No. PD-

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS , Appellant

v.

SEAN MICHAEL MCGUIRE, Appellee

Appeal from Fort Bend County
No. 01-18-00146-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

TABLE OF CONTENTS

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Sean Michael McGuire.

* The trial judge was the Honorable Brady G. Elliott, 268th Judicial District.

* Counsel for the State at trial were Jason Bennyhoff, Sherry Robinson, and Gail McConnell, 301 Jackson, Richmond, Texas 77469.

* Counsel for the State on appeal was Jason Bennyhoff, 301 Jackson, Richmond, Texas 77469.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellee at trial were Michael Elliott and Kristen Elaine Jernigan, 905 Front Street, Richmond, Texas 77469.

* Counsel for Appellee on appeal was Kristen Elaine Jernigan, 207 S. Austin Avenue, Georgetown, Texas 78626.

INDEX OF AUTHORITIES

Cases

Statutes

Law Review Article

No. PD-

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS , Appellant

v.

SEAN MICHAEL MCGUIRE, Appellee

Appeal from Fort Bend County
No. 01-18-00146-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Applying the "correct under any applicable theory of law" rule to affirm a suppression ruling does not authorize an appellate court to invent a new theory that the appealing party cannot now defeat because it turns on evidence it had no chance to offer. Here, the majority of the court of appeals held that the State failed to show exigent circumstances justified the warrantless arrest of Appellee who appeared

intoxicated in a suspicious place after being involved in a fatal accident. TEX. CODE CRIM. PROC. art. 14.03(a)(1). However, that legal theory was not litigated in the trial court; the State was therefore denied the opportunity to offer evidence on exigency. Alternatively, the majority erred to hold that exigent circumstances are required to justify a warrantless arrest under Article 14.03(a)(1). But even if it is an element under Article 14.03(a)(1), the need to preserve the integrity of Appellee's blood alcohol content satisfied exigency.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellee was charged with felony murder. 1 CR on Remand Corrected[1] 5-6. He filed a motion to suppress, alleging that his warrantless arrest was not supported by probable cause because the arresting officers did not witness Appellee commit an offense in their presence or view as required by TEX. CODE CRIM. PROC. art. 14.01(b). 1 CR on Remand Corrected 11-15. Granting the motion, the trial court agreed with Appellee's legal theory and also decided that Appellee's arrest did not occur in a suspicious place under TEX. CODE CRIM. PROC. art. 14.03(a)(1). 1 CR on Remand

[1] Because this case has prior appellate history, the SPA refers to the second suppression record following the court of appeals' remand after vacating the trial court's judgment as 2nd Corrected CR.

Corrected 71-78. The First Court of Appeals majority affirmed under a legal theory not raised or ruled upon in the trial court. *State v. McGuire*,__S.W.3d__, No. 01-18-00146-CR, 2019 WL 4065459, at *5-9 (Tex. App.—Houston [1st Dist.] 2019). Holding that Article 14.03(a)(1) has an exigency requirement, the majority declared that the State failed to meet its burden. *Id*. at *6.

STATEMENT OF PROCEDURAL HISTORY

Over Justice Keyes' dissent, a majority of the court of appeals affirmed the trial court's ruling granting Appellee's motion to suppress. *Id.*; *see also id*. at *9-17 (Keyes, J., dissenting). The State's petition is due by September 30, 2019.

GROUNDS FOR REVIEW

1. **Whether the lower court erred to affirm the suppression of evidence based on the State's failure to establish exigency for Appellee's warrantless arrest under TEX. CODE CRIM. PROC. art. 14.03(a)(1) when exigency was neither raised or ruled upon.**

2. **Does TEX. CODE CRIM. PROC. art. 14.03(a)(1) have an exigency requirement for warrantless arrests?**

3. **If Article 14.03(a)(1) has an exigency requirement for a warrantless arrest in public, it was satisfied here because the integrity of blood-alcohol-content evidence would have been compromised had Appellee been free to leave.**

ARGUMENT

I. Statute at Issue

TEX. CODE CRIM. PROC. art. 14.03 states, in part:

(a) Any peace officer may arrest, without warrant:

(1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws; . . . .

II. Grounds Analyzed

1. The lower court erred to affirm the suppression of evidence based on the State's failure to establish exigency for Appellee's warrantless arrest under TEX. CODE CRIM. PROC. art. 14.03(a)(1) when Appellee failed to raise that ground and the trial court did not rule on it.

In *State v. Esparza*, the trial court suppressed breath-test results because the State failed to show the circumstances under which they were obtained. 413 S.W.3d 81, 84 (Tex. Crim. App. 2013). The State appealed and, in response, Esparza argued for the first time that the suppression ruling should be upheld because the State failed to establish the scientific reliability of the results under TEX. R. EVID. 702. *Id*. at 85. Reversing the trial court's ruling, this Court carved out an exception to the "*Calloway* rule," which authorizes a court of appeals to affirm a trial court's ruling on an alternative theory not raised in the trial court by the prevailing party. *Id*. at 86-90 (citing *Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988)). It held that reliability under Rule 702 was not a "theory of law applicable to the case" because Esparza never objected on that basis at trial. *Id*. at 86-88. And because Rule 702 turns on the production of "predicate facts" that the State was never fairly called upon to adduce, the "*Calloway* rule" would result in "a manifest injustice." *Id*. at 89-90.

The *Esparza* rule applies here. The lower court majority erred to uphold the trial court's ruling granting Appellee's motion to suppress on the exigency legal

theory not raised or ruled on in the trial court.

A. The trial-court suppression litigation did not address exigency.

Appellee filed a motion to suppress evidence obtained as a result of his alleged unlawful warrantless arrest. 1 CR on Remand Corrected 11-15. Appellee specifically maintained that the only exception to the warrant requirement that could possibly apply was TEX. CODE CRIM. PROC. art. "14.01(b)," which states: "A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." 1 CR on Remand Corrected 12. In support, Appellee stated that Troopers Tomlin and Wiles testified that they did not observe Appellee commit an offense in their presence. 1 CR on Remand Corrected 13. Thus, Appellee argued that there was no probable cause to support his arrest.[2] 1 CR on Remand Corrected 13.

The State responded, arguing that Appellee's arrest was lawful under TEX. CODE CRIM. PROC. art. 14.03(a)(1), which authorizes the warrantless arrest of a person found in a suspicious place and under circumstances that reasonably show he is guilty of a felony or offense involving breach of the peace. 1 CR on Remand

[2] Appellee was granted a new trial after the court of appeals reversed the trial court's suppression ruling on the legality of the blood draw following *Missouri v. McNeely*. *McGuire*, 2019 WL 4065459, at *2. Because a live suppression hearing on the arrest issue (in addition to the blood draw) was held before Appellee's first trial, the trial court used the record from that hearing and the first trial in ruling on Appellee's motion that was filed after the case was remanded. *See, generally*, 1 CR on Remand Corrected.

Corrected 16-28.

The trial court granted Appellee's motion, concluding that there was no probable cause. 1 CR on Remand Corrected 71. In doing so, it concluded that no crime occurred in the Troopers' presence or view under Article 14.01(b) and that the accident scene at which the Trooper arrested Appellee[3] was not a suspicious place under Article 14.03(a)(1). 1 CR on Remand Corrected 76-77.

B. The lower-court majority introduced exigency as a new legal theory.

Instead of reviewing the legal grounds litigated in the trial court, the court of appeals majority, citing this Court's opinions in *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004), and *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005), held that Article 14.03(a)(1) requires the State to prove exigent circumstances existed. *McGuire*, 2019 WL 4065459, at *4-5. So, in addition to the statutory elements, the majority concluded that exigency is a third element. *Id*. It then upheld the trial court's ruling, concluding that the State failed to establish that exigent circumstances justified Appellee's warrantless arrest. *McGuire*, 2019 WL 4065459, at *4-9. Focusing on the State's failure, it stated: "Neither the State's response to McGuire's motion to suppress nor its arguments at the suppression

[3] Appellee was taken to the scene of the collision after the Troopers first confronted him at the gas station. 1 CR on Remand Corrected 77. The trial court determined that Appellee was arrested at the scene of the collision rather than at the gas station. 1 CR on Remand Corrected 77; *McGuire*, 2019 WL 4065459, at *1.

hearing addressed exigency." *Id*. at *5; *see also id*. at *6 ("Without any evidence or argument that an exigency existed, we must conclude that the State failed to meet its burden[.]").

C. The State had no opportunity to establish exigency in the trial court.

The State did indeed fail to show exigency.[4] But it did so for a very good reason: Appellee never put the State on notice that exigency was a contested issue. Appellee's only registered complaint was the absence of probable cause, specifically that no offense had been committed within the Troopers' presence. 1 CR on Remand Corrected 12. The exigency element was never raised, not even mentioned in fact, in his suppression motion or at the 2018 hearing.[5] 1 CR on Remand Corrected 11-13;

---

[4] The SPA assumes for purposes of procedural default that "exigency" is a requirement under Article 14.03(a)(1).

[5] Appellee's motion incorporated by reference a previous motion to suppress from his first trial. It is unclear which prior suppression motion Appellee referred to since there were three. Regardless, Appellee's first and second amended motions to suppress (which were ruled upon the first time) did not raise exigency as a basis for concluding that the arrest was unlawful. 1 CR 186-91 (first amended motion), 166-71, 174 (order by associate Judge Ruiz on first amended motion to suppress), 186-92 (second amended motion), 195-96 (district court's order adopting and modifying in part Judge Ruiz's order in ruling on Appellee's second amended motion).

Before the court of appeals, the State indicated that Appellee mentioned exigency at a live hearing six years earlier but the SPA is unable to find any reference. *See* State's Post-Submission Court of Appeals Brief, filed April 15, 2019, at 3; 5 Suppression RR 50-56. Regardless, even if it was mentioned in 2012, it is insufficient to have put the State on notice in 2018. Further, it was not raised in any suppression motion, and it was never litigated or ruled upon in the current

1 RR on Remand (Feb. 23, 2018). The State therefore responded in kind to Appellee's motion and made no reference to exigent circumstances. 1 CR on Remand Corrected 16-27. And limited to the issues raised by Appellee, the trial court never ruled on exigency.[6] 1 CR on Remand Corrected 71-77.

Like the predicate facts required for Rule 702 reliability discussed in *Esparza*, an exigency analysis is laden with facts—viewed according to the totality of the circumstances—and judged on a case-by-case basis. *See Missouri v. McNeely*, 569 U.S. 141, 151 (2013). "An exigency analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search." *Weems v. State*, 493 S.W.3d 574, 579 (Tex. Crim. App. 2016). This fact-driven inquiry is dependent upon the production of evidence relevant to the issue. For example, testimony from the Troopers about the time needed and procedures used to obtain a warrant would resolve whether the officers could have reasonably obtained a warrant without compromising the integrity of the evidence, the investigation, and the practicalities related to the deceased motorcyclist. *McNeely*, 569 U.S. at 154-55; *Cole v. State*, 490 S.W.3d 918, 924 (Tex. Crim. App. 2016) (relevant facts include: (1) "the procedures in place for obtaining a warrant;" "the availability of a magistrate judge;" and "the

---

proceeding. 1 CR on Remand Corrected; 1 RR on Remand (Feb. 23, 2018).

[6] Appellee did not object to the findings and conclusions.

practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence.") (internal citations omitted).

Further, at the very least, a trial court would also want to consider Appellee's ability to leave the scene and then proceed to remove, conceal, alter, or destroy any evidence of the offense. *See Estrada v. State*, 154 S.W.3d 604, 608-10 (Tex. Crim. App. 2005) (warrantless entry into home to arrest occupants justified over fear of destruction of evidence). Because Appellee never brought the matter of exigency to the attention of the State or trial court, the State was denied the opportunity to present evidence that would satisfy its burden. *Esparza*, 413 S.W.3d at 87 n.23.[7] The majority overlooked this key factor and therefore erred to affirm the suppression

---

[7] *See also Lyssy v. State*, 429 S.W.3d 37, 41 (Tex. Crim. App. 2014) (challenge concerning non-compliance with statutory requirements did not preserve complaint about the constitutionality of a search under the statute); *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009) (argument that police failed to memorialize his *Miranda* warnings on tape as required by Article 38.22, Section 3(a)(2) was not preserved by global reference to Article 38.22 because a number of subsections could have been applicable; thus, it was not specific enough to bring it to the trial court's attention); *Buchanan v. State*, 207 S.W.3d 772, 777 (Tex. Crim. App. 2006) ("Nothing about the hearing up to [the closing argument] would reasonably have alerted the trial court or opposing counsel that the appellant meant to challenge the legality of his arrest under Chapter 14, as opposed to the constitutional provisions cited in his written motion to suppress."); *State v. Copeland*, No. PD-1802-13, 2014 WL 5508985, at *5 (Tex. Crim. App. Oct. 22, 2014) (not designated for publication) ("Because the State was never confronted with its burden to establish that Danish's consent was freely and voluntarily made, and because Copeland implicitly conceded the existence of Danish's consent, the absence of evidence on that matter could not be a basis for finding procedural default by the State.").

ruling under the exigency legal theory, even assuming it is an element under Article 14.03(a)(1).[8] This Court should reverse its decision. And, if it does so, because the majority's merits ruling on exigency being a requirement under Article 14.03(a)(1) would then qualify as *dicta*, it should be identified as such by this Court in reversing its opinion.

---

[8] Requiring Appellee to bring the exigency issue to the trial court's attention serves an additional purpose. As this case highlights, whether Article 14.03(a)(1) has an exigency requirement—a matter beyond the statute's plain text—is an unsettled issue. *See argument accompanying* Ground 2 s*upra*. Novel issues must be fully litigated by both parties and ruled upon by the trial court to preserve them for review. *See, e.g., Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("Pena was obligated to put the trial judge on notice of the specific legal theory that he intended to advocate because: the federal constitutional standard was clearly established; the trial judge and the State unmistakably relied solely on the federal standard; and there is no independent interpretation on the subject of lost or destroyed evidence under the Texas Constitution's due course of law provision.). So, even assuming Appellee had satisfied his initial burden in moving to suppress, contrary to the lower-court majority's determination, the State did not have sufficient notice that exigency was part of the Article 14.03(a)(1) justification. *See argument accompanying* Ground 2 s*upra*.

Justice Keyes in dissent argued that the State did not forfeit the exigency argument. *McGuire*, 2019 WL 4065459, at *14, 14 n.4 (Keyes, J., dissenting). This is true, but finding no forfeiture does not remedy the problem since the appellate record cannot be expanded. The more important consequence is the majority's ability to affirm the trial court's ruling on that basis when the State had no opportunity to proffer evidence.

2. Alternatively, the lower-court majority erred to hold that TEX. CODE CRIM. PROC. art. 14.03(a)(1) has an exigency requirement for warrantless arrests.

A. The lower-court majority's Article 14.03(a)(1) exigency holding is novel.

The majority of the court of appeals held that Article 14.03(a)(1) requires a showing of exigency. It concluded that this Court has held as much in *Gallups*, 151 S.W.3d at 202, and *Swain*, 181 S.W.3d at 366, because both opinions cited Judge Cochran's concurrence in *Dyar v. State*, 125 S.W.3d 460, 470-71 (Tex. Crim. App. 2003) (Cochran, J., concurring). *McGuire*, 2019 WL 4065459, at *3, 6-7. Justice Keyes dissented in part to this particular holding. *Id*. at *13 (Keyes, J., dissenting). She stated that Article 14.03(a)(1) does not require exigency in all situations; nevertheless, she concluded that it plays a "prominent role" in the totality of the circumstances analysis. *Id*.

The following issue is now squarely before this Court for the first time: Does Article 14.03(a)(1) require exigency in addition to the explicit statutory elements?

B. Constitutional and statutory law do not support an exigency requirement for public arrests authorized by Article 14.03(a)(1).

Answering the foregoing issue presents two constitutional questions. First, does the United States Constitution have an exigency requirement for a warrantless arrest in a public place based on probable cause? No. The Supreme Court has held that under the Fourth Amendment, exigency is not part of the equation when

justifying a warrantless arrest made in public. "[T]he judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *U.S. v. Watson*, 423 U.S. 411, 423-24 (1976); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

Second, does the Texas Constitution require exigency to accomplish an arrest without a warrant? No. In 1998 in *Hulit v. State*, this Court held that the Texas Constitution has no warrant requirement; it requires only that a search and seizure be reasonable. 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) ("Article I, Section 9 of the Texas Constitution contains no requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant.").

Under both constitutions, without a warrant requirement, exigent circumstances are not needed to establish a warrantless exception for a public arrest. However, a warrantless arrest inside the home (or other place with the same level of privacy

expectation) must be supported by exigent circumstances or consent under the federal constitution and Texas statute. *Payton v. New York*, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); TEX. CODE CRIM. PROC. art. 14.05(2) ("exigent circumstances require that the officer making the arrest enter the residence without the consent of a resident or without a warrant.").

C. Neither *Gallups* nor *Swain* created an exigency requirement in Article 14.03(a)(1).

If there is no constitutional exigency requirement for a public arrest supported by probable case, has contrary caselaw, specifically *Gallups* and *Swain*, erroneously developed? No, but the legal grounds and demarcations have been somewhat muddled in the past fifteen years, and it began with Judge Cochran's 2003 concurrence in *Dyar*. There, she raised the concern that Article 14.03(a)(1) on its face is inconsistent with constitutional principles, but she cited no conflicting principles or law. Instead, she relied on Professor Gerald S. Reamey's article arguing that *Hulit* was wrongly decided because, before *Hulit*, Texas common law recognized a warrant requirement and the Legislature, by creating the statutory exceptions, has operated with the same understanding. *Dyar*, 125 S.W.3d at 470, 470 n.10 (Cochran, J., concurring); Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 979 (2000). Commenting on Article

14.03(a)(1) in light of his perceived warrant requirement, Professor Reamey was troubled by this Court's precedent defining "suspicious places" to include post-offense crime scenes. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. at 976-79 (referring to *e.g.*, *Johnson v. Texas*, 722 S.W.2d 417 (Tex. Crim. App. 1986)). To curtail a *de facto* post-crime-scene warrant exception, he proposed that "suspicious places" warrantless arrests be limited to situations in which "some reason exists not to obtain prior judicial approval[.]" *Id*. at 976.

Judge Cochran's statement in *Dyar* that the "organizational principle of exigent circumstances" could be used to define "suspicious places" was also a proposal. 125 S.W.3d at 470-71. Hers, however, unlike Professor Reamey's, does not appear to be based on the belief that a warrant is constitutionally required for an arrest based on probable cause. *Id*. at 469-71. The misgivings she identified about Article 14.03(a)(1)'s application dated back to the pre-Civil War era when it was used to arrest or detain persons on less than probable cause or reasonable suspicion or for merely being suspicious or, as Judge Cochran said, "those who were not welcome in Pleasantville." *Id*. It is therefore unclear how an exigency requirement fixes Judge Cochran's constitutionality concerns; exigent circumstances cannot cure the lack of probable cause or reasonable suspicion.

With this background in mind, it is necessary to ask whether this Court has in fact held that Article 14.03(a)(1) requires exigent circumstances. *Gallups* made no such holding. *Gallups* addressed a warrantless arrest conducted inside the home. 151 S.W.3d at 197, 200-02. According to the Court, both Articles 14.03(a)(1) and 14.05(a)(1) were implicated. *Id*. at 201-02. The officers were given consent to enter the home, satisfying Article 14.05(a)(1), and the home was deemed a suspicious place under 14.03(a)(1). *Id*. at 200-02. The Court explained that the provisions' application to a warrantless arrest in a home were consistent with state and federal constitutional heightened privacy protections because exigent circumstances justified dispensing with a warrant. *Id*. at 201-02. *Gallups* therefore did not create a generally applicable Article 14.03(a)(1) exigency rule; it was a combination of statutory and constitutional law that made the arrest lawful.

Swain also did not hold that exigency is required under Article 14.03(a)(1). When reviewing the trial court's ruling denying Swain's motion to suppress based on his alleged warrantless arrest, this Court held that Swain had not been under arrest when he made the incriminating statements. 181 S.W.3d at 366. Nevertheless, the Court went on and assumed that, if Swain had been under arrest, it was authorized by Article 14.03(a)(1) because he was in a suspicious place and there was probable cause and exigent circumstances. *Id*. at 366-67. In support of the latter, the Court cited

Gallups and noted *Gallups*' reliance on Judge Cochran's *Dyar* concurrence. *Id*. at 366. A close review of *Swain* establishes that its exigent circumstances reference is irrelevant for two reasons.[9] First, it was *dicta*. Second, it was a restatement of law from *Gallups* that overlooked the distinguishing and determinative fact that *Gallups* involved a home arrest.

D. Conclusion: Article 14.03(a)(1) does not require exigent circumstances.

Gallups and *Swain* did not hold that exigent circumstances are required to conduct a warrantless arrest under Article 14.03(a)(1). The majority in the lower court erred to rely on cursory statements in those decisions that may have implied otherwise. And this Court should not reach a contrary conclusion now because constitutional and statutory law do not support adding an exigency element into Article 14.03(a)(1). Exigency, applicable to a warrantless arrest inside the home (or another place with a like expectation of privacy), is required by law independent of Article 14.03(a)(1). *See Payton*, 445 U.S. at 590; TEX. CODE CRIM. PROC. art. 14.05(2).

---

[9] The majority of the lower court also cited other lower-court cases requiring exigent circumstances. *McGuire*, 2019 WL 4065459, at *4. Those cases followed *Swain*'s unsubstantiated statement of law without analyzing or second-guessing its authority or underpinnings.

3. If Article 14.03(a)(1) has an exigency requirement, it was satisfied here despite that issue not being litigated at trial.

A. The lower-court majority erred in holding exigency was not satisfied when the integrity of the BAC would have been compromised.

The court of appeals majority held that the record does not support exigent circumstances because: (1) Appellee would not be in danger of subsequent intoxicated driving; (2) the possibility of Appellee fleeing was ambiguous; (3) the police could have seized the truck to avoid the destruction of evidence; and, (4) the need to expeditiously draw blood has been precluded by *McNeely*. *McGuire*, 2019 WL 4065459, at *5-9. Regarding the fourth rationale, the court stated: "If dissipating blood-alcohol levels are not considered a per se exigency in the search context, they are not considered per se exigency to justify a warrantless arrest[.]" *Id*. at *9.

The majority missed a conclusive fact in the State's favor. The integrity of any blood-alcohol-content (BAC) evidence was paramount. Indeed, integrity was more at risk in this context than in the warrantless search situation. Had Appellee been released, he could have compromised the integrity of any BAC evidence by ingesting more alcohol or another faculty-altering substance. *See Crider v. State*, 352 S.W.3d 704, 708 (Tex. Crim. App. 2011) ("Assuming that a suspect did not drink after being stopped by an officer, at least 'some' evidence of alcoholic 'intoxication' (defined as 0.08 BAC) should still be in his blood system four hours later . . . ."). This would

undermine the reliability (and possibly admissibility) of any sample obtained in the future.

Further, the accuracy of Appellee's BAC at the time the analysis is performed is important. Texas law allows for enhancement to a Class A misdemeanor for driving while intoxicated if the defendant's BAC was .15 *at the time the analysis was performed*. TEX. PENAL CODE § 49.04(d) (emphasis added). On notice of this enhancement option and that Appellee could possibly only be charged or convicted of DWI, the officers acted reasonably to preserve their ability to obtain a sample that may yield a .15 or more BAC. At least forty-five minutes had passed since the accident and Appellee's arrest,[10] so dissipation could have been anywhere from .03 to .008 percent.[11] *See McNeely*, 569 U.S. at 156 ("longer intervals may raise questions about the accuracy of the [BAC] calculation"), 165 (metabolization and loss of evidence must be considered in assessing exigency); *Mata v. State*, 46 S.W.3d 902, 908-13 (Tex. Crim. App. 2001) (unknown variables—when the defendant last ate, and when, how fast, and how much he drank—will affect the equation so that the

---

[10] Dispatch to accident was at 12:41 a.m., and Appellee was arrested between 1:30 a.m. 2 RR 53-54 (first suppression hearing Dec. 14, 2012); 4 RR 116-17; 14 RR State's Exhibit 87 (time of arrest 1:30 a.m.). More time had passed since Appellee traveled to the gas station and then made a few phone calls before law enforcement was dispatched. *McGuire*, 2019 WL 4065459, at *1.

[11] "Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour." *McNeely*, 569 U.S. at 169.

degree of intoxication at a given time is less certain). The at least .008 reduction in BAC provided an objective fact that preservation of a BAC of .15 presented a now-or-never situation. The forty-five minutes could have already reduced Appellee's BAC to .14 (under the .15 enhancement threshold).

The integrity of the BAC evidence supplied exigent circumstances.

PRAYER FOR RELIEF

The SPA asks this Court to reverse the court of appeals decision affirming the trial court's ruling granting Appellee's motion to suppress and remand for proceedings consistent with its opinion.

Respectfully submitted,

/s/ Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 4,174 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on September 18, 2019 *via* email or certified electronic service provider to:

Hon. Michael Bloch
michael.bloch@ectorcountytx.gov

Hon. M. Michele Greene
mmg@michelegreenelaw.com

/s/ Stacey M. Soule
State Prosecuting Attorney

APPENDIX

(Court of Appeals' Opinion)

2019 WL 4065459
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Houston (1st Dist.).

The STATE of Texas, Appellant
v.
Sean Michael MCGUIRE, Appellee

NO.
01
-
18
-
00146
-
CR
|

Opinion issued August 29, 2019

On Appeal from the 268th District Court, Fort Bend County, Texas, Trial Court Case No. 10-DCR-055898, Hon. Brady G. Elliott, Judge

Attorneys and Law Firms

John Healey, District Attorney, Fort Bend County, Texas, Gail Kikawa McConnell, 301 Jackson St. Rm. 101, Richmond, Texas 77469, for Appellant.

Kristen Jernigan, 2017 S. Austin Ave., Georgetown, Texas 78626, for Appellee.

Panel consists of Justices Keyes, Higley, and Landau.

OPINION

Sarah Beth Landau, Justice

***1** Sean Michael McGuire is charged with felony murder for the death of a motorcyclist McGuire struck while allegedly intoxicated. McGuire moved to suppress evidence obtained after his arrest, arguing that his warrantless arrest was unlawful. The State argued that Article 14.03(a)(1) of the Code of Criminal Procedure authorized McGuire's warrantless arrest because McGuire was found in a suspicious place. TEX. CODE CRIM. PROC. art. 14.03(a)(1). The trial court granted McGuire's motion to suppress, and the State appealed. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(5) (permitting State an interlocutory appeal of an order granting a criminal defendant's motion to suppress evidence).

Because the Court of Criminal Appeals has interpreted Article 14.03(a)(1) to require the State to show exigent circumstances [1] to arrest without a warrant under Article 14.03(a)(1) and the State did not, we affirm. *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005); *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004); *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (describing *Swain* as holding that "warrantless arrest under [Article] 14.03(a)(1) requires showing of exigent circumstances"); *cf. Bell v. State*, No. 02-17-00299-CR, 2019 WL 3024481, at *2–3 (Tex. App.—Fort Worth July 11, 2019) (mem. op., not designated for publication) (noting *Swain* exigency requirement and numerous intermediate appellate court opinions applying *Swain* to require proof of exigency when State relies on Article 14.03(a)(1)'s suspicious-place exception).

1 Black's Law Dictionary defines exigent circumstances as follows:

> **Circumstance** ...
> – **exigent circumstances** (1906) 1. A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside. 2. A situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists, and thus may do so without first obtaining a warrant. • Exigent circumstances may exist if (1) a person's life or safety is threatened, (2) a suspect's escape is imminent, or (3) evidence is about to be removed or destroyed.

Circumstance, BLACK'S LAW DICTIONARY (10th ed. 2014).

Background

Late one evening, Sean Michael McGuire was driving home when his truck struck a motorcycle driven by David Stidman. McGuire made a U-turn and pulled into the parking area of a nearby Shell gas station. McGuire called his mother and

two people he knew in law enforcement. After calling them, McGuire waited at the gas station.

Meanwhile, the police were investigating the discovery of a motorcycle and dead motorist. During their investigation, the police were told that McGuire was waiting at the Shell gas station. They went to the gas station. At least one officer who spoke with McGuire suspected he had been driving while intoxicated.

The police drove McGuire to the location of Stidman's body. There, McGuire was arrested. He was taken to a local hospital where a warrantless, nonconsensual blood draw was performed to determine his blood-alcohol content.

***2** McGuire was charged with felony murder on the basis that he was driving while intoxicated, he had two prior out-of-state DWIs, and those DWIs elevated this offense to a first-degree felony. *See* TEX. PENAL CODE §§ 19.02(b)(3) (felony murder), 49.09(b)(2) (enhancing DWI to felony).

McGuire moved to suppress evidence on the argument that his warrantless arrest and warrantless search were unlawful. Among his arguments, he contended that the warrantless blood draw was an unlawful search in violation of the Fourth Amendment. His motion to suppress was denied. He was convicted of murder and appealed. This Court reversed his conviction, holding that the warrantless, nonconsensual blood draw violated McGuire's Fourth Amendment right to be free from unreasonable searches as recognized in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). *See McGuire v. State*, 493 S.W.3d 177, 199 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *see also id.* at 202 (stating, "All remaining issues raised in McGuire's appeal of the murder conviction are moot."). The case was remanded and set for retrial in 2018.

In advance of retrial, McGuire filed another motion to suppress evidence.[2] He argued that his warrantless arrest was unlawful and did not fit within any of the Chapter 14 exceptions to the warrant requirement. *See* TEX. CODE CRIM. PROC. art. 14.01–.06. In the State's written response and at the suppression hearing, the State argued that the arrest fell within the suspicious-place warrant exception under Article 14.03(a)(1), but the State did not note the exigency requirement, point to any evidence that might satisfy the exigency requirement, or argue that a per se exigency exists.

2 A ruling on a motion to suppress evidence is interlocutory and may be subject to reconsideration and revision on remand. *See Clement v. State*, 530 S.W.3d 154, 160 (Tex. App.—Eastland 2015) (stating that "a pretrial motion to suppress evidence is 'nothing more than a specialized objection to the admissibility of that evidence' that is interlocutory in nature ... [and] may be the subject of reconsideration and revision as is any other ruling on the admissibility of evidence ... [therefore,] the State will not be precluded from seeking a reconsideration of the suppression on a more fully developed record upon the remand of this case to the trial court."), *rev'd on other grounds*, 2016 WL 4938246 (Tex. Crim. App. Sept. 14, 2016) (not designated for publication). This Court did not review the trial court's 2012 suppression ruling based on whether the warrantless *arrest* was legally permissible, only whether the warrantless *search* was permissible. *See McGuire*, 493 S.W.3d at 202. Thus, there was no bar to reconsideration of the warrantless-arrest suppression issue on remand at the 2018 suppression hearing; nor has law of the case been established on the warrantless arrest issue because this Court did not rule on that issue. *See State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014) ("The 'law of the case' doctrine provides that an *appellate court's* resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue.") (emphasis added).

The trial court—with a different trial judge than the one who presided over the first trial—did not receive any new evidence at the 2018 suppression hearing. Instead, the court reviewed the 2012 suppression-hearing transcript, the 2016 trial testimony, and the parties' pleadings. After considering these materials and the parties' motion and response, the trial court granted McGuire's motion to suppress, and the State appealed.

Standard of Review

***3** Appellate courts review a trial court's ruling on a motion to suppress using a bifurcated standard of review. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. 2019). Under the bifurcated standard, the trial court is given almost complete deference in its determination of historical facts, especially if based on an assessment of demeanor and credibility, and the same deference is afforded the trial court for its rulings on application of law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of demeanor and credibility. *Id.* However, for

mixed questions of law and fact that do not fall within that category, the reviewing court may conduct a de novo review. *Id.* Our review of questions of law is de novo. *Id.*

We will sustain the trial court's ruling if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003). This is so even if the trial judge gives the wrong reason for its decision. *Id.*; *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000); *State v. Brabson*, 899 S.W.2d 741, 745–46 (Tex. App.—Dallas 1995), *aff'd*, 976 S.W.2d 182 (Tex. Crim. App. 1998) (stating that, in context of reviewing trial court order granting motion to suppress "we cannot limit our review of the [trial] court's ruling to the ground upon which it relied. We must review the record to determine if there is any valid basis upon which to affirm the county criminal court's ruling").

Article 14.03(a)(1) and the Necessary Showing of Exigency

Warrantless arrests in Texas are authorized only in limited circumstances. *Swain*, 181 S.W.3d at 366. Once a defendant has established that an arrest has occurred and that no warrant was obtained, the burden shifts to the State to show that the arrest was within an exception to the warrant requirement. *Covarrubia v. State*, 902 S.W.2d 549, 553 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *Holland v. State*, 788 S.W.2d 112, 113 (Tex. App.—Dallas 1990, pet. ref'd). Most of the exceptions to the warrant requirement are found in Chapter 14 of the Code of Criminal Procedure. *See Swain*, 181 S.W.3d at 366; TEX. CODE CRIM. PROC. art. 14.01–.06 (delineating those circumstances in which warrantless arrests are permissible). The validity of a warrantless arrest can only be decided by the specific factual situation in each individual case. *Holland*, 788 S.W.2d at 113.

The exception relied on by the State in this appeal is found in Article 14.03(a)(1), which provides:

> Any peace officer may arrest, without warrant ... persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony ... breach of the peace, or [various other listed offenses] ... or are about to commit some offense against the laws[.]

TEX. CODE CRIM. PROC. art. 14.03(a)(1).

The Court of Criminal Appeals has held that, when relying on Article 14.03(a)(1), the State must establish that (1) probable cause existed, (2) the person was found in a suspicious place, and (3) "exigent circumstances call for immediate action or detention by police." *Swain*, 181 S.W.3d at 366 (concluding that exigent circumstances were established on evidence that person arrested had just admitted to leaving injured woman in secluded area after beating her during robbery, police perceived urgent need to find woman before she died from her injuries, and held additional concern that person who had admitted his involvement might flee); *Gallups*, 151 S.W.3d at 202; *cf. Dyar v. State*, 125 S.W.3d 460, 470–71 & n.13 (Cochran, J., concurring) (stating that "if there are no exigent circumstances that call for immediate action or detention by the police, article 14.03(a)(1) cannot be used to justify a warrantless arrest") (citing Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 967–77, 980 (2000)).

***4** At least five intermediate courts—including this one—have noted the State's burden to establish exigent circumstances when relying on Article 14.03(a)(1). *See, e.g.*, *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (describing *Swain* as holding that "warrantless arrest under Section 14.03(a)(1) requires showing of exigent circumstances" and concluding that risk of destruction of computer-data evidence on laptops established exigency); *Polly v. State*, 533 S.W.3d 439, 443 & n.4 (Tex. App.—San Antonio 2016, no pet.) (relying on *Swain* for proposition that exigency must be established for warrantless arrest under Article 14.03(a)(1)); *see also Cook v. State*, 509 S.W.3d 591, 603–04 (Tex. App.—Fort Worth 2016, no pet.); *LeCourias v. State*, 341 S.W.3d 483, 489 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *State v. Morales*, No. 08-09-00137-CR, 2010 WL 819126, at *2 (Tex. App.—El Paso Mar. 10, 2010, no pet.) (mem. op., not designated for publication).

There are several pre-2013 appellate court cases in which Texas intermediate appellate courts have held that the natural dissipation of alcohol in a suspect's blood provides an exigency under Article 14.03(a)(1) in that dissipation destroys evidence of a DWI offense. *See, e.g.*, *Gallups*, 151 S.W.3d

at 202 (stating that "need to ascertain appellant's blood-alcohol level" was exigent circumstance); *Winter v. State*, 902 S.W.2d 571, 575–76 (Tex. App.—Houston [1st Dist.] 1995, no pet.); *Morales*, 2010 WL 819126, at *2; *State v. Wrenn*, No. 05-08-01114-CR, 2009 WL 1942183, at *3 (Tex. App.—Dallas July 8, 2009, no pet.) (mem. op., not designated for publication).

In 2013, the United States Supreme Court ruled that the dissipation of alcohol does not provide a per se exigency to relieve the State of the requirement of a search warrant when conducting an unconsented-to blood draw of a DWI suspect. *McNeely*, 569 U.S. at 155, 133 S.Ct. 1552. Since *McNeely*, at least one intermediate appellate court has held that the dissipation of alcohol does not, without more, meet Article 14.03(a)(1)'s exigency requirement either. *State v. Donohoo*, No. 04-15-00291-CR, 2016 WL 3442258, at *6 (Tex. App.—San Antonio June 22, 2016, no pet.) (mem. op., not designated for publication) (stating that "*McNeely* forecloses the State's position" that "exigent circumstances called for Donohoo's immediate arrest" on its singular argument that it needed to obtain his blood-alcohol level before the natural dissipation of alcohol); *see also Bell*, 2019 WL 3024481, at *2 n.2 (citing *McNeely* in discussion of exigency justifying arrest); *but see Dansby v. State*, 530 S.W.3d 213, 222 (Tex. App.—Tyler 2017, pet. ref'd) (relying on *Gallups*, and without citation to *McNeely* or discussion of any case-specific facts influencing ability to timely obtain warrant, holding that "exigent circumstances—the need to ascertain Appellant's alcohol concentration—existed to justify Appellant's immediate arrest" under Article 14.03(a)(1)); *Lewis v. State*, 412 S.W.3d 794, 802 (Tex. App.—Amarillo 2013, no pet.) (without citing *McNeely* or discussing any case-specific facts influencing ability to timely obtain warrant, holding that officer "needed to take prompt action to ascertain appellant's blood-alcohol level" and exigency existed to support warrantless arrest under Article 14.03(a)(1)).

Here, the State does not argue that the dissipation of alcohol provided the necessary exigency, either per se or based on the particular facts of McGuire's arrest. In fact, the State's position is that no exigency requirement exists at all. At oral argument, the State explained that it reads *Minassian* to say that no exigency is required under Article 14.03(a)(1). But the State misreads the case's holding. This Court stated, in *Minassian*, that proof of exigency circumstances is not required "to pass constitutional muster" in the context of a warrantless felony arrest made in a public place but that more had to be considered to review the lawfulness of the arrest at issue because Article 14.03(a)(1) additionally "requires exigent circumstances to make a warrantless arrest premised on suspicious activity in a suspicious place." 490 S.W.3d at 639 (citing *Swain*, 181 S.W.3d at 366). Proof of exigent circumstances is required when the State relies on Article 14.03(a)(1) to justify a warrantless arrest. *Id.*

***5** The State had the burden at the 2018 suppression hearing to establish exigent circumstances to permit the warrantless arrest of McGuire, but it did not.

The State Made No Showing of Exigency; Therefore, the Trial Court Did Not Err in Granting Motion to Suppress

In its appellate brief, the State presents three arguments why the trial court erred in granting McGuire's suppression motion; however, the State fails to point to any evidence of exigent circumstances. This is consistent with the State's presentation of the issues to the trial court. Neither the State's response to McGuire's motion to suppress nor its arguments at the suppression hearing addressed exigency.

This failure of evidence provided a basis for the trial court to grant McGuire's motion to suppress. On appeal of the grant of a motion to suppress, "[w]e must review the record to determine if there is any valid basis upon which to affirm the [trial] court's ruling." *Brabson*, 899 S.W.2d at 745–46. Because the State did not meet its evidentiary burden to bring McGuire's arrest within the sole warrant exception on which it relied, we must affirm the trial court's order granting the motion to suppress. The dissent's approach fails to hold the State to its evidentiary burden or follow this well-established standard of review.

Even if the State had sought to meet its burden to establish an exigency, there is no basis on which the trial court could have found a per se or case-specific exigency on this record. The State could not rely on McGuire's alleged intoxication to argue a per se exigency because, after *McNeely*, there is no per se exigency for dissipation of alcohol in a suspect's blood. 569 U.S. at 164, 133 S.Ct. 1552; *see Donohoo*, 2016 WL 3442258, at *6 (relying on *McNeely* to reject State's argument for warrantless arrest under Article 14.03(a)(1) based on dissipation of suspect's blood-alcohol level, given that officers had testified they never sought warrant); *see also Bell*, 2019 WL 3024481, at *2 n.2 (in connection with holding that, under *Swain*, exigent circumstances must be shown,

noting that the United States Supreme Court held, in *McNeely*, that "the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency but must be determined on a case-by-case basis on the totality of the circumstances.").

Neither do the case-specific facts establish an exigency to successfully challenge the suppression order. McGuire called his mother from the Shell gas station before he interacted with any police officers, and she drove to the gas station to wait with him. She was available to drive him, should he have been allowed to leave, which meant there was no danger of subsequent driving while intoxicated. *Cf. York v. State*, 342 S.W.3d 528, 536–37 (Tex. Crim. App. 2011) (evidence of defendant's running vehicle warranted reasonable belief that, if defendant were intoxicated, he would eventually endanger himself and others when he drove vehicle home). Moreover, McGuire waited at the gas station for law enforcement to arrive and agreed to ride with the officers to the location where Stidman's body was located. There was no evidence that, after the police engaged McGuire, they held any concern that McGuire would attempt to flee. *Cf. Villalobos v. State*, No. 14-16-00593-CR, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that Article 14.03(a)(1) requirements were met on evidence driver "needed to be detained because he had fled scene of accident").

***6** Without any evidence or argument that an exigency existed, we must conclude that the State failed to meet its burden to establish that McGuire's warrantless arrest was authorized under Article 14.03(a)(1), on which the State relied. *See Brabson*, 899 S.W.2d at 745–46; *cf. Buchanan v. State*, 175 S.W.3d 868, 876 (Tex. App.—Texarkana 2005) (concluding that State failed to establish exigent circumstances to support warrantless arrest under Article 14.03(a)(1) because there was no evidence suspect was going to escape or that urgency existed, and stating, "We cannot interpret Article 14.03(a)(1) to be so encompassing that it swallows the general rule that a valid arrest should be based on an arrest warrant."), *rev'd on waiver grounds*, 207 S.W.3d 772 (Tex. Crim. App. 2006).

Accordingly, we conclude that the trial court did not err in granting McGuire's motion to suppress. *See Laney*, 117 S.W.3d at 857 (stating that ruling on motion to suppress must be upheld if legally correct even if trial court did not present same basis in its ruling). In light of our holding, we do not reach any other issues raised in the State's brief.

Response to Dissent

The dissent addresses three issues that require a response: whether Article 14.03 requires a showing of exigency, whose burden it is to make that showing, and whether certain facts or circumstances satisfy that burden under a per se or fact-specific analysis.

A. Article 14.03 requires a showing of exigency

The dissent presents the current state of law on exigency in the context of a warrantless arrest as though a turn of phrase has been frivolously used and then given unintended weight. *Dissenting Op.* at *—— (after determining that "courts have implied an exigency requirement from a sentence in" *Swain v. State*, openly doubting whether Texas law actually does "require exigent circumstances in all cases under article 14.03(a)(1)"). But there can be no question that Texas law requires a showing of exigency when relying on this warrant exception. The Court of Criminal Appeals has expressly stated—twice—that a showing of exigency is part of the proof necessary under Article 14.03(a)(1). *See Gallups*, 151 S.W.3d at 202; *Swain*, 181 S.W.3d at 366–67. Both opinions show the deliberative basis for the statement of law, citing to a 2003 concurrence in another Court of Criminal Appeals opinion, *Dyar*, 125 S.W.3d at 468–71 (Cochran, J., concurring).

The *Dyar* concurrence discussed the historical context of Article 14.03(a)(1) and the ill fit between the terms of the 150-year-old statute and modern Fourth Amendment search-and-seizure law. *Id.* The provision now found in Article 14.03, when implemented, sanctioned the arrest of "suspicious people" who "might soon commit" breaches of the peace such as "drunks in the bar" who "had not yet breached the peace" but seemed like they might. *Id.* at 469. Officials relied on the law to "arrest, escort out of town, or generally hassle those who were not welcome." *Id.* at 470. The concurrence noted that application of the statute in such a manner "would not pass constitutional muster today" and would, instead, be considered "constitutionally offensive." *Id.* at 469–70.

The *Dyar* concurrence stated that courts might best harmonize the "original intent of the pre-Civil War statute" and "current constitutional" norms and protections by using "the organizational principle of exigent circumstances" to analyze when the requirements of Article 14.03 are satisfied. *Id.* at 470 (explaining that an exigency-based analysis would "make some sense out of the 'suspicious places' language"); *see id.*

at 470 n.13 (quoting Gerald S. Reamey's *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 Tex. Tech L.Rev. 931, 980 (2000)). [3]

3 An excerpt of the law review quote reads as follows:
Necessity is the guiding principle in interpreting warrant exceptions. Therefore, not every crime scene qualifies as a suspicious place excusing a warrant. The correct question in crime scene cases is not whether an offense was committed at the place where the suspect is found, but whether some reason exists not to obtain prior judicial approval for the arrest. A certain level of exigency usually accompanies the bringing together of a suspect, criminal evidence (which may be evanescent), and probable cause in the place where the offense occurred.
Dyar, 125 S.W.3d at 470 n.13 (Cochran, J., concurring) (quoting Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L.REV. 931, 980 (2000)).

***7** The *Dyar* concurrence explained how an exigency framework would guide the Article 14.03 analysis while adhering to Fourth Amendment jurisprudence:

> [If] police have probable cause to believe that person "X" has committed a felony or breach of the peace and he is found in "Y" location under "suspicious circumstances" and there is no time to obtain a warrant because: 1) the person will not otherwise remain at "Y" location; 2) the evidence of the crime will otherwise disappear; or 3) the person poses a continuing present threat to others, then police may arrest "X" without a warrant. On the other hand, if there are no exigent circumstances that call for immediate action or detention by the police, article 14.03(a)(1) cannot be used to justify a warrantless arrest.... [T]his construction best adheres to the legitimate historical purpose and scope of the statute .. [and] also complies with Fourth Amendment jurisprudence.

Id. at 471.

The concurrence's framework was adopted by a majority of the Court of Criminal Appeals one year later in *Gallups,* 151 S.W.3d at 202 (citing the *Dyar* concurrence and requiring a showing that arrestee was in suspicious place and that exigent circumstances existed to justify immediate arrest under Article 14.03(a)(1)). The following year, the Court again expressly stated that Article 14.03(a)(1) requires a showing that exigent circumstances existed. *Swain*, 181 S.W.3d at 366–67 (majority opinion adopted by seven judges with two others concurring, citing *Dyar* concurrence and requiring showing of exigency). In light of this trio of Court of Criminal Appeals cases, there can be no doubt that binding precedent requires a showing of exigency when the State is relying on Article 14.03(a)(1). *See id.*; *Gallups*, 151 S.W.3d at 202.

The dissent remains doubtful, citing post-*Swain* cases that do not include an exigency analysis. *See Dissent Op.* at *—— –—— & n.3. Four of those cases are readily distinguishable in that none involved the State arguing the Article 14.03(a)(1) exception in response to a motion to suppress. For example, in *Griffin v. State*, No. 03-15-00398-CR, 2017 WL 2229869 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication), the appellate issue was a claim of ineffective assistance of counsel based on a failure to ever move to suppress evidence. *Id.* at *——. The appellate court affirmed on that issue with alternative holdings: first, there was a strategic reason for counsel to not seek exclusion of the evidence, and, second, the evidence was not subject to exclusion because the arrestee had just assaulted a public official and was acting belligerently and aggressively to the arresting officer, thereby permitting a warrantless arrest under Article 14.03(a)(1). *Id.* at *——. True, the ineffective-assistance-of-counsel opinion did not discuss the exigency requirement. But, the opinion amply described the arrestee's agitated and aggressive state, which would have warranted a belief by the officer that an arrest was necessary to prevent physical harm, and the opinion cited approvingly other cases that did discuss the exigency requirement. *See id.* (citing *Dyar*, *Swain*, and *Cook v. State*, 509 S.W.3d 591, 604 (Tex. App.—Fort Worth 2016, no pet.)); *see also Dyar*, 125 S.W.3d at 471 (Cochran, J., concurring) (discussing what would constitute exigency in context of Article 14.03(a)(1)). Neither *Griffin* nor any other case cited in the dissenting opinion calls into question the Court of Criminal Appeals's direct statement of law that evidence of exigency is required under Article 14.03(a)(1).

B. The State has the burden to show an exigency

***8** It is the State's burden, when arresting without a warrant, to prove that its actions fell within one of the statutory warrantless-arrest exceptions. *See Fry v. State*, 639 S.W.2d 463, 467 (Tex. Crim. App. 1982); *cf. Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007) (in warrantless-search context, stating "the warrant requirement is not lightly set aside, and the State shoulders the burden to prove that an exception to the warrant requirement applies"). It is not the Court's role to scour the record for exigent or quasi-exigent circumstances. *See Fry*, 639 S.W.2d at 467 (rejecting argument that testimony supported finding of exigency for warrantless arrest because testimony was "ambiguous at best" and, therefore, did not meet State's burden). When the State argues only one warrant exception, yet fails to meet the evidentiary burden to establish that exception, and the trial court grants the motion to suppress, this Court is bound to affirm the trial court's grant of a motion to suppress. *See Brabson*, 899 S.W.2d at 745–46 ("We must review the record to determine if there is any valid basis upon which to affirm the [trial] court's ruling."); *Donohoo*, 2016 WL 3442258, at *6 (affirming trial court order granting motion to suppress because State failed to present evidence of exigency).

C. Facts and circumstances identified in the dissent do not satisfy the State's burden under a per se or fact-specific analysis

Without holding the State to its evidentiary burden, the dissent looks to the record and identifies three facts that, in the dissent's view, would suffice to show an exigency: (1) McGuire having "shown his willingness to flee," (2) a need to preserve evidence in the form of the motorcycle bumper lodged in McGuire's truck, and (3) McGuire's suspected intoxication. Even if a review of the record for exigency were permitted without the State making any showing in support of its burden, none of the three arguments meets the threshold.

Fist, evidence that McGuire might have fled the scene if not arrested is ambiguous at best, and ambiguity in this context is resolved against the State. *Fry*, 639 S.W.2d at 467. Yes, this Court has held that legally sufficient evidence existed to support the jury's determination that McGuire failed to comply with the technical requirements of the stop-and-render-aid statute when he left the scene of impact and drove to the gas station. *See McGuire v. State*, 493 S.W.3d 177, 204–07 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied* —— U.S. ——, 137 S. Ct. 2188, 198 L.Ed.2d 255 (2017) (noting McGuire did not get out of his truck to determine whether an injured person might be near the known spot of impact or call emergency services; he, instead, went to a gas station and waited for police to come to him). But that evidence cannot reasonably be argued to suggest that McGuire was likely to flee from police. He went directly to a gas station, called police personnel, waited for police to come to him, and called his mother to bear witness to the entire episode. Once the police arrived, he voluntarily answered questions and left with them. Speculation that McGuire might have called his mother and the police to his location only to flee once they arrived does not show exigency. Moreover, had the State chosen to make this argument, itself, its most likely vehicle would have been Article 14.04, not 14.03, because Article 14.04 permits the warrantless arrest of suspected felons who are "about to escape." *See* TEX. CODE CRIM. PROC. art. 14.04.

Second, the police had more options than choosing to arrest McGuire or to allow the possible destruction of evidence on his truck: the State could have seized the truck. *See Dismukes v. State*, 919 S.W.2d 887, 893–94 (Tex. App.—Beaumont 1996, pet. ref'd) (with proper showing, including existence of probable cause, police may seize vehicle without warrant and hold the vehicle "for whatever period is necessary to obtain a warrant for the search," detached from any arrest).

Third, suspected intoxication and a related need to determine a suspect's blood-alcohol content no longer provide a per se exigency. *McNeely*, 569 U.S. at 141, 133 S.Ct. 1552; *see McGuire*, 493 S.W.3d at 199. The dissent argues that *McNeely*'s no-per-se-exigency holding is limited to invasive searches to obtain a suspect's blood and does not apply to arrests. This position must be rejected in light of the rationale provided in *McNeely*, the broader protections provided by the Texas warrantless-arrest statute beyond federal constitutional protections, and the perverse results that would follow under the dissent's construction.

***9** The dissent posits that the need to expeditiously draw a suspect's blood to determine its blood-alcohol content could supply a per se exigency to arrest a person without approaching the judiciary for an arrest warrant, even though, under *McNeely*, the police would not have automatic legal authority to then draw the suspect's blood without approaching that same judicial actor for a search warrant (or establishing case-specific exigency). If an articulated need does not automatically excuse the State from approaching the judiciary to obtain a search warrant, as *McNeely* holds,

it cannot follow that the same need would automatically excuse the State from approaching the judiciary for an arrest warrant, given that the State would be required to approach the judiciary anyway, in the interim as it held the suspect in custody.

The State should not be permitted to invoke a particular assertion of exigency to invariably allow a predicate step to a desired law-enforcement activity when the United States Supreme Court has explicitly prohibited that same exigency from per se authorizing the desired activity. *Cf. State v. Villarreal*, 475 S.W.3d 784, 808 (Tex. Crim. App. 2014) (rejecting State's argument that dissipation of alcohol can provide per se exigency for search incident to arrest when it cannot supply per se exigency for search, itself, under *McNeely*).

The incongruence of recognizing a per se exigency for a predicate step when it cannot authorize the actual police activity that is the focus of the encounter cannot be explained away under a theory that the sanctity of one's freedom from searches and from arrests are markedly different in a constitutional sense. *See Dissent Op.* at *—— – ——. The requirement of a search warrant and the requirement of an arrest warrant do not derive from distinct areas of law with different standards or concepts of exigency—they both derive from the Fourth Amendment. As the United States Supreme Court has affirmed, the principles in the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *see Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990) ("In order for a warrantless arrest or search to be justified, the State must show the existence of probable cause at the time the arrest or search was made and the existence of circumstances which made the procuring of a warrant impracticable."). If dissipating blood-alcohol levels are not considered a per se exigency in the search context, they are not a per se exigency to justify a warrantless arrest for the purpose of conducting a search. To treat arrests differently than searches in this context would allow the government to subvert *McNeely.* It also would obviate the extra protection the Article 14.03(a)(1) exigent-circumstances requirement affords the public against unreasonable governmental intrusion beyond Fourth Amendment protections.

Conclusion

We affirm the trial court's order granting McGuire's motion to suppress.

Justice Keyes, dissenting.

DISSENTING OPINION

Evelyn V. Keyes, Justice

I respectfully dissent. I would hold that the trial court abused its discretion in granting Sean McGuire's motion to suppress the evidence obtained as a result of his warrantless arrest, effectively declaring his arrest illegal.

Based solely on review of the cold reporter's record from an evidentiary suppression hearing held two years earlier, the trial court, on remand, reached the opposite conclusion of the original trial judge who had presided over the hearing. The trial court selectively cited facts from that record, disregarding important contradictory facts, to draw the incorrect legal conclusions that the officers lacked probable cause and that the suspicious place exception to the warrant requirement did not apply. And the majority opinion affirms by incorrectly presuming that the United States Supreme Court's holding in *Missouri v. McNeely* extends beyond warrantless searches to draw blood into the distinct domain of warrantless arrests. *See* 569 U.S. 141, 145, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In so doing, it ignores this Court's own binding precedent holding that the need to preserve evidence constitutes an exigent circumstance under the suspicious place exception to the warrant requirement.

Suspicious Place Exception to Warrant Requirement

***10** Warrantless arrests are authorized only in limited circumstances outlined primarily in Chapter 14 of the Texas Code of Criminal Procedure. *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005). Here, the State relies on the "suspicious place" exception, codified in article 14.03(a)(1), authorizing the warrantless arrest of an individual found in a suspicious place under circumstances reasonably showing he committed a felony or a breach of the peace. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1). [1]

1 McGuire was originally charged with the felony of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08(b) (stating that offense of intoxication manslaughter is second-degree felony). He was later charged with felony murder, *see id.* § 19.02(b)(3), and failure to stop and render aid, *see* TEX. TRANSP. CODE ANN. § 550.021 (stating that failure to stop and render aid is felony offense). In a previous opinion, this Court affirmed his conviction for failure to stop and render aid, vacated his conviction for felony murder because of the admission of an illegal blood draw, and remanded for further proceedings. *See McGuire v. State*, 493 S.W.3d 177, 199, 208 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied*, —— U.S. ——, 137 S. Ct. 2188, 198 L.Ed.2d 255 (2017).

The Court of Criminal Appeals has held that "the test under [a]rticle 14.03(a)(1) is a totality of the circumstances test. First, probable cause that the defendant committed a crime must be found and second, the defendant must be found in a 'suspicious place.' " *Dyar v. State*, 125 S.W.3d 460, 468 (Tex. Crim. App. 2003); *Lewis v. State*, 412 S.W.3d 794, 801 (Tex. App.—Amarillo 2013, no pet.). I would hold that the State met this test and established that McGuire's arrest was justifiable under the suspicious place exception to the warrant requirement.

A. Probable Cause

Probable cause for a warrantless arrest exists when the arresting officer possesses reasonably trustworthy information sufficient to warrant a reasonable belief that an offense has been or is being committed. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009).

The record establishes the following:

At approximately 12:45 a.m. on August 2, 2010, Trooper Tomlin reported to the scene of a fatality crash, which he was told by dispatch involved a motorcycle that had been hit and dragged 800 feet, "from Brazos Town Center to the intersection of 2977."

Around the same time, McGuire called his mother and two police acquaintances, who in turn called law enforcement to report that McGuire had hit something in the road and was waiting at a nearby Shell station for law enforcement to arrive.

At the scene of the accident, Trooper Tomlin saw the complainant's body on the side of the road. Tomlin was then informed that the driver of the vehicle that had hit the complainant's motorcycle was across the highway at a Shell gas station.

Trooper Tomlin was the first to arrive at the Shell station, at approximately 12:50. Minutes later, Trooper Wiles, who had heard over the police radio that there had been a fatal accident and that the suspected driver was at the Shell station, joined him there, where the two troopers encountered McGuire.

McGuire stated that he had been driving his truck, that he had hit something, and that his wife, who was in the truck with him, told him that he had hit a person.

Trooper Wiles observed that McGuire's truck had "a piece of metal stuck inside the grille with some motor oil on it" that "appeared to be the rear fender of the motorcycle," but he "didn't seem to know where it came from."

***11** Due to "[a] strong order of alcoholic beverage that [Trooper Wiles] smelled [on McGuire's] person and breath," his bloodshot, glassy eyes, and the "slight dazed look on his face," Wiles believed McGuire was intoxicated. Wiles asked McGuire if he was willing to perform a field sobriety test, and McGuire refused.

Trooper Wiles then drove McGuire to the scene of the accident. Wiles testified, and video of the crime scene showed, that when McGuire saw the motorcycle, "he covered his face and started supposedly crying and said that he was sorry."

I would hold that this information was sufficient to warrant a reasonable belief that McGuire had committed a crime. [2] *See, e.g.*, *Dyar*, 125 S.W.3d at 468 (holding arresting officer had probable cause to believe appellant had committed DWI; officer found appellant at hospital after having been informed that driver in one-car accident was taken to hospital, appellant had slurred speech, red glassy eyes, and strong smell of alcohol, and appellant admitted to drinking and driving); *Lewis*, 412 S.W.3d at 801–02 (holding arresting officer had probable cause to believe appellant had committed DWI based in part on appellant's flight from scene of accident, officer's detection of odor of alcohol emanating from appellant, appellant's highly emotional state, and appellant's admission that she "had too much to drink"); *see also Coronado v. State*, No. 01-99-00912-CR, 2000 WL 730682, at

*2–3 (Tex. App.—Houston [1st Dist.] June 8, 2000, pet. ref'd) (not designated for publication) (holding officer had probable cause to arrest appellant after he received information from other officers that appellant was driver of one of vehicles in fatality accident and officer noticed appellant had strong odor of alcohol, slurred speech, and glassy eyes).

2 The majority opinion does not address probable cause.

B. Suspicious Place

I would further hold that the State proved that the Shell station where Troopers Tomlin and Wiles first encountered McGuire was a suspicious place and that the trial court erred in reaching the opposite conclusion because that conclusion was not supported by the facts and it failed to consider the totality of the circumstances.

Relevant to the question whether McGuire was found at a suspicious place, the trial court found that Troopers Tomlin and Wiles testified that there was nothing suspicious about the location where they encountered McGuire and that McGuire was not acting in a suspicious manner. These findings are wholly inadequate to support the legal conclusion that the Shell station was not a suspicious place under the circumstances known to the troopers at that time. *Cf. Villalobos v. State*, No. 14-16-00593-CR, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref'd) (not designated for publication) (rejecting argument that warrantless arrest was illegal because officer testified that it was not suspicious for defendant to stay near his damaged vehicle after accident). It appears the trial court took the troopers' testimony as a legal conclusion, and in so doing, did not follow the well-established law that the suspicious-place inquiry requires more than evaluating whether a particular place, on its own and without context, is suspicious.

"Few places, if any, are inherently suspicious. The determination of whether a place is suspicious requires a highly fact-specific analysis." *Lewis*, 412 S.W.3d at 802. As the Court of Criminal Appeals has explained, under article 14.03(a)(1),

> ***12** Any place may become suspicious when an individual at the location and the accompanying circumstances raise a reasonable belief that the individual committed a crime and exigent circumstances call for immediate action or detention by the police.

Swain, 181 S.W.3d at 366 (citations omitted).

Here, the trial court did not make any fact-specific findings beyond the officers' testimony that the Shell station, in and of itself, was not a suspicious place and that McGuire was not acting suspiciously when they encountered him there. In concluding that "[t]here is no evidence that the place where [McGuire] was arrested was a suspicious place pursuant to Texas Code of Criminal Procedure Article 14.03(a)(1)," the trial court made no findings with respect to "the accompanying circumstances," which here clearly raised a reasonable belief that McGuire had committed a crime. *Id.*

In determining whether to characterize a place as suspicious, the Court of Criminal Appeals has stated that the "only ... factor [that] seems to be constant throughout the case law" is that "[t]he time frame between the crime and the apprehension of a suspect in a suspicious place is short." *Dyar*, 125 S.W.3d at 468. Here, McGuire was found at the Shell station only minutes after the crash occurred. But this fact pales in significance in comparison to other circumstances that surrounded McGuire's presence at the Shell station, including the facts that he called police acquaintances to report that he had hit something in the road just across from the Shell station, where he then waited for law enforcement to arrive; upon his arrival at the scene of the accident, Trooper Tomlin observed the complainant's dead body on the side of the road; at the Shell station, Trooper Wiles observed "a piece of metal stuck inside the grille [of McGuire's truck] with some motor oil on it" that "appeared to be the rear fender of the motorcycle"; and McGuire, who showed signs of intoxication, stated to the troopers that he believed he had hit something and that his wife told him it was a person.

On this record, I would hold that the trial court erred in concluding that the Shell station was not a suspicious place under article 14.03(a)(1). *See, e.g.*, *Villalobos*, 2018 WL 2307740, at *6 ("[T]he area where appellant was found was a suspicious place because the police reasonably could have believed, based on the surrounding circumstances [including facts that appellant was found shortly after accident having fled scene, his vehicle was missing wheel that matched model of wheel and other debris found at accident site, he displayed signs of intoxication, and he admitted he had been involved

in accident after leaving bar], that appellant drove while intoxicated and was involved in a recent accident nearby and needed to be detained because he had fled the scene of that accident."); *Polly v. State*, 533 S.W.3d 439, 443 (Tex. App.—San Antonio 2016, no pet.) (holding scene of hit-and-run accident was suspicious place where one hour after accident appellant returned to scene and officer could have reasonably believed appellant committed offense of driving while intoxicated).

Turning to the focus of the majority opinion—exigent circumstances—I do not agree that a strict showing of exigency is always necessary, particularly in hit-and-run cases, where the suspect has shown his willingness to flee with evidence of not only his intoxication but also of the crash (such as the bumper of the complainant's motorcycle embedded in the grille of McGuire's truck). *Cf. Cribley v. State*, No. 04-04-00047-CR, 2005 WL 1812585, at *2 (Tex. App.—San Antonio Aug. 3, 2005, no pet.) (mem. op., not designated for publication) (holding, without mention of exigency, that appellant's home where she went shortly after fleeing scene of accident was suspicious place).

***13** The statutory language of article 14.03(a)(1) does not mention exigency. It states only that a warrant is not necessary to arrest

> persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws[.]

See TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).

Nevertheless, some courts have implied an exigency requirement from a sentence in the Court of Criminal Appeals' opinion in *Swain*: "Any 'place' may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances call for immediate action or detention by police." *See* 181 S.W.3d at 366. I do not read this to require exigent circumstances in all cases under article 14.03(a)(1). While exigency does ordinarily play a prominent role in the analysis, it is but one of innumerable circumstances that may present for consideration in assessing the totality of the circumstances.

Notably, many post-*Swain* cases have addressed the suspicious place exception without ever mentioning exigency, including at least two from this Court. *See, e.g.*, *Rodriguez-Rubio v. State*, No. 01-17-00463-CR, 2018 WL 6061306, at *4 (Tex. App.—Houston [1st Dist.] Nov. 20, 2018, no pet.) (mem. op., not designated for publication) ("Although an apartment complex is not an inherently suspicious place, the fact that the GPS locator in the stolen cell phone showed that the phone and appellant, who matched the witnesses' description, were in the same location, rendered this apartment complex a 'suspicious place.' The 'pinging' of the stolen cell phone at the apartment complex tied appellant to the crime scene."); *Contreras v. State*, No. 01-08-00424-CR, 2009 WL 2461483, at *3 (Tex. App.—Houston [1st Dist.] Aug. 13, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that appellant, who was found at scene of crime searching for something under bushes and cars, was found in suspicious place where police were aware that robbery and shooting suspects had lost firearm in course of committing crime). [3]

3 *See also, e.g.*, *Gonzalez v. State*, No. 08-14-00175-CR, 2017 WL 2464690, at *6 (Tex. App.—El Paso June 7, 2017, no pet.) (not designated for publication) (holding that appellant's location near ditch where his truck had landed tail-up after accident was suspicious place where appellant showed signs of intoxication); *Griffin v. State*, No. 03-15-00398-CR, 2017 WL 2229869, at *6 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication) (stating that warrantless arrest for assault of public servant was justified under suspicious place exception based on: (1) short distance between scene of assault and appellant's residence; (2) short amount of time between report of assault and appellant's apprehension at his residence; (3) appellant's signs of intoxication, refusal to cooperate, and belligerent behavior; (4) complainant's statements to officers describing assault and identifying appellant as assailant; and (5) physical evidence tending to corroborate complainant's account); *Patel v. State*, No. 08-13-00311-CR, 2015 WL 6437413, at *5 (Tex. App.—El Paso Oct. 23, 2015, no pet.) (not designated for publication) (holding that, under totality of circumstances, location where appellant, who showed signs of intoxication, was found near single-car accident

in which his vehicle left road, traveled thirty yards down embankment, and landed in ditch was suspicious place); *Gary v. State*, No. 13-12-00266-CR, 2013 WL 485793, at *4 (Tex. App.—Corpus Christi–Edinburg Feb. 7, 2013, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's car in parking lot of pub was suspicious place where officer observed him repeatedly come and go from his car over short period of time because regular patron would have no reason to do so); *Owen v. State*, No. 13-10-00417-CR, 2011 WL 5515548, at *5 (Tex. App.—Corpus Christi–Edinburg Nov. 10, 2011, pet. ref'd) (mem. op., not designated for publication) (holding that truck was suspicious place because it was parked in otherwise-vacant high school stadium parking lot in middle of night in January in close proximity to scene of burglary, man meeting appellant's description had recently committed separate burglary, and officer apprehended appellant thirty minutes after being dispatched to scene); *Perez v. State*, No. 10-09-00022-CR, 2010 WL 3342009, at *2–3 (Tex. App.—Waco Aug. 25, 2010, no pet.) (mem. op., not designated for publication) (holding that residence where appellant, who admitted to police he had been drinking and was involved in traffic accident, was found asleep was suspicious place); *State v. Drewy*, No. 03-08-00169-CR, 2008 WL 4682441, at *4 (Tex. App.—Austin Oct. 23, 2008, no pet.) (mem. op., not designated for publication) (holding that appellant, who showed signs of intoxication and was combative, was in suspicious place as he stood near his disabled vehicle); *Hollis v. State*, 219 S.W.3d 446, 460 (Tex. App.—Austin 2007, no pet.) (holding that dance hall where appellant was found was suspicious place because it emanated strong odor of ether characteristic of "meth lab," was located in secluded area, and had no legitimate commercial or residential purposes).

***14** In this connection, I disagree with the majority's conclusion that the State forfeited its argument that the circumstances in this case were exigent. The State asserted in the trial court and on appeal that McGuire's warrantless arrest was justified under article 14.03(a)(1), which, again, makes no mention of an exigency requirement in providing that a peace officer may make a warrantless arrest of a person found in a suspicious place. At no stage of this case did McGuire argue that the State failed to prove exigent circumstances—indeed the phrase does not appear in his motion to suppress or in the transcript of the hearing on that motion, nor did he raise the issue on appeal.[4] Further, the State acknowledges that exigent circumstances may figure into the 14.03(a)(1) equation, and correctly notes that courts "sometimes use the term 'exigent circumstances' and sometimes not," and that warrantless arrests under article 14.03(a)(1) "on very similar facts to the facts in this case have been routinely upheld by courts all over Texas."

4 McGuire did not argue that the State was required to establish exigent circumstances to justify his warrantless arrest under the suspicious place exception until this Court requested supplemental briefing on the subject.

In my opinion, it would be a gross distortion of the Rules of Appellate Procedure to affirm the trial court's suppression of evidence obtained from a warrantless arrest that the record shows to have been justified under article 14.03(a)(1), for the State's purported failure to preserve argument in the trial court on, or to adequately address on appeal, a so-called element of the statute that is absent from its express terms, and that McGuire never brought to the trial court's attention. *See State v. Allen*, 53 S.W.3d 731, 733 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (concluding theories not presented to trial court are not "applicable to the case" and thus do not fall under traditional rule that reviewing court should affirm if trial court's decision is correct on any theory of law applicable to case); *cf. Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015) (concluding, under Texas Rule of Appellate Procedure 33.1(a), that appellant failed to preserve complaints because "isolated statements globally asserting that a blood draw was conducted without a warrant" were not "enough to apprise the trial court that it must consider whether there were exigent circumstances to permit the warrantless search").

Assuming, nevertheless, that there is an exigency requirement built into the suspicious place exception to justify a warrantless arrest and that the requirement applies in this case, I would hold, under Court of Criminal Appeals precedent, that the need to preserve evidence of McGuire's blood alcohol level constituted exigent circumstances, as did the more general need to preserve evidence of the crash. *See Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004) (holding appellant's warrantless arrest for DWI met exigency requirement of suspicious place exception because "the circumstances surrounding appellant's warrantless home arrest raised a reasonable belief that appellant had committed a breach of the peace and that exigent circumstances (the need to ascertain appellant's blood-alcohol level) existed to justify appellant's immediate arrest"); *see also, e.g.*, *Banda v. State*, 317 S.W.3d 903, 912 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that exigency requirement for warrantless arrest under suspicious place exception was met where police could reasonably believe it was necessary to take prompt

action to ascertain appellant's blood-alcohol level); *see also State v. Wrenn*, No. 05-08-01114-CR, 2009 WL 1942183, at *3 (Tex. App.—Dallas July 8, 2009, no pet.) (mem. op., not designated for publication) (holding that necessity of preserving evidence of DWI suspect's blood alcohol level constitutes exigency (citing *Gallups*, 151 S.W.3d at 202)).

In holding that the need to preserve evidence of McGuire's blood alcohol level did not constitute exigent circumstances, the majority relies on the United States Supreme Court's opinion in *McNeely*. *McNeely* held that the natural metabolization of alcohol in the bloodstream does not present an exigency justifying a warrantless blood draw when there is time—as there was here—to obtain a search warrant. *See* 569 U.S. at 145, 152, 133 S.Ct. 1552. In relying on *McNeely*, the majority overlooks an important distinction: *McNeely* addressed the exigency required for a warrantless *blood draw*, not a warrantless *arrest.* The only authority the majority cites to support its expansion of *McNeely* into new territory is the unpublished case *State v. Donohoo*, in which the San Antonio Court of Appeals assumed without discussion that *McNeely*'s holding regarding warrantless blood draws extends to warrantless arrests. *See* No. 04-15-00291-CR, 2016 WL 3442258, at *6 (Tex. App.—San Antonio June 22, 2016, no pet.).

***15** As noted in the majority opinion, other courts of appeals have reached the opposite conclusion in published cases, holding, in keeping with *Gallups* and subsequent Texas cases, that the exigency requirement for a warrantless arrest under the suspicious place exception is met by the need to preserve evidence of a suspect's blood alcohol level. *See Dansby v. State*, 530 S.W.3d 213, 222 (Tex. App.—Tyler 2017, pet. ref'd) (holding that "exigent circumstances—the need to ascertain Appellant's alcohol concentration—existed to justify Appellant's immediate arrest" under article 14.03(a)(1)); *Lewis*, 412 S.W.3d at 802 (holding that officer's need "to take prompt action to ascertain appellant's blood-alcohol level" satisfied exigency requirement for warrantless arrest under Article 14.03(a)(1)).

Minimizing the holdings in these cases, the majority points out that they do not mention *McNeely.* I reply that there is good reason for the omission—*McNeely* is a blood draw case; *Dansby*, *Lewis*, and the case before us are all arrest cases. The distinction is critical. As the Court of Criminal Appeals has explained, "a search [such as a blood draw] affects a person's privacy interests, whereas a seizure [such as an arrest] only affects a person's possessory interests and is generally less intrusive than a search." *Sanchez v. State*, 365 S.W.3d 681, 686 (Tex. Crim. App. 2012). This distinction is perhaps even more pronounced when the seizure compels a "physical intrusion beneath [a person]'s skin and into his veins." *See McNeely*, 569 U.S. at 148, 133 S.Ct. 1552. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *Id.* (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)).

Both *Lewis* and *Dansby* (and at least one other post-*McNeely* case)[5] implicitly recognize the crucial distinction between a warrantless blood draw and a warrantless arrest—and consequently *McNeely*'s inapplicability to the exigency requirement for a warrantless arrest—and continue to regard the need to preserve the time-sensitive evidence of a suspect's blood alcohol level as a valid exigency justifying a warrantless arrest. *See Gallups*, 151 S.W.3d at 202. And these cases are consistent with the long-standing broader principle that the need to preserve any kind of evidence of a crime can be an exigency justifying a warrantless arrest. For example, in *Minassian v. State*, this Court held that that the possibility of the "immediate erasure of any evidence of wrongdoing provides the necessary exigency for an immediate arrest." *See* 490 S.W.3d 629, 639 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Coyne v. State*, 485 S.W.2d 917, 919 (Tex. Crim. App. 1972)).

5 *See also Polly v. State*, 533 S.W.3d 439, 443 (Tex. App.—San Antonio 2016, no pet.) (upholding warrantless arrest under article 14.03(a)(1) in part because circumstances called for immediate action by police to ascertain appellant's blood alcohol level).

Here, the need to preserve evidence of McGuire's intoxication before its natural dissipation was not the only exigency presented: there was also an urgent need to preserve other evidence. This includes evidence of the accident—including the fender of the complainant's motorcycle lodged in the grille of McGuire's truck—the need for which was made immediate by the knowledge that McGuire had already fled the scene once, when he continued to drive instead of stopping after having crashed his truck into the complainant's motorcycle. The possibility that McGuire might again flee, taking with him evidence of the collision in addition to the blood evidence of his intoxication, established further exigence. *See Swain*, 181 S.W.3d at 366–67 (holding that appellant who admitted to beating victim and leaving her at remote location was found at suspicious place, where "[g]iven appellant's nervous behavior and his admission that he had been involved in

a crime, it was reasonable to believe that appellant would not remain at the residential treatment home if the officers left to obtain a warrant"); *Minassian*, 490 S.W.3d at 639 (holding that possibility that suspect would escape and destroy evidence contained on laptop computers constituted exigent circumstances under suspicious place exception); *cf. Villalobos*, 2018 WL 2307740, at *6 (holding that appellant's warrantless arrest was justified under suspicious place exception where appellant was found near scene of accident and "needed to be detained because he had fled the scene of that accident"); *Cribley*, 2005 WL 1812585, at *2 (holding that warrantless arrest of suspected hit-and-run driver was justified under suspicious place exception where police found her at home shortly after she had fled scene). And this concern would have been heightened by McGuire's emotional reaction to seeing the destroyed motorcycle.

***16** In any event, the totality of the circumstances presented in this case establishes exigence even under *McNeely*, which noted that the need to preserve evidence of a suspect's blood alcohol level is but one factor to consider in assessing the totality of the circumstances. *See* 569 U.S. at 165, 133 S.Ct. 1552 ("[T]he metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required."); *id.* at 153, 133 S.Ct. 1552 ("We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test."); *see also Weems v. State*, 493 S.W.3d 574, 580–81 (Tex. Crim. App. 2016) (holding that *McNeely* does not require courts "to turn a blind eye to alcohol's evanescence and the body's natural dissipation of alcohol in [their] calculus of determining whether exigency existed"; courts still must 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").

Indeed, the Court of Criminal Appeals has cautioned against an approach that would reduce findings of exigency "to an exceedingly and inappropriately small set of facts" and thus "defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires." *Cole v. State*, 490 S.W.3d 918, 926 (Tex. Crim. App. 2016) (holding that availability of other officers on scene to obtain warrant is relevant but not sole consideration in exigency analysis for warrantless blood draw). In addition to immediacy, the United States Supreme Court has recognized that a totality of the circumstances analysis of exigency may include consideration of "the gravity of the underlying offense for which the arrest is being made." *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *see also State v. Villarreal*, 475 S.W.3d 784, 857 (Tex. Crim. App. 2014) (Yeary, J., dissenting) (noting, in dissenting to denial of State's motion for rehearing, that "as the gravity of the offense increases, so too does the need to preserve, not just some evidence of intoxication, but the very best evidence that may reasonably be obtained"). McGuire stands accused of committing the grave offense of intoxication manslaughter. Clearly, the consequences of losing evidence of such a serious crime make it "all the more imperative that the best evidence of intoxication not be lost in the time it usually takes to secure a warrant." *Villarreal*, 475 S.W.3d at 843.

Thus, even though I disagree with the majority's conclusions that *McNeely* applies to warrantless arrests and that section 14.03(a)(1) requires an exigency finding, I would hold that the State's evidence established exigency beyond the need to preserve evidence of McGuire's blood alcohol level, based on the totality of circumstances, including the undisputed fact that McGuire left the scene of the crash and the need to preserve evidence of his truck's collision with the complainant's motorcycle. *See, e.g.*, *Cole*, 490 S.W.3d at 927 ("[L]aw enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded. We therefore conclude that exigent circumstances justified [appellant]'s warrantless blood draw."); *see also State v. Keller*, No. 05-15-00919-CR, 2016 WL 4261068, at *5 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op., not designated for publication) ("Evaluating the totality of the circumstances here, we conclude the warrantless blood draw was constitutionally permissible under exigency principles ... [L]aw enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a potentially fatal accident and the necessity of securing the site and protecting the public. We therefore conclude that the warrantless blood draw did not violate the Fourth Amendment and the trial court erred in concluding a violation occurred.").

***17** On this record, the totality of the circumstances show that McGuire's warrantless arrest was justified under the suspicious place exception because the troopers needed to preserve evidence both of the level of alcohol in McGuire's blood, regardless of the separate search warrant required to draw blood, and of the state of McGuire's vehicle, with a portion of the complainant's motorcycle lodged in it, shortly after the accident.

Conclusion

I would hold that because the State proved that McGuire's warrantless arrest was justified under the Code of Criminal Procedure article 14.03(a)(1), the trial court abused its discretion in granting the motion to suppress the evidence obtained as a result of the arrest.

All Citations

--- S.W.3d ----, 2019 WL 4065459

End of Document