the blood draw. *Id.* As such, this Court concluded that he did not possess the statutory right to refuse consent pursuant to Section 1547(b). *Id.* In making this distinction, the *March* Court relied on the Pennsylvania Supreme Court's previous decisions in *Riedel* and *Eisenhart*. *Id.* Furthermore, the Court, relying on *Riedel*, concluded that because March "was unconscious and unresponsive," he did not have the right to refuse to consent to blood testing. *Id.* Accordingly, we concluded that the "warrantless blood draw was permissible" because March "was involved in a motor vehicle accident, was unconscious at the scene and required immediate medical treatment, was not under arrest, and remained unconscious when the blood tests were administered." *Id.* Ultimately, however, the Supreme Court vacated and remanded our decision in *March*. *See Commonwealth v. March*, 643 Pa. 95, 172 A.3d 582 (2017). In doing so, the Supreme Court expressly instructed this Court to reconsider our disposition in *March* in light of the decision in *Myers*, *supra* and the United States Supreme Court's decision in *Birchfield*, *supra*. *See id.*

[7] [8] [9] Based upon the foregoing, we conclude that Section 1547(a) and its counterpart, Section 3755(a), no longer independently support implied consent on the part of a driver suspected of or arrested for a DUI violation and, in turn, dispense with the need to obtain a warrant. "Simply put, statutorily implied consent cannot take the place of voluntary consent." *Myers*, *supra* at 1178. Thus, in order for the Commonwealth to request a driver's blood test results, it must obtain a warrant or it must proceed within a valid

exception to the warrant requirement. If government officials rely upon a driver's consent to request his blood test results, the Commonwealth must demonstrate that the *543 driver's consent is voluntary, which means the driver had a meaningful opportunity to "make a 'knowing and conscious choice' of whether to undergo chemical testing or exercise his right of refusal." *Id.* at 1181 (citation omitted).

[10] In this case, the Commonwealth cannot simply rely upon its compliance with Section 3755(a) to justify the warrantless request to test Appellant's blood sample. As stated above, by the time Sergeant Farren arrived at York Hospital, Appellant was fading in and out of consciousness. N.T. Suppression Hearing, 12/21/15, at 59. Appellant, therefore, did not have the "opportunity to choose whether to exercise [the right of refusal] or to provide actual consent to the blood draw." *Myers*, *supra* at 1181. "Because [Appellant] was deprived of this choice, the totality of the circumstances unquestionably demonstrate[ ] that he did not voluntarily consent to the blood draw." *Id.* Thus, the Commonwealth's warrantless request to test Appellant's blood sample violated Appellant's constitutional rights and the trial court erred in denying his motion to suppress.

Lastly, we must address whether exigent circumstances existed in this case to permit the warrantless request to test Appellant's blood sample. Herein, Appellant argues that the Commonwealth failed to prove that exigent circumstances existed to permit the warrantless search. Appellant's Brief at 57-58. We are constrained to agree.

[11] **[12]** Exigent circumstances comprise one of the "well-recognized exception[s]" to the Fourth Amendment's and Article I, Section 8's warrant requirements. *McNeely*, *supra* at 148, 133 S.Ct. 1552. Exigent circumstances "[exist] when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *Id.* at 148-149, 133 S.Ct. 1552. In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court considered the constitutionality of a warrantless blood draw under circumstances analogous to those present here. The *Schmerber* Court concluded that an exigency may arise if an officer "reasonably [ ] believe[s he is] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threaten[s] the destruction of evidence." *Id.* at 770, 86 S.Ct. 1826. The existence of an exigency that overcomes the warrant requirement is determined on a case-by-case basis after an examination of the totality of the circumstances. *McNeely*, *supra* at 145, 133 S.Ct. 1552 (determination of whether an exigency supports a warrantless blood draw in drunk-driving investigation is done "case by case[,] based on the totality of the circumstances").

The United States Supreme Court recently revisited the issue of exigent circumstances in the context of intoxicated driving investigations. In *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019), the Court explained that, in general, exigent circumstances may exist to permit the police to pursue a warrantless blood draw if the driver's BAC is dissipating and the driver is unconscious. *Mitchell*, 139 S.Ct. at 2537. In *McNeely*, however, the Supreme Court cautioned that the natural metabolization of BAC, alone, does not present "a *per se* exigency that justifies an exception to the [warrant requirement]." *McNeely*, *supra* at 145, 133 S.Ct. 1552. Instead, *McNeely* clarified that the "the metabolization of alcohol [or a controlled substance] in the bloodstream and the ensuing loss of evidence are among the factors" to consider when determining whether exigent circumstances justify a warrantless blood draw. *Id.* at 165, 133 S.Ct. 1552. *McNeely* also *544 highlighted additional factors, such as the "need for the police to attend to a related car accident," "the procedures in place for obtaining a warrant, the availability of a magistrate judge," and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." *Id.* at 164, 133 S.Ct. 1552. Notably, this Court previously utilized the aforementioned factors to determine whether an exigency existed in a drunk-driving investigation. *See* *Commonwealth v. Trahey*, 183 A.3d 444, 450-452 (Pa. Super. 2018) (applying the factors listed in *McNeely* to determine whether, under the totality of the circumstances, an exigency permitted a warrantless blood draw).

[13] Based upon the totality of circumstances present in this case, we conclude that the Commonwealth failed to prove that an exigency permitted the police to request, without a warrant, the chemical testing of Appellant's blood sample. At the suppression hearing, the Commonwealth established that the police were "dealing with a chaotic situation" and that they had probable cause to believe that Appellant was driving under the influence of marijuana. N.T. Suppression Hearing, 12/21/15, at 77. Specifically, Officer Briar explained that the scene involved a collision between a train and a vehicle where one person (Sisti) was declared dead, and two others (Appellant and S.J.) required emergency treatment. *Id.* at 7-39. In addition, Officer Kevin Romine testified that he interviewed the train's conductor, Virgil Weaver, on the day of the accident and Weaver informed him that he "detected an odor of marijuana around the vehicle" after attempting to render aid. *Id.* at 46. In addition, Officer Romine testified that he interviewed Leslie Garner, the paramedic who assisted Appellant, and she confirmed that "she detected an odor of marijuana about [Appellant's] person." *Id.* at 47.

[14] While these circumstances undoubtedly confirm the existence of a tragic and unfolding emergency, other factors compellingly undermine the conclusion that exigent circumstances permit us to jettison the warrant requirement. Sergeant Farren testified that when he arrived at York Hospital, he learned that hospital personnel already obtained a blood sample from Appellant. *Id.* at 59. The blood draw occurred at 5:56 p.m., approximately one hour and 20 minutes after the accident. As of 5:56 p.m., then, Appellant's blood sample, including all of the intoxicants contained therein, was preserved. Thus, the extraction of Appellant's blood shortly before 6:00 p.m. on the date of the accident literally stopped the clock on any concern that the further passage of time could result in dissipation of evidence since the withdrawal of Appellant's blood by hospital personnel ceased all metabolic activity that might influence a toxicological assessment of the sample. As a result, any argument that an exigency existed at the time Sergeant Farren submitted his request to test Appellant's blood sample was no longer viable. [18] Sergeant Farren and *545 Lieutenant Lutz's testimony at the suppression hearing bolsters this conclusion as both officers admitted that the police could have obtained a warrant before asking that chemical tests be performed on Appellant's blood. *See* N.T. Suppression Hearing, 12/21/15, at 65-66 and 83. Therefore, in view of the foregoing circumstances, we conclude that no exigency permitted the warrantless search in this case and, as such, the trial court erred in denying Appellant's motion to suppress.

We note that, initially, the trial court denied suppression based upon a finding of exigent circumstances. Upon review, it is apparent that the trial court originally inferred that an exigency existed because the requirements of 75 Pa.C.S.A. § 3755(a) were met. Indeed, the court explained its reasoning as follows:

> Here, there was an accident scene involving the parties to the accident, emergency [personnel], and the investigators. As recounted above, [Lieutenant] Lutz dispatched [Sergeant] Farren to the hospital to obtain blood from [Appellant] after gathering enough information at the scene to form probable cause [that Appellant was DUI]. [T]he officers [also] had to process an accident scene and [Appellant was] transported to a hospital. The exigency [Lieutenant] Lutz felt is evident in his testimony when he stated, "I instructed [Sergeant] Farren, who was reporting on duty, that as soon as he came on duty to jump in his car and respond to [ ] York Hospital and request a legal, a BAC for [Appellant]." [ ] N.T., [Preliminary Hearing,] 4/29/15, at 47 [emphasis in original]. Though [Lieutenant] Lutz's subjective feeling of exigency carries no weight, [the court] agree[s] that the circumstances warranted it.
>
> Metabolization of alcohol is not, in and of itself, enough to find exigency; however, [the court] believe[d] that investigators' fears vis-à-vis metabolization are enough to find exigency when the officers were delayed by needs more pressing tha[n] obtaining [Appellant's] BAC—namely, attending to victims and processing the scene of death.
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> ***
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> [T]hus, Appellant's] request to suppress the results from the blood draw in this case for lack of a warrant is denied.

Trial Court Opinion, 4/27/16, at 10–11.

In its 1925(a) opinion, however, the court explained:

> The trial court based its denial of suppression of the blood test results upon its finding of exigent circumstance[s]. Upon further review, the trial court believes it erred

[in denying suppression.] While the Newberry Township Police Department was preoccupied with the hectic nature of a train wreck, [Sergeant] Farren arrived at York Hospital to request a blood test. When he arrived, York Hospital had already conducted a [blood draw]. All [Sergeant] Farren did was [ ] follow the procedure under [75 Pa.C.S.A. § 3755(a)] and instruct the hospital staff to transfer the blood samples to NMS [laboratory] in Willow Grove.

When the trial court denied [ ] suppression, it incorrectly viewed the totality of the circumstances and gave too much weight to the preoccupied police force. The trial court now believes that there w[ere] not urgent and compelling reasons [that prevented Sergeant Farren *546 from leaving the hospital to procure] a warrant before returning to have the blood samples transferred to NMS [laboratory]. Because of this, exigent circumstances did not exist[.]

Trial Court Opinion, 4/13/18, at 12-13.

[15] As detailed above, we agree with the trial court's statement in its 1925(a) opinion that no exigency existed to justify the warrantless search. Thus, the trial court should have suppressed Appellant's blood test results. As such, we must vacate Appellant's judgment of sentence, reverse the trial court's order denying suppression, and remand for a new trial.[19] *Commonwealth v. Kreuzel*, 209 A.3d 1024, 1032 (Pa. Super. 2019) (where trial court erred in denying suppression, order denying suppression should be reversed, appellant's judgment of sentence should be vacated, and case should be remanded for a new trial); *Commonwealth v. Boyd Chisholm*, 198 A.3d 407, 418 (Pa. Super. 2018) (same).

Judgment of sentence vacated. Order denying suppression reversed. Case remanded for new trial. Jurisdiction relinquished.

All Citations

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Footnotes

1 S.J. survived the injuries she sustained in the accident.

2 The record does not establish why hospital personnel collected a blood sample from Appellant. It is clear, however, that hospital personnel performed the blood draw before receiving a request from Sergeant Farren.

3 75 Pa.C.S.A. § 3735(a).

4 75 Pa.C.S.A. § 3732(a).

5 18 Pa.C.S.A. § 4304(a)(1).

6 18 Pa.C.S.A. § 2705.

7 75 Pa.C.S.A. § 3802(d)(1)(i).

8 75 Pa.C.S.A. § 3802(d)(1)(ii).

9 75 Pa.C.S.A. § 3735.1(a).

10 75 Pa.C.S.A. § 3732.1(a).

11 75 Pa.C.S.A. § 3714(a).

12 We have altered the order of Appellant's issues for clarity and ease of discussion. *See* Appellant's Brief at 1-2.

13 The procedure followed by law enforcement personnel complied with Section 3755(a) even though the hospital extracted Appellant's blood sample prior to Sergeant Farren's request. *See* *Commonwealth v. Seibert*, 799 A.2d 54, 64 (Pa. Super. 2002) (explaining that an "officer is entitled to the release of [chemical] test results" if "an officer determines there is probable cause to believe a person operated a motor vehicle

under the influence ... and requests that hospital personnel withdraw blood" regardless of the fact that "medical staff previously drew the blood and a request by the police ... came after the blood was drawn.")

14 Based upon this language, it would appear that either law enforcement officers or hospital personnel may make the probable cause determination. Thus, the key inquiry is whether the individual who requested chemical testing did, in fact, have probable cause to believe that the individual who operated the vehicle was under the influence of alcohol or a controlled substance.

15 The *O'Connell* warnings were first pronounced in *Commonwealth, Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 521 Pa. 242, 555 A.2d 873 (1989). In a later opinion, our Supreme Court explained both the *O'Connell* warnings and the reasoning behind the warnings:

> in order to guarantee that a motorist makes a knowing and conscious decision on whether to submit to testing or refuse and accept the consequence of losing his driving privileges, the police must advise the motorist that in making this decision, he does not have the right to speak with counsel, or anyone else, before submitting to chemical testing, and further, if the motorist exercises his right to remain silent as a basis for refusing to submit to testing, it will be considered a refusal and he will suffer the loss of his driving privileges[. T]he duty of the officer to provide the *O'Connell* warnings as described herein is triggered by the officer's request that the motorist submit to chemical sobriety testing, whether or not the motorist has first been advised of his [*Miranda v. Arizona*, 384 U.S. 436[, 86 S.Ct. 1602, 16 L.Ed.2d 694] (1966)] rights.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Scott, 546 Pa. 241, 684 A.2d 539, 545 (1996).

16 Only Justices Donohue and Dougherty joined this portion of Justice Wecht's opinion. *See Myers*, 164 A.3d at 1180, n. 15.

17 This Court issued its decision in *March* prior to our Supreme Court's decision in *Myers*, *supra*. Thus, the panel relied upon this Court's previous decision in *Commonwealth v. Myers*, 118 A.3d 1122 (Pa. Super. 2015), *appeal granted*, 635 Pa. 60, 131 A.3d 480 (2016).

18 Sergeant Farren's request to test Appellant's blood sample constitutes the relevant search for purposes of our constitutional analysis. That is, we look to the circumstances that existed at the time of his request to determine whether an exigency was present. The blood draw by hospital personnel did not trigger protections under either the Fourth Amendment or Article I, Section 8 because there is no evidence that hospital personnel acted at the direction of the police or as an agent of the police. *Seibert*, *supra* at 63 (explaining that, "because the hospital did not withdraw [the appellant's] blood at the direction of [the police] the search did not implicate [the appellant's] Fourth Amendment rights." Instead, "the hospital withdraw [the appellant's] blood on its own initiative for its own purposes."). As such, in the absence of state action (or a demonstration thereof), the earliest possible governmental search occurred when Sergeant Farren requested that Appellant's blood sample be submitted for chemical testing.

19 Due to our disposition, we need not address Appellant's remaining appellate issues.

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