STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

ORIGINAL

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THE STATE,

RESPONDENT,

V.

MARY ANN GERMAN,

APPELLANT.

APPELLATE CASE NO. 2018-002090

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SC Court of Appeals

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Over three years after the United States Supreme Court issued its decision in Missouri v. McNeely, 569 U.S. 141 (2013), did the police's warrantless, nonconsensual taking of appellant's blood while she was restrained, where the State expressly waived any reliance on the exigent circumstances exception or the search incident to arrest exception, violate appellant's rights under the Fourth Amendment and the South Carolina Constitution?

## STATEMENT OF THE CASE

On September 15, 2016, a Beaufort County Grand Jury indicted appellant Mary Ann German for Felony Driving Under the Influence, Death Results. R. 575. On August 23, 2018, a hearing was held before the Honorable Brooks P. Goldsmith on appellant's motion to suppress. R. 1. Scott Lee represented appellant and Dustin Whetsel and Leigh Staggs represented the State. R. 2. On October 3, 2018, Judge Goldsmith denied the motion to suppress. R. 569. On November 13, appellant's case was tried before Judge Goldsmith and a jury. R. 91. The jury convicted appellant. R. 553, ll. 6 – 10. Judge Goldsmith sentenced appellant to eleven years' imprisonment. R. 566, ll. 13 – 15. This appeal follows.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from a suppression hearing, appellate courts are bound by the circuit court's factual findings if any evidence supports the findings. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002) (stating "Brockman does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence").

## ARGUMENT

Over three years after the United States Supreme Court issued its decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), did the police's warrantless, nonconsensual taking of appellant's blood while she was restrained, where the State expressly waived any reliance on the exigent circumstances exception or the search incident to arrest exception, violate appellant's rights under the Fourth Amendment and the South Carolina Constitution.

**Factual and Procedural Background**

*The Warrantless Blood Draw*

The state trooper who ordered Mary Ann German's blood taken against her will candidly admitted the reason why he did not get a warrant: "In a case, normally, of—if there's a felony DUI involving death, we do not need permission." R. 41, l. 25 – 42, l. 9. Trooper Jeff Shumaker "was trained that way when I came into law enforcement." R. 42, ll. 10 – 12. Trooper Shumaker agreed that magistrates were on call "24/7" in Beaufort County, he had contact information for a magistrate, but he made no attempt to get a warrant for the blood draw. R. 40, l. 5 – 41, l. 14. He also agreed that getting a warrant "could have been possible." R. 41, ll. 10 – 14.

When German's blood was taken at 2:00 AM, she was restrained to a bed in the emergency room. R. 59, ll. 3 – 17. R. 8, ll. 7 – 13. The trooper had been to the scene of the fatal automobile accident in which German was the driver of a truck. R. 15, l. 3 – 17, l. 2. German's truck hit a sedan head-on on Highway 21 in Beaufort County and was pointed in the wrong direction of travel. R. 15, l. 3 – 17, l. 2. The driver of the sedan died from the crash. R. 22, ll. 2 – 8. Trooper Shumaker suspected German was intoxicated. R. 22, ll. 13 – 17.

Trooper Shumaker read German the wrong implied consent rights. R. 22, l. 22 – 23, l. 7. He did not read her the felony DUI implied consent rights because he "grabbed the wrong form."

R. 23, ll. 1 – 7. He read German the advisement for misdemeanor DUI instead. R. 32, ll. 6 – 12. Trooper Shumaker agreed that the advisement he read to German was "inconsistent in some ways with the felony DUI advisement." R. 35, ll. 3 – 18.

German refused to cooperate with any testing. R. 36, ll. 3 – 7. She refused to sign the trooper's form. R. 20, ll. 9 – 25. She became upset. R. 36, ll. 8 – 18. Trooper Shumaker nevertheless told German he was getting the blood. R. 43, l. 20 – 44, l. 12. He admitted it was "[p]ossible" that he told German that "like it or not, we are getting a blood draw." R. 44, ll. 6 – 12. A phlebotomist took German's blood and gave it to law enforcement for testing. R. 8, l. 7 – 9, l. 11. SLED's testing of German's blood revealed a blood alcohol level of 0.275. R. 393, l. 23 – 394, l. 4.

*Isa and Muck's Grown and Sexy Bash*

At trial, German raised (and received a jury instruction on) the defense of necessity because of events that quickly spiraled downwards at a rural club in Beaufort. R. 546, l. 16 – 547, l. 5. On the day leading up to the fatal crash in rural Beaufort County, German and her husband, Roger, set off from their home in Myrtle Beach intent on visiting two state parks in the lowcountry to get stamps in their Ultimate Outsider book. R. 409, l. 19 – 411, l. 2. The Germans, who had been married for twenty-six years, were avid campers. R. 406, ll. 19 – 22. R. 412, ll. 3 – 12. Their truck, which had a camper shell on the back, was full of camping gear and provisions for up to a week of camping. R. 409, l. 16 – 412, l. 2.

The Germans intended to visit both Hunting Island and Edisto State Parks and went first to Edisto. R. 408, l. 21 – 409, l. 1. R. 412, l. 22 – 413, l. 8. They collected a stamp at the park in Edisto. R. 412, l. 22 – 413, l. 8. A bad wreck on the only highway into Edisto delayed their departure for Hunting Island State Park for over five hours. R. 413, l. 20 – 414, l. 14. The July

evening had already become dark when they left Edisto. R. 414, l. 15 – 415, l. 5. Mary drove the truck on the empty road between Edisto and Beaufort. R. 415, l. 9 – 416, l. 2.

The first place they saw that had its lights on was a small bar on Highway 21 that they later learned was called A&J Flea Market. R. 415, l. 15 – 416, l. 11. R. 461, l. 11 – 462, l. 6. Figuring Hunting Island park would be closed, the Germans pulled into the empty parking lot to get a drink and decide where to stay for the night. R. 415, l. 15 – 417, l. 9. R. 461, l. 11 – 462, l. 6. Roger testified he thought it looked like a safe place to stop and have a beer. R. 417, l. 24 – 418, l. 21. The bar was almost empty when the Germans arrived at approximately 10:30PM. R. 418, l. 7 – 419, l. 5.

Not being much of a beer drinker, Mary decided to get a mixed drink. R. 419, ll. 9 – 13. A lady sitting at the corner of the bar offered the Germans "the opportunity to purchase an all you can drink bracelet for $10." R. 419, ll. 14 – 21. The Germans bought bracelets and went around a corner where someone was "free pouring" liquor. R. 419, l. 19 – 420, 23.

Unknown to the Germans, they had unintentionally become guests at "Isa and Muck's Grown and Sexy Bash." R. 420, l. 20 – 421, l. 9. A&J Flea Market was known locally as "Archie's" and was a night club. R. 156, ll. 12 – 16. Isa Grant ("Isa") and Mahogany Fields ("Muck") were the hostesses of the Grown and Sexy Bash and had promoted the event with a flyer that said "Security strictly enforced." R. 165, l. 5 – 166, l. 15. One of the attendees said having security would be important to her at a party at Archie's, but she saw no security that night. R. 166, ll. 5 – 15. Judge Goldsmith sustained the State's objection when defense counsel attempted to cross-examine the eponymous Archie about shootings, attempted murders, and other times the police had been called to Archie's. R. 216, l. 3 – 225, l. 3. The court allowed

defense counsel to ask Archie in front of the jury whether people had "a habit of bringing guns and weapons" to the bar and Archie said, "That's right." R. 225, l. 20 – 226, l. 6.

Archie's started filling with people. R. 469, ll. 2 – 9. As it became "packed," Roger said the crowd became hostile to them. R. 422, l. 15 – 424, l. 24. Somebody called Roger "a white bitch." R. 423, ll. 6 – 9. Several other people in the bar asked Roger "what the fuck was my white ass doing there." R. 423, ll. 6 – 9. Someone "shouldered" Roger. R. 423, ll. 10 – 18. Mary dropped a beer bottle and when she lifted her head while trying to pick up the broken pieces, one woman loudly said, "Who the fuck is this white bitch." R. 471, l. 18 – 472, l. 13. Mary testified she was the only person in the bar to whom this comment could be directed. R. 472, ll. 10 – 20. Roger told Mary, "It's time to go." R. 472, ll. 2 – 4.

"Things went from bad to worse" when the Germans got into the parking lot. R. 425, ll. 15 – 23. The Germans had considered spending the night in their truck when it was the only car parked in the rural parking lot, but that was no longer a possibility. R. 425, l. 22 – 426, l. 1. People followed them out of the bar. R. 426, ll. 2 – 3. The parking lot had as many people as the inside the bar. R. 426, ll. 13 – 23. The parking lot was full and the Germans' truck was blocked by cars. R. 426, l. 22 – 428, l. 11. Mary got in the truck and Roger tried to find somebody to move cars so they could leave. R. 428, ll. 2 – 11.

Roger quickly realized "[t]hat wasn't a possibility." R. 428, ll. 10 – 11. People gathered around the truck and then surrounded Roger, making more racially charged comments. R. 428, l. 18 – 429, l. 5. Roger fell to the ground dodging a punch. R. 429, ll. 1 – 5. As he stood up, another man pulled a gun and pointed it at Roger. R. 429, ll. 1 – 9. Roger put his hands in the air. R. 429, ll. 6 – 23.

Mary "was terrified." R. 473, ll. 16 – 19. She saw the man pointing the gun at Roger. R. 475, l. 25 – 476, l. 2. Mary quit "being careful about getting out of the parking spot," pulled up next to Roger and told him to get in the truck. R. 479, ll. 4 – 13. They "took off" screaming at people to "move, move, move." R. 479, ll. 9 – 13. Mary said, "There was no way I was gonna watch my husband get shot." R. 481, ll. 2 – 4. She testified calling 911 or calling a cab were impossible and that, "There were no options. I couldn't go back in the club. I couldn't run away. I couldn't leave my husband there to be shot. I did the only thing that I knew to do." R. 484, l. 6 – 486, l. 8.

Neither Mary nor Roger could remember the accident. R. 489, l. 20 – 490, l. 2. R. 434, ll. 10 – 11. A member of the MAIT team testified as an expert in accident reconstruction. R. 290, ll. 4 – 13. German's truck pulled out of the parking lot and across the four-lane highway which was divided by a grassy median. R. 296, l. 18 – 310, l. 13. The truck began travelling the wrong way at 22mph. R. 296, l. 18 – 310, l. 13. Sadly, a sedan driven by Shermain Palmer was travelling at 62mph and collided head-on with the Germans' truck, killing him. R. 296, l. 18 – 310, l. 13.

*The Trial Court Admits the Warrantless Blood Draw*

Approximately three months before trial, Judge Goldsmith heard testimony and argument on appellant's motion to suppress the blood draw and toxicology results. R. 1. Appellant argued that based on Missouri v. McNeely, 569 U.S. 141 (2013) and Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), the warrantless, nonconsensual blood draw was illegal under the Fourth Amendment. R. 62, l. 9 – 89, l. 7. Appellant argues that under United States Supreme Court precedent, the DUI statute was unconstitutional as-applied and did not give the officer carte blanche to take German's blood. R. 62, l. 9 – 89, l. 7. The State was required to prove that it

was impractical to get a warrant, and the office admitted that he could have done so. R. 62, l. 9 – 89, l. 7. Appellant also cited the South Carolina Constitution's express right of privacy and argued that the warrantless blood draw was an unreasonable invasion of German's privacy. R. 62, l. 9 – 89, l. 7.

During its argument, the State expressly waived any argument that the exigent circumstances exception applied. R. 71, l. 16 – 6. The solicitor said, "and also, we are not talking about an exigency here. That's a very specific Fourth Amendment exception." R. 71, ll. 18 – 22. The solicitor also waived any reliance on search incident to arrest. R. 72, l. 16 – 73, l. 8. He told the court, "So why take Birchfield? You can distinguish it because we're talking about assertions [sic] to arrest exception. Birchfield, which is not what we're talking about here." R. 121, l. 20 – 122, l. 8. The State argued the blood draw and toxicology results were admissible under the DUI statute and under the good faith exception. R. 70, l. 12 – 74, l. 7. As pointed out by appellant in reply, McNeely "was over three years old when this happened" and therefore the good faith exception did not apply. R. 86, l. 21 – 89, l. 5. Appellant also argued that good faith could not apply because the trooper admitted he read German the wrong implied consent rights. R. 86, l. 21 – 89, l. 5. The court took the matter under advisement at the end of the hearing. R. 138, ll. 6 – 11.

On October 3, 2018, Judge Goldsmith issued a written order adopting the State's reasoning and denying the motion to suppress. R. 569. Appellant re-argued the motion immediately before trial and Judge Goldsmith stood by his earlier ruling. R. 120, l. 4 – 125, l. 20. Appellant renewed his objection during the testimony of the phlebotomist about the blood draw. R. 318, l. 24 – 320, l. 15. Appellant asked for a "continuing objection" and Judge Goldsmith said, "Certainly." R. 319, ll. 5 – 7. Appellant also renewed his objection when the

State introduced the toxicology results. R. 392, ll. 12 – 25. Finally, appellant renewed his motion to suppress at the close of the State's case and after appellant rested. R. 398, l. 23 – 399, l. 11. R. 496, ll. 3 – 10.

**Discussion**

The Fourth Amendment and the South Carolina Constitution prohibit the warrantless, nonconsensual blood draw in this case. No exception to the exclusionary rule applies. Quite simply, the police were required to get a warrant. The police admitted they could have done so, but chose not seek approval from a magistrate solely in reliance upon a statute that was rendered unconstitutional by McNeely. Admission of the results was error.

In McNeely, the United States Supreme Court held that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . it does not do so categorically." 569 U.S. at 156. The Court concluded that "[w]hether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. The Court also rejected the Missouri's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant." Id. The Court ultimately held, "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 152.

The Court reiterated McNeely's holding in Birchfield. The Court held that neither the search incident to arrest doctrine nor state implied consent statutes would uphold categorical warrantless blood tests. Birchfield, 136 S.Ct. at 2184-87. The Court concluded that "motorists

cannot be deemed to have consented to a blood test on pain of committing a criminal offense." Id. at 2186.

This Court dealt with a warrantless blood draw in Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019). In a significant distinction from appellant's case, the officers in Hamrick drew his blood before the Supreme Court issued McNeely. Hamrick at 654-55, 828 S.E.2d at 604-05. This Court found that because "the law appeared to support the existence of exigent circumstances and the validity of statutory implied consent" when the officers drew Hamrick's blood, the good-faith exception applied. Id.

In German's case, at the time her blood was taken, McNeely was three years old and Birchfield was almost three weeks old. R. 8, ll. 1 – 9. No good faith exception applies here because these cases required the State to show that getting a warrant was impractical despite the language of South Carolina's implied consent statute, S.C. Code Ann. § 56-5-2946. The officer admitted he could have gotten a warrant, but in violation of McNeely and Birchfield's command that he attempt to do so, disregarded the Fourth Amendment entirely. Furthermore, good faith cannot apply because the officer admitted he read German the wrong implied consent rights.

No doubt recognizing the impact of McNeely and Birchfield, the State expressly waived any reliance on the exigent circumstances or search incident to arrest exceptions to the warrant requirement. While citing McNeely and Birchfield, the trial judge erred in ruling that these cases did not apply because of the State's waiver. R. 569. The trial judge ruled that because the trooper had probable cause, he did not need a warrant. R. 569. No such rationale can exist because it would eviscerate the Fourth Amendment's requirement of assessment by a "neutral and detached magistrate." Giordenello v. United States, 357 U.S. 480, 486 (1958) (internal

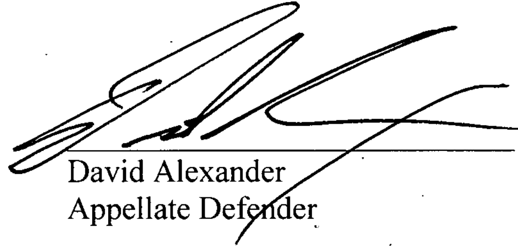
quotations omitted). The trial judge erred in admitting the results of the warrantless blood draw under the Fourth Amendment.

The South Carolina Constitution also prohibits this warrantless blood draw. S.C. Const. art. I, § 10. Our state constitution provides an express right of privacy. Id. This Court has interpreted the right of privacy as favoring interpretations offering a higher level of privacy than the Fourth Amendment. See State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). This Court reaffirmed the higher level of protection under the South Carolina constitution when it required reasonable suspicion for officers seeking to conduct a "knock-and-talk." See State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015). Our right of privacy further dismantles the trial court's reliance on the implied consent statute as allowing officers, not judges, to make the all-important probable cause determination. The right of privacy and the right to be free from unreasonable searches and seizures lose all effect if police officers do not have to seek judicial approval and a warrant when it is practical to do so. They could have done so here, but did not. The State expressly waived reliance on any exceptions to the warrant requirement and good faith is inapplicable. Admitting the results was error.

The State will argue that other evidence of intoxication existed in an attempt to prevent reversal under the harmless error doctrine. However, the 0.275 reading was so high, that its admission cannot be harmless beyond a reasonable doubt. It also affected the consideration of German's actions and perceptions under her defense of necessity. Appellant had the burden of proving this affirmative defense by the preponderance of the evidence. R. 546, l. 16 – 547, l. 5. She had to show she had no reasonable alternative to her actions. R. 546, l. 16 – 547, l. 5. After hearing the high BAC, the jury could have discounted her perceptions and testimony that no reasonable alternative existed. This error cannot be harmless and this case must be reversed.

## CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and her case remanded for a new trial.



This 9th day of March, 2020.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 9, 2020.

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