IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2015-25
	)	
OLEITHIA JUNE CUDJO,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE:

Oleithia June Cudjo was charged with second degree murder in violation of 21 O.S.2011, § 701.8, failure to stop at a stop sign in violation of 47 O.S.2011, § 11-201, driving while privilege suspended in violation of 47 O.S.2011, § 6303, and transporting an open container of an intoxicating substance in violation of 37 O.S.2011, § 537(A), in Oklahoma County district court case number CF-2012-6970. The district court, Honorable Jerry D. Bass, District Judge, suppressed evidence of a blood test prior to the trial. The State now appeals pursuant to 22 O.S.2011, § 1053(6) ("Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.")

We find that the appeal is proper and, after thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the trial court's decision suppressing the evidence should be reversed. The State presents the following propositions.

I. The District Court wrongly applied the two-hour rule to the blood draw.

II. The statute allowing for a warrantless blood draw after a vehicular homicide or a collision causing great bodily injury is constitutional.

III. The Exclusionary Rule should be applied where law enforcement reasonably relied on existing statutory authority and binding appellate precedent.

This Court reviews a ruling on a motion to suppress for an abuse of discretion. *State v. Iven*, 2014 OK CR 8, ¶ 6, 335 P.3d 264, 267. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Id.* This Court, however, will review the trial court's legal conclusions based on the facts *de novo*. *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92.

The trial court, in its written order ruled that *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 698 (2013) renders 47 O.S.2011 § 10-104(B) unconstitutional. The trial court further ruled that even though *McNeely* was decided after this arrest, the good faith exception does not apply. The trial court also found that, based on the facts, the arrest occurred at 11:06 a.m. The State appeals this order.

FACTS

The undisputed facts are that Cudjo was involved in a motor vehicle accident which resulted in the death of another. When officers arrived on scene at 10:46 a.m., they questioned Cudjo, suspected that she might be under the

influence of intoxicants, and placed her in the patrol vehicle at approximately 11:06 a.m.

Sometime around 11:15 a.m. to 11:30 a.m. Cudjo was removed from the vehicle and field sobriety tests were conducted, and she was placed back in the vehicle. Then at 12:20 p.m. Cudjo was again removed from the vehicle and told she was under arrest. Officers transported Cudjo to the University of Oklahoma medical center where a registered nurse withdrew blood at 1:35 p.m. No search warrant was obtained for the blood draw.

There was some dispute about when Cudjo was cuffed. Officers testified that she was not cuffed until 12:20 p.m. Cudjo believed it was earlier, but could not recall exactly when.

Officers investigating the accident opined that Cudjo failed to yield from a stop sign and pulled in front of a motorcycle. The motorcyclist struck the side of Cudjo's vehicle, went airborne, and sustained head injuries when he struck the roadway. The motorcyclist succumbed to his injuries.

PROPOSITIONS OF ERROR

Proposition one raises an issue of first impression with this Court. Whether the language of 47 O.S.2011, § 10-104(B) applies in instances where a suspected intoxicated driver is arrested at the scene of a motor vehicle accident involving death or great bodily injury, thus negating the two-hour rule outlined in 47 O.S.2011, § 11-902. We hold that it does. This holding requires this Court to revisit language in *Sanders v. State*, 2002 OK CR 42, ¶ 9, 60 P.3d 1048, 1050.

In *Sanders v. State*, 2002 OK CR 42, ¶ 9, 60 P.3d 1048, 1050, this Court held that § 10-104 is a more specific statute, and it applies when no arrest is made in cases of an accident involving great bodily injury or death. In that case, the police are under an obligation to obtain blood "as soon as practicable." *Id.* The Court went on to say that once an arrest is made, the officers have two hours within which to withdraw blood for a chemical test. *Id.* The Court reasoned that 47 O.S.2011, § 11-902 applies once an arrest is made, and the blood must be obtained within two hours of the arrest. *Id.* In *Sanders*, the appellant was not arrested at the scene, so the language about § 11-902 applying once an arrest is made is *dicta.*

In the present case, the defendant was arrested at the scene, and we now hold that 47 O.S.2011, § 10-104 applies in cases whether or not an arrest is made. This Court has "recognized the unique circumstances of fatality accidents" which render at two-hour time limitation impractical in instances where no arrest is made. *Sanders*, ¶ 7, at 1050. These same unique circumstances are present even when the suspected intoxicated driver remains at the scene. Because § 10-104 applies, the two-hour rule is not applicable.

We find that the officers obtained blood from Cudjo "as soon as practicable." The accident investigation officers assigned to this case first attended to the injured and then thoroughly investigated the scene and Cudjo's condition before determining that her blood should be obtained.

We hold that the trial court erred in finding that the two-hour time limitation applied to this case; therefore, the argument in State's proposition one has merit.

We find, in deciding proposition two, that *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 698 (2013), is instructive but not dispositive. The United States Supreme Court held in *McNeely* that; first, broad per se rules allowing warrantless blood draws from persons suspected of driving under the influence of alcohol are not valid exceptions to the warrant requirement and are unconstitutional; second, each case involving a warrantless blood draw must be examined on a case by case basis to determine if the warrantless search falls under one of the valid exceptions to the Fourth Amendment's warrant requirement; and, third, the natural dissipation of alcohol in the blood cannot be the sole exigency supporting the exigent circumstances exception to the warrant requirement.

The statute examined in *McNeely* allowed warrantless testing of all suspected of driving under the influence. The statute in Oklahoma is not as broad. Title 47 O.S.2011 § 10-104(B), requires,

> [a]ny driver of any vehicle involved in an accident who could be cited for any traffic offense where said accident resulted in the immediate death or great bodily injury . . . of any person shall submit to drug and alcohol testing as soon as practicable after such accident occurs.

In other words, an officer may conduct drug and alcohol testing of a driver without a warrant even if the driver does not consent and no other valid exception to warrant requirements exist, only when the driver has violated a

traffic law, and is involved in an accident resulting in death or great bodily injury. *See also* 47 O.S.2011, § 753 ("such test otherwise authorized by law may be made in the same manner as if a search warrant had been issued for such test or tests").

The Oklahoma legislature has determined that evidence of driving under the influence of drugs or alcohol while intoxicated which results in a serious motor vehicle collision involving death or great bodily injury must be collected as soon as possible. *See Cripps v. State*, 2016 OK CR 14, ¶ 6, ___ P.3d ___. The legislature has placed themselves in the place of a neutral magistrate and proclaimed that if an "officer has probable cause to believe that the person under arrest, while intoxicated, has operated the motor vehicle in such a manner as to have caused the death or serious physical injury of any other person or persons" then a search may be made as if a warrant existed. *See* 47 O.S.2011, § 753.

Valid reasons exist for this exception to the warrant requirement, which fall under the exigent circumstances umbrella of valid exceptions. The time constraints necessary to develop probable cause to believe that a driver is intoxicated, was operating a motor vehicle, and caused the death or great bodily injury of another are extensive. It is these time constraints coupled with the dissipation of alcohol in the blood, which present exigent circumstances. The additional delays in the warrant application process are too onerous and would cause the loss of probative evidence.

The loss of evidence caused by time, including the dissipation of intoxicants in the blood, should be considered in accidents involving death or

great bodily injury because of the gravity of the offense. "[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense . . . ." *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 2099, 80 L.Ed.2d 732 (1984). Again, the gravity of the offense like dissipation cannot be the sole basis for a finding of exigency, but it is an important factor. *Id., citing Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (the mere fact that a felon is inside a home does not present exigent circumstances authorizing an entry without an arrest or search warrant).

In these cases, the loss of evidence could mean the distinction between whether the offense is murder, manslaughter, negligent homicide, or no culpable homicide offense at all. Many times persons involved in these accidents, if not seriously injured, are dazed, disoriented, and confused. Officers could reasonably conclude that these persons are intoxicated when in-fact the persons are not. Testing of the person's blood, in these cases might lessen the person's culpability. A common notion is that probative or relevant evidence is that which makes a fact more or less probable. 12 O.S.2011, § 2401. Clearly, the existence or absence of intoxicants in a person's blood would be highly probative in these cases.

Under Oklahoma statutes, an officer's ability to obtain blood for testing is limited to a specific set of limiting circumstances, and the officer must have probable cause to believe that all of the limiting circumstances are present. We find, therefore, that under these limited circumstances, circumstances

amounting to exigent circumstances will be present allowing an officer to search for and seize evidence of intoxication in compliance with Oklahoma's implied consent statutes.

As Oklahoma's statutory scheme is more narrowly drawn than that of Missouri, *McNeely* is inapplicable, and the taking of blood in cases such as the one it issue here without a warrant does neither violates the Fourth Amendment to the United States Constitution nor Article II, Section 30 of Oklahoma's Constitution. *See Cripps*, 2016 OK CR 14, ¶ 9, ___ P.3d at ___. We find, therefore, that the trial court erred in holding 47 O.S.2011, § 10-104, unconstitutional and find that State's proposition two has merit. As we have determined that the taking of Cudjo's blood was proper, proposition three is rendered moot.

In conclusion, 47 O.S.2011, §§ 10-104(B) and 753, do not offend constitutional standards, and the statute applies to this case even though Cudjo was placed under arrest at the accident scene.

DECISION

The ruling of the trial court suppressing the evidence in this case is **REVERSED** and this case is **REMANDED** to the trial court for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
HONORABLE JERRY D. BASS, DISTRICT JUDGE

ATTORNEYS ON APPEAL

DAVID W. PRATER
DISTRICT ATTORNEY
MATTHEW R. ADAMS
ASSISTANT DISTRICT ATTORNEY
OKLAHOMA COUNTY
320 ROBERT S. KERR AVE.
SUITE 505
OKLAHOMA CITY, OK 73102
FOR STATE/APPELLANT

ANDREA DIGILIO MILLER
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OK 73102
FOR DEFENDANT/APPELLEE

OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Part/Dissents in Part
JOHNSON, J.: Concurs in Results
HUDSON, J.: Concurs in Part/Dissents in Part

SMITH, PRESIDING JUDGE, CONCURRING IN RESULT:

I agree that 47 O.S.2011, § 10-104(B) is constitutional as applied in this case, and that the two-hour rule does not apply to cases involving fatality accidents under § 10-104. I cannot join in the discussion of 47 O.S.2011, § 753, which is not at issue in this case.

LUMPKIN, VICE PRESIDING JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in the decision to reverse the trial court's ruling which suppressed the evidence in this case. However, I cannot agree with the analysis used to reach this result.

I dissent to the majority's treatment of *Sanders v. State*, 2002 OK CR 42, 60 P.3d 1048. This Court's determination in *Sanders* that 47 O.S.Supp.1999, § 11-902(A) applies once an arrest is made was not *dicta* as the opinion suggests.[1] In *Sanders*, the appellant expressly argued "that 47 O.S.Supp.1999, § 11-902(A) specifically requires that a blood alcohol test be administered within two hours after the arrest of the person" and he asserted "that the specific provisions of 47 O.S.Supp.1999, § 11-902(A), driving while intoxicated, override the general provisions of 47 O.S.Supp.1999, § 10-104(B)." *Sanders*, 2002 OK CR 42, ¶ 5, 60 P.3d at 1050. Applying the rules of statutory construction, this Court in *Sanders* construed the plain language in the two statutes, recognized the competing concerns, and reconciled the conflicting provisions. *Sanders*, 2002 OK CR 42, ¶¶ 6-7, 60 P.3d at 1050; *State ex. rel. Mashburn v. Stice*, 2012 OK CR 14, ¶¶ 11-12, 288 P.3d 247, 250 ("We are [ ] required to seek to reconcile conflicting [statutory] provisions to give effect to both, if possible, and apply the intent of the Legislature, if it can be properly

[1] *Dicta* is defined as: "Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY, 454 (6th ed. 1990).

discerned."). Therefore, *Sanders* properly construed both § 11-902(A) and § 10-104(B) and this determination is binding precedent.

This Court's holding in *Sanders* was driven by the plain language of the statutes.

> There are two statutes that address circumstances under which persons driving upon public roads and highways in Oklahoma may be required to submit to blood and breath tests to check for intoxicating substances. Title 47 O.S.Supp.1998, § 751(A) provides that any person is deemed to have given consent to blood or breath tests if such person is "arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle upon the public roads, highways, streets, turnpikes or other public place while under the influence of alcohol or other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance." More narrowly drafted, 47 O.S.Supp.1998, § 10-104(B) provides that, "[a]ny driver of any vehicle involved in an accident who could be cited for any traffic offense where said accident resulted in the immediate death of any person shall submit to drug and alcohol testing as soon as practicable after such accident occurs."
>
> This Court and the Oklahoma Supreme Court have held that the specific language of section 751 requires an officer to place a driver under arrest before requesting him or her to submit to a blood alcohol test. *See State v. Shepherd*, 1992 OK CR 69, ¶ 3, 840 P.2d 644, 645. *See also Smith v. State ex rel. Dept. of Public Safety*, 1984 OK CR 16, ¶ 3, 680 P.2d 365. There is no such language found in section 10-104(B).

Guest v. State, 2002 OK CR 5, ¶¶ 5-6, 42 P.3d 289, 290.[2] An arrest is not a prerequisite for drug or alcohol testing under 47 O.S.2011, § 10-104(B)." *Bemo v. State*, 2013 OK CR 4, ¶ 5, 298 P.3d 1190, 1191. Any person subject to the

[2] I note that 47 O.S.2011, § 10-104(B) has been expanded to include not only an accident that results in immediate death but also great bodily injury. I further note that 4 O.S.2011, § 752(B) expressly authorizes blood withdrawal with the consent of the person whose blood is to be withdrawn.

provisions of § 10-104(B) "shall submit to drug and alcohol testing as soon as practicable after such accident occurs."

In contrast, the plain language of 47 O.S.Supp.2012, § 11-902(A)(1) requires that a blood or breath alcohol concentration test be administered within two hours after the arrest of the person. Section 11-902 does not come into effect until the person has been arrested. *Sanders*, 2002 OK CR 42, ¶ 9, 60 P.3d at 1050.

I note that the opinion overlooks the effect of 47 O.S.2011, § 756. This statutory provision sets forth the requirements for admission of evidence concerning the concentration of alcohol or any other intoxicating substance in the blood or breath of a person. "To be admissible in a proceeding, the evidence must first be qualified by establishing that the test was administered to the person within two (2) hours after arrest of the person." *Id.*

The practical effect of these statutes is the result which we reached in *Sanders*. In the case of an accident involving a fatality or great bodily injury, where the person is not arrested at the scene or shortly thereafter (at the hospital), the police are under a duty to conduct the drug or alcohol testing as soon as practicable. *Sanders*, 2002 OK CR 42, ¶ 9, 60 P.3d at 1050; 47 O.S.2011, § 10-104(B). However, once an arrest has been made, the police have two hours in which to administer the drug or alcohol test. *Id.*; 47 O.S.Supp.2012, § 11-902, § 756.

Applying this analysis to the present case, I find that the trial court abused its discretion. *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42 (holding review of trial court's ruling on motion to suppress is for an abuse of discretion). The trial court's conclusion that the blood draw did not occur within two hours of Cudjo's arrest was clearly erroneous. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining abuse of discretion as arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts).

The trial court aptly determined that Cudjo's blood was drawn at 1:35 p.m. but its determination that the officers arrested Cudjo at 11:06 a.m. was clearly against the logic and effect of the facts presented. It is evident from the record that Cudjo was not arrested until 12:20 p.m. and that prior to that time the officers detained her pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Officers may detain a motorist to investigate a traffic stop or collision. *Seabolt v. State*, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237-38; *Edge v. City of Oklahoma City*, 1988 OK CR 166, ¶ 8, 760 P.2d 836, 838. Such stops are treated akin to the investigative detentions outlined by the United States Supreme Court in *Terry*. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. The scope and duration of such a seizure must be related to the stop and must last no longer than is necessary to effectuate the stop. *Florida v. Royer*, 460 U.S. 491,

500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879; *McGaughey*, 2001 OK CR 33, ¶¶ 24, 27, 37 P.3d at 136-37. If the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime. *See State v. Paul*, 2003 OK CR 1, ¶ 3, 62 P.3d 389, 390.

The distinction between an investigatory detention and a full arrest is largely a matter of degree. *Coffia v. State*, 2008 OK CR 24, ¶ 4, 191 P.3d 594, 600; *Sowell v. State*, 1980 OK CR 98, ¶ 3, 620 P.2d 429, 430. Officers may restrain an individual in order to maintain the status quo during the course of an investigative detention. *See Alverson v. State*, 1999 OK CR 21, ¶ 14, 983 P.2d 498, 507; *Morris v. Noe*, 672 F.3d 1185 (10th Cir. 2012). Thus, it often depends upon the intention of the officer involved. *Castellano v. State*, 1978 OK CR 107, ¶ 8, 585 P.2d 361, 365; *DeVooght v. State*, 1986 OK CR 100, ¶ 7, 722 P.2d 705, 708 ("There must be an intent to arrest by the officer and an understanding by the arrestee that submission is necessary".)

In the present case, Officer Michael Lambert of the Oklahoma City Police Department was one of the first officers to respond to the accident involving great bodily injury. Lambert testified that he arrived at 10:46 a.m. but did not immediately arrest Cudjo. Instead, he detained her while the officers went about investigating the collision between Cudjo's car and the gravely injured motorcyclist. Based upon what he observed at the scene, Lambert formed the opinion that Cudjo had caused the accident when she failed to yield at a stop

sign and pulled out in front of James Helsloot. The officers had Cudjo take a seat in a patrol car for her own safety. Her car was in the middle of the intersection and it was cool outside. Lambert remained with Cudjo. Although he did not smell alcohol on her breath, Lambert believed that Cudjo was under the influence of an intoxicating substance based upon her slurred speech, lethargy and confusion. (P.H. 9-15, 18-19, 53-54; 11/12/14 Tr. 9-10; 12/8/14 Tr. 6).

Because Helsoot's injuries were so severe, the patrol officers had called for the Traffic Investigations Unit to investigate the collision. (P.H. 58, 60-61). Officer Brian Fowler arrived at 10:53 a.m. (11/12/14 Tr. 6; 12/4/14 Tr. 47). After approximately 15 minutes, he spoke with Cudjo about the collision. He had her perform the standardized field sobriety tests and determined that she was under the influence but did not make the decision to arrest her. Instead, Fowler had Cudjo retake her seat in the back seat of one of the police cars and continued his investigation of the collision. Fowler testified that Cudjo was not handcuffed. Fowler went through the scene and looked at all of the evidence with his partner, Officer Terry Harrison. Afterwards, he made the decision to place Cudjo under arrest. Fowler left Harrison to complete the investigation including taking the scene measurements. He placed Cudjo under arrest at 12:20 p.m. Fowler told Cudjo that she was under arrest and read her the Implied Consent Test Request. He documented the time and her response on the form. (P.H. 38-41, 52; 11/12/14 Tr. 6-7; 12/4/14 Tr. 50).

Fowler had Officer Lambert transport Cudjo to Presbyterian Hospital where Fowler had a nurse withdraw blood from Cudjo at 1:35 p.m. (P.H. 41-44, 56-57). Lambert testified Cudjo was placed under arrest at approximately 12:34 p.m. and only then were handcuffs placed on her person. (12/8/14 Tr. 6-7).

Officer Harrison testified that he arrived at the accident scene at 11:15 a.m. He took approximately 15 to 20 minutes to assess the scene before he contacted Cudjo. (12/4/14 Tr. 33-34). Harrison opened the back door of the patrol car in which Cudjo was seated and spoke with her about the accident. Harrison testified that he did not place Cudjo under arrest. She was not handcuffed. (12/4/14 Tr. 37). He was still working the scene when Lambert transported Cudjo from the scene. (12/4/14 Tr. 45).

As the officers testified that they did not intend to arrest Cudjo but that she remained under investigative detention while they investigated the accident involving great bodily injury, she was not restrained, but waited for her own safety in the back of the patrol car until Officer Fowler placed her under arrest at 12:20 p.m., I find that the trial court's determination that she was arrested at 11:06 a.m. to be clearly against the logic and effect of the facts presented. Because Cudjo's blood was withdraw within two hours of her arrest the trial court abused its discretion when it sustained the motion to suppress.

As to Proposition Two, I agree that the trial court's determination that *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 698 (2013), rendered 47 O.S.2011, § 10-104(B) unconstitutional was a clearly erroneous

conclusion and judgment. However, I cannot agree with the majority's determination that *McNeely* is somehow "instructive" but yet "inapplicable." *McNeely* clearly calls into question the constitutionality of § 10-104(B). The only way to save the statute is to interpret it, not as a *per se* rule authorizing a warrantless blood draw, but pursuant to the case by case guidelines set forth in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

The Supreme Court in *McNeely* held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute [a *per se*] exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely*, 133 S. Ct. at 1568. Instead, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.*, 133 S.Ct. at 1563. A warrantless search may be reasonable when "'there is compelling need for official action and no time to secure a warrant.'" *Id.*, 133 S.Ct. at 1559 (*quoting Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978)). *McNeely* expressly affirmed the exigent circumstances exception set forth in *Schmerber*, however, the Supreme Court clarified that its determination that the warrantless blood test was reasonable in *Schmerber* was strictly based on the facts within that record. *Id.*, 133 S.Ct. at 1560, *citing Schmerber*, 384 U.S. at 772, 86 S.Ct. at 1836. The Supreme Court explained: "In finding the warrantless blood test reasonable in *Schmerber*, we considered all of the facts and circumstances of the particular

case and carefully based our holding on those specific facts." *Id.*, 133 S.Ct. at 1560.

McNeely is applicable to the present case because § 10-104(B) provides for the administration of a drug and alcohol test to any driver of any vehicle involved in accident who could be cited for any traffic offense where said accident resulted in death or great bodily injury. Section 10-104(B) does not require either a warrant or exigent circumstances prior to the administration of a nonconsensual blood test. Thus, it would appear that § 10-104(B) is contrary to the holding set forth in *McNeely*.

Although § 10-104(B) does not explicitly meet the requirements of *McNeely*, the statute can be applied in a constitutional manner. I note that "it is the duty of the courts, whenever possible, to harmonize acts of the Legislature with the Constitution." *Murphy v. State*, 2012 OK CR 8, ¶ 32, 281 P.3d 1283, 1292. Requiring officers to only cause a nonconsensual blood draw in reliance upon either a warrant or exigent circumstances allows § 10-104(B) to be construed as constitutional. Because the trial court failed to harmonize § 10-104(B) with the United States Supreme Court's pronouncement in *McNeely*, I find that the trial court erred.

Relying upon this Court's recent decision in *Cripps v. State*, 2016 OK CR 14, ___ P.3d ____, the majority erroneously concludes that § 10-104(B) creates a *per se* exception to the warrant requirement "under the exigent circumstances umbrella of valid exceptions." However, there can be no confusion on this issue. Even within the past few weeks, the United States

Supreme Court reiterated in *Birchfield v. North Dakota*, 579 U.S. ___, 2016 WL 3434398, at *14 (June 23, 2016), that "the exigent-circumstances exception must be applied on a case-by-case basis."

The majority further relies upon 47 O.S.2011, § 753 to justify this exception. However, this Court has previously recognized that Section 753 "is not constitutionally adequate on its face" because it "does not require the constitutional mandates set forth in *Schmerber*." *State v. Shepherd*, 1992 OK CR 69, ¶ 6, 840 P.2d 644, 646. As we were without the guidance of *McNeely*, this Court did not require a warrant and instead simply required that "the determination of whether section 753 has been applied in a constitutionally sound manner must be made on a case by case basis." *Id.*

After *McNeely* and *Birchfield*, it is clear that an officer must have either a warrant or exigent circumstances prior to conducting a nonconsensual blood draw. Each instance of alleged exigency must be individually examined on a case by case basis. *Birchfield*, 2016 WL 3434398 at *14; *McNeely*, 133 S.Ct. at 1563.

The issue of exigency was not fully developed in this case. Instead, the State urges in Proposition Three for application of the good-faith exception because the officers acted in reasonable reliance upon both § 10-104(B) and this Court's decision in *Guest v. State*, 2002 OK CR 5, 42 P.3d 289. I find that the trial court abused its discretion when it declined to apply the good-faith exception to this case.

This Court has adopted the good-faith exception to the exclusionary rule. *State v. Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d 714, 718. The good-faith exception extends to searches conducted in reasonable reliance on binding appellate precedent. *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 2434, 180 L. Ed. 2d 285 (2011).

In the present case, Officer Fowler acted in reasonable reliance upon of binding appellate precedent. The trial court found that he acted on the law as known to him at the time of the traffic accident. This Court's binding precedent permitted the blood draw at the time that Fowler directed the nurse to draw Cudjo's blood. In *Guest*, this Court upheld § 10-104(B) against a Fourth Amendment challenge stating "under section 10-104(B), it is enough that Appellant was the driver of a vehicle involved in an accident, that he could be cited for a traffic offense and that the accident resulted in the immediate death of a person." *Guest*, 2002 OK CR 5, ¶ 8, 42 P.3d at 291. The United States Supreme Court decided *McNeely* on April 17, 2013. This was approximately 5 months after the blood was withdrawn in the present case. As the officers reasonably relied upon this Court's binding precedent justifying the blood draw I find that the good-faith exception applies. The trial court's order suppressing the blood test evidence was clearly erroneous.

As I noted in *Cripps*, "judges, prosecutors, defense counsel and individuals who instruct law enforcement personnel regarding the methods to conduct Constitutional searches should emphasize the necessity to rely on the guidelines of *Schmerber v. California, supra*, rather than the *carte blanche*

language in our statute." *Cripps*, 2016 OK CR 14, ¶ 15, ___ P.3d at ___ (Lumpkin, V.P.J., concurring in part/dissenting in part). While at a later date the United States Supreme Court may find the restrictions contained in our statute to satisfy the reasonableness of the Fourth Amendment, at this juncture, we must urge law enforcement to take a conservative approach pursuant to *Schmerber* rather than hope those restrictions of authorization in cases involving traffic accidents resulting in death or great bodily injury are sufficient. In turn, this Court should not confuse the issue by issuing results oriented opinions that conflict with binding precedent in order to salvage a case.

HUDSON, J., CONCURRING IN PART/DISSENTING IN PART

I concur in the decision to reverse the trial court's ruling which suppressed the evidence in this case. However, I dissent to the majority opinion's treatment of *Sanders v. State*, 2002 OK CR 42, 60 P.3d 1048, for the reasons stated in Judge Lumpkin's separate opinion concurring in part/dissenting in part. I also join Judge Lumpkin's separate analysis in Proposition I finding that Cudjo's blood was withdrawn within two hours of her arrest.

I write separately to dissent to the majority's disregard in Proposition II of the Fourth Amendment limitations placed on 47 O.S.2011, § 10-104(B) as explained in *Missouri v. McNeely*, __U.S.__, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). The majority relies upon our recent decision in *Cripps v. State*, 2016 OK CR 14, __P.3d__ which is plagued by the same faulty reasoning. The Supreme Court in *McNeely* held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute [a *per se*] exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.*, 133 S. Ct. at 1568. Instead, in each case law enforcement must examine the totality of the circumstances in determining whether such a warrantless search is reasonable and permissible under *McNeely*. Specifically, law enforcement must consider whether "there is compelling need for official action and no time to secure a warrant." *Id.* at 1559 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)). *McNeely* reaffirmed the Supreme Court's holding in *Schmerber v. California*, 384 U.S.

757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) which likewise evaluated the totality of the circumstances in determining whether a warrantless, nonconsensual blood draw by police was justified by exigent circumstances. *McNeely*, 133 S. Ct. at 1559-60.

Although 47 O.S.2011, § 10-104(B) creates a *per se* rule requiring blood testing where a fatality accident has occurred, the majority concludes that the Supreme Court's decision in *McNeely* is inapplicable here. Neither *McNeely* nor *Schmerber* hold that a *per se* rule like § 10-104(B) automatically satisfies the Fourth Amendment. It does not matter simply that we are addressing a vehicular homicide case as opposed to a non-injury DUI case as in *McNeely*. As one court has held, "[t]he seriousness of the offense does not itself create exigency[.]" *State v. Stavish*, 868 N.W.2d 670, 680 (Minn. 2015) (citing *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)).[1] Nor does the difference between attempting to obtain evidence essential to a probable DUI charge and a vehicular homicide charge "reduce the quantum of evidence the State must present to prove exigent circumstances." *Id.*

The majority cites *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) for the proposition that the seriousness of the offense is an important factor to be considered in the exigency analysis which justifies the *per se* exception to the warrant requirement at issue here. Majority Op. at

[1]In *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the Supreme Court rejected a categorical exception to the warrant requirement based on the existence of a possible homicide at a crime scene which, according to the State, presented an emergency situation demanding immediate action. *Id.* at 392-94, 98 S. Ct. at 2413-14. The *Mincey* court "decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394, 98 S. Ct. at 2414.

7. *Welsh*, however, arose in the context of a home entry by police to effectuate a warrantless arrest for a noncriminal, civil forfeiture DUI offense for which imprisonment was impossible. 466 U.S. at 753-54. *Welsh* does not address DUI-related arrests for criminal offenses made in public places which result in forced blood draws. *McNeely* and *Schmerber* do. *McNeely*, like *Schmerber*, makes clear that we must "evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *McNeely*, 133 S. Ct. at 1559 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931)).

Nothing in *McNeely* endorses application of a *per se* rule in any context which disregards the Fourth Amendment prohibition against warrantless searches. On the contrary, everything in *McNeely* and *Schmerber* (which itself involved a two-person DUI non-fatality injury accident) tells us that the regular exigency analysis must be applied in all cases. Perhaps the exigency analysis will be satisfied in the vast majority of fatality-DUI cases. But that is not to say police will act reasonably in *every* fatality-DUI case when they do not obtain a warrant before conducting forced blood-draws. On this last point, I repeat what *McNeely* held: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 133 S. Ct. at 1561.

Recently, the Supreme Court held in *Birchfield v. North Dakota*, __U.S.__, 136 S. Ct. 2160, __L. Ed. 2d__ (2016) that the Fourth Amendment permits

warrantless breath tests as a search incident to arrest for drunk driving. *Id.* at 2184. The Court reached a different conclusion, however, with respect to forced blood draws incident to arrest for drunk driving. The Court noted the widespread availability of less intrusive breath tests and observed that:

> a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, **and when they arise, the police may apply for a warrant if need be.**

Id. at 2184-85 (emphasis added). This passage alone suggests that the majority's reliance on the serious nature of DUI-related vehicular homicide offenses to justify a *per se* exception to the warrant requirement is fatally flawed. As I wrote in *Cripps*, the majority's approach to § 10-104(B) is not built to last and *Birchfield* drives this point home. *Cripps*, 2016 OK CR 14, ¶¶ 1-11 (Hudson, J., concurring in part/dissenting in part). Simply, we have an obligation under the Supreme Court's exigent circumstances cases "to decide each case on its facts [and] not to accept the 'considerable overgeneralization' that a *per se* rule would reflect." *McNeely*, 133 S. Ct. at 1561 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997)). *See Birchfield*, 136 S. Ct. at 2183 (the exigent circumstances exception to the warrant requirement "has always been understood to involve an evaluation of the particular facts of each case.").

Our own case law is also instructive. In *State v. Shepherd*, 1992 OK CR 69, 840 P.2d 644, this Court addressed the constitutional limits of 47

O.S.Supp.1988, § 753, a similar provision that allows an officer to take blood against the objections of a conscious person whom he has placed under arrest when "the investigating officer has probable cause to believe that the person under arrest, while intoxicated, has operated his motor vehicle in such a manner as to have caused the death or serious physical injury of any other person or persons." This Court held that § 753 did not meet the constitutional mandates set forth in *Schmerber*. Nonetheless, § 753 *could* be applied in a constitutional manner, this Court held, "if the investigating officer only instructs that blood be drawn from the driver when the officer reasonably believes that under the circumstances, any delay necessary to secure a warrant may result in the loss of evidence." *Shepherd*, 1992 OK CR 69, ¶¶ 5-6, 840 P.2d at 646 (citing *Schmerber*, 384 U.S. at 770-71).

In the present case, the prosecutor acknowledged the holding in *McNeely* and conceded that no exigent circumstances existed to justify Cudjo's warrantless, nonconsensual blood draw. The prosecutor stated too that the officers involved did not seek a search warrant because they relied upon the provisions of §§ 10-104 and 753 (O.R. 46). Under these circumstances, the district court correctly analyzed the warrantless blood draw from Appellant in light of the guiding principles set forth in *McNeely*.

However, the district court abused its discretion—as the State urges in Proposition III—in declining to apply the good faith exception and in concluding that suppression of Cudjo's blood test results was warranted. The district court specifically found that the police officers in this case "acted on the law as

known to them at the time of the traffic accident." (O.R. 93). *McNeely* was handed down well after the November 4, 2012, vehicular homicide in this case and this Court has previously upheld § 10-104(B) against a Fourth Amendment challenge. *Guest v. State*, 2002 OK CR 5, 42 P.3d 289. Thus, when Cudjo's blood was drawn there was binding precedent from this Court justifying forced blood draws in the investigation of vehicular accidents resulting in immediate death or great bodily injury under § 10-104(B). I find that the police officers in this case acted in objectively reasonable reliance on settled law from this Court in drawing Cudjo's blood without a warrant. Thus, the good faith exception applies and the blood evidence should not have been suppressed. *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 2428, 2434, 180 L. Ed. 2d 285 (2011).

This case illustrates why police and prosecutors must be careful to avoid being lulled into relying on § 10-104(B) as a cure-all provision exempting them from the Fourth Amendment's warrant requirement before drawing blood from a non-consenting DUI suspect. *McNeely* makes clear that law enforcement officers are not categorically permitted to obtain a non-consenting suspect's blood sample without a warrant simply because alcohol is leaving a suspect's blood stream. The majority in this case wrongly limits *McNeely*'s reach. This is particularly troubling considering the "cardinal principal" embodied by the Fourth Amendment that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few established and well delineated exceptions." *Mincey*, 437

U.S. at 390, 98 S. Ct. 2412 (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (footnotes omitted)).

As a cautionary note, law enforcement should be mindful that "[n]othing endures but change." Heraclitus, *from Diogenes Laertius, Lives of Eminent Philosophers*. Application of the good-faith exception in cases similar to this one is only appropriate so long as the majority of this Court continues to discount the Fourth Amendment limitations placed on § 10-104(B) by *McNeely*. Should this change, the exclusionary rule will likely be triggered. For the above reasons, I concur in part and dissent in part to the majority opinion in this case.