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& GOVERNMENT

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES

No. 03-18-01234-CR

The State of Texas, Appellant

vs.

Cameron Shephard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AUSTIN

Attorney Brief Book

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The State of Texas, Appellant

v.

Cameron Shepard, Appellee

**FROM THE COURT OF APPEALS, THIRD DISTRICT, AT
AUSTIN**

Brief For Appellant

River Nattinger (Attorney #1)

Daniel Spranger (Attorney #2)

Introduction

This argument is directed to the Texas Criminal Court of Appeals.

Statement of the Case

Defendant Cameron Shepard has been charged and convicted of intoxicated manslaughter. In his trial, Mr. Shepard has brought up two errors in the conviction: (1) that the results of a blood draw should be suppressed as evidence, (2) that footage of the Officer Cole's body camera should be suppressed; the court then denied his request and he is now convicted as guilty. Mr. Shepard now demanded an appeal on account that the trial court failed in to suppress evidence, and the State petitioned for review.

Statement of the Facts

On June 30, 2018, around 2:00 a.m, Officer Jordan Cole was dispatched to the scene of a car crash. Upon arrival, Officer Cole activated his body camera and started recording audio and video. He then found a deceased female lying in the road, next to a small crashed car carrying two people. Officer Cole then administered the standard field sobriety test on the driver of the car, Cameron Shepard, and formed the opinion that Mr, Shepard was driving while intoxicated, causing the death of the female. Officer Cole initially received consent from Mr. Shepard to receive a blood draw. Upon arrival at the hospital. Mr. Shepard revoked his consent for the blood draw. Officer Cole then contacted one of eight local magistrates, but the magistrate was unable at the time. Knowing all this, Officer Cole had Mr. Shepard's blood drawn anyway.

ISSUES ON APPEAL

The State of Texas requests for review in the case as to the following issues:

(a) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

(b) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

We will first address (a)

In The Fourth Amendment to the United States Constitution, it states that searches and seizures may be performed only if a warrant is written and signed by a magistrate given probable cause. These rules have been violated in the past, in a situation where there was either not enough time to receive a warrant or a warrant was unavailable.

The first example of this is in the *Missouri v. McNeely* 133 S.Ct. 1552(2013). It states that "Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." The court ruled in this case that Mr. McNeely was still guilty and the results of the blood draw were too valuable to the trial to be dismissed.

This just proves the point that even without a permit or warrant, if there is probable cause or trouble communicating with the magistrates, evidence should still be used because it proves very valuable. In some instances, such as

someone being intoxicated, there simply isn't time to obtain a warrant before blood alcohol levels return to normal. It says in *Schmerber v. California*, 384 U. S. 757 (1966), that Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." It goes without saying that on the night of the arrest, Officer Cole was faced with an emergency, so it is only fair to give him the same treatment that other officers were given when faced with an equally important emergency.

It was very clear through all of Mr. Shepards's action that he was drunk. If a blood drive hasn't taken place, the court would have had to rely on less reliable tests. The human body has buffers to reduce alcohol levels over time. So every minute that a blood drive isn't being taken, the soberer a person becomes. It is only fair to test for alcohol in the blood as quickly after the crash as possible to obtain viable results.

Another court case that found a blood draw without consent as viable evidence was *Cole v. State* 490 S.W.3d 918 (2016) In this case, Steven Cole was convicted of a DWI(Driving While Intoxicated) and received a blood drive without giving his consent. After Mr. Coles attempts to have this information be unavailable for the court trial, the court overruled Mr. Cole's claim that the test was vain and unviable and used it to find him guilty. This previous case is directly similar to our case in the sense that in both cases, the defendant was arrested for a DWI, and had a blood draw performed without their consent. In

this previous case, the State used the blood draw as viable evidence, so it proves that this has been done before and should be used now.

These cases and laws can help us to understand that not all evidence found by warrantless searches and seizures should be dropped just because of that reason. The Fourth Amendment was created to protect citizens' privacy and possessions from an overbearing government. Once a car crash has occurred though, the information to be gained from potentially unconstitutional searches outweighs the need for privacy.

To summarize this as a whole, the advantages of having a reliable way to determine someone's sobriety(a blood draw), outweigh the negatives of not having a warrant. Not all situations will have a way for the arresting officer(s) to obtain a warrant quickly and safely. The evidence gained from a blood drive can prove a man innocent or guilty, free or imprisoned, felon or victim. It is too valuable to the trial to be just thrown away because a magistrate was unavailable, an officer was too busy, or a phone was out of battery. It States in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." Ante, at 12. During that time, the evidence is destroyed, and police who have probable cause to believe a crime has been committed should not have to guess how long it will take to secure a warrant.

It is clear to everyone that people convicted of a DWI wouldn't want to be proven guilty, so they do not give permission for the test to be taken at all, and letting them get away with it because they don't want to take the test is just laughable. Most people would agree that keeping drunk drivers off of the streets

is more important than protecting those same drunk drivers privacy. It is clear from this that stopping drunk drivers from returning to the streets, potentially injuring or killing people, is of the utmost importance.

We will now address (b)

Cameron Shepard requested to have the suppress the videotape that Officer cole recorded on his body camera removed, on two grounds: (1) that the tape included hearsay; (2) Officer Cole's narrating functionally acted as a defense report(which is excluded in from the public records);

First, we will address point number one, that Mr. Shepard made. Mr. Shepard's request to suppress the evidence because of hearsay is unnecessary and invalid.

"However, the admission of inadmissible evidence does not require reversal if the same facts are proved by other proper testimony." *Evans v. State(Tex.App.-Houston [14th Dist.] 2006)*. Using this there is no reason to suppress the evidence just because of hearsay. In fact, only one paragraph could really be considered hearsay at all. At 02:02:27 Officer Cole says "Vehicle left the roadway. Collided into a bridge support column on the left side of the service road. Front end damage from that collision but no other damage around the sides of the car. Two males trapped inside.". The reason that we don't include this as hearsay is that of Rule 803. Exceptions to the Rule Against Hearsay, Paragraph 5, which makes an exception a statement that "was made or adopted by the witness when the matter was fresh in the witness's memory, and accurately reflects the witness's knowledge." Furthermore the footage of the

accident being incredibly dark because it is still nighttime, it is harder to see and Officer Cole could not determine if the crash could be seen or not. Therefore, not all the portions of the video should be excluded.

Now we will address point number 2, that Mr. Shepard made. Mr. Shepard's requests to suppress the evidence Officer Cole's narrating in the videotape. Because of Officer Cole is narrating parts of the tape Officer Cole has a better memory of what happened because he was speaking out loud. On the topic of learning foreign languages, Professor Emerita of second-language education at the Ontario Institute for Studies in Education, University of Toronto, Merrill Swain says: "Actively producing phrases or sentences in the target language is an effective learning exercise since it prompts learners to "recognize consciously some of their linguistic problems". What this means is that when you are learning something saying something even once, you remember it better than if you don't even say it at all. This means that Officer Cole has a better memory of certain points than others because he said it out loud.

At the time when Officer Cole was narrating the videotape Officer Cole had just arrived at the scene, his body had not quite comprehended the whole situation yet. When humans see death they continue to make rash decisions and Officer Cole only human is apt to make mistakes. But at this time Officer Cole could not know what the people watching and listening the video could see or hear. Officer Cole did not make a mistake and was only doing what he was trained to do. He was trained to keep the law, and if a police officer has to not only deal with a person DWI, and remember to not say hearsay than a police officer will not be able to do the former thing as well as the latter.

Conclusion

From the information shown above, it can be proven that the trial court did not fail in its decision to deny Cameron Shepard's request to suppress evidence of the blood draw and the body camera because of these reasons. (1) The need for reliable evidence in court outweighs the need for Mr. Shepard's privacy. (2) The alcohol levels would have dropped if Officer Cole had waited. (3) Officer Cole attempted to contact a magistrate, but she was unavailable.

(4) The evidence was proven else which means that the video should not be suppressed. (5) everything that could be considered hearsay, we proved was not. (6) Speaking out loud helped Officer Cole remember what happened better than not. (7) And finally, Officer Cole Should not have to multitask while keeping the law.

Prayer

For all the reasons listed above, we pray to the court that they affirm with the lower court's decision to not suppress the information gathered for the two points of error as evidence.

River Nattinger (Attorney #1)

Daniel Spranger (Attorney #2)

Northwest Family YMCA

Homeschool Delegation

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Cameron Shepard, Appellee

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Brief For Appellee

River Nattinger (Attorney #1)

Daniel Spranger (Attorney #2)

Introduction

This argument is directed to the Texas Criminal Court of Appeals.

Statement of the Case

Defendant Cameron Shepard has been charged and convicted of intoxicated manslaughter. In his trial, Mr. Shepard has brought up two errors in the conviction: (1) that the results of a blood draw should be suppressed as evidence, (2) that footage of the Officer Cole's body camera should be suppressed; the court then denied his request and he is now convicted as guilty. Mr. Shepard now demanded an appeal on account that the trial court failed in to suppress evidence, and the State petitioned for review.

Statement of the Facts

On June 30, 2018, around 2:00 a.m, Officer Jordan Cole was dispatched to the scene of a car crash. Upon arrival, Officer Cole activated his body camera and started recording audio and video. He then found a deceased female lying in the road, next to a small crashed car carrying two people. Officer Cole then administered the standard field sobriety test on the driver of the car, Cameron Shepard, and formed the opinion that Mr, Shepard was driving while intoxicated, causing the death of the female. Officer Cole initially received consent from Mr. Shepard to receive a blood draw. Upon arrival at the hospital. Mr. Shepard revoked his consent for the blood draw. Officer Cole then contacted one of eight local magistrates, but the magistrate was unable at the time. Knowing all this, Officer Cole had Mr. Shepard's blood drawn anyway. Cameron Shepard requested to suppress the results of the blood draw on the grounds that the

blood was drawn without consent or a warrant, making them unconstitutional and therefore invalid to be used in court.

ISSUES ON APPEAL

The State of Texas requests for review in the case as to the following issues:

1. Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and
2. Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

The Fourth Amendment to the United States Constitution very clearly states that the government can not, and will not, perform searches and seizures of one's property or body without consent or a warrant written and signed by a magistrate. This amendment was violated by Officer Jordan Cole, therefore, making the information gathered unusable his trial. A very clear example of this is the ruling of the *Fears v. State trial 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.)*. In this case, the court decided to overrule the decision of the trial court and remove all evidence gathered from the blood draw, giving the quote "We conclude that neither the potential delay required to obtain a warrant from one of thirteen magistrate judges in the county nor appellant's belligerence created an emergency that justified the State's acting without a warrant." This proves that there was no "emergency" making it necessary to take the blood draw at that time.

Some might argue that the body's natural dissipation of alcohol makes it necessary to take the blood test as soon after the accident as possible, but in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the court states that "We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." This point is reiterated in the quote from *Schmerber v. California*, 384 U. S. 757 (1966) where it states that the "court requires "more than "the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case". Backing up the point that the urgency of needing the blood draw "before it's too late" is never urgent enough to justify the use of a blood draw and test without a warrant.

On the night of the accident, although Officer Cole attempted to contact only one magistrate, we know that eight were available. Where it says in *Missouri v. McNeely* that "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." This quote proves that if it doesn't jeopardize the search, they must exhaust all resources to obtain a warrant before attempting anything without one. Officer Cole's failure to at least attempt to contact more than one magistrate shows that he showed poor judgment in a time of importance. In *Missouri v. McNeely*, it states that "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." A warrantless search isn't ever objectively reasonable if the officer fails to perform his due diligence in contacting multiple magistrates available. If Officer Cole had

attempted to contact more magistrates after his failure to contact the first, an argument could possibly be made. But, since that didn't happen, we can't classify his actions as objectively reasonable.

Officer Cole violated not only a police policy but a law when he had an operation performed on Mr. Shepard not only without consent or a warrant but over Mr. Shepard's objections not to perform the blood sample. This was an invasion of not just his basic privacy but of his rights of an American citizen.

All of this proves the point that there is no reason that the blood sample was legal or necessary in the first place, making it useless to the court trial. We have already shown evidence from previous cases that the natural dissipation of alcohol doesn't justify an emergency, or make it necessary to perform the blood draw without a warrant. We have also shown that Officer Cole failed to perform his due diligence when he only attempted to contact one of eight magistrates available. All of this proves that the blood test results should be suppressed in the court trial, because of the reasons listed above.

Now we address (2) the body camera

Mr. Shepard wanted to suppress the evidence of the body camera because of two points of error: #1 that the audio contained hearsay, and that the audio was the oral form of a defense report; first, we will address the hearsay.

In rule 803 of the Texas Rules of Evidence, the first set of exceptions to the Hearsay Rule are "street corner" utterances made by ordinary people. These utterances are unreflective statements, one of these exceptions, rule 803(1), is "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." This means, as described in *FISCHER v. STATE* 252 S.W.3d 375 (Tex. Crim. App. 2008) "It was not the type of unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow. In the videotape, we quote at 2:02 am Officer Cole says, "Vehicle left roadway. Collided into a bridge support column on the left side of the service road. Front end damage from that collision but no other damage around the sides of the car. Two males trapped inside." This quote is from Officer Cole who is not some random person of the block, and he does not say some random street talk. He **explains** the situation. This is not an exception to the hearsay rule thus it should be excluded from evidence.

That is not the only thing that is said that is hearsay. When asked by the EMS if this was a DWI, Officer Cole answers, "Afraid so. I smell alcohol coming from the vehicle. The one in the driver seat is clearly the driver of the vehicle. We'll talk when he gets out. It'll be intox manslaughter." This is clearly hearsay because Officer Cole is stating 2 things, out of court: #1. That Shepard Cameron is the driver of the vehicle; #2. That there was a intoxicated manslaughter; Mr. Shepard being the driver of the vehicle is evidence because it means that Mr. Shepard was the person that was driving when someone was killed. Number two, Officer Cole stated that there was an intoxicated

manslaughter. Officer Cole's testimony is evidence. Which means that this is hearsay and does not fall under any exception to the hearsay rule.

Now we will address Mr. Shepard's second claim: that the audio was the verbal form of a defense report;

In the audio of Officer Cole's body, cam video Officer Cole is constantly stating facts and is constantly informing people about the facts, which should be excluded as evidence because it acts as a defense report, which is excluded from the public records. Which brings up another point, Officer Cole is not the only reason though that Cameron Shepard wanted to suppress the evidence of the camera, **both** the EMS **and** Mr. Shepard state facts. The EMS states: "Yeah, she is gone", the EMS is stating a fact, the EMS is stating that the woman is dead, which is evidence. Mr. Shepard says: "Just a few drinks. Not very many, I can pass your tests." he is stating that he drank a few drinks this is evidence as well.

One last point that we would like to make clear is that Mr. Shepard was not sober, and was drunk, which means his judgment, and his memory is affected because of him being drunk. During the trial case, he is sober and is able to give his testimony truthfully. During the case, he is under oath and is sober. But in the body camera videotape, he is not under oath and he is not sober. What Mr. Shepard says during the videotape cannot be taken seriously.

Conclusion

From the information shown above, it can be proven that the information gathered from the blood draw results and the body cam footage needs to be suppressed in court because of these reasons. (1) The blood draw was an invasion of Mr. Shepards Privacy, a basic right of an American citizen. (2) Officer Cole failed to perform his due diligence when attempting to contact magistrates. (3) The slow rate of alcohol dissipation made it unnecessary to take the blood draw at that time.

(4) everything said are hearsay. (5) Officer Cole's narration is the verbal form of a defense report. (6) Except for the fact that Mr. Shepard was drunk, everything that Mr. Shepard did and said cannot be a testimony because Mr. Shepard's judgment was impaired.

Prayers

For all of the reasons listed above, we ask that the court reverse the ruling of the lower court to suppress the information gathered for the two points of error as evidence.

River Nattinger (Attorney #1)

Daniel Spranger (Attorney #2)

Northwest Family YMCA

Homeschool Delegation

The Court

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The State of Texas,

The Appellant

V.

Cameron Shepard,

The Appellee

FROM THE COURT OF APPEALS,

THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Lance Belderol

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To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Cameron Shepard was charged and pled guilty to intoxicated manslaughter after a tragic car accident that caused the death of his girlfriend Chassidy Barnes. Before pleading guilty, however, Mr. Shepard made two motions to suppress evidence vital to the case. The lower court has remanded this court to review the motions and the trial court's discretion.

II. Statement of Facts

Cameron Shepard was arrested on June 30, 2018, at early hours of the morning after a night of drinks with friends resulted in a tragic car accident that took the life of Chassidy Barnes. Mr. Shepard went out with his girlfriend and best friend on a Friday night for drinks at The Platinum Bar on 6th street. After several drinks, the group left the bar and Mr. Shepard opted to drive. While driving down the interstate, Mr. Shepard lost control and crashed. Officer Jordan Cole was dispatched to the accident scene where he found Chassidy's body and Mr. Shepard his friend trapped inside his vehicle. Officer Cole proceeded to wait on the Fire Department and EMS to arrive on the scene and treat Mr. Shepard and his friend before continuing his investigation.

After EMS medically cleared Mr. Shepard, Officer Cole asked a few questions pertaining to the events that led to the crash and upon finding

out he had been drinking, Officer Cole explained that he would have to administer a series of Standardized Field Sobriety Tests. After failing several tests, Mr. Shepard was arrested and transported to the city jail where he was given his statutory warnings and requested a specimen sample. After agreeing to provide his specimen, Mr. Shepard was transported to the hospital so he could fill the necessary paperwork but at the last minute, he withdrew his consent. Officer Cole transported Mr. Shepard to the city jail and made several calls to obtain a warrant, but given the time and the festivities, he was unable to obtain a signed warrant for the specimen sample. It was becoming late and Mr. Shepard was complaining of a chest pain that if treated could alterate the specimen sample. Having no last resort, Officer Cole requested for Mr. Shepards' blood to be drawn before treating anything.

At trial court Mr. Shepard presented two motions to suppress the video and the specimen sample collected on the night of the accident. After the court denied both motions Mr. Shepard pled guilty. Today the State of Texas answers whether the motions presented by Mr. Shepard on appeal were unfounded and why the trial court's discretion should not be questioned.

III. Issues on Appeal

Point of Error (1): Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

Point of Error (2): Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

IV. Argument

Point of Error (1): Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

To begin with, when reviewing a ruling on a motion to suppress evidence we “view the evidence in the light most favorable to the trial court’s ruling.” **Gutierrez v. State, 221 S.W.3d 680, (Tex. Crim. App. 2007)**. The Fourth Amendment of the United States Constitution grants its citizen protection from unreasonable searches and seizures. A warrantless search is defined as “per se unreasonable unless it falls within a well-recognized exception to the warrant requirement.” **State v. Villarreal, 2014 (Tex. App.—Corpus Christi Jan. 23, 2014)**.

Mr. Shepard's rights were at no point violated and all protocol was followed and practiced given the circumstances. As the court has held before, "based on circumstances surrounding the search a warrantless seizure of specimen can be reasonable." **Schmerber v. California, 384 U. S. 757 (1966)**. The case like in ours dealt with a drunk driver that caused an accident. The police officer on the case asked for a physician to take the petitioner's blood without his consent because an exigency was present. Schmerber like Mr. Shepard was going to receive treatment, the treatment could alter the tests results and the Officer had to intervene.

Officer Cole did everything he had to do, even before obtaining the specimen sample, Officer Cole spent a hours trying to obtain a warrant but no one was available given the time and upcoming festivities. The supreme court has reasoned before that "consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." **Missouri v. McNeely 133 S.Ct. 1552 (2013)**. The circumstances of this case cannot be considered out of the norm or an abrogation of rights. While it may be true that the "dissipation alone does not permit a warrantless search of a suspect's blood, there may be circumstances surrounding law enforcement's decision to forego obtaining a warrant that withstand Fourth Amendment scrutiny."**id.**

As held previously, police officers can conduct a search without a warrant to "prevent the imminent destruction of evidence." **See Cupp v. Murphy, 412 U. S. 291, 296 (1973)**. Had Officer Cole not asked the hospital to take the specimen there wouldn't have been any way to determine what Mr. Shepard's

state of intoxication was. We must also take in consideration that an individual's "alcohol level gradually declines soon after he stops drinking." **Schmerber v. California, 384 U. S. 757 (1966).**

Even if the court were to adopt a totality of circumstances approach pertaining to the blood draw, it would still surrender the blood draw as reasonable. In **Schmerber v. California, 384 U. S. 757 (1966)** we are introduced to this standard in six parts. First, whether the officer had probable cause to believe that the individual was operating a vehicle while intoxicated; Second, how fast can the body naturally dissipate the alcohol consumed; Third, that the lack of time to obtain a warrant; Fourth, that the effectiveness of the means taken to determine if an individual is intoxicated; Fifth, procedure used to obtain specimen sample and Sixth, that the test was performed in a reasonable manner.

All of the aforementioned were met by Officer Cole. There was nothing unreasonable nor out of protocol throughout this investigation, Officer Cole did his job and so did the trial judge. Why suppress the evidence if no mistake was made? The trial court did not abuse its discretion when deciding not to suppress the the specimen sample.

Point of Error (2): Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Rules 801 and 802 of the **Texas Rules of Evidence** encode the hearsay doctrine. The hearsay doctrine was included to protect the truth and exclude any comments that may alter it. In **Fischer v. State, 252 S.W.3d 375 (Tex.Crim.App.2008)** the court defined what would deem a video inadmissible under hearsay violations. The circumstances in the case are completely different from ours. In **Fischer v. State, 252 S.W.3d 375 (Tex.Crim.App.2008)** the officer that was handling the case not only narrated but also recorded the events with the dashboard camera of his patrol car. It is also very important to note that the motion made in the Fischer case was to suppress the audio of the video, not the entire video.

Which leaves us with two conclusions, number one being that the nature of Officer Cole's comments in the video cannot be held under the same standard as the officer's statements were in the Fischer case and number two being that there is no hearsay issue and that the Respondent is using this as an excuse to exclude valuable probative evidence. In **Shuffield v. State, S.W.3d , 2006 WL 335911, (Tex.Crim.App. 2006)** the court held that "we review a trial court's decision to admit or exclude evidence under an abuse of discretion standard."**id.** Meaning that we view the evidence in the light most favorable to the trial court's ruling.

That being said, the trial judge saw that Officer Cole's statements were more conversational and generally unreflective. The only time Officer Cole may have narrated a portion of the video is during the administering of the FSTs. Which under **Evans v. State, (Tex.App—Houston [14th Dist.] 2006)** the court held that narrative comments on the performance of FSTs were "were

merely cumulative and did not require reversal.” The most the respondent can make out of this is a harmless error, meaning “If the error did not influence or had only a slight influence on the verdict, the error is harmless because it did not affect substantial rights of the defendant.” **Lee v. Rolla Speedway, Inc, 539 S.W.2d 627.**

When dealing with a harmless error the court has also gone on to say “ if the fact to which the hearsay pertains is sufficiently proved by other competent and unobjected-to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error.”**Anderson v. State, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986).** Considering that Officer Cole’s affidavit was sworn true and that there seemed to be no objections by the Respondent, it qualifies his retelling of the accounts on June 30th, as the unobjectified-to and competent evidence necessary to admit the alleged hearsay as a harmless error. Meaning that there still wouldn't it be any grounds for the court to decide that denying the motion was an abuse of discretion. As held in **Evans v. State (Tex.App—Houston [14th Dist.] 2006)** “harmless error would not support a remand of the case for a new trial.”

In conclusion, it is fair to say that some small mistakes may have been made, but those mistakes to not acquit murder. Even when summed up together, the court would have to deem them as cumulative and harmless. The video recorded with Officer Cole’s body camera does not compare in the least to others where actual violations of the hearsay doctrine are blatantly committed. Officer Cole’s intentions are not malicious nor self-serving, he was simply doing his job. Trial court saw this and didn't see the need to suppress the video.

V. Conclusion

There exists no violation of rights here other than the ones taken from Ms. Chassidy Barnes by Mr.Cameron Shepard and his poor decision making. Trial court viewed all evidence in regards to the circumstances and there was nothing that could be done. Officer Cole followed procedure in an exigency situation and handled the investigation like any other professional would. There was no abuse of discretion. The evidence speaks for itself. Suppressing the evidence would have only prolonged the inevitable. The facts of the case are very simple, on June 30th Mr.Shepard made a decision. He chose to drive and a person died. He must pay for his crime.

VI. Prayer

For these reasons, we pray that the court overturn the Travis County Court of Criminal Appeals decision and vote on the side of the U.S. Constitution.

.Respectfully Submitted By:

Lance Belderol

Bryssa Rodriguez Muro

Attorneys for Appellant

Del Valle High School

The Court
Of Criminal Appeals, State Of Texas

NO. 03-18-01234-CR

The State of Texas,

The Appellant

V.

Cameron Shepard,

The Appellee

FROM THE COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

Brief for Appellee

Lance Belderol

Bryssa Rodriguez

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Mr. Shepard brought two points of error related to the trial court's denial of his Motion to Suppress, first claiming that the trial court should have suppressed the results of the blood draw because the blood draw violated the Fourth Amendment's warrant requirements, and second, that the trial court should have suppressed the body camera video because it contained inadmissible hearsay.

II. Statement of Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on the scene, he activated his body camera which then captured both the audio and video from the perspective of purely the officer. After having found the driver in the accident, Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard, coming to the conclusion that the driver had been intoxicated and had caused the accident. Mr. Shepard initially agreed to provide a blood sample, however, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole instead of contacting another judge transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

III. Issues on Appeal

- (1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and**
- (2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.**

IV. Argument

1. PER SE EXCEPTIONS TO THE WARRANT REQUIREMENT ARE RARELY PROPER AND RARELY UPHELD.

Appellant urges this Court to adopt a *per se* rule authorizing warrantless blood draws in *all* DWI cases based solely upon a police officer's determination of probable cause. This court's Fourth Amendment jurisprudence takes the opposite approach: it favors a judicial role under the Fourth Amendment and disfavors *per se* exceptions to the warrant requirement.

A. The Warrant Requirement Plays A Critical Role In Protecting Personal Privacy.

The Court's classic statement regarding the warrant requirement was written more than 60 years ago:

The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate

instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Accordingly, "it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States*, 389 U.S. 347, 357 (1967).**

More is typically required than an officer's determination of probable cause to justify a warrantless search. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." ***Johnson v. United States*, 303 U.S. at 14. (1948); *Katz v. United States*, 389 U.S. at 357 (1967).**

Bodily intrusions are another example. As the Court stated in ***Schmerber*, 384 U.S. at 770 (2013)**, "warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." Applying this in our case would mean that the blood draw would be the seizure under the Fourth Amendment, however, it entails that bodily intrusions are no less important, if not more, than dwellings of the person.

B. Search And Seizure Is Permitted Without A Warrant When There Is The Exigent Circumstance of Imminent Destruction Of Evidence.

The Fourth Amendment prohibits searches that are unreasonable. The general rule enunciated by this Court is that a search without a warrant is *per se* unreasonable. ***Katz v. United States*, 389 U.S. 347, 357 (1967)**. This rule, however, is subject to certain exceptions. One is the existence of probable cause combined with exigent circumstances. Exigency exists - and the warrant requirement may be excused - when the circumstances present a "now or never" situation, such that if the evidence is not seized at the time, the opportunity will be lost.

However, the delineated warrant-requirement exceptions are permitted because each is potentially reasonable and "there is a compelling need for official action and no time to secure a warrant." ***Weems v. State*, 493 S.W.3d, 574 (2016)**. Applying these principles to the case, it is clear that the facts involved in the Appellant's time frame of obtaining warrant to the blood draw, do not fit under the exigency exception, for "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." ***Missouri v. McNeely*, 133 S.Ct. 1552 (2013)**. The circumstances of this case are similar to that of ***Gore v. State*, 451, S.W.3d 182, 197-98 (2014)**, in which this Court held that the State did not establish the existence of exigent circumstances, and as observed in *Gore*, to accept general testimony "that it usually takes two or three hours to get a warrant as sufficient evidence of exigency in every DWI case would be to create a *per se* exigency rule, which *McNeely* expressly prohibits." **451, S.W.3d 182, 197-98 (2014)**.

C. The Exigent Circumstances Exception To The Warrant Requirement Reflects The Court’s Preference For A Totality-Of-The-Circumstances Test.

As Appellant correctly notes, this Court has held that the potential destruction of evidence may constitute an exigent circumstance justifying a warrantless search. ***Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011)**. But, this Court has also warned against the adoption of *per se* rules in cases involving the potential destruction of evidence.

Most notably, in ***Richards v. Wisconsin*, 520 U.S. 385 (1997)**, the Court rejected a blanket exception to the knock-and-announce rule in all felony drug cases. The Court acknowledged that such cases often pose a threat of physical violence and a risk that evidence could be destroyed if the suspect were alerted to the presence of the police. The Court further acknowledged that such considerations could justify an exception to the knock-and-announce rule on particular facts. Indeed, the Court found that facts presented in ***Richards*** warranted an exception. Nevertheless, the Court ruled that the Fourth Amendment required a “case-by-case evaluation,” *id.* At 392, because the facts justifying a no-knock search might not be present in every felony drug case. Numerous other cases have likewise applied a totality-of-the-circumstances test when weighing a claim of exigent circumstances.

There is no reason for the Court to adopt a different approach here. Whether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances. Adopting a totality-of-circumstances approach, the Court held in ***Weems v. State*** that the

circumstances surrounding the blood draw rendered the warrantless search reasonable: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body naturally dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time taken to transport Schmerber to a hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) venipuncture is a common procedure and usually “involves virtually no risk, trauma, or pain”; and (6) the test was performed in a reasonable manner. **493 S.W.3d, 574 (2016).**

2. HEARSAY EVIDENCE IS INADMISSIBLE DUE TO THE CIRCUMSTANCES OF THE CASE.

“Hearsay” is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay. “An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative.” Such a narrative constitutes a “speaking offense report” in which the “on-the-scene observations and narrations of a police officer conducting a roadside investigation . . . are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime.”

Essentially, hearsay would be second-hand evidence to the upbringing of the case's issue, however just because it may be said in court doesn't make it true. Applying this logic to the case, these hearsay statements should not, at default, be taken as truth, for these statements have gone unattended since Mr. Shepherd nor his attorney were not able to assess any of outside people's, that made an appearance on transcript, facts or validity by cross examining these witnesses under oath.

A case different to the circumstances of evidence regarding hearsay would be *Evans v. State*, where the Court in this case agreed with the State that the evidence may be used only due to it aligning with testimony. The main issue between admitting hearsay evidence would be the inevitable circumstances of the case, such as our case having Mr. Shepherd pleading guilty in pre-trial motions but proceeding with the requests of suppressing blood draw evidence and body camera information. In our case, there is no proper testimony given to be in line with the hearsay evidence, therefore it is inadmissible.

V. Conclusion

In conclusion, in order to sustain the constitution that has built precedence in our judicial system and our country, we must adhere to the rights that people are given. Mr. Shepherd, our client, was the victim of procedural error that would ultimately be the result in committing the violation of his Fourth Amendment's rights.

VI. Prayer

We pray that you uphold the Travis County Court of Criminal Appeals' rulings and vote on the side of the U.S. Constitution.

Respectfully Submitted By:

Lance Belderol

Bryssa Rodriguez Muro

Del Valle High School

**COURT OF CRIMINAL APPEALS,
THE STATE OF TEXAS**

=====

NO. 03-18-01234-CR

=====

**The State of Texas,
The Appellate
v.
Cameron Shepard,
The Appellee**

=====

FROM THE COURT OF APPEALS, THE THIRD DISTRICT, AT AUSTIN

=====

BRIEF FOR APPELLATE

**Written by
Emma Castro
Adonis Birch Franklin
Del Valle High School**

I. To The Honorable Court Of Criminal Appeals Statement of the Case

After pleading guilty to manslaughter, Mr. Shepard brought two proposed points of error claiming that the trial court's denial of his Motion to Suppress was invalid. Due to the Appeals Court's decision to suppress the evidence the State has appealed to reverse the motion. First, Mr. Shepard claims that the trial court should have suppressed the results of the blood draw due to the Fourth Amendment's warrant requirements, regardless of exigent circumstances. Second, Mr. Shepard claims that the trial court should have suppressed the officer's body camera video because it contained "inadmissible hearsay" in the form of the officers on-duty professional commentary.

II. Factual Background

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, his body camera which capture audio and video from the his perspective. Officer Cole found a deceased female in the roadway and a small car occupied by two figures. Officer Cole left it to firefighters to pry them out Cameron out of the driver's seat and Taylor out of the backseat. After he was cleared by EMS and because Mr. Shepherd's breath smells heavily of alcohol, Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his experienced observations, Officer Cole concluded that Mr. Shepard had been

illegally operating a vehicle while intoxicated and had caused the death of the female. He was transported to the jail, giving consent to a blood draw, and was thus transported to the hospital.

Upon arrival at the hospital, Mr. Shepard withdrew his consent to the blood draw. Officer Cole contacted the "on call" magistrate to obtain a warrant after arriving back at the jail. The magistrate was unavailable at the time. After a failed attempt to contact the Chief Magistrate, Mr. Shepard began complaining of chest pains. Officer Cole transported him to the hospital where he drew Mr. Shepard's blood, determining that there was exigent circumstances due to contamination. The State appealed to have these pieces entered into evidence once again.

III. Issues and Applicable Law

Introduction: The appellate has claimed that there were two points of error in the proceedings of his trial for intoxicated manslaughter regarding the trial court's decision to not suppress certain pieces of evidence. The first issue brought up was related to the blood test taken at the hours later at hospital he was transported to after crashing into a bridge column, while the second is attempting to suppress the body cam footage of the arresting officer's, Officer Cole, on-scene observations. The trial court was correct in letting these pieces of evidence be admitted as the proceedings are completely legal and just. Today's proceeding will be just as just in the denial of the appellee's misinformed allegations towards Officer Cole and the State of Texas.

First Point Of Error: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

Due to the trial courts records, we know that Officer Cole followed proper procedures established in his jurisdiction to attempt to get the blood warrant. State protocol was followed up the failed attempt to call the on-call magistrate, who was busy with a juvenile offender, an event outside the officer's control. McNeely provides that "No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed." **Missouri v. McNeely (2013)**. Officer Cole anticipated the delays that would arise should he attempt to wait on the on-call magistrate. The evidence was being destroyed at the very minute, which lead the officer to exigent circumstances.

"Exigent circumstances has allows the warrantless blood draw. This applies in addition to the logistical obstacles of securing a warrant, Higginbotham knew that during the hour to an hour and a half necessary to obtain a warrant [as] Coles body would continue to metabolize the methamphetamine and other intoxicating substances he may have ingested." **Cole v State (2016)**. Mr. Shepard's request for medical attention would have potentially destroyed evidence, leading to Officer Cole's decision. This decision was completely legal and sound as is clearly covered in the before stated case, and the Judge saw this, thus under the abuse of discretion standard of review, the Judge would not error.

Second Point of Error: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

The officer turned on his body camera and recorded his point of view of the accident, using the state funded equipment to its fullest capacity. He captured several statements that are key, he captured the fact that the driver was drunk, and proof that proper protocol was followed. The appellee wishes for this to be dismissed, but this simply is not possible. Due to ***Fischer v. State (2008)*** Honorable Judge Hervey stating "The brief period of time (a few seconds) between Martinez's observation of the events and his description of them on the audiotape provided him with very little opportunity of "[thinking about it" and does not present a setting "brimming with the potential for exaggeration or misstatement." And, though Martinez may have been "engaged in the competitive enterprise of ferreting out crime" this short time interval provided little or no time for calculated misstatement and it still eliminated the four "hearsay dangers" of faulty perception, faulty memory, accidental miscommunication, or insincerity. The contemporaneity and "immediately thereafter"; requirements of Rule 803(1) remove any analogy between cases like this and Rule 803(8)(B)." This tells us that the commentary cannot possibly be "hearsay,"

Furthermore, ***Thompson v. State (2008)*** had a similar situation where a appellee wanted a video that had been entered into evidence be suppressed due to it telling a "narrative" and containing hearsay. This motion was denied as this case provides that an officer's professional commentary on the scene of the

crime can in fact be utilized as evidence as long as the statements made fall under the “present-sense impression exception to the hearsay rule.”

IV. Conclusion

The two points of error (1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw and (2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer’s body camera video are proven to be false allegations against the legal process that was followed. Thus, we must conclude the proper decision was reached and no mistake was made.

V. Prayer

For these reasons, we pray that this court would uphold the decision of the lower court.

Respectfully Submitted By:

Emma Castro

Adonis Birch Franklin

Attorneys for Appellant

Del Valle High School

COURT OF CRIMINAL APPEALS,

THE STATE OF TEXAS

=====

NO. 03-18-01234-CR

=====

The State of Texas,

The Appellate

v.

Cameron Shepard,

The Appellee

=====

FROM THE COURT OF APPEALS, THIRD DISTRICT

=====

BRIEF FOR APPELLEE

Written by

Emma Castro

Adonis Birch-Franklin

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Addressing his charges, Mr. Shepard brought two points of error related to the trial court's denial of his Motion to Suppress to be reviewed under the de novo standard. Firstly, Mr. Shepard states that the trial court should have suppressed the results of the blood draw because by forcefully taking the blood, the officer violated the Fourth Amendment's warrant requirements. His second point of error states that the trial court should have suppressed the officer's body camera video because it contained inadmissible hearsay in the form of the officer's personal commentary.

II. Factual Background

On June 30th, 2018, at 1:53 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. The officer turned on his body can as he received the dispatch. When he arrived on the scene at 2:00 am, Officer Cole examined said scene, reaching his conclusion at 2:04 am. After the EMS arrived and cleared Mr. Shepard, Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard, to attempt to prove said conclusion. After he conducted these tests to the extent of his abilities and made his own personal observation, he arrested Mr. Shepard for intoxicated manslaughter, transported

the new arrestee to the jail where Mr. Shepard gave consent to a blood draw, and transported them back to the jail where Mr. Shepard withdrew it upon arrival to the hospital. Officer Cole then contacted the two of the eleven magistrates in the area, and, after failing, proceeded to transport Mr. Shepard back to the hospital. Officer Cole forcibly obtained a blood sample over Mr. Shepard's vehement objections and ignoring his plea for an attorney.

III. Issues and Applicable Law

Introduction:

The issues brought up by Mr. Shepard were in regards to the trial court judge's error in denying the motion to suppress the results of the blood test forcibly taken at the hospital hours following the accident and the body cam footage impaired with the arresting officer's hearsay. The trial court judge made a erroneous mistake in letting these pieces of "evidence" be accepted. Hopefully, today's proceedings will be just and shed light on the malpractice of the officer that took away Mr. Shepard's right to choose and the error of the Judge by denying the motion to suppress as per the de novo standard of review. The de novo standard of review allows the appeals court to hear the facts of the case without any reference to the trial court so as to reevaluate the facts in a manner that is completely clear-minded. It's looking at the facts and making a decision, and after reviewing the facts of this case, it's clear that the judge erred.

---First Point of Error: Whether the trial court erred in denying the motion to

suppress the results of the warrantless blood draw.

Applying the de novo standard, there are facts to look to regarding the first point of error. Every citizen in America has the expectation that a warrant is required when the police want access to your home, want access to your car, or, in this case, want access to your blood. This is a right afforded by the Fourth Amendment, this right specifically reading "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." This is supported in *Missouri v. McNeely* they quote *Weems v. State* by stating that it is an infringement of one's "most deep rooted expectations of privacy" thus demands that a warrant be required. There are warrant exceptions, and the state would like the court to believe that "exigent circumstances" made this invalid, but the exigent circumstances defense the appellant is so trying to push is unjust. Exigent circumstance only applies when there is no time to get a warrant, when evidence is about to be destroyed, or if there is immediate danger. There was no immediate danger surrounding the situation, there was time to get a warrant, a fact we know from the officer's attempted phone call and we know from *Weems v. State*, a before cited case that aids in outlining the warrant requirements, that "dissipation alone does not permit a warrantless search of a suspect's blood." as it is not legally destruction of evidence. It is because of this appalling lack of evidence that, in applying the de novo review, the appeals court was right in suppressing the results of the blood test.

---Second Point of Error: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Once again applying the de novo standard, the facts reveal similar results as the blood draw. *Fischer v. State* provides "Rule 803(1), the present sense impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The case goes on to say that pieces that fall under this rule are excluded from the hearsay rule. This is how the state defended them, but the very same court case has a declarant verdict. "...Rule 803(8)(B), which explicitly excludes investigative reports by law enforcement from the public records exception to the hearsay rule "trumps" Rule 803(1) and disallows any out-of-court factual observations by police officers" (*Fischer v. State*). As well as applying the notion that the evidence is inapplicable ,the body camera video never faced the court makes it as well illegal to move it through. The de novo standard of review is necessary to make sure that the court today follows some sort of procedure. Therefore any possible justifications the appellant could have for their actions should be under de novo.

IV. Conclusion

The two points of error (1)Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw and (2)Whether the trial court erred in denying the motion to suppress the video recording from

the police officer's body camera video are reportedly proven time and time again to be a misguided and ungrounded. This clearly concluded with the only conclusion possible under de novo: that there was grievous error on the court's part that should be reversed.

V. Prayer

For these reasons, we pray that this court would overturn the decision of the lower court.

Respectfully Submitted By:

Emma Castro

Adonis Brich-Franklin

Attorneys for Appellee

Del Valle High School

The Court
Of Criminal Appeals, State Of Texas

NO. 03-18-01234-CR

The State of Texas,

The Appellant

V.

Cameron Shepard,

Appellee

FROM THE COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Madison Adelstein

Emily Kai Fiddler

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to investigate an accident along a stretch of roadway near downtown Austin. Upon arriving on the scene and noticing a badly hurt young woman on the pavement, he turned on his body camera. Shortly after his arrival on the scene the female succumbed to her massive injuries. At that time, Officer Cole turned his attention to the two(2) persons occupying a vehicle. The ambulance arrived, pronounced the young woman dead and pronounced the two other passengers physically okay to question. After his investigation Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard, which indicated that the driver was intoxicated. Mr. Shepard claimed that the trial court should have suppressed the results of the blood draw because the blood draw violated the Fourth Amendment's warrant requirements. Second, Mr. Shepard claimed that the trial court should have suppressed the body camera video because it contained inadmissible hearsay. The State believed that both of these motions to dismiss vital evidence were essential parts of the case against Cameron Shepard and bore witness on what happened in these early morning hours of June 30, 2018.

II. Issues and Applicable Law

FACTUAL BACKGROUND

June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department arrived on the scene of an accident along a stretch of roadway near downtown Austin. Shortly before arriving, he arrived on scene, he activated his body camera which captured video and audio of the scene. Officer Cole found a deceased female in the roadway and a small car occupied by two persons, one, the driver, identified as Cameron Shepard. Officer Cole administered the Standardized Field Sobriety Test on the driver. Officer Cole was able to indicate that Mr. Shepard had been driving the crashed vehicle while intoxicated, ultimately resulting in the death of the female. Video evidence was recorded by Officer Cole's body cam, in which Mr. Shepard is agreeing to provide a blood sample. The officer transported Mr. Shepard to the hospital and obtained a blood sample in order to obtain proper evidence from/about the scene in order to seek justice for the death of the young female.

III. Issues and Applicable Law: Points Of Error

First Point of Error: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

Under Texas law, there are circumstances in which a person can be compelled, or forced, to give a sample of their blood. These circumstances existed on June 30, 2018. Please note that Texas **Transportation Code §724.012. TAKING OF SPECIMEN** states:“(a) One or more specimens of a person’s breath or blood may be taken if the person is arrested and at the request of a peace officer having reasonable grounds to believe the person:(1) while intoxicated was operating a motor vehicle in a public place, or a watercraft; or (2) was in violation of Section 106.041, Alcoholic Beverage Code. (b) A peace officer shall require the taking of a specimen of the person’s breath or blood under any of the following circumstances if the officer arrests the person for an offense under **Chapter 49, Penal Code**, involving the operation of a motor vehicle or a watercraft and the person refuses the officer’s request to submit to the taking of a specimen voluntarily: (1) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident: (A) any individual has died or will die; (B) an individual other than the person has suffered serious bodily injury; or (C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment; (2) the offense for which the officer arrests the person is an offense under **Section 49.045, Penal Code**; or (3) at the time of the arrest, the officer possesses or receives reliable information from a credible source that the person: (A) has been previously convicted of or placed on community

supervision for an offense under **Section 49.045, 49.07, or 49.08, Penal Code**, or an offense under the laws of another state containing elements substantially similar to the elements of an offense under those sections; or (B) on two or more occasions, has been previously convicted of or placed on community supervision for an offense under **Section 49.04, 49.05, 49.06, or 49.065, Penal Code**, or an offense under the laws of another state containing elements substantially similar to the elements of an offense under those sections. (c) The peace officer shall designate the type of specimen to be taken.”

Essentially with the death of Ms. Barnes and the subsequent taking of Cameron Shepard If you have been arrested for DWI involving a car accident and a passenger or driver of the car you hit or for that matter your car, left in an ambulance for treatment of injuries, Texas Laws give police permission to forcibly take a blood sample from you. The State of Texas also allows law enforcement to forcibly draw blood without your consent if the following conditions were present at the time of your DWI arrest: 1. someone died or will die from the car accident injuries; 2. an individual has suffered serious bodily injury; or 3. an individual has been transported to a hospital or other medical facility for medical treatment of injuries that occurred in the accident. Two prongs (a death and taking a person to the hospital as results of their injuries) both would automatically trigger a warrantless blood draw. If a blood draw was result of the Law of Texas, than the District Court Judge did not err in denying their pre-trial motion.

Second Point of Error: Whether the trial court erred in denying the motion to suppress

the video recording from the police officer's body camera video.

The essence of Mr. Shepard's pre-trial motion to dismiss was centered on the concept that somehow the video recording was not a direct record of the government. They were trying to have this court believe that it was equal to nothing more than a mere report and therefore could contain Hearsay. The truth of the matter is slightly different than what they argued. The **Local Government Records Act (LGRA) in §201.003** defines a local government record as "any document... [including] ***sound or video recording***... created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business" Therefore, videos produced by a body camera worn by a peace officer are local government records because they are created by an employee (a peace officer) of a local government in the transaction of the public business (keeping the peace and enforcing the state and local laws). As a local record they would fit under either Best Evidence or Present Sense exemptions of the Hearsay Rules. Whereby making Shepard's argument moot. You can not have Hearsay in a first person Best Evidence recording. If there could be no Hearsay, then the District Court Judge did not err in denying their pre-trial motion.

IV. Conclusion

It is clear that Officer Cole followed all proper procedures in regards to our case here today. He, at no point, violated any of the Mr. Shepard's rights, while in the meantime, doing all he could to establish justice for a young woman whose life was forcibly taken from her on June 30, 2018 from a lethal accident caused by Cameron Shepard. It is also clear that the District Court Judge did not err on denying either motion. In fact, the Judge was following the Letter of the Law and duties of his office. Cross Apply the fact that First Point of Error should have been about the Constitutionality of Texas Law not the fact if he erred. If in fact the Judge had ruled the Law of Texas unconstitutional- he would have been in violation of his office. That would have been an error. There would only one possible error here. That error be only constructed now and would only come into play if this Court would rule that District Court erred. An error can not exist if the accused error could not legally happen. Thereby, making the only verdict in today's decision that for the Appellant.

V. Prayer

We pray that the court will take into consideration our arguments and vote to uphold the decision of the District Court Judge in two trial motions. Doing anything else would be an error on the part of this court not an error on the part

of District Court Judge which actually proves our point in this argument. This clearly is the case here.

Respectively Submitted

Emily Kai Fiddler

Madison Adelstein

Attorneys for the Appellant

Del Valle High School

The Court
Of Criminal Appeals, State Of Texas

NO. 03-18-01234-CR

The State of Texas,
The Appellant

V.

Cameron Shepard,
The Appellee

FROM THE COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

Brief for Appellee

Kai Fiddler
Madison Adelstein
Attorneys for the Appellee
Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

The appellee, Mr. Cameron Shepard, was wrongly charged with offense of intoxication manslaughter, following a brief and totally unacceptable investigation which denied him of his rights. He was forced to plead guilty for the mercy of the Appeals Court after the trial judge denied his motions to suppress the results of a blood draw and the body camera video. The lower court has overturned the trial court's ruling and presented this court with two appealable concerns.

II. Statement of Facts

Cameron Shepard was incredulously submitted to several unlawful sobriety tests on the early morning of June 30th, 2018 at the scene of a car accident. Officer Cole, who was the Austin Police Officer that investigated the scene, submitted Mr. Shepard to the aforementioned tests without a warrant or consent and narrated the interactions with Mr. Shepard with his body camera. The investigation severely lacked proper procedures and depth, and Officer Cole was already predisposed to believe Mr. Shepard was drunk due to a statement from the dispatcher on the way to the scene. Cole jumped to the conclusion that it was a DWI and by extension did not properly handle the investigation. Rather than taking the steps to follow proper procedures, the officer transported Mr. Shepard to a hospital and obtained his blood samples against his will, violating him of his rights. The blood samples were used against Mr. Shepard at trial, in which he made a motion to dismiss the tainted evidence but was ignored and

found guilty. The lower court overturned the trial court's opinion after having reviewed the appalling procedural errors made by the State and the utter disregard of Mr. Shepard's rights.

III. Issues on Appeal

(1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

(2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

IV. Argument

Point of Error 1: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Warrantless searches are not reasonable under the Fourth Amendment unless they fall within a recognized exception to the warrant requirement.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." **U.S. CONST. Amend. IV.** The Supreme Court has held that a warrantless search of the person is reasonable only if it falls within a recognized exception. **Missouri v. McNeely (2013), 113 S.Ct.; United States**

v. Robinson, 414 U.S. 218, 224 (1973). Exigent circumstances is one such well-recognized exception. **Missouri v. McNeely (2013)** The State argues in this case that the statutory scheme found in the **Texas Transportation Code**, which implies consent of a driver and mandates blood draws under certain scenarios, is “a reasonable substitute” for the Fourth Amendment’s warrant requirement. In other words, it argues that this statutory scheme should be considered an exception to the warrant requirement, and this is not true. The implied consent statute, found in **section 724.011(a) of the Texas Transportation Code** provides the following:

If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, or a watercraft, while intoxicated, the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person’s breath or blood for analysis to determine the alcohol concentration or the presence in the person’s body of a controlled substance, drug, dangerous drug, or other substance.

Tex. Transp. Code Ann. § 724.011(a) (West 2011). Section 724.013, in turn, states that “[e]xcept as provided by **section 724.012(b)**, a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer.” **Id. § 724.013. Section 724.012(b)** requires a peace officer to take a specimen of a person’s breath or blood, even if the person refuses, if the person is arrested for an intoxication offense under **chapter 49 of the Penal Code** involving the operation of a motor vehicle or watercraft and

(1) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident: (A) an individual has died or will die; (B) an individual other than the person has suffered serious bodily injury; or (C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment;

(2) the offense for which the officer arrests the person is [driving while intoxicated with a child passenger]; or

(3) at the time of the arrest, the officer possesses or receives reliable information from a credible source that the person (A) has been previously convicted of or placed on community supervision for [driving while intoxicated with a child passenger, intoxication assault, or intoxication manslaughter]; or (B) has been on two or more occasions previously convicted of or placed on community supervision for [driving while intoxicated, flying while intoxicated, boating while intoxicated, or assembling or operating an amusement ride while intoxicated].

As Villarreal made plain, a warrantless search is per se unreasonable unless it falls within a well-recognized exception to the warrant requirement. The exigency exception operates “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” Exigency potentially provides for a reasonable, yet warrantless search “because `there is compelling need for official

action and no time to secure a warrant.” Whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances. “[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation.” An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search.

Point of error 2: Whether the trial court erred in denying the motion to suppress the video recording from the police officer’s body camera video.

Present Sense impression – Rule 803(1) is defined as; a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Present sense impression is the exception to the hearsay rule under **TEX.R. EVID. 803(1)**. It is defined as a statement that describes an event while it is occurring or immediately thereafter. Trial court has erred for admitting the video without reviewing whether the audio could be interpreted as the exception to the rule. In **Shuffield v. State (2006)**, the court made point to review a “trial court’s decision to admit or exclude evidence under an abuse of discretion standard.”

Meaning, your honor, that this court is to view evidence in light most favorable to the trial court findings and review de novo the court’s application of facts. That being the case, in **Ramon v. State, 159 S.W.3d 927, 931 (Tex.Crim.App. 2004)** the court held that “admission of inadmissible evidence does not require reversal if the same facts are proved by other proper

testimony.” Your honor without a trial and without reviewing the evidence there is no way the judge could have determined that the video qualified under the exception to the hearsay rule.

Also, **Rule 803(8)(B)** excludes the following materials from the general rule excluding hearsay: “[R]ecords, reports, statements, or data compilations, in any form, of public offices or agencies setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel .” On its face, Officer Cole's video consists of matters observed by a law enforcement officer as described in **Rule 803(8)(B)**. Thus, Shepard argues that Cole ’s recorded narrative is the functional equivalent of a law enforcement officer's report of his observations and should have been excluded. **Gomez v. State, 35 S.W.3d 746, 748 (Tex.App.-Houston [1st Dist.] 2000.)** Here, Shepard argues that a police officer's offense report “is not admissible because it is expressly excepted from the exclusion to the hearsay rule for public records under **Rule of Evidence 803(8)(B)**; By applying **Thompson v. State No. 12-03-00014-CR, 2003 WL 22839810, at *4 (Tex.App.-Tyler Nov.26, 2003)** in this case, holding that the trial court erred in admitting the audio portion of a videotape containing a police officer's commentary while following the defendant because such commentary is hearsay and does not fall within an exception for admission at trial and could not be admissible at court.

Without the ability to use the video or transcript, the State would not have sufficient evidence to justify a re-trial of Cameron Shepard without

producing some sort of legally obtainable evidence heretofore has not been shown in court. Clearly, through application of these cases, one could conclude the only logical decision that could be made is to not allow this to become part of the record.

V. Conclusion

Clearly, through the course of this argumentation, it becomes clear that Mr. Shepard was a victim of violation of his 4th and 6th amendment rights. These violations included but were not limited to; poor investigation, hasty conclusion, warrantless blood draw, failure to obtain probable cause before warrant, failure to talk to all witnesses, and last but not least, failure to look at anything other than the facts of a predetermined conclusion. This is a travesty of justice. This is not permitted by the United States Constitution and the Bill of Rights. The only way to vote today in this case is to vote for the people. Vote for the rights.

VI. Prayer

For these reasons we pray that this court reaffirm the Travis County Appeals Court ruling and find in favor of the Appellee.

Respectively Submitted by

Kai Fiddler

Madison Adelstein

Attorneys for the Appellee

Del Valle High School

COURT OF CRIMINAL APPEALS,

THE STATE OF TEXAS

=====

NO. 03-18-01234-CR

=====

The State of Texas,

The Appellant

v.

Cameron Shepard,

The Appellee

=====

FROM THE COURT OF APPEALS, THE THIRD DISTRICT, AT AUSTIN

=====

BRIEF FOR APPELLANT

Submitted By

Cesilia Perez

Freddy Nieto

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Cameron Shepard was arrested on the morning of June 30, 2018 for both DWI and Intoxicated Manslaughter. After his arrest he was given a warrantless blood draw and video evidence of the event was recorded on Officer Cole's body camera as a second witness to the proceedings.

II. Factual Background

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department arrived at wreck on Interstate 35 north of downtown Austin, Texas. Shortly before he arrived on the scene, he activated his body camera which capture audio and video of his investigation. The preliminary results showed that there was a badly hurt female in the roadway and a small car had two people stuck in the car. The EMS arrived and rendered first aid to the passengers of the car, but the young woman died of the injuries from the wreck. Officer Cole noted that the car reeked in question had a heavily aroma of alcohol. After freeing the two passengers from the car. Officer Cole gave the Standardized Field Sobriety Test on the driver, Cameron Shepard. As the result

of this test, Cameron Shepard was placed under arrest at 3:00 AM for DWI and Intoxicated Manslaughter.

III. Issues and Applicable Law

Introduction: The original defendant, Cameron Shepard, claimed that there were two points of error in the proceedings of his trial for intoxicated manslaughter regarding the trial court's decision to not suppress certain pieces of evidence. The first point error of this appeal is based upon the decision of the District Court Judge and did he make the right decision.

First Point Of Error: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

Officer Cole followed proper procedures established in his jurisdiction attempted to get the blood warrant. However, do to factors outside of his control he was not able to obtain one. Should he be punished or should our society be punished for that? This clearly does not make any sense either. Over forty years ago, the Supreme Court's decision in ***United States v. Robinson*** "created a categorical rule holding that police officers are authorized to conduct a full search of a person who has been lawfully arrested." That ruling, it argues, allows both a warrantless breath test for a suspected drunk driver and criminal charges for refusing to take the breath test. And, the state continues, the breath tests do advance the rationale of preventing the destruction of evidence: even if the Court in *McNeely* ruled that alcohol does not disappear from the bloodstream so quickly to justify warrantless blood tests in all cases,

the Court in that case “did not dispute” that blood-alcohol levels decline as time passes. Easily, Officer Cole had the ability to take Mr. Shepard after his arrest for a blood draw. Cross apply both the concept that full search of person involved in drunk driving death would have to be the actual amount of alcohol in that person’s system.

According to the 10th Amendment of the US Constitution which states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. This means that States not the Federal government is in charge of setting laws that protect its citizens from drunk driving. This is exactly what many states have recently in the past ten years done. In 2012, North Dakota had the highest per-capita rate of deaths attributable to drunk driving in the United States: 11.3 deaths per 100,000 people, more than three times the national average. Many of the drivers arrested for driving under the influence in the state – nearly one in five in 2011 – refused to take any test that would allow police to measure the alcohol in their blood, making it harder to bring criminal drunk-driving charges against them. In an effort to cut down on drunk driving in the state, North Dakota legislators passed a law that imposed criminal penalties on suspected drunk drivers who declined testing. North Dakota says this strategy – which is similar to laws in eleven other states, including Minnesota, and on National Park lands – has worked and is now an important weapon in the fight against drunk driving.

Officer Cole followed his State’s protocol as well as the protocol of his police force. Even the Federal Supreme Court case of ***Missouri v. McNeely***

(2013) did not state that the State could never do a warrantless search. The unrealistic concept that police work must be done within working hours of office people does not work here. When the thought that the evidence was about to be destroyed at any minute, this action alone created a condition of exigent circumstances. Exigent circumstances allows the warrantless blood draw **Missouri v. McNeely (2013)**, the 10th Amendment allows states to create their laws concerning alcohol, and **United States v. Robinson-** allows for warrantless blood draw on a person who has been arrested for DWI Intoxicated Manslaughter after the arrest. Therefore, the State of Texas has clearly proven their point of error.

Second Point of Error: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

The real argument here is about if the trial judge erred when ruling against Mr. Shepard's Motion to Suppress. To look at this logic one must look at the following key facts.

- The Supreme Court under **Robinson (1973)** found the search permissible under U.S. Constitutional Amendment IV.
- The search incident took place two hours after a lawful arrest.

- When an officer had probable cause for an arrest, an arrest was made thereby creating a more extensive exploration of the suspect's person was authorized.
- This was to protect the officer, but also to preserve evidence. The video tape is not part of the police report- it is real time documentation of the conditions that were present at the time.
- The fact that defendant was to be arrested for a driving offense did not lessen the officer's right to search defendant in fact it increases it. **Texas Transportation Code** called for a Blood Draw with any accident involving alcohol and death. This had both.
- The State of Texas under the 10th Amendment had the right to make laws requiring motorists to surrender to take a blood draw when alcohol is involved. If the Appellee argues against this- then they have already lost this argument. The only documentation of their denial would be the videotape. Therefore, the Judge did not err because both sides of the case could clearly benefit from knowing exactly what happened in the early morning hours of June 30, 2018.

IV. Conclusion

The two points of error (1)Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw and (2)Whether the trial court erred in denying the motion to suppress the video recording from

the police officer's body camera video were not made when the District Court Judge ruled to deny Mr. Shepard's motions to dismiss.

V. Prayer

For these reasons, we pray that this court would uphold the decision of the District Court and find the District Court did not make an error by denying these motions.

Respectfully Submitted By:

Cesilia Perez

Freddy Nieto

Attorneys for Appellant

Del Valle High School

The Court
Of Criminal Appeals, State Of Texas

NO. 03-18-01234-CR

The State of Texas,

The Appellant

V.

Cameron Shepard,

Appellee

FROM THE COURT OF APPEALS,

THIRD DISTRICT, AT AUSTIN

Brief for Appelle

Freddy Nieto

Cecilia Perez

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

We are here today to ensure the rights of all citizens are never violated. That simply means we are representing all people here today to make sure that all of their rights are upheld, protected, and guaranteed. Furthermore we will carefully at the appellant's two points of error, (1) the warrantless blood draw was in violation of our clients rights, our opposition will argue there was exigency but we will prove there was none. (2) we will argue the reason for dismissing the audio/video recording and argue for a motion to suppress.

II. Issues and Applicable Law (FACTUAL BACKGROUND)

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of Interstate Highway near downtown Austin. When he arrived on scene, he activated his body camera which records audio and video from the scene. Officer Cole arrived on the scene inspecting for details. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Cameron Shepard passed five out of the eight tests and furthermore passed the blood test when it was taken. This should have been

the end of the story. He was not drunk. However, Officer Cole took advantage of a dazed and confused young man who was involved in a wreck.

According to Officer Cole's own testimony- Mr. Shepard was trapped in the car and he did not talk with Officer Cole before Officer Cole had already made up his mind about this case. Clearly Mr. Shepard was impaired after the wreck. His impairment was not the result of drinking but the result of wreck. His failure on some of the Field Test indicators were a direct result of the wreck not drinking. In fact, Officer Cole's responsibility at this point would be to offer proof not charges. Mr. Shepard confusion can be seen clearly when initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate Within the three hour time frame. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections. Mr. Shepard preferred for a lawyer to be present before this happened but Officer Cole had objectified and wanted the blood sample now. Further conclusions provide evidence he was not intoxicated as seen in the blood draw. With a .035 alcohol level the Appelle Mr. Shepard did not meet the .08 requirements to be deemed intoxicated.

III. Issues and Applicable Law: Points Of Error

We stand in court today to review the two points brought upon court to bring justice and safety to our society. The two points of error are:

(1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw,

(2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video

IV. Arguments

(1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw Your honor,

Your honor, after Officer Cole had arrived with a pre adjust disposition assuming it was a DWI and that my client had been drunk he concluded after a procedure of SFTS tests that Mr. Shepard was intoxicated. In 1978 U.S. Supreme Court Justice Powell wrote: "There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances. " Expressions of agreement with Justice Powell's observation are not difficult to locate for almost every contemporary Justice. It is somewhat anomalous, therefore, to find that once one moves beyond mere generalizations as to the meaning of the fourth amendment in respect to the significance of a search warrant, there has been very little agreement among the Justices as to the proper approach to the solution of warrantless search cases.

Today this is not the case. The Supreme Court in 2013 made great strides in changing this when they ruled on **Missouri V Mc Neely**. Justice Powell wrote back in 1978, "There is no more basic constitutional rule in the Fourth

Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances. " Expressions of agreement with Justice Powell's observation are not difficult to locate for almost every contemporary Justice. It is somewhat anomalous, therefore, to find that once one moves beyond mere generalizations as to the meaning of the Fourth Amendment in respect to the significance of a search warrant, there has been very little agreement among the Justices as to the proper approach to the solution of warrantless search cases. (**Missouri V Mc Neely 2013**)

The case, **Missouri v. McNeely**, was analyzed under the basic protections afforded by the Fourth Amendment. The Fourth Amendment offers the protection against unreasonable searches and seizures. In this case, the removal of blood from one's body without consent is considered a search. Conducting such a search without a warrant is only allowed if it falls within one of the listed exceptions.

As noted in the case, these exceptions include:

- A police officer's need to provide emergency assistance.
- Engaging in hot pursuit of a suspect.
- Entering a burning building to determine the cause of the fire.
- Prevention of imminent destruction of evidence.

Clearly, there is not exception here. They knew it then at 2:00 am and 5:00 am- they must have had a warrant for blood draw.

(2) Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video

Advances in technology have led to the use of various digital techniques in the presentation of evidence to the courts. In some cases, digital techniques have allowed the court to gain more valuable information from evidence than would otherwise have been evident. In other cases, it has allowed the court to receive evidence that it would not have been able to receive without the assistance of digital technology. Digital evidence has been presented to the courts in various areas including audio enhancement, photograph enhancement, forensic video analysis and the digital enhancement of latent fingerprints. Where digital technology adds little to the original evidence, it is rarely worth the time and effort in preparing and presenting such evidence in a digital environment. However, where digital assistance allows the court or jury to see additional information that it would not otherwise have seen or heard or where it allows the court to see or hear such evidence in a more thorough, analytical format, it is well appear worthwhile- yet the Courts have ruled that this would be Hearsay because in most of the cases this additional testimony would not stand up to a Six Amendment challenge by defendant in the Appeals Process. There have been numerous cases over the past decade where forensic video analysis has made the difference between a justified conviction and an unjust acquittal. Here our argument is not that information is not important- it is that information

obtained was obtained illegally-cross apply the fact that State never proved their case against this and the trial judge showed have suppressed the jury from seeing this information and ruled in favor of these pretrial motions.

IV Conclusion

The two points of error being (1) Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and (2) Whether the trial court erred in denying the motion to suppress the video from the police officer's body camera video. Considering all the information, which includes our points and case law, we conclude that the trial court did in fact err in not dismissing the blood draw after an illegal and Warrantless draw. Furthermore, the conclude the audio/video recording as admissible since not only contains hearsay but the recording itself violated APD procedural policy on how to properly record. The use of this material was illegal and therefore, should have been protected by the Judge and not used in the trial. If you do not stand up for our rights here today, who will? If the US Constitution and Bill of Rights truly means something- do not let some police force just tear it up before our very eyes today.

V Prayer

Your Honor, associate justices we ask you find Mr. Shepard innocent by any means and furthermore we vote that Trial Judge did err when he did not vote for the motions to suppress the video/audio recording and warrantless blood draw.

Respectfully Submitted By:

Freddy Neito

Cesilia Perez

Attorneys for Appellee

Del Valle High School

THE COURT OF CRIMINAL APPEALS,

THE STATE OF TEXAS

=====

NO. 03-18-01234-CR

=====

The State of Texas,

The Appellant

v.

Cameron Shepard,

The Appellee

=====

FROM THE COURT OF APPEALS, THE THIRD DISTRICT, AT AUSTIN

=====

BRIEF FOR APPELLANT

Submitted By

Isis Garcia

Vanessa Barrera

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Cameron Shepard was arrested on two felony charges on the morning of June 30, 2018 DWI and Intoxicated Manslaughter. After his arrest he was given a warrantless blood draw and video evidence of the event was recorded on Officer Cole's body camera. In his pre-trial motions, Mr. Shepard tried to get both pieces of evidence suppressed from his trial. After losing both of his motions, Mr. Shepard plead guilty to all counts in his District Court Trial.

II. Factual Background

On June 30, 2018, at approximately 2:00 a.m., the Austin Police Department arrived at wreck on Interstate 35 north of downtown Austin, Texas. Two men were trapped in the car and one woman lay dead on the road. Officer Cole of the Austin Police Department was assigned to investigate this case. He called EMS to help get the two men who were trapped in the car out of the car. After the driver was checked out and cleared by the EMS, Officer Cole performed some Field Tests on Mr. Shepard to ascertain if he was impaired or under the influence when he was driving. After failing several important indicators on

these tests, Cameron Shepard was placed under arrest at 3:00 AM for DWI and Intoxicated Manslaughter.

III. Issues and Applicable Law

In the beginning the original defendant, Cameron Shepard, claimed that there were two points of error in the proceedings of his trial for intoxicated manslaughter regarding the trial court's decision to not suppress certain pieces of evidence. The first point error of this appeal is based upon the decision of the District Court Judge and did he make the right decision. The basis of this argument is the idea that the entire arrest should not have taken place so therefore the body camera video and subsequent warrantless blood draw should not have taken place-rendering them not useable in court.

First Point Of Error: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

In **Missouri v. McNeely, 133 S. Ct. 1552 (2013)**, The US Supreme Court said that "States have a broad range of tools to enforce their drunk-driving laws and to secure [Blood Alcohol Content] evidence without undertaking warrantless nonconsensual blood draws." The very first example the Court offered was "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." And, of particular relevance here, the Court explained that "[s]uch laws impose significant consequences when a motorist withdraws consent," such as revoking

the driver's license and using "the motorist's refusal to take a BAC test as evidence against him in a subsequent criminal prosecution." Every State has enacted such a law, and these laws have long withstood legal attack.

The Court recognized, however, that "drunk driving continues to exact a terrible toll on society" and provided reassurance that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." In particular, the US Supreme Court pointed to the fact that all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent. . . This is because of the 10th Amendment which leaves the ability to make laws concerning driving and drinking up to each state. Since this is a State 'Rights issue the State Judge hearing the pre-trial motion could not rule any way but to deny the motion because the motion itself was based on Constitutional Issue which the District Judge has not ability to rule on or over.

In **Birchfield v. North Dakota** the Supreme Court determined that warrantless blood tests are an unconstitutional search under the Fourth Amendment. However, what they did not consider was the fact that this decision was in step with the 10th Amendment. When in conflict the rulings of the the US Supreme Court should uphold the law of the land not break it. Cleverly by hiding arguments inside of other arguments, the Justices did in fact err in granting too much power to the Federal government whereas that power

was to be granted to the State and the people not the Federal Government.
(Tenth Amendment)

Second Point of Error: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

The argument becomes video recordings—such as body camera footage—they are increasingly being offered against defendants as proof in court in lieu of live witness testimony, the limitations of what constitutes a “statement” and to whom it is attributed deserve serious consideration. Unlike prior forms of proof such as photographs, surveillance videos, and data output from machines analyzing forensic evidence that are historically “not hearsay,” body cameras afford their operators a large amount of discretion to record certain portions of interactions from a subjective viewpoint—the recording officer’s during crucial points in an officer-suspect interaction.

Courts have yet to address the argument that body camera footage, in and of itself, is hearsay. While some have argued for hearsay recognition training so officers avoid recording verbal statements on the footage, such proposals fail to address the concept that these tests are subjective and without standards. Therefore, how can a District Judge rule that video camera evidence is Hearsay when US Supreme Court has failed to do the same. The judge's first role is to make sure all the parties and witnesses follow proper courtroom procedure. Although this doesn't sound particularly exciting, procedure is of vital

importance to the legal system. It was designed to ensure that everyone who comes to court gets a fair trial. In their position as a District Judge they would enforce court procedure. Although many questions about evidence are settled before the start of trial in pre-trial motions, sometimes these decisions have to be made on the fly while court is in session. However, Constitutional Issues would be taken up at the Supreme Court level not the District Court. This makes any other decision other than denial of the pre-trial motions an err on the part of the Judge.

IV. Conclusion

The two points of error (1)Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw and (2)Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video were not made by the District Court Judge when they ruled to deny Mr. Shepard's motions to dismiss because as previously shown, the only error could have been if the Judge had approved the motions.

V. Prayer

For these reasons, we pray that this court would vote for the Appellant in this matter and the Judge made no err in denying these motions.

Respectfully Submitted By:

Isis Garcia

Vanessa Barrera

Del Valle High School

The Court
Of Criminal Appeals, State Of Texas

NO. 03-18-01234-CR

The State of Texas,
The Appellant

V.

Cameron Shepard,
Appellee

FROM THE COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

Brief for Appellee

By

Barrera

Submitted
Isis Garcia
Vanessa Barrera
Vanessa

Del Valle High School

To The Honorable Court Of Criminal Appeals

I. Statement of the Case

Mr. Shepard brought two points of error related to the trial court's denial of his Motion to Suppress. First, Mr. Shepard argued that the trial court should have suppressed the results of the blood draw because the blood draw violated the Fourth Amendment's warrant requirements. Mr. Shepard initially cooperated and consented to have his blood drawn but was in diminished capacity due to his accident. Second, Mr. Shepard stated that the trial court should have suppressed the body camera video because it contained inadmissible hearsay

II. Issues and Applicable Law

In this case the State of Texas erred in two different ways. First, the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and second in denying the motion to suppress the video recording from the police officer's body camera video. "[This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding]" (Article VI). Therefore an

exception to the law cannot be made for the federal law stands in **Missouri v. McNeely**.

III. FACTUAL BACKGROUND

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which capture audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion Mr. Shepard had been driving a vehicle while impaired and caused the death of a female.

Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

IV. Issues and Applicable Law: Points Of Error

First Point of Error: Mr. Shepard claims that the trial court should have suppressed the results of the blood draw because the blood draw violated the Fourth Amendment's warrant requirements.

From the Field Tests- Mr. Shepard was arrested. Wait if we had in effect stopped there was this justice? The Fourth Amendment provides in part that "[the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. Does this make sense to arrest Mr. Shepard without proof, without a warrant, and without a proper investigation?

The protections afforded by the Fourth Amendment apply equally to Officer Cole's action of forcibly extracting blood from Mr. Shepard's body as they do to an officer entering into a citizen's house without permission. Over the years, the United States Supreme Court has created many exceptions to the warrant requirement. In this case, the State argues that the blood draw falls within the "exigent circumstance" exception to the warrant requirement. Under this exception, a warrantless seizure of evidence is justified if "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." ***Missouri v. McNeely*, 133 S.Ct. 1552 (2013)**. Whether exigency exists will be determined on a totality-of-circumstances approach.

Using this approach, we conclude that Mr. Shepard's warrantless blood draw was not justified by exigent circumstances. We acknowledge that some impediments led to a delay in procuring a blood sample. However, **McNeely** makes it clear that "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." **Missouri v. McNeely, 133 S. Ct. 1552 (2013)**. The reviewing court should not use the benefit of hindsight to impose undue burdens on the officer. However, in this case, there were reasonable avenues for obtaining a warrant that Officer Cole chose not to explore.

The trial court record states that there was another judge available to review the search warrant. The fact that Officer Cole or his department had not prepared for this scenario and obtained contact information for the Travis County judges should not be held against Mr. Shepard. The State bears the burden of establishing sufficient facts to prove that exigent circumstances existed to justify the warrant requirements.

We do know that Officer Cole failed to contact the other eight judges despite the fact that the officer did have contact information for those judges. Also, we know from the body camera video that other officers were in the area when the accident occurred. Other officers might have been able to assist Officer Cole in locating a magistrate. The State failed to meet its burden and on this point of error, the results of the blood draw should be excluded.

Second Point of Error: Whether the trial court erred in denying the motion to suppress the video recording from the police officer’s body camera video.

“Hearsay” is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay. “An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative.” Such a narrative constitutes a “speaking offense report” in which the “on-the-scene observations and narrations of a police officer conducting a roadside investigation . . . are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime.”

In this case, Officer Cole’s statements consist of a narration of what he was observing at the crime scene including his interviews with witnesses and the defendant. If this video were transcribed word-for-word and offered as evidence by the State, it would be properly excluded as an offense report under **Rule of Evidence 803(8)(B)**. Thus, the trial court erred in admitting the portions of the video in which the officer was narrating the events that he perceived.

IV. CONCLUSION

The two points of error (1) whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and (2) whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video. On both grounds, we reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

V. PRAYER

For these reasons we pray that this court would uphold the decision of the Travis County Court of Appeals and protect the rights of all of our citizens of this great land.

Respectfully Submitted By:

Isis Garcia

Vanessa Barrera

Attorneys for Appellee

Del Valle High School

APPEAL towards the RECONSIDERATION of SHEPARD V. TEXAS

Alden Harris

Luka Verheul

TEXAS COURT OF CRIMINAL APPEALS,

THE STATE OF TEXAS

=====

NO. 03-18-01234-CR

=====

The State of Texas,

The Appellant

v.

Cameron Shepard,

The Appellee

=====

=====

FROM THE COURT OF APPEALS, THE THIRD DISTRICT, AT AUSTIN

=====

=====

BRIEF FOR APPELLEE

This brief is directed to the judge and/or panel of justices, who will give their objective ruling in this case.

STATEMENT OF THE CASE

Appellant Cameron Shepard was arrested and charged with the crime of manslaughter while intoxicated. He would receive his right to being tried in front of a jury of his peers, and before entering trial requested that the evidence of a blood draw taken without his consent, and the body camera footage taken by the officer on site. This motion was denied, and Shepard entered the trial with a guilty plea.

STATEMENT OF THE FACTS

The defendant, Cameron Shepard, has been accused of intoxicated manslaughter by the State of Texas. At approximately 2:00 a.m., Austin police officer Cole was dispatched to investigate a automobile accident near downtown Austin. At the scene, he activated his body camera, on which footage was found of him narrating his findings at the scene. At a scene, he found woman in the middle of the road who had fell out of the car, and a totalled car on the side of the road with two passengers, the driver being Cameron Shepard. He told shepherd that he smelled alcohol coming from the car and is in sight of an empty bottle. After only contacting only one out of eight contactable judges for a warrant, Officer Cole asked for Shepherd's consent for performing a blood draw, to which he agreed. Upon arrival at the hospital, Shepard revoked his consent

for a blood draw, which was performed anyways, and the results showed he was intoxicated.

Rule 803(8)(B) argues that the body-camera footage of officer cole is not admissible as evidence, due to prior hearsay laws.

ISSUE OF THE APPEAL

ARGUMENT

Point of error one:

Cole had EIGHT judges to contact, yet he stopped trying to contact any of them for a warrant after the first magistrate was unavailable. This is a judgment call taken by Officer Cole, and a blatantly unlawful one, judgment calls by authority figures should be regulated in law rather than passed as rightful. Law does not take into account Officer Cole's reasoning for not acquiring a warrant, and Officer Cole, as an extension of the law, is unrightful in making this call. In addition, there were other police in the area that could have aided Cole in locating a magistrate.

Prior cases, such as Weems v. State prove to us Officer's postponing of tests due to injury. Officer Cole, who should operate under the truism "Innocent until guilty," disregarded Shepard's physical condition completely, and in a rapid

assumption of his guilt proceeded with unwarranted, consentless intrusive tests. In short, officer Cole has been entrusted the duty of defending the people of Austin, which was all but his motive in yet another reckless judgement call, which was not his to make in the first place.

Officer Cole argues that his actions were legally appropriate due to their objective decency, yet the most reasonable action would be to administer a simple breathalyzer test. This is because it would (1) prove Shepard's intoxication and (2) if Shepard denied this test, initiate exigent cause.

Point of error two:

It is accepted in the practice of law that if two conflicting laws apply, the law more specific and apt to the situation should prevail. This law, in this case, is Rule 803(8)(B) which applies over Rule 803(1). Rule 803(1) is a more general rule that allows space for admission of evidence that includes hearsay, while 803(8)(B) compels the court to deny the admission of the audio-video evidence of officer Cole's body-cam footage, because it is clearly based around out-of-court testimonial statements, which are not admissible in court.

Judge Reyes argument is based on the importance of evidence: "Further, the video contains highly probative evidence such as witness temperament and

speech patterns and vehicle roadway layout.” This has NOTHING to do with why the evidence should be admitted.

CONCLUSION

Presented the compelling errors of the case and its supporting precedents, this being Officer Cole’s failing to contact a judge and the pertinence of Rule 803(8)(B), all must reconsider prior standings on this matter.

PRAYER

We wish for the honorable judge to overturn prior ruling in Texas V. Shepard at the presentation of this appeal.

TEXAS COURT OF CRIMINAL APPEALS,

THE STATE OF TEXAS

=====

NO. 03-18-01234-CR

=====

The State of Texas,

The Appellant

v.

Cameron Shepard,

The Appellee

=====

=====

FROM THE COURT OF APPEALS, THE THIRD DISTRICT, AT AUSTIN

=====

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This brief is directed to the judge and/or panel of justices, who will give their objective ruling in this case.

STATEMENT OF THE CASE

Appellant Cameron Shepard was arrested and charged with the crime of manslaughter while intoxicated. He would receive his right to being tried in front of a jury of his peers, and before entering trial requested that the evidence of a blood draw taken without his consent, and the body camera footage taken by the officer on site. This motion was denied, and Shepard entered the trial with a guilty plea.

STATEMENT OF THE FACTS

The defendant, Cameron Shepard, has been accused of intoxicated manslaughter by the State of Texas. At approximately 2:00 a.m., Austin police officer Cole was dispatched to investigate a automobile accident near downtown Austin. At the scene, he activated his body camera, on which footage was found of him narrating his findings at the scene. At a scene, he found woman in the middle of the road who had fell out of the car, and a totalled car on the side of the road with two passengers, the driver being Cameron Shepard. He told shepherd that he smelled alcohol coming from the car and is in sight of an empty bottle. After only contacting only one out of eight contactable judges for a warrant, Officer Cole asked for Shepherd's consent for performing a blood draw, to which he agreed. Upon arrival at the hospital, Shepard revoked his consent

for a blood draw, which was performed anyways, and the results showed he was intoxicated.

Rule 803(8)(B) argues that the body-camera footage of officer cole is not admissible as evidence, due to prior hearsay laws.

ARGUMENT

Point of sustain 1:

The trial court was correct to deny the suppression of the warrantless blood draw. While the appellee will blindly argue for a vile interpretation of the Fourth Amendment, twisting and bending it into gruesome angles to conform to their case, we must consider the well-ignored sequel to their highlighted cliché of “unreasonable searches or seizures.” This sequel goes “but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”. Probable cause is a given, spawned blatantly in the show of Shepard drunken mannerisms and failure to comply with the field sobriety test. Similar prior cases such as *Weems V. State* and *Missouri V. McNeely* set a precedent of exigent circumstance, allowing officers in Cole’s position to disregard the lack of approval for a blood draw. Exigent circumstances such as the presence of a deceased body at the scene and Shepard’s unstable state warranted completely the blood draw given to Shepard.

Point of sustain 2:

The trial court was correct in denying the motion to suppress the video recording from the police officer's body camera video. It seems predictable for a guilty man to grapple wildly at hearsay laws, hoping to suppress key evidence with a loose interpretation of law. Hearsay is defined as an out-of-court doctrine, solidified by laws designed to protect the defendant from speeches or statements that might be contorted to shift out of an objective state and against the defendant's favor. Officer Cole's body-cam footage, however, includes no trace of hearsay, and is even more just under Rule 803(1), which regards the present sense impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event, or condition, or immediately thereafter." Because all footage was taken in the situation described by Rule 803(1), hearsay is not applicable to this situation.

CONCLUSION

Given these two points of sustain, being proof of the justified blood draw and lack of hearsay in the body-cam footage, we compel the honorable judge to not be swayed by the false logic of the appellee and remain by the side of the law, secured by precedent.

PRAYER

We ask that the judge would rule to sustain the verdict of the lower courts and not let the defendant escape the law.

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

**FROM THE COURT OF APPEALS, THIRD DISTRICT, AT
AUSTIN**

Brief for Appellant

Joshua Assef

Samuel Jing

Vic Coppinger YMCA

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

The defendant, Cameron Shepard, was charged with intoxicated manslaughter. Mr. Shepard filed a motion to suppress the unwarranted blood test and the body camera footage taken at the scene, but this was denied by the trial judge. Following this Mr. Shepard pleaded guilty to the charges and filed an appeal. Mr. Shepard is appealing on the basis that the blood draw was unwarranted and did not have the proper exigence and the body camera video was inadmissible hearsay. Shepard petitions the court to remand for a new trial upon these grounds.

STATEMENT OF FACTS

At 2:00 AM on June 30, 2018 Officer Cole of the Austin police department was dispatched to the scene of a car wreck. When he arrived, he began the recording on his body camera. After finding the petitioner, Cameron Shepard, in the driver's seat along with a deceased female, Officer Cole presumed that Mr. Shepard was intoxicated and proceeded to conduct a Standard Field Sobriety Test. Officer Cole had also requested a blood sample to which Mr. Shepard initially consented to, however he [Mr. Shepard] later withdrew his consent forcing Officer Cole to obtain a warrant. After contacting the magistrate on duty who was unavailable at the time due to another case involving a juvenile, Officer Cole refrained from attempting to retrieve a warrant and instead transported Mr. Shepard to the hospital to obtain the blood sample. Prior to Mr. Shepard's trial, he [Shepard] had motioned to suppress the results of the blood draw and body

camera footage. The motion was denied as “pieces of evidence” and Mr. Shepard pleaded guilty to the charges and later filed this appeal.

ISSUES ON APPEAL

Counterpoint number 1: The trial court did not err in denying Mr. Shepard’s motion to suppress the blood draw taken by Officer Cole.

Counterpoint number 2: The trial court did not err in denying Mr. Shepard’s motion to suppress the body camera video taken by Officer Cole.

ARGUMENT

Counterpoint number 1: The trial court did not err in denying Mr. Shepard’s motion to suppress the blood draw taken by Officer Cole. Under the legal exception of “exigent circumstances,” it was impractical for a warrant to be obtained by Officer Cole in this situation.

In response to the argument that the Fourth Amendment is only exempt when there is a “probable cause” at hand, the circumstances Officer Cole had faced present the following reasons for his search being justified as satisfying probable cause.

According to the *Missouri v. McNeely* case, exigency is justified when evidence is at risk of being destroyed. Specifically in the case regarding the warrantless blood draw, the natural dissipation of alcohol within the human body was definitely known to Officer Cole based on his prior knowledge and training and therefore he was prompted to go ahead with the blood draw after the delays in obtaining the consent and warrant. Since Mr. Shepard had initially consented to the blood draw and withdrew his consent later, Officer Cole was definitely

delayed significantly in obtaining the evidence necessary without it being tampered by the natural dissipation.

Additionally, Officer Cole had followed normal protocols for obtaining a blood warrant after Mr. Shepard's withdraw of consent. Even though the on-call magistrate was unavailable, the Supreme Court case of *Cole v. State* states that an officer does not need to attempt every form of obtaining a warrant before declaring exigency. This suggests that if the officer deems it is impractical to obtain a warrant based on the circumstances, then the officer has the right to proceed with the search. In this specific case, the delays present at the time Officer Cole chose to proceed with the blood draw and the potential delays to obtaining the evidence qualify Officer Cole to claim that the results for the blood test as soon as possible was necessary.

Factors that contributed to the delay of the blood test include the fact that a deceased individual was present at the site of the accident which would have prompted the necessary protocols for addressing that particular issue. Additionally, Shepard's initial consent would have prompted Officer Cole to assume that there would be no hindrance in obtaining the blood draw, however his ultimate withdraw of consent prompted Officer Cole to obtain a warrant to search Shepard legally. With the on-call magistrate being unavailable, Officer Cole was forced to go out of his way even further to obtain the legal means of searching. According to a Justice Reyes' input on this case, Shepard had also requested a medical intervention which could have definitely tainted the blood test results. For the potential delays along with the dissipation of alcohol throughout the body over time, Officer Cole's actions fall under the premises set

by *Cole v. State* and *Missouri v. McNeely* and therefore qualifies for being under exigency for proceeding with the blood draw.

Counterpoint number 2: The trial court did not err in denying Mr. Shepard's motion to suppress the body camera video taken by Officer Cole. Hearsay is an out of court statement that is used in court to prove the truth of an assertion. However, there are some exceptions to this rule.

First, hearsay is typically excluded whenever the declarant is unavailable because the declarant cannot be cross examined to determine the validity of their statement. However in the instance of this trial, Officer Cole was available to testify. Should the video be used, Officer Cole could have testified and given a statement as to whether the statements expressed by him were true. Additionally, the same applies to Mr. Shepard as he could have testified to the validity of his statements as well. This idea is supported by *EVANS v. STATE* (Tex.App.-Houston [14th Dist.] 2006) as in this similar scenario, statements made by the arresting Officer were not considered inadmissible hearsay since the officer has already testified and said the statements on the video camera; thus, the validity of the statements on the camera were confirmed.

Secondly the admission of inadmissible hearsay is a non-constitutional error. Non-constitutional errors are to be disregarded by appellate courts if the errors do not affect the substantial rights of the defendant (this means that the jury was in some detrimental way swayed by the inadmissible hearsay). *Thompson v. State*, NO. 03-12-00519-CR. In the instance of the case at hand, the jury never made a verdict because Mr. Shepard pleaded guilty immediately following

the denial of his motion to suppress the blood test and body camera footage as evidence. Therefore, the opinion of the jury never mattered the verdict of the case and cannot be considered to be greatly affecting the verdict; thus, an appellate court should disregard this admission.

Finally, the statements made by Officer Cole are admissible hearsay under the present tense impression rule. According to Rule 803(1), a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it, is under the present tense impression and is therefore admissible. As Officer Cole came up to the car crash he had no knowledge of what had occurred other than a crash. This is evident as this was the only information that the dispatch provided him before he arrived at the scene. Therefore, Officer Cole's initial impressions until he finds Mr. Shepard and begins the standard field sobriety test, would be applicable to the present tense impression rule and inapplicable to the case of *Fischer v. State*. *Fischer v. State* merely states that since an officer is attempting to gather evidence at a crime scene, the statements expressed by the officer are not under the present sense impression rule. The section containing the standard field sobriety test would be considered inadmissible under the principles of *Fischer v. State*. In all at the least the section of the audio until the Officer Cole makes his statement that "It'll be intoxic manslaughter" is admissible hearsay and should therefore have been admitted by the court. The video of the crash and Officer Cole's statements in this section alone contain important details to the trial and should therefore have been used.

CONCLUSION

The blood draw was in violation of Mr. Shepard's Fourth Amendment Right, but the situation had the proper exigence for Officer Cole to bypass this right and perform the blood draw. Additionally, the body camera footage was not inadmissible hearsay. There were statements expressed that were applicable under the present tense impression rule and overall the footage did not affect the constitutional rights of Mr. Shepard. Additionally, Officer Cole and Mr. Shepard could have testified to the hearsay to confirm the validity of the statements that they expressed which would make the hearsay admissible. Therefore, the court must find in favor of the Respondent with regard to this issue.

PRAYER

For these reasons we pray that this court reverse the decision of the lower court.

Respectfully Submitted By:

Joshua Assef

Samuel Jing

Attorneys for Appellant

Dawson High School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

**FROM THE COURT OF APPEALS, THIRD DISTRICT, AT
AUSTIN**

Brief for Appellee

Joshua Assef

Samuel Jing

Vic Coppinger YMCA

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

The defendant, Cameron Shepard, was charged with intoxicated manslaughter. Mr. Shepard filed a motion to suppress the unwarranted blood test and the body camera footage taken at the scene, but this was denied by the trial judge. Following this Mr. Shepard pleaded guilty to the charges and filed an appeal. Mr. Shepard is appealing on the basis that the blood draw was unwarranted and did not have the proper exigence and the body camera video was inadmissible hearsay. Shepard petitions the court to remand for a new trial upon these grounds.

STATEMENT OF FACTS

At 2:00 AM on June 30, 2018 Officer Cole of the Austin police department was dispatched to the scene of a car wreck. When he arrived, he began the recording on his body camera. After finding the petitioner, Cameron Shepard, in the driver's seat along with a deceased female, Officer Cole presumed that Mr. Shepard was intoxicated and proceeded to conduct a Standard Field Sobriety Test. Officer Cole had also requested a blood sample to which Mr. Shepard initially consented to, however he [Mr. Shepard] later withdrew his consent forcing Officer Cole to obtain a warrant. After contacting the magistrate on duty who was unavailable at the time due to another case involving a juvenile, Officer Cole refrained from attempting to retrieve a warrant and instead transported Mr. Shepard to the hospital to obtain the blood sample. Prior to Mr. Shepard's trial,

he [Shepard] had motioned to suppress the results of the blood draw and body camera footage. The motion was denied as “pieces of evidence” and Mr. Shepard pleaded guilty to the charges and later filed this appeal.

ISSUES ON APPEAL

Point of error number 1: The trial court erred in failing to suppress the unwarranted blood draw taken by Officer Cole which violates the Fourth Amendment regarding “unreasonable search and seizure.”

Point of error number 2: The trial court erred in failing to suppress the body camera video taken by Officer Cole.

ARGUMENT

Point of error number 1: The trial court erred in failing to suppress the unwarranted blood draw taken by Officer Cole which violates the Fourth Amendment regarding “unreasonable search and seizure.”

The Fourth Amendment states that people have the right to secure their property “against unreasonable search and seizure and that no warrant shall issue this violation but upon probable cause.” The case involving Mr. Shepard can be applied to the fourth amendment since the action of taking blood from an individual without their consent is comparable to the forced entry into one’s house for search reasons. According to the Supreme Court case *Winston v. Lee* (1985), obtaining blood from a person’s body forcibly is invading an “individual’s most personal and deep-rooted expectations of privacy.” The action Officer Cole

committed [taking blood without the active consent of the petitioner and not obtaining a warrant] in regard to the verdict of *Winston v. Lee* constitutes as having violated Mr. Shepard's basic rights of privacy under the constitution's Fourth Amendment. However, there are exceptions on the bypassing of the warrant requirement including the determination of "exigence" based on the specific circumstances of the case. As determined by the *Missouri v. McNeely* case, exigency is the absolute necessity to conduct a warrantless search and addresses the Fourth Amendment's statement regarding "probable cause(s)."

Analyzing Mr. Shepard's case, it must be noted that exigency is granted only when the circumstances of the search place the evidence into jeopardy and there is absolutely no possible route for obtaining a warrant. However, this was not the case for the petitioner [Mr. Shepard]. Continuing with *Missouri v. McNeely*, if the officers are capable of obtaining a warrant, the route of exigency for justifying a warrantless search is invalid. Officer Cole had not made any efforts to contact another magistrate following that the one on duty was unavailable even though the trial court acknowledged that another eight (8) judges in the county were capable and according to the trial court another one that was available at the present time of the accident. In this case, Officer's Cole's actions do not suggest the granting of exigence but only the neglect of pursuing other "legal" (although determining exigency is also technically identified as legal, the presumption here is that exigency is not granted here and therefore the term legal is referring to the alternative options for obtaining a warrant) methods of obtaining the evidence. Additionally, it is stated that other officers were present and available to assist Officer Cole in establishing contact

with the other judges. Officer Cole had assumed his position of exigency (to which he presumably planned to further justify in court) when he proceeded with the blood test. If Officer Cole had deemed the situation to fall under "exigent" circumstances, then it would be logical that he proceed with the blood test after the petitioner's choice to withdraw consent without attempting to take the time in searching for a warrant. His search for the warrant initially shows his attention to the situation of not falling under the exigent circumstances such as those specified in *Missouri v. McNeely*.

In regards to the destruction of evidence, we must acknowledge that alcohol does dissipate from a human body over time. However, it is scientifically proven that a minimum of five (5) hours is required for alcohol levels greater than the legal limit of 0.08 BAC to dissipate from the human body. In the case of the petitioner, it is important to note that Officer Cole had initially presumed that Mr. Shepard was "clearly intoxicated" (which is legally defined as one "not being able to perform ordinary actions") and therefore assumed that Mr. Shepard was well above the legal limit for Blood Alcohol Content (BAC). Therefore, with the circumstances stated above regarding the accessibility of a warrant at Officer Cole's disposal, it is not right to grant exigence to this situation based on the potential "destruction of evidence" since Officer Cole had ample time to obtain a warrant before having results from a blood test that would taint the decisions of the jury.

Point of error number 2: The trial court erred in failing to suppress the body camera video taken by Officer Cole.

Hearsay is an out of court statement that is used in court to prove the truth of an assertion. Unless hearsay falls under one of the 24 exceptions, it is banned from being used within a courtroom. This applies to anything that is written, spoken, or visually motioned by a person. However, there are some exceptions to the hearsay rule, but none of them apply to the scenario at hand.

To start, Rule 803(8) specifies that a record or statement of public office is admissible hearsay, if it was a matter observed under a legal duty. However, Rule excludes law-enforcement personnel. When applying this to the case at hand, because of the fact that Officer Cole was an on duty police officer (law-enforcement personnel) his statements are not applicable under this exception. This is because law-enforcement personnel are thinking about gathering evidence for the possibility of being used in the courtroom for some motive. Additionally, the fact that police officers are trying to collect evidence that can be used in court to prosecute someone, these statements are not applicable under the present sense impression rule. In order to be applicable under Rule 803(1) of the Texas Rules of Evidence, statements must be unreflective. This means that statements made must not have any thought put into them. Statements that are reflective have the possibility of being altered from the truth to serve a certain purpose. *FISCHER v. STATE*, 252 S.W.3d 375 (Tex. Crim. App. 2008). So, in conjunction with Rule 803(8), which would certify that Officer Cole was not perceiving the situation from an objective point of view. Therefore, Officer Coles statements did have some thought put into them as they were made with the intent of providing evidence in the courtroom; thus, they do not apply to the present sense impression rule. In all, the fact that

Officer Cole was a police officer could result in some sort of bias within his statements. It is for this reason that the statements should not be allowed within the courtroom and instead Officer Cole would need to make any of this statements as a witness under oath.

CONCLUSION

The blood draw conducted by Officer Cole on the petitioner [Mr. Shepard] violates his Fourth Amendment right. Even though there are exceptions to this in the case of probable cause for being able to conduct a warrantless search, other Supreme Court decisions have ruled that if an officer is capable of attaining a warrant he must do so. In officer Cole's circumstances, he had many avenues for obtaining a warrant and therefore does not qualify for exigency. In regards to the body camera footage, the video and audio would constitute as inadmissible hearsay within the court because the statements made by Officer Cole could have been potentially altered under the

PRAYER

For these reasons we pray that this court would confirm the decision of the lower court.

Respectfully Submitted By:

Joshua Assef

Samuel Jing

Attorneys for Respondent

Dawson High School

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

No. 03-18-01234-CR

The State of Texas

Appellant

v.

Cameron Shepard

Appellee

From the Court Of Appeals, Third District, at Austin

Brief for Appellant

Joseph Bremer

Joanna Boyer

Creekview High School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this appeals brief.

Statement of the Case

After the State of Texas attempted to use body camera footage and blood test results in a trial for involuntary manslaughter, Cameron Shepard appealed due to State of Texas violations of the Fourth Amendment. The Travis County District Court ruled in favor of Mr. Shepard, however, the State of Texas appealed to the Texas Court of Criminal Appeals.

Statement of the Facts

On June 30, 2018, at 2:00 AM, Officer Cole of the Austin Police Department was dispatched to a horrific accident on an interstate near busy downtown Austin. On the scene of the accident, Officer Cole found a woman dead in the roadway, and two individuals in a car that smelled strongly of alcohol. Officer Cole could smell the stench while outside of the vehicle. The driver of the vehicle was identified as Mr. Cameron Shepard, who failed the Standardized Sobriety Test. He was then transported to the hospital under the pretext of a blood test. Mr. Sheppard consented, and only after being transported to the site of his blood test, he withdrew consent. After attempting contact with a magistrate judge to no avail, Officer Cole's time to conduct a blood test was running out. Officer Cole, believing the need to conduct a blood test was compelling, and given exigent circumstance, conducted a warrantless blood test.

Issues on Appeal

Point of Error 1: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

Point of Error 2: The trial court did not err in denying the motion to suppress the video recording from the police officers body camera video

Issue One

The trial court did not err in denying the motion to suppress the results of the warrantless blood draw due to the Fourth Amendment exceptions to warrantless search and seizure of persons.

To begin, Officer Cole's situation presented him with plenty of exigent circumstances to conduct a warrantless blood draw. In 2016, this court in *Missouri v. McNeely* 133 S.Ct. 1552 (2013) defined exigent circumstance as an exception to the Fourth Amendment that applies when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment," exigencies of the situation being defined as a situation that "provides for a reasonable, yet warrantless search because there is compelling need for official action and no time to secure a warrant." *Weems v. State* (2016) (*Texas Court of Criminal Appeals*). Due to these definitions of exigent circumstance, Officer Cole had plenty as his situation was quite compelling.

There is no defined test to prove whether or not exigent circumstance is present, but one can be created using case law and historical context.

Compulsion in terms of the Fourth Amendment is defined by *Preston v. United States* 376 U.S. 364 (1964) as a situation in which an officer "might reasonably have believed that he was confronted with an emergency." The question then becomes what the standard is to determine whether Officer Cole's need was compulsive, and for that, we need a test.

Missouri v. McNeely (2013) states that "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 they do so." *Cupp v. Murphy* 412 US 291 (1973) then states that a warrantless search may be conducted to prevent the imminent destruction of evidence. Finally, *Preston v. United States* provides that "an unwarranted search may be permissible if the officer 'might reasonably have believed that he was confronted with an emergency.'"

Using this information, a test can be constructed which consists of three major parts: In order for a warrantless blood draw to be Constitutional under the Fourth Amendment, it must have been conducted

1. During a time in which an officer did not have time to retrieve a warrant without undermining the efficacy or purpose of the Fourth Amendment.
(*Missouri v. McNeely*)
2. During imminent destruction of evidence (*Cupp v. Murphy*)
or

3. When an officer might have believed he was confronted with an emergency.

Only one of these 3 circumstances must be met in order for exigent circumstance to be present.

Firstly, Officer Cole was certainly confronted with an emergency to take Cameron Sheppard's blood to do testing. Cameron Sheppard's blood test was a pressing matter, as, by his own demand, he required medical assistance. He was complaining of severe chest pain after being transported to the city jail and was asking for medical assistance. The efficacy, or purpose, of the Fourth Amendment, was to prevent writs of assistance, and we can see that Officer Cole didn't even come close to violating that historical precedent. Officer Cole only administered the test to avoid destruction of the test results which brings us to the second prong of the test.

To address destruction of evidence, *Schmerber v. California* 384 US 757 (1966) ruled that destruction of evidence "requires more than the mere dissipation of blood alcohol evidence to support a warrantless blood draw in an alcohol-related case," and there is in fact much more on the table. Cameron Sheppard requested medical attention that would destroy evidence, so in order to carry out Sheppard's request, a blood draw had to be conducted before the procedure to address his chest pain.

Finally, we can see that Officer Cole had no intention of breaking the law and truly believed he was confronted with an emergency. Throughout the

process, Officer Cole attempted to contact the magistrate judge, attempted to receive consent to a blood draw, until finally he was forced to take the blood draw without a warrant due to Sheppard's request for medical attention.

In conclusion, Officer Cole's blood draw was completely legal, as it passed all of the requirements for a warrantless blood draw to be Constitutional, when it only needed to pass one. It in no way violated Cameron Sheppard's right to be free from a warrantless search and seizure. It took place in an emergency, with danger of evidence being destroyed.

Issue Two

The trial court did not err in admitting Officer Cole's body camera video because the video is a present sense impression under Rules of evidence 803(1), or, alternatively, qualifies as harmless error. The Rules of Evidence prohibit out-of-court statements made for the truth of the matter asserted from being entered into evidence unless the statements fall under one of the hearsay exceptions *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). Such exceptions include Rule 803(8), which allows certain documents to be excluded from the hearsay standard, and Rule 803(1) which allows present sense impressions to be excluded from the hearsay standard. The Appellee is attempting to suppress the body camera video as an 803(8)(B) police record. However, Rule 803(8)(b) should not apply to evidence being admitted as a present sense impression, as the state is doing in today's case, because both the Rules of Evidence and *Fischer v. State* recognize the distinction between the

two. The Rules of Evidence distinguished between admitting statements as mere observations, and admitting them with the authority of an official document by separating the present sense impression and the official document hearsay exceptions into two separate rules. Rule 803(8)(b) only applies to evidence that is being admitted as an official document and should not be applied to present sense impressions. *Fischer v. State* further recognizes this distinction by holding that one rule does not trump the other, but that the purposes of each must be considered.

Even if the court applies Rule 803(8)(B) to Officer Shepard's body camera video, the video is not a record that includes an investigatory narrative which *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) requires for statements to qualify as an official report. Instead, as in *State v. Rendon*, 715 P. 2d 777 Ariz: Court of Appeals, 2nd Div., Dept. A 1986, "the statements were virtually contemporaneous with the ongoing crime they described. The fact that the declarant was a law enforcement officer does not change the analysis." *State v. Wright* 370 P.3d 1122 (2016). The transcript in both cases merely details a suspect's actions and movements, unlike in *Fischer v. State*, where the transcript was intended to chronicle earlier investigatory findings.

Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008) also recognizes that "hearsay may be admissible under one hearsay exception even if it is inadmissible under another hearsay exception." The hearsay exception that Officer Cole's video transcript falls under is Rule of Evidence 803(1), which allows and defines a present sense impression as "A statement describing or explaining an event or condition made while the declarant was perceiving the

event or condition, or immediately thereafter.” *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). “Police officers, like the rest of humanity, may make unreflective present sense impression statements that qualify for admission under Rule 803(1)” The body camera video is unreflective because it offered nothing but a description of what Officer Cole was experiencing. Unlike the police video in *Fischer*, where the court found that the transcript did constitute inadmissible hearsay because it offers statements and opinions of guilt, Officer Cole’s video transcript does neither but is instead akin to the transcript in *State v. Wright* 370 P.3d 1122 (2016) where the court determined that the transcript offered real-time descriptions of the suspects' appearance, vehicle, and movements that described the events of a crime as it unfolded, and provided law enforcement officers with information they could use to disrupt that crime and successfully apprehend the perpetrators.

Alternatively, if this court finds that the video should have been excluded because it was not a present sense impression and was, in fact, a police record, any hypothetical error caused by the video’s admission was harmless. “The admission of inadmissible hearsay constitutes non-constitutional error.” *Lee v. State*, 21 S.W.3d 532, 538 (Tex. App.— Tyler 2000, no pet.) “An appellate court must disregard non-constitutional errors that do not affect substantial rights of the defendant.” The admission of the video is harmless because it merely offers support and clarification to Officer Cole’s testimony. The courts have consistently found that evidence that may have been deemed as inadmissible is harmless when it does not introduce additional information: “Because the complained of narrative on the videotape was therefore merely cumulative of the testimony,

any error in its admission does not require reversal" *Evans v. State (Tex.App.-Houston [14th Dist.] 2006)*; "The admission of inadmissible evidence does not require reversal if the same facts are proved by other proper testimony" *Ramon v. State, 159 S.W.3d 927, 931*; "If the fact to which the hearsay pertains is sufficiently proved by other competent and unobjected-to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error," *Anderson v. State, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986)*. The court's reasoning is that if the error did not influence or had only a slight influence on the verdict, the error is harmless because it did not affect substantial rights of the defendant. The video does not have more than a slight influence on the verdict because the information conveyed within the video is also provided and supplemented through Officer Cole's testimony. *Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008)* "An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene." Officer Cole's testimony and video transcript both offer a description of what he saw, did, heard, smelled, and felt when he arrived at the crime scene and throughout his investigation.

Conclusion

The trial court did not err in admitting the warrantless blood draw because Officer Cole's situation did meet the guidelines for exigent circumstance set forth in *Missouri v. McNeely*, and the exceptions to the Fourth Amendment warrant requirement do apply to the situation Officer Cole was put in. The trial court also

did not err in admitting Officer Cole's body video because it is not a police record that does qualify as a present sense impression.

Prayer

It is for these reasons that we pray this court rule in favor of the state of Texas and reverse the lower court's ruling.

Respectfully Submitted By:

Joseph Bremer

Joanna Boyer

Attorneys for Appellant

Creekview High School, Coppell YMCA

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

No. 03-18-01234-CR

The State of Texas

Appellant

v.

Cameron Shepard

Appellee

From the Court Of Appeals, Third District, at Austin

Brief for Appellee

Joseph Bremer

Joanna Boyer

Creekview High School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this appeals brief.

Statement of the Case

___After the State of Texas attempted to use body camera footage and blood test results in a trial for involuntary manslaughter, Cameron Shepard appealed due to the State of Texas violating the Fourth Amendment. The Travis County District Court ruled in favor of Mr. Shepard and Texas subsequently appealed.

Statement of the Facts

On June 30, 2018, Officer Cole of the Austin Police Department arrived on the scene of an accident. When he arrived on the scene he switched on his body camera and began investigating the scene. Upon investigation, Officer Cole found a deceased woman on the road and Cameron Sheppard in a nearby vehicle. Officer Cole administered a field sobriety test and the results of the test led Officer Cole to believe that Mr. Sheppard was driving while intoxicated, and was as a result, responsible for the accident. Ambitiously desiring further evidence, Officer Cole brought Mr. Sheppard to the hospital for a blood test. On arrival at the hospital, Cameron Sheppard did not consent to the blood test, however, despite repeated objections Officer Cole had the blood test done without Mr. Sheppard's consent.

Point of Error 1: The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Point of Error 2: The trial court erred in denying the motion to suppress the body camera video

Issue One

The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

To begin, Officer Cole's situation did not present him with enough exigent circumstance to conduct a warrantless blood draw. In 2016, this court defined exigent circumstance as an exception to the Fourth Amendment that applies when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment," exigencies of the situation being defined as a situation that "provides for a reasonable, yet warrantless search because there is compelling need for official action and no time to secure a warrant." *Weems v. State (2016) (Texas Court of Criminal Appeals)*. We contend that Officer Cole did not have exigent circumstance as his situation was not compelling. To understand compulsion, and what would qualify as compelling to pass the Fourth Amendment, we can look to the Fourth Amendment's historical context. Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the use of the "writs of assistance" and warrantless searches. In writing the Fourth Amendment, James Madison demonstrated how important protection of person was, as he listed persons first in the list of persons, houses, papers, and

effects. This is further supported by *Winston v. Lee*, which states that “the body is one of the most personal and deep-rooted expectations of privacy.” While there is no test to prove whether or not exigent circumstance is provided, one can be easily made keeping in mind Madison’s emphasis on search of person. Compulsion in terms of the Fourth Amendment must be something that overrules the massive importance Madison placed on protection of person. The question then becomes what the standard is to determine whether Officer Cole’s need was compulsive, and for that, we need a test.

Missouri v. McNeely (2013) states that “absent an emergency, nothing less than a search warrant can be required when intrusions to the human body are concerned.” and that “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 they do so.” Finally, *Cupp v. Murphy (1973)* states that a warrantless search may be conducted by Using this information, a test can be constructed which consists of three major parts: In order for a warrantless blood draw to be Constitutional under the Fourth Amendment, it must have been conducted

1. During an emergency when an officer had no time to conduct a warrantless blood draw, (Cited from *Missouri v. McNeely*)
2. During a time in which an officer did not have time to retrieve a warrant without undermining the efficacy or purpose of the Fourth Amendment.
3. During imminent destruction of evidence (*Cupp v. Murphy*)

Firstly, Officer Cole was certainly not in an emergency to take Cameron Sheppard’s blood to do testing. Cameron Sheppard’s blood test was not a

pressing matter, as the blood test could have been conducted later. While blood alcohol deterioration is dependent on multiple things, Dr. Sidney Tate, the Doctor who took Cameron Sheppard's blood sample, presented this court with multiple ways to calculate blood alcohol content, one of which was a formula that took time into account. According to Dr. Sidney Tate, Cameron Sheppard had a blood alcohol content level of .68. He started drinking at about Midnight, and the car accident happened at 1. At 5 o'clock his BAC was .35, which means that Officer Cole could have conducted the blood test all the way up to 9 o'clock. It's very possible that Officer Cole could have obtained a warrant by then, or at least waited in an attempt to secure one before conducting a warrantless blood draw on Mr. Sheppard.

Secondly, even if Officer Cole didn't have time to obtain the warrant, he still absolutely undermined the efficacy of the Fourth Amendment. The efficacy, or purpose, of the Fourth Amendment as stated prior, was to prevent writs of assistance especially in cases of protection of person. We see clearly that there were reasonable avenues that Officer Cole could have explored that he chose not to in obtaining a blood warrant, as there was a judge that other officers that night managed to get warrants from.

Finally, to address destruction of evidence *Schmerber v. California (2012)* ruled that destruction of evidence "requires more than the mere dissipation of blood alcohol evidence to support a warrantless blood draw in an alcohol-related case." While the Appellants might argue that since Cameron Sheppard requested medical attention, that might cause destruction of evidence, that is not at all the case. Officer Cole didn't even allow Cameron Sheppard to have Medical

Treatment in the first place. By his own contention, he took the warrantless blood draw specifically because he didn't want narcotics to affect his test results, and then after the blood draw immediately took him back to the city jail without any medical attention.

In conclusion, Officer Cole's blood draw was absolutely illegal, as it does not pass a single requirement for a warrantless blood draw to be Constitutional. It violated Cameron Sheppard's right to be free from a warrantless search and seizure. It did not take place in an emergency, it did not happen in time constraints, and it did not happen while evidence was being destroyed.

Issue Two

The trial court erred in denying the motion to suppress the body camera video because it qualifies as inadmissible hearsay. *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) defines hearsay as an "out-of-court statement offered for the truth of the matter." As explained in *Fischer* the Hearsay Doctrine was created to address the four main dangers posed by these out-of-court statements: faulty memory, accidental miscommunication, faulty perception, or insincerity. The Rules of Evidence have established several exceptions to this doctrine including rule 803(8), which allows certain documents to be excluded from the hearsay standard, and rule 803(1) which allows present sense impressions to be excluded from the hearsay standard. Officer Jordan Cole's body camera video does not fit within either of these exceptions. Rule 803(8) of the Rules of evidence allows certain public records to be admitted into evidence without qualifying as hearsay because official records have been found to be

“generally reliable and trustworthy” *Fischer v. State, supra*. Section B of this public record exception excludes police records because out-of-court statements made by the police, even if they are reliable, are calculated, not non-reflective, and “are given in a setting that human experience and the law recognizes is brimming with the potential for exaggeration or misstatement.” *State v. Tucker, 205 Ariz. 157, ¶ 42, 68 P.3d 110, 118 (2003)*. Officer Cole’s body camera video is an example of a police record because he himself states that his primary duties involve accident investigations and enforcement of the Texas Transportation Code, and one of the ways he fulfills those duties and collects evidence and information for trial is through his body camera video.

The State of Texas attempts to introduce the body camera video through Rule 803(1) of the Rules of Evidence which allows “statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, because they are non-narrative, off-hand comments made without any thought of potential litigation. *Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008)*. However, while an officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. Even if his words are the very same as those he used during his on-the-scene narrative and merely describe what is around him, they are still part of a police investigation and therefore “fraught with the thought of a future prosecution.” *Fischer v. State, supra*. Requiring that an Officer’s testimony be given in-court, under oath, and subject to cross-examination protects defendants from litigatory, and potentially biased, statements. This vital

distinction between-in-court testimony and augmenting video transcripts protects defendants from the state using Rule 803(1), Present Sense Impression, "as a 'backdoor' to admit evidence explicitly inadmissible under Rule 803(8)(B)." *Fischer v. State, supra*, which is exactly what the state is asking the court to do in today's case.

Compare the police transcript that was analyzed in Fischer to the one before the court today. In both, police officers turned on the camera before approaching the scene to accurately record the investigation for litigation purposes, stated they smelled alcohol, stated that the suspect looked intoxicated, and stated that the suspect failed to follow directions, such as beginning the walk-and-turn too early. Because of the opinions of guilt and considerations for future litigation the court in Fischer subsequently determined the transcript to be a reflective narrative and not admissible as a present sense impression. *State v. Tucker, 205 Ariz. 157, ¶ 42, 68 P.3d 110, 118 (2003)* defined present sense impressions by holding that "When the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable." Thus any present sense impression must be both immediate and uttered by the declarant. The video in question is neither. The video offers statements made by multiple people, including the EMS and witness Imani Haines, some of whom made statements that are pertinent to the question posed before the trial court and are not available for cross-examination. The statements in the video are not immediate either, but instead were questions carefully calculated to support any potential future litigation.

Contrary to the appellant's contention, admitting the camera video and the warrantless blood draw does not constitute harmless error. "When the appellate record in a criminal case reveals constitutional error, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *Gore v. State*, 451 S.W.3d at 198; see also *TEX. R. APP. P. 44.2(a)*. The state does not meet its burden and a defendant is entitled to a new trial if the trial court's erroneous ruling "contributed in some measure to the State's leverage in the plea bargaining process." *Holmes v. State*, 323 S.W.3d 163, 173-74 (*Tex. Crim. App.* 2009). Officer Shepard's warrantless blood draw does establish a harmful constitutional error because it violates Mr. Shepard's Fourth Amendment right against unreasonable searches and seizures. Holmes went on to apply the beyond a reasonable doubt standard to hearsay evidence, such as the body camera video in today's case. *Fears v. State* 2016 *Tex. App. LEXIS 3708* (*Tex. App.* 2016,) upholds this rationale by holding that there is harmful error "when the admittance of evidence contributed to the defendant's decision to plead guilty and to his subsequent punishment." As did the defendants in *Holmes* and *Fears*, Mr. Shepard agreed to plead guilty to the charges brought before him only after the court denied his motions to suppress both pieces of evidence, giving the state additional leverage in the context of plea negotiations.

Conclusion

The trial court erred in admitting the warrantless blood draw because Officer Cole's situation did not meet the guidelines for exigent circumstance set forth in

Missouri v. McNeely, and the exceptions to the Fourth Amendment warrant requirement do not apply to the situation Officer Cole was put in. The trial court also erred in admitting Officer Cole's body video because it is a police record that does not qualify as a present sense impression.

Prayer

It is for these reasons that we pray this court uphold the lower court's ruling in favor of Cameron Shepard and uphold the lower court's ruling.

Respectfully Submitted By:

Joseph Bremer

Joanna Boyer

Attorneys for Appellee

Creekview High School, Coppell YMCA

IN THE COURT OF CRIMINAL APPEALS

STATE OF TEXAS

No. YAG-APP-2018

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

On Appeal from

Texas Court of Appeals, Third District

Brief for the Appellant

Evan Miller

Daniel Baldizon

Creekview High School

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

___Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

Cameron Shepard was arrested on the morning of June 30th, accused of intoxication manslaughter after a car accident. Shepard filed suit against the State of Texas in response to the evidence presented before the Court, claiming warrantless seizure and hearsay testimony. The State of Texas is filing suit to the Texas Court of Criminal Appeals for discretionary review. Two issues are presented on appeal.

STATEMENT OF THE FACTS

On June 30th, 2018, an intoxicated driver was involved in an accident on a Texas roadway resulting in one death. The officer on duty, Officer Jordan Cole, followed standard recording procedure by attaching a body camera to himself as he approached the scene. As he handled the situation, he narrated the scene of the crash and the actions of Cameron Shepard, the intoxicated driver. After issuing the Standardized Field Sobriety Test, Officer Cole concluded that the driver was indeed intoxicated and the death of the female was caused by Shepard's intoxicated driving. Originally, Shepard consented to give a blood sample to Officer Cole, but retracted his consent later in the night. Officer Cole attempted to contact the "on-call" magistrate to obtain a warrant, but received no response. In order to ensure that the blood sample was accurate and closest to the time of arrest, Officer Cole proceeded to collect the blood sample. In the pre-trial, Shepard moved to have the body camera recording and blood test

results be deemed inadmissible, but the court overruled his motion to suppress and admitted both into evidence.

ISSUES ON APPEAL

- 1) Whether or not the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and
- 2) Whether or not the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Issue 1: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

The fourth amendment of the Constitution prohibits the state from ever conducting unreasonable searches and seizures, and requires that in order to conduct a search, the state must obtain a warrant. There are, however, many exceptions to the fourth amendment's warrant requirement, including plain view, consent, and search incident to arrest. The exception which pertains to our case today is the exigency exception, which, according to *Weems v. State* operates "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the fourth amendment." (*Weems v. State 2016 Tex. Crim. App. LEXIS 85*

(*Tex. Crim. App. May 25, 2016*)) In other words, a search can be warrantless if there is compelling need for official action and no time to secure a warrant.

This court has specifically defined exigent circumstances as it applies in our case, and to other instances of warrantless blood draws. In *Cole v. State*, a warrantless blood draw was justified on the reasoning that the acting officer reasonably concluded that obtaining a warrant would have lead to unreasonable delays, that hindsight distorts a proper exigency analysis, and that a person's body will continue to metabolize any substances ingested until eventually the evidence is completely destroyed (*COLE v. STATE 490 S.W.3d 918 (2016)*). When determining whether or not exigency exists, this court views the circumstances on a case-by-case basis, in which we objectively evaluate the facts reasonably available to the officer at the time of the search (*WEEMS v. STATE 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)*). In this case, Officer Cole arrived at the scene of the crash after a woman had died, and spotted Cameron Shepard trapped inside a crashed vehicle. After issuing the Standard Field Sobriety Test (SFST), Officer Cole determined that Shepard was most likely drunk, and told Shepard that blood tests would be conducted to determine his blood alcohol content. Because the "on call" magistrate was unavailable, Officer Cole was faced with the decision to proceed or not to proceed with the blood test. Based on the circumstances presented to him, Officer Cole decided to continue with the test, seeing as Shepard had previously consented to comply. When reviewing the constitutionality of a search (in this case a blood sample), it is important to understand that police are presumably familiar with the warrant procedures in their particular jurisdiction and can make

reasonable judgments as to whether or not obtaining a warrant in a particular circumstance would produce unacceptable delay. The ruling in *Missouri vs. McNeely* recognizes this, and states that reviewing courts should “assess those judgments from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” (*Missouri v. McNeely* 133 S.Ct. 1552 (2013)).

Additionally, *Cupp v. Murphy* provides this court with clear precedent that supports an officer acting in good faith to prevent the destruction of evidence. The court in *Cupp* determined that the search of a murder suspect was constitutional, even though no warrant was obtained beforehand. The basis for this ruling originated with the actions of the murder suspect, who obviously attempted to clean dried blood on his hands. As this court put it “the ready destructibility of the evidence, and the suspect’s observed attempts to destroy it justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence.” (*Cupp v. Murphy*, 412 U. S. 291, 296 (1973)) In addition to the ever-diminishing evidence within Cameron Shepard’s blood alcohol content, Cameron Shepard’s revocation of consent was reasonably construed as an attempt to delay the warrant application process, which consequently resulted in an attempt to destroy the evidence within his blood. Though the specific act of revoking consent may not be viewed as unconstitutional, the convenient timing of Shepard’s revocation effectively limited the many options that Officer Cole could have taken to obtain a warrant before initially transporting Shepard to the hospital.

The whole purpose of the exclusionary rule is to prevent police misconduct, and therefore, we look to the intent of the officer on duty. Officer

Cole was acting in good faith to conduct a search which, at the time, he reasonably concluded would be justified by exigent circumstances. Therefore, because there was a reasonable conclusion of exigency, and because Officer Cole was acting in good faith to abide by the law, the warrantless blood draw is constitutional.

Issue 2: The trial court did not err in denying the motion to suppress the video recording from the police officer's body camera video.

The motion to suppress evidence refers to the exclusion of specific evidence from the judge's and jury's consideration in the case before the Court. Cameron Shepard, the Appellee, is making efforts to have this evidence deemed inadmissible as hearsay, claiming Rule of Evidence 803(8)(B), categorizing the narration in the police body camera as an offense report.

The narration is the police officer gathering evidence that he can come back to later when deciding if he wants to be involved in a future prosecution. The narration should be admitted into evidence because it constitutes a present sense impression based on the fact that the narration is not intended for as testimony, but rather as a description of what was occurring at the scene of the crime. Shepard, however, claims that the narration is premeditated and biased because its source is a law enforcement officer, but when looking at the transcript of the audio, the officer is making general statements that can be used for either side. In contrast to the facts of *Fischer v. State* where the officer's comments were, "a calculated narrative statement," because the officer

was not merely explaining or describing the events (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). The officer in *Fischer v. State* was not an objective observer, because his narrative served as a police offense report, for the explicit reason that he had to return to his police car to record his findings (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). This gave him time to reflect over the events, taking it out of the purview of the present sense exception. In the case before the court, Officer Cole had the recording device on his person and was reporting as it happened, qualifying his statements as a present sense impression.

The purpose of excluding police officer offense reports is so that the natural bias of police officers does not intrude into the court and does not unduly sway the jury because officers are not objective observers. For example, the officer's statements in *Fischer v. State* would be inadmissible in court because his narrative served as a police offense report because he has to return to his police car to record his findings (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). This gave him time to reflect over the events, taking it out of present sense. In the case before the court, Officer Cole has the recording device on him and is reporting as it happens, making sure that this is a present sense impression report.

Allowing the full body camera video into evidence was harmless error because the audio portions would not be necessary to sway the jury into the correct direction. The video provides insight into the arrest and the clear intoxication of the driver from the first person perspective that any witness, police officer or not, would have. Without the audio portions, a jury could still

find a defendant guilty based on other facts that would be presented by attorneys at trial. The argument that this is a police report and should not be allowed into evidence because of Rule of Evidence 803(8)(B) is invalid because what the video recording offers is a present sense impression that a traditional police report would not have. The newly found perspective changes what can be found by a jury and excluding this clarifying piece of evidence from the trial court's hearing would allow the chance for the defendant to walk from a clear case of intoxication manslaughter.

CONCLUSION

In conclusion, this court should find that no person should be allowed to get away with the death of another American because of the harmless error of the court concerning the evidence the jury sees or a person's sudden refusal to provide the evidence needed for justice.

PRAYER

We pray this court rule in favor of the appellant, in allowing law enforcement to take advantage of appropriate modern technology and gathering evidence for trial. Thank you

Respectfully submitted by:

Evan Miller

Daniel Baldizon

Coppell YMCA

Creekview High School

THE COURT OF CRIMINAL APPEALS

STATE OF TEXAS

No. YAG-APP-2018

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

On Appeal from

Texas Court of Appeals, Third District

Brief for the Appellee

Evan Miller

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

Cameron Shepard was arrested on the morning of June 30th, accused of intoxication manslaughter after a car accident. Shepard filed suit against the State of Texas in response to the evidence presented before the Court, claiming warrantless seizure and hearsay testimony. The State of Texas is filing suit to the Texas Court of Criminal Appeals for discretionary review. Two issues are presented on appeal.

STATEMENT OF THE FACTS

On June 30th, 2018, Police Officer Cole arrived at the scene of a severe car crash, where Cameron Shepard had veered off of the road and hit a bridge support column. As he arrived on scene, Officer Cole activated his body camera, and recorded the audio and video from the officer's perspective. After the fire department freed Cameron Shepard from the wreck, Officer Cole administered the Standard Field Sobriety Tests to help determine the sobriety of Shepard. Earlier that night, Shepard had gone to a local bar with some friends, where he consumed alcohol. A bartender working that night had observed Cameron Shepard, and noticed nothing to indicate that he was unable to drive. During the drive home, Shepard and his passengers noticed a car next to them, containing a lady who was acting frantically. The lady, later identified as Imani Haynes, started to drift lanes, and forced Cameron Shepard's car off of the road. Officer Cole questioned Shepard's sobriety, and took him to a hospital to run blood

tests to determine his blood alcohol content. When Officer Cole was unable to obtain a warrant, he proceeded to take Shepard's blood, even though he refused to consent.

ISSUES ON APPEAL

- 1.) Whether or not the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and
- 2.) Whether or not the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Issue 1: The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

In the United States, preventing an abuse of government power is something taken very seriously. The Fourth Amendment of the United States Constitution is one of the most highly protected safeguards from an abusive government, and, aside from specified exceptions, this court has required a state-issued warrant in order for authorities to conduct searches. One of the few exceptions to the warrant requirement is the exigency exception, which, according to *Weems vs. State* occurs "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." (*WEEMS v. STATE 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)*) To determine whether or not exigent circumstances exist, this court can look to *Gutierrez v. State*, where a two-step test is provided. According to *Gutierrez*, to validate a

warrantless search based on exigent circumstances, the state must prove that (1.) probable cause exists and (2.) exigent circumstances exist which call for a warrantless search. (*Gutierrez v. State*, 221 S.W.3d 680, 686–87 (Tex. Crim. App. 2007)).

Though it is unclear what exactly might qualify as an “exigent circumstance,” the court in *Fears v. State* elaborates on the second portion of the test provided in *Gutierrez*, determining that a law enforcement officer must be faced with “an emergency which justified acting without a warrant.” In *Fears v. State*, a drunk driver had been detained after driving recklessly, and was subject to a warrantless blood draw by the officer who pulled him over. The officer in *Fears* testified that because of the extreme belligerence of the appellant and the estimated amount of time it would take to secure a warrant, a warrantless intrusion into the body of *Fears* was justified. Under review, however, it was determined that “neither the potential delay required to obtain a warrant... nor appellant's belligerence created an emergency that justified the State’s acting without a warrant,” and that “the state failed to demonstrate the existence of any such emergency or imminent destruction of evidence.” (*FEARS v. STATE* 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.))

The State in our case relies heavily on four circumstances to demonstrate exigent circumstances. Unless the State can prove that any combination of these circumstances constitutes an emergency as defined in *Fears v. State*, there lacks the crucial exigent circumstances that this court’s precedent has required to justify the forceful intrusion into a person’s body.

First, the State relies on the accident involving a deceased individual to justify exigency. As distressing as these events may be, the severity of the accident has little to nothing to do with demonstrating exigent circumstances. Second, the State uses Shepard's withdrawal of consent to create the illusion of an intentional delay. Essentially, the state argues that because Cameron Shepard refused to have his body intruded by a needle, they can justify a sense of exigency, even though that defeats the purpose of his lack of consent in the first place. It would be unreasonable for this court to determine that the exercise of a constitutional right should lead to a bypassing of that same right. Third, the State makes the claim that the unavailability of a magistrate judge should be used to justify Officer Cole's actions. *Fears v. State* is one of the many cases where this court has acknowledged that "blood alcohol evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner." (*FEARS v. STATE 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.*)) This gradual dissipation over time was the sole reason that the court in *Fears* ruled against the state, on the basis that "even if it took upwards of 3 hours to secure a warrant, blood alcohol content would likely have still been available." Because this court looks to the circumstances from a reasonable officer's perspective, this court can come to the conclusion that Officer Cole could reasonably infer the high level of intoxication present in Mr. Shepard. Therefore, although it's impossible for Officer Cole to be able to know the exact level of blood alcohol content in Mr. Shepard, he would have been able to determine the low probability that evidence within Mr. Shepard's blood would become unusable. Lastly, the State

relies on Shepard's request for medical intervention to justify the warrantless intrusion into his body. However, this court can look to *Weems v. State* for guidance in this topic. This court in *Weems* demonstrates that a request for medical attention is hardly a relevant factor on its own to support an exigent circumstances claim. In fact, the drunk-driving suspect in *Weems* received medical attention, and the court still deemed the warrantless blood draw as unconstitutional. (*WEEMS v. STATE 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)*)

What the State is essentially arguing implies that because of the fact that alcohol content naturally dissipates within the body, there exists an automatic case of exigency. However, this court has consistently ruled that naturally dissipating blood alcohol content "does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," and that a per se rule would be a "considerable overgeneralization." (*MISSOURI v. MCNEELY 133 S.Ct. 1552 (2013)*) Additionally, this court has recognized that "unquestionably routine DWI cases do not constitute warrantless searches," and that for exigency to apply, delays must occur during the warrant application process (*Schmerber v. California, 384 U. S. 757*). This court's precedent makes it abundantly clear that warrantless blood draws have never been intended to be conducted solely due to the lack of appropriate procedure in a police department.

Issue 2: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

In the motion to suppress evidence, a formal request is given to the court to remove evidence from trial and exclude it from the record due the insight or lack thereof it provides. In the case before the court, Cameron Shepard moved to suppress the evidence of the video recording from the police officer's body camera due to the recording being made by a police officer, a violation of Rule of Evidence 803(8)(B) when categorizing the recording as an offense report by the officer. This motion was denied by the trial court.

The audio of the narration should not be admitted into evidence and the trial court erred in allowing it into evidence due to the fact that the audio narration serves the same purpose as a offense report which is inadmissible in court. In the case *Fischer v. State*, Trooper Martinez recorded the traffic stop and made statements regarding how the suspect reacted and cooperated (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). His report was the "functional equivalent of a police offense report." The same reasoning applies for Officer Cole in his traffic stop of Shepard. Police offense reports are inadmissible in court and an audio-video recording should not be allowed into the court either because it serves as out-of-court testimony in violation of the Hearsay Rule. Although reliability exists in the audio-video recording, it remains inadmissible hearsay. The issue is the fact that without the officer physically present, a cross examination cannot occur from the opposing attorneys, swaying the jury into seeing only one narrow view from the audio-video recording. As stated in the Honorable Justice Rodgers' opinion, "the law that more specifically applies to the circumstance" is in control. Rule of Evidence 803(1) should not be in application

here as a present sense impression when Rule of Evidence 803(8)(B) guides the court into a specific rule.

In *State v. Wright*, the argument appears that the officer in the case was making a recording, "for the specific purpose of creating evidence to be used at trial." (*State v. Wright* 370 P.3d 1122 (2016)). The same applies to most officer recordings, many of which are later used as reference for offence reports in the future. As quoted from Justice Rodgers, officer narrations are "fraught with the thought of a future prosecution," meaning the police officer is gathering evidence for use in deciding whether to charge a suspect with a crime. The main purpose of the body camera is to use the recording for an offense report later and the admission of the recording as evidence is the equivalent of allowing a police offense report into evidence, creating a bias for the State and influencing the jury into a verdict.

The alleged present sense impression in the video recording serves the same purpose as a police report eventually would and by purpose, it is in fact, a police report in an unorthodox format. It may not be a written report, however it is still a biased police report that serves the purpose of sharply swaying the jury into a specific opinion. There is no harmless error if the video sways the jury because a jury would not convict beyond a reasonable doubt without using the piece of evidence that was erroneously admitted and its inclusion should never have happened. In a fair trial guaranteed by the Constitution, police reports create a wall that blocks out justice and it is simply unimaginable that it would be included in an American court.

CONCLUSION

In conclusion, this court should find that controversial evidence erroneously admitted should be suppressed in order for the guarantee of a fair trial to be fulfilled and the error of the previous courts should not be repeated.

PRAYER

We pray this court rule in favor of the appellee and the rights of the people the United States is obliged to protect. Thank you.

Respectfully submitted by:

Evan Miller

Daniel Baldizon

Coppell YMCA

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In the Court of Criminal Appeals, State of Texas

NO. 03-18-01234-CR

THE STATE OF TEXAS, (APPELLANT)

V.

CAMERON SHEPARD, (APPELLEE)

FROM THE COURT OF APPEALS, THIRD DISTRICT,

AT AUSTIN

Brief of Appellant

Daniel Sawyers

Alexis Phan

Coppell YMCA

Creekview High School

Introduction

This brief is directed to the Texas Court of Criminal Appeals.

Statement of the Case

Cameron Shepard, the Appellant, was charged and pled guilty to intoxicated manslaughter. Shepard appeals on two issues - the motion to suppress the results of the blood draw and the motion to suppress the body camera video recording.

Statement of Facts

Cameron Shepard was arrested for a DWI on June 30, 2018. At approximately 2:00 a.m., he had been driving while intoxicated; this resulted in his colliding into a bridge support column with one of his passengers flying out of the vehicle and dying on the roadway. The responding officer activated his body camera, capturing his audio and video perspective. The officer noted the two passengers in the car and dead woman on the road. The fire department pulled out Cameron Shepard, the driver, and Officer Cole administered a Standardized Field Sobriety Test; this included observation of eye focus, HGN test, and lifting a foot off the ground. The officer concluded from these tests that Shepard was driving while intoxicated. Shepard first agreed to undergo a blood test, but upon arrival at the hospital, he rescinded his consent. The officer attempted to contact an on-call magistrate, but was unable to, so he performed a warrantless blood sample.

Issues on Appeal

The following issues upon appeal are:

1. Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw,
AND
2. Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Point of Error 1: The trial court did not err in allowing the blood test be entered into evidence because the officer went about correctly obtaining the evidence through the per se exigency rule when considering the totality of circumstances.

Missouri v. McNeely 133 S.Ct. 1552 (2013) states that each case should be evaluated on a "case by case context based on the totality of [the] circumstances." When analyzing the circumstances surrounding the blood draw without the benefit of hindsight, one can reasonably assume "that an officer might reasonably [have] believed that he was confronted with a emergency" se. *Missouri v. McNeely 133 S.Ct. 1552 (2013)*. Evidence could and would be imminently destroyed without taking action therefore permitting the blood draw through the exigent circumstances. As Justice Thomas stated in his dissenting opinion in *Missouri v. McNeely 133 S.Ct. 1552 (2013)*, "just because it will take time for the evidence to be completely destroyed does not mean that there is no exigency." With the delays that the officer faced, there is no doubt that the officer had reason to believe that the evidence could be destroyed to the point below the .08% legal alcohol limit at any point. Looking back at the officer's

actions with perfect hindsight distorts the image which the officer faced, he “might reasonably have believed that he was confronted an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the ‘destruction’ of evidence” se. *Preston v. United States* 376 U.S. 364 (1964).

In most of the cases that have ruled against an unwarranted drawing of blood, the officer in question faced no delays. As in *Missouri v. McNeely* 133 S.Ct. 1552 (2013), “in which no factors other than the natural dissipation of blood alcohol suggested that there was an emergency.” In this case however, as stated earlier, the officer faced the delay of transporting Cameron Shepard to the hospital which is the key difference between this case and other exigent circumstances cases that involve intoxicated driving.

Exigency still exists despite the fact that there was another magistrate judge possibly available for review. In cases like these, the court must not forget that, “hindsight distorts a proper exigency analysis,” *Cole v. State* 490 S.W.3d 918 (2016) and we cannot be so scrutinous of the actions of the officer based on what little information he had. Officer Cole was faced with a difficult decision to either keep attempting to obtain a warrant that could reasonably take much more time than was afforded when, at any moment, Cameron Shepard’s blood could have dropped below 0.8%, or get the blood draw under the exigency rule. He chose the latter. As mentioned in the statement of the facts, Officer Cole made a good faith attempt to secure a warrant by trying to contact a magistrate judge unlike many similar cases such as *Cole v. State* 490 S.W.3d 918 (2016), *Fears v. State* 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.) , or *Missouri v. McNeely* 133 S.Ct.

1552 (2013); therefore, carrying out his rightful duties of making an attempt to secure a warrant. When this failed, exigency rightfully came into place.

Missouri v. McNeely 133 S.Ct. 1552 (2013)'s ruling should not apply here due to important differences in the facts of the cases. The biggest difference that sets Officer Cole's situation apart is the fact that Shepard requested medical intervention. When examining on a "case by case context based on the totality of circumstances," it is not unreasonable to believe that Officer Cole could rationally believe that medical intervention along with natural dissipation of alcohol could present valid exigent circumstances that would allow him to take a warrantless blood draw. The court should not apply the *Missouri v. McNeely* 133 S.Ct. 1552 (2013) precedent because the factual basis of that case is different since Officer Cole had to face a potentially evidence threatening delay along with the fact that in both cases the officers had trouble getting a warrant from a magistrate judge.

Expecting Officer Cole to explore every "avenue" of making an attempt to contact all of the other eight judges would be an unwarranted burden. After Officer Cole made a good faith attempt to contact a magistrate judge and it failed, he fulfilled his duty to attempt to obtain a warrant. Hence, exigency would be present following the failed attempt if the Officer can reasonably believe that evidence will be destroyed. McNeely states that "where [a] police officer can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates they do so." In attempting to contact all eight magistrate judges in the hope that one might be available after already attempting to

contact one, McNeely would be sacrificing the “efficacy of the search” due especially to the fact that medical intervention was requested by Cameron Shepard. Similarly in *Schmerber v. California*, 384 U.S. 757 (1966), which applied a totality of the circumstances analysis, the court ruled in favor of an officer acting in exigency to take a warrantless blood sample because of the fact that Schmerber required medical intervention similarly to Cameron Shepard. McNeely does not share in this fact that medical intervention was required hence their ruling against exigency. Rather, in *Schmerber v. California*, 384 U.S. 757 (1966), the reasoning of the ruling was that the the officer “might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.” and “particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.” It would make much more sense to apply the reasoning and precedent of the Schmerber ruling rather than the McNeely ruling due to the fact that this particular case shares much of the same circumstances present in *Schmerber v. California*, 384 U.S. 757 (1966).

In conclusion, the trial court did not err in its ruling because exigent circumstances existed that permitted the officer to take a blood sample from Cameron Shepard without obtaining a warrant, and the officer carried out his rightful duties before resorting to obtaining a blood sample under exigency.

Point of Error 2: The trial court did not err in denying the motion to suppress the body camera recording because it is not hearsay, as it

constitutes harmless error, and if it is hearsay; it falls under the present-sense exception.

Even if the video recording is hearsay, it would fall under the present-sense exception and Rule 803(8)(A)(ii) (formerly known as Rule 803(8)(B) before the update on the Federal Rules of Evidence) would not apply, because, "Rule 803(8)(A)(ii) does not "trump" Rule 803(1), the basis for exclusion of police reports and investigative recordings is exactly the same under both rules," *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). The court should consider the common rationale behind the hearsay exceptions to determine which rule would apply. The rationale behind hearsay is that evidence must be reliable to not impede a person's basic rights. In painting a reliable picture, the present sense impression would allow the court to observe what occurred in the realistic video recording - meaning the recording should be allowed in under the present sense exception.

Additionally, Rule 803(8)(A)(ii) would not apply. Rule 803(8)(A)(ii) states, "a record or statement of a public office if: (A) it sets out: (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel." For the Rule to apply, the body camera footage would have to constitute a record or statement of public office; however, it does not constitute a record or statement from a public office, as for it to be a record or police offense report, an officer must take time to reflect on their actions. For example, when an officer writes an offense report, it is not immediately after the offense occurred, but rather the officer has had time to reflect on their narrative. This reflection would not be present in body camera

footage as an officer's comments are immediate with no time of reflection, so it should be allowed in under the present sense exception.

In *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)'s dissent, it is stated that, "the declaration must be instinctive rather than deliberative - in short, the reflexive product of immediate sensual impressions, unaided by retrospective mental action." In application, this means that Officer Cole's immediate observations on scene would be allowed as the narration is instinctive and unreflective without any thought.

Even if the body camera video does fall under Rule 803(8)(A)(ii), it is still allowed in court. *Ramon v. State*, 159 S.W.3d 927, 931 (2004), states that, "the admission of inadmissible evidence does not require reversal if the same facts are proved by other proper testimony" and *Evans v. State* (Tex.App.-Houston [14th Dist.] 2006) elaborates that since "the videotape was admitted ... after the jury had already heard [the arresting officer] testify... on direct examination... Because the complained-of narrative on the videotape was therefore merely cumulative of [the officer]'s testimony on direct examination, any error in its admission does not require reversal." As the recording would fall under the same facts as the testimony of Officer Cole, the responding officer, even if it is inadmissible evidence, it does not require reversal.

The video recording is not hearsay, as it constitutes harmless error. According to *Cardenas v. State* 971 S.W.2d 645, 651 (Tex. App.—Dallas 1998, pet. ref'd) (citing *Jones v. State*, 833 S.W.2d 118, 127 (Tex. Crim. App. 1992)), "the error is harmful if there is a reasonable likelihood that the evidence, either

alone or in context, moved the jury from a state of nonpersuasion to one of persuasion beyond a reasonable doubt." For evidence to constitute harmless error, it must not affect the jury or judge verdict. In this case, "the video contains highly probative evidence such as witness temperament and speech patterns and the vehicle and roadway layout." Dissent. "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *Gore v. State*, 451 S.W.3d at 198. Since the recording is harmless error, it would be allowed into use by the court.

Thus, the trial court did *not* err in denying the motion to suppress the body camera recording because it is *not* hearsay and if it is hearsay, it falls under the present-sense exception and even if it does not fall under the present-sense exception, it would constitute harmless error, meaning it would not be subject to reversal.

Conclusion

In conclusion, the trial court did not err in allowing the blood test to be entered into evidence because the officer correctly obtained the evidence through the exigency rule when considering the totality of circumstances and the trial court did *not* err in denying the motion to suppress the body camera recording because it is *not* hearsay and if it is hearsay, it falls under the present-sense exception and constitutes harmless error.

Prayer

For these reasons, we pray that this court reverses and remands the decision of the lower court and rules in favor of the Appellant.

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In the Court of Criminal Appeals, State of Texas

NO. 03-18-01234-CR

THE STATE OF TEXAS, (APPELLANT)

V.

CAMERON SHEPARD, (APPELLEE)

FROM THE COURT OF APPEALS, THIRD DISTRICT,

AT AUSTIN

Brief of Appellee

Daniel Sawyers

Alexis Phan

Coppell YMCA

Creekview High School

Introduction

This brief is directed to the Texas Court of Criminal Appeals.

Statement of the Case

The Appellant, Cameron Shepard, was charged and pled guilty to intoxicated manslaughter. Shepard appeals on two issues: the motion to suppress the warrantless blood draw results and the motion to suppress the body camera video.

Statement of Facts

At 2:00 a.m. on June 30, 2018; Officer Cole responded to an accident in downtown Austin. Upon arrival, Officer Cole activated his body camera. On inspection of the scene, Officer Cole found a deceased person and a car with two people inside, including Cameron Shepard, the driver. Officer Cole used the Standardized Field Sobriety Test on Shepard, concluding that Shepard was driving while intoxicated which led to the death of his passenger. At first, Shepard agreed to a blood draw; however, at the hospital he rescinded his consent. Officer Cole attempted to contact the on call magistrate, but was unable to do so. Thus, Officer Cole took Shepard to a hospital to obtain a warrantless blood sample.

Issues on Appeal

The following issues upon appeal are:

1. Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw,

AND

2. Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Counterpoint of Error 1: The trial court erred in denying the motion to suppress the results of the blood draw because "exigent circumstances" were not present.

The officer did not face exigent circumstances that would allow him to take a warrantless blood draw. The main point of the State in this case is that the natural metabolization of alcohol in the bloodstream would create an exigent circumstance that would permit the warrantless blood draw of Cameron Shephard. This simply isn't true and even if it were, it is the state's burden to prove all reasonable attempts were made to obtain a warrant without resorting to exigency. As stated in *Missouri v. McNeely* 133 S.Ct. 1552 (2013), "whether the natural metabolization of alcohol in the blood stream presents per se exigency ... we conclude that it does not." *Missouri v. McNeely* 133 S.Ct. 1552 (2013) went over the exact question we face here and concluded that an officer did not face exigency that would allow him to take a blood draw; therefore, the precedence that case presents should apply here - especially when considering the similarities in facts between the two cases. Due to the slow nature that metabolization of alcohol presents, there would have to be a considerable number of outstanding delays before the potential destruction of evidence allows exigency. When analyzing the case, there were no arguable or exceptional delays that took place other than having to take Cameron Shepard to the

hospital, which would have needed to be done regardless in order to take the disputed blood sample here.

There were other ways the officer could have obtained a warrant, yet he chose not to explore those options. “Where police officers can reasonably obtain a warrant without significantly undermining the efficacy of a search, the Fourth Amendment mandates they do so” *Missouri v. McNeely* 133 S.Ct. 1552 (2013). Simply put, the officer chose not to explore any other routes to obtaining a warrant even though there was another available magistrate judge for review. The process of contacting the second magistrate judge would not have taken so long that it would impede the efficacy of the investigation, especially with the means of getting in contact in the modern day with instantaneous means of communication via email or cellular communications. While we can’t look back with perfect hindsight and expect the officer to foresee many of the events that took place, it is reasonable to assume that an officer should have known that there was another magistrate judge available in his jurisdiction. The simple fact that another magistrate judge was available proves that the officer could have easily obtained a warrant within a reasonable amount of time without significantly undermining the search. In *Fears v. State* 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.) the court ruled that “neither the potential delay required to obtain a warrant from one of the thirteen magistrate judges ... justified the state acting without a warrant,” effectively ruling that it would be a reasonable burden for an officer to contact another magistrate judge to review a warrant request, and that if a police officer fails to do so, then they have no right to perform a search. Even if there were

not another magistrate judge available or the officer didn't know, it remains the state's burden to have a constant and available means of obtaining a warrant. The people living under their jurisdiction should not have to sacrifice their Fourth Amendment rights and their "most personal and deep rooted expectations of privacy" *Winston v. Lee*, 470 U.S. 753 (1985) just because the state does not address issues pertaining to obtaining a warrant within a reasonable amount of time.

If we allow circumstances like this to permit the use of the exigency rule, it opens the door to abuse by officers to declare exigency whenever convenient to them. The precedents that this would set by ruling that exigency comes in when an officer only makes one attempt to secure a warrant through a magistrate judge would be vulnerable to abuse. For example, an officer in such a situation as Officer Cole, could "explore an avenue" of obtaining a warrant that he knows would fail. In order to essentially artificially create the circumstances that would present exigency.

In conclusion, the officer did not face exigent circumstances that would permit him to take a warrantless blood sample from Cameron Shepard and there were other reasonable ways the officer could have obtained a warrant without having to resort to exigent circumstances.

Counterpoint of Error 2: The trial court erred in denying the motion to suppress the body camera recording as it is hearsay and even if it falls under the present-sense exception to hearsay, it would not be allowed under Rule 803(8)(A)(ii).

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Offense reports containing statements made by law enforcement officers during a criminal investigation - including audio and video recordings containing such statements - are generally considered to be inadmissible hearsay.

Since the video recording is hearsay, it would fall under Rule 803(8)(A)(ii) (formerly known as Rule 803(8)(B) before the update to the Federal Rules of Evidence), even if, "Rule 803(8)(A)(ii) does not "trump" Rule 803(1), the basis for exclusion of police reports and investigative recordings is exactly the same under both rules," *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). The court should thus consider the common rationale behind the hearsay exceptions to determine which rule would apply. The rationale behind hearsay is that evidence must be reliable to not impede a person's basic rights, which is rooted in the Bill of Rights. Since hearsay is based off of the Bill of Rights, which is a limitation against the government and the police are an extension if not a part of the government, hearsay should limit the power of the police. The rule that limits the power of the police, and specifically addresses officers would be Rule 803(8)(A)(ii), not Rule 803(8)(1). Additionally, "the court...essentially decided that Rule 803(a)(ii) trumps Rule 803(1)." *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) *dissent*, Rule(8)(a)(ii) would essentially take precedence and thus, would not allow the recording to be admitted under the present sense impression exception.

Hearsay can be categorized into "unreflective statements, reliable documents and reputation evidence." *Fisher v. State* 252 S.W.3d 375 (Tex.

Crim. App. 2008). Unreflective statements are, "street corner utterances made by ordinary people before any thoughts of litigation have crystallized," and could also be defined as, "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition thereafter." Rule 803(1). In this case, the arresting officer, Officer Cole, during the duration of the recording made much narration over the criminal investigation of Shepard. Additionally, since "on-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of a future prosecution" *Fisher v. State* 252 S.W.3d 375 (*Tex. Crim. App. 2008*), an officer's thoughts are interpreted to be untrustworthy, biased and not reliable as they attempt to search for evidence in hopes of prosecution. Thus, Officer Cole's narration in the video recording should not be allowed in court, as an officer's thoughts and point of view are biased.

The recording is disallowed under Rule(8)(A)(ii), which excludes, "a record or statement of a public office if it sets out: (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel." Such a report would be a "speaking offense report." "An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. This calculated narrative in an adversarial setting was a "speaking offense report." The narrative of Officer Cole in the record would be concluded as a "speaking offense report" or reflective statement and thus would be considered hearsay. The way "the [officer] was professionally and politely engaged in the competitive enterprise of

ferreting out crime... the adversarial nature of this on the scene investigation of a potential crime is entirely at odds with the unreflective instinctive comments of a street corner speaker who was not thinking about the legal consequences of his statements" *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). In both *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) and this case, both arresting officers turned on their recording devices before either Fisher or Shepard were detained. In both cases, both officers narrated their opinions, conclusions and impressions - basically, "a speaking offense report" as the officers were attempting to find or create evidence for future prosecution, using their words in such a way to provide more evidence for prosecution. The narrative was not the type of "unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow." *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). This hearsay is not admissible in court as it constitutes a speaking offense report and; therefore, should be suppressed under Rule 803 (8)(A)(ii).

Conclusion

In conclusion, the trial court erred in denying the motion to suppress the results of the blood draw because "exigent circumstances" were not present and the trial court erred in denying the motion to suppress the body camera recording because it is hearsay and even if it falls under the present-sense exception to hearsay, it would not be allowed under Rule 803(8)(A)(ii).

Prayer

For these reasons, we pray that this court upholds the decision of the lower court and rules in favor of the Appellee.

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IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

V.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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To The Honorable Court Of Appeals: Comes now, the State of Texas, and files this appeals brief.

Introduction

In a matter of the State of Texas v. Cameron Shepard, co-counselors Sadie Stevenson and Makaylia Askew submit this brief on behalf of the Appellee, Cameron Shepard, to the Texas Court of Criminal Appeals. The matter began in the Texas Court of Appeals, where the court denied Shepard's motion to suppress a warrantless drawing of his blood and video camera footage. Shepard appeals that decision to this court.

Statement of the Case

The Appellee, Cameron Shepard, was charged with the offense intoxication manslaughter. At the Texas Court of Appeals, 3rd district, Mr. Shepard filed for a motion to suppress the results of the blood sample as evidence and the body camera video filmed by Officer Cole. After the court denied Mr. Shepard's motion to suppress both pieces of evidence, he entered a plea of guilt and filed an appeal for the Texas Court of Criminal Appeals. The court has reversed the trial court's order and remanded for further proceedings consistent with the trial court's opinion.

Statement of Facts

On June 30, 2018, at around 2 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. Upon arriving on scene, he activated his body camera which

captures audio and video from the perspective of the officer. Officer Cole observed the scene verbally, as if making notes for the prosecution. He administered the Standard Field Sobriety Tests for the driver of the vehicle, later identified as Cameron Shepard and then ordered Mr. Shepard into the police car to go to the hospital. He initially agreed to provide a blood sample; however, upon arrival at the hospital, Mr. Shepard withdrew his consent. Unable to obtain a warrant because a magistrate could not be reached, Officer Cole still proceeded to order a blood sample despite Mr. Shepards objections.

Issues on Appeal

Issue Number One: The trial court erred in denying the motion to suppress the warrantless blood draw

Issue Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

Issue Number One: The trial court erred in denying the motion to suppress the warrantless blood draw

The Fourth Amendment states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Because Mr. Shepard

withdrew his consent to the seizure of his blood and Officer Cole did not have a warrant to order the blood be drawn, his Fourth Amendment rights were violated.

An exception to the warrant requirement is exigent circumstances, which according to Missouri v. McNeely 133 S.Ct. 1552 (2013), justifies a warrantless seizure if, "the needs of law enforcement are so compelling that a warrantless search is reasonable." The needs of law were not compelling in this case, because a warrant could have been obtained had Officer Cole contacted the on duty judge that night. Missouri v. McNeely 133 S.Ct. 1552 (2013) states, "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." In this case, Officer Cole could have reasonably obtained the warrant from the available County Judge in an efficient enough manner to prevent any potential destruction of evidence. Therefore, there weren't exigent circumstances in this case.

The state has a burden to make necessary resources available to an officer in the same way an officer has a burden to use these resources to enforce the law without violating anyone's rights. In today's case, Mr. Shepard's Fourth Amendment rights were violated because the failed to meet their burden and provide Officer Cole with all necessary resources such as the on-call list of Travis County judges. Inefficient protocol is not an exigent circumstance but a failure on the part of law enforcement. The extraction of Mr. Shepard's blood is an unconstitutional seizure.

For these reasons, the drawing of Mr. Shepard's is an unconstitutional violation of his Fourth Amendment rights and any evidence involved in the blood draw should be suppressed.

Issue Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Hearsay is a statement made by someone other than the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted.

Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008). There are two exceptions to the hearsay rule in question. One, Rule 803(8)(B) and two, Rule 801. Rule 803(8)(B) is a subsection to Rule 803(8), public records, which is defined as a record or statement made by a public officer. Rule 803(8)(B) is actually an offense report made by a public officer. Rule 803(1) is present sense impression which is defined as a statement describing or explaining an event or made while the declarant was perceiving the event immediately thereafter.

Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008)

Most offense reports containing statements made by law enforcement officers during a criminal investigation, including audio and video recording containing such statements, are generally considered to be inadmissible hearsay. "An officer may testify in the courtroom to what he saw, did, heard, smelled and felt at the scene, but he cannot substitute or argument his in-court testimony with an out of court oral narrative" *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) "On the scene observations and narrations of a police officer conducting a roadside investigation... are fraught with the thought of a

future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime.”

In this case, Officer Cole’s statements consist of a narration of what he was observing at the crime scene including his interviews with the witnesses and the defendant. If this video were transcribed word for word and offered as evidence by the State, it would be properly excluded as an offense report under Rule of Evidence 803(8)(B). An police officers verbal narrative on a videotape is the functional equivalent to an offense report. *Evans v. State* (Tex.App—Houston [14th Dist.] 2006). Even if Officer Cole’s statements were made contemporaneously with the events described in the video and thus may possibly be considered a present sense impression, Rule 803(8)(B) controls and requires the video to be excluded.

“The mere fact that a declaration is contemporaneous with the transaction in issue, and even relates to and is prompted by it in a general way, does not render it admissible in evidence. Such a declaration...must directly relate to and in some degree illustrate and explain the occurrence in question; and essentially, it must be the apparently spontaneous product of that occurrence operating upon the visual... perceptive sense of the speaker. The declaration must be instinctive rather than deliberative- in short, the reflex product of the immediate sensual impressions, unaided by retrospective mental action. *Illinois Central v. Lowery* 184 Ala. 443, 63 So. 952, 953 (1913).

The court in *Fischer v. State* even held that: “Instead, his comments are a calculated narrative statement in which the Officer does not merely explain or describe events, but participates in and even creates some of the events he

reports in the course of collecting evidence.... It, therefore, appears that the officer recorded his comments not as a law enforcement officer, as a lay witness, and as an expert witness cataloging evidence and opinions for use in [appellants] prosecution. The rules of construction dictate when two conflicting laws appear to apply to a given circumstance, the law that more specifically applies to the circumstance controls. In this case, Rule 803(1) is the general presence sense impression rule, whereas, Rule 803(8)(B) specifically references police officer offense reports. As such, Rule 803(8)(B) would control, and the video should be excluded as inadmissible hearsay. If the error did not influence or had only a slight influence on the verdict, the error is harmless because it did not affect substantial rights of the defendant.Lee v. State 21 S.W.2d at 539 (Tex. App.-Tyler 2000, no pet.)

Conclusion

The drawing of Mr. Shepard's blood violated his Fourth Amendment rights because there were no exigent circumstances that would erase the need for a warrant and the body camera footage is inadmissible hearsay because it violates Rule of Evidence 803(8)(B). Therefore, the court must find in favor of the Appellee with regard to both issues.

Prayer

For these reasons we pray that this court would rule in favor of the Appellee, Cameron Shepard and accept the motion to suppress.

Respectfully Submitted By:

Sadie Stevenson

Makaylia Askew

Attorneys for Appellee

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IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

No. 03-18-01234-CR

The State of Texas, Appellant

V.

Cameron Shepard, Appellee

From The Court of Appeals, Third District, At Austin

Brief for Appellant

Angela Nguyen

Christian Velazquez

Creekview High School

Introduction

This particular brief is for the side of Appellant, The State of Texas. Directed to the Court of Appeals.

Statement of the Case

___Appellee Cameron Shepard was charged with intoxicated manslaughter. Before his trial, he motioned to suppress the evidence of a warrantless blood draw and unlawful body camera video filmed by his arresting officer. Mr. Shepard then pleaded guilty and filed this appeal.

Issues on Appeal

1. Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw
2. Whether the trial court erred in denying the motion to suppress the video from Officer Cole's body camera video

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Department was dispatched to an accident along a highway near downtown Austin. When he had arrived at the scene, he activated his body camera that records audio and video from his perspective. Officer found a deceased female in

the road and a small car occupied by two people. Cole administered a Standardized Field Sobriety Test on Mr. Shepard. After tests were done, Officer Cole came to the opinion that Mr. Shepard was indeed under the influence while operating a vehicle and caused the death of the female.

Officer Cole then decided that a blood draw should be done on Cameron. Initially, he agreed to provide a blood sample. Upon the arrival to the hospital, Mr. Shepard withdrew his consent. Officer Cole then tries to contact an on call magistrate, who of which was unavailable to obtain a warrant. Officer Cole made no further attempts to contact other magistrates or obtain a warrant. Cole then sent Shepard to the hospital to get his blood drawn over Shepard's objection and consent withdrawal.

The blood withdraw did FALL under exigent circumstances and should not be suppressed rights.

The fourth amendment states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.." These protections afforded by the 4th amendment apply equally to officer Cole forcibly extracting blood from Mr. Shepard as they to an officer entering a citizens house without permission. Without a warrant, an officer should be denied access for unreasonable seizures.

Yes, officer Cole needed a warrant but there is also an exception to the 4th amendment which is exigent circumstances. "Exigent circumstances is

permitted when an officer has the right for a warrantless search when probable cause to search exists and officers reasonably believe that contraband or other evidence may be destroyed or removed before a search warrant could be obtained” This applies to this case as well because officer Cole believed that the dissipation of alcohol in blood reasonably showed a sort of exigency, in which explains his reasons on why he extracted the sample of blood without a warrant. The actions officer Cole took of extracting Mr. Shepard’s blood without a warrant is valid, if officer Cole’s belief that obtaining a warrant was impractical based on circumstances and information known at the time of the search was reasonable. And yes dissipation alone does not permit a warrantless search of a suspect blood, there may be circumstances surrounding law enforcement’s decision to forgo obtaining a warrant that withstands Fourth Amendment scrutiny. The four scenarios that took place threaten officer Cole’s belief that he was confronted with an emergency which was, “The blood draw being delayed despite Mr. Shepard’s initial consent and then withdraw of the blood sample, the on-call magistrate being unavailable, accident involving a deceased individual, and Mr. Shepard’s request of medical intervention.” All of these circumstances that took place were time-consuming and an officer needs “not exhaust every available avenue for obtaining a search warrant before exigency allows a warrantless blood draw.”

“Circumstances surrounding the blood draw rendered the warrantless search reasonable: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body naturally dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time

taken to transport Schmerber to a hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) the test was performed in a reasonable manner.”(Schmerber v. State in Weems v, State). All these occurrences in the case of Schmerber v. State led the officer to reasonably take a warrantless blood sample in which officer Cole also try to do. “Hindsight distorts a proper exigency analysis’ focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time at time of the search” Cole v. State this means that with hindsight it is easy to say that officer Cole should have done more than what he did, but that is perceived as misleading because at that moment officer Cole believed that the delay of a warrant would result in the destruction of evidence and at that moment he needs to act on what he believed which follows procedure”

No doubt, given a large number of arrests for this offense in different jurisdiction nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed” This quote relates to the case because Mr. Shepard’s results came back as a positive intoxication and disregarding the evidence because of a delayed access to obtaining a warrant could be considered as a destruction of evidence.

Point of Error 2: The trial court was correct in denying the motion to suppress the body camera footage.

Rule 803(1), states that present sense is" statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008). Officer Cole's body camera records everything that he hears, says, and does. He can't lie about what was seen at the scene because the court can also observe it. This adds to his recollection and credibility of what was said to have happened. In *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008), a similar scene also occurred. The arresting officer also activated his camera on the way to the scene, the camera recorded all video and audio footage of the whole accident just like this case. The ruling of this case was that the footage was to be allowed as evidence since it proves the truth of the matter asserted and it is also an exception to the rule exception. Which goes back to the definition of the exception to the rule, that it was a statement describing the event during the moment it happened. Since the audio is an exception to present sense impression it is allowed in court and can substitute an in court statement.

The body camera evidence is not a police report." A police report is something that is deliberately typed or written out by the arresting officer." *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008). Body camera videos are videos not a piece of writing. It is a live recording in the fact that the footage was raw. Saying that the footage is raw means that there was no edits or changes made to the footage. This adds to the reliability/credibility of the body camera footage. Officer Cole would not have been able to edit anything extra to make him look more innocent than he already is. Since the Camera

Footage is not a police report, it is not an out of court statement. Therefore, the audio and video recording is allowed to be used as evidence in court.

Even if the court allows the evidence as a police report, neither rule trumps the other. This line was taken directly out of *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). The case law that has been selected states that "both rules are the basis for exclusion of police reports and investigative recordings," and that this is stated in both Rule 803(1) and Rule 803(8)(B). Since the rules are equal to each other, they would have the same amount of restrictions and allowances. The rule that states that the more specific rule applies, would not apply to this case. Even if you decided to put the audio and video recordings as a police report, it would still be allowed since neither rule "trumps" the other and they both allow the police report as an investigative report in court. *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)

Harmless error does not apply to this case. Harmless error is when "the appellate court must disregard non-constitutional errors that do not affect substantial rights of the defendant" *Thompson v. State* No. 03-12-00519-CR. The totalities of this case were quite similar to the case presented today in court. The arresting officer recorded a citizen while he was questioning him for actions that happened before the arresting officer arrived at the scene. Another reason why the totality of circumstances of the case were similar were because both appellees were assumed and tested to be under the influence while driving. The ruling of *Thompson v. State* No. 03-12-00519-CR should influence the court's decision of what the ruling of the case presented in court today. The ruling of *Thompson v. State* was that the recording be included as evidence since it does

not harm either side of the argument in doing so. The evidence would not have proven the truth of the matter asserted in *Thompson v. State No. 03-12-00519-CR*. Just as it would not prove it in the case presented today

Conclusion

In conclusion, the court was correct in denying the motion to suppress the motion to the results of the warrantless blood draw and denying the motion to suppress the body camera footage.

Prayer

Because of the arguments presented, we pray that the Court of Appeals agrees with the decisions of the Trial Court and deny the motion to suppress the warrantless blood draw and body camera footage.

Respectfully submitted,

Christian Velazquez

Angela Nguyen

Attorney for Petitioner

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

No. 03-18-01234-CR

The State of Texas, Appellant

V.

Cameron Shepard, Appellee

From The Court of Appeals, Third District, At Austin

Brief for Appellee

Angela Nguyen

Christian Velazquez

Creekview High School

Introduction

This brief is on behalf of Appellee, Cameron Shepard, directed to the Court of Appeals.

Statement of the Case

___Appellee Cameron Shepard was charged with intoxicated manslaughter. Before his trial, he filed a motion to suppress the evidence of a warrantless blood draw and unlawful body camera video filmed by his arresting officer. Mr. Shepard then pleaded guilty and filed this appeal.

Issues on Appeal

1. Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw
2. Whether the trial court erred in denying the motion to suppress the video from Officer Cole's body camera video

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Department was dispatched to an accident along a highway near downtown Austin. When he had arrived at the scene, he activated his body camera that records audio and video from his perspective. Officer Cole found a deceased

female in the road and a small car occupied by two people. Cole administered a Standardized Field Sobriety Test on Mr. Shepard. After tests were done, Officer Cole came to the opinion that Mr. Shepard was indeed under the influence while operating a vehicle and caused the death of the female.

Officer Cole then decided that a blood draw should be done on Cameron. Initially, he agreed to provide a blood sample. Upon the arrival to the hospital, Mr. Shepard withdrew his consent. Officer Cole then attempted to contact an on call magistrate, who was unavailable to obtain a warrant. Officer Cole made no further attempts to contact other magistrates or obtain a warrant. Cole then sent Shepard to the hospital to get his blood drawn over Shepard's objection and withdrawn consent.

The blood draw should be suppressed because it violated his fourth amendment rights.

The Fourth Amendment of the U.S. Constitution provides "[the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..." These protections afforded by the 4th amendment apply equally to Officer Cole forcibly extracting blood from Mr. Shepard as they do to an Officer entering a citizen's house without permission. Without a warrant, an officer should be denied access for unreasonable seizures however, there is an exception to the fourth amendment which is exigent

circumstances. Exigent circumstances are applied when an officer has the right for a warrantless search when probable cause to search exists. Officers also believe evidence may be destroyed or removed before a search warrant could be obtained.

There was no probable cause to extract blood because the alcohol was not going to immediately dissipate. "Because the hospital, was particularly busy that night Weem's blood was taken at 2:30 a.m., over two hours after his arrest. Subsequent testing indicated a blood alcohol concentration of .18 grams per deciliter well above the .08 gram per deciliter definition of intoxication."

Schmerber V. California This means that even after what seems to be a delayed access of a warrant two hours to be exact, intoxication was still there.

Transporting Mr. Shepard to the hospital did not necessarily make obtaining a warrant impractical or unduly delay the taking of Mr. Shepherds blood to the extent that natural dissipation would significantly undermine a blood tests efficacy.

McNeely v. Missouri, 133 S.Ct. 1552 (2013) also reasserts that not in all cases of natural dissipation of alcohol are and should be considered a form of exigency. "Holding: In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." We have to take note that dissipation of alcohol in the blood isn't an immediate occurrence. " Aside from Weems own self-imposed delay and the forty minutes worth of alcohol dissipation, little else in the record lends support to finding exigency in

this case.” Just like Mr. Shepard, the record showed some impose delay which is not enough evidence of exigency.

“ Hindsight distorts a proper exigency analysis’ focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time at time of the search”*Cole v .State 490 S.W.3d 918 (2016)* and the state also argues the four scenarios that took place; “The deceased female, the on and off call with the magistrate, Mr. Shepard’s initial consent and then withdraw for the blood sample, and Mr. Shepard’s request for medical assistant” was time-consuming which meant an exigency applies to the case, but without hindsight we wouldn’t have known that officer Cole had other options“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.” *Missouri v. McNeely 133 S.Ct. 1552 (2013)*. Officer Cole failed to contact the other eight judges despite the fact that officer did have contact information for those judges. Meaning there were other possible avenues to which obtain a warrant indicating they didn’t meet exigent

Issue 2: The trial court erred in denying the motion to suppress the body camera evidence.

"Hearsay is a statement, other than one made by the declarant while testifying in court..." "An officer may testify what he saw, smelled, heard, did and felt on the scene, but he cannot substitute an in court testimony with an out of court statement." *Majority Opinion*. This applies to this case because the audio is an out of court statement that cannot substitute an in court testimony. Making the audio in the body camera Hearsay and not allowed to be used in court.

Rule 803(8)(B), is more narrow and precise on explaining how to deal with police reports than Rule 803(1). What Rule 803(8)(B) does is it, "explicitly excludes investigative reports by law enforcement from the public records exception to the hearsay rule, "trumps" Rule 803(1) *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008). This case had many similarities to this case and the incident itself is similar as well. The totalities of that case is similar to this one in the fact that the arresting officers both had cameras which they activated upon the arrival of the scene. The appellees also both motioned to suppress the video camera. The results of *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008) was that most of the audio recording was inadmissible evidence. *Fischer v. State* 252 S.W.3d 375 (*Tex. Crim. App.* 2008) also states Rule 803(8)(B) "trumps" Rule 803(1) since it is the more specific rule. The ruling of *Fischer v. State* should be applied

Rule 803(1) does not apply, because it is "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Statements that qualify under this exception are not excluded by the hearsay rule, even though the declarant is

available.” *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). Rule 803(8)(B) should apply because it is the more specific rule. *Majority Opinion.* *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) also had similar occurrences. There was an argument about which rule would apply, Rule 803(8)(B) overruled Rule 803(1) in the end. This should also be applied to the case presented today because the totality of the circumstances were very similar as well. The appellees was charged with a DUI and both motioned to suppress body camera evidence.

Conclusion

In conclusion, the court erred in denying the motion to suppress the results of the warrantless blood draw and denying the motion to suppress the body camera footage. This court should overrule and grant the motion to suppress these issues.

Prayer

We pray that the Court of Appeals reconsiders their results and to overrule the Trial Court and accept the motion to suppress the issues.

Respectfully submitted,

Christian Velazquez

Angela Nguyen

Attorney for Petitioner

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

THE STATE OF TEXAS, Appellant

vs.

CAMERON SHEPARD, Appellee

On Appeal from

The 15th Court of Appeals

Appellant

Judah Powell (Attorney #1)

Anna Strohmeyer (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Appellant, Mr. Cameron Shepard was charged with the offense of intoxication manslaughter. Prior to trial Mr. Shepard put forward a motion to suppress evidence of the blood draw results and the body camera video filmed by the arresting officer. After his motion to suppress both pieces of evidence was denied, Mr. Shepard entered a plea of guilty to the charge and filed an appeal against the state. He won that appeal, but the State of Texas then in turn filed an appeal against that appeal court.

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which capture audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female. Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to

locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

Issues on Appeal

Point of Error 1: The trial court did not error in denying the motion to suppress the results of the warrantless blood draw, and

Point of Error 2: The trial court did not error in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

Point of Error 1: *The trial court did not error in denying the motion to suppress*

the results of the warrantless blood draw

According to The Fourth Amendment "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." These protections given by The Fourth Amendment equally apply to Officer Cole's action of forcibly extracting blood from Mr. Shepard as they do to an officer entering into a citizen's house without authority. However, In this case, the blood draw falls within the "exigent circumstance" exception to the warrant requirement. Under this exception, a warrantless seizure of evidence is justified

if “the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). We know from the trial court record that Officer Cole followed the normal practice that was established in his jurisdiction for obtaining a blood warrant. Presumably this practice had been successful up until this point in providing an officer immediate access to a magistrate for the purpose of obtaining a blood warrant. However, circumstances outside the officer’s control led to the process breaking down. An officer need not exhaust every available avenue for obtaining a search warrant before exigency allows a warrantless blood draw. “Hindsight distorts a proper exigency analysis’ focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search.” *Cole v. State*, 490 S.W.3d 918 (2016). We also know that the blood draw was delayed by the following circumstances that were outside of the officer’s control: (1) The accident involving a deceased individual, (2) Mr. Shepard’s initial consent and then withdrawal of consent for the blood draw, (3) The on call magistrate being unavailable, and (4) Mr. Shepard’s request for medical intervention which would taint the blood test. All of these circumstances establish exigency such that the warrantless blood draw was proper.

Point of Error 2: The trial court did not error in denying the motion to suppress

the video recording from the police officer’s body camera video.

According to the Federal Rule of Evidence, any statement defined as hearsay, which is "a statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted", is not admissible unless it falls under any of the hearsay exceptions rules. The body camera video can not be considered hearsay, as it falls under the rule of present sense impression, which states that a statement is not considered hearsay if it is explaining an event or condition made while the declarant was perceiving the event or condition. As the majority of the arresting officers remarks were explaining the accident scene or the state of Mr. Shepard, they should fit under the rule of present sense impression, and thus should be included. The video also provides such important evidence, as witness behavior and scene layout. Furthermore, the video does not just consist of the officers statements, and instead consist of multiple statements made by different groups. Therefore, even if the officers statements must be excluded, the jury should be allowed to view the parts with statements not made by the officer. Lastly, even if the video is considered inadmissible, it alone is not enough to call for a retrial, as it is considered a harmless error. See *Evan v. State* (Tex.app--Houston [14th district] 2006). Therefore, if the court decided the blood draw was inadmissible, than it would not be enough to call for a retrial.

Conclusion

We should not uphold the the previous Appeals Courts decision, as they wrongly asserted that the trial court erred in denying to suppress the results of the blood draw and body camera video.

Prayer

The State of texas prays that the court reverse the previous ruling, and dismiss the case.

Respectfully submitted,

Judah Powell

Anna Strohmeyer

Attorneys for Apellant

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2017

THE STATE OF TEXAS, Appellant

vs.

CAMERON SHEPARD, Appellee

On Appeal from

The 15th Court of Appeals

Appellee

Judah Powell (Attorney #1)

Anna Strohmeyer (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Mr. Cameron Shepard was charged with the offense of intoxication manslaughter. Prior to trial Mr. Shepard put forward a motion to suppress evidence of the blood draw results and the body camera video filmed by the arresting officer. After his motion to suppress both pieces of evidence was denied, Mr. Shepard entered a plea of guilty to the charge and filed an appeal against the state. He won that appeal, but the State of Texas then in turn filed an appeal against that appeal court.

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which capture audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female. Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to

locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

Issues on Appeal

Point of Error 1: The trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

Point of Error 2: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

Point of Error 1: *The trial court erred in denying the motion to suppress the results of the warrantless blood draw*

According to The Fourth Amendment "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." These protections given by The Fourth Amendment equally apply to Officer Cole's action of forcibly extracting blood from Mr. Shepard as they do to an officer entering into a citizen's house without authority. In this case, the State argues that the blood draw falls within the "exigent circumstance" exception to the warrant requirement under *Missouri v. McNeely*. Whether exigency exists will be determined on a totality-of-circumstances approach.

Using this approach, Mr. Shepard's warrantless blood draw is not justified by "extingent circumstances". *McNeely* makes it clear that "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." *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).. However, in this case, there were avenues for getting a warrant that Officer Cole chose not to explore. The trial court record shows there was another judge able to review the warrant. The fact that Officer Cole or his department had not prepared for this scenario and obtained Mr. Shepard's contact information for the judges should not be held against Mr. Shepard. The State carries the burden of establishing enough facts to prove "extingent circumstances" existed to justify the search. We know Cole failed to contact the other eight judges despite the fact that he had contact information for those judges. We also know from the body cam that other officers were in the area and could have been able to help Cole in locating a magistrate. The State failed to meet its burden on this point of error, and thus the results of the blood draw should be excluded.

Point of Error 2: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

According to the Federal Rule of Evidence, any statement defined as hearsay, which is "a statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted", is not admissible unless it falls under any of the hearsay expectations rules. As the

statements made by Mr. Shepard were not made while testifying at trial, instead being made on a video recording, they are considered hearsay. Although his statements can perhaps be ammissible under the rule of present sense impression, which states that a statement is not considered hearsay if it is explaining an event or condition made while the declarant was perceiving the event or condition, his body camera video specifically violates Rule of Evidence 803 (8)(b), which states that in criminal cases, offense reports are not legally admissible into court proceedings. As according to the ruling of *Evan v. State*, an arresting officers verbal narrative on the videotape is the functional equivalent of an offense report, so we can therefore say that it violates this rule. Furthermore, as the rules of construction delicate that when two conflicting laws apply to a circumstance, than the one with the highest level of specificity has precedence. Thus as the Rule of Evidence 803 (8)(b) specifically references police reports, while the general rule of presence sense impression is much more general and does not specifically reference anything, we can say that the Rule of Evidence 803 (8)(b) had precedence over the rule of presence sense impression. Thusly, we can state that the body camera footage should have suppressed the footage, and that the court erred in not suppressing the footage. As such, the Appeals Court's decision that the body camera footage should have been supressed.

Conclusion

We should uphold the the previous Appeals Courts decision, as they rightly asserted that the trial court erred in denying to suppress the results of the blood draw and body camera video.

Prayer

Mr. Cameron Sheppard prays that this summary court uphold the lower court's decision.

Respectfully submitted,

Judah Powell

Anna Strohmeyer

Attorneys for Apellee

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2018

The State of Texas, Appellant

vs.

Cameron Shepard, Appellee

On Appeal from
The 15th Court of Appeals

----- Appellant

Zan Haq (Attorney #1)

John Calvert (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Appellant Cameron Shepard was charged with the offense of intoxication manslaughter. Before the trial, Shepard filed a motion to suppress evidence of the results of a blood draw and a body camera video filmed by the arresting officer. His motion was denied in both cases. Mr. Shepard proceeded entered a plea of guilty to the charge and filed this appeal.

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which captured audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female. Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a

warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections

Argument

Point of Error 1: *The trial court was incorrect in denying the motion to suppress the results of the blood test.*

The Fourth Amendment says that people have the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." While Officer Cole did not have a warrant to extract the blood of Mr. Shepard, the state will argue that in this specific case Officer Cole did not need a warrant as the specific blood draw operated within the exigency exception. This exception, provided under *Missouri v. McNeely* says that a warrantless seizure of evidence is justified if "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. The *Missouri v. McNeely* case also determined that exigency will be based on the totality of the circumstances approach, meaning whether or

not an exception is granted is based on the available information, not a set brightline. Given the information the court has of the event, the precedent set by *Missouri v. McNeely* in regards to the exigency rules did not justify a warrantless blood draw. The case says that “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.” We will argue that the blood draw should be excluded as evidence, because Officer Cole did not meet the exigency exception given that the court has shown that Officer Cole had the contact information of eight judges who he could have gotten a warrant from, and all of whom were available at the time. This means that that involuntary and unwarranted blood draw

performed by Officer Cole on Mr. Shepard is in violation of the fourth amendment and should be disregarded as evidence

Point of Error 2: *The trial court was incorrect in denying the motion to suppress the video recording from police officer Jordan Cole’s body camera.*

The Federal Rule of Evidence defines hearsay as “a statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted,” and establishes that, unless it falls under the hearsay exception rules, it is not admissible. Mr. Shepard’s statements were not

made while testifying in court, but are instead part of an audio recording, and are thus considered hearsay. Although, under the rule of present sense impression, whereby a statement is not considered hearsay if it explains an event or condition while the declarant was experiencing said the event or condition, his statements may be permissible, the body camera video specifically violates Rule of Evidence 803 (8)(b), whereby in criminal cases, offense reports are not legally admissible in court proceedings. In, for example, *Evan v. State*, an arresting officer's taped verbal narrative is the functional equivalent of an offense report, and thus is not admissible. Furthermore, the rules of construction dictate that when two conflicting laws apply to a circumstance, the one with the highest level of specificity has precedence. Because the Rule of Evidence 803 (8)(b) specifically references police reports, and the rule of presence sense impression is quite general, the Rule of Evidence 803 (8)(b) had precedence. Thus, the video was not admissible, and should not have have been used in this criminal preceding.

Conclusion

The lower court's decision should not be upheld, as it rests on the flawed assertion that the trial court was incorrect in permitting both the blood test results and the body camera video to be used as evidence.

Prayer

The State of Texas prays that the court reverses its previous ruling and dismisses this case.

Respectfully
submitted,

Zan Haq

John Calvert

Attorneys for Appellant

IN THE SUPREME COURT OF

THE STATE OF TEXAS

No. YAG-APP-2018

The State of Texas, Appellant

vs.

Cameron Shepard, Appellee

On Appeal from

The 15th Court of Appeals

----- Appellee

Zan Haq (Attorney #1)

John Calvert (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

Appellant Cameron Shepard was charged with the offense of intoxication manslaughter. Before the trial, Shepard filed a motion to suppress evidence of the results of a blood draw and a body camera video filmed by the arresting officer. His motion was denied in both cases. Mr. Shepard proceeded entered a plea of guilty to the charge and filed this appeal.

Statement of the Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near downtown Austin. When he arrived on scene, he activated his body camera which captured audio and video from the perspective of the officer. Officer Cole found a deceased female in the roadway and a small car occupied by two persons. Officer Cole administered the Standardized Field Sobriety Test on the driver, Cameron Shepard. From these tests and his observations, Officer Cole formed the opinion that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female. Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole

made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections

Arguments

Point of Error 1: *The trial court was correct in denying the motion to suppress the results of the warrantless blood test.*

Enshrined in the Bill of Rights is the Fourth Amendment, which establishes that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause" These protections also apply to Officer Cole's forceful extraction of blood from Mr. Shepard. In this case, the State argues that the blood test falls within the "exigent circumstance" exception to the warrant requirement under the case Missouri v. McNeely. Whether or not such exigency exists must be determined by totality of circumstance, and Shepard's blood test does not meet this criteria. McNeely makes it clear that "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." Missouri v. McNeely, 133 S. Ct. 1552 (2013).. In this case, there were many opportunities for Officer Cole to retrieve a warrant, but he took none of them. The trial court

record clearly shows there were many judges able to review the warrant, but neither Officer Cole nor his department had sent Mr. Shepard's contact information to any of them. Cole failed to contact the other eight judges, despite the fact that he was clearly able to do so. Furthermore, we know from the body camera footage that other officers were in the area, and could have assisted Cole in doing this. The burden of establishing enough facts to prove "extingent circumstances" rests on the State, and they have not done so in any sufficient manner. The State failed to meet its burden on this point of error, so the results of the blood test must be excluded.

Point of Error 2: *The trial court was correct in denying the motion to suppress the video recording from police officer Jordan Cole's body camera.*

The Federal Rule of Evidence defines hearsay as "a statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted," and establishes that, unless it falls under the hearsay exception rules, it is not admissible. The body camera footage cannot be considered hearsay, as it falls under the rule of present sense impression, whereby a statement is not considered hearsay if it explains an event or condition while the declarant was experiencing said the event or condition. Because most of the arresting officer's remarks were explaining either the

accident site or Mr. Shepard himself, they fit under the rule of present sense impression, and are therefore admissible. The video also provides important evidence like witness behavior and scene layout, and contains statements made by multiple other persons involved. Therefore, even if the officer's statements must be excluded, the jury must be allowed to view the rest of the footage. And even if the video itself is considered inadmissible, that alone is not enough to call for a retrial, because it is considered a harmless error. See *Evan v. State* (Tex.app--Houston [14th district] 2006).

Conclusion

The lower court's decision should be upheld, as it correctly asserted that the trial court was incorrect in denying to suppress both the blood test results and body camera video.

Prayer

Mr. Cameron Sheppard prays that the court upholds the lower court's decision.

Respectfully submitted,

Zan Haq

John Calvert

Attorneys for Appellee

Statement of the Case

Defendant Cameron Shepard charged and found guilty of intoxicated manslaughter. Cameron Shepard appeals the conviction on two points of error. Shepard appeals that the blood draw used as evidence violated his Fourth Amendment right, and thus, is fruit of a poisonous tree. Shepard also appeals that the body camera footage is hearsay due the narrative elements stated by Officer Cole.

Statement of the Facts

On June 30, 2018 at 2:00 a.m., Cameron Shepard's ("Shepard") car crashed on a stretch of roadway in downtown Austin, resulting in the death of a female passenger. Shepard, however, survived without fatal injuries, though shaken. A short time after the crash, Officer Cole of the Austin City Police Department was dispatched to the scene to investigate, in which he recorded his perspective of the event along with oral narration heard in the video. When taken to the hospital, Shepard withdrew his consent to be given a blood test to determine the concentration of alcohol in his blood. Despite Shepard's wishes, Officer ordered the physician to administer a blood test. Despite having the contacts of eight different Magistrates as well as nearby officers who could aid him in contacting Magistrates, Officer Cole decided to proceed with the blood test without procuring a warrant.

Shepard moved to suppress the introduction of the results of the blood draw citing that the means by which the sample was obtained violated the Fourth Amendment warrant requirements, as Officer Cole had multiple avenues

to obtain a warrant. Shepard also moved to suppress the body camera footage, citing that the oral narration made in the video made the evidence hearsay. Both of these Motions were denied by the lower courts.

Points of Error

Point of Error Number One: Officer Cole did not obtain a warrant before taking a blood sample from Shepard despite having multiple avenues of obtaining a warrant. Therefore, under the Fourth Amendment, Officer Cole was in direct violation of “the right of the people to be secure in their persons.”

Point of Error Number Two: Officer Cole’s police body camera contained “hearsay” due to the crafted oral narration of Officer Cole and therefore cannot be substantiated.

Arguments

Point of Error Number One: Officer Cole did not obtain a warrant before taking a blood sample from Shepard despite having multiple avenues of obtaining a warrant. Therefore, under the Fourth Amendment, Officer Cole was in direct violation of “the right of the people to be secure in their persons.”

Under the Fourth Amendment, Shepard was protected from unreasonable and warrantless “search and seizures” and therefore Officer Cole required either consent from Shepard or a warrant to obtain the blood sample. Officer Cole violated Shepard’s withdrawal of consent and claimed exigent circumstances threatened the “destruction of evidence.” However, the Missouri Supreme Court concluded, “[The Missouri Supreme Court] hold[s] that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” Based on the Missouri Supreme Court’s decision, Officer Cole disregards Shepard’s withdrawal of consent is in direct violation of the Fourth Amendment despite probable cause present. In addition, despite Officer Cole observing Shepard’s slurred speech and Shepard’s failure to complete the Standardized Field Sobriety Test, which were both indicative of alcohol consumption, in *Schmerber v. California*, the Supreme Court concluded a blood test, “requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol related case.” The blood test illegally performed on Shepard is therefore not valid evidence. Also, Officer Cole did not exhaust every means as to procuring a warrant for Shepard’s blood test. Officer Cole had only contacted one Magistrate before claiming exigent circumstances. The officer had access to 8 other Magistrates before he performed the test against Shepard’s consent. According to *Johnson v. United States*, however, the court explained the importance of a warrant granted by a Magistrate before allowing an officer to, “invade another’s body in search of evidence of guilt is indisputable and great.” Therefore, Officer Cole was required

to exhaust all avenues possible before administering a blood test to Shepard, though he neither received a warrant or contacted all Magistrates.

Point of Error Number Two: Officer Cole's police body camera contained "hearsay" due to the crafted oral narration of Officer Cole and therefore cannot be substantiated.

Throughout the body camera footage, Officer Cole makes statements that appear to craft a narrative. *Evans v. State* states that body camera footage with narration is not valid unless the narration is solely "present sense impression," which is what the officer sees, feels, or hears while recording. However, Officer Cole's body camera footage has multiple points in which he makes reflective, crafted statements that are aimed to craft a narrative. At one point, during the footage, Officer Cole says, "I believe he understands the instructions and is refusing to cooperate with the HGN test," (Transcript of Exhibit 1). Such a statement is an overt attempt to craft a narrative and influence the court decision despite the statements not being under oath.

Also applicable is *Fischer v. State*. The case establishes that "an officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative." Evidently, the statements in the bodycam footage are not under oath and therefore invalid. Using the video and the statements made in it would be augmenting the appellee's argument with statements not made under oath.

Conclusion

The blood sample taken against Shepard's will is in direct violation of the Fourth Amendment. No exigency claim can be substantiated as Officer Cole had 8 different Magistrates available to contact. Additionally, the body camera audio contains statements which are aimed at influencing the viewer despite the fact that the statements are not made under oath. The statements made in the footage are not present sense impressions as Officer Cole draws subjective conclusions that have no pertinence to what he is experiencing.

Prayer

For these reasons we pray that this court would reverse the decision of the lower court.

Respectfully Submitted By,

Ehsan Kapadia

Carter Goetz

Attorneys for Petitioner

Highland Park High School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this is appeals brief.

Statement of the Case

The defendant, Cameron Shepherd is convicted of intoxicated manslaughter for the killing of an unnamed civilian. Shepherd is pleading guilty to the charge. Two issues are presented on appeal.

Statement of the Facts

On June 30, 2018 at 2:00 a.m., a car crashed on a stretch of roadway in downtown Austin. The crash resulted in the death of a female passenger. The driver, however, survived without fatal injuries. A 911 dispatch received a report stating prior to the crash, the driver, Cameron Shepard ("Shepard"), was swerving between lanes and nearly collided with other vehicles multiple times. A short time after the crash, Officer Cole of the Austin City Police Department was dispatched to the scene to investigate, in which he recorded his perspective of the incident and the events proceeding with his body camera. After conducting the Standard Field Sobriety Test, Officer Cole concluded that Shepard was intoxicated and had been driving while intoxicated. Following the tests, Shepard consented to a blood test, however, later, expressed that he no longer

consented to a blood test at the hospital. After attempting to contact the “on duty” magistrate, who was unavailable at the time, Officer Cole recognized the exigency of the circumstances and proceeded to administer a blood test to Shepard.

Shepard moved to suppress the introduction of the results of the blood draw claiming that the means by which it was obtained violated the Fourth Amendment warrant requirements, despite Officer Cole having probable cause. Shepard also moved to suppress the body camera footage, claiming that the statements made in the video made the evidence hearsay. Both of these Motions were denied.

Issues on Appeal

Counterpoint Number One: The blood sample taken hours after the crash is admissible due to the exigent circumstances surrounding the incident.

Counterpoint Number Two: The body camera footage is admissible evidence due to Officer Cole giving a “present sense impression” of the event throughout the video and therefore is not “hearsay.”

Argument

Counterpoint Number One: The blood sample taken hours after the crash is admissible evidence due to the exigent circumstances surrounding the incident.

Although the blood draw was warrantless, due to exigent circumstances, probable cause, and enough evidence for Officer Cole to definitively say Shepard had been intoxicated while driving, the blood draw was justified. Shepards sudden withdrawal of consent to the blood test and the inability to procure a warrant due to the time of night, the blood draw was proper. To avoid the destruction of vital evidence to the sentencing of Shephard, Officer Cole reacted promptly and overrode Shepards withdrawal of consent. *Missouri v. McNeely*, 358 S.W.3d 65 states that factors relating to the necessity of a warrant in the context of intoxicated manslaughter include the availability of a Magistrate Judge, who at the time was occupied with another case. Due to the timeliness of the blood sample, due to the dissipation of alcohol in the blood, and therefore evidence, waiting for a warrant from an off-duty Magistrate would result in the destruction of evidence. The preceding circumstances are classified under exigents under both *Missouri v. McNeely* as well as *Schmerber v. California* L. Ed. 2d 908. Armando Schmerber was ordered to be given a blood test despite his protests by the investigating police. It was ruled that since the investigating police had probable cause, as well as the timeliness of the blood sample, that

the blood sample was valid evidence and not in violation of any constitutional amendment.

Counterpoint Number Two: The body camera footage is admissible evidence due to Officer Cole giving a “present sense impression” of the event throughout the video and therefore is not “hearsay.”

Officer Cole also had probable cause against Shepard, as he smelled alcohol while on the scene of the crash on the driver. In addition, Cole conducted the Standard Field Sobriety Test which Shepard failed.

The body camera footage is not, as the appellant claims, an oral narrative, rather a present sense impression. What is said by Officer Cole are all observations that he saw, heard, or felt. *Fischer v. State*, 207 S.W.3d states that hearsay is designed to allow unreflective statements like the ones made by Officer Cole.

Conclusion

The blood sample ordered by Officer Cole was under exigent circumstances. Officer Cole had no easily accessible Magistrate to contact. However, the accessibility to the Magistrate is impertinent as Officer Cole had probable cause by smelling alcohol in the vehicle as well as conducting the

Standardized Field Sobriety Test. Additionally, the body camera footage includes the Officer's present sense impression, including unreflective, observational statements.

Prayer

For these reasons we pray that this court would confirm the decision of the lower court.

Respectfully Submitted By,

Ehsan Kapadia

Carter Goetz

Attorneys for Respondent

Highland Park High School

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Spencer Allan

Madeline Ingrum

Highland Park High School

Statement of Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near

downtown Austin. When he arrived on scene, he activated his body camera which

captured audio and video from the perspective of the officer. Officer Cole found a

deceased female in the roadway and a small car occupied by two persons.

Officer

Cole administered the Standardized Field Sobriety Test on the driver, Cameron

Shepard. From these tests and his observations, Officer Cole formed the opinion

that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female.

Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

Point of Error One: Whether the court erred in denying the motion to suppress the results of the warrantless blood draw

The Fourth Amendment to the Constitution established the right of the people to be secure from unreasonable searches and seizures. While most commonly referring to one's cars, houses, and belongings, this amendment also protects one's body from being subjected to unwarranted tests or blood withdrawals. A warrantless violation of one's body implicate the "most personal and deep-rooted expectations of privacy" and not be lawfully conducted unless it falls under the recognized exceptions to the fourth amendment. *Winston v. Lee*, 470 US 753 (1985). Because of the sanctity of the human body, probable cause should not act as the single determination to intrude the human body without a warrant.

One of these notable exceptions states that depending on the exigency and totality of the situation, a warrantless blood draw is permitting in order to conduct justice. *Schmerber v. California*, 384 U. S. 757 (1966). Specifically isolating drunk-driving cases, the "totality of a situation" refers to everything from the cooperation of the procedures for obtaining a warrant, connecting to a magistrate, and dealing with the intoxicated culprit. Therefore, it cannot be concluded that a situation falls under a exigent exception of the fourth amendment simply because the blood alcohol content (BAC) gradually declines over time as law enforcements goal should be equally as supporting justice as protecting the rights of the constitution. *Missouri vs. McNeely* 358 S. W. 3d 65 (2012).

This particular case does not meet the criteria for the exigent circumstances as the Officer didn't exhaust all of his resources for a warrant. Despite only contacting one magistrate, Officer Cole stopped his search before covering his bases. Records indicate that there were 8 working judges in the area; however, Officer Cole made it appear that he called all working personnel but no one was able to help. In addition, his body camera video indicate that in fact, there were more law enforcement officers working that night who could have helped out with transporting Shepard to a hospital or obtaining a warrant.

Unlike in the case of *Cole v. State* 304 S.C. 47 (1991) where multiple setbacks justifies a warrantless blood withdrawal, this case was relatively cut and dry. Officer finds the defendant at the scene of the incident, takes him to the hospital, and permits the warrantless blood sample. There was little belligerent or fighting from Cameron Shepard, no shortage of police officers or judges, and no wait time at the hospital. If nothing was delayed, then what was the rush to get the sample?

Officer Cole's decision to obtain this warrantless sample is not supported by an exigent circumstances but by his own belief that he needed to withdraw the blood sample to preserve evidence.

Point of Error Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Officer Cole undeniably committed heresy, and such statements made at the scene of the incident would have no legal bearing in a case. Under State Rule of Evidence 803(8)(B), any reactionary remarks made by a police officer do not constitute a statement of facts or legal evidence. This includes video and audio recordings, which were collected by Officer Cole's body camera.

The Rule continues: "An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative." If the remarks of Officer Cole were to be submitted as a "speaking offense report," the document would have no bearing in any case. Thus, the court erred in allowing selections of the footage to be included.

Despite Rule 803(1) constituting the report as a contemporaneous police report, 803(8)(B) has controlling precedence in determining the recording to be inadmissible hearsay under the rules of construction.

Conclusion: Because the case does not satisfy the requirements of an exigent circumstance and the officer's remarks classify as heresy, the lower court was incorrect in its decision.

Prayer: We pray this court reverses the decision of the lower court.

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellee

Spencer Allan

Madeline Ingrum

Highland Park High School

Statement of Facts

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident along a stretch of roadway near

downtown Austin. When he arrived on scene, he activated his body camera which

captured audio and video from the perspective of the officer. Officer Cole found a

deceased female in the roadway and a small car occupied by two persons.

Officer

Cole administered the Standardized Field Sobriety Test on the driver, Cameron

Shepard. From these tests and his observations, Officer Cole formed the opinion

that Mr. Shepard had been operating a vehicle while intoxicated and had caused the death of the female.

Mr. Shepard initially agreed to provide a blood sample. However, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole contacted the "on call" magistrate to obtain a warrant. The magistrate was unavailable at the time because she was providing magistrate warnings to a juvenile. Officer Cole made no further attempts to locate another magistrate. Instead, the officer transported Mr. Shepard to the hospital and obtained a blood sample over Mr. Shepard's objections.

Counterpoint Number One: Whether the court erred in denying the motion to suppress the results of the warrantless blood draw

The trial court ruled as this case fell under the exigent circumstance as considering the "totality of circumstance." *Schmerber v. California*, 384 U. S. 757 (1966). While it would be ideal for warrants to be issued at every occasion, sometimes circumstances don't allow for the extra time to be taken in order to follow official procedure. In drunk driving cases it should be emphasized that the BAC rapidly declines rapidly causing unfortunate destruction of justice. In order to preserve the evidence, the officers must act swiftly to obtain the sample.

In the case of *Fears v. State* 451 So. 2d 385 (1984) , the officer didn't even attempt to gain a warrant because he believed that it would consume extra time that they didn't have. He utilized his experience as an officer in the field and made his best judgement call in order to bring about justice. In the analysis of such case, the judges emphasized the need for two aspects of evidence in order to prove a warrantless blood draw: a probable cause and exigent circumstances.

The appellate suggests that there were no such existent circumstances as there were many avenues for the officer to take in order to obtain a warrant as well as no significant obstacles that delayed the blood sample. In almost every circumstance, there will most likely be an officer within the jurisdiction that would be able to aid in the investigation. The argument that there is another available officer somewhere that would defeat the exigency clause reduces that argument of a "inappropriately small set of facts, and would defeat a claim of

exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances. *Evans vs State* 725 So. 2d 613.

The court should uphold the decision of the lower court due to these certain circumstances that would have delayed the warrant. Officer Cole attempted to follow the official procedure to obtain a warrant but moved to obtain a blood sample as contacting multiple justices would further delay the extraction and cause an obstruction of justice.

Counterpoint Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Besides the intrinsic insightfulness provided by the Officer's recordings into the Statement of Fact, the recordings constitute present sense impression because they provide documentation of the case itself.

Under *Evans v. State*, such a recording could very well, like the blood sample, classify as harmless error which does not support a remand of the case for a new trial. Because of this, the validity of the video as a piece of evidence is clear, and the Jury should be allowed to review the parts of it that constitute present sense, something that is considered exempt under public record heresy laws.

Conclusion: Because a lengthy warrant procedure would constitute obstruction of evidence and the video provided clear present sense impression, the ruling of the trial court is correct.

Prayer: The defendant argues for the appeals court to uphold the ruling of the trial court.

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT

AUSTIN

Brief for Appellant

Kennedi Ford

Kennedy Onic

Duncanville High School

STATEMENT OF THE CASE

Following the trial court's denial of two motions to suppress, Appellee Cameron Shepard entered a guilty plea to the charge of intoxicated manslaughter. In the first appeal, the court reversed the decision of the trial court, causing The State of Texas, Appellant, to request for a second. The motions in the trial court, pertaining to a warrantless blood draw and the arresting officer's body camera footage, are the two issues presented on appeal.

STATEMENT OF FACTS

On June 30, 2018, Officer Cole of the Austin Police Department was dispatched to the scene of a car accident near downtown Austin. Upon his arrival, Cole turned on his body camera and observed a presumably-deceased female in the roadway and a small car with two occupants. After administering a Standard Field Sobriety Test (SFST) on the driver (Appellee), Officer Cole formed the opinion that Shepard was driving while intoxicated and had caused the death of the female.

Initially, the appellee agreed to provide a blood sample; however, upon arrival at the hospital, Shepard withdrew his consent. Following Shepard's withdrawal of consent, Officer Cole contacted the "on-call" magistrate with the intent to obtain a warrant. The magistrate, occupied with a juvenile, was unable to assist Cole with his request; Officer Cole made no further attempt to locate a magistrate and, despite Shepard's objections, proceeded with the blood draw without a warrant.

In Shepard's view, the warrantless blood draw and footage from Cole's body camera did constitute evidence suppression in the trial court. Nevertheless, the trial court denied these motions and Shepard entered a guilty plea. During the hearing of the first appeal, the court ruled in Shepard's favor, causing The State (Appellant) to request another.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Issue One: In *Schmerber v. California*, as cited in *Missouri v. McNeely*, the court, utilizing the totality of circumstances approach, ruled that the officer's actions were justifiable under the criteria of exigency by identifying six extenuating circumstances that "undermined the efficacy" of the arresting officer's abilities. *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). In the case at bar, all six of those circumstances are present. First, the arresting officer had probable cause to believe the driver was intoxicated, as identified by the strong alcohol smell present upon his arrival, and the 911 call made by a witness. Second, he was delayed by the presence of the deceased female and the Appellee's needed medical attention, thus, the metabolization of alcohol in the bloodstream was a significant factor at play. The third circumstance was the lack of time available to procure a warrant, and fourth was the effectiveness of the

means used to determine if an individual is intoxicated. *Id.* As seen from the body camera transcriptions, the Appellee was either unwilling or unable to perform most of the Standard Field Sobriety Tests- making the evidence gained from them virtually unreliable.

At its very core, the case at bar demonstrates the uncertainty officers face with regard to the delay caused by obtaining a warrant. The “totality of circumstances approach” is employed with respect to the destruction of evidence and the immediate actions the arresting officer is witnessing. *Weems v. State 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016).* The State, and more specifically the arresting officer, acted within the best interest of the preservation of evidence, and their actions should be weighed only against such.

Furthering the aforementioned point, Officer Cole followed the normal practices of the Austin Police Department; therefore, weighing his decisions unequivocally in the negative, would be “weighing them against hindsight’s omniscience”- something prohibited in *Weems v. State*. *Weems v. State 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016).*

Issue Two: The audio and visual recordings obtained from the arresting officer’s body camera should not be suppressed because they constitute a present sense impression. As elucidated in *Fischer v. State*, “if the statements were generally unreflective and described or explained the event, then the court should allow said statements to be admitted into evidence”. *Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008)* Each of the statements recorded from the

arresting officer were describing either the accident scene or the actions of the Appellee. The officer made the statements immediately upon observing the situation or condition described by the statements. Furthermore, the video contains highly probative evidence such as witness temperament and speech patterns and the vehicle and roadway layout- a key component of determining the issue of exigency in regard to the blood draw. *Fears v. State (2016) Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.)*

Conclusion

The Appellant, the State of Texas, followed and put forth a set procedure that was followed to the highest of ethical standard. The arresting officer acted, regarding the first issue, in the best interest of maintaining a probative evidence. In regard to the second issue, the arresting officer was merely stating his initial observation of the scene, making the audio and visual admissible under the “present sense impression” rule.

Prayer

The State of Texas, Appellant, prays you uphold the decision of the trial court, and reverse the decision made during the first appeal.

Respectfully Submitted,

Kennedi Ford

Kennedy Onic

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT

AUSTIN

Brief for Appellee

Kennedi Ford

Kennedy Onic

Duncanville High School

STATEMENT OF THE CASE

Following the trial court's denial of two motions to suppress, Appellee Cameron Shepard entered a guilty plea to the charge of intoxicated manslaughter. In the first appeal, the court reversed the decision of the trial court, causing The State of Texas, Appellant, to request for a second. The motions in the trial court, pertaining to a warrantless blood draw and the arresting officer's body camera footage, are the two issues presented on appeal.

STATEMENT OF FACTS

On June 30, 2018, Officer Cole of the Austin Police Department was dispatched to the scene of a car accident near downtown Austin. Upon his arrival, Cole turned on his body camera and observed a presumably-deceased female in the roadway and a small car with two occupants. After administering a Standard Field Sobriety Test (SFST) on the driver (Appellee), Officer Cole formed the opinion that Shepard was driving while intoxicated and had caused the death of the female.

Initially, the appellee agreed to provide a blood sample; however, upon arrival at the hospital, Shepard withdrew his consent. Following Shepard's withdrawal of consent, Officer Cole contacted the "on-call" magistrate with the intent to obtain a warrant. The magistrate, occupied with a juvenile, was unable to assist Cole with his request; Officer Cole made no further attempt to locate a magistrate and, despite Shepard's objections, proceeded with the blood draw without a warrant.

In Shepard's view, the warrantless blood draw and footage from Cole's body camera did constitute evidence suppression in the trial court. Nevertheless, the trial court denied these motions and Shepard entered a guilty plea.

During the hearing of the first appeal, the court ruled in Shepard's favor, causing The State (Appellant) to request another.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Issue One: The Fourth Amendment to the United States Constitution establishes the right of the people to be secure in their persons, and remain free of unreasonable searches and seizures, unless a warrant is issued based upon probable cause. A search that bypasses this amendment- hereby referred to as a "warrantless search"- is only deemed constitutional if it falls within a recognized exception. Weems v. State 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016).

As cited in Missouri v. McNeely, the aforementioned exception must fall within circumstances of exigency. Under the exigency exception, a warrantless blood draw is justified if the circumstances surrounding it are "so compelling that a warrantless search is objectively reasonable under the Fourth

Amendment". Missouri v. McNeely, 133 S. Ct. 1552 (2013). As adopted in *Schmerber v. California*, and reaffirmed in *McNeely*, the court must utilize a "totality-of-circumstances" approach in order to properly analyze the case at bar. Missouri v. McNeely, 133 S. Ct. 1552 (2013). Upon review of the totality of circumstances in this record, it is evident that Shepard's warrantless blood draw was not justified by exigent circumstances. While there are aspects of Shepard's blood draw that do weigh in favor of exigency, the totality of the circumstances found in the record do not warrant a finding of exigency.

According to the affidavits obtained during the trial court proceedings, Officer Cole stated he "knew there was the possibility of an increase in unsafe, intoxicated drivers on the roadway". The aforementioned statement suggests that substantial delay in obtaining Shepard's blood sample was somewhat foreseeable, and not a measure that is based upon "hindsight's omniscience". Although the time needed to procure a warrant is a viable circumstance in the consideration of exigency, it is clearly stated in *Missouri v. McNeely* that it is "the responsibility of the state to exhaust all avenues and provide reasonable outlets to do so, in regard to the fourth amendment". Cole v. State 490 S.W.3d 918 (2016). The institutional delay, brought forth by the Appellant, is one that should not be held against the Appellee. Suppose that, instead of a delay, there were procedures to ensure officers could routinely obtain warrants in a timely manner; the argument would not stand for exigency.

Based on the aforementioned arguments, it is clear the warrantless blood draw was not justified on grounds of exigent circumstance, and thus, unconstitutional.

Issue Two: In regard to the second issue, whether the admittance of Officer Cole's body camera footage should have been suppressed, the Appellee stands firmly that, according to the Texas Rules of Evidence, the footage contained hearsay; thus, the audio and visual captured by Officer Cole should have been suppressed. The video recording from Officer's Cole body camera consists of a narration of what he was observing at the crime scene including his interviews with witnesses and the defendant. If this video were transcribed word-for-word and offered as evidence by the State, it would be properly excluded as an offense report. Rule Evidence 803 (8)(B). However, as seen in the affidavits, the Appellant is attempting to admit only certain segments of the audio and visual recordings. Therefore, the trial court erred in admitting the portions of the video in which the officer was narrating the events that the arresting officer perceived. Even though his statements were made contemporaneously with the events described in the video and thus may possibly be considered a present sense impression, it has been upheld that "present sense impression is not an exception to the hearsay rule", requiring the video be excluded. Fischer v. State 252 S.W.3d 375 (Tex. Crim. App. 2008).

Conclusion

In consideration of the warrantless blood draw, the events leading up to Cameron Shepard's arrest were prognostic-able; therefore, stating the events did not constitute exigency would not be weighing the arresting officer's actions

against hindsight's omniscience. Due to this, it is evident that occurrences were avoidable and not constitutive of the exigency exception.

In regard to issue number two, the video footage captured by the arresting officer's body camera contained hearsay due to its conclusion of stray comments and direct conversation with other parties included in the trial court's case. This evidence should have been suppressed in the trial court, and the first Appeals Court was correct in its reversal.

Prayer

We pray this court rule in favor of the Appellee and uphold the decision of the first Appellate Court.

Respectfully Submitted,

Kennedy Onic

Kennedi Ford

Attorneys for Appellee

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Naomi Sanchez

Sebastiane Caballes

Duncanville High School

STATEMENT OF THE CASE

Appellant Cameron Shepard was charged with the offense of intoxication manslaughter. Prior to the trial, Mr. Shepard filed a motion to suppress the evidence of the results of a blood draw in addition to a body camera video filmed by the arresting officer. After his motion was denied in regards to both pieces of evidence, Mr. Shepard entered a plea of guilty to the charge and filed this appeal alleging the lower court erred in failing to suppress both pieces of evidence.

STATEMENT OF FACTS

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident involving the appellee, Cameron Shepard, located near downtown Austin. Upon Cole's arrival on the scene, he proceeded to activate his body camera which recorded audio and video from the perspective of the officer. A deceased female as well as a small car occupied by two persons was found at the scene. Cole proceeded to administer a Standardized Field Sobriety Test on the driver/appellee, Cameron Shepard. Based upon the results of the tests as well as his observations of Mr. Shepard, Officer Cole concluded that the appellant was intoxicated while operating a vehicle which led to the death of the female.

Mr. Shepard had initially agreed to provide a blood sample; however, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole then attempted to obtain a warrant through the "on call" magistrate who was unavailable at the time. The officer made no further attempts to locate another

magistrate or obtain a warrant, rather Officer Cole transported the appellant Mr. Shepard to the hospital where a blood sample was then drawn despite the objections raised by the appellee.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

ARGUMENT

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

The Fourth Amendment establishes that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” In addition, “the taking of a blood specimen is a search and seizure under the Fourth Amendment.” *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). However, the Fourth Amendment also contains special exceptions to these protections, as stated in *Mcneely* “...cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization...” *Id.* The actions taken by Officer Cole fall under the “exigent circumstance” exception to the warrant requirement and should not be suppressed.

The exigent circumstance exception justifies a warrantless seizure of evidence if “the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Id.* The determination of exigency is done through a totality-of-circumstances approach which is justified through a two step process:

1. Probable cause to search must exist—that is, “reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead a man of reasonable prudence to believe that the instrumentality... or evidence of a crime will be found.”
2. The State must establish the existence of an exigent circumstance justifying the warrantless search.

Examining the circumstances surrounding the case at hand, we see that the 1st step is clearly satisfied. Officer Cole was dispatched to the scene of the accident involving Cameron Shepard. Upon arrival Cole sighted a deceased female along with a small vehicle occupied by two people. Thus, probable cause does indeed exist. The burden of establishing exigency, the 2nd step, is placed upon the State as stated in *Gutierrez v. State*, 221 S/W/3d 680, 686-87 (Tex. Crim. App. 2007). The Appelle contends that the 2nd step of this process is not satisfied, however observing the actions of Shepard in conjunction with the circumstances surrounding the case, exigency can be easily established.

After performing a Standardized Field Sobriety Test, Cole decided to transport Shepard from the accident to obtain a blood draw. Shepard initially gave consent to the blood draw but suddenly withdrew his consent upon arrival

the hospital. Cole then attempted to contact an on call magistrate judge in order to obtain a warrant but to no avail. Throughout the entire time of these events, the blood alcohol levels of Cameron Shepard were in decline. In addition, Shepard also requested medical treatment which would have an adverse effect on the presence and level of alcohol in Shepard's blood. *McNeely* cites *Tyler*, 436 U. S., at 509 in that if there is "...no time to secure a warrant..." a warrantless search under exigency is justified. Officer Cole faced a diminishing time frame as the natural dissipation of blood in conjunction with the lack of readily available magistrate to obtain a warrant, the time it took to transport Shepard from the scene of the accident to the hospital, and Shepard's actions in giving then withdrawing consent and seeking medical treatment. Cole acted proactively in ordering a warrantless blood draw in lieu of the circumstances present as to avoid the loss of crucial evidence. Furthermore, the court must be careful in its review. "[H]indsight distorts a proper exigency analysis' focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search." *Cole v. State*, 490 S.W.3d 918 (2016). The determination of exigency must purely rely on the officer's knowledge and belief. The key differences between the case at hand and the likes of *McNeely* is in the vastly greater amount of circumstances at play in this case. Thus, the lack of severity in *McNeely* led the court to correctly rule against any exigency in that case; however, applying the decision in *McNeely* to this case without examining the other circumstances would be negligent. The case at hand today clearly is greater in its severity, and the circumstances

surrounding Officer Cole necessitated the need for a warrantless blood draw and the draw should be admissible evidence.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Examining the statements made by Officer Cole in the body camera video, the issue at hand relies on whether this video constitutes a present sense impression as in Rule 803(1). In order to qualify as a present sense impression "a statement requirement requires immediacy." *State v. Thompson*, 146 Ariz. 552, 557, 707 P.2d 959, 961 (App. 1985).

The present sense impression exception to the hearsay rule "is based on the notion that 'substantial contemporaneity of event and statement' negates the likelihood of fabrication or misrepresentation." *State v. Damper*, 223 Ariz. 572. In addition "we assume, as a general matter, that when the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable." *State v. Tucker*, 205 Ariz. 157. Officer Cole's statements were contemporaneous with the events occurring and were made in a spontaneous manner. Cole simply described what had occurred on the scene, with no instance or moments of reflection present. Similarly a caller describing the appearance of two burglars and their actions was a proper present sense impression. *State v. Rendon*, 148 Ariz. 524, 526, 715 P.2d 777, 779, 781 (App.1986).

Even if the admission of this video was in error, should the court reach the conclusion that the warrantless blood draw was permissible, the admission

of inadmissible hearsay constitutes non-constitutional harmless error. *Lee v. State*, 21 S.W.3d 532, 538. Harmless error does not support a remand of a case for a new trial. *Evans v. State* (Tex.App—Houston [14th Dist.] 2006). With the blood draw evidence present, the evidence provided by the body cam video does not influence the verdict substantially if at all to reach the conclusion that its inclusion is harmful, nor did it affect the substantial rights of the defendant.

CONCLUSION

Based on the exigency established by the State as well as the present sense impression provided by the video, the decisions to suppress both pieces of evidence by the lower court should be affirmed.

PRAYER

For these reasons we pray that this court affirms the decision of the lower court.

Respectfully Submitted By:

Naomi Sanchez

Sebastiane Caballes

Attorneys for Appellee

Duncanville High

School

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellee

Naomi Sanchez

Sebastiane Caballes

Duncanville High School

STATEMENT OF THE CASE

___Appellant Cameron Shepard was charged with the offense of intoxication manslaughter. Prior to the trial, Mr. Shepard filed a motion to suppress the evidence of the results of a blood draw in addition to a body camera video filmed by the arresting officer. After his motion was denied in regards to both pieces of evidence, Mr. Shepard entered a plea of guilty to the charge and filed an appeal alleging the lower court erred in failing to suppress both pieces of evidence.

STATEMENT OF FACTS

On June 30, 2018, at approximately 2:00 a.m., Officer Cole of the Austin Police Department was dispatched to an accident involving the appellant, Cameron Shepard, located near downtown Austin. Upon Cole's arrival on the scene, he proceeded to activate his body camera which recorded audio and video from the perspective of the officer. A deceased female as well as a small car occupied by two persons was found at the scene. Cole proceeded to administer a Standardized Field Sobriety Test on the driver/appellant, Cameron Shepard. Based upon the results of the tests as well as his observations of Mr. Shepard, Officer Cole concluded that the appellant was intoxicated while operating a vehicle which led to the death of the female.

Mr. Shepard had initially agreed to provide a blood sample; however, upon arrival at the hospital, Mr. Shepard withdrew his consent. Officer Cole then attempted to obtain a warrant through the "on call" magistrate who was unavailable at the time. The officer made no further attempts to locate another magistrate or obtain a warrant, rather Officer Cole transported the appellant Mr.

Shepard to the hospital where a blood sample was then drawn despite the objections raised by the appellant.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

ARGUMENT

Issue Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

The Fourth Amendment establishes that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” In addition, “the taking of a blood specimen is a search and seizure under the Fourth Amendment.” *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The involuntary extraction of blood from the body of Mr. Shepard is clearly an explicit transgression of the protections afforded by the Fourth Amendment.

The United States Supreme Court has defined clear exceptions to the warrant requirement. In regards to the issue at hand, the State contends that the blood draw falls under the “exigent circumstance” exception to the warrant requirement. This exception justifies a warrantless seizure of evidence if “the

needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Id.* The determination of exigency is determined on a totality-of-circumstances approach.

In order to validate a warrantless search based on exigent circumstances, the State must satisfy a two step process.

1.) Probably cause to search must exist—that is, “reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead a man of reasonable prudence to believe that the instrumentality... or evidence of a crime will be found.”

2.) The State must establish the existence of an exigent circumstance justifying the warrantless search.

Without establishing probable cause and exigent circumstances, a warrantless search will not stand. *Gutierrez v. State*, 221 S/W/3d 680, 686-87 (Tex. Crim. App. 2007).

The burden of justifying a warrantless search and seizure is clearly placed upon the State, who fails to fulfill the second step outlined in *Gutierrez v. State* which requires the establishment of an exigent circumstance. The facts hold that Officer Cole did not choose to pursue further means to obtain a warrant after his initial attempt to obtain a warrant from the “on call” magistrate after Mr. Shepard chose to withdraw his consent to a blood draw. These circumstances are insufficient to establish exigency per se as “neither the potential delay to obtain a warrant... nor appellant’s belligerence create[s] an emergency that

justifie[s] the State's acting without a warrant." *Id.* Furthermore it is "concluded that [it] requires more than mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). It is clear that simply because the single "on call" magistrate contacted by Officer Cole was unavailable does not create an exigent circumstance that qualifies an exception to the need to obtain a warrant. The record holds that eight (8) other judges were available and that Officer Cole possessed the necessary information to contact those judges. There is a clear difference between the lack of information that would undoubtedly create an emergency necessitating a warrantless blood draw and the conscious decision to forgo readily available resources as found in the record of this case.

Officer Cole's negligence in failing to properly obtain a warrant, in addition to the need for more than the mere dissipation of alcohol levels in an individual's blood stream to justify exigency clearly exhibit that the trial court erred in failing to suppress the results of the warrantless blood draw.

Issue Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Under the Rule of Evidence 803(8)(B) the contents of the body camera video, should they be transcribed word-for-word and offered as evidence by the State, it would be properly excluded as an offense report.

Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay. Although

Rule 803(1) provides an exception to “present sense impressions”, the constitution not only dictates that law more specifically applicable to the circumstance controls, but “on-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of a future prosecution.” *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008). This differs vastly from the spontaneous and unbiased narration outlined under the exception a present sense impression. Furthermore it has been established that “[an] officer’s statements to the camera amounted to a speaking offense report.” *Id.* The record shows that Officer Cole made statements such as “your speech is a little slow as well” when describing Mr. Shepard, “it’ll be intox manslaughter” mere minutes after arriving on the scene. These statements indicate the lack of spontaneity in Officer Cole’s speech, and “reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious “thinking-it-through” statements are not proper present sense impressions, because [t]hinking about it destroys the unreflective nature of a present sense impression.” *State v. Thompson*, 146 Ariz. 552, 557, 707 P.2d 959, 961 (App. 1985). Moreover, “to qualify as a present sense impression, a statement require[s] immediacy.” *Id.*

Officer Cole’s narration lacked the nature of a present sense impression: immediacy, non-reflectiveness, and a non-conscious or non-calculated statement. Rule 803(1) in addition to the nature of Rule 803(1)(B) disqualifies Officer Cole’s statements as they were not made under a present sense impression and in turn categorize any verbatim transcriptions of the audio in the

video as an inadmissible police report. Thus, the trial court committed an error in its' failure to suppress the video recording from Officer Cole's body camera.

CONCLUSION

The lack of any exigent circumstances justifying a warrantless blood draw coupled with the inadmissibility of the body camera footage reveals that the lower court acted in error by denying the motion to suppress both the blood draw and footage as evidence. In order to preserve a fair and just trial, it is thus necessary to continue further proceedings with both pieces of evidence properly suppressed.

PRAYER

For these reasons we pray that this court reverses the decision of the lower court.

Respectfully Submitted By:

Naomi Sanchez

Sebastiane Caballes

Attorneys for

Appellant

Duncanville High

School

No. 03-18-01234-CR

**In the
Supreme Court of Texas**

**The State of Texas,
Appellant**

**V.
Cameron Shepard,
Appellee**

**On appeal from the Texas Court of Criminal Appeals,
Third District at Austin**

Brief of Appellant

**Semira Morgan
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Attorneys for Appellant**

Statement of the case

The Appellee Cameron Shepard was charged with intoxicated manslaughter. Before trial, Shepard filed a motion to suppress evidence regarding the blood draw and the audio portion of the film from the officer's body camera. After both motions to suppress were denied, Shepard entered a plea of guilty to the charges and filed this appeal. The Court of Appeals held that both the blood draw and audio should have been suppressed and set aside the conviction. The state appealed to this court.

Statement of the facts

On June 30, 2018 at around the time of 2:00 a.m., Officer Cole from the Austin Police Department was dispatched to an accident along a roadway not very far from Downtown Austin. Once on the scene, Officer Cole turned on his body camera. He identified a car accident with a deceased female named Chassidy Barnes. The defendant was trapped in the car, in the driver's seat. When Officer Cole arrived, he activated his body video camera which made an audio and video recording of the events that took place at the scene. Officer Cole then freed the defendant and presented him to EMS responders, who cleared him as uninjured. Officer Cole then administered the Standardized field Sobriety Test (SFST) on Mr. Shepard and finished around 2:45 am. The body camera made a visual and audio record of the events. After the performance of the test, Cole arrested the defendant on suspicion of Intoxicated Manslaughter. Officer Cole then transported Cameron Shepard to jail. When asked by Officer

Cole, Cameron Shepard consented to a blood draw, and Officer Cole transported the defendant to the hospital for that purpose. Around 3:15 am they arrived at the hospital. Once there Cameron withdrew his consent to the blood draw. So, Officer Cole then transported Cameron Shepard back to the jail to obtain a warrant. At approximately 4:15 a.m., Cole learned that the on call judge and the Chief judge were not available. Unaware of any other available judge, Officer Cole determined that any further delay would likely result in the loss of crucial evidence, and that an exigent circumstance existed which justified a warrantless blood draw. Officer Cole transported Shepard back to the hospital. On the way, Shepard started to complain of chest pains and requested narcotics for his pain. Officer Cole became concerned that medical treatment would taint the blood draw evidence. Upon arrival at the hospital, Officer Cole obtained the blood draw without the warrant around 5:00 am, 3 hours after the fatal accident.

Point of error 1: The Court of Appeals erred when it held the warrantless blood draw should have been suppressed.

The fourth amendment says “the right of the people to be secure in their persons houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. “The fourth amendment applies to the blood draw. *Schmerber v. California* 384 U. S. 757. Generally, the fourth amendment requires a warrant, but the court has created exceptions over time. The exception that applies in this case is exigent circumstances. An exigent circumstance “applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the 4th amendment.,

as stated in Missouri v. Mcneely 133 S.Ct. 1552. If an officer is faced with an exigent circumstance, then they are not required to get a warrant before drawing a blood sample as stated also in Missouri v. Mcneely 133 S.Ct. 1552. To determine whether law enforcement was faced with an emergency in a particular case, courts need to make a "case-by-case determination based on the totality of circumstances". Gutierrez State 221 S.W.3d 680, 686-87.

There are five factors to determine if the officer was faced with an exigent circumstance. The first factor is a compelling need of law enforcement and. Weems v. State. The severity of the crime will determine the compelling need of the officer. The second factor is the time it will likely take obtain the warrant. As stated in Missouri v. Mcneely 133 S.Ct. 1552, "there is a compelling need for official action and no time to secure a warrant". In Schmerber v. California 384 U. S. 757, the U.S. Supreme Court said exigent circumstance exists if the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." The third factor that will determine the exigency is the procedures in place for obtaining a warrant and availability of magistrate judges Cole v. State, 490 S.W.3d 918, and officers Weems v. State.

Determining whether an exigency exists is based on what the officer reasonably knows at the time. The court will not hold the officer accountable for information that was not known to him at the time of the search. Cole v. State, 490 S.W.3d 918. If the officer reasonably believes he was confronted with an emergency, in which the delay would lead to the destruction of evidence, in

which was necessary to obtain a warrant which was the holding in Missouri v. Mcneely 133 S.Ct. 1552.

Applying the law to this case demonstrates that all the requirements for an exigent circumstance are presented in the facts of this case. First, time was an issue in obtaining the warrant to be able to prove that Mr. Shepard was drunk. Like Missouri v. Mcneely 133 S.Ct. 1552 says" where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant". Officer Cole had to first arrive at the scene and thirty-seven minutes after the accident was reported he was able to start the SFSTs. Then fifteen minutes later Officer Cole was able to arrest Mr. Shepard. Next there was the time to take Mr. Shepard to the hospital. All this was happening as his alcohol levels were dropping. Cameron Shepard then started complaining about chest pains and asked for medication. Officer Cole needed to obtain the blood draw before any narcotics could be administered. Then by the time that they were able to take the blood draw five hours had passed. Mr. Shepard's BAC level had already dropped to around .035. In Missouri v. Mcneely 133 S.Ct. 1552 it states, "Nothing in the Fourth Amendment requires officers to allow evidence essential to enforcement of drunk-driving laws to be destroyed while they wait for a warrant to issue." considering the totality of the circumstances. The 4th amendment does not require for the Officer to lose evidence waiting for a warrant. Id.

Second, Officer Cole had a compelling need to obtain the blood draw in time to prove that Mr. Shepard was drunk at the time of the fatal accident.

Intoxicated manslaughter is a very serious crime that justifies a highly accurate and thorough investigation. Obtaining a blood sample would be compelling evidence for either side. Losing the evidence would have meant that a jury would have to decide the case on much more subjective evidence. Third, Officer Cole learned that the only judge on duty at the time was unavailable to give him a warrant, and that the Chief judge was unreachable. Fourth, Officer Cole followed all the procedures for obtaining the warrant in his jurisdiction as stated in *Weems v. State 6 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)*. before reaching the reasonable conclusion that there would not be enough time to obtain the warrant before the evidence would be lost. He contacted the on-duty judge and then placed a call to the chief judge. Going any further would have violated department guidelines and possibly resulted in disciplinary action against the office. And fifth, there is nothing in the record to suggest that any other officer was available to assist in obtaining the warrant; even if another officer had been available, he would likely have faced the same difficulty in finding a magistrate that Cole experienced. Therefore, the warrantless blood draw is permissible; it falls under exigent circumstances which justifies the search.

Despite the opinion of the court below, this court cannot hold Officer Cole accountable for not contacting the other magistrates available. He was not aware that they were available because they were in a different court. He was in a municipal court, while the other judges were in a county court. He was only aware of the two municipal judges that he contacted. Although Cole was aware of other off-duty municipal judges, the record does not indicate he had their

contact info. On the contrary, he was not allowed to contact them. As Cole v. State, 490 S.W.3d 918 says "... the potential timeliness of the search's result impermissibly views law enforcement action through the lens of hindsight.". We must look at what the officer knows. We ca not tell the officer what he should have done the next day when he was not aware of the circumstances. At that time, Officer Cole had a reasonable belief that he did not have any other magistrate or judge to contact at the time of the arrest.

Finally, from the record, most, if not all the exigency was caused Mr. Shepard, perhaps intentionally, When the defendant consented to the draw, the pair headed to the hospital. Once there, defendant withdrew his consent requiring a trip back to the police station. With no magistrate available, the pair returned to the hospital, and the defendant claim he was in pain and needed narcotics. Officer Cole reasonably believed that this medication would be offered to Shepard and would destroy or taint the blood test results. However, the nurses statement establishes that, once he was at the hospital, the defendant told the nurse he was fine; he did not complain of chest pains or request medication. These events suggest that the defendant not only created the situation, at least in part, but did not intentionally to avoid or at least delay the blood draw. Even if this was not his intention, this was the result, and the state should not punished for having to deal with the delay.

Point of error 2: Even if the trial court did not err in failing to suppress the blood draw, the error is harmless error and therefore is insufficient cause to set aside the conviction.

Lastly the blood draw should be considered harmless error, because letting it in did not harm the defendant. The error is harmful when “there is a reasonable likelihood that the evidence either alone or in context, moved the jury from a state of non-persuasion to one of persuasion beyond a reasonable doubt.”” State v. Thompson, 146 Ariz. 552, 557, 707 P.2d 956, 961. Ultimately, the defendant has made clear that he intends to use the blood draw to prove that he was not legally drunk at the time of the accident. The expert witness Dr. Sidney Tate used the Widmark calculation to determine that Cameron Shepard had a BAC level of .074 at the time of the accident as stated by Dr. Sidney Tate in his affidavit. The legal drinking limit is .08 under the Texas Penal Code Sec. 49.01 and Cameron Shepard’s BAC levels are below that.

Point of error 3: The Trial Court did err when it held the officers body cam audio should have been suppressed, because the audio is allowed under 803 (1).

The trial court did not err in refusing to suppress the audio from the officer’s body cam video because the audio is a present sense impression which is an exception to hearsay. The rule 803(1) states that audio is admissible if the audio is a “general sense impression”. The officer made impressions while testing the defendant of a field sobriety test. During the sobriety test officer Cole said “... He stopped between steps 4 and 5. Turn. All steps back are not heel-to-toe steps. Stop between 5 and 6.” The officer said these things as he was watching the defendant perform the test.

This is similar to the Arizona Court of Appeals, State v. Wright 370 P.3d 1122 case 370 P.3d 1122 (2016). A Tucson officer by the name of J.D. who

went undercover to expose Arthur Wright for possession and sale of a narcotic drug. When the officer was undercover he stated things that he was observing the two suspects doing in the car. Officer J.D. was reporting what he saw while the two suspects were distributing the narcotics. This case relates to ours because Officer Cole was stating out the performance and actions of Mr. Shepard as officer J.D. was. If the officer would have said things a little time after Cameron Shepard performed the test like Trooper Martinez did in Fischer v. State 207 S.W.3d at 850, it would not be considered a present tense impression. In Fischer v. State 207 S.W.3d at 850 the Trooper asked a couple of questions and walked back to his patrol car and recorded what he observed. The fisher case differs from ours because the officer in fisher had time to process his words and form his thoughts before recording them while walking to the patrol car. In our case the officer described what he was seeing as he saw it and did not have time to reflect on his observation as Trooper Martinez did. Therefore, this case involves a presence sense impression and the ruling in fisher does not apply here.

Rule 803(8) does not apply in this case because the recording is not a police report. A police report is a physical record of an incident written by police officers after the initial phase of the investigation. In our case, the officer was recording what the defendant was doing and had no intention of using this as a police report but merely to look back at the video as points to put in his police report. The officer's responsibility is to point out what the suspect does and make observations. Also, if a citizen were to point out the same thing that an officer did, the officer's statements would have to be questioned while we can

unquestionably submit in the citizens impressions. If anything, we should not doubt the officer's statements as he or she is an expert observer.

Point of error 4: Even if the Trial Court did not err when letting in the audio because it is harmless error.

Even if an error was made, it was harmless because admitting the audio, it would make no impact. As the case Anderson v. state 717 S.W.2d 622,627 (Tex. Crim. App. 1986) says "If the fact to which the hearsay pertains is sufficiently proved by other competent and un-objected to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error." The court has testimony and evidence to sufficiently prove the same thing that the audio would meaning the audio is harmless error. And as King v. State 953 S.W.2d 266,271 (Tex. Crim. App. 1997) says "The error is harmful if there is a reasonable likelihood that the evidence either alone or in context move the jury from a state of non-persuasion to one of persuasion beyond a reasonable doubt." Using the reasoning of King v State, the audio is not harmful. The audio tape does not give new information meaning it would not be able to persuade the jury in another direction. For example, in" State v. Thompson, 146 Ariz. 552, 557, 707 P.2d 956, 961, before trial, Thompson successfully moved to exclude several portions of officer royal's dashboard video of the field sobriety test and the outcome was still a guilty verdict. No matter how many pieces of evidence Thompson excluded, the story would not have disappeared since the officer's testimony would remain. The same reasoning is with Evans v. State 14-05-00332-CR, where the case says that "the admission of inadmissible evidence does not require reversal if the same facts are proved

by other proper testimony.” There is no material that would prove the innocence or guilt of Cameron Shepard in the videotape that would not already be said in the live testimony.

Prayer

Based on these arguments, Appellant State of Texas prays that this court reverse the judgement of the 3rd District court of Appeals and reinstate the Conviction of Cameron Shepherd.

Respectfully submitted,

Semira Morgan

Cora Hughes

Attorneys for Appellant, State of Texas

Judge Barefoot Sanders Law Magnet

No. 03-18-01234-CR

**In the
Supreme Court of Texas**

**The State of Texas,
Appellant**

V.

**Cameron Shepard,
Appellee**

**On appeal from the Texas Court of Criminal Appeals,
Third District at Austin**

Brief of Appellee

**Semira Morgan
Cora Hughes
JBS Law Magnet
Attorneys for the State of Texas,
Appellee**

Statement of the Case

The Appellee Cameron Shepard was charged with intoxicated manslaughter. Before trial, Shepard filed a motion to suppress evidence regarding the blood draw and the video from the officers body camera . After both motions to suppress were denied he then entered a plea of guilt to the charges and filed to appeal. The Court of Appeals held that both MTS should have been granted, and set aside the conviction. The state appealed to this court

Statement of the Facts

On June 30, around 2:00 am, Officer Cole was dispatched to an accident along a roadway. When he arrived he activated his body camera. Officer Cole found Cassidy Barnes in the roadway, who was deceased, and two people trapped in the car. Cameron Shepard, who was the driver, was cleared by the medics and Officer Cole began to administer the Standardized Field Sobriety Test on Cameron Shepard. Officer Cole believed Cameron Shepard was intoxicated while driving and caused the accident. Officer Cole then transported Cameron Shepard to jail and then to the hospital. Cameron Shepard withdrew his consent, so Officer Cole had to transport Cameron Shepard back to the jail. He called 2 judges who were not available but there were also eight other judges available. He made no attempt to contact them and transported Cameron Shepard back to the hospital because Cameron Shepard was complaining of chest pains. Officer Cole then proceeded to take the blood draw without a warrant against Cameron Shepard's consent.

Counterpoint of error 1: The Court of appeals correctly held that the trial court erred by admitting the evidence collected from the blood draw as it violates the defendants 4th amendments right.

The warrantless blood draw violated Mr. Shepard's 4th amendment right. "Search warrants are ordinarily required for searches of dwellings... and that no less could be required where intrusions into the human body are concerned" as stated in Missouri v. Mcneely 133 S.Ct. 1552 (2013) 133 S.Ct. 1552 . As Johnson v. United States 333 U. S. 10, 13-14 (1948) states, "that the importance of requiring authorization by a neutral and detached magistrate ... before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great. A warrantless search or seizure is always unreasonable unless it falls under recognized exception to warrant requirement. *Id.* One exception would be if there were exigent circumstances. *Id.* The state is claiming the officer was faced with exigent circumstances. But the court below correctly held that this case does not present exigent circumstances that would justify the unreasonable search.

In Missouri v. Mcneely 133 S.Ct. 1552 (2013), the Supreme Court of the United States stated, "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 they do so". So, if the officer can get a warrant he must do so. In *Fears v. State*, the Texas Court of Criminal Appeals says, "Without establishing probable cause and exigent circumstances, a warrantless search will not stand." Whether an exigent circumstance exists depends on the circumstances of each case. *Id.*

The record states that there was another judge available at the time to help Officer Cole obtain a warrant. Officer Cole was not aware of this because the State and his department failed to make available the information needed to contact the county judges. This was a mistake provoked by the states lack of rules not by exigent circumstances. It is the state's burden and should not be held against Mr. Shepard. In Weems v. State there was a lack of hospital procedures which was one of the reasons the blood draw was not allowed. In Weems the facts of the case are very similar to our case. In Weems there was a DWI accident and a warrantless blood draw which is the same as this case. In Weems the record did not reflect what procedures to follow. We should apply the ruling of this case to ours. There was a lack of information of available judges or magistrates to assist in obtaining a warrant. The fact that Officer Cole was not aware and that the State had not fully prepared for this situation should not be held against Cameron Shepard and should not be justified and used as an excuse of exigent circumstances. The state has procedures in place that create exigent circumstances within itself. These are foreseeable circumstances that could be prevented. Unlike a situation where the circumstances cannot be prevented and cannot be prepared for.

They were still able to trace back Cameron Shepherds alcohol levels to when the accident occurred. If Officer Cole would have tried to obtain a warrant in the time he had, they would still be able to find his BAC level at the time of the accident. Dr Sidney Tate, who is an expert witness, can use the Widmark calculation which is contained in the Retrograde Extrapolation Manual. When you use the Widmark calculation and information on the drinks Cameron Shepard

drunk they would be able to determine his alcohol levels. So, there was no compelling need for Officer Cole to obtain a warrant when it comes to trying to find his BAC levels. For there to be exigent circumstances "the needs of law enforcement are so compelling that a warrantless search is objectively reasonable." There were no compelling reasonable needs for Officer Cole to conduct a warrantless blood draw.

The fact that this is a DWI case does not automatically cause exigent circumstances. In Missouri v Mcneely 133 S.Ct. 1552 (2013) the Supreme Court ruled that "the body's natural metabolization of alcohol in the bloodstream does not create a per se exigency that justifies an exception to the Fourth Amendment warrant requirement." So, in this case time is not a factor. There were no time delays that affected Officer Cole from being able to obtain the warrant. It took Officer Cole around fifteen to twenty minutes to administer the SFST. The time needed to drive Cameron Shepard to the hospital once he started to complain about pains was not that long as Officer Cole stated. In Missouri v. Mcneely 133 S.Ct. 1552 (2013) they looked at where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident. So, time is not a factor. In this case Officer Cole had time to secure a warrant. For there to be exigent circumstances "there is compelling need for action and no time to secure a warrant".

In Missouri v. Mcneely 133 S.Ct. 1552 (2013) the reason they ruled in favor of Mcneely is because they wanted to force states to make better procedures. We should apply the same reasoning to our case, so that in the future an officer will not have trouble locating a magistrate when there is one

available. If we allow the blood draw to be admissible, the state and the department would not have to worry about information and contact for the judges being available. It will impact future cases and never fix the lack of procedures that the state failed to establish. We need to hold the State accountable for their failure in establishing and setting up procedures in this scenario.

For those reasons the blood draw shall not be admissible. There was no reasonable need to obtain the warrant. Time was also not a problem when it came to obtain the warrant. Lastly, Officer Cole not knowing about the other judge available is the States problem, and just because the State messed up it should not be justified by exigent circumstances. Therefore, when you look at the totality of the circumstances there were no exigent circumstances presented in this case that justify the warrantless blood draw.

Point of error 2: The trial court erred in allowing the admission of the video as it is hearsay and violates rule 803(8)(b)

A piece of evidence is hearsay if 1 the declarant does not make while testifying at the current trial or hearing and 2 if a party offers in evidence to prove the truth of the matter asserted in the statement. This audio falls under these two requirements of hearsay. First is was not made during the trial and so it is hearsay

Officer Cole said things such as "Alright. Stand just right here, give me a second. Now you smell like alcohol, and your eyes are red and a little watery. Have you had anything to drink tonight?" Officer Cole said these extra things like smelling like alcohol to make a report to the jury what Shepards state was

and how that was the cause of the the accident. In the fisher v state case in paragraph 2 it states that hearsay can be included if it is unrelective statements. In our case officer cole said statements to later offer these to a jury. Officer Cole says "We'll talk when he gets out. It'll be intox manslaughter." Officer Cole says this before any interview and any investigation meaning he had his mind made up on what this case was and only asked questions about alcohol after that but did not ask questions about where he had come from or how he was feeling but since he had killed another person he was only interested in asking questions that would convict him. Officer Cole also relied on what the witness Imani Hanes said, and she is the one who caused the accident and did not have her glassed-on Officer Cole did not how much he drank, if he was the one drinking, or if he was the one that caused the accident but jumped to conclusions whenever he smelled a little alcohol coming from the car and a hint of alcohol coming from Shepard mouth. If anything, it could have been the passenger that was drunk but since Shepard was the driver he pointed out the smell to him to make it seem that he was the one drunk. Officer Cole does not answer the question that Shepard asks about passing one of the tests and officer Cole did not answer leaving the conclusion that he did in fact pass the test for a non-drunk person and did not answer because it would not help him prosecuting Shepard. Second this would not help our side defend ourselves because the dominance that the police officer has in the conversation. Mr.Shepard had just gotten out of an accident and Officer Cole disregarded the test that he did pass and went into detail on the tests that he did not pass and also disregarded the fact that Shepard had been in an accident and would not have the stability that a normal

person would. In addition, Mr. Shepard did not respond like an intoxicated person and the officer did not see that because he was determined to find things that would make him guilty. Another thing that would back that up would be that officer Cole said they were going to perform a blood draw and did not ask if he could because the sobriety test did not give Officer Cole enough to prove he was guilty. This should not be allowed in because Officer Cole made assumptions that would later effect Shepard's trial.

Everything counts as it can be the tie breaker, meaning the audio is not harmless

The officer's commentary infers that Cameron is intoxicated when the case could be that he was injured and not able to do the simple tests because of damage which could be supported because Mr. Shepard did say he needed to go to the hospital.

It is harmful error because it does not give a neutral argument and therefore it does not give the defendant an opportunity to defend himself. In state v wright 370P.3d 112 the officer made statements that about every action that the suspect and everybody around him were doing. All officer Cole was doing was stating negative things about the defendant like the watery bloodshot eyes, but the doctor said it herself that shepherd's eyes indicate that he was or possibly could not have been crying and we can prove that that statement is true because officer Cole left out one indication which is that his eyes were not twitching.

Point of error 3: the evident is harmful error because it is product of officer Cole being bias and violates Cameron Shepards 7th amendment right

The audio violates also our 7 amendments right. The 7th amendment guarantees that the defendant can confront the witnesses against him. In our case the exhibit 1 contains damaging hearsay within hearsay from the dispatcher. The dispatcher says "Yes, caller was following small car that was weaving across lanes, almost hit a few cars..." if the court allows this in into evidence the jury will hear this statement without the defendant having an opportunity to confront either the dispatcher or the unknown caller. We cannot confront the dispatcher in trial so that violates or 7th amendment right if we allow this harmful piece of evidence in it could be the deciding factor because of the one line from the dispatcher and the unknown caller said. As what

Sheffield v State S.W.3d ,2006 WL 335911, at *9 says " the admission of inadmissible evidence does not require the reversal if the same facts are proved by other proper testimony." this will change the outcome of the case in a harmful and unjust way and will not be backed up with other testimony and therefore the audio in its entirety is hearsay and harmful error.

Prayer

Based on these arguments, Appellee Cameron Shepherd prays that this court affirms the decision of the 3rd District Court.

Respectfully submitted,
Semira Morgan

Cora Hughes

JBS Law Magnet

Attorneys for the State of Texas,

Appellee

No. 03-18-01234-CR

**In the
Supreme Court of Texas**

**The State of Texas,
Appellant**

V.

**Cameron Shepard,
Appellee**

**On appeal from the Texas Court of Criminal Appeals,
Third District at Austin**

Brief of Appellant

Lauren Nutall

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Statement of the Case:

Appellee, Cameron Shepard, plead guilty to Intoxication Manslaughter after his motion to suppress the results of his blood draw and the audio recorded on arresting officers body camera were denied. The Court of Appeal set aside the conviction on grounds that both motions should have been granted. The state has filed this appeal alleging three Points of Error.

Point of Error #1 - The Court of Appeals erred by not allowing the blood draw to be admitted as evidence because the arresting officer was under exigent circumstances.

Point of Error #2: The Court of Appeal erred by ruling that the audio tape should be suppressed; the trial court did not error in denying the motion to suppress the audio on Officer Cole's body camera because under Rule of Evidence 803(8) the audio is not hearsay.

Point of Error #3:

If the trial court erred in failing to suppress the audio and the Court of Appeals did not, then it's harmless error because the audio itself is cumulative to the testimony of Officer J. Cole and the eyewitness.

Statement of Facts:

At approximately 2 a.m., on June 30, 2018, Officer Cole responded to an accident near

downtown Austin. The audio captures Officer Cole as he starts to describe the scene. Officer Cole's body camera captured the exact moment when the officer found a small car with two occupants and the body of a deceased female. Officer Cole then administered the Standardized Field Sobriety Test to driver, Cameron Shepard. As he administered the SFST, he described the actions of Mr. Shepard as he failed the test and began to not comply with instruction given by Officer Cole. Officer Cole determined that Appellee Cameron Shepard was indeed intoxicated and took him into custody. Initially, Mr. Shepard agreed to have his blood drawn, but upon arrival at the hospital, he withdrew consent. Officer Cole returned the suspect to the jail to obtain a warrant. Cole contacted the local magistrate and was informed the magistrate was unavailable. He then called the Chief Judge, who did answer. After completing procedure, Officer Cole transferred Mr. Shepard back to the hospital where they obtained his blood in order to preserve the blood from further contamination. During the trip back, Mr. Shepherd complained of chest pains and asked for narcotics, but he did not inform the nurse of these pains or repeat his request. Instead, Mr. Shepherd asked the nurse for a lawyer before the blood draw. The nurse did not respond to his request. Instead she drew the blood without further delay at 5:00 a.m., 3 hours after the accident.

Point of Error #1 - The Court of Appeals erred by not allowing the blood draw to be admitted as evidence because the arresting officer was under exigent circumstances.

There is an exigent circumstances exception to the warrant requirement. It is stated that “that exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant.” ***Missouri v. McNeely, 133. S.Ct. 1552 (2013)***. The trial court did not err in admitting the evidence of the blood draw because, although it was acquired without a warrant, Officer Cole was acting under exigent circumstances. Had Officer Cole not acted as quickly as possible, it would have resulted in the loss of evidence.

According to *Villarreal*, “a warrantless search is per se unreasonable unless it falls within a well -recognized exception to the warrant requirement.” ***Villarreal [full citation omitted in the records]*** Exigency is determined by many factors. First, the availability of other officers and a magistrate judge can determine whether exigency is present. ***Missouri*** Although there were other police officers present at the scene of the accident, because of the severity of the crime and the involvement of a deceased female, each of these officers was unavailable to assist Officer Cole in his attempt to obtain a warrant. Officer Cole did attempt to contact the “on-call” magistrate judge. However, due to providing magistrate warnings to a juvenile, this judge was unavailable at the time. Officer Cole was unaware that there were other accessible judges and was unable to visit a judge at their home due to a rule set in place by the state of Texas. Officer Cole exhausted what he believed to be every resource available to him.

Another factor that determines exigency is the time available to obtain a warrant. Before arriving at the hospital, Mr. Shepard had given Officer Cole consent to withdraw his blood. However, upon arrival, Mr. Shepard withdrew his consent. Mr. Shepard also requested medical attention to address the pain in his back.

Officer Cole needed to acquire the blood draw before having any medical procedures performed, lest the evidence of the blood draw be polluted. Officer Cole also had to obtain the blood sample before the evidence in Mr. Shepard's bloodstream dissipated. In *Missouri v. McNeely*, "the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed." Individual characteristics and the circumstances in which the alcohol was consumed.

Another factor that determines exigency is based on what the officer reasonably knows. ***Schmerber v. California*, 384 U.S. 757 (1966)**. In *Weems v. State*, it was stated that "An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search." Because Officer Cole was not aware of the other magistrate judges accessible to him, he should not be punished for acting under presumably exigent circumstances and it is unreasonable to punish Officer Cole for not contacting the other magistrate judge.

According to *Missouri v. McNeely*, "the destruction of evidence implicates the exigent-circumstances doctrine." *McNeely* also states that "the natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence." Officer Cole had a compelling need and his actions were reasonable based on the totality of the circumstances.

Point of Error #2: The Court of Appeal erred in failing to deny the motion to suppress the audio; the trial court did not error in denying the motion to suppress the audio on Officer Cole's body camera because under Rule of Evidence 803(8) the audio is not hearsay.

Rule 803 of the Texas Rules of Evidence allows exceptions to the rule of Hearsay. The Present Sense Impression Rule is one of these exceptions; stating that, "...a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it is not hearsay. The audio recorded on the night of the offense was attached to the body cam worn by Officer J. Cole, who arrived on scene to a vehicular accident near downtown Austin. The audio recorded clearly falls within the Present Sense Impression clause. In this audio, Officer Cole describes the encounter with Appellee, Cameron Shepard, as it occurs. As Officer Cole administers the Standardized Field Sobriety Test, the audio picks up the exact moment that Cameron Shepard failed to comply with the officer's directions, this is proven when Officer Cole describes the instructions given to Mr. Shepard and gives description to the action taken during the exam. After administering the heel to toe test, he described Mr. Shepard's actions stating, "He stopped between steps 4 and 5. Turn. All steps back are not heel to toe. Stops between 5 and 6." This clearly describes what Office Cole is perceiving while he perceives it. Officer Cole was merely describing what he saw. The audio continues to reveal how Mr. Shepard failed the third test administered by Officer Cole and ends with Officer Cole stating that he was taking the defendants to run some blood tests. This in no way violates the rules of hearsay but follows the exception to it.

To the extent that the court below relied on *Fischer v State* to reverse the conviction, the facts of that case are different form the case before the court. That case, however, was different because the officer had time to reflect on his statements, our office did

not. There was no time for Officer Cole to reflect, Fisher said the rationale of Rules 801(1) is that the statements are 'safe from any error,' since the person making the statement has no time to be carried by insecurities. Officer Cole meets this exception because these statements were= his perceptions of the events as they happened.

Appellee argues that Rule 803(8) states that a record or report made by a law enforcement personnel is not an exception to hearsay. This, however, does not apply to our case because Officer Cole's declaring what he perceives is not an official report. These statements were not written down and filed into a police report, therefore they are not considered an official report. There was no intent to use the information as reason to report to a judge and jury, but to have a depiction of the scene and interaction. If the court decides that this case does violate 803(8), then under *Fischer v. State* "... hearsay may be admissible under one hearsay exception even if its inadmissible under another." So, we see that Officer Cole can testify into the microphone of his body camera without it being classified as a documented report. The State, again, emphasize the purpose of the body camera and assures that a police officer's words are not of legal duty. Legal duty plays a massive part to Rule 803(8), which Officer Cole was not under. Officer Cole choose to state what he saw, and he had a right to, as indicated in *Fisher v. State* 252 S.W.2d 735 (Tex. Crim App. 2008). We have no reason to believe that Officer Cole, from the Austin Police Department, is not trustworthy or to believe he had malintent in making the statements. The Court of Appeals failed in denying the motion to suppress under Rule 803(1).

Point of Error #3:

If the trial court erred in failing to suppress the audio and the Court of Appeals did not, then it's harmless error because the audio itself only gives truth to the recounts of Officer J. Cole and the eyewitnesses.

The audio is an instant description of the scene and events that we are discussing in this court, from Officer Cole's point of view. The same officer who has given the account to what happened the night of the incident. What we know about the night comes from what Officer Cole has testified to. This is supported by the audio and footage collected on the officer's body camera. If the it only proves what has already been given, then the significance would be none. No harm will be done. The admission itself does not violate any Rule, nor does it feed new information to this court. It's an extra pair of eyes and an extra descriptor to be able to serve justice the way it was meant to be. The purpose of an officer's body camera is to record the interaction that the officer is having. It is essential to have a clear account of what happened in order to correctly serve justice and that is what Officer Cole's body camera provides for us.

Evans v. State explains how, "...the admission or inadmissible of evidence does not require reversal if the same facts are proved by other proper testimony." We know from Officer Cole that Mr. Shepard failed the SFST and failed to comply with one of the tests, which is seen in the footage and is further in detail by Officer Cole's statements. We know that Officer Cole made the assessment that Mr. Shepard was intoxicated based on his slur speech, inability to walk straight, and Mr. Shepard's constant confusion. This court can make that same

assessment not only by words, but by the footage and audio that put those serving justice in the mind of Officer Cole. This is, nonetheless, harmless error.

The audio is not hearsay and was improperly suppressed because it falls under Texas Rule of Evidence 803(1), Rule of Evidence 803(8), and the audio itself being harmless error. The trial court rightfully denied the motion to suppress understanding it was not hearsay and by these reasons this court must find favor regarding the State.

Prayer

Whereas, these arguments being considered, Appellant, The State of Texas, prays that this honorable court enter an order reversing the court of Appeals in all respects and reinstate the judgement of conviction entered by the trial court, and grant such other relief to which the Appellant may be entitled.

Respectfully submitted,

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Attorneys for Prosecution/Appellant

Judge Barefoot Sanders Law Magnet

Dallas ISD

No. 03-18-01234-CR

**In the
Supreme Court of Texas**

**The State of Texas,
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V.

**Cameron Shepard,
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**On appeal from the Texas Court of Criminal Appeals,
Third District at Austin**

Brief of Appellee

**Lauren Nutall
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Statement of the Case:

Cameron Shepard pled guilty after the trial court wrongfully denied the motion to suppress the results of a warrantless blood draw and the audio recorded on Officer Cole's body camera. The Court of Appeals rightfully reversed the decision of the Trial Court, setting aside the conviction and remanding for a new trial without the blood draw and audio recording. The State then appealed to this honorable court. Two issues arise from this appeal.

Counterpoint #1- The 3rd District Court of Appeals did not err by rejecting the evidence of the blood draw because it had been obtained without a blood warrant and exigency did not exist.

Counterpoint #2: The Court of Appeals did not error in reversing the decision, made by the trial court, to suppress the audio, due to the recording on Officer Cole's body camera being hearsay under Texas Rules of Evidence 803(8)(b)

Statement of Facts

After visiting a bar, Shepard was involved in a fatal car accident that killed one of the passengers, Chassidy Barnes. Once law enforcement arrived, Officer Cole administered the Standardized Field Sobriety Test (SFST) on Mr. Shepard. Once he had finished, Officer Cole transported the appellant to jail and charged him with intoxication manslaughter. He then transferred Mr. Shepard to the hospital. Although he had initially given Officer Cole permission to withdraw his blood, upon

arrival, Mr. Shepard withdrew his consent. After 3 phone calls, attempting to reach the “on call” magistrate judge and the Chief Judge, Officer Cole decided he could not get a warrant. At the time, Cole had the contact information for 8 other judges, but he made no attempt to reach them. A Travis County judge was also signing blood warrants that night. Nonetheless, the officer then instructed medical personal to withdraw Mr. Shepard’s blood. Cameron Shepard was charged with intoxication manslaughter.

Counterpoint #1- The 3rd District Court of Appeals did not err by rejecting the evidence of the blood draw because it had been obtained without a blood warrant and exigency did not exist.

The Fourth Amendment of the United States Constitution states that the people have the right to be secure in their persons against unreasonable searches and seizures. This law is applied in all states through the Fourteenth Amendment’s due process clause. [citation omitted from the record] Evidence that has been acquired without undergoing proper procedures may be admitted if the evidence was acquired under exigent circumstances. ***Missouri v. McNeely***, (133 S.Ct. 1552, 2013) “A warrantless blood draw is per se unreasonable unless it falls within a well-recognized exception to the warrant requirement. ***Villareal*** [***full citation omitted in the records***]. The Court of Appeals did not err because the trial court committed a material error by allowing the blood draw to be admitted as evidence. There were no exigent circumstances that prevented Officer Cole from obtaining a warrant.

For the exigency exception to apply, “exigencies of the situation make the needs of the law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” Missouri In *Weems*, it was stated that “whether law enforcement faced an emergency that justifies acting without a warrant calls for a case-by-case determination that is based on the totality of the circumstances.” ***WEEMS v. STATE, LEXIS 85 (Tex. Crim. App. May 25, 2016)*** ***In*** order for an unwarranted blood draw to be an exception to the warrant requirement, the arresting officer must have a compelling need, or a reason for violating that right.

Exigency is determined by a series of factors. A) First, the availability of another police officer and B) second, the availability a magistrate judge can determine whether exigency exists. Missouri.

According to Officer Cole, there were many other officers present at the scene of the crash. It is unreasonable to believe that each of these officers were too occupied to assist Officer Cole in his search for a warrant.

In regard to the magistrate judge, Officer Cole only attempted to contact 2 judges; one was unavailable, and the other did not answer. Despite having the contact information of other available judges, Officer Cole decided to obtain Mr. Shepard’s blood without his consent. In total, there were eight (8) municipal judges on the night of the incident and Officer Cole had the contact information for each of these judges. There was also a Travis County District judge available. *Affidavit of Officer Jordan Cole*. In ***FEARS v. STATE, LEXIS 3708 (Tex. App. - Houston 2016)***, the court held that an exigency did not exist when 13 judges were available

to sign the warrant. Likewise, there not a shortage of judges to justify Cole's decision.

Another factor that determines exigency is the time available to acquire a warrant. Officer Cole has reasoned that, because of the potential loss of evidence, he was under strict time constraints, thus creating exigency. However, according to *Missouri v. McNeely*, "the body's natural metabolization of alcohol in the bloodstream" does not automatically establish exigency.

The factors that determine exigency is based on what the officer reasonably knows. ***SCHMERBER v. CALIFORNIA, 384 U.S. 757 (1966)***. Officer Cole claims to have been unaware of the number of accessible magistrate judges and, due to a state implemented rule, is unable to visit a judge's home after a certain time. Mr. Shepard also requested medical attention. This would result in the metabolization of alcohol in Mr. Shepard's bloodstream.

While transporting Mr. Shepard from the police station to the hospital, Officer Cole could have contacted another on-duty officer who could wait in line in his stead for the blood draw warrant.

The next question for the court to consider is whether the error made by the trial court is reversible error. Reversible error exists if the evidence However, if the trial court rejects a motion to suppress and instead allows the evidence to be admitted, it could have a substantial effect on the results of the case. According to the Texas Rules of Appellate Procedures, "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the Court of Appeals must reverse a judgement of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or

punishment.” TEX. R. APP P. 44.2(a) Admitting evidence gained in violation of the defendant 4th Amendment is a constitutional error. Thus, the court cannot hold the error to be harmless unless it is harmless beyond a reasonable doubt. The court cannot meet this heavy burden.

The defendant filed this appeal after pleading guilty. He pled guilty after the trial court denied it his motion to suppress. Where “the trial court’s erroneous ruling `contributed in some measure to the state’s leverage in the plea-bargaining process,’” the ruling is harmful error. ***See, Fears***, quoting ***Holmes v State*** 323 S.W.2d 163, 173-174. In this case, it is the state’s responsibility to prove that the result of the suppression hearing did not contribute to the guilty plea. The state has not addressed this issue and therefore, has not satisfied its burden. Because the trial court admitted both the evidence of the blood draw and the evidence of the arresting officer’s body camera video, Mr. Shepard entered a plea of guilty, giving the State an advantage in the plea-bargaining process, had the trial court granted Mr. Shepard’s motion to suppress both pieces of evidence, the case would have not been mishandled. However, because the case was mishandled, which led to Mr Shepard pleading guilty, the error is harmful error.

Counterpoint #2: The Court of Appeals did not error in reversing the decision, made by the trial court, to suppress the audio, due to the recording on Officer Cole’s body camera being hearsay under Texas Rules of Evidence 803(8)(b)

Texas Rules of Evidence prohibit introduction of hearsay evidence. TEX.R. EVID 802. Rule 801 defines hearsay is, an out of court statement offered to prove

the truths of the matter asserted. In this case, the state obtained and recorded verbal statements on video from the scene of the accident. These statements, made by Officer Cole, the 911 dispatcher, are hearsay and should be excluded. .". TEX.R. EVID. 803(8)(a)(ii) specifically excludes statements offered in a criminal case describing "matters observed by law-enforcement personnel." Since much of the audio recording has statements by Officer Cole about matters observed at the scene of the accident, the video is inadmissible under this rule. This in order to avoid the "presumed unreliability of law enforcement observations in an adversarial, investigative setting." FISHER V. STATE 252 S.W.3d 375 (Tex. Crim. App. 2008) When Officer Cole arrives on the scene and after observing the scene states, "It'll be intox manslaughter," we see what is mentioned in Fisher v. State, a "presumed unreliability." Officer Cole jumped into conclusions and from that point on, the officer is gathering evidence to support a conviction. He is not making an impartial record that would fall under 803(8).

The state argues, and the court below, that the Officer's comments were Present Sense Impression under Texas Rule of Evidence 803(1). The rationale behind 803(1) is that unreflective sentences are usually reliable. *Id.* The rule assumes "the speaker was not thinking about the legal consequences of his statement. In most instances the speaker was not thinking at all; the statement was made without any reflection, thought process, or motive to fabricate or exaggerate." *Id.*

This is not the case with Officer Cole's recorded statements. As described above, Officer Cole had already made the decision that Mr. Shepard was guilty of DUI homicide. The statements in the recording show that he was not simply

describing what he saw, unreflectively and without motive; he was gathering evidence for prosecution. Consider that the officer only commented when Mr. Shepard did something that would be used against him. For example, during the walk-and-turn test, the officer recorded, "he stopped between steps 4 and 5," but the officer did not record that Mr. Shepard had successfully maintained his balance during the test and continued to walk down the line as instructed.

Compare this one-sided commentary with the observations made by the officer in *State v. Wright* 370 P.3d1122, (ARIZ. CT. APP, DIV 2, 2016). In that case, an undercover officer was describing events to his backup officers. "Two-Five, He's getting out, and uh looks like he's going in the store. He's got the twenty in his right hand..." The officer is describing all of the events, just as they occur. He is not detailing just the facts with the purpose to incriminate, the way Officer Cole did.

Officer Cole's behavior is more similar to the officer in *Fischer v. State*. *Supra*. In that case, the officer was recorded making only incriminating statements, like Officer Cole. Even though, the officer in *Fischer* had more time to reflect on his incriminating comments, Officer Cole managed to accomplish the same task in less time. None the less, both officers had the same goal: they were recording incriminating evidence only and excluding further evidence that would support Cameron Shepard.

Even if this audio recording is a valid sense impression, Rule 803(8)(a)(ii) should apply rather than 803(1) as the court below observed. Were two rules conflict, the more specific rule should apply. Rule 803(1) is a general rule but 803(8)(a)(ii) specifically refer to police officers and offense reports. In this case, the specific rule should apply more than the general rule.

Finally, the trial court mistake in admitting this evidence creates reversible error. A trial court erroneous ruling on a motion to suppress contributes in some measure to the states leverage in the plea-bargaining process. *Holmes v. State*, 323s.w.3d 163,173-74 (Tex. Cri. App. 2009) In this case, Mr. Shepard pled guilty after this court denied the motion to suppress. Since the decision led to the guilty plea, the error is reversible.

Prayer

Whereas, these arguments being considered, Appellee, Cameron Shepard, prays that this honorable court affirms the decision of Third District Court of Appeals and grant such other relief to which the Appellee may be entitled.

Respectfully submitted,

Attorneys for Defendant/Appellee Cameron Shepherd

Judge Barefoot Sanders Law Magnet

Dallas ISD

**IN THE COURT OF CRIMINAL
APPEALS, STATE OF TEXAS**

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for _____ *Appellant* _____

Name (Isabel Bannerot)

Name (Adelaide Zink)

Christian Life Preparatory

School

To the honorable Court of Appeals:

Comes now, the State of Texas, Appellant, and files this appeals brief.

Statement of the Case

Mr. Cameron Shepard was put on trial for intoxication manslaughter. He filed a motion to suppress both the results of the blood draw and the body camera video. His motion was denied on both points. Mr. Shepard pled guilty for the charge and appealed. The trial court's decision was reversed and remanded. The State appeals to reverse the appellate court's decision of granting the motion to suppress the results of the blood draw and body camera video.

Statement of the Facts

Around midnight on June 30, 2018, Mr. Cameron Shepard was driving his best friend, Mr. Taylor Belanger, and his girlfriend, Ms. Chassidy Barnes to a concert after having two beers and a shot of whisky. According to Mr. Urban Rhodes, an employee of Platinum Bar, none of them were showing signs of over intoxication when they left the bar, about an hour after drinking. While Mr. Shepard was driving, an older woman, Ms. Imani Haines, noticed that he was swerving between lanes, and called 911. Unfortunately, Mr. Shepard swerved sharply to the left and ran into a bridge column. Ms. Chassidy, ejected from the car, was lying on the ground and died shortly after. Mr. Shepard had been planning on proposing to Ms. Chassidy.

Officer Cole arrived at the accident and immediately turned on his body camera. He saw Ms. Chassidy on the ground, and Mr. Shepard in the driver's

seat. Officer Cole then administered the SFSTs. Mr. Shepard “intentionally, excessively blinked” during the Horizontal Gaze Nystagmus test, he demonstrated 3 out of 8 clues on the Walk and Turn test, and he demonstrated 3 out of 4 clues on the One Leg Stand Test. Officer Cole then arrested Mr. Shepard, transported him to the city jail, and requested a sample of his blood. Mr. Shepard agreed. They arrived at the hospital and Officer Cole completed the necessary paperwork. Mr. Shepard then withdrew his consent. In accordance with the law, Officer Cole transported Mr. Shepard back to the city jail. After locating the on-call list, calling the available judge, and waiting fifteen minutes, the judge called Officer Cole back. She was unavailable. Officer Cole also called the Chief Judge for the municipal court but was unable to contact him either. He transported Mr. Shepard back to the hospital. On the way there, Mr. Shepard began complaining of chest pain and asked for medical assistance. Upon arriving at the hospital, Officer Cole requested that Mr. Shepard’s blood be drawn before any narcotics were administered. Nurse Emery Payne followed the normal legal and medical procedure for a warrantless blood draw.

Issues on Appeal

Counterpoint Number One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw, and

Counterpoint Number Two: Whether the trial court erred in denying the motion to suppress the video recording from the police officer’s body camera video.

Argument

Counterpoint Number One: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

The State has two burdens to meet. One, that Officer Cole had probable cause to believe that Mr. Shepard was intoxicated and by reason of that intoxication had caused the death of Ms. Chassidy Barnes. Two, that exigent circumstances existed which justified the warrantless blood draw.

First of all, Officer Cole had probable cause to believe that Mr. Shepard was intoxicated. 1. Mr. Shepard refused to submit to the Horizontal Gaze Nystagmus Test. 2. Mr. Shepard demonstrated three out of the four clues on the One Leg Stand test. 3. Mr. Shepard demonstrated three out of the eight clues on the Walk and Turn test. 4. Ms. Imani Haines testified to having seen Mr. Shepard drift between lanes. 5. Officer Cole noted in his affidavit that Mr. Shepard "had blood-shot, watery eyes; slow soft speech; and the odor of alcohol on his breath and clothing". 6. On the audio from Officer Cole's body camera video, Mr. Shepard made statements of confusion such as "Can I call my dad? I think I'd like to go home now", and "I don't know if I want to do any tests". 7. Mr. Shepard's initial consent to the blood draw and later withdrawal provides circumstantial evidence of his intoxication. 8. Considering that he got into a car accident with a bridge column, not with another car, and had just had several drinks at a bar, it was quite likely that he was intoxicated. If one takes only two or three of these signs, they do not necessarily make a case. However, when one looks at the totality of circumstances, Officer Cole had probable cause to believe that Mr. Shepard was intoxicated and that his intoxication caused the death of Ms. Chassidy Barnes.

The Fourth Amendment says that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause”, such as the reasons listed above. “First, probable cause to search must exist- that is, ‘reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead a man of reasonable prudence to believe that the instrumentality... or evidence of a crime will be found” (Fears v. State 2016 Tex. App. Lexis 3708 (Tex. App. -Houston [1st Dist.] April 12, 2016, no pet.). In accordance with the definition above probable cause is (1) trustworthy facts, (2) known by the officer, (3) that would reasonably lead him/her to believe that there was a crime. In our own case, (1) The reasons for probable cause listed above are trustworthy because they were observed not only by an officer of the law, but also bystanders observed many if not all of the facts and circumstances. (2) Officer Cole was aware of most if not all of these facts and circumstances when he arrested Mr. Shepard. (3) These facts could have reasonably led him to believe that Mr. Shepard was intoxicated. In accordance with Missouri v. McNeely, we must look at the totality of circumstances of this case. “First we afford almost total deference to a trial judge’s determination of historical facts...Second, we review a judge’s application of the law to the facts *de novo*” (Cole v. State 490 S.W.3d 918 (2016). Based on this application, the facts I listed earlier must be given almost total deference, and the totality of the circumstances could have reasonably led Officer Cole to believe that Mr. Shepard was intoxicated.

Secondly, exigent circumstances existed which justified the warrantless blood draw. The dissenting opinion of *Missouri v. McNeely* gives police officers guidance on how to know whether to secure a warrant or not. Firstly, they give deference to police officers by assuming that they are familiar with the time involved to obtain a warrant in their own jurisdiction (*Missouri v. McNeely* 133 S.Ct. 1552 (2013)). Officer Cole had been in the Austin Police Department for about two and a half years so he was most likely familiar with the time involved to obtain a warrant. Secondly, the Court recognize that “the natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence” (*Missouri v. McNeely* 133 S.Ct. 1552 (2013)). By the time Mr. Shepard had his blood drawn, it was about three hours after the accident, and perhaps roughly four and a half hours after Mr. Shepard had his last drink. Thirdly, the dissenting opinion agrees with the majority opinion that the Court has to take the totality-of-circumstances approach in deciding whether or not there were exigent circumstances. When all of the facts are taken into consideration, (1) Officer Cole was obliged to transport Mr. Shepard to the jail, then to the hospital, fill out paperwork, drive him back to the jail, wait for a response, and drive back to the hospital, and (2) Officer Cole was concerned about how any narcotics given could affect the blood draw, the totality of the circumstances make exigency. Fourthly, the Court recognizes that in certain circumstances a police officer “might reasonably have believed that he was confronted with an emergency”, justifying the warrantless search (*Missouri v. McNeely* 133 S.Ct. 1552 (2013)). Officer Cole, after calling two judges, had no way of determining how long it would take to locate an available judge, and then

wait for them to arrive at the jail. As I stated earlier, it was already almost two and a half hours after the accident. On top of this, Mr. Shepard requested medical assistance. These circumstances together justified the warrantless blood draw.

In *Cole v. State*, while the abused drugs were amphetamine and methamphetamine instead of alcohol, two points are very similar to our own case. Officer Higginbotham did not obtain a warrant because he claimed that the warrant process would take an hour to an hour-and-a-half at least. Also, he was concerned that any narcotics administered to Mr. Cole might affect the blood results. This case went to the Texas Court of Criminal Appeals, which ruled that exigent circumstances did exist which justified the warrantless blood draw. In this case, Officer Cole also was concerned that it would take too much time to call another judge and that any narcotics given to Mr. Shepard could affect the blood sample.

Counterpoint Number Two: The trial court did not err in denying the motion to suppress the police officer's body camera video.

The State has two burdens to meet. One, that Officer Cole's statements are not hearsay. Two, even if the Court finds that his statements are hearsay, the statements constitute harmless error.

Firstly, Officer Cole's statements are not hearsay. He made the statements as he was perceiving the event. Officer Cole, as explained under "Counterpoint Number One", had probable cause to believe that Mr. Shepard was intoxicated. In order for him to have valuable evidence to prove his conclusion, Mr. Shepard

turned on his body camera video and audio. Based on the witness's affidavits, the results of the blood draw, the Standardized Field Sobriety Tests, and Mr. Shepard plea as guilty, we can conclude that Mr. Shepard was intoxicated, and his intoxication led to Ms. Chassidy's sudden death. Even without the video and audio camera, Mr. Shepard was intoxicated and is guilty of a DWI.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. The hearsay doctrine was designed to exclude out-of-court statements that posed one of the four hearsay dangers: faulty perception, faulty memory, accidental miscommunication, or insincerity. There are twenty-four exceptions to this hearsay doctrine which can be roughly categorized into three groups; the category that pertains to this case is unreflective statements. Because unreflective statements made during an event pose very little danger of faulty memory or insincerity, and are made before the speaker thinks of the legal consequences of his or her statements, unreflective statements are not hearsay (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). One of the hearsay exceptions that falls under this category is the present-sense impression exception. Statements that fall under the present-sense impression exception must be statements, "describing or explaining an event or condition, made while or immediately after the declarant perceived it". They must be the street-corner type of statements, non-narrative, and without any thought of a future court case (*Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008)). If we take apart the definition of present-sense impression, there are three aspects to it: they must be (1) statements that (2) describe or explain while (3) the declarant perceives it. Officer Cole's fit all three of these requirements because they

describe an event as he perceives it. They pose no danger of faulty memory and faulty perception, but have high value for the Court. Even if some of his statements were accidentally miscommunicated or insincere, the other two hearsay dangers, the jury sees the video at the same time they hear the audio and so they can judge for themselves whether or not Officer Cole was being truthful. The appellee may argue that under Texas Rule 803(8) investigative reports by police officers are not an exception to the hearsay rule. However, *Fischer v. State* ruled that even if an out-of-court statement does not fall under one hearsay exception, it may still fall under another one. Because of the contemporaneity and "immediately thereafter" requirement of Rule 803(1), there is no analogy between this case and Rule 803(8) (*Fischer v. State* 252 S.W.3d 375 Tex. Crim. App. 2008). Since most of Officer Cole's statements are directed toward Mr. Shepard, Officer Cole would have had little time to think carefully through what he said. Therefore, Officer Cole's statements are not hearsay.

Secondly, "if the fact to which the hearsay pertains is sufficiently proved by other competent and unobjected-to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error" (*Thompson v. State* No. 03-12-00519-CR). Because what the video and audio tape proved are exactly the same as what Officer Cole stated in his affidavit, the admission of the video does not constitute reversible error. Moreover, Officer Cole's statements do not even constitute as hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted (Rule 801 c). The State did not offer Officer Cole's statements as the truth of Mr. Shepard's intoxication.

They offered the video. The jury could see exactly what Officer Cole saw, and made their decision based on the video, witness's testimonies and affidavits, and the blood draw results. In another case similar to our own, the videotape was admitted at trial after the jury had already heard Martinez testify to the same matters. Officer Cole's statements were not hearsay, and any error in admitting them was harmless error. Even if one or two of the statements were hearsay, the jury already knew Officer Cole's opinion on the matter. One or two reflective remarks could not have had any influence on their decision.

Conclusion

The trial court did not err in denying the motion to suppress the results of the blood draw because Officer Cole had probable cause to believe that Mr. Shepard was intoxicated, and exigent circumstances existed. The trial court did not err in denying the motion to suppress the body camera video because Officer Cole's statements were not hearsay, and any error in admitting them was harmless error. As a police officer, Mr. Cole had a duty. He fulfilled this duty, and yet he is being accused of making statements categorized as hearsay. Please consider that he was doing his job, and he was doing it well. Ms. Chassidy died because of Mr. Shepard's rash decision to drive while intoxicated. If the Court finds in favor of Mr. Shepard, they will be setting a precedent to let deaths due to driving while intoxicated go unnoticed. Remember Ms. Chassidy's family and what they must be going through. DWI's are serious offenses and this case was not a small accident. The Court cannot allow such outright abuse of the law to go unpunished.

Prayer

For these reasons, we respectfully request that you uphold the decision of the appellate court.

Respectfully Submitted by:

Isabel Bannerot

Adelaide Zink

Attorney for Appellant

Christian Life Preparatory School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for _____ *Appellee* _____

Name (Isabel Bannerot)

Name (Adelaide Zink)

Christian Life Preparatory

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To the honorable Court of Appeals:

Comes now, the attorneys for Mr. Shepard, Appellee, and files this appeals brief.

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Around midnight on June 30, 2018, Mr. Cameron Shepard was driving his best friend, Mr. Taylor Belanger, and his girlfriend, Ms. Chassidy Barnes to a concert after having two beers and a shot of whisky. According to Mr. Urban Rhodes, an employee of Platinum Bar, none of them were showing signs of over intoxication when they left the bar, about an hour after drinking. While Mr. Shepard was driving, an older woman, Ms. Imani Haines, noticed that he was swerving between lanes. She called 911. Unfortunately, Mr. Shepard swerved sharply to the left and ran into a bridge column. Ms. Chassidy, ejected from the car, was lying on the ground and died shortly after. Mr. Shepard had been planning on proposing to Ms. Chassidy.

Officer Cole arrived at the accident and immediately turned on his body camera. He saw Ms. Chassidy on the ground, and Mr. Shepard in the driver's seat. Officer Cole then administered the SFSTs. Mr. Shepard "intentionally, excessively blinked" during the Horizontal Gaze Nystagmus test; he demonstrated 3 out of 8 clues on the Walk and Turn test, and 3 out of 4 clues on the One Leg Stand test. Officer Cole arrested Mr. Shepard, transported him to the city jail, and requested a sample of his blood. Mr. Shepard agreed. They arrived at the hospital and Officer Cole completed the necessary paperwork. Mr. Shepard then withdrew his consent. In accordance with the law, Officer Cole transported Mr. Shepard back to the city jail. After locating the on-call list, calling the available judge, and waiting fifteen minutes, the judge called Officer Cole back. She was unavailable. Officer Cole also called the Chief Judge for the municipal court but was unable to contact him either. He transported Mr. Shepard back to the hospital. On the way there, Mr. Shepard began complaining of chest pain and asked for medical assistance. Upon arriving at the hospital, Officer Cole requested that Mr. Shepard's blood be drawn before any narcotics were administered. Nurse Emery Payne followed the normal legal and medical procedure for a warrantless blood draw.

Issues on Appeal

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Counterpoint Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

Counterpoint Number One: The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

The appellee has one burden to prove: that Mr. Shepard's Fourth Amendment rights were violated. We will make two points. One, Officer Cole did not have probable cause to believe that Mr. Shepard was intoxicated. Two, there were not exigent circumstances that justified the warrantless blood draw.

First of all, the Fourth Amendment says that, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause". Mr. Shepard's Fourth Amendment rights were violated because Officer Cole did not have probable cause to believe that Mr. Shepard was intoxicated. First of all, Mr. Shepard only exhibited three out of the eight clues on the walk-and-turn test. Secondly, Mr. Belanger said that Ms. Haines was not driving safely, and her poor driving could have caused the accident. Thirdly, any signs of intoxication that Mr. Shepard showed were most likely due to the fact that his girlfriend, who he was going to propose to, died. Fourthly, Mr. Rhodes, who was up-to-date in proper alcohol distribution, saw that Mr. Shepard was not overly intoxicated, one hour after drinking, and determined that he had enough control of his actions to drive.

Secondly, there were not exigent circumstances. There were eight other judges that Officer Cole chose not to contact. Also, Officer Cole could have delegated responsibilities among the other officers. In *Missouri v. McNeely*, a

Supreme Court case, the court ruled that “the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant” (Missouri v. McNeely 133 S.Ct. 1552 2013). There must be “special facts” that constitute exigency.

“Bodily intrusions implicate an individual’s ‘most personal and deep-rooted expectations of privacy’” (Weems v. State 2016 Tex. Crim. App. Lexis 85 Tex. Crim. App. May 25, 2016). In Weems v. State, Weems hid from law enforcement, and it took them 40 minutes to find him. On top of this, he needed medical assistance, and so Deputy Bustamante transported him to a hospital, not knowing what narcotics might be administered to him. He asked for the blood draw, which took two hours. The blood draw proved that Weems was very intoxicated. The circumstances of this case are much more extreme than our own. However, the Court ruled in favor of suppressing the results of the blood draw because “aside from Weems; own self-imposed delay and the forty minutes worth of alcohol dissipation, little else in the record lends support to finding exigency in this case” (Weems v. State 2016 Tex. Crim. App. Lexis 85 Tex. Crim. App. May 25, 2016). The Court also noted that Weems could have delegated some of the responsibilities to another officer.

In Fears v. State, “Trooper Guerra...did not believe he needed a warrant...he felt he did not have time to obtain one... based on one previous experience when it had taken him three hours to obtain a warrant” (Fears v. State 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet). In this case, Trooper Guerra arrested the appellant for a DWI based on six clues demonstrated in the HGN test, and the appellant’s behavior. The appellant

was “very verbally abusive”, and had at least two prior DWI convictions; however, the Court ruled in favor of the appellant because “neither the potential delay required to obtain a warrant from one of thirteen magistrate judges in the county nor appellant’s belligerence created an emergency that justified the State’s acting without a warrant” (Fears v. State 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet).

The two cases given above establish certain requirements. 1. A self-imposed delay, such as the one Weems gave, does not constitute exigency. 2. Necessary hospitalization, such as in Weems v. State, does not create exigency. 3. Police officers can delegate responsibilities in order to create the ability to obtain a warrant; which if obtaining a warrant is possible, it is mandatory that an officer do so. 4. A potential delay required to obtain a warrant when many judges are available does not constitute exigency (Fears v. State 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet). These two cases, along with Missouri v. McNeely, prove that there were not exigent circumstances.

Because Officer Cole did not have probable cause or exigent circumstances, the trial court’s decision must be reversed.

Counterpoint Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer’s body camera video.

One, Officer Cole’s statements do not fall under the present-sense impression exception to the hearsay rule. Two, Officer Cole’s statements

constitute an investigative report, which is hearsay. Three, any mistakes found in the trial court's decision require that this case be reversed and remanded.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. The hearsay doctrine was designed to exclude out-of-court statements that posed one of the four hearsay dangers: faulty perception, faulty memory, accidental miscommunication, or insincerity. There are 24 exceptions to this hearsay doctrine which can be roughly categorized into three groups; the category that pertains to this group is unreflective statements. Because unreflective statements made during an event pose very little danger of faulty memory or insincerity, and are made before the speaker thinks of the legal consequences of his or her statements, unreflective statements are not hearsay (*Fischer v. State* 252 S.W.3d 375 Tex. Crim. App. 2008). One of the hearsay exceptions that falls under this broad category is the present-sense impression exception. Statements that fall under the present-sense impression exception must be statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it" (Rule 803(8)). They must be the street-corner type of statements, non-narrative, and without any thought of a future court case (*Fischer v. State* 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet).

However, Officer Cole's statements were, in fact, reflective. Officer Cole made several statements that he intended to use against Mr. Shepard. For example, Officer Cole stated "I believe he understands the instructions and is refusing to cooperate with the Horizontal Gaze Nystagmus test". The word believe assumes reflection. Also, Officer Cole stated his conclusion that "It'll be

intox manslaughter". Instead of giving only the facts and what he knew to be true, Officer Cole inserted his own opinion with the thought of a future court case. He "was making the recording for the specific purpose of creating evidence to be used at trial" (State v. Wright 370 P. 3d 1122 (2016)). Officer Cole is an expert in his field of knowledge. He is trained to make split-second decisions. By stating his opinion that the case would be intoxication manslaughter, the jury was hearing bias before the SFSTs had even started. Beginning with his conclusion that it would be intoxication manslaughter, Officer Cole crafts a narrative throughout the audio tape.

In *Fischer v. State*, the court ruled that statements made by Trooper Martinez "constituted a calculated narrative in an adversarial, investigative setting" (*Fischer v. State* 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet). The court decided that Trooper Martinez's words from a video could be exactly the same as what he said in court "but they must be given under oath and subject to cross-examination" (*Fischer v. State* 2016 Tex. App. Lexis 3708 Tex App. -Houston 1st Dist. April 12, 2016, no pet). Because he made reflective statements in an investigative setting, Officer Cole's statements do not fall under the present-sense impression exception to hearsay.

Secondly, Texas Rule 803(8) "disallows any out-of-court factual observations by police officers", according to the interpretation of *Fischer v. State*. Rule 803(8) provides an exception to the hearsay rule for "A record or statement of public officer if it sets out a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel" (*Fischer v. State* 2016 Tex. App. Lexis 3708 Tex App. -

Houston 1st Dist. April 12, 2016, no pet). Officer Cole's statements cannot be allowed in this case, because he is a police officer who was under the legal duty to report outside of the courtroom. Based on the interpretation quoted above of Fischer v. State, if Officer Cole's statements were transcribed word-for-word, they would constitute an investigative report because they are out-of-court factual observations. Officer Cole can testify to exactly the same circumstances in court, but he must be subject to cross-examination.

Also, an important point that the appellant will try to prove is that Officer Cole's statements fall under the present-sense impression exception. We have explained why they do not, but even if they prove that the statements do fall under that exception, Fischer v. State ruled that Rule 803(1) cannot be used as a "back door" to admit evidence explicitly inadmissible under Rule 803(8).

Finally, our third point is that any mistakes found in the video recording require that this case be reversed and remanded. Even if some of the statements are found to fall under the present-sense impression exception this case still must be sent back to the trial court. The appellant may say that any errors made are not reversible errors; however, the State would not have offered Officer Cole's statements for the truth of the matter asserted, unless they influenced the jury's decision. The audio could have been turned down; instead, the jury heard Officer Cole's conclusions, giving unfair bias against Mr. Shepard.

Conclusion

There was not exigency to justify the warrantless blood draw. Officer Cole's statements are hearsay. We bring not one, but two ways in which Mr. Shepard was deprived of his rights. We would like to remind the Court that to rule in favor of Mr. Shepard, they need to only agree with one of our two issues. If the trial court is found to have erred in either of our two issues, this case must be reversed and remanded. The State failed to meet its burden regarding the blood draw and video camera. Don't allow the mistakes of the State of Texas to be dismissed as unimportant. To do so would set a precedent for future courts to ignore the faults of the State and endanger the rights of defendants.

Prayer

For these reasons we respectfully request that you reverse and remand the trial court's decision

Respectfully Submitted by:

Isabel Bannerot

Adelaide Zink

Attorney for Appellant

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IN THE COURT OF CRIMINAL APPEALS, STATE OF

TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

**FROM THE COURT OF APPEALS, THIRD DISTRICT, AT
AUSTIN**

Brief for Appellant

Matthew D. Lynn

Christopher C. Fryman

Christian Life Preparatory School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

The defendant, Cameron Shepard, was charged with intoxication manslaughter. Mr. Shepard was then convicted of intoxicated manslaughter and sentenced to imprisonment. Two issues are presented on appeal.

STATEMENT OF FACTS

On June 30, 2018, at approximately 2:00 am, Officer Cole arrived at a single vehicle accident located in downtown Austin. He activated his body camera and observed a deceased female on the roadway, later identified as Chassidy Barnes. Officer Cole attempted but was unable to remove two males from a crashed vehicle, later identified as Cameron Shepard and Taylor Belanger. He then contacted the Austin Fire Department and the Austin-Travis County EMS. Officer Cole determined that Cameron Shepard was the driver of the vehicle. The officer then performed the Standard Field Sobriety Test on Mr. Shepard after Mr. Shepard's removal from the vehicle by the Austin Fire Department. Officer Cole determined that Cameron Shepard was intoxicated and arrested him, transporting him to the county jail. The officer obtained Mr. Shepard's consent for a blood draw and then drove him to the hospital. When Cameron Shepard arrived at the hospital and after completion of the necessary paperwork, he withdrew his consent. Officer Cole then transported Mr. Shepard back to the county jail. Neither the local municipal court nor the county court has judges on duty overnight. Officer Cole located an on-call list where one out of ten judges was on call that night at 4:00 am. Officer Cole attempted to

contact the on-call magistrate but received no reply and left a message. After fifteen minutes, the magistrate returned the call and indicated that she was not available due to a family emergency. Officer Cole then attempted to contact the chief magistrate, but this judge was also unavailable. Concluding that he was under exigent circumstances, Officer Cole drove Mr. Shepard back to the hospital, where Cameron Shepard had his blood drawn at 5:00 am. A few days after Mr. Shepard's arrest, Officer Cole was able to secure an on-call list for the Travis county judges. There was a judge signing blood warrants on the nights of June 29 and 30.

ISSUES ON APPEAL

Counterpoint Number One: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

Counterpoint Number Two: The trial court did not err in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Counterpoint Number One: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

As noted in *Missouri v. McNeely*, "one well-recognized exception, and the one at issue in this case, applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) citing *Kentucky v. King*, 563 U.S. (2011). Officer Cole exercised reasonable efforts to contact a magistrate in order to obtain a warrant. In order

to determine that an exigency exists, "the reasonableness of a warrantless search must be evaluated based on the totality of circumstances." *Id.* In consideration of totality of circumstances, we must evaluate (1) the impact of the investigation of a complex accident scene involving a fatality; (2) the time taken to transport the accused to and from the jail and hospital; and (3) the special circumstances resulting in the unavailability of the on-call magistrate.

First, in the subject case, Officer Cole was the first to arrive at a complex accident scene which involved a fatality. It was necessary for Officer Cole to request assistance from EMTs to secure the removal of occupants, including the accused, from the crashed vehicle. These circumstances align with the fact that the fact that the crash scene was a complex accident scene with a fatality.

Secondly, after arresting Mr. Shepard, Officer Cole experienced unexpected travel due to a last minute withdrawal of consent for a blood draw. Officer Cole first transported Mr. Shepard to the jail and, after obtaining consent, transported him to the hospital for a blood draw. After the officer completed the required paperwork, Mr. Shepard withdrew his consent, at which time Officer Cole transported Mr. Shepard back to the jail. Utilizing the totality of these circumstances, we can additionally reason that Officer Cole was under time constraints.

Thirdly, as the municipal and county courts did not have judges on duty overnight, following existing procedures, Officer Cole obtained information and contacted the on-call magistrate. After finding out that the on-call magistrate was unable to consider a warrant request due to family emergency, Officer Cole unsuccessfully attempted to contact another judge. Under time constraints,

Officer Cole performed reasonable action by attempting to contact two magistrates. The first magistrate was occupied with a family emergency, which fits the very definition of an exigent circumstance. Officer Cole even extended his given standard procedure of obtaining a warrant by attempting to contact the chief magistrate. Further action would have created additional time constraints. As noted in *McNeely*, "Because 'the police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction,' post, at (opinion of ROBERTS, C.J.), we expect that officers can make reasonable judgements about whether the warrant process would produce unacceptable delay under the circumstances. Reviewing courts in turn should assess those judgements from the perspective of a reasonable officer on the scene." *Id.* Officer Cole's actions comply with established procedures as impacted by his reasonable judgement. Thus, a complex accident scene, unanticipated travel, and lack of an available judge due to a family emergency created exigent circumstances, making Officer Cole's warrantless blood draw objectively reasonable under the circumstances.

One may argue that Officer Cole should have continued his attempts to contact magistrates until an available judge was located. This argument effectively requires that an exigency finding cannot be made unless the State proves that no other judges were available on the night in question. This would place an undue burden upon the State and is not consistent with the totality of circumstances analysis. As noted in *Evans v. State*, "It further reduces the exigency exception to an exceedingly and inappropriately small set of facts, and would defeat a claim of exigency on the basis of a single circumstance in direct

opposition to the totality of circumstances review *McNeely* requires.” *Evans v. State*, (Tex.App.-Houston [14th Dist.] (2006)). If the exigency standard required that Officer Cole should have contacted all the magistrates on his list, what about other cases? These other cases would require officers to attempt to contact every single magistrate on their given list. What if there were thirty judges on this said list? Additionally, what if the officer had to drive to each of the magistrates’ houses to contact them all? Collectively, Officer Cole sufficiently attempted to contact a magistrate.

Additionally, one could argue that Officer Cole should have contacted the additional on-call magistrate that was available to sign blood warrants on June 29 and June 30. This argument errs, however, because it requires Officer Cole’s use of hindsight. Hindsight is the knowledge of an event after it happens. Officer Cole never knew to any degree about this other magistrate that was on-call until a few days after Cameron Shepard’s arrest. It simply cannot be argued against the officer that he should have attempted to contact this judge, because, for Officer Cole at the time, this judge did not exist. Hindsight would also be required for Officer Cole to have attempted to contact additional magistrates during the time he was waiting to hear back from the first judge he called that night. With this information, we can conclude that Officer Cole used his complete knowledge and ability to contact a magistrate on the night of June 30.

Counterpoint Number Two: The trial court did not err in denying the motion to suppress the video recording from the police officer’s body camera video.

The officer's body camera video is admissible due to the present sense impression to hearsay. Hearsay, according to its legal definition, is an out-of-court statement offered to prove the truth of the matter asserted. According to Mr. Shepard's accusations, Officer Cole's body camera video footage is hearsay. Rule 803 provides several exceptions to this hearsay rule. One of these, 803(1), is named the present sense impression exception, which states that if a statement describes or explains an event or condition, made while or immediately after the declarant perceived it, it can be classified as admissible. This said exception applies to Officer Cole's body camera video, in that Officer Cole's statements were made while or immediately after he perceived events or conditions. The officer had "very little opportunity of '[t]hinking about it' and [did] not present a setting 'brimming with the potential for exaggeration or misstatement.'" *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008). As stated in *Fischer*, when referring to present sense impression, "The declaration must be instinctive rather than deliberative—in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action. These are the indicia of verity which the law accepts as a substitute for the usual requirement of an oath and opportunity for cross-examination." *Id*, citing *Illinois Central R.R. Co. v. Lowery*, 184 Ala. 443, 63 So. 952, 953 (1913). All of Officer Cole's comments were made immediately in response to what he was seeing and experiencing. At no time did Officer Cole pause to reflect upon what he was seeing and then make comments.

Officer Cole's statements in the video did not represent the type of language referenced in *Fischer* to be the same as an offense report. *Fischer* represents a

DWI case involving a contested video and concluded the officer's statements in the video represented an offense report. As stated in *Fischer*, "This calculated narrative in an adversarial setting was a speaking offense report. It was not the type of unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow." *Id.* The circumstances in *Fischer*, however, were materially different. *Fischer* specifically indicates that prior to making a narrative statement, the officer left the accused and returned to his vehicle, making a declarative statement. Clearly, in this case there was no reason for the officer to return to his car. *Fischer* goes on to state, "He made four separate trips back to his patrol car for the specific purposes of narrating what he had seen, smelled, and heard during his investigatory stop. . . .and then announced his conclusion: 'Subject is going to be placed under arrest for DWI.'" *Id.* In the subject case, no such facts exist. Officer Cole's statements in the video were made as events were occurring with no opportunity represented for reflection or calculation. Almost all of Officer Cole's statements were made to Cameron Shepard and represented instructions provided to Mr. Shepard or observations of events immediately as they occurred.

CONCLUSION

Firstly and conclusively, Officer Cole made a reasonable and sufficient attempt to contact a magistrate. Additionally, the officer utilized his complete knowledge and ability to contact a judge. Secondly and collectively, Officer Cole's body camera video footage is admissible by the present sense impression to hearsay.

PRAYER

For these reasons we pray that this court would deny the decision of the lower court.

Respectfully Submitted By:

Matthew D. Lynn

Christopher C. Fryman

Attorneys for Petitioner

Christian Life Preparatory School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

**FROM THE COURT OF APPEALS, THIRD DISTRICT, AT
AUSTIN**

Brief for Appellee

**Matthew D. Lynn
Christopher C. Fryman
Christian Life Preparatory School**

TO THE HONORABLE COURT OF APPEALS:

Comes now, Cameron Shepard, and files this appeals brief.

STATEMENT OF THE CASE

The defendant, Cameron Shepard, was charged with intoxication manslaughter. Then, Mr. Shepard was convicted of intoxication manslaughter and sentenced to imprisonment. Two issues are presented on appeal.

STATEMENT OF FACTS

On June 30, 2018, at approximately 2:00 am, Officer Cole arrived at a single vehicle accident located in downtown Austin. He activated his body camera and observed a deceased female on the roadway, later identified as Chassidy Barnes. Officer Cole attempted but was unable to remove two males from a crashed vehicle, later identified as Cameron Shepard and Taylor Belanger. He then contacted the Austin Fire Department and the Austin-Travis County EMS. Officer Cole determined that Cameron Shepard was the driver of the vehicle. The officer then performed the Standard Field Sobriety Test on Mr. Shepard after Mr. Shepard's removal from the vehicle by the Austin Fire Department. Officer Cole determined that Cameron Shepard was intoxicated and arrested him, transporting him to the county jail. The officer obtained Mr. Shepard's consent for a blood draw and then drove him to the hospital. Upon arriving at the hospital, Cameron Shepard withdrew his consent at 3:40 am. Officer Cole drove him back to the county jail. Officer Cole unsuccessfully attempted to contact a magistrate to obtain a warrant for a blood draw. At 4:15 am, Officer Cole decided to obtain a blood draw from Mr. Shepard without a

warrant and returned to the hospital, where Cameron Shepard had his blood drawn at 5:00 am.

ISSUES ON APPEAL

Counterpoint Number One: The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Counterpoint Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

ARGUMENT

Counterpoint Number One: The trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Officer Cole failed to exhaust his resources to contact a magistrate prior to obtaining a blood draw warrant. According to the officer, he first called the municipal judge presented on a given list of on-call municipal judges. Because this judge did not respond, Officer Cole left a message. After fifteen minutes, the municipal judge returned the call and informed the officer that she was occupied with a demanding family emergency. During the fifteen minutes prior to receiving a return call from the municipal judge, Officer Cole made no effort to contact another judge or to determine if other judges were available. After receiving the call back, Officer Cole attempted to contact the chief municipal judge of the jurisdiction, but this said judge was unavailable. Circumstances provide neither information nor evidence that Officer Cole further persisted to contact the chief municipal judge, such as at least to leave a message. Moreover, the officer did not reasonably undertake contacting the remaining

nine municipal judges on the judge list. We know from Officer Cole's affidavit that he later determined a county judge was on call at the time and was available to sign warrants. Had Officer Cole exercised reasonable effort to determine the availability of judges, it is reasonable to conclude that he would have determined that a county judge was available. Reasonable action, given the significance of Mr. Shepard's Fourth Amendment rights, would have been to call more than just two of ten judges, an inexcusably miniscule portion of the list. This small percentage is not sufficient enough to decide matters concerning a subject of utmost importance such as the law, especially when concerning obtaining a warrant. If this unacceptable action were considered reasonable, a questionable precedent would be presented to other cases. According to *Missouri v. McNeely*, "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." *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). As a consequence of Officer Cole's failure to attempt to contact the remaining judges on the list or his lack of effort in pursuing the availability of other judges, such as the county judge, it is not plausible to evaluate their availability in the context of exigent circumstances. The sufficiency of contacting two judges is predicated on the presumption that Officer Cole did not have sufficient time to contact other judges when clearly he did have time. Had Officer Cole made additional attempts, one could fairly evaluate each situation from the perspective of a totality of circumstances. It would be inappropriate to generally accept the sufficiency of only attempting to contact two judges in a fifteen minute period when other judges were available.

As stated in *Fears v. State*, "And, as we observed in *Gore*, to accept general testimony that it usually takes two or three hours to get a warrant as sufficient evidence of exigency in every DWI case would be to create a *per se* exigency rule, which *McNeely* expressly prohibits." *Fears v. State*, 2016 Tex. App. LEXIS 3708 (Tex.App.-Houston [1st Dist.] April 12, 2016, no pet.). In the subject case to accept the sufficiency of two phone calls in the absence of a thorough analysis, other circumstances would likewise create a *per se* rule. Such thorough analysis is not plausible because Officer Cole failed to utilize the time available to attempt to contact other judges.

An argument can be made that the complex accident scene and unanticipated travel represented exigent circumstances in conjunction with a totality of circumstances analysis. In the case of the accident scene, Officer Cole arrived at the scene at 2:00 am, arrested Mr. Shepard, and arrived at the city jail at approximately 3:00 am. From the time Officer Cole arrested Mr. Shepard and arrived at the jail, Officer Cole was no longer involved in any investigation relating to the accident scene. He was entirely available to devote his attention to Mr. Shepard and the pursuit of a warrant for his blood draw. The complex accident scene did not impact Officer Cole's ability to obtain a warrant. The unanticipated travel time associated with Mr. Shepard's withdrawn consent did reduce the amount of time available to Officer Cole to obtain a warrant; however, due to the proximity of the hospital to the city jail, this additional time did not materially impact Officer Cole's ability to obtain a warrant. The time associated with the travel to the hospital and back due to withdrawn consent represented approximately fifty-five minutes. Upon returning to the city jail,

Officer Cole's judgement was that he had sufficient time to obtain a warrant as evidenced by his efforts to do so. What is unclear is why Officer Cole discontinued these efforts after his phone call and the return message. During this time, Officer Cole made no effort to contact another judge. Based on Officer Cole's affidavit, there is no indication that a return phone call was expected in a defined period of time. Given that the on-call judge did not answer the phone, Officer Cole should have immediately started pursuing other judges to obtain a warrant. During this time, Officer Cole easily could have called all of the judges on the list he had obtained or pursued other steps that could have uncovered the availability of other judges.

Admittedly, one could argue that Officer Cole acted under sufficient exigent circumstances that allowed him to take the blood draw: specifically, the dissipation of blood alcohol in the blood. This argument is conspicuously false, however, due to a confirmation featured in *Missouri v. McNeely*: "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). Additionally, *McNeely* states, "For exigent circumstances to justify a warrantless search, however, there must also be 'no time to secure a warrant.'" *Id.*, citing *Michigan v. Tyler*, 436 U.S. 499 (1978). Officer Cole clearly had enough time to exercise effort to determine the availability of other judges. Thus, the circumstances surrounding the blood draw were not compelling, or exigent, enough for Officer Cole to believe that he could take a blood sample from Mr. Shepard in the absence of a warrant.

Counterpoint Number Two: The trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

The body camera footage is inadmissible because: (1) it was hearsay; (2) Officer Cole's statements on the video represent a speaking offense report; and (3) his narrative was not admissible under the present sense impression exception to the hearsay rule. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. One type of hearsay is a speaking offense report. Officer Cole, in the body camera footage, narrated two speaking offense reports. A speaking offense report is an officer's narrative (specifically, an officer's on-the-scene narrations) that is fraught with the thought of future prosecution. "[It] is excluded from the public records exception to the hearsay prohibition" and therefore is inadmissible. *Evans v. State*, (Tex.App.-Houston [14th Dist.] 2006). Two examples of speaking offense reports made by Officer Cole in the body camera footage transcript were: "I believe he understands the instructions and is refusing to cooperate with the HGN test. I will move on to the walk and turn test," and, "At his count of eight, he put his foot down on the ground for balance and picked it back up. He is swaying a lot. Uses arms for balance. Very unstable."

Concerning the above examples, Officer Cole narrated to the camera alone that Cameron Shepard was "refusing" to cooperate with the SFST and that Mr. Shepard was demonstrating clues of intoxication like being "Very unstable." According to *Fischer v. State*, "Once reflective narratives [like Officer Cole's two narrations], calculated statements, deliberate opinions, conclusions, or conscious 'thinking-it-through' statements enter the picture, the present sense

impression exception no longer allows their admission." *Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008). Officer Cole's first narration was a deliberate opinion because he utilized the words "I believe" in his utterance. Deliberate opinions are speculations, not facts, and should not be used as evidence by the court. Additionally, the officer's second statement included "Very unstable," a conclusion. Conclusions must be made after a period of calculative thought, and therefore they do not fit the conditions of present sense impression. Irrefutably, according to the case of *Fischer*, Officer Cole's utterances are unquestionably spoken to support Officer Cole in the future in terms of prosecution. Furthermore, present sense impression almost always involves an individual in normal conversation with another person whereby such comments to the other person communicate his or her impressions or observations regarding events that he or she is not creating. As stated in *Fischer*, "on-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense are fraught with the thought of future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime. Calculation and criminal litigation shimmer in the air; the officer is gathering evidence, he is not making an off-hand non-reflective observation about the world as it passes by." *Id.* In this case, several of Officer Cole's statements clearly do not represent instructions or comments for the benefit of Mr. Shepard. Rather, these statements are spoken directly for the benefit of the video to create a record of events in anticipation of a trial.

One may argue that, according to *Evans v. State*, “[Officer Cole’s videotape] was admitted at trial after the jury had already heard [Officer Cole] testify to virtually the same matters on direct examination without objection. Because the complained-of narrative on the videotape was therefore merely cumulative of [Officer Cole’s] testimony on direct examination, any error in its admission does not require reversal.” *Evans v. State*, (Tex.App.-Houston [14th Dist.] 2006). This argument is in error, however, due to the fact that Officer Cole never testified. Instead, Officer Cole only created an affidavit, which is not the same as a testimony because it cannot be cross-examined. Thus, the issues with Officer Cole’s statements must be examined.

CONCLUSION

Firstly and conclusively, Officer Cole failed to reasonably exhaust his resources to contact a magistrate. Additionally, there were no exigent circumstances surrounding the blood draw. For these reasons, the results of the blood draw should have been suppressed. Secondly and collectively, Officer Cole narrated two speaking offense reports. Also, Officer Cole’s statements are not present sense impression, and he provided an affidavit, not a testimony, which clarifies that his statements’ errors should be examined. For these reasons, the video recording from the police officer’s body camera video should have been suppressed. Therefore, this court must find in favor of the Respondent with regard to the blood draw and body camera footage issues.

PRAYER

For these reasons we pray that this court would confirm the decision of the lower court.

Respectfully Submitted By:

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Texas Court of Criminal Appeals

**NO. 03-18-01234-
CR**

**The State of Texas,
Appellant v.
Cameron Shepard,
Appellee**

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Chloe

Baker

Victoria

Storm

Timber Creek High School

Keller ISD

Statement of Case

Cameron Shepard was tried for intoxication manslaughter. After losing at trial, he appealed to the Texas Court of Criminal Appeals, Third District, at Austin, based on the trial court's denial of his motion to suppress the results of a blood test and an officer's body cam footage. The court of appeals reversed the trial court's decision and remanded the case for further proceedings. The Texas Court of Criminal Appeals should reverse the court of appeal's ruling and uphold the ruling of the trial court.

Statement of the

Facts

On June 30, 2018, Officer Jordan Cole was dispatched to an accident in downtown Austin. When arriving at the scene, he activated his body camera that captured audio and video of the situation. The video footage showed a deceased female in the roadway and two persons occupied in a small car. Officer Cole then administered the Standard Field Sobriety Test on the driver, Cameron Shepard. Mr. Shepard didn't cooperate for the Horizontal Gaze Nystagmus test as he constantly blinked his eyes. Further he failed, the One Leg Stand test. Gathering this information, Officer Cole determined that Mr. Shepard was intoxicated and caused the death of the female named Chassidy Barnes. Mr. Shepard gave consent to take a sample of his blood but withdrew his consent twenty-five minutes later. Officer Cole set to reach a magistrate on the "on call" list to obtain a warrant for his blood draw, but they were unavailable at the time being. Officer Cole took Mr. Shepard back to the hospital from the county jail. Mr.

Shepard complained about chest pains, and before any narcotics were given to Mr. Shepard, his blood was drawn at exactly 5:00 a.m.

Counterpoint 1: The trial court did not err in denying the motion to suppress the results of the warrantless blood draw.

Cameron Shepard's warrantless blood draw falls under exigent circumstances; exception recognized by the U.S. Supreme Court. In *Schmerber v. California*, 384 U.S. 757 (1966), the court upheld a warrantless blood test because the officer was confronted by an emergency, in which the delay necessary to a warrant under the circumstances threatening the destruction of evidence. As seen in *Schmerber*, 384 U.S. 757, the evidence of the blood draw was necessary to the present case. In adopting a totality of circumstances approach in this case the court should find that there were, exigent circumstances because: (I) the officer had probable cause to believe the driver operated a vehicle while intoxicated; (II) alcohol in the body naturally dissipates after drinking stops; (III) there was insufficient time to procure a warrant because of the time taken to transport the driver to the hospital; (IV) a blood test is a highly effective means of determining whether an individual is intoxicated; (V) venipuncture is a common procedure and usually involves virtually no risk, trauma, or pain; (VI) the test was performed in a reasonable manner. Mr. Shepard's failure to comply during the administration of a field sobriety test and his failure of a different field sobriety test, as well as the odor of alcohol coming from Mr. Sheppard gave the officer reasonable cause. Mr. Shepard's blood was drawn at 0500 hours, dissipation for an average human body is .015 per hour. Although Officer

Cole tried obtaining a warrant from the magistrate on the “on call” list he did not have the proper means of time to wait for the magistrate to become available due to the dissipation of alcohol from Mr. Shepard’s blood. Officer Cole had to record the scene of the accident, transport Mr. Shepard to the county jail, and obtain a reliable sample of blood in order to determine whether or not this was a case of intoxication manslaughter, meaning Officer Cole did not have the time needed to procure a warrant for Mr. Shepard’s blood draw. Blood draw tests are the easiest and safest way to determine whether an individual is intoxicated. Officer Cole performed the most accurate test to discover whether the accident was due to intoxication or due to reckless driving. The test to Mr. Shepard did not harm him physically or mentally. The administered blood draw was reasonable in this case especially because it was likely that to Mr. Shepard being treated by narcotics for chest pains. This blood draw could tell the nurse of what type of medicine she was able to give Mr. Shepard.

Counterpoint 2: The trial court did not err in the denying the suppression of the video recording of the police officers body cam footage.

The body cam footage falls under the present sense impression exception:

A present sense impression is defined as the following: A statement describing or explaining an event or condition made while or immediately after the declarant perceived it. The video recording in this clearly constitutes a present

sense impression and is supported by *State v. Wright*, 370 P.3d 1122 (2016), where the court had held that the present-sense-impression exception to the hearsay rule, "is based on the notion that 'substantial contemporaneity of event and statement' negates the likelihood of fabrication or misrepresentation." The Damper court held that, *State v. Damper*, 225 P.3d 1148 Ariz. (2010), "We assume, as a general matter, that when the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable." In *Fischer v. State*, 252 S.W.3d 375 Tex. Crim. App. (2008), it was decided that a law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, were not admissible as a present sense impression exception to the hearsay rule under TEX.R. EVID. 803(1). The *Fischer* court based this on the fact that an officer cannot substitute or augment his in-court testimony with an out-of-court oral narrative. However, the *Fischer* case does not set a precedent for this case. Looking at Officer Cole's comments in the video as well as his affidavit, we can see that no part of his in-court testimony was substituted or augmented with his statements in the video. For example, in the video Officer Cole states, "Now you smell like alcohol, and your eyes are red and a little watery. Your speech is a little slow as well." These statements are perfectly congruent with his in court testimony when he says, "I had determined that Cameron had bloodshot watery eyes slow soft speech and the odor of alcohol on his breath and clothing." In the duration of the video he gave Mr. Shepard instructions of the Field Sobriety Tests, after Mr. Shepard

said he understood he began the Walk and Turn Test while Officer Cole stated the following, "At his count of eight, he put his foot down on the ground for balance and picked it back up. He is swaying a lot. Uses arms for balance. Very unstable." Officer Cole's affidavit then states, " At the fifteen second marks, when Cameron was saying the number eight, he put his foot back on the ground and picked it back up again. Also at this time Cameron began swaying." These facts distinguish *Fischer v. State*, 252 S.W.3d 375 Tex. Crim. App., and its precedent irrelevant to Mr. Shepard's case. Further *Shuffeild v. State*, 729 S.W.2d 11 (1987), as referenced in *Evans v. State*, 558 S.E.2d 51 (2001), the admission of inadmissible evidence does not require reversal if the same facts are proven by other proper testimony. Because the evidence contained in the excluded body camera footage was included in Officer Cole's in-court testimony no reversal of the trial court's decision to suppress the video is necessary.

The exception to Rule 803(8) does not apply to this case:

At issue in this case is not a "speaking offense report," which would be excluded under Rule 803(8). Offense reports are normally prepared some time after the event in question, with the

officer having had the opportunity of "[t]hinking about it." However, in Mr. Shepard's case, the brief period of time (a few seconds) between Officer Cole's observation of the events and his description of them in the video left him little to no opportunity to "[t]hink about it" and does not present a setting "brimming with the potential for exaggeration or misstatement." Officer Cole was reporting the incident and development as he saw and partook in it, which is exactly the kind of evidence protected by Rule 803(1). The video shows exactly what happened and eliminates the four "hearsay dangers" of faulty perception, faulty memory, accidental miscommunication, or insincerity. The contemporaneity and "immediately thereafter" requirements of Rule (803)(1) remove any conflict between it and Rule (803)(B).

Conclusion:

In light of the facts, Officer Cole not obtaining a warrant for Mr. Shepard's blood draw was due to exigent circumstances therefore the blood evidence should not be suppressed. Furthermore, officer Cole's body cam footage is admissible as a present sense impression and is not an offense report covered by the exception in Rule 803(8).

Prayer:

For these reasons above we pray the court upholds those of the initial trial court's decision to not suppress the warrantless blood draw and the video cam footage from the officer on scene.

Chloe Baker Victoria Storm

Timber Creek High School

Keller ISD

**NO. 03-18- 01234 -
CR**

**The State of Texas,
Appellant V.
Cameron Shepard,
Appellee**

From the Court of Appeals, Third District, at Austin

Appellee Petition for Discretionary Review

Chloe

Baker

Victoria

Storm

Timber Creek High School

Keller ISD

To The Honorable Texas Court of Criminal Appeals:

Comes now Appellee, Cameron Shepard, and files this appellate brief.

Statement of the Case

Cameron Shepard was convicted of intoxication manslaughter. Shepard appealed this conviction on two points of error: 1-the admission of a warrantless blood draw and 2- the admission of a narrated bodycam video into evidence in violation of hearsay rules and Fourth Amendment protections. The Texas Court of Appeals Third District at Austin reversed the trial court's decision on both points of error and remanded it for further proceedings.

Statement of the Facts

On June 30, 2018, at approximately 2:00 am. Cameron Shepard's car crashed, ejecting and killing one of the passengers, Chassidy Barnes. Officer Jordan Cole was the responding officer. Upon Officer Cole's arrival at the scene he turned on his body camera providing video and audio from the scene as he narrated it. After Officer Cole checked on the deceased and the other passengers were removed from the car and evaluated by EMS, Officer Cole immediately proceeded to interrogate Mr. Shepard and performed several field sobriety tests including the Horizontal Gaze Nystagmus test, the Walk and Turn test, and finally the One Leg Stand test all directly in front of the scene where Mr. Shepard's girlfriend had just passed away. Based on his

administration of the tests, Officer Cole determined that Mr. Shepard was intoxicated. He placed him under arrest and transported him to the city jail where Mr. Shepard agreed to provide a blood sample. They made their way to a hospital where Mr. Shepard then withdrew his consent. They then went to the city jail so Officer Cole could obtain a warrant; he called two judges yet was unsuccessful. Regardless, he took Mr. Shepard back to the hospital with the intent of obtaining a blood draw. On the way to the hospital, Mr. Shepard began complaining of chest pains, and when they arrived Officer Cole requested Mr. Shepard's blood be drawn before any narcotics were given. In the lower court both the narrated body camera video and the warrantless blood draw were allowed into evidence over objection from Shepard's team, and Shepard was found guilty. On appeal the decision was reversed. Shepard respectfully requests that this Court uphold the decision of the Court of Appeals.

Issues of Appeal

Point of error 1: The trial court erred in allowing the warrantless blood draw into evidence as it did not fall under exigent circumstances thereby violating Shepard's Fourth amendment rights.

On the night of June 30th, 2018 there was an "on call" list for magistrates available to sign for warrants. Officer Cole transported Mr. Shepard to the hospital to obtain his blood without utilizing the on call list and only called one magistrate who was busy at that moment. Officer Cole violated his 4th amendment rights by not obtaining a warrant for his blood

draw. Officer Cole he had time to obtain a warrant because there was another officer investigating the scene of the crime. Officer Cole not only had reasonable time to obtain a warrant he, according to his affidavit, had an on call list for ten magistrates who were signing warrants at the time.

Point of error 2: The trial court erred in allowing the body camera video into evidence as it constitutes a spoken offense report, which is inadmissible hearsay under Rule 803 (8), and cannot be included as a present sense impression under 803 (1).

As the Texas Court of Appeals stated in its opinion in this case, “‘Hearsay’ is an out of court statement offered to prove the truth of the matter asserted. Offense reports containing statements made by law enforcement officers during a criminal investigation—including audio and video recordings containing such statements—are generally considered to be inadmissible hearsay. ‘An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-Court oral narrative.’ Such a narrative constitutes a ‘speaking offense report’ in which the ‘on-the-scene observations and narrations of a police officer conducting a roadside investigation . . . are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime.’” *State v. Shepard* NO. 03-18- 01234-CR.

There is no way for Officer Cole’s statements to be seen as anything

other than motivated towards future prosecution. It is clearly seen in his comments like, "I smell alcohol coming from the vehicle... We'll talk when he gets out. It'll be intox manslaughter... Now you smell like alcohol, and your eyes are red and a little watery. Have you had anything to drink tonight?... Your speech is a little slow as well.... I believe he understands the instructions and is refusing to cooperate with the HGN test.... He stopped between steps 4 and 5. Turn. All steps back are not heel-to-toe. Stop between 5 and 6.... At his count of eight, he put his foot down on the ground for balance and picked it back up. He is swaying a lot. Uses arms for balance. Very unstable...." The recording ended with Officer Cole stating, "Mr. Shepard, you are going to come with me.

We are going to run some tests on your blood to determine your blood alcohol content." These are exactly the kind of biased statements that Rule 803(8) is designed to exclude. *Fischer v State*, 252 S.W.3d 375 (Tex. Crim. App. 2008) found that the basis for exclusion of police reports and investigative recordings is exactly the same under both 803 (1) and 803(8). "The recorded factual observations made by police officers investigating a suspected crime are not the type of "non-reflective" street-corner statements of objective observers that the present sense impression exception is designed to allow. Courts admit present sense impression statements precisely because they are non-narrative, off-hand comments made without any thought of potential litigation by a neutral and detached observer. Conversely, on-the-scene observations and narrations of a police officer conducting a roadside investigation into a suspected DWI offense

are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime. Calculation and criminal litigation fill the air; the officer is gathering evidence, he is not making an off-hand, non-reflective observation about the world as it passes by. Similarly, factual observations, narrations, opinions, and conclusions made by a citizen or bystander that might be intended by the declarant to be made with an eye toward future litigation or evidentiary use are inadmissible under the rule." *Id.* It's the same for everyone. "The rationale for excluding recorded oral narrative of an on-the-scene investigation as a present sense impression under Rule 803(1) is precisely the same as the rationale for excluding that evidence under Rule 803(8)(B): the presumed unreliability of law enforcement observations in an adversarial, investigative setting" *Id.* The *Fischer* court reasoned that "reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through' statements" *Id.* are not proper present sense impressions because, "thinking about it' destroys the unreflective nature required of a present sense impression." *Id.* Therefore, it is inadmissible under both points.

Conclusion

The Appellee was entitled to a fair and just trial, but the admittance of the warrantless blood draw and the hearsay body camera video into evidence unfairly weighed the room against Mr. Shepard and failed to provide him a fair trial.

Prayer

We pray the court upholds the decision of the Court of Appeals 3rd district at Austin and find in favor of Cameron Shepard that justice and due process be fairly given to him.

Chloe

Baker

Victoria

Storm

Timber Creek High School

Keller ISD

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State Texas Appellant

vs.

Cameron Shepard Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN -----

Brief for Appellant

Caleb Barkman

Jack Bennett

Cleburne High School

Joshua YMCA

Statement of the case

Cameron Shepard was charged with intoxication manslaughter after an accident that occurred. Cameron motioned to suppress the results of a warrantless blood draw and the body camera footage from the night on question.

Statement of the facts

On the night of June 30th, 2018 Officer Cole responded to a dispatch call reporting a DWI accident at approximately 2 am. Officer Cole arrived on scene to find the body of Chassidy Barnes and a flipped car with 2 passengers, Cole requested backup and fire and EMS arrived to remove the 2 remaining passengers. After this Cole began questioning the driver of the vehicle Cameron Shepard. Officer Cole noted Cameron's demeanor and qualities while administering a Field sobriety test. After considering all of the factors available to him, Officer Cole placed Cameron under arrest under charges of DWI manslaughter. Cameron initially agreed to the subsequent blood draw so Officer Cole transported him to the hospital, upon arrival Cameron removed consent. Officer Cole then transported Cameron to the jail to begin the process of obtaining a warrant. After arriving at the jail Cameron began complaining of chest pains, Officer Cole then transported Cameron to a hospital where he ordered a nurse to draw blood before Cameron's blood could be diluted by the administered narcotics. At Cameron's trial he motioned for the suppression of the results of said blood draw and for the suppression of the body camera footage, the trial court denied both requests and subsequently Cameron pleaded guilty.

Issues on appeal

1st Issue on Appeal: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

___Exigency is said to exist when evidence is at risk of being destroyed. Clearly this is brought into question with the dissipation of the BAC in Mr. Shepard's blood. Now it is the burden of the state to prove the existence of exigency as established by the trial courts. To prove exigency we must look at each and every aspect of the case while avoiding the use hindsight as established by *Cole v. State*, 490 S.W.3d 918 (2016). First, this was an irregular DWI case because of the tragic death of Chassidy Barnes, according to *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) exigency depends on special factors that would delay the warrant obtaining process, since the tragic death of Ms. Barnes is for sure a special factor that would extend the investigation process it could reasonably be inferred that this was no regular DWI stop. According to the missouri supreme court (which ruled on *Missouri*, 569 U.S. 141 (2013))factors that would delay an officers attempt to obtain a warrant further increase the need for the use of exigent circumstances. Another factor that contributed to the time frame in which Officer Cole could not obtain the warrant was Cameron's request for medical assistance. This request extended the time that it would take to acquire a warrant and since as *Missouri*, 569 U.S. 141 (2013) states "for in every case the law must be concerned that evidence is being destroyed" it was officer Cole's determination that he had to think ahead to the trial to guarantee a fair and speedy trial in which Mr. Shepard could be judged by his peers and assessed fairly. This is not Cole trying to strip a man of his rights. This is an

officer of the law trying to protect the values of the accused and the sanctity of the legal process, those two are on opposing sides a surprising amount and the fact that he managed to toe the line should be applauded rather than condemned. I understand the severity of what Officer Cole did, we must also assume an officer of the law understood what he was doing, meaning he was acting in the best interest of the law and Mr. Shepard, if Mr. Shepard was not intoxicated then clearly this blood draw would vindicate him, if he was intoxicated then we can get justice for the death of a beautiful young girl taken way before her time.

Furthermore a question of Mr. Shepards intoxication could be raised by the appelle, however intoxication in a legal matter is defined as "not having normal use of mental or physical faculties because of alcohol or other drugs".As we can tell from Officer Cole's body camera transcript it was clear Mr. Shepard did not have full control of his physical faculties. This clearly indicates that Mr. Shepard was by definition intoxicated.

Now to supplement my point concerning *Missouri*, 569 U.S. 141 (2013), *Cole*, 490 S.W.3d 918 (2016) set a precedent not giving us a cookie cutter outline for what exigent circumstances are but it does set some guidelines we can refer too when attempting to prove exigency for ourselves, one of these references comes from the final opinion of the trial court when they ruled that obtaining a warrant was "impractical" it was ruled this way due to the special circumstances that were contained within the case itself these time consuming elements included a death and things that would require the attention of the officer before his need to get a warrant. In our case we have a time consuming

element with the death chassidy this is something that requires Officer Coles attention and direct actions. And since officer Cole was the first officer on the scene it is his job to delegate and let the arriving forces know what he needs to protect the safety of the people. Then another factor arose concerning the time frame in which Officer Cole could solely focus on obtaining a warrant, first officer cole transported Mr. Shepard to the hospital to obtain a blood draw with Mr. Shepard's consent, however upon arrival Cameron withdrew his consent, this forced Officer Shepard to take Cameron to the jail so he could begin the process of obtaining a warrant for the blood draw however this process was interrupted when Mr. Shepard began complaining of chest pain, this forced Officer Cole to stop the process of obtaining a warrant and transport Mr. Shepard back to the hospital. This entire affair took three hours! That is all time that could have been spent finding a warrant.

Now your honor I would like to remind you that we must avoid the use of hindsight, and to do this we must look at each individual action as it happened. It is not unreasonable to believe officer Cole thought he could handle each event as it happened because individually they are not huge issues. Cameron's initial consent would tell Officer Cole that this will be a fairly routine blood draw, meaning he would not need a warrant because Cameron is okay with what is about to happen. But when Cameron withdraws his consent, Officer Cole is prepared for this and heads back to the jail to begin the process of filing a warrant. But when this is interrupted by Cameron's request for medical assistance Officer Cole had to take an action that was in the best interest of the evidence. Individually all of these events are rather inconsequential but, when

we remove our hindsight bias, and look at the totality of circumstances faced by officer Cole we can clearly see that the only action that could guarantee the sanctity of evidence was to take a warrantless blood draw

Officer Cole should always be concerned with the loss of evidence, as stated by *Cole*, 490 S.W.3d 918 (2016). The loss of evidence is one of the biggest causes of error in the trial court system, for when evidence is lost the truth becomes a blurry and blurry picture. An Officer of the laws job is to protect the peace and when they cannot protect the peace they are to insure that justice can be obtained. In Officer Cole's mind given the circumstances he had, his number one goal was to get the evidence required to give Mr. Shepard a fair and speedy trial, the notion that he was acting under some malicious intent to degrade the rights of American citizens is simply an erroneous and irresponsible leap to make.

2nd Issue on Appeal: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video

___As the Honorable Judge Cochran stated in FISCHER v. STATE 252 S.W.3d 375 (Tex. Crim. App. 2008) "If a person observes some situation or happening which is not at all startling or shocking in its nature, nor actually producing excitement in the observer, the observer may yet have occasion to comment on what he sees". Meaning that if Officer Cole was in a calm and collected state of mind then all of the things that he said could be considered factual and not be considered hearsay. The only thing that could be considered startling was the

deceased body of Ms. Barnes which he saw at 2am. However, Officer Cole is an experienced police officer with 2 years served in Austin, Texas. Leading us to believe that he should be trained enough to keep his composure no matter what the situation. It is reasonable to infer that Officer Cole's views would have come in a calm and collected manner, he was trained for this exact situation, all of the things officer cole spoke to his body camera were factual statements that were made in a calm and collected manner.

Hearsay is defined as testimony or documents which quote persons not in court. Because the person who supposedly knew the facts is not in court to state his/her exact words, the trier of fact cannot judge the demeanor and credibility of the alleged first-hand witness, and the other party's lawyer cannot cross-examine. Now my opposing counsel has attempted to show that Officer Cole's body camera footage was simply hearsay and nothing more, however according to the dissenting opinion if the video contains evidence that is valuable to the trial court's final decision then it must be admitted, these things include but are not limited to descriptions of the scene and the demeanor of the accused. The Trial court had to know about how the location of vehicle and how it, and I quote, "Collided into a bridge support column on the left side of the service road." and in addition how there were quote "Two males trapped inside." This is completely necessary for the court because without it they simply could not make an informed decision. There is also insight into Cameron Shepards demeanor given during the conduction of the field sobriety test. By removing the body camera footage we are losing major details of the case, the trial court's decision could hinge on the details provided. Removing the body camera footage

would not just prevent the trial court to know important facts from the perspective of Officer Cole, however. As it stands Officer Cole simply followed the protocols of an irregular DWI stop for his jurisdiction. Nothing crazy or out of the ordinary happened in this footage to separate it from any other DWI case, officer Cole simply stated his thoughts and perceptions as he moved about the process of trying to make sense of this tragedy, and for the most fair and informed trial the jury needs to come along for that ride.

Now your Honor I would like to discuss a main point of contention my opposing counsel will likely focus on. Officer Cole was quoted as saying " I smell alcohol coming from the vehicle. The one in the driver seat is clearly the driver of the vehicle. We'll talk when he gets out. It'll be intox manslaughter." However as a we know from FISCHER 252 S.W.3d 375 (Tex. Crim. App. 2008) this is simply a "street corner statement" Let's look at who he is speaking too; his co-worker. Their discussion? Work. It may be a morbid sense of comradery but it comes with the job.

Conclusion

Officer Cole operated under the confines of the law on this tragic night. He used his best judgement to protect the sanctity of the law. Just because a pre law student took a reasonable time period, and a normal post crime interview, and exploded it to unreasonable lengths does not mean that he should be let off. He committed a crime in which an innocent woman died. Justice must be served.

Prayer

And for these reasons we pray this court rules in favor of the great state
of Texas.

Respectfully submitted by:

Caleb Barkman

Jack Bennett

Attorneys for Appellant

Cleburne High School

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State Texas Appellant

vs.

Cameron Shepard Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN -----

Brief for Appellee

Caleb Barkman

Jack Bennett

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Joshua YMCA

Statement of case

Cameron Shepard was charged with intoxication manslaughter after an accident that occurred. Cameron motioned to suppress the results of a warrantless blood draw and the body camera footage from the night on question.

Statement of the facts

On the night of June 30th, 2018 Officer Cole responded to a dispatch call reporting a DWI accident at approximately 2 am. Officer Cole arrived on scene to find the body of Chassidy Barnes and a flipped car with 2 passengers, Cole requested backup and fire and EMS arrived to remove the 2 remaining passengers. After this Cole began questioning the driver of the vehicle Cameron Shepard. Officer Cole noted Cameron's demeanor and qualities while administering a Field sobriety test. After considering all of the factors available to him, Officer Cole placed Cameron under arrest under charges of DWI manslaughter. Cameron initially agreed to the subsequent blood draw so Officer Cole transported him to the hospital, upon arrival Cameron removed consent. Officer Cole then transported Cameron to the jail to begin the process of obtaining a warrant. After arriving at the jail Cameron began complaining of chest pains, Officer Cole then transported Cameron to a hospital where he ordered a nurse to draw blood before Cameron's blood could be diluted by the administered narcotics. At Cameron's trial he motioned for the suppression of the results of said blood draw and for the suppression of the body camera footage, the trial court denied both requests and subsequently Cameron pleaded guilty.

Issues on Appeal

1st Issue on Appeal: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

In the case of WEEMS v. STATE 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016) it is established that the State holds the burden of establishing exigent circumstances. Exigent circumstances are a provision of the 4th amendment, and are said to exist when "A person's life or safety is being threatened, a suspects escape is imminent, or evidence is about to be removed or destroyed." The only question that could be raised for establishing these circumstances is the removal of evidence, however the blood was drawn 3 hours after the crash so any reasonably experienced law enforcement officer would know that there is no way Cameron would have tested higher than the legal limit at this point. Especially given Cameron's performance on a field sobriety test and the various accounts from eye witnesses' there is no way Officer Cole could reasonably infer that Cameron was intoxicated to the point of loss of physical control. (taylor's affidavit) Even if Officer Cole would have been taking the blood draw in an attempt to reverse engineer Mr. Shepard's BAC at the time of the crash, the affidavit of Dr. Sidney Tate, a professional on this topic, does the math of reverse engineering and by her estimates Mr. Shepard would have been at a .06, well below the legal limit. This shows that the blood draw was completely pointless in the first place. However this blood draw is considered legal if exigent circumstances did exist, but it is clear that no such circumstances

exist. Exigency is an exception, not the norm, to say that this case contains the extreme circumstances required to justify this warrantless action is completely false. *Winston v Lee* states that a person's body is the most private and sacred thing that we own and to violate it requires the most extreme of circumstances. This is not an extreme circumstance. In *Cole V State* an intoxicated man blasted through an intersection going 110 miles per hour, colliding with another car and causing a massive explosion where the victim died on impact, the explosion caused a massive fire that required streets to be shut down and people to be evacuated. Even then the appeals court found that this didn't justify a warrantless blood draw. This was simply a tragedy in which a man lost the love of his life because a blind old woman was tailing his car too closely. First he lost his girlfriend and now he has to endure watching himself be blamed for it as his rights are stripped away

Now I will address the negligence shown by Officer Cole in his attempt or rather lack thereof to obtain a warrant for this heinous blood draw. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) establishes a precedent of the officer having to obtain a warrant if reasonably possible without undermining the efficacy of the investigation. Just using the facts of the case it becomes clear the lack of effort made by Officer Cole to obtain a warrant before violating 200 years of precedent. First he only called one out of eight available magistrates in attempting to get a warrant then he failed to notify any of the assisting officers of his need for a warrant meaning that they couldn't help him obtain this warrant, this clearly shows a pure lack of accountability and responsibility by Officer Cole. The fourth amendment is created to prevent people from being

indicted based on evidence that is illegally obtained. In this case there is no question that exigent circumstances do not exist. But the Appelle will undoubtedly attempt to use case law like *Cole v State* to establish a precedent for what exigent circumstances are, this however is countered by *Weems v State* which states that exigent circumstances are established on a case by case basis. This is further bolstered by *Schmerber v. California*, 384 U. S. 757 (1966) that says in any DUI case you must look at the totality of the situation before making these leaps. Exigent circumstances are an exception to the 4th amendment that are designed not to be used regularly but in extreme circumstances, this is clearly not that. This is simply a tragedy in which a man lost the love of his life in an accident that was not his fault. After he lost the love of his life, he had his body violated by an officer who barely even attempted to obtain a warrant.

2nd Issue on appeal: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

For my first point your honor I will be going over how the statements made by Officer Cole are indicative of a speaking offense report. This idea is supported by the case *FISCHER v. STATE* 252 S.W.3d 375 (Tex. Crim. App. 2008) where John Robert Fischer was stopped and questioned by Officer Martinez. The significance of this is that while he was questioning Mr. Fischer he made statements about him having "glassy, bloodshot eyes" and "slurred speech". Statements like these were the main point of contention in the case and they were determined to be a speaking offense report. According to

FISCHER 252 S.W.3d 375 (Tex. Crim. App. 2008) a speaking offense report is defined as "on-the-scene observations and narrations of a police officer conducting a roadside investigation..." and "are fraught with the thought of a future prosecution: the police officer is gathering evidence to use in deciding whether to arrest and charge someone with a crime." Meaning if Officer Cole's statements have mention of the charges and prosecution then they would be deemed a speaking offense report. Now specifically I am referring to a statement made by Officer Cole on his body camera footage. "I smell alcohol coming from the vehicle. The one in the driver seat is clearly the driver of the vehicle. We'll talk when he gets out. It'll be intox manslaughter." From this we can see that he was very clearly gathering evidence to prosecute Cameron like Officer Martinez was gathering evidence in *FISCHER 252 S.W.3d 375 (Tex. Crim. App. 2008)*. This is clearly ground to claim that what Officer Cole said was a speaking offense report, and as we know from Rule of Evidence 803(8)(B) a speaking offense report is not admissible as evidence. Rule of Evidence 803(8) deals with public records and under the (B) section of the rule it states "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." meaning that 803(8)(B) excludes investigative reports from public record and prevents out of court observations made by officers of the law from being admissible.

Now undoubtedly my opposing counsel will try to present the court with a counter rule, more specifically Rule of evidence 803(1) which states that present sense impressions of an event given during or immediately after it happens are admissible in court. This however fails when applied to the Rule of Construction,

the rule of construction is meant to be used when two conflicting laws meet, just like we have here. The rule of construction states that we must use the law most appropriate for our own case. Now your honor, I submit to you that our rule 803(8)(B) is the correct rule to follow during this case, because this is infact a public record that was stated by an officer of the law. Given the circumstances stated it is clear that Officer Cole has an agenda to follow given the statements I highlighted in the transcript of the body camera footage.

Furthermore your honor I will discuss the most basic point of this entire issue. The violation of the rule against hearsay. Hearsay is defined as a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. However there is infact a rule against hearsay, Rule 802 states that hearsay is not admissible unless provided with a federal statute to state otherwise. Hearsay is not admissible because of the 4 bias dangers; faulty perception faulty memory accidental miscommunication or insincerity. Hearsay could be anything from an unreflective statement to street corner talk, but in our case it is the blatantly unreflective statements made by Officer Cole in the body camera footage, first off Officer cole claims that Cameron is acting intoxicated even though we have multiple eye witness reports that said he appeared to be fine before engaging in operating the vehicle, these come from his best friend Taylor Belanger, and the bartender that night Urban Rhodes. Both of these accounts claim that Cameron looked normal and was able to operate a vehicle with the full control of his physical abilities. Meaning that Officer Cole's description is either wrong or subjective, and as we know Officer Cole has an agenda to meet, leading us to

reasonably infer that his description of Cameron's demeanor is nothing more than him trying to create more evidence that would railroad Cameron through a trial and put an innocent man behind bars.

Now your honor I will speak on the potential precedent being set. Allowing this body camera footage to be admitted would set a detrimental precedent that arresting officers can make speculative statements that are completely false and erroneous leading to them being treated as fact in trial court. It is a matter of someone's constitutionally given right to a fair trial being decided here. In addition to deciding on a constitutionally given right you, your honor, would also be setting the precedent that consent is not truly consent. What I mean by that is that when Mr. Shepard did not consent to a field sobriety test he should have been allowed his right to refuse. By allowing this body camera footage you are denying that right to Mr. Shepard as well as denying that right to citizens in the future that are impacted by this case. We live in a world of very slippery slopes that can cause the biggest landslides of degradation in human rights, let's be the court that takes the right step and says that the rights of the every man woman and child should be respected.

Conclusion

It is clear that Officer Cole violated the 4th amendment by ordering a nurse to violate my clients body. My client has a right to be heard fairly and with evidence that was gained through legal means. To rule against Cameron Shepard today would be ruling against the Constitution itself.

Prayer

And for these reasons we pray this court rules in favor of the Appellee

Respectfully submitted by:

Caleb Barkman

Jack Bennett

Attorneys for Appellee

Cleburne High School

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State Texas Appellant

vs.

Cameron Shepard Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN -----

Brief for Appellant

Tarek Arouse

Arturo Rolon

Cleburne High School

Joshua YMCA

Statement of the Case

Cameron Shepherd was found at the scene of a vehicular incident that resulted in a death. Under suspicion of intoxication, Officer Jordan Cole requested a blood sample from Mr. Shepherd. After withdrawing his initial consent, Officer Cole obtained the blood sample from Mr. Shepherd over his objections. After his motion was denied to suppress evidence in the trial court, Mr. Shepard entered a plea of guilty to the charge and filed his appeal. The Texas Court of Appeals in the Third District at Austin reversed the decision of the trial court and remanded for further proceedings consistent with the majority opinion given by Justice Rodgers

Statement of the Facts

On June 30th 2018, Officer Cole found himself at the scene of a gruesome vehicular accident. At the scene of the incident Officer Cole found that a young woman was lying dead in the roadway and two other individuals were trapped in a car. The driver, Mr. Cameron Shepherd, was under suspicion to be intoxicated by the results of a standardized field sobriety test and had caused the death of the now deceased Chasidy Barnes. After a multitude of delays caused by Mr. Shepherd and the inability of practically locating a magistrate at the time, Mr. Shepherd had his blood drawn at the hospital. The Appellant Cameron Shepard was charged with the offense of intoxication manslaughter and prior to

the trial plead guilty to the charge. The State now appeals to have the subsequent decision by the Court of Appeals, Third District, at Austin reversed.

Issues on Appeal

1st Issue on Appeal: Whether the trial court erred in denying the motion to suppress

the results of the warrantless blood draw

Question of Exigency

Exigent circumstances are said to exist when evidence is about to be removed or destroyed. *Missouri v. McNeely*, 569 U.S. 141 (2013) further identified relevant facts in their ruling for Tyler Mcneely that each alone can establish exigency, such as the “availability of a magistrate” and a “time frame.....to obtain evidence”. A multitude of circumstances were present at the time of Mr.Shepherds crash that prompted a exigency. These circumstances include the issue of the car crash, Mr Shepherd’s initial consent and withdrawal, the on call magistrate being unavailable, and Mr.Shepherds request for medical intervention. Even with their ruling against warrantless action in their case, *Missouri*, 569 U.S. 141 (2013) mandates “for in every case the law must be concerned that evidence is being destroyed.” which is exactly what Officer Cole made sure was his chief concern. Officer Cole could not have forseen the events that caused a restraint on time. We know from the affidavits that Officer Cole had to wait for The Austin Fire Department to aid in extracting Cameron and Taylor who were both trapped in the damaged vehicle. Officer Cole also had to await the arrival of the EMS to clear Mr.Shepherd before he could administer

Standardized Field Sobriety Tests, all of which Mr. Shepherd failed. From there Officer Cole told Cameron he was under arrest and transported him to the city jail. Cameron agreed to provide a blood sample there, but once arriving at the hospital Cameron withdraw his consent, further delaying the process. Officer Cole had to transport Mr. Shepherd back to county jail in attempt to obtain a warrant. Due to the unavailability of a magistrate, Officer Cole, in the interest of preserving the ongoing diminishing evidence, transported Cameron back to the hospital to have his blood drawn before narcotics would be administered that would have tampered with the evidence. Our case is a parallel to *Schmerber vs California*, where a warrantless blood test of an individual was upheld because the officer reasonably believed he was confronted with an emergency.

Schmerber v. California, 384 U.S. 757 (1966) stated that exigency depends on “the existence of additional “special facts”” which from the affidavits is clearly present. Officer Cole had time-related restraints that saw him taking unexpected time transporting a manipulative law student abusing his knowledge of the legal system to protect himself. *Missouri*, 569 U.S. 141 (2013) supported the *Schmerber*, 384 U.S. 757 (1966) precedent when conveying that the reasonableness of a “a warrantless blood test of a drunk-driving suspect” must be determined “case by case based on the totality of the circumstances”. In with giving total deference to the trial court and reviewing the facts of the case present to Officer Cole at the time objectively, the court can come to the conclusion using this approach that the actions taken were a necessity to preserving evidence.

Officer Jordan Cole’s Actions

Officer Cole's actions were done in agreement to the law while also managing the aforementioned special circumstances presented to him at the time of the arrest. The "totality of the circumstances" approach as created in *Schmerber*, 384 U.S. 757 (1966) and used in *Missouri*, 569 U.S. 141 (2013) gives officers no set in stone guidelines on determining exigencies. Officer Cole states in his affidavit that neither their local municipal court nor the county court has judges on duty overnight. He located the on-call list where one out of the ten judges is on call every night. He located this list in the jail and called the on call judge yet no one answered .A few days after Cameron's arrest only then was he able to secure an on call list for the Travis County judges. We can assume Officer Cole until now has followed the regular established procedures to obtaining blood warrants, but the facts of this case showed that the situation was outside of Officer Coles control and he acted in the most appropriate way the situation allowed. *Missouri*, 569 U.S. 141 (2013) expresses that "police are presumably familiar with the mechanics and time" within their jurisdiction and can make "reasonable judgments... under the circumstances" provided and continues in stating that "Reviewing courts in turn should assess those judgments from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" *id* . Without any standard guidelines to follow, we must adhere to the totality of the circumstances approach and look at each case separately by its individual facts. Officer Cole did what he felt was the best way to lawfully preserve evidence with the unexpected exigency prompting factors at play.

2nd Issue on Appeal: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video

Harmless Error, Admission of Inadmissible Hearsay

Ramon v. State, 159 S.W.3d 927, 931 (Tex.Crim.App. 2004), as per *Evans v. State* 14-05-00332-CR (Tex.App.-Houston [14th Dist.] 2006) clarifies "The admission of inadmissible evidence does not require reversal if the same facts are proved by other proper testimony." The argument against body-camera footage is "inadmissible evidence", although it is, the use of the affidavit of Officer Cole in lieu of testimony for the Court of Appeals to deny the reversal may be used. Officer Cole states, "At this point I had determined that Cameron had bloodshot, watery eyes; slow, soft speech; and the odor of alcohol on his breath and clothing... I... believed Cameron Shepard was intoxicated and by reason of that intoxication had cause the death of Chassidy Barnes.", and according to *Evans* 4-05-00332-CR (Tex.App.-Houston [14th Dist.] 2006) "the complained-of narrative on the videotape was therefore merely cumulative of [the-officer-in-question's] testimony on direct examination, any error in its admission does not require reversal." The body-camera-footage follows the affidavit of Officer Cole providing confirmation and further support for his testimony. Furthermore, if there was any error in admitting the evidence that error would be deemed harmless according to *Thompson v. State* NO. 03-12-00519-CR , "The admission of inadmissible hearsay constitutes non-constitutional error *Lee v. State*, 21 S.W.3d 532, 538 (Tex. App.— Tyler 2000, no pet.)" and "An appellate court must disregard non-constitutional errors that

do not affect the substantial rights of the defendant Tex. R. App. P. 44.2(b)“ A substantial right is defined as “an important or essential right that merits enforcement or protection by the law”, so Cameron Shepard’s substantial rights were not violated. If body-camera footage was inadmissible hearsay that was admitted in trial court, there would be no reason to reverse the motion of the trial courts.

Rule 803(1)

The body-camera footage would be admissible hearsay under the present-sense-impression exception, Rule 803(1). *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008) notes that the hearsay doctrine lists numerous exceptions to hearsay that “contain such strong independent, circumstantial guarantees of trustworthiness that the risk of the four hearsay dangers is minimal while the probative value of such evidence is high.” The dissenting opinion of *Fischer* 252 S.W.3d 375 (Tex. Crim. App. 2008) concurs that Officer Cole’s mention of DWI in conversation with the EMS would classify as present-sense-impression, Rule 803(1) “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” *id.* Moreover, there is a general over-emphasis on the narrative provided by Officer Cole in the body-camera footage, but Cole is not the only present-sense-impression narrative in the footage. The objective observation of Imani Hanes when she sees the body is, “I don’t think she is breathing. Oh my dear Jesus” and even the EMS comments “DWI?” when it is not their duty to fraught over investigation. Even if the Cole narrative was inadmissible, the other narratives

would qualify under Rule 803(1), meaning that parts of the body-camera footage would still be admitted.

Conclusion

Acting in the best interest of preserving evidence, Officer Jordan Cole operated within the reasonable confines of the law to assure the possibility of a fair trial for all parties involved. The circumstances of this case were both unforeseeable and out of Officer Coles's control. With giving total deference to the trial court's ruling and looking at the facts of the case again in a light most favorable to the trial court, this court can reasonably find in favor of the State of Texas. There was a clear issue of exigency to prompt a blood draw as well as the fact that the statements made in the body camera footage were unreflective statements solely described the event.

Prayer

For these reasons we pray the court finds in favor of the court finds in favor of the State of Texas.

Respectfully Submitted,

Tarek Arouse

Arturo Rolon

Attorneys for Appellant

TEXAS COURT OF CRIMINAL APPEALS

NO. 03-18-01234-CR

The State Texas Appellant

vs.

Cameron Shepard Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN -----

Brief for Appellee

Tarek Arouse

Arturo Rolon

Cleburne High School

Joshua YMCA

Statement of the Case

Cameron Shepherd was found at the scene of a vehicular incident that resulted in a death. Under suspicion of intoxication, Officer Jordan Cole requested a blood sample from Mr. Shepherd. After withdrawing his initial consent, Officer Cole obtained the blood sample from Mr. Shepherd over his objections. After his motion was denied to suppress evidence in the trial court, Mr. Shepard entered a plea of guilty to the charge and filed his appeal. The Texas Court of Appeals in the Third District at Austin reversed the decision of the trial court and remanded for further proceedings consistent with the majority opinion given by Justice Rodgers

Statement of the Facts

On June 30th 2018, Officer Cole found himself at the scene of a vehicular accident. At the scene of the incident Officer Cole found an emotionally scarred Cameron Shepard who had just lost the love of his life. After stating his wish not to have his blood drawn, Officer Cole decided to supersede the warrant requirements to attain Mr. Shepherds blood by force.

Issues on Appeal

1st Issue on Appeal: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw

4th Amendment Violation

Before discussing the question of exigency, I'd first like to address the states direct violation of one of our most basic protections guaranteed by the bill of rights: our right against unreasonable searches and seizures. As stated in *Missouri vs McNeely*, 569 U.S. 141 (2013) in discussion of the fourth amendments restrictions , "search warrants are ordinarily required for dwellings... no less could be required where intrusions into the human body are concerned". Noting that the fourth amendment protection applies equally to whether the officer is forcibly entering one's home or body, then there is clearly a undoubtable violation of Cameron's right to be "secure in their persons" as supposedly guaranteed by the fourth amendment. This idea of preventing warrantless, unlawful searches of one's body is further supported in *Missouri*, 569 U.S. 141 (2013) , stating "The Supreme Court held that the Fourth Amendment's protection against bodily intrusions outweighs the state's interest in gaining evidence quickly" and further commands that the fourth amendment mandates officers must obtain warrants before obtaining blood samples if they can reasonably do without undermining the efficacy of their search. This exemplifies the belief that an officers warrantless blood draws are to always be considered a rare exception, an exception that is far from present in the Mr. Shepard's case.

Question of Exigency

The state will attempt to convince the court that the blood draw was permitted due to exigent circumstances believed to be present. Exigent

circumstances are said to exist when (1) a person's life or safety is threatened (2) a suspect's escape is imminent, or (3) evidence is about to be removed or destroyed. However the state has failed to satisfy any of these prongs to meet its burden to establish "that exigent circumstances existed" as outlined in *Missouri*, 569 U.S. 141 (2013), as what the state MUST do to satisfy the "fourth amendments reasonableness standard". The court held in their majority decision for Tyler Mcneely that in "drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency [alone] in every case..." *id*, so therefore we know that bloods diminishing properties does not automatically shift the states burden. We must then use the totality of the circumstances approach as directed by *Schmerber v California*, 384 U.S. 757 (1966), which looks at the circumstances of each case alone and shows to us that there were plenty of reasonable avenues available for obtaining a warrant. Regardless of the fact that the court in *Schmerber*, 384 U.S. 757 (1966) ruled in favor of warrantless action, the court decided that "exigency depends heavily on the existence of additional "special facts"" and that it "requires more than the mere dissipation of [the] blood alcohol content". There's a failure for the state to establish existence of special facts and a need to preserve evidence as an exigency for the warrantless blood draw, a blood draw which was done with disregard to attempting to reasonably obtaining a warrant and preserving the interest of the individual's privacy to their body.

2nd Issue on Appeal: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video

Officer Cole's Reflective Statements

Officer Cole's statements are reflective and constitute as hearsay. Hearsay is an inadmissible out-of-court statement offered in evidence to prove the truth of the matter asserted. Before Officer Cole administers any Standardized Field Sobriety Tests, he already comes to a conclusion and tells the EMS "It'll be intox manslaughter." at that moment Cole is no longer an "objective observer". Although the body-camera footage would seem to fall under the present-sense-impression exception to the hearsay rule, Rule 803(1), "The recorded factual observations made by police officers investigating a suspected crime are not the type of "non-reflective" street-corner statements of objective observers that the present sense impression exception is designed to allow." as per *Fischer v. State* 252 S.W.3d 375 (Tex. Crim. App. 2008). The narrations made by law enforcement are with the intent of finding evidence that they would convict a suspect or to further the investigation, these law enforcement are not "street-corner statements" *id.* Because of the expertise of Officer Cole, the jury would arrive to the same conclusion as his reflective statements. As stated by *State v. Wright* 370 P.3d 1122 (2016) Cole's statements cannot fall under the present-sense-impression exception to the hearsay rule, Rule 803(1), because law enforcement "[were] making the recording for the specific purpose of creating evidence to be used at trial." Moreover, if the testimony provided by Officer Cole were the same statements

as in the body-camera footage, the footage “ must be given under oath and subject to cross-examination” *Fischer* 252 S.W.3d 375 (Tex. Crim. App. 2008) and cannot qualify under Rule 803(1); essentially the footage is a lay witness and violates Mr. Shepard’s right to be represented.

Speaking Offense Report

The videotape recording is classified as a “speaking offense report” and should be excluded under Rule 803(8)(B). As stated in *Fischer* 252 S.W.3d 375 (Tex. Crim. App. 2008) in the discussion about substituting an in-court testimony with an out-of-court narrative, requires that “An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative.” Noting that the hearsay doctrine is designed to exclude out-of-court statements offered for the truth of the matter and Rule 803(8)(B) explicitly excludes investigative reports by law enforcement from the public records and disallows any out-of-court factual observations by police officers, then there is a clear error made by the trial court in denying the motion to suppress the video recording from the police officer’s body camera video. If The Court were to allow the body camera footage to fall under Rule 803(1), that same footage would still fall under Rule 803(8)(B), and due to the rules of construction, which dictate when two conflicting laws appear to apply to a given circumstance, the law that is most specifically related to the circumstance applies. Since Rule 803(8)(B) expressly excludes reports observed by police officers and other law enforcement personnel in a criminal case, the most appropriate law would be Rule 803(8)(B) nevertheless excluding the body-camera-footage.

Conclusion

Seemingly acting in the best interest of preserving evidence, Officer Jordan Cole mistakenly violated the 4th amendment rights of Cameron Shepard and did not use the totality of circumstances for a warranted blood draw. Being a veteran of the police force, Officer Cole should have know that he was in error with the warrantless blood draw. The body-camera footage cannot fall under Rule 803(1) exception because Officer Cole's statements are reflective and the body-camera footage cannot be admitted because it qualifies as a speaking offense report.

Prayer

For these reasons we pray the court finds in favor of the court finds in favor of the Appellee, Mr. Cameron Shepard.

Respectfully Submitted,

Tarek Arouse

Arturo Rolon

Attorneys for Appellee

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellant

Alexis Boehmer

Ashlyn Dodson

Keller High School

Statement of the Case

Cameron Shepard was charged with intoxicated manslaughter. Before trial he filed a motion to suppress the result of a blood draw and a video from the arresting police officer. His motion was denied and he plead guilty before proceeding to file an appeal. The lower appeals court reversed the decision of the trial court and now the state has filed an appeal.

Statement of the Facts

On June 30, 2018, Officer Cole of the Austin Police Department was dispatched to an accident. When he arrived he turned on his body camera. He discovered a deceased female in the roadway and two passengers in car. He administered Standardized Field Sobriety Tests on the driver Cameron Shepard. Officer Cole came to the conclusion that Shepard had been drunk while operating the vehicle and took him in for a blood draw which he initially consented to. Shepard then withdrew consent for the blood draw. Officer Cole attempted to call the on call magistrate for a warrant but the magistrate was unavailable. Officer Cole then proceeded to take Cameron Shepard to the hospital where a blood draw was done

Error One: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

Today we are debating whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw. Which is essentially asking if

a member of law enforcement was correct in their decision to obtain biological evidence from a visibly drunk suspect in order for justice to prevail in the name of an innocent woman's death.

There is no denying that blood draws fall under the 4th amendment's warrant requirements. However *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) states that a warrantless seizure of evidence is justified if “the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” which is to be determined based on a totality of circumstances approach. The standard for this is set by *Gutierrez v. State*, 221 S.W.3d 680, 686–87 (Tex. Crim. App. 2007). to validate a warrantless search based on exigent circumstances, the State must satisfy a two-step process. *Id.* at 685. First, probable cause to search must exist— that is, “reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead a man of reasonable prudence to believe that the instrumentality . . . or evidence of a crime will be found.” *Id.* Second, the State must establish the existence of an exigent circumstance justifying the warrantless search.

The first prong being the need for probable cause is fulfilled with both circumstantial and direct evidence. The circumstantial evidence being Cameron Shepards slow and slurred speech and his failure of multiple standardized field sobriety tests. Direct evidence can be seen as when Officer Cole asked if Shepard had had anything to drink that night he responded in the affirmative stating “just a few drinks”. Any reasonable person could see this as undeniable evidence of Mr. Shepards possible intoxication.

The second prong being the existence of exigent circumstances. Officer Cole had to deal with multiple delays that are to be considered special facts as seen in *Schmerber v. California*, 384 U. S. 757 (1966). (1) the accident involving a deceased individual. (2) Mr. Shepards initial consent and the withdrawal of consent for the blood draw. (3) the on call magistrate being unavailable (4) Mr. Shepards request for medical intervention that would taint the blood. Beginning with the deceased individual Officer Cole either had to deal with the proper protocol and investigation himself including taking care of the deceased individual, speaking to the witness, and the field sobriety tests all of which cost Officer Cole 45 minutes. Second Mr. Shepards consent then withdrawal of consent took time as Officer Cole had not initially been ready to work on providing a warrant as Mr. Shepard had originally consented. Officer Cole had initially taken Shepard to the jail and the hospital before Shepard retracted consent wasting 55 minutes. Officer Cole then had to take Shepard back to the jail in order to get a warrant only for special fact (3) the on call magistrate being unavailable to stop them. There are no judges on over night duty but they do have a list of ten magistrates where one is supposed to be on call each night. Unfortunately the on call magistrate was unavailable due to a family emergency. Officer Cole then attempted to contact the Chief Judge for the municipal court but was unable to get ahold of them. At that point over two hours had passed and the on call magistrate and chief judge were unavailable. Officer Cole had no way of knowing which magistrate if any were available. Although it was later discovered there was one available magistrate Officer Cole could not know which specific magistrate would be available and according to *Cole v. State*, 490

S.W.3d 918 (2016). “[H]indsight distorts a proper exigency analysis’ focus: whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search.” Cole v. State, 490 S.W.3d 918 (2016). Therefore an Officer cannot be held accountable for not having the knowledge that we have and not exhausting every resource before exigency takes priority. Due to the lack of an available magistrate Officer Cole began to transport Shepard to the hospital when on the way Shepard began to complain of chest pain and requested medical intervention. This brings us to the fourth special fact which is that Shepard requested medical intervention that would have tainted the blood sample preventing the court from having crucial evidence. In Schmerber v. California, 384 U. S. 757 (1966), the Court upheld a warrantless blood test because the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.” The on call magistrate was unavailable and with Shepherd’s requested medical intervention the destruction of evidence was fast approaching. WEEMS v. STATE 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016) states In addition to natural dissipation, the Court noted circumstances relevant to an exigency analysis of a warrantless blood draw. They include “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.” Looking at the total circumstances of the case they include the procedure including a lack of a night duty judge, the

fact that the on call magistrate was unavailable and the issues of obtaining a warrant on time because of the requested medical intervention. With these special facts in mind it is clear that Officer Cole acted within reason when he decided to go ahead with the warrantless blood draw to prevent the destruction of evidence.

Conclusion

In conclusion Officer Cole was faced with a difficult situation in which he is the assumed expert on time management and he made the decision that considering all of the delays and the limited time frame he had to go on with the unwarranted blood draw and as I have shown this was a valid decision.

Prayer

For these reasons we pray the court reverse the findings of the lower appellate court.

Point of Error 2: The trial court did not err in its decision to deny the motion to suppress the video recording.

Officer Cole's body cam recording is admissible as evidence under the rule 803(1) exception of present sense impression. Present-sense impression is defined as "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Officer Cole's statements qualify as present sense impression under this definition. Each of his statements were made as or right after he observed the events show no sign of calculated thought. The majority of officer Cole's

statements were just dialogue with Mr. Shepard following proper procedure. Even when Mr. Shepard begins the field sobriety tests, Officer Cole simply states what he observes. For example, at one point in the recording, Officer Cole observes that Mr. Shepard “stopped between steps 4 and five” and later that Mr. Shepard “Uses arms for balance. Very unstable.” These statements were made as Officer Cole saw the events unfold. He assigned no meaning or interpretation to what he saw, only stated what he observed. *State v. Tucker* maintains that “We assume, as a general matter, that when the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable.” and *State v Thompson* established that statements made under the present-sense impression exception “require immediacy”. As all of Officer Cole’s statements were made with little to no time for reflection, his statements must be taken as reliable and not an issue of hearsay. Even in cases like *State v. Sucharew*, where a witness stated “There goes your Fast and Furious movie” referencing two racing cars was taken as admissible under present sense impression. Even when the declarant made a comparison of her observations, the statement was still taken as admissible due to its immediacy following the events observed. Likewise, Officer Cole’s statements qualify for the same admissibility due to their immediacy following observation. Therefore, his statements qualify as present-sense impression under Rule 803(1).

For this court to rule in favor of Mr. Shepard, the app. must prove that any inadmissible hearsay allowed by the court affected the substantial rights of the defendant. *Lee v. State* S.W.3d 532 (2000) states that appellate courts must disregard non-constitutional errors that do not affect the substantial rights of

the defendant. *King v. State*, 953 S.W.2d 266 (1997), a substantial right is affected when the court's error has a detrimental effect on the jury's verdict. But the error is harmless if even if it had a slight influence on the verdict because the defendant's substantial rights were not affected according to *Lee v. State* S.W.3d 532. Considering the results of the blood draw and the fact that Mr. Shepard plead guilty, it's unreasonable to assume that the admission of the video transcript had major influence on the jury's decision. Ergo, Mr. Shepard's substantial rights were not affected and the court should disregard any non-constitutional errors it may find.

The appellee has chosen to focus solely on the statements in the recording given by Officer Cole. However, other parts of the recording contain statements from different declarants. If even part of the video is admissible under any exception, then the admissible portions should be viewed by a jury upon remand.

Even if the recording were to be taken as inadmissible by the court, the state need only prove that the blood draw results were deemed admissible. Case law shows that if only one point at issue was found to be in error but the other permissible, the error would be considered harmless error. And as established by *Evans v. State* 202 S.W.3d 158 (2006), harmless error would not support a remand of the case for a new trial.

Conclusion

Due to the unreflective nature of Officer Cole's speech, it is admissible under the present sense impression rule. Any portions of the video transcript found

inadmissible would still not require a remandment of this case because they did not violate the substantial rights of Mr. Shepard. If this court rules in favor of Mr. Shepard, it will create a system in which any situation or evidence involving public officials would not be considered admissible in court, preventing a fair trial and just verdict to all citizens.

Prayer

For these reasons, we pray that the court uphold the ruling of the trial court.

Respectfully Submitted By:

Alexis Boehmer

Ashlyn Dodson

Attorneys for Appellant

Keller High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellee

Alexis Boehmer

Ashlyn Dodson

Keller High School

Statement of the Case

Cameron Shepard was charged with intoxicated manslaughter. Before trial he filed a motion to suppress the result of a blood draw and a video from the arresting police officer. His motion was denied and he plead guilty before proceeding to file an appeal. The lower appeals court reversed the decision of the trial court and now the state has filed an appeal.

Statement of the Facts

On June 30, 2018, Officer Cole of the Austin Police Department was dispatched to an accident. When he arrived he turned on his body camera. He discovered a deceased female in the roadway and two passengers in car. He administered Standardized Field Sobriety Tests on the driver Cameron Shepard. Officer Cole came to the conclusion that Shepard had been drunk while operating the vehicle and took him in for a blood draw which he initially consented to. Shepard then withdrew consent for the blood draw. Officer Cole attempted to call the on call magistrate for a warrant but the magistrate was unavailable. Officer Cole then proceeded to take Cameron Shepard to the hospital where a blood draw was done

Point of Error 1: The trial court erred in denying the motion to suppress the results of the warrantless draw.

This case must be evaluated using a totality-of-circumstances approach according to *Schmerber v. California* 384 U. S. 757 (1996) and the state bears

the burden of establishing sufficient facts to prove that exigent circumstances existed. In *Schmerber v. California* 384 U. S. 757, a warrantless blood draw was rendered reasonable based on six criterion: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time taken to transport Schmerber to the hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) venipuncture is a common procedure and usually “involves virtually no risk, trauma, or pain”; and (6) the test was performed in a reasonable manner.

According to a totality of circumstances approach, the court must consider all factors of a case, rather than focusing on one. As the Appellant will explain, there are multiple key differences separating this case and *Schmerber, Id.* which would lead to the court to a different ruling. Firstly, the state provided no time frame regarding the transportation of Shepard to the hospital or the time it would have taken to procure a warrant. Additionally, Shepard did not need immediate transportation to the hospital as in *Schmerber*. Because of this lack of evidence, the state failed to prove that time played a factor in its claim of exigent circumstances. Due to the state’s failure to prove that the totality of circumstances created exigency, the warrantless blood draw was not reasonable.

Gutierrez v. State 221 S.W.3d 680 (2007) established a means of evaluation similar to *Schmerber*. To validate a warrantless search, the state must satisfy a two step process. First, that probable cause to search exists, and second, that exigent circumstance justifying the warrantless search exist. *Id.*

The appellant does not contest the first step. However, Mr. Shepard does contest the second point due to a lack of exigent circumstance. According to Missouri v. McNeely, exigent circumstances are those that “significantly undermine efficiency” in procuring a warrant and, quoting Schmerber v. California “threaten the imminent destruction of evidence”. The state failed to prove that any circumstances significantly undermined the efficiency of procuring a warrant. In fact, there is evidence to the contrary. While the magistrate on call was not available, there were eight other magistrates in the county the Officer Cole failed to contact. Even if he himself couldn’t have contacted one of the magistrates to procure a warrant, we know from the body cam video that other officers were in the area when Officer Cole arrived. One of the officers could have helped Cole procure a warrant without significantly undermining the efficiency of the case. Regarding any imminent destruction of evidence, the only possible argument is the dissipation of alcohol in the body. At the very most, this shows that destruction of evidence was *eventual*, but certainly not imminent; and as held in Missouri v. McNeely, that alone can not fulfill the state’s burden in proving that exigent circumstances existed. Because the state failed to prove that exigent circumstances exist under the Gutierrez review, a warrantless search was not reasonable.

The key in this case is the totality of circumstances approach. As decided in Weems v. State, even if surrounding circumstances weigh in favor of exigency, the totality of circumstances can still not warrant an exigency finding. In Weems, the circumstances that weighed in favor of exigency were Weems’ attempts to hide from law enforcements, his transportation to the hospital, and

the two hour delay in drawing his blood. In this case, the circumstance weighing in favor is most nearly the unavailability of the on-call magistrate. However, like in *Weems*, surrounding circumstances—including the eight other magistrates and officers in the area—do not lead the court to find any actual exigency.

Conclusion

Unlike in *Schmerber v. California*, the facts of this case don't lend themselves to finding a blood draw reasonable. This case bears greater resemblance to *Weems* and *McNeely*, both of which ruled against permitting the results of a warrantless blood draw. If the court today rules that the insufficient evidence provided by the state proves exigency, it will create a system where the rights of citizens can be infringed upon without consequence due to the ill-preparedness and negligence of law enforcement.

Prayer

For these reasons, the appellant prays that the court of appeals reverses the decision of the trial court.

Error 2: Whether the trial court erred in denying the motion to suppress the video recording from the police officer's body camera video.

The issue before the court is a matter of whether or not we will allow biased evidence to be allowed into courts that are based on finding the truth.

Today I will prove Officer Cole's body camera does in fact contain inadmissible hearsay.

The hearsay doctrine in the Texas Rules of Evidence 801 and 802 are made to exclude any evidence that pose one of the four hearsay dangers including faulty perception, faulty memory, accidental miscommunication, or insincerity. There are exceptions to this in rules 803 and 804 but these do not apply here. Hearsay exceptions are meant to be unreflective statements made before any thought of litigation forms. It is this necessary part of the exception that excludes the video from becoming admissible hearsay. In the video Officer Cole almost immediately gives his own opinion of what the charge will be stating, "It'll be intox manslaughter." Before performing any standardized field sobriety tests or even speaking to the suspect he forms his own conclusion on the situation just based on taking in his surroundings. From that point on his entire viewpoint is biased based on the conclusion he has already come to and nothing he says is admissible. As stated in *FISCHER v. STATE* 252 S.W.3d 375 (Tex. Crim. App. 2008) "Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious "thinking-it through" statements enter the picture, the present sense impression exception no longer allows their admission." This keeps the entire video from being used as he has shown direct evidence of his mindset of litigation and all further comments can no longer be seen as present sense non opinionated comments.

Even without that declaration the rest of Officer Cole's narration falls under inadmissible hearsay as well. As Officer Cole has Cameron Shepard perform various sobriety tests he narrates his own observations however rule

803 states "The recorded factual observations made by police officers investigating a suspected crime are not the type of "non-reflective" street-corner statements of objective observers that the present sense impression exception is designed to allow." Officer Cole had already stated his beliefs on the charges but then furthered this by collecting evidence in the video making remarks on Shepards instability and slurred speech. These observations are something that could be gone over with the Officer in court where he could be questioned but they are not be just stated in a video and left unquestioned, without the possibility of cross examination the evidence is reported to the court as fact which with such condemning statements could heavily influence the jury. This disqualifies the comments as harmless error from *Evans v. State* (Tex.App—Houston [14th Dist.] 2006) as it could affect the outcome of the case. Just as a police report would be excluded so would investigative recordings.

Officer Cole's remarks are very similar to Trooper Martinez in *FISCHER v. STATE* 252 S.W.3d 375 (Tex. Crim. App. 2008.). In *FISCHER v. STATE* 252 S.W.3d 375 the video was declared inadmissible because "Martinez's narrative is the functional equivalent of a police offense report[.]" Cole's and Martinez's comments are one in the same. Cole stating "I smell alcohol coming from the vehicle." Martinez stating "I smell alcohol." Cole commenting on how "At his count of eight, he put his foot down on the ground for balance and picked it back up. He is swaying a lot. Uses arms for balance. Very unstable." and Martinez similarly stating that Fischer "gave several clues" to intoxication and noted that appellant swayed, hopped, and put his foot down twice. Both use the video to record evidence regarding the sobriety tests which is inadmissible as

police officers gathering evidence to use in decisions whether or not to arrest and charge a suspect with a crime is considered a speaking offense report.

Cole's remarks fail to meet the exceptions set by other cases. For instance *STATE v. WRIGHT* 370 P.3d 1122 (2016) the statements described the events of a crime as it unfolded, and provided law enforcement officers with information they could use to disrupt that crime and successfully apprehend the perpetrators. For Cole the imminent danger had passed already and he was now just pointing out evidence and coming to his own conclusions on the situation. It was not necessary to his health and safety to make the observations that he did.

Looking at the situation as whole first Officer Cole states that "It'll be intoxic manslaughter." already dismissing the unreflective statements exception by discussing future legal action putting himself in the mindset of litigation for the rest of the video. After that Cole continues down that path collecting evidence commenting on the smell of alcohol, Shepard's balance issues, and slurred speech similar to Martinez in *FISCHER v. STATE* 252 S.W.3d essentially providing an offense report which would be rejected under Rule of Evidence 803(8)(B).

Conclusion

In conclusion if the court does not reverse the findings of the lower appellate court then it sets the standard that someone's fate can be sealed before they even have a fighting chance. That an Officer can dictate which way the jury sways by making an observation before having evidence to back it up and never having to have their findings questioned and possible biases revealed.

We have these laws on inadmissible hearsay in place to protect people's rights to defend themselves. Everyone has a right to a trial, a real, fair, and unbiased, trial.

Prayer

For these reasons we pray the court reverse the findings of the lower appellate court.

Respectfully Submitted By:

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IN THE COURT OF CRIMINAL APPEALS, STATE OF

TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

V.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for Appellant

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To The Honorable Court Of Appeals: Comes now, the State of Texas, and files this appeals brief.

Introduction

In the matter of Texas v. Cameron Shepard, co-counsels Sadie Stevenson, and Makaylia Askew submit this brief on behalf of the Appellant, the State of Texas, to the Texas Court of Criminal Appeals. The matter began at the Texas Court of Appeals, where the Court denied the Appellee's, Cameron Shepard's, motion to suppress the blood draw and video camera evidence. Shepard appeals the decision to this court for the reasons as follows.

Statement of the case

The Appellee, Cameron Shepard, was charged with the offense intoxication manslaughter. At the Texas Court of Appeals 3rd district, Mr. Shepard filed for a motion to suppress the results of the blood sample and the body camera video filmed by Officer Cole as evidence. After the court denied Mr. Shepard's motion to suppress both pieces of evidence, he entered a plea of guilt and filed an appeal for the Texas Court of Criminal Appeals. The court has reversed the trial court's order and remanded for further proceedings consistent with the trial court's opinion.

Statement of facts

On June 30, 2018, at around 2 a.m., Officer Cole responded to an accident near downtown Austin. Upon arriving at the scene, Officer Cole activated his body camera which captures audio and video from his point of view. Officer Cole found a dead female in the road and a crashed car occupied by 2 people. Officer Cole promptly administered the Standard Field Sobriety Test on Cameron Shepard, the driver of the vehicle, at 2:30, and concluded at 2:45 a.m., and determined that Mr.

Shepard was intoxicated while driving and caused the death of the female. After transporting Mr. Shepard to the jail, Officer Cole and Mr. Shepard arrived at the hospital at 3:15. Initially, Mr. Shepard agreed to provide a blood sample but withdrew his consent at 3:40 after Officer Cole had filled out necessary hospital paperwork. This forced Officer Cole to transport Mr. Shepard back to the jail to attempt to obtain a warrant. Officer Cole obtained an on-call list of magistrate judges at 4:00 a.m.. the first judge contacted was unavailable and the chief judge could not be reached. On the way back to the hospital, Mr. Shepard complained of chest pains and requested immediate medical assistance. Officer Cole requested the blood be taken quickly before narcotics were administered. Mr. Shepard's blood was drawn at 5:00 a.m..

Issues On Appeal

Issue Number One: The trial court did not err in denying the motion to suppress the warrantless blood draw.

Issue Number Two: The trial court did not err in denying the motion to suppress the video recording from the police officer's body camera video.

Argument

Issue Number One: The trial court did not error in denying the motion to suppress the warrantless blood draw.

The Fourth Amendment states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

An exception to the warrant requirement is exigent circumstances, which according to Missouri v. McNeely 133 S.Ct. 1552 (2013) justifies a warrantless seizure if, "the needs of law enforcement are so compelling that a warrantless search is reasonable." The needs of law enforcement were compelling in this case, because Mr. Shepard was requesting immediate medical assistance that may have included being given narcotics, and could taint the blood and thus destroy evidence. Officer Cole contacted multiple Magistrate judges from an on-call list but none were available to provide a warrant. Although a county judge was on duty the early morning of June 30, Officer Cole is justified in not contacting the county judge because Officer Cole was unaware that judge was on duty and did not have the means to contact them. Therefore, he could not obtain a warrant, creating exigent circumstances.

Although the blood draw in Missouri v. McNeely 133 S.Ct. 1552 (2013) was deemed unconstitutional, the ruling stated that "each case must be considered on its individual facts," and the circumstances in the present case present greater justification for a warrantless blood draw by not relying solely on the dissipation of alcohol over time. The concern of Missouri v. McNeely 133 S.Ct. 1552 (2013) was that the alcohol in the blood would naturally dissipate over time while the concern here is that the medical treatment Mr. Shepard would receive might taint the alcohol evidence in the blood. Furthermore, the police officer in Missouri v. McNeely 133 S.Ct. 1552 (2013) did not even attempt to obtain a warrant while Officer Cole did. A more applicable case is Cole v. State 490 S.W.3d 918 (2016) because Cole has more similar facts to today's case. In both Cole v. State 490 S.W.3d 918 (2016) and today's case, the Officer's concern was the administration of narcotics,

the efficiency of obtaining a warrant from a magistrate, and a significant amount of time for chemicals in the blood to dissipate. (in Cole v. State 490 S.W.3d 918 (2016) 1-1.5 hours, today 3 hours). Therefore, Cole v. State 490 S.W.3d 918 (2016) is a better precedent to follow based on facts.

Although Cameron Shepard's blood was drawn without a warrant, it was completely constitutional, because there were exigent circumstances since Officer Cole was unable to contact a judge, Mr. Shepard was requesting treatment that may have included narcotics, and there were three hours between Officer Cole arriving on the scene and the blood being drawn, one hour and forty minutes since officer Cole arrived at the scene were wasted on trying to get the blood drawn before Mr. Shepard revoked consent. Therefore, the drawing of Mr. Shepard's blood is constitutional.

Issue Number Two: The trial court did not err in denying the motion to suppress the video recording from the police officer's body camera video.

Hearsay is an out of court statement made by someone other than the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Fisher v. State 252 S.W. 3d 375 (Tex. Crim. App. 2008). The two expectations in question are Rule 803(8)(B), Public Records, which is a record or statement of a public office, and rule 803(1) which is present sense impression. This is defined as [a] statement describing or explaining an event or condition made while the declarant was perceiving the event immediately, therefore. Fisher v. State

Officer Cole body camera video is admissible because all of his statements are generally unreflective statements that described or explained the event, the court should allow these statements to be admitted as evidence. The statements

made by Officer Cole are either describing the accident scene or the actions of Mr. Shepard. The court should not exclude such statements simply because they were made by an officer instead of a civilian. The second issue truly depends on the appellate court's decision as to the first point of error; if the court were to rule that the warrantless blood draw was permissible but the admission of the video was an error, case law is clear that the error would be considered a harmless error. Harmless errors would not support a remand of the case for a new trial. Evans v State (Tex. App.- Houston [14th Dist.] 2006). Further, if the fact to which the hearsay pertains is sufficiently proved by other competent and unobjected-to evidence, admission of the hearsay is properly deemed harmless and does not constitute reversible error. Anderson v. State, (Tex. Crim. App. 1986); and Matz v. State, Tex. App- Fort Worth 2000, pet. ref'd) Not only that but that the rationale for the exception is that the contemporaneity of the statement with the event that is described eliminates all danger of faulty memory and virtually all danger of insincerity. Fischer v. State (Tex. Crim. App. 200) "If a person observes some situation or happening which is not at all startling or shocking in its nature, nor actually producing excitement in the observer, the observer may yet have occasion to comment on what he sees (or learns from his other sense) at the very time that he is receiving the impression. Such a comment, as to a situation then before the declarant, does not have the safeguard of impulse, emotion, or excitement, but there are other safeguards. In the first place, the report at the moment of the thing then seen, heard etc., is safe from any error from defect of memory. Secondly, there is no calculated misstatement, and thirdly the statement will usually be made to another (the witness who report it) who would have equal opportunities to

observe and hence to check a misstatement. Consequently, it is believed that such comments, strictly limited to reports of present tense impressions, have such exceptional reliability as to warrants their inclusion within the hearsay expectation for Spontaneous Declarations.

The evidence given from the video recording from Officer Cole contains highly probative evidence that should not be excluded. The majority from the Texas Court of Appeals failed to examine whether the officers' statements in the video could constitute a present sense impression. If the statements were generally unreflective statements that described or explained the event, then the court should allow the statements to be admitted into evidence. Each of the statements from the officer was describing either the accident scene or the actions of Mr. Shepard. The officer made such statements immediately upon observing the situation or condition described by the statements. The video in question before the court today contains multiple statements from various declarants. The lower court has heavily focused on the statements from the officer. However, if parts of the video are admissible, then the court should allow those parts to be viewed by a jury upon remand.

Conclusion

The drawing of Mr. Shepard's blood did not violate the Fourth Amendment, the court in *Missouri v. McNeely* justifies a warrantless seizure if "the needs of law enforcement are so compelling that a warrantless search is reasonable." It is clear that Officer Cole was acting under such exigent circumstances. The body camera footage is also admissible because it does fall under Rule 803(8)(B) and did it also falls under Rule 803(1).

Prayer

For these reasons, we pray that this court would rule in favor of the State of Texas and deny the motion to suppress.

Respectfully Submitted By:

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