SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2019 TO APRIL 2020

HON. DAVID C. NEWELL
JUDGE, PLACE 9
Court of Criminal Appeals

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Acknowledgement

This paper has been the primary responsibility of my briefing attorney, Lynda Hercules Charleson. The summaries have been prepared by her with editing from me. The commentary was prepared by me with editing (or lack thereof) also prepared by me. I believe Lynda has done a wonderful job and I hope you agree. I would also like to acknowledge that Microsoft Word can be an excellent word-processing tool. It can also be a fierce formatting enemy, a soulless monster of hidden styles. In that regard, I present this paper at last partially out of a sense of bitter, yet moral victory.

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SCOTUS/CCA Update

Significant Decisions from September 2019 to April 2020

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2019 and April 24, 2020. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. If you feel something is missing, please email me through Nichole Reedy at Nichole.Reedy@txcourts.gov and we'll do our best to either correct or explain ourselves. Additionally, I will continue to update the paper throughout the terms of the respective courts. If you'd like a copy of the updated paper, do not lose the email mentioned above.

II. MOTIONS TO SUPPRESS

A. Expectation of Privacy

1. Implied consent does not justify drawing an unconscious DWI suspect's blood without a warrant. Jose Ruiz fled the scene of a car wreck under circumstances demonstrating that he had been driving while intoxicated. Officers found him unresponsive in a nearby field and carried him to a patrol car. Emergency medical responders tried to revive him, but he remained unresponsive, and they took him to the hospital. Sergeant Bethany McBride arrested Ruiz at the hospital and, although Ruiz was unconscious, she read the DWI statutory warnings to him and then ordered a warrantless blood draw pursuant to sections of the Texas Transportation Code.

Ruiz filed a motion to suppress his blood results based on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances). After a hearing on the issue, the trial court granted his motion, and the State appealed. The court of appeals affirmed, holding that neither implied consent nor exigent circumstances justified the warrantless blood draw of an unconscious defendant. The Court of Criminal Appeals vacated the court of appeals opinion and remanded for consideration of whether exigent circumstances justified the warrantless blood draw in light of *Cole v. State*, 490 S.W.3d 918 (Tex. Crim. App. 2016) and *Weems v. State*, 493 S.W.3d 574 (Tex. Crim. App. 2017). On remand, the court of appeals again held that evidence was insufficient to establish exigent circumstances and affirmed the trial court's granting of the motion to suppress. The State again sought discretionary review on both the implied consent issue and the exigent circumstances issue.

The Court of Criminal Appeals affirmed in part and remanded in part, holding that implied consent did not provide a sufficient justification for drawing the blood of an unconscious DWI suspect without a warrant. ***State v. Ruiz*, 581 S.W.3d 782 (Tex. Crim. App. Sept. 11, 2019) (6:2:2)**. Writing for the Court, Judge Keel explained that under Section 724.011(a) of the Transportation Code, a drunk-driving suspect who uses the public roadways has implicitly consented to having his blood drawn for analysis to determine the alcohol concentration. Further, Section 724.014(a) provides that a person has not withdrawn that consent even though he or she may be unconscious at the time that testing is requested. But the implied-consent-law framework does not give officers the ability to forcibly obtain blood samples from anyone arrested for DWI. Rather, it gives officers the ability to present an affidavit to a magistrate in every DWI case.

When the State relies on consent to justify a warrantless search, it must prove that consent was freely and voluntarily given. Voluntariness depends on the totality of the circumstances and is more than a knowing choice. The ultimate question is "whether the person's will has been overborne and his capacity for self-determination critically impaired, such that his consent to search must have been involuntary." A person can not only limit the scope of his consent but revoke it altogether; Such ability is a necessary element of valid consent. In this case, Ruiz was unconscious throughout his encounter with law enforcement and had no capacity for self-determination; he could not make a choice; he could not hear Sargent McBride read warnings to him; and he could not limit or revoke his consent. Under these circumstances, drawing his blood was an unreasonable application of the consent exception to the Fourth Amendment warrant requirement.

However, the Court vacated the lower court's opinion and remand the case to the court of appeals for reconsideration in light of *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (holding that the exigent-circumstances exception to Fourth Amendment's warrant requirement almost always permits blood test without a warrant where a driver suspected of drunk driving is unconscious and unable to take a breath test).

Presiding Judge Keller filed a concurring and dissenting opinion, joined by Judge Slaughter. She agreed with the Court's decision to remand the exigent-circumstances issues for further proceedings in light of *Mitchell*. But she disagreed with the Court's resolution of the implied-consent issue. First, she said that she would not have addressed the implied-consent issue at this time because the court of appeals had not had the benefit of *Mitchell* and resolution of the case in light of *Mitchell* might make consideration of the implied-consent issue unnecessary. Second, she believed that the Court's statement—the ability to limit or revoke consent is a necessary element of a valid consent—is true only when the type of consent at issue is unilateral and non-contractual, where the defendant has no obligation to consent and where no consequences attach to the withdrawal of consent. But that is not the case when the type of consent is bilateral and contractual, where the defendant impliedly consents in exchange for some privilege or benefit and where consequences do attach to the withdrawal of consent. Because the implied consent at issue in this case is contractual, Ruiz did not revoke his consent.

[**Commentary:** It may seem like *Mitchell v. Wisconsin* left open the possibility that implied consent laws might justify a warrantless blood draw. However, looking at the vote break down in *Mitchell* seems to suggest otherwise. Upholding a warrantless blood draw under an implied consent theory means that a police officer would not even need probable cause to believe a suspect is intoxicated to forcibly take his or her blood. The officer would only need reasonable suspicion to stop and then, similar to consent to search a car, the officer would be able to demand the driver's blood. This appeared to be too broad a rule for Justice Thomas in *Mitchell*. In his concurring opinion, Justice Thomas reiterated his belief that a warrantless blood draw can be justified by exigent circumstances if there is probable cause to believe a suspect is intoxicated due to the elimination of the evidence of intoxication in the blood stream. Justice Gorsuch also didn't join the majority in *Mitchell* because he thought question of exigent circumstances should have been addressed in a better case. Perhaps Justice Gorsuch has some persuadability on the implied consent issue, but if he did, that would have rendered Justice Thomas's vote unnecessary. With this case, the Court of Criminal Appeals puts the issue to rest in Texas.]

2. The third-party doctrine alone cannot defeat a person's expectation of privacy in at least twenty-three days of historical CSLI under Article I, Section 9. Christopher James Holder and his girlfriend, Casey James, moved into Billy Tanner's home with James's two children. Tanner was James's ex-stepfather. A few months later, Holder's and James's relation soured, and Tanner asked Holder to move out. James and her daughters continued to live in Tanner's home. The next month, James told Holder that one of her daughters had made comments about Tanner and asked Holder if he had ever seen Tanner act inappropriately around that daughter. Holder said he had. But Appellant had never said anything to James because James was in the room when it happened. After she and a friend spoke to her daughter, James concluded that Tanner had not been inappropriate. The next time James spoke to Holder, she told him she would be out of town on certain days and that her kids were going to be staying with a friend while she was gone. When James returned to Tanner's home, she thought something was wrong. The garage-door opener did not work, Tanner's truck was not at the house, the house was pitch black, and there was a horrible smell. Afraid, James went back to her vehicle and ended up calling the police. Police found Tanner's body in the house. Tanner had suffered blunt-force trauma to the head and was stabbed twenty times. One of the stab wounds was inflicted post-mortem, and Tanner had defensive-type wounds on his hands. Police concluded that the murder was a crime of passion, not a burglary gone wrong. They also found two black latex gloves, which James said were not there when she left for the weekend. On Facebook, there was a picture of Holder wearing similar black latex gloves while he was tattooing someone. DNA testing showed that "it would be extremely unlikely that anyone other than [Holder] was a major

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