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COURT OF CRIMINAL APPEALS
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**COURT OF CRIMINAL APPEALS
OF TEXAS**

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COURT OF CRIMINAL APPEALS
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The State of Texas,
Appellant

v.

Jose Ruiz

from the Court of Appeals for the
Thirteenth Judicial District at Corpus Christi

13-13-00507-CR

STATE'S PETITION FOR DISCRETIONARY REVIEW

An appeal from the 25th Judicial District Court, Gonzales County, Texas
The Honorable William D. Old III., Judge Presiding

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Identity of Judge, Parties, and Counsel

Trial Court............................**The Honorable William D. Old, III.**

Presiding Judge
25th Judicial District Court
Gonzales County, TX

Appellant ....**The State of Texas**

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Issue Two

> Were there sufficient exigent circumstances to justify the warrantless blood draw where (1) officers were occupied with the accident investigation (2) the defendant had fled the scene and remained unidentified for some time, and (3) where there were few officers or magistrates on hand to expeditiously obtain a warrant?

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To the Honorable Court of Criminal Appeals of Texas:

Statement Regarding Oral Argument

The State does not request oral argument. The parties argued the identical issues in this petition on June 15, 2016. Should this Honorable Court decide that another argument would be beneficial, Counsel would be honored to appear on behalf of the State.

Statement of the Case

Jose Ruiz was indicted for driving while intoxicated, third or more. (Cl. R. vol. 1 of 1, at 3-4). Ruiz filed a motion to suppress the results of his blood test based on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). (Ct. R. vol. 1 of 1 at 4-23). The trial court granted the motion, and the State appealed. (Cl. R. vol. 1 of 1, at 16-18).

Statement of Procedural History

The court of appeals held in its original opinion that neither implied consent nor exigent circumstances justified the unconscious blood draw. *State v. Ruiz,* 509 S.W.3d 451 (Tex. App.—Corpus Christi 2015, pet. granted). In 2016, this Honorable Court granted the State's petition for discretionary review on the issues in this petition. After

argument, the Court remanded the case for the court of appeals "to consider whether, under the totality of the circumstances known to the police officer at the time, exigent circumstances existed in light of this Court's intervening decisions in *Cole* and *Weems*." *State v. Ruiz,* PD-1362-15, 2017 Tex. Crim. App. LEXIS 183, 2017 WL 430291 (Tex. Crim. App. Feb. 1, 2017)(not designated for publication). The court of appeals issued its opinion on remand on January 11, 2018. *State v. Ruiz,* No. 13-13-00507-CR, 2018 Tex. App. LEXIS 302 (Tex. App.—Corpus Christi Jan. 11, 2018)(designated for publication). This petition is thus timely filed on or before February 10, 2018. Tex. R. App. P. 68.2(a).

Grounds for Review

Issue One

> **Is it unreasonable under the Fourth Amendment for an officer to rely on a driver's implied consent to a blood draw when the driver was involved in an accident, there is probable cause to believe he is intoxicated, and where the driver's own unconsciousness prevents the officer from effectively obtaining the driver's actual consent?**

Issue Two

> **Were there sufficient exigent circumstances to justify the warrantless blood draw where (1) officers were occupied with the accident investigation, (2) the defendant had fled the scene and remained unidentified for some time, and (3) where there were few officers or magistrates on hand to expeditiously obtain a warrant?**

The Facts and Issues Argued Below

I. The Offense

In September 2012—six months before the Supreme Court's April 2013 decision in *Missouri v. McNeely*—Sergeant Bethany McBride responded to a two vehicle accident around midnight. (Ct. R. vol. 1 of 1, at 7). When Sergeant McBride arrived at the scene she observed a tan Lincoln Navigator had collided with a tan Pontiac. (Ct. R. vol. 1 of 1, at

7, 13). The driver of the Pontiac remained on the scene but the driver of the Lincoln fled. (Ct. R. vol. 1 of 1, at 7). Two witnesses gave Sergeant McBride a description of the driver of the Lincoln and stated that he had run behind a nearby carwash. (Ct. R. vol. 1 of 1, at 7). In the Lincoln, Sergeant McBride located insurance paperwork that belonged to Ruiz. (Ct. R. vol. 1 of 1, at 7-8). She also ran the license plate, which came back to Ruiz. (Ct. R. vol. 1 of 1, at 8). While inside the vehicle Sergeant McBride observed several Bud Light cans in the front seat area. (Ct. R. vol. 1 of 1, at 8).

Officers searched for and ultimately found Ruiz in a field behind the car wash. (Ct. R. vol. 1 of 1, at 8-9). He was unresponsive, and it took several officers to carry him to the patrol unit. (Ct. R. vol. 1 of 1, at 9). Sergeant McBride observed the very strong odor of alcoholic beverages coming from Ruiz. (Ct. R. vol. 1 of 1, at 9-10). Sergeant McBride did not observe any injuries on Ruiz and determined that he was unresponsive due to the amount of alcohol in his system. (Ct. R. vol. 1 of 1, at 10-11).

EMS arrived on scene to treat Ruiz. (Ct. R. vol. 1 of 1, at 11). EMS performed several sternum rubs to try and get Ruiz to be responsive,

but Ruiz never responded. (Ct. R. vol. 1 of 1, at 11). EMS also checked Ruiz's blood pressure, and based on his condition, transported him to the hospital for treatment. (Ct. R. vol. 1 of 1, at 11).

Sergeant McBride went to the hospital and arrested Ruiz for driving while intoxicated. (Ct. R. vol. 1 of 1, at 12). When she ran Ruiz's criminal history she discovered Ruiz had four convictions for DWI. (Ct. R. vol. 1 of 1, at 17). She prepared the necessary paperwork and a qualified hospital lab technician drew Ruiz's blood. (Ct. R. vol. 1 of 1, at 12). Ruiz remained unresponsive the entire time. (Ct. R. vol. 1 of 1, at 12-13).

As Sergeant McBride explained later, it would have been impractical to secure a warrant because there was no magistrate available at that time and it would have been difficult to find one at that time on a weekend. (Ct. R. vol. 1 of 1, at 15, 18). Also, Sergeant McBride was one of only two officers on duty for the Gonzales Police Department, and it would have been impracticable to remove one to secure the warrant. (Ct. R. vol. 1 of 1, at 15). Sergeant McBride explained that at the time there were no procedures in place to obtain a search warrant and if she were able to obtain a search warrant it would

have taken probably two to three hours to write the affidavit and then she would have had to drive the search warrant to the magistrate's house, if she could find one, to sign the warrant, and return to the hospital to execute the warrant. (Ct. R. vol. 1 of 1, at 15, 18, 19).

Sergeant McBride explained that because of the accident, Ruiz fleeing the scene, and his condition, necessitating medical treatment, the investigation was prolonged beyond a normal DWI. (Ct. R. vol. 1 of 1, at 17-20). Sergeant McBride knew that during this prolonged process the alcohol in Ruiz's bloodstream was dissipating. (Ct. R. vol. 1 of 1, at 19).

II. The Trial Court Suppresses the Blood Test Results

Ruiz moved to suppress his blood-test results under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and the trial court held an evidentiary hearing. (Ct. R. vol. 1 of 1, at 4-5). In its findings of fact and conclusions of law, the trial court found Sergeant McBride's testimony credible in all respects. (Cl. R. Supp. vol. 1 of 1, at 11). The trial court further found that Ruiz was unconscious at the time of the blood draw and did not revoke his implied consent to the blood draw. (Cl. R. Supp. vol. 1 of 1, at 11, 12). The trial court found itself bound by *McNeely,* and granted

the motion to suppress. (Cl. R. Supp. vol. 1 of 1, at 11). The trial court concluded there were no exigent circumstances which justified the blood draw. (Cl. R. Supp. vol. 1 of 1, at 12).

III. The Court of Appeals on Original Submission Rejects Implied Consent Never Revoked and Exigent Circumstances

In its court of appeals brief the State argued that Ruiz's warrantless blood draw was justified under the Fourth Amendment because Ruiz was deemed to have consented to the blood draw and because he was unconscious his consent to the blood draw was never revoked. Tex. Transp. Code Ann. §§ 724.011 (West), 724.014 (West). In addition, the State argued there were sufficient exigent circumstances which justified the warrantless blood draw.

The majority opinion held because Ruiz was unconscious, he was unable to give his consent freely and voluntarily or have the opportunity to revoke his consent. *Ruiz,* 509 S.W.3d at 455-57.

Justice Perkes in his dissenting opinion held that the implied consent laws in this instance do not offend the Fourth Amendment and thus the blood sample was obtained legally. *Id.* at 462. Justice Perkes reasoned that "Ruiz was precisely the type of person—a person incapable of refusal—contemplated by section 724.014." *Id.* at 461.

"This factual scenario is the type of situation where implied consent makes perfect sense. To hold otherwise would render ineffective the entire implied consent statutory scheme." *Id.* at 461.

On exigent circumstances, the majority opinion concluded "the State produced no evidence to show that the destruction of evidence was imminent, how it was deprived of an opportunity to obtain reliable evidence within a timeframe, or how a more expeditious process was not available to locate a magistrate and obtain a warrant from the magistrate through alternative means such as via telephone rather than physically driving to the magistrate's home." *Id.* at 459.

Justice Perkes disagreed and pointed to the officer's need to investigate the accident, find and identify Ruiz as the missing driver, and get Ruiz medical attention, while facing the prospect of a two to three-hour delay to secure a warrant (when no magistrate was on call) and the impracticability of removing one of only two officers on duty in Gonzales to do so.

IV. The Court of Appeals on Remand Again Rejects Both Justifications

Although not encompassed in the remand order to reconsider exigent circumstances in light of *Cole* and *Weems,* the court of appeals

again addressed and rejected the unconscious blood draw under an implied consent theory. *See Ruiz,* 2018 Tex. App. LEXIS 302 at *7-9.[1]

As to exigent circumstances the court of appeals agreed that the first prong of an exigent circumstances analysis was met because there was probable cause to arrest Ruiz for the offense of driving while intoxicated. *Ruiz,* 2018 Tex. App. LEXIS 302 at *11. While the court of appeals found that "certain facts in the record" "tend to gravitate toward a finding of exigency….the totality of the circumstances found in the record do not warrant such a finding." *Id.* at *21. It determined that Sergeant McBride's "conclusory" testimony that taking one officer off regular duty would have been unreasonable did not support a finding of exigency because there was nothing in the record "that shows that the available officers on duty that night in Gonzales were fulfilling the type of law enforcement or public safety duties of the tremendous magnitude that existed in *Cole* nor was there any articulated concern that Ruiz's blood sample would be affected as a result of the two to three-hour window it would have taken the officer to apply for and obtain a search warrant." *Id.* at *24-25.

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[1] At the time of remand Justice Perkes was no longer a justice with the Thirteenth Court of Appeals and Justice Hinojosa completed the panel.

The court of appeals held that while the record showed there were no procedures in place to obtain a blood warrant and that it would have been difficult to find a magistrate, these facts had to be considered alongside the judge's finding that the officer had ordered the blood draw in erroneous reliance on the implied consent statutes. *Id.* at *26. Because of this later finding, the trial court "could have reasonably found" that Sergeant McBride "erroneous believed that she did not need to apply for a warrant based on the implied consent statutes." *Id.* at *26.

Finally, the court of appeals noted that Officer McBride was not concerned that Ruiz would destroy any evidence in her investigation other than the alcohol metabolizing in his blood, and that as "the *McNeely* Court stated, blood alcohol content evidence is 'lost gradually and relatively predictably' which permits experts to work backwards from the blood alcohol content at the time the sample was taken to determine the blood alcohol content at the time of the alleged offense." *Id.* at *27.

Argument

I. The Blood Results Should Not Have Been Suppressed

This petition should be granted because this Court has previously granted review of both issues and they remain important questions of state and federal law that are unsettled and should be settled by this Court. *See* Tex. R. App. P. 66.3(b). The first question is whether warrantless blood draws conducted under Transportation Code § 724.014 are reasonable under the Fourth Amendment. The court of appeals has misconstrued a statute by ignoring the plain meaning of 724.014, by requiring the State to prove free and voluntary consent from an unconscious individual where the statute unequivocally establishes a presumption of consent. *See* Tex. R. App. P. 66.3(d). Furthermore, the court of appeals' exigency analysis conflicts with the applicable decisions of this Honorable Court and the Supreme Court of the United States. *See* Tex. R. App. P. 66.3(c).

A. A Blood Draw Performed with Implied Consent Never Revoked is Reasonable under the Fourth Amendment

The court of appeals' opinions ignored the plain meaning of section 724.014 by holding that the State must first obtain the voluntary consent of an unconscious individual where the statute unequivocally

establishes that a presumption of consent exists. Tex. Transp. Code Ann. § 724.014 (West). Because there is no guidance from this Honorable Court, post *McNeely,* on the issue of whether withdrawing blood of an unconscious person pursuant to §724.014, is reasonable under the Fourth Amendment review is warranted in this case.

The implied consent laws—which establish a driver's initial consent to a blood draw for alcohol testing and remain in full effect until that consent is withdrawn or revoked—are reasonable under the Fourth Amendment. "Driving is not a constitutional right but a privilege;" that privilege "is subject to reasonable regulations formulated under the police power in the interest of welfare and safety of the general public." *Ex Parte Tharp,* 935 S.W.2d 157, 159 (Tex. Crim. App. 1996). "The implied consent law does just that—it implies a suspect's consent to search in certain circumstances." *Beeman v. State,* 86 S.W.3d 613, 615 (Tex. Crim. App. 2002). Specifically, "[t]he implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to

draw blood in certain limited circumstances even without a search warrant." *Beeman,* 86 S.W.3d at 616.

This Honorable Court in *State v. Villarreal,* 475 S.W.3d 784, 800 (Tex. Crim. App. 2014), left open the possibility that implied consent, that had not been withdrawn or revoked, could serve as a substitute for the free and voluntary consent under the Fourth Amendment.

In addition the United States Supreme Court in *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016), acknowledged that it had previously "referred approvingly to the general concept of implied consent laws" and it continued to do so in *Birchfield*; ultimately deciding to limit the "consequences to which motorists may be deemed to have consented by virtue of their decision to drive on public roadways" where a state "not only insists upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." The court reasoned that based on the particular facts a breath test was a reliable, less intrusive test that "would satisfy the State's interest in acquiring evidence to enforce its drunk-driving laws." *Id.* at 2186.

When Ruiz voluntarily drove on Texas roadways, he gave his consent to his blood being drawn if an officer had probable cause to believe that he had been driving while intoxicated. That consent remained in full effect unless it was withdrawn or revoked, and the trial court specifically found Ruiz never did. (Cl. R. Supp. vol. 1 of 1, at 12). There were no less intrusive tests that could have been performed on Ruiz to determine his blood alcohol content due to his unconsciousness. Because Ruiz's consent to a blood test was never withdrawn or revoked his blood was drawn pursuant to his consent.

Moreover, other states are sharply divided over whether implied consent can satisfy the consent exception under the Fourth Amendment post-*McNeely*. *See Sims v. State,* 358 P. 3d. 813 (Idaho Ct. App. 2015, rev. denied)(Sims consented to be tested for alcohol by driving a motor vehicle and his alleged unconsciousness does not effectively operate as a withdrawal of his implied consent); *Bobeck v. Idaho Transp. Dep't,* 363 P.3d 861 (Idaho Ct. App. 2015, rev. denied)(any person who drives in Idaho consents to be tested for alcohol, but may withdraw consent by affirmatively resisting the blood draw, unconsciousness cannot operate as a withdrawal of implied consent); *People v. Hyde,* 393 3d. 962 (Colo.

2017)(an unconscious driver's statutory consent provided by driving on Colorado roads satisfies the consent exception to the Fourth Amendment); *State v. Brar,* 898 N.W.2d 499 (Wis. 2017)("Implied consent is not a second-tier form of consent; it is well-established that consent under the Fourth Amendment can be implied through an individual's conduct. When he availed himself of the roads of Wisconsin he consented through his conduct to a blood draw); *Cripps v. State,* 387 P.3d 906 (Okla. Crim. App. 2016), *cert. denied* by *Cripps v. Oklahoma,* 137 S. Ct. 2186 (2017)(where the driver was unconscious after a fatal accident he had no right to revoke his implied consent and therefore his blood was legally taken without a warrant); *State. v. Weber,* 139 So. 3d 519 (La. 2014)(blood draw upheld from a driver at the hospital without his express consent where the officer had reasonable grounds to believe the defendant was the driver of the vehicle that caused the fatal accident); *Wolfe v. Commonwealth,* 793 S.E.2d 811 (Va. Ct. App. 2016)(the constitutional validity of the implied consent statute is well established and serves as an exception to the search warrant requirement); *Martini v. Commonwealth,* No. 0392-15-4, 2016 Va. App. LEXIS 67, 2016 WL 878017 (Va. Ct. App. March 8, 2016)(an driver's

incoherence or unconsciousness does not constitute a refusal or rescission of a driver's implied consent because consent is continual); *State v. Schuster,* No. CA2016-05-097, 2017 Ohio App. LEXIS 2168, 2017 WL 2417815 (Ohio Ct. App.—12th Dist. June 5, 2017)(where an individual was in a condition rendering her incapable of refusal implied consent justified the warrantless withdrawal of the driver's blood); *State v. Modlin,* 867 N.W.2d 609 (Neb. 2015)(finding that the existence of an implied consent statute is one of the totality of circumstances a court should consider to determine voluntariness of consent and that while mere submission to authority is insufficient, the defendant made the choice to drive in Nebraska and did and said nothing to objectively manifest his refusal); *State v. Gurule,* No. 33,375, 2014 N.M. App. Unpub. LEXIS 160, 2014 WL 3049592 (N.M. Ct. App. May 12, 2014, writ denied)(not designated for publication)(upholding defendant's blood draw based on his incapacity to consent and his resulting presumed consent under the Implied Consent Act); *but see Bailey v. State,* 790 S.E. 2d 98 (Ga. Ct. App. 2016, writ dsm'd)("Bailey's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as

he was unconscious"); *State v. Havatone,* 389 P.3d 1251 (Ariz. 2017)(a blood draw from an unconscious individual is constitutional only when case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant); *State v. Romano,* 800 S.E.2d 644 (N.C. 2017)(finding the statute that allows a blood draw to be taken from an unconscious driver to be unconstitutional as applied to the defendant because it created an impermissible categorical exception to the warrant exception); *Commonwealth v. Myers,* 164 A.3d 1162 (Pa. 2016)(where a driver was unconscious and could not therefore choose whether to exercise his right to refuse the chemical test or to provide voluntary consent, his blood draw could not be justified under the consent exception); *State v. Dawes,* No. 111,310, 2015 Kan. App. Unpub. LEXIS 699, 2015 WL 5036690 (Kan. Ct. App. Aug. 21, 2015)(not designated for publication)(holding that implied consent that was not revoked because the suspect was unconscious creates a categorical exception to the warrant requirement, which runs afoul of the ruling in *McNeely); People v. Arredondo,* 245 Cal. App. 4th 186 (Cal. Ct. App. 2016, review granted by 371 P.3d 240 (Cal. 2016))(the unconsciousness of the defendant prevented him from manifesting his consent

voluntarily in the absence of facts sufficient to establish actual consent, or some other exception to the rule, the seizure must be supported by a duly issued warrant).

This Honorable Court should decide where Texas stands on the issue by granting review in this case.

B. Sufficient Exigent Circumstances Existed

The court of appeals' exigent circumstances analysis is flawed because it fails to take into consideration the full force of the totality of the circumstances known to Sergeant McBride at the time of the blood draw and is contrary to previous precedent from this Court and the United States Supreme Court.

First, the court of appeals holds that Sergeant McBride's "conclusory" testimony that taking one of only two on-duty Gonzales police officers to apply for a warrant was impracticable was insufficient to support a finding of exigency. *Ruiz,* 2018 Tex. App. LEXIS 302 at *24; (Ct. R. vol. 1 of 1, at 15). Reasoning that "nothing in the record here shows that the available officers on duty that night in Gonzales were fulfilling the type of law enforcement or public safety duties of the tremendous magnitude that existed in *Cole,*" *Ruiz,* 2018 Tex. App.

LEXIS 302 at *25, the court of appeals misconstrues this Court's rationale in *Cole* regarding the "theoretically available officer" as it pertains to an exigency analysis. As this Court stated, "in all but the rarest instances, there will theoretically be an officer somewhere within the jurisdiction that could assist the lead investigator. Requiring such a showing in every case where exigency is argued improperly injects the courts into local law-enforcement personnel management decisions and public policing strategy." *Cole v. State,* 490 S.W.3d 918, 926 (Tex. Crim. App. 2016). Not only did this Court note that the fourteen officers at the scene in *Cole* were performing important law-enforcement duties or public safety duties and taking any of them away would have left a necessary duty unfilled, this Court also found important that those fourteen officers at the scene made up nearly half of the minimum amount of officers the Longview Police Department requires for the entire city over two shifts. *Cole,* 490 S.W.3d at 926.

Here, the court of appeals has squarely injected itself into law-enforcement personnel management decisions and public policing strategies by disregarding Sergeant McBride's testimony that it was impracticable to remove one of only two officers on duty for the

Gonzales Police Department to prepare the search warrant for two to three hours. (Ct. R. vol. 1 of 1, at 15). Further, while the court of appeals seems to discount an officer performing "regular police duties" as fulfilling an essential law-enforcement or necessary law-enforcement duty, Sergeant McBride, based on her five years' experience with the Gonzales Police Department, was qualified to testify about the particular public policing strategies and law-enforcement personnel management of the Gonzales Police Department. *Ruiz,* 2018 Tex. App. LEXIS 302 at *23, 24-25; (Ct. R. vol. 1 of 1, at 6, 15).

Next, the court of appeals acknowledged that the record showed there was a lack of blood-warrant procedures at the time and that the officer would have had difficulty finding a magistrate and that these factors would ordinarily support exigency. But the court of appeals dismissed these factors by implying a finding of fact the trial court did not make: that the reason for the blood draw was because the officer wrongly believed she did not need to apply for a warrant. *Ruiz*, 2018 Tex. App. LEXIS 302 at *26-27 ("the trial court could have reasonably found that despite finding Officer McBride's testimony credible regarding the reduced likelihood of finding a judge at that hour and the

lack of procedural guidelines in place at the time, Officer McBride erroneously believed that she did not need to apply for a warrant based upon the implied consent statutes.") Implying this finding contradicts with this Court's holdings that where the trial court makes express findings of fact and conclusions of law, other supplemental findings should not be presumed.[2] *See State v. Saenz,* 411 S.W.3d 488, 495 (Tex. Crim. App. 2013); *State v. Ross,* 32 S.W.3d 853, 858-59 (Tex. Crim. App. 2000); *Cullen v. State,* 195 S.W.3d 696, 697-99 (Tex. Crim. App. 2006).

Lastly, the court of appeals in its opinion states that other than the alcohol dissipating in Ruiz's system, there was no other evidence that the two to three-hour delay would otherwise affect Ruiz's blood sample. *Ruiz,* 2018 Tex. App. LEXIS 302 at *25, 27. This statement however ignores that the delay in time between the offense and the blood draw is the *central* consideration in an exigency analysis. As the Supreme Court of the United States and this Honorable Court has recognized "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the

[2] This is not the only court of appeals to make erroneous implied findings in support of its exigency analysis. *See State v. Sanders,* Nos. PD-0080&81&82-18 (petitioning for review of *State v. Sanders,* Nos. 02-16-00226&227&228-CR, 2017 Tex. App. LEXIS 11674 (Tex. App.—Fort Worth 2017, pet. filed Jan. 18, 2018).

efficacy of the search, the Fourth Amendment mandates they do so. But the Court would still consider alcohol's natural dissipation over time (and the attendant evidence destruction) the antagonizing factor central to law enforcement's decision whether to seek a warrant or proceed with a warrantless seizure: We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the blood stream will support and exigency justifying a properly conducted warrantless blood test." *Weems v. State,* 493 S.W.3d 574 (Tex. Crim. App. 2016)(*citing Missouri v. McNeely,* 33 S. Ct. 1552, 1561, 1568 (2013)); *See also Cosino v. State,* 503 S.W.3d 592 (Tex. App.—Waco 2016, pet. ref'd).

The court of appeals states that "as the *McNeely* Court stated, blood alcohol content evidence is 'lost gradually and relatively predictably' which permits experts to work backwards from the blood alcohol content at the time the sample was taken to determine the blood alcohol content at the time of the alleged offense." *Ruiz,* 2018 Tex. App. LEXIS 302 at *27. However, as this Court precedent has made clear, retrograde extrapolation—the computation back in time of the blood-alcohol level at the time of driving based on a test result from some

later time—becomes more difficult and likely inadmissible when there is a significant time lapse after the offense (two hours), a single blood draw, and few or no individual characteristics known about the defendant. *Mata v. State,* 46 S.W.3d 902, 908-10, 916-917 (Tex. Crim. App. 2001); *Stewart v. State,* 129 S.W.3d 93 (Tex. Crim. App. 2004); *Owens v. State,* 135 S.W.3d 302, 307-09 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Gigliobianco v. State,* 210 S.W.3d 637, 643 (Tex. Crim. App. 2006)(an alcohol test administered several hours after he was stopped and the results are at or below the legal limit could render the entire test inadmissible under Rule 403).

Here, because of the significant delay of two to three hours to obtain a search warrant, no individual characteristics that could be obtained directly from Ruiz, due to his unconsciousness, and a single blood test, it is unlikely that retrograde extrapolation would be admissible to "work backwards from the blood alcohol content at the time the sample was taken to determine the blood alcohol content at the time of the alleged offense." Also, in the face of a Rule 403 challenge, the blood alcohol test may not have been admissible at all.

Further, it was reasonable for Sergeant McBride to believe that the hospital would administer some type of treatment to Ruiz that could have impacted the results of a blood draw had she waited to obtain a search warrant. *See Cole,* 490 S.W.3d at 926. Ruiz became unconscious due to the amount of alcohol in his system, previous attempts to treat Ruiz's unconsciousness were unsuccessful, and the hospital wanted to keep Ruiz in the hospital overnight due to his condition. Under these circumstances, a medical exigency also existed.

Because the court of appeals fails to take into consideration the totality of the circumstances in assessing exigent circumstances, decides the important issue whether implied consent never revoked can satisfy the consent exception to the warrant requirement, and misapplies this Court's prior precedent, review should be granted.

Prayer for Relief

Wherefore, the State of Texas prays that this Court will grant the petition and ultimately reverse the decision of the court of appeals.

Respectfully submitted,

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Certificate of Service

The State has e-served Chris Iles, counsel for Jose Ruiz, through the eFileTexas.gov filing system and sent a copy to The Honorable Stacey M. Soule, State Prosecuting Attorney, on this, the 9th day of February, 2018.

/s/ Keri L. Miller

Certificate of Compliance

This petition for discretionary review complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this petition, the undersigned attorney certifies that this document contains 4407 words, exclusive of the sections exempted by Rule 9.4(i)(1).

/s/ Keri L. Miler
Assistant County Attorney

APPENDIX A

Majority Opinion of the Court of Appeals
August 27, 2015

NUMBER 13-13-00507-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

JOSE RUIZ, **Appellee.**

On appeal from the 25th District Court
of Gonzales County, Texas.

O P I N I O N

Before Chief Justice Valdez and Justices Benavides and Perkes
Opinion by Justice Benavides

In this appeal, the State challenges the trial court's granting of appellee, Jose Ruiz's, motion to suppress blood alcohol test results that police seized following his arrest for driving while intoxicated. We affirm.

I. Background

On September 9, 2012, Gonzales Police Sergeant Bethany McBride arrived on the scene of an accident shortly after midnight in Gonzales County to discover a collision between a Lincoln Navigator and a Pontiac. Witnesses at the scene told Sergeant McBride that the driver of the Navigator, later identified as Ruiz, had fled the scene and had run behind a car wash.

Sergeant McBride looked into the Navigator and found insurance paperwork in Ruiz's name, as well as "several Bud Light . . . cans, that [had] exploded in the [front] seat." Other officers later located Ruiz in a field behind the car wash that witnesses had described earlier. Sergeant McBride described Ruiz as "unresponsive" that night and further observed that he "couldn't open his eyes." Additionally, his body emitted a "strong odor of [alcohol]." According to Sergeant McBride, Ruiz did not appear to be injured, but was "just unresponsive due to the amount of alcohol in his system."

Emergency medical personnel eventually arrived, and also attempted to elicit responses from Ruiz by performing several sternum rubs, but such tests were unsuccessful. As a result, Ruiz was taken by ambulance to Gonzales Memorial Hospital. At the hospital, Ruiz remained unresponsive. Sergeant McBride testified that she had enough probable cause to place Ruiz under arrest for driving while intoxicated and completed paperwork at the hospital for lab technicians to administer a blood draw. Sergeant McBride also discovered that Ruiz had four prior convictions for driving while intoxicated. Once Ruiz's blood was drawn, Sergeant McBride took custody of Ruiz's blood evidence and returned to the Gonzales Police Station.

On cross examination, Sergeant McBride testified that it would have been unreasonable to obtain a search warrant of Ruiz's blood for a number of reasons, namely: (1) it was difficult to find a magistrate or judge to sign a search warrant that late at night, and she was required to drive to the judge's house to retrieve the warrant; and (2) only two officers were on duty that night, and Sergeant McBride did not want to take one of the officers off duty to work on the warrant. According to Sergeant McBride, she estimated that it would have taken her "about two or three hours" to obtain a search warrant that night. Sergeant McBride also admitted that at the time, no procedures were in place to obtain search warrants for blood draws. The record also shows that Ruiz was admitted to the hospital overnight due to his sustained unconsciousness and did not appear to be a flight risk.

At the suppression hearing, the State stipulated that it had conducted a warrantless blood draw, but argued that the blood draw was nevertheless valid because: (1) section 724.014 of the transportation code provides implied consent of an accused who is unconscious, and (2) exigent circumstances existed. The trial court granted Ruiz's motion to suppress, and issued the following relevant findings of fact and conclusions of law:

Findings of Fact

> 1. [Ruiz] was involved in an accident late at night to early morning on September 9, 2013. Gonzales Police Department Sgt. Bethany McBride responded.
>
> . . . .
>
> 4. Following [Ruiz's] arrest by McBride the attending physicians indicated they wanted to keep [Ruiz] overnight.

5. There was no concern that [Ruiz] would flee from the hospital.

6. A warrant could have been obtained within 2 to 3 hours.

. . . .

8. McBride performed a criminal history check on [Ruiz] and found four previous convictions for DWI. Relying on Texas Penal Code 724.012 and 724.014 McBride ordered the blood draw from [Ruiz].

9. [Ruiz] remained in custodial arrest during the time the blood was drawn.

10. The court finds Officer McBride's testimony to be credible in all respects.

Conclusions of Law

1. The court takes judicial notice of all statutes promulgated under [the] Texas Transportation Code and in effect during all times relevant to this case.

2. The court finds that it is bound by *Missouri v. McNeely*, 133 S.Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013).

3. [Ruiz] did not revoke his consent to a blood draw under section 724.011 of the Texas Transportation Code.

4. No exigent circumstances existed in this case.

5. Believing itself to be bound by *McNeely*, the court granted the motion to suppress.

6. If exigent circumstances existed the court believes *McNeely* would not apply and the motion to suppress would be denied.

This appeal followed.

II. Motion to Suppress

By its sole issue, the State contends that the trial court erred by granting Ruiz's motion to suppress because he impliedly consented to the blood draw, and even if he did not consent, there were sufficient exigent circumstances to justify the warrantless blood

draw.

A. Applicable Law and Standard of Review

To suppress evidence on an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). This initial burden is satisfied by establishing that a search occurred without a warrant. *Id.* Once a defendant makes this showing, the burden of proof shifts to the State where it is required to establish that the search was conducted pursuant to a warrant or under a reasonable exception. *Id.* (citing *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002)).

In reviewing a trial court's ruling on a motion to suppress, we must view the evidence in the light most favorable to the trial court's ruling. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013); *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). When the trial court does not make explicit findings of fact, we infer the necessary factual findings that support the trial court's ruling if the record evidence (viewed in light most favorable to the ruling) supports these implied facts. *Johnson*, 414 S.W.3d at 192.

Motions to suppress are reviewed pursuant to a bifurcated standard under which the trial judge's determinations of historical facts and mixed questions of law and fact that rely on credibility are granted almost total deference when supported by the record. But when mixed questions of law and fact do not depend on the evaluation of credibility and demeanor, we review the trial judge's ruling de novo. *Id.* (citing *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. 2013); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

B. Discussion

In this case, the State stipulated that Ruiz's blood was drawn without a warrant. Therefore, the burden shifted to the State to establish that the search was reasonable. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. *Missouri v. McNeely*, 133 S.Ct. 1552, 1563 (2013).

To meet its burden that the warrantless search in this case was reasonable, the State asserts that Texas's implied consent law, *see* TEX. TRANSP. CODE ANN. §§ 724.011; 724.014 (West, Westlaw through Ch. 46 2015 R.S.), established Ruiz's consent to the blood draw; and in the alternative, exigent circumstances existed to justify the taking of Ruiz's blood. We will analyze each argument below.

1. Implied Consent

Section 724.011(a) of the transportation code implies consent for an individual who has been arrested for driving while intoxicated. *See id.* § 724.011(a); *see State v. Villarreal*, No. 13–13–00253–CR, __ S.W.3d __, __, 2014 WL 1257150, at *11 (Tex. App.—Corpus Christi Jan. 23, 2014) *aff'd*, No. PD–0306–14, 2014 WL 6734178 at *21 (Tex. Crim. App. Nov. 26, 2014) *reh'g granted*, (Feb. 25, 2015). This implied consent, however, may be revoked, absent certain exceptions. *See id.* § 724.013 ("Except 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."). Thus, if a drunk-driving suspect refuses to submit to the taking of a specimen, police are prohibited from doing so without a warrant. *Id.* However, if a drunk-driving suspect is "dead, unconscious, or otherwise incapable of refusal," implied consent is considered "not to

have [been withdrawn] as provided by section 724.011." *See id.* § 724.014(a). This implied-consent law framework, however "does not give officers the ability to forcibly obtain blood samples from anyone arrested for [driving while intoxicated]," but instead "gives officers the ability to present an affidavit to a magistrate in every DWI case, just like every other criminal offense." *See Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002).

In this case, the State relies upon these implied-consent statutes to establish that Ruiz effectively consented to the warrantless blood draw, which is a recognized exception to the warrant requirement. We disagree with the State's position. The record is undisputed that Ruiz was unconscious and hospitalized during the course of Sergeant McBride's investigation on September 9, 2012. Regardless of this fact, the State appears to rely upon section 724.014(a) as a key to unlock the recognized consent exception to the warrant requirement. We do not read the implied consent statutes as expansively as the State advances on appeal.

When the State seeks to rely upon consent to justify the lawfulness of a search, it must prove that the consent was, in fact, freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 546 (1968). Additionally, a person who consents to a search may also specifically limit or revoke such consent. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012); *Valtierra v. State*, 310 S.W.3d 442, 450 (Tex. Crim. App. 2010). The question of whether a consent was valid is a question of fact that the State must prove by clear and convincing evidence. *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012). The fact finder must consider the totality of the circumstances in determining whether consent was given voluntarily. *Id.* Thus, the State cannot meet

its burden to establish that one consented if such consent was not given freely and voluntarily. *See Bumper*, 391 U.S. at 546. Here, the trial court found that Ruiz was unconscious and did not respond to Sergeant McBride. It is clear that based upon these facts, Ruiz was unable to give his consent freely and voluntarily, or have the opportunity to revoke such consent. *See id.*; *see also Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (holding that a suspect may delimit the scope of a search for which he has consented); *Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) ("[I]t is undisputed that . . . consent may be limited or revoked."). Therefore, we decline to hold that sections 724.011(a) and 724.014(a) of the transportation code is the equivalent to voluntary consent as a recognized exception to the warrant requirement. *See Forsyth v. State*, 438 S.W.3d 216, 222 (Tex. App.—Eastland 2014, pet. ref'd) (holding that implied consent under the Transportation Code is not the equivalent to voluntary consent as a recognized exception to the warrant requirement).

Additionally, the implied consent statutes at issue in this case do not address or purport to dispense with the Fourth Amendment's warrant requirements for blood draws. *See Villarreal*, 2014 WL 1257150 at *11 (holding the same as it relates to section 724.012(b)(3)(B)). These statutes do not take into account the totality of the circumstances present in each case, as mandated by *McNeely*, and only consider certain facts—that is: (1) was the person arrested for driving while intoxicated; and (2) was implied consent revoked? As a result, we hold that the implied consent statutes involved in this case are not recognized exceptions to the warrant requirement under the Fourth Amendment, and the State's reliance on these statutes in this case to establish that the warrantless search was reasonable is constitutionally infirm. *See id.*; *see also Perez v.*

State, No. 01-12-01001-CR, 2015 WL 1245469, at *9 (Tex. App.—Houston [1st Dist.] Mar. 17, 2015, pet. filed) ("the warrantless taking of appellant's blood sample pursuant to the implied consent/mandatory blood draw statutory scheme did not satisfy the requirements of the Fourth Amendment without a showing that some established exception to the warrant requirement applied"); *State v. Anderson*, 445 S.W.3d 895, 912 (Tex. App.—Beaumont 2014, no pet.) (holding that nothing in section 724.011 nor section 724.012 require police to take blood without a warrant); *Gentry v. State*, No. 12-13-00168-CR, 2014 WL 4215544, at *4 (Tex. App.—Tyler Aug. 27, 2014, pet. filed) (mem. op., not designated for publication) ("the implied consent and mandatory blood draw statutory schemes found in the transportation code are not exceptions to the warrant requirement under the Fourth Amendment"); *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App.—San Antonio 2014, pet. filed) (holding that the transportation code's implied consent statutes were not permissible exceptions to the Fourth Amendment's warrant requirement); *Reeder v. State*, 428 S.W.3d 924, 930 (Tex. App.—Texarkana 2014, pet. granted) (holding that in the absence of a warrant or exigent circumstances, taking defendant's blood pursuant to Section 724.012(b)(3)(B) of the Texas Transportation Code violated his Fourth Amendment rights); *Sutherland v. State*, 436 S.W.3d 28, 41 (Tex. App.—Amarillo 2014, pet. filed) ("To the extent that Section 724.012(b)(3)(B) can be read to permit, nonetheless, a warrantless seizure of a suspect's blood in the absence of such exigent circumstances or the suspect's consent, it runs afoul of the Fourth Amendment's warrant requirement.").

Furthermore, we respectfully disagree with the dissent's implied consent analysis in two respects. First, the dissent asserts that we are requiring the State "contrary to the

plain language of the statute, to prove that the consent was freely and voluntarily given." However, this requirement is not a novel imposition by the majority, but rather one required by the Fourth Amendment. *See Bumper*, 391 U.S. at 548 (holding that to rely on consent to justify the lawfulness of a search, the State must show that consent was "freely and voluntarily given."); *see also Beeman*, 86 S.W.3d at 616 (implied consent law gives "police officers nothing more than the Constitution already gives them—the ability to apply for a search warrant, and if the magistrate finds probable cause to issue that warrant, the ability to effectuate it. This does not give officers the ability to forcibly obtain blood samples from anyone arrested for DWI). To give the State *carte blanche* authority, as advanced by the State and adopted by the dissent, to draw a suspected unconscious drunk driver's blood without a warrant evokes more questions than it does answers. For example, under what authority may the State supply consent for individuals, who have not yet freely and voluntarily consented? In what other respects and situations, other than drunk driving investigations, may the State statutorily imply consent to search persons, houses, papers, and effects without a warrant? Such a position by the State is untenable and flies in the face of common sense and into the abyss of absurdity. *See Griffith v. State*, 116 S.W.3d 782, 785 (Tex. Crim. App. 2003) ("If one reasonable interpretation yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred.").

Second, we do not believe that our holding today renders the entire implied consent statutory scheme ineffective as the dissent states. The implied consent statutory scheme is premised on consent. *See Villarreal*, 2014 WL 1257150 at *9 (citing TEX. TRANSP. CODE ANN. § 724.011(a); *Beeman*, 86 S.W.3d at 615)). Further, section

724.014 is likewise premised on consent. *See* TEX. TRANSP. CODE ANN. § 724.014(a) ("A person who is dead, unconscious, or otherwise incapable of refusal is considered not *to have withdrawn the consent* provided by Section 724.011.") (emphasis added). Based on the facts of this case and the totality of the circumstances, Ruiz never consented to trigger the applicable provisions of Chapter 724 of the transportation code.

In summary, we conclude that the State did not meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code.[1] *See Ford*, 158 S.W.3d at 492.

2. Exigency

In the alternative, the State asserts that exigent circumstances justified the taking Ruiz's blood without a warrant.

Exigency is a "well-recognized exception" to the warrant requirement, when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) (internal quotation marks and brackets omitted). Exigent circumstances that have been recognized by the United States Supreme Court include: entering a home to provide emergency assistance to an occupant; engaging in a hot pursuit of a fleeing suspect, entering a burning building to put out a fire and investigate its cause, and preventing the imminent destruction of evidence. *See McNeely*, 133 S.Ct. at 1558–559 (internal citations omitted).

[1] We do not hold that sections 724.011(a) and 724.014(a) of the transportation code are unconstitutional. Instead, we hold that these provisions do not create per se exceptions to the Fourth Amendment's warrant requirement.

To validate a warrantless search based on exigent circumstances, the State must satisfy a two-step process. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). First, probable cause must exist to search—that is, reasonable, trustworthy facts and circumstances within the knowledge of the officer on the scene would lead an officer of reasonable prudence to believe that the instrumentality . . . or evidence of a crime will be found." *See id.* at 685. Second, an exigent circumstance exists to justify a warrantless search. *See id.* To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, we look to the totality of circumstances. *McNeely*, 133 S.Ct. at 1559. Without establishing probable cause and exigent circumstances, a warrantless search will not stand. *Gutierrez*, 221 S.W.3d at 685–86.

In this case, we agree with the State that it had probable cause to arrest Ruiz for driving while intoxicated. The record shows that Ruiz was involved in an accident, in which he fled the scene. Upon arrival, Sergeant McBride discovered several beer cans thrown about Ruiz's vehicle. Furthermore, Ruiz's unconscious body was found in a field behind a car wash, and according to Sergeant McBride, Ruiz "couldn't open his eyes" and his body emitted a "strong odor of [alcohol]." We conclude that sufficient probable cause existed to arrest Ruiz for driving while intoxicated. *See id.* at 685.

Next, the State asserts that several issues prevented Sergeant McBride from obtaining a search warrant to draw Ruiz's blood thereby creating exigency. Specifically, the State argues that Sergeant McBride "was required to not only investigate the scene of the accident," but also was required to identify and locate Ruiz, who had fled the scene of the collision. Sergeant McBride also testified that it would have taken her "three hours" to obtain a warrant to draw Ruiz's blood. However, Sergeant McBride opted not

to obtain a warrant because only two officers were on duty that night and to take one off duty to apply for a warrant was not feasible. Furthermore, although Sergeant McBride's testified that no procedures were in place by the Gonzales Police Department to obtain search warrants for blood in driving while intoxicated cases, the crux of her argument for not obtaining a warrant related more to the amount of time that it would take to obtain the warrant rather than an inability to apply for a warrant. Additionally, Sergeant McBride agreed with the State's prosecutor that it would have been "difficult to find a judge" at midnight on a Saturday night and that she would have had to drive to the magistrate's house to obtain the warrant, while the alcohol in Ruiz's blood stream dissipated. Finally, the trial court found that: (1) Ruiz was unconscious throughout Sergeant McBride's investigation, (2) physicians admitted Ruiz into the hospital overnight, and (3) Ruiz presented no risk of flight.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "now or never" situation. *McNeely*, 133 S.Ct. at 1561. The *McNeely* court noted that blood alcohol evidence from a drunk-driving suspect "naturally dissipates over time in a gradual and relatively predictable manner, rather than in circumstances in which the suspect has control over easily disposable evidence." *Id.* Additionally, the time expended by a police officer to transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test creates an inevitable delay between the time of the arrest or accident and the time of the test, regardless of whether the police officers are required to obtain a warrant. *Id.* Additionally, the *McNeely* court noted that technological developments enable police

officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion. *Id.* at 1562–563 (citing various state statutes that allow police to use technology-based developments to "streamline the warrant process"); *see also Clay v. State*, 391 S.W.3d 94, 103–04 (Tex. Crim. App. 2013) (holding that "no compelling reasoning" contemplated in the search warrant statute requires that the oath always be administered in the corporal presence of the magistrate, so long as sufficient care is taken in the individual case to preserve the same or equivalent solemnizing function to that which corporal presence accomplishes).[2]

In this case, the State's exigency argument relates to Sergeant McBride's timing concerns of obtaining the warrant. While we recognize that factors such as procedures in place for obtaining a warrant, or the availability of a magistrate judge, as well as practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence may establish exigency to permit a warrantless search, we must still look to the particular facts and circumstances of each case. *See McNeely*, 133 S.Ct. at 1568. Here, the State produced no evidence to show that destruction of Ruiz's blood alcohol was imminent, how it was deprived of an opportunity to obtain reliable evidence within a timeframe, or how a more expeditious process was not available to locate a magistrate and obtain a warrant from the magistrate through alternative means such as via telephone rather than physically driving to the magistrate's

[2] The dissent's reliance on *Schmerber* to support the conclusion that Sergeant McBride believed that she was facing the imminent destruction of evidence was sufficient to support an exigent circumstance to conduct a warrantless blood draw is misplaced because it does not take into account the factors discussed in *McNeely* regarding technological developments in the law to obtain a search warrant without having to physically visit a magistrate. *See McNeely v. Missouri*, 133 S.Ct. 1552, 1562–563 (2013); *see also Clay v. State*, 391 S.W.3d 94, 103–04 (Tex. Crim. App. 2013).

home. Therefore, under the totality of the circumstances of this case, we agree with the trial court and hold that the State did not meet its burden to show that Ruiz's warrantless blood draw was justified by exigent circumstances. The State's sole issue on appeal is overruled.

III. Conclusion

We affirm the trial court's granting of Ruiz's motion to suppress.

GINA M. BENAVIDES,
Justice

Dissenting Opinion by
Justice Gregory T. Perkes.

Publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
27th day of August, 2015.

APPENDIX B

Dissenting Opinion of Justice Perkes,
August 27, 2015

NUMBER 13-13-00507-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

JOSE RUIZ, **Appellee.**

On appeal from the 25th District Court
of Gonzales County, Texas.

DISSENTING OPINION

Before Chief Justice Valdez and Justices Benavides, and Perkes
Dissenting Opinion by Justice Perkes

I dissent from the majority's opinion for two reasons. First, I believe Sergeant McBride obtained the blood sample with appellee Jose Ruiz's implied consent. Second, I believe the totality of the circumstances in this case permit the taking of a blood sample without the necessity of a warrant.

I. Background

Sergeant Bethany McBride, with the Gonzales Police Department, was dispatched to a two vehicle accident around midnight on September 9, 2012. When Sergeant McBride arrived at the scene, she observed a tan Lincoln Navigator that had collided with a tan Pontiac. The driver of the tan Pontiac remained at the scene but the driver of the Lincoln Navigator had fled. As Sergeant McBride investigated the scene, two witnesses approached and gave her a description of the Lincoln's driver and stated that the driver had run behind a nearby car wash. Sergeant McBride looked in the Lincoln Navigator to determine the identity of the driver, and located insurance paperwork that belonged to Ruiz. While inside the vehicle, Sergeant McBride observed several Bud Light cans in the front seat area. While searching the area where the witnesses said Ruiz had fled, the police officers located Ruiz in a field behind the car wash. Ruiz was unresponsive and it took several officers to carry him to the patrol unit. Sergeant McBride noticed a very strong odor of alcoholic beverages coming from Ruiz and determined that he was unresponsive due to the amount of alcohol in his system.

Sergeant McBride drove Ruiz to the hospital, where she placed him under arrest for driving while intoxicated. When Sergeant McBride ran Ruiz's criminal history, she learned that Ruiz had four prior convictions for driving while intoxicated. Sergeant McBride prepared the necessary hospital paperwork to obtain a blood sample, and a qualified hospital lab technician drew Ruiz's blood. Ruiz remained unresponsive the entire time. Ruiz was indicted for DWI—third or more offense, a third-degree felony enhanced to a habitual felony offender. *See* TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2)

(West, Westlaw through Ch. 46 2015 R.S.). Following his indictment, Ruiz filed a motion to suppress the blood evidence.

During the hearing on Ruiz's motion to suppress, Sergeant McBride explained that she was one of only two officers on duty for the Gonzales Police Department at the time, and that it would have been impracticable to remove one officer from duty to secure the warrant. Sergeant McBride testified that there were no procedures in place to obtain a search warrant for blood draws and that it would have been difficult to locate a judge at midnight on a Saturday night. Sergeant McBride further testified that if she were able to get a warrant, it would have taken two or three hours. Sergeant McBride stated that the circumstances of the investigation—the accident, driver identification, Ruiz's fleeing and unresponsiveness—prolonged the case beyond a normal DWI investigation.

The State's argument at the hearing was twofold. First, it argued that because Ruiz was incapable of refusing the blood test, he was deemed to have consented under implied consent. Second, it argued that the circumstances of the investigation and arrest demonstrated exigency sufficient to dispense of the warrant requirement.

The trial court granted Ruiz's motion to suppress the blood evidence. In its comprehensive findings of fact and conclusions of law, the trial court concluded that Ruiz did not revoke his consent to the blood draw under section 724.011 of the Texas Transportation Code. The trial court further concluded that it was bound by *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) and that no exigent circumstances existed.

II. BLOOD EVIDENCE

By its sole issue, the State asserts that the trial court erred when it granted Ruiz's

motion to suppress. Specifically, the State argues Ruiz was unconscious at the time of the blood draw and thus incapable of withdrawing his consent to the blood draw under the Texas Transportation Code. Alternatively, the State argues there were sufficient exigent circumstances present which justified the warrantless taking of Ruiz's blood sample. I agree with both of the State's arguments.

A. Implied Consent

Warrantless searches may be premised on consent. *See* TEX. TRANSP. CODE ANN. §§ 724.011, 724.012(b) (West, Westlaw through Ch. 46 2015 R.S.); *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973).

The Texas Transportation Code provides that:

> (a) 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, or an offense under Section 106.041, Alcoholic Beverage Code, 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.

See TEX. TRANSP. CODE ANN. § 724.011(a).[1]

Additionally, section 724.014 states that:

> (a) A person who is dead, unconscious, or otherwise incapable of refusal is considered not to have withdrawn the consent provided by Section 724.011.
>
> . . . .
>
> (c) If the person is alive but is incapable of refusal, a specimen may be taken by a person authorized under Section 724.016 or 724.017.[2]

[1] The trial court specifically found that Ruiz was under arrest prior to the taking of the blood sample.

[2] These sections involve the procedures for taking a sample and qualifications of the person taking

See TEX. TRANSP. CODE ANN. §§ 724.014(a), (c) (West, Westlaw through Ch. 46 2015 R.S.). The presumption of consent is so strong that a person who is dead, unconscious, or otherwise incapable of refusal is considered not to have withdrawn the consent provided by Section 724.011. *State v. Amaya*, 221 S.W.3d 797, 800 (Tex. App.—Fort Worth 2007, pet. ref'd).

The uncontroverted evidence shows that Ruiz was unconscious throughout the entire encounter with law enforcement, including the blood draw at the hospital. The testimony supports the trial court's finding that Ruiz never affirmatively revoked his consent under section 724.011. Ruiz was precisely the type of person—a person incapable of refusal—contemplated by section 724.014. *See Miller v. State*, 387 S.W.3d 873, 880–81 (Tex. App.—Amarillo 2012, no pet.) (holding that because defendant was incapacitated, he was considered not to have withdrawn consent provided by section 724.011); *Amaya*, 221 S.W.3d at 802. This factual scenario is the type of situation where implied consent makes perfect sense. To hold otherwise would render ineffective the entire implied consent statutory scheme.

The majority states that it refuses to read the implied consent statute "expansively", but then requires the State, contrary to the plain language of the statute, to prove that the consent was freely and voluntarily given. Such a reading encumbers the State with the impossible task of obtaining consent freely and voluntarily from an unconscious person. While the majority correctly states that consent must be freely and voluntarily given, the cases it relies on are factually distinguishable. *See Bumper v. North Carolina*, 391 U.S.

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the sample. *See* TEX. TRANSP. CODE ANN. §§ 724.016, 017 (West, Westlaw through Ch. 45 2015 R.S.)

543, 546 (1968) (examining consent in the context of police coercion); *Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) (explaining defendant revoked consent for officers to enter apartment after domestic violence investigation was complete); *Valtierra v. State*, 310 S.W.3d 442, 452 (Tex. Crim. App. 2010) (holding that in context of drug possession case, "[o]nce permitted into a residence, a police officer may take action only in accordance with the purpose for which he was invited or allowed into the residence."); *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012) (holding that trial court did not abuse its discretion in finding that defendant gave consent for breath sample when defendant vacillated between granting and withdrawing consent in conversation with officer); *Forsyth v. State*, 438 S.W.3d 216, 222 (Tex. App.—Eastland 2014, pet. ref'd) (holding that circumstances required search warrant to collect blood evidence where defendant explicitly refused to provide blood sample during DWI investigation).

Ruiz's blood sample was taken pursuant to implied consent as provided by the transportation code. *See* TEX. TRANS. CODE ANN. §§ 724.011, 724.014. Because the implied consent laws in this instance do not offend the Fourth Amendment, I would conclude that the blood sample was obtained legally. *See Miller,* 387 S.W.3d at 880–81; *see also Anderson v. State*, No. 03–09–00041–CR, 2010 WL 3370054, at *3 (Tex. App.—Austin Aug. 26, 2010, pet. ref'd) (mem. op.) (not designated for publication).

B. Exigency

Missouri v. McNeely, relied on by the trial court, answered the narrow question regarding whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's search warrant

requirement for nonconsensual blood testing in drunk-driving cases. *See* 133 S.Ct. 1552, 1568 (2013). *McNeely*, however, further recognizes and affirms the totality of circumstances approach in deciding whether a warrant is required. *See id.* at 1559 (citing *Schmerber v. California*, 384 U.S. 757 (1966)). *McNeely* contemplates situations where "circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* at 1561.

McNeely supports a finding of exigency sufficient to justify the warrantless blood test in this case. After arriving at the scene of an accident in the middle of the night, Sergeant McBride was required to not only investigate the scene of the accident but also required to find Ruiz and identify him as a driver involved in the accident. Additionally, when Sergeant McBride was finally able to locate Ruiz, he was unconscious and in need of medical attention. Sergeant McBride testified that no magistrate was on duty, and that it would have taken time to find one, drive the warrant to their residence to have it signed, and then return to the hospital to serve the warrant. She estimated that obtaining a warrant would have taken two or three hours and that it was impractical to remove one of the only two officers on duty that night in order to prepare a search warrant affidavit. Under these circumstances, it was reasonable for Sergeant McBride to believe that she was facing the imminent destruction of evidence. *See Schmerber*, 384 U.S., at 771 (holding that warrantless search was legal when "there was no time to seek out a magistrate and secure a warrant").

Because the blood evidence was taken with implied consent, and, alternatively,

under exigent circumstances, I would sustain the State's issue.

III. CONCLUSION

I would reverse the order of the trial court and remand for further proceedings.

GREGORY T. PERKES
Justice

Publish.
TEX. R. APP. P. 47.2(b)

Delivered and filed the
27th day of August, 2015.

APPENDIX C

Opinion of the Court of Appeals
January 11, 2018

NUMBER 13-13-00507-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

JOSE RUIZ, **Appellee.**

On appeal from the 25th District Court of Gonzales County, Texas.

O P I N I O N

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Opinion by Justice Benavides

This cause is before this Court for a second time. *See State v. Ruiz*, 509 S.W.3d 451, 452 (Tex. App.—Corpus Christi 2015), *vacated and remanded by* PD-1362-15, 2017 WL430291, at *1 (Tex. Crim. App. Feb. 1, 2017) (per curiam) (not designated for publication).

In its per curiam opinion, the Texas Court of Criminal Appeals stated that while our 2015 decision remained pending on its docket, the high court decided two cases analyzing the issue of exigent circumstances in the context of suppressing blood evidence obtained pursuant to a warrantless draw. Thus, the court of criminal appeals vacated our previous opinion and remanded this case for further analysis in light of those two opinions. *See id.* at *1.

Following the court of criminal appeals' mandate, we issue this new opinion today by re-analyzing the State's appeal challenging the trial court's granting of appellee Jose Ruiz's motion to suppress. We affirm.

I. BACKGROUND[1]

At approximately midnight on September 9, 2012, Gonzales, Texas police officer Bethany McBride responded to an automobile collision between a Lincoln and a Pontiac at the intersection of 90A and Robertson. The driver of the Pontiac remained at the scene and advised Officer McBride that the driver of the Lincoln—later identified as Ruiz—had fled the scene of the crash and had run behind a car wash in the area. Other witnesses at the scene relayed the same information to Officer McBride.

Upon closer inspection of the Lincoln, Officer McBride observed several exploded Bud Light beer cans in the front seat and found insurance paperwork in Ruiz's name. Officer McBride also confirmed that the vehicle was registered to Ruiz. Once Officer McBride's backup officer[2] arrived at the scene, she advised the backup officer that Ruiz

[1] The Honorable Gregory T. Perkes, former Justice of this Court, participated in this Court's previous decision on this matter. However, because Justice Perkes's term of office expired on December 31, 2016, the Honorable Leticia Hinojosa has been substituted in his place.

[2] The backup officer's name is unclear from the record.

had fled behind the car wash on Apache Loop. Officer McBride also testified that at that point "we had county officers and my backup officer try to locate [Ruiz]." The officers eventually located Ruiz in "the exact location" that witnesses had described and carried him to a patrol unit.

Officer McBride testified that once Ruiz was located, "it took several officers to get [Ruiz] from the field to carry him to the patrol unit." Officer McBride described Ruiz as "unresponsive," that he "couldn't open his eyes" and "wouldn't respond" to the officers. She further recalled that Ruiz had a "strong odor of alcoholic beverage" emitting from his person and also had "no apparent injuries" to his body.

Emergency medical service (EMS) personnel arrived at the scene and performed several sternum rubs on Ruiz but found him to be unresponsive. At that point, EMS transported Ruiz to the hospital, where he remained unconscious throughout the night.

Officer McBride testified that after "a period of time" she traveled to the hospital in order to "make sure that he was cleared medically and to have blood drawn." She eventually placed Ruiz under arrest and then gathered and filled out paperwork to order hospital personnel to perform a blood draw. Once the blood was drawn, Officer McBride took custody of the blood sample and "put it in the icebox at the Gonzales Police Department to be sent to [the] lab." While already in custody, doctors at the hospital told Officer McBride that they wanted to keep Ruiz hospitalized overnight "due to his condition." Officer McBride testified that she had no concern that he would flee from the hospital or destroy any evidence.

On cross-examination, when asked by Ruiz's attorney whether it would have been reasonable to obtain a warrant to draw Ruiz's blood that night, Officer McBride said no. When asked why, Officer McBride responded: "that night two officers on, to take one off, no." Furthermore, she estimated that it would have taken "probably about two or three hours" to get a warrant that night. Additionally, Officer McBride stated that she based her decision to draw Ruiz's blood on section 724.012 of the transportation code.[3]

On re-direct, Officer McBride testified that her investigation of Ruiz's crash took "longer" than a general traffic stop. Furthermore, she testified that no procedures were in place at the time within the Gonzales Police Department to obtain search warrants for blood evidence. And lastly, Officer McBride stated that it would have been "difficult" to find a judge to sign a warrant that night, and if she would have found a judge, she would have had to drive to that judge's house to obtain the appropriate signature.

After the hearing, the trial court granted Ruiz's motion to suppress and issued the following relevant findings of fact and conclusions of law:

Findings of Fact

1. [Ruiz] was involved in an accident late at night to early morning on September 9, 2013. Gonzales Police Department Sgt. Bethany McBride responded.

2. [Ruiz] became unconscious and was carried and placed in McBride's patrol vehicle.

. . . .

[3] During questioning, Ruiz's counsel referred to section 724.012 of the "penal code." The penal code does not contain a section 724.012. However, in closing arguments, the State directed the trial court's attention to section 724.012 of the *transportation code* in support of its argument to perform a warrantless blood draw pursuant to the implied consent statutory scheme. *See* TEX. TRANSP. CODE ANN. § 724.012 (West, Westlaw through 2017 1st C.S.). We treat all references to chapter 724 of the penal code rather than the transportation code in this record as inadvertent errors.

4. Following [Ruiz's] arrest by McBride the attending physicians indicated they wanted to keep [Ruiz] overnight.

5. There was no concern that [Ruiz] would flee from the hospital.

6. A warrant could have been obtained within 2 to 3 hours.

. . . .

8. McBride performed a criminal history check on [Ruiz] and found four previous convictions for DWI. Relying on Texas [Transportation] Code 724.012 and 724.014 McBride ordered the blood draw from [Ruiz].[4]

9. [Ruiz] remained in custodial arrest during the time the blood was drawn.

10. The court finds Officer McBride's testimony to be credible in all respects.

Conclusions of Law

1. The court takes judicial notice of all statutes promulgated under [the] Texas Transportation Code and in effect during all times relevant to this case.

2. The court finds that it is bound by *Missouri v. McNeely*, 133 S.Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013).

3. [Ruiz] did not revoke his consent to a blood draw under section 724.011 of the Texas Transportation Code.

4. No exigent circumstances existed in this case.

5. Believing itself to be bound by *McNeely*, the court granted the motion to suppress.

[4] Similar to our note in footnote 3, it appears that the trial court inadvertently referred to sections 724.012 and 724.014 of the penal code in its findings rather than sections 724.012 and 724.014 of the transportation code.

6. If exigent circumstances existed the court believes *McNeely* would not apply and the motion to suppress would be denied.

This appeal followed.

II. MOTION TO SUPPRESS

By its sole issue, the State contends that the trial court erred by granting Ruiz's motion to suppress because he impliedly consented to the blood draw, and even if he did not consent, there were sufficient exigent circumstances to justify the warrantless blood draw.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion, but review the trial court's application of law to facts de novo. *Id.* We will sustain the trial court's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

B. Discussion

In this case, the State stipulated that Ruiz's blood was drawn without a warrant. Therefore, the burden shifted to the State to establish that the search was reasonable. *See Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013).

To meet its burden that the warrantless search in this case was reasonable, the State asserts that Texas's implied consent law, *see* TEX. TRANSP. CODE ANN. §§ 724.011; 724.014 (West, Westlaw through 2017 1st C.S.), established Ruiz's consent to the blood

draw to satisfy an exception to the warrant requirement; and in the alternative, exigent circumstances existed to justify the taking of Ruiz's blood. We will analyze each argument below.

1. Implied Consent

Section 724.011(a) of the transportation code implies consent for an individual who has been arrested for driving while intoxicated. *See id.* § 724.011. This implied consent, however, may be revoked, absent certain exceptions. *See id.* § 724.013 ("Except 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."). Stated another way, if a drunk-driving suspect refuses to submit to the taking of a specimen, police are prohibited from doing so without a warrant. *See id.* However, if a drunk-driving suspect is "dead, unconscious, or otherwise incapable of refusal," implied consent is considered "not to have [been withdrawn] as provided by section 724.011." *See id.* § 724.014(a). This implied-consent-law framework "does not give officers the ability to forcibly obtain blood samples from anyone arrested for [driving while intoxicated]," but instead "gives officers the ability to present an affidavit to a magistrate in every DWI case, just like every other criminal offense." *See Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002).

In this case, the State relies upon these implied-consent statutes to establish that Ruiz effectively consented to the warrantless blood draw, which is a recognized exception to the warrant requirement. We disagree with the State's position. The record is undisputed that Ruiz was unconscious and hospitalized during the course of Officer McBride's investigation on September 9, 2012. Regardless of this clear fact, the State appears to rely upon section 724.014(a) as a key to unlock the recognized consent

exception to the warrant requirement. We do not read the implied consent statutes as expansively as the State advances on appeal.

When the State seeks to rely upon consent to justify the lawfulness of a search, it must prove that the consent was, in fact, freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 546 (1968). Additionally, a person who consents to a search may also specifically limit or revoke such consent. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012); *Valtierra*, 310 S.W.3d at 450. The question of whether consent was valid is a question of fact that the State must prove by clear and convincing evidence. *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012). The fact finder must consider the totality of the circumstances in determining whether consent was given voluntarily. *Id.* Thus, the State cannot meet its burden to establish that one consented if such consent was not given freely and voluntarily. *See Bumper*, 391 U.S. at 546.

Here, the trial court found that Ruiz was unconscious and did not respond to Officer McBride. It is clear that based upon these facts, Ruiz was unable to give his consent freely and voluntarily, or have the opportunity to revoke such consent. *See id.*; *see also Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (holding that a suspect may delimit the scope of a search for which he has consented); *Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) ("[I]t is undisputed that . . . consent may be limited or revoked.").

Therefore, we hold that sections 724.011(a) and 724.014(a) of the transportation code is not the equivalent to voluntary consent as a recognized exception to the warrant requirement. *See Forsyth v. State*, 438 S.W.3d 216, 222 (Tex. App.—Eastland 2014, pet. ref'd) (holding that implied consent under the Transportation Code is not the equivalent to voluntary consent as a recognized exception to the warrant requirement).

In summary, we conclude that the State did not meet its burden to establish the reasonableness of drawing Ruiz's blood without a warrant pursuant to sections 724.011(a) and 724.014(a) of the transportation code.[5] *See Ford*, 158 S.W.3d at 492. Therefore, we turn now to the State's alternative argument that exigent circumstances justified Ruiz's warrantless blood draw.

2. Exigency

Exigency is a "well-recognized exception" to the warrant requirement, when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) (internal quotation marks and brackets omitted). Exigent circumstances that have been recognized by the United States Supreme Court include: entering a home to provide emergency assistance to an occupant; engaging in a hot pursuit of a fleeing suspect, entering a burning building to put out a fire and investigate its cause, and preventing the imminent destruction of evidence. *See McNeely*, 569 U.S. at 149 (internal citations omitted).

To validate a warrantless search based on exigent circumstances, the State must satisfy a two-step process. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). First, probable cause must exist to search—that is, reasonable, trustworthy facts and circumstances within the knowledge of the officer on the scene [that] would lead an officer of reasonable prudence to believe that the instrumentality . . . or evidence of a crime will be found." *See id.* at 685. Second, an exigent circumstance exists to justify a

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[5] We do not hold that sections 724.011(a) and 724.014(a) of the transportation code are unconstitutional. Instead, we hold that these provisions do not create per se exceptions to the Fourth Amendment's warrant requirement.

warrantless search. *See id.* To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, we look to the totality of circumstances. *McNeely*, 569 U.S. at 149. Without establishing probable cause and exigent circumstances, a warrantless search will not stand. *Gutierrez*, 221 S.W.3d at 685–86.

a. Probable Cause to Search?

In this case, we agree with the State that it had probable cause to arrest Ruiz for driving while intoxicated. The record shows that Ruiz was involved in an accident, in which he fled the scene. Upon arrival, Officer McBride discovered several beer cans thrown about Ruiz's vehicle. Furthermore, Ruiz's unconscious body was found in a field behind a car wash, and according to Officer McBride, Ruiz "couldn't open his eyes" and his body emitted a "strong odor of [alcohol]." We conclude that sufficient probable cause existed to arrest Ruiz for driving while intoxicated. *See id.* at 685.

b. Existence of Exigent Circumstances?

With regard to the second step—that is, existence of exigent circumstance—we examine two recent cases from the Texas Court of Criminal Appeals for guidance, *Cole v. State* and *Weems v. State*. *See* 490 S.W.3d 918 (Tex. Crim. App. 2016); 493 S.W.3d 574 (Tex. Crim. App. 2016); *see also Ruiz*, 2017 WL 430291 at *1 ("[W]e . . . remand this case to that court for it to consider whether, under the totality of the circumstances known to the police officer at the time, exigent circumstances existed in light of this Court's intervening decisions in *Cole* and *Weems.*").

1. Examination of *Cole v. State*

In *Cole*, the court of criminal appeals concluded that exigent circumstances justified a warrantless blood draw. *See* 490 S.W.3d at 927.

In that case, the record showed that Cole drove his large pickup at 10:30 p.m. in excess of 110 miles per hour through the streets of Longview, Texas, ran a red light at a busy intersection, and struck a pickup that caused an explosion, engulfing the other driver's pickup and killing the other driver instantly. *See id.* at 920. The initial responding police officer arrived to a fiery scene, not knowing who was dead or alive. *See id.* Other officers later arrived and assisted in removing Cole from his "heavily damaged truck's driver's seat." *Id.* Even at that time of night, "there was still considerable activity and traffic in the area of the accident," which required "as many officers on the scene as they could possibly get" to maintain public safety. *Id.* Fire and explosions from the pickup continued to rage as the officers blocked off several major intersections in the area in order to protect the public. *Id.* In addition to the ongoing public safety situation, the crash occurred during a shift change at the police department, which "complicated satisfying the manpower needed to secure the scene, conduct an investigation, and maintain public safety." *Id.*

Upon making contact with Cole near the scene of the crash, he appeared "confused and did not know where he was." EMS evaluated Cole's injuries and Cole admitted to EMS that he had taken "some meth." *Id.* Once at the hospital, police described Cole's behavior as "'tweaking'—a condition consistent with methamphetamine intoxication." *Id.*

The police officer tasked with investigating whether a crime was committed in this case was called back to the scene of the crash after his shift had ended for the day. *Id.* During his investigation, which lasted approximately three hours, the officer "discovered a large debris field that spread beyond the intersection and nearly a full block long." *Id.* The officer testified that fourteen officers assisted with the scene of the crash that night

performing law enforcement or public safety-duties. *Id.* The scene was not cleaned up and cleared until 6 a.m. the following morning. *Id.*

Back at the hospital, police arrested Cole and attempted to obtain a blood sample from him by seeking his voluntary consent after reading him the statutory warning. *Id.* at 920–21. During the reading of the warnings, Cole "frequently interrupted" the officer and insisted that he used methamphetamines "and was not drunk." *Id.* at 921. Cole refused to provide a blood sample, and the officer requested hospital staff to draw Cole's blood. *Id.* The evidence revealed that Cole's blood "contained intoxicating levels of amphetamine and methamphetamine." *Id.*

Cole moved to suppress the blood evidence. The lead accident investigator testified that before he arrived and conducted his investigation, "there was no one else who could have determined the nature and cause of the accident or who was at fault." *Id.* at 921. The investigator further testified that he did not try to get a warrant with an on-call judge because he was unable to leave the scene to go to the courthouse and speak to a prosecutor to secure a warrant. *Id.* In the investigator's estimation, the warrant-process "takes an hour to an hour-and-a-half 'at best'" and it was not feasible to wait until the accident investigation was entirely complete before securing a warrant. *Id.* Furthermore, the investigator "expressed concern that medical intervention and treatment—specifically the administration of medicine and especially narcotic medicines—could affect the integrity of a blood sample." *Id.* Lastly, the investigator testified that to assign another officer at the scene the responsibility to obtain a warrant "would leave an essential duty unfulfilled." *Id.* The trial court denied Cole's motion to suppress after concluding that exigent circumstances justified the warrantless seizure. *Id.* The Texarkana Court of Appeals

reversed the trial court and concluded that exigent circumstances did not exist in that case. *See Cole v. State*, 454 S.W.3d 89, 93–104 (Tex. App.—Texarkana 2014)*, rev'd and remanded by Cole*, 490 S.W.3d at 927.

In reversing the court of appeals and upholding the trial court's ruling denying the motion to suppress, the Texas Court of Criminal Appeals took into account several factors to justify the warrantless blood draw. As a starting point, it cautioned other courts from examining a record through the lens of hindsight because doing so "distorts a proper exigency analysis's focus"—that is, 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. *Id.* at 925.

Next, the *Cole* Court concluded that based on the facts of the case, the time required to complete the accident investigation and the lack of available law enforcement personnel further hindered the pursuit of a warrant. *Id.* Additionally, the court concluded that the officer at the hospital could not draw up warrant paperwork because she was responsible for Cole's custody at the hospital. *Id.* The court also noted that a number of other officers on duty were performing necessary responsibilities that night "including securing the accident scene, directing traffic, and keeping the public away from the scene." *Id.* Of the fourteen officers working the scene of the crash, all of them were performing "important law enforcement or public safety duties" and taking any of them away from those duties to draw up a warrant "would have left a necessary duty unfilled." *Id.* at 926. Moreover, the court of criminal appeals concluded that even if an attempt was made to secure a warrant, it would have taken between an hour and an hour-and-a-half, which reasonably concerned the lead accident investigator because of the potential medical

intervention performed at the hospital and the natural dissipation of methamphetamine in Cole's body would affect the reliability of the sample. *Id.* Furthermore, the lead investigator was also reasonably concerned that hospital personnel would administer pain medication, including narcotics, which would also affect the blood sample's integrity. *Id.* Lastly, unlike *McNeely*, which held that a minimally delayed test when dealing with an alcohol-related offense does not drain the test of reliability because experts can work backwards to calculate blood-alcohol content at an earlier date, this case dealt exclusively with methamphetamine intoxication, which has no known elimination rate like alcohol. *Id.* at 926–27. As a result, the police faced inevitable evidence destruction without the ability to know how much evidence it was losing as time passed. *Id.* at 927.

Based on a review of the totality of the circumstances, the court of criminal appeals held that obtaining a warrant was impractical in this case because police were confronted with the natural destruction of evidence through natural dissipation of intoxicating substances, coupled with logistical and practical constraints posed by a severe accident involving death and the attendant duties that the accident demanded. *Id.* at 927.

2. Examination of *Weems v. State*

In *Weems*, the court of criminal appeals concluded that the state failed to establish that a warrantless blood draw was justified by exigent circumstances. 493 S.W.3d 574, 582 (Tex. Crim. App. 2016).

In that case, the record showed that after drinking at a bar, Weems drove himself and a friend back to his house, when Weems's car "started to slowly veer off the road, flipped over on to its roof, and struck a utility pole." *Id.* at 575. A passerby stopped to observe Weems's vehicle on its roof with the tires still spinning. *Id.* Weems exited the

vehicle through the driver's side window, tried to stand but stumbled, and experienced difficulty maintaining his balance. *Id.* When asked if he was okay or drunk, Weems responded that he was drunk, then ran from the scene. *Id.* A Bexar County sheriff's deputy responded to the scene, and as he approached, a passerby waved down his patrol unit. *Id.* at 576. The passerby pointed to a parked car near the area and told the deputy that "someone was under her car and that he did not belong there." *Id.* The deputy observed a man—later identified as Weems—under the car, which had matched the description of the subject involved in the accident. *Id.* The deputy noted that Weems had bloodshot eyes, slurred speech, a bloodied face, and an inability to stand on his own. *Id.* Deputies eventually arrested Weems for suspicion of driving while intoxicated. *Id.*

Weems refused consent to give a breath or blood sample after being read the statutory warnings about the consequences of refusal. *Id.* Weems was treated at the scene by EMS, but because he complained about neck and back pain, EMS transported him to the hospital, which was "only 'a couple of minutes'" away from the accident scene. *Id.* At the hospital, Weems was placed in the hospital's trauma unit. *Id.* The deputy investigating the accident arrived at the hospital, filled out a form requesting a blood draw, and gave it to the nurse in charge. *Id.* The hospital was "particularly busy that night" so Weem's blood was drawn at 2:30 a.m., over two hours after his arrest. *Id.* The testing revealed that Weems's blood-alcohol concentration was .18 grams per deciliter, well above the .08 gram per deciliter definition of intoxication. *Id.*

The trial court denied Weems's motion, and a jury convicted him of felony DWI. The San Antonio Court of Appeals reversed and held *inter alia* that the record developed at trial did not support admitting the blood evidence under the exigency exception. *See Weems v. State*, 434 S.W.3d 655, 665–66 (Tex. App.—San Antonio 2014).

In affirming the intermediate appellate court, the court of criminal appeals began its analysis by noting the circumstances relevant to an exigency analysis of a warrantless blood draw include: the natural dissipation of alcohol, 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. *Weems*, 493 S.W.3d at 580. Relevant to the case, the court of criminal appeals highlighted that the sheriff's deputy acknowledged that due to the day of the week of the accident, the substantial delay in obtaining Weems's blood "was at least foreseeable." *Id.* at 581. The *Weems* Court further noted that the record was devoid of what procedures were in place, if at all, for obtaining a warrant when the arrestee is taken to the hospital, or whether Bustamante could have reasonably obtained a warrant, and if so, how long that process would have taken. *Id.* Furthermore, the deputy's testimony indicated that a magistrate was normally on duty to review search-warrant requests from the sheriff's office. *Id.* at 581–82. Moreover, the court of criminal appeals pointed out that the hospital's close proximity to the scene of the accident did not necessarily make obtaining a warrant impractical or unduly delay the taking of Weems's blood to the extent that natural dissipation would significantly undermine a blood test's efficacy. *Id.* at 582. Lastly, the record showed that another deputy accompanied the arresting officers to the hospital and waited until Weems's blood was taken. *See id.*

Based on a review of the totality of circumstances, the court of criminal appeals held that the State was unable to demonstrate that practical problems existed in obtaining a warrant within a timeframe that still preserved the opportunity to obtain reliable evidence. *Id.* at 582.

3. Application of *Cole* and *Weems*

On review of the totality of the circumstances found in the record of this case, we conclude that Ruiz's warrantless blood draw was not justified by exigent circumstances. To be sure, certain facts in this record, as we will discuss in further detail below, tend to gravitate toward a finding of exigency. However, the totality of the circumstances found in the record do not warrant such a finding.

We begin by reemphasizing that exigency analyses are fact-intensive and require case-by-case determinations based on the totality of circumstances. *See Cole*, 490 S.W.3d at 923 (citing *McNeely*, 569 U.S. at 149). The record in this case is not as robust as those in *Cole* and *Weems*. Both *Cole* and *Weems* were post-trial direct appeals, in which a seemingly more complete record was developed for review. The present case is before us on a pre-trial State's appeal, with a factual record consisting of one twenty-four-page hearing transcript containing only arguments by counsel and testimony from one witness, Officer McBride. With that in mind, we turn to the facts of this case.

The record undisputedly shows that Ruiz was involved in a car crash, fled the scene, and ended up unconscious in a nearby field. Ruiz remained unconscious for the remainder of the night. Further, Ruiz's level of unconsciousness was so severe that he had to be carried by "several officers" from the field where he was found to one of the officer's patrol units. EMS personnel unsuccessfully attempted several times to wake him

by performing sternum rubs. Moreover, once at the hospital, physicians wanted to keep Ruiz hospitalized overnight "due to his condition." Officer McBride testified that she had no concern that Ruiz would flee from custody that night and "didn't think [Ruiz] was going anywhere."

Next, the record shows that no procedures were in place for Gonzales police to obtain search warrants for blood from drunk-driving suspects at the time of this accident. Despite the lack of procedures in place, Officer McBride agreed that it would "have been difficult to find a judge" to sign a warrant at that time of day on an early Sunday morning, but even if she had found a judge, she would have had to drive the warrant to the judge's house. According to Officer McBride, she estimated that it would have taken "two or three hours" to obtain a warrant that night. Officer McBride further testified that it would have been unreasonable that night to obtain a warrant—even if it took two hours to complete—because "Being that, that night two officers on, to take one off, no."[6] Without further elaboration from Officer McBride, however, this testimony seems to suggest that Officer McBride did not want to remove an officer, including herself, away from regular police duties in order to prepare a warrant.

These facts draw some similarities and differences to the facts involved in *Cole*. In *Cole*, fourteen officers were on duty who were performing "important law enforcement or public-safety duties" related to the serious and explosive automobile accident involving a death in a busy city street intersection. 490 S.W.3d at 926. The lead accident investigator in *Cole* testified that taking any one of the fourteen officers away "would have left a necessary duty unfulfilled." *Id.* Additionally, the lead investigator testified that even if they

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[6] Officer McBride also testified that unidentified "county officers" assisted in locating Ruiz at the scene of the crash.

would have applied for a warrant, it would have taken "an hour to an hour and a half" to obtain. *Id.* The timing of applying for the warrant concerned the lead investigator in *Cole* because he was reasonably concerned that "the administration of pain medication, specifically narcotics, would affect the blood sample's integrity." *Id.*

Turning back to the record of this case, Officer McBride testified in a conclusory manner that taking one officer off regular duty to apply for a warrant would have been unreasonable. We conclude that this testimony, without more, is insufficient to support a finding of exigency because it is readily distinguishable from the facts in *Cole*. The *Cole* record showed that every available officer was fulfilling a necessary duty related to a serious car crash that caused a fire, explosions, and a death. Additionally, the crash scene in *Cole* was an active scene from approximately 10:30 p.m. until 6 a.m. the following morning. *See id.* at 920. Nothing in the record here shows that the available officers on duty that night in Gonzales were fulfilling the type of law enforcement or public safety duties of the tremendous magnitude that existed in *Cole* nor was there any articulated concern that Ruiz's blood sample would be affected as a result of the two to three-hour window it would have taken the officer to apply for and obtain a search warrant.

We emphasize that our analysis today on officer availability does not foreclose the possibility in future cases of finding exigent circumstances in some other situations when an available police officer might be fulfilling a law enforcement or public safety duty that does not rise to the level exhibited in *Cole*. However, based on the totality of circumstances in this case, we conclude that the State failed to establish exigency. Furthermore, we weigh these facts against a finding of exigency by focusing our analysis on 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 rather than through the distorted lenses of hindsight. *See Cole*, 490 S.W.3d at 925; *see also Weems*, 493 S.W.3d at 582 ("Another officers' presence or the 'hypothetically available officer' that, in theory, could have secured a warrant in the arresting officer's stead will certainly not render all warrantless blood draws a Fourth Amendment violation, nor do we suggest it is a circumstance that the State must disprove in every case to justify a warrantless search under an exigency theory.").

Next, the record shows that Officer McBride was without any procedures in place to guide her in obtaining a search warrant in this type of case. Additionally, the trial court found Officer McBride's testimony credible that she believed that it would have been "difficult" to find a judge at that time of night. These facts viewed in isolation certainly lend themselves to finding exigency. However, the trial court also found that Officer McBride erroneously relied upon the implied consent statutes of the transportation code in ordering the hospital staff to draw Ruiz's blood. Stated another way, the trial court could have reasonably found that despite finding Officer McBride's testimony credible regarding the reduced likelihood of finding a judge at that hour and the lack of procedural guidelines in place at the time, Officer McBride erroneously believed that she did not need to apply for a warrant based upon the implied consent statutes.

Lastly, as noted above, Officer McBride testified that she had no concern about Ruiz destroying any evidence in her investigation other than the alcohol metabolizing in his blood. In *Cole*, however, the court of criminal appeals found exigent circumstances after pointing out that officers were concerned about the timing of obtaining Cole's blood quickly to the administration of pain medication affecting Cole's blood sample's integrity,

as well as not knowing the elimination rate of methamphetamine in the blood. 490 S.W.3d at 926. Here, the State was dealing with an alcohol-related offense rather than one involving methamphetamines. As the *McNeely* Court stated, blood alcohol content evidence is "lost gradually and relatively predictably" which permits experts to work backwards from the blood alcohol content at the time the sample was taken to determine the blood alcohol content at the time of the alleged offense. *See McNeely*, 569 U.S. at 155–56 (holding that longer intervals may raise questions about the accuracy of the blood alcohol content calculation, which may create exigent circumstances justifying a warrantless blood sample). On this record, aside from Officer McBride's testimony that alcohol dissipates over time, no other evidence was presented by the State regarding the reliability, destruction, or possible tainting of Ruiz's blood alcohol-evidence.

In summary, the Fourth Amendment mandates that police in drunk-driving investigations obtain a warrant before a blood sample can be drawn, so long as it does not significantly undermine the efficacy of the search. *Id.* at 152. The burden to prove the necessity of a warrantless draw rests solely with the State. *See Ford*, 158 S.W.3d at 492. Based on the particulars of this record and considering the totality of the circumstances, the State has failed to demonstrate that exigent circumstances existed to satisfy the Fourth Amendment's reasonableness standard. *See id.*; *see also Weems*, 493 S.W.3d at 582 (holding that the State failed to carry its burden to establish exigency in a warrantless blood draw).

III. CONCLUSION

We affirm the trial court's order.[7]

GINA M. BENAVIDES,
Justice

Publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
11th day of January, 2018.

[7] On February 23, 2017, Ruiz's original appellate attorney, the Honorable Mark Symms, filed a motion to withdraw as counsel in this case. This Court then abated this proceeding and remanded the matter to the trial court for its consideration and possible action of appointing new counsel. On March 1, 2017, the trial court appointed the Honorable Chris Illes to serve as Ruiz's new appellate attorney. To the extent that the Honorable Mark Symms's motion remains pending in this Court, it is hereby granted.