IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2015-785
	)	
RONNIE B. WRIGHT,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE:

Ronnie B. Wright was charged with, count one, first degree manslaughter in violation of 21 O.S.2011, § 711, count two, causing an accident while driving without a valid driver's license in violation of 47 O.S.2011, § 11-905, count three, possession of a firearm after former conviction of a felony in violation of 21 O.S.2011, § 1283, and, count four, possession of a controlled dangerous substance in violation of 63 O.S.2011, § 2-402, in Oklahoma County district court case number CF-2013-5265. The district court, Honorable Glenn M. Jones, District Judge, suppressed evidence of a blood test prior to the trial. The State now appeals pursuant to 22 O.S.2011, §§ 1053 (6 & 7).

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 erred in sustaining the appellee's (defendant's) motion to suppress because the officers acted reasonably under the circumstances to investigate a crime and preserve evidence.

II. The district court erred in sustain the appellee's (defendant's) motion to suppress because probable cause existed to justify the seizure of the appellee's (defendant's) blood based upon the totality of the circumstances.

III. The district court erred in sustaining the appellee's (defendant's) motion to suppress because suppression of the evidence is the inappropriate remedy under the situation.

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 ruled that the officers had no probable cause to believe that Wright was under the influence of intoxicants, thus the trial court suppressed the evidence.

FACTS

Wright was involved in a motor vehicle accident which resulted in the death of another at 13th and Stonewall in Oklahoma City on August 8, 2013. When officers arrived on scene at 7:10 a.m. on Sunday morning, they saw Defendant unresponsive in a yellow vehicle with extensive damage to its front, and they also saw a green vehicle resting on its roof with extreme, crushing

damage. Two people occupied the green vehicle; one was deceased and the other was severely injured.

Officer Tracy Lee Warkentien of the Oklahoma University Health Science Center (O.U.H.S.C.) Police Department arrived first. He observed Wright who was unconscious and unresponsive. He tried to arouse him, but he remained unresponsive. He testified at the suppression hearing that he had no reason to believe that he was under the influence of drugs or alcohol. He ordered that blood be drawn because of the nature of the accident involving death and great bodily injury and pursuant Oklahoma Statutes. Warkentien believed an emergency existed and that the statute allowed the taking of Wright's blood for testing.

Defendant Wright was taken to the nearby University Medical Center emergency room. Warkentien remained at the accident scene. According to an emergency-room nurse, after arriving at the hospital, Wright was agitated, confused, disoriented, aggressive, and would frequently fall into a sleep state; although he was easily aroused.

Warkentien believed it could take up to eight hours to obtain a warrant, so no warrant was obtained. After Wright was transported, Warkentien contacted Officer Carlos Pena, also of the O.U.H.S.C. police department, who was stationed at the emergency room, to facilitate the blood draw.

Pena testified that Wright was unconscious when the blood was taken, but he became aware of what was going on later. Wright was at the hospital for treatment; he was not placed under arrest before the blood draw. The blood was

drawn at 7:58 a.m. At the time of the blood draw, Warkentien knew that Wright could be cited for several traffic violations including driving at a high rate of speed (above the posted limit) and driving without a license.

PROPOSITIONS OF ERROR

The defendant in this case relied on *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), in his motion to suppress the evidence resulting from a blood draw.[1] The State argues that 47 O.S.2011, § 10-104(B), provides sufficient protections to make the search reasonable.

Both the United States and Oklahoma Constitutions prohibit unreasonable searches and seizures. *State v. Feeken*, 2016 OK CR 6, ¶ 5, 371 P.3d 1124, ___. There is no disagreement about whether a blood draw constitutes a search implicating constitutional protections. A blood draw, no doubt, is a search, as the type of invasion under a person's skin and into their bloodstream is a search which implicates the Fourth Amendment. *See McNeely*, 133 S.Ct. at 1558. Blood draws "require piercing the skin" and necessitate the extraction of a part of the subject's body. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 625, 109 S.Ct. 1402, 1417-18, 103 L.Ed.2d 638 (1989). This Court is well aware that searches conducted without a warrant are presumed unreasonable under the under the Fourth Amendment unless they fall under "a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967);

[1] The incident at-issue here occurred after *McNeeley* was handed down by the U.S. Supreme Court (Decided April 13, 2013).

Flores v. State, 1999 OK CR 52, ¶ 10, 994 P.2d 782, 784; *Tomlin v. State*, 1994 OK CR 14, ¶ 16, 869 P.2d 334, 338.

In its brief, the State argues that the statute circumvents the need for an individualized determination that probable cause exists before a search is authorized. Section 10-104(B) provides that the existence of a traffic violation shall constitute the probable cause necessary to believe that a blood draw is necessary.[2] Thus, the State's argument is that the warrantless search authorized by the statute falls within the exceptions to the warrant requirement.

This Court, in *Cripps v. State*, 2016 OK CR 14, ¶¶ 8-9, ___ P.3d ___, established that § 10-104(B) is constitutional.[3] This Court reasoned that the existence of an accident involving great bodily injury or death, in addition to the dissipation of alcohol provides an exigency which overcomes the need for a

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[2] 47 O.S.2011, § 10-104(B), provides:

> Any 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, as defined in subsection B of Section 646 of Title 21 of the Oklahoma Statutes, of any person shall submit to drug and alcohol testing as soon as practicable after such accident occurs. The traffic offense violation shall constitute probable cause for purposes of Section 752 of this title and the procedures found in Section 752 of this title shall be followed to determine the presence of alcohol or controlled dangerous substances within the driver's blood system.

[3] The writer of this Opinion continues to believe that 47 O.S.2011, § 10-104(B), is constitutional on its face; otherwise, *Cripps v. State*, 2016 OK CR 14, ___ P.3d ___, and *State v. Cudjo*, Oklahoma Court of Criminal Appeals case number S-2015-25 (unpublished opinion Aug. 5, 2016), would have been decided differently.

Had this writer determined that the statute was unconstitutional on its face, this writer would have concluded that the blood evidence should be suppressed. This writer would not agree that, if the statute is unconstitutional on its face, it might be saved by the use of a "constitutional as applied" standard. If this statute is unconstitutional on its face, then there is no conceivable set of facts where the statute can be applied constitutionally, unless an officer follows search and seizure guidelines in articulating probable cause and exigent circumstances that are required despite this statute. In that case, there is no need for the statute at all, as the officer has simply followed basic fundamental constitutional search and seizure guidelines.

search warrant.[4] This Court did not discuss the probable cause aspect of a reasonable search and seizure in the *Cripps* case, as the issue was not presented. The issue, however, is squarely presented here.

Probable cause is simply more probable than not. *Harjo v. State*, 1994 OK CR 47, ¶ 22, 882 P.2d 1067, 1073. Probable cause exists when, considering the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *Marshall v. State*, 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479. "A practical, nontechnical probability based on factual and practical considerations that incriminating evidence is involved is all that is required." *Hallcy v. State*, 2007 OK CR 2, ¶ 10, 153 P.2d 66, 69, *citing Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed.2d 1879 (1949).

The legislature has determined that probable cause exists to believe that evidence of a crime will be found in a person's blood, when that person has violated the traffic law and caused an accident involving death or great bodily injury to any person. This seems to be a practical, nontechnical probability. However, it also seems to authorize a fishing expedition in every single similar factual situation.

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[4] The dissipation of alcohol is always a factor to consider in determining exigent circumstances in a driving under the influence case. This Court in *Cripps* discussed the additional factor of the existence of an accident involving great bodily injury or death.

This Court is tasked with determining whether there exists a fair probability that drugs or alcohol will be found in a person's blood stream if they are involved in an accident involving death or great bodily injury and they have committed a traffic violation. We conclude that the probability does exist.

Research indicates that the leading cause of fatality accidents is the presence of drugs and alcohol.[5] *Cf. McNeely*, 133 S.Ct. at 1565 ["While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes)."]; *see also Michigan v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990) (citing statistics in upholding sobriety checkpoints). The statistics indicate that there is a fair probability that drugs and/or alcohol will be present in the blood of a person who is involved in serious accidents involving death or great bodily injury. The legislature has obviously reached the same conclusion and has determined that the probability exists in every instance, and no one has shown otherwise. This Court must presume that the statute is constitutionally sound.

> Statutes are presumed constitutional; and, if possible, this Court has a duty to construe statutes in a manner which does not run afoul of the constitution. . . . [This Court] also has a duty to liberally construe statutes "with a view to effect their objects and to promote justice." 25 O.S.1991, § 29.

Gonseth v. State, 1994 OK CR 9, ¶ 8, 871 P.2d 51, 54.

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[5] According to NHTSA Traffic Safety Facts 2002, driving under the influence of alcohol is the number one cause of traffic fatalities.

Only in limited circumstances, however, where the privacy interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 624, 109 S.Ct. 1402, 1417, 103 L.Ed.2d 638 (1989) (blood and urine testing for the presence of drugs and alcohol of railway employees involved in train accidents).

> The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U. S. 305, 308 (1997). While such suspicion is not an "irreducible" component of reasonableness, *Martinez-Fuerte*, 428 U. S., at 561, we have recognized only limited circumstances in which the usual rule does not apply. For example, we have upheld certain regimes of suspicion less searches where the program was designed to serve "special needs, beyond the normal need for law enforcement." *See, e. g., Vernonia School Dist. 47J v. Acton*, 515 U. S. 646 (1995) (random drug testing of student athletes); *Treasury Employees v. Von Raab*, 489 U. S. 656 (1989) (drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); *Skinner v. Railway Labor Executives' Assn.*, 489 U. S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations). We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. *See, e. g., New York v. Burger*, 482 U. S. 691, 702-704 (1987) (warrantless administrative inspection of premises of "closely regulated" business); *Michigan v. Tyler*, 436 U. S. 499, 507-509, 511-512 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534-539 (1967) (administrative inspection to ensure compliance with city housing code).

City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000). This Court must determine whether this limited circumstance is

one where the privacy interests of the individual is less important than the government interest at stake. *See Skinner*, 489 U.S. at 624, 109 S.Ct. at 1417. The *Skinner* case is the most comparable case.

The government interest in determining whether a person who causes serious accidents is under the influence of drugs or alcohol for both a punishment and deterrence effect is extremely great. As stated before, intoxicated driving takes a terrible toll on human life. Detecting these individuals after they have caused a serious accident may mean that they are punished in such a way as to protect society from their future actions, and, potentially, their severe punishment will, hopefully, deter others from choosing to drive while intoxicated. A warrantless seizure of these drivers' blood is just as reasonable as if a warrant had been obtained.

Warrant requirements insure that intrusions are not the random or arbitrary acts of government agents. *Skinner*, 489 U.S. at 621-22, 109 S.Ct. at 1415-16. Warrants assure citizens that the intrusion is authorized by law and it is narrowly limited in objectives and scope. *Id.* at 622, 1416. The justifications supporting blood draws here are narrowly defined and, as established law, are well known to those who chose to travel the public roadways. *Id.* "In light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.*

Moreover, in cases where the person subject to testing is unconscious and there is no other immediate indication of drug use, such as was the case here,

there is no obvious indication that the person is under the influence of drugs other than a violation of traffic laws and a serious bodily injury accident. Thus, the means of detecting intoxicated drivers will be frustrated without the blanket probable cause authorized by the statute.

The facts of *McNeely* are not comparable to the facts of this case, as *McNeely* only dealt with simple arrest for driving under the influence. Here, an officer was faced with an unconscious driver who created a dangerous situation by violating traffic laws and caused a fatality accident. Because the driver was unconscious, no field sobriety tests could be conducted. It was impossible, due to unconsciousness and drug use, for the officer to detect slurred speech, unsteady walking, or even an odor of an alcoholic beverage, which are the normal things that would support probable cause for a search and seizure.

The legislature surely foresaw the impossibility of developing probable cause to believe an unconscious person's blood contains drugs without this legislation. Thus the legislature knew that enforcement efforts would be frustrated.

Limiting an officer's discretion, in effect mandating that an officer must draw blood, ensures that the acts are not random and arbitrary. The officer must 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. 47 O.S.2011, § 10-104(B); *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").

Our law, therefore, constitutes a valid exception to the Fourth Amendment's requirement for a warrant. The resolution of this appeal renders the State's proposition three moot.

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 GLENN M. JONES, DISTRICT JUDGE

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AND AT THE TRIAL COURT

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OPINION BY: LEWIS, J.

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

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTING

I dissent to reversing the trial court's ruling suppressing the evidence of the blood draw. In *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct.1552, 1563, 185 L.Ed.2d 698 (2013) the U.S. Supreme Court ruled that "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. *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. Therefore, the determination of whether 47 O.S.2011, § 10-104(B) has been applied in a constitutionally sound manner must be made on a case by case basis. As I stated in my separate writing to *Cripps v. State*, 2016 OK CR 14, ___ P.3d ___, "[r]equiring 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." *Id.*, (Lumpkin, V.P.J. Concurring in Results, ¶ 10).

In *Cripps*, the decision to draw the defendant's blood was supported by exigent circumstances; these being that he was unconscious and scheduled to go into surgery where evidence could be lost and the officer did not have time to secure a warrant. However, no such exigent circumstances are present in this case. The officer arrived at the accident scene to find Appellee unconscious and unresponsive. She later testified that she had no reason to believe that Appell was under the influence of alcohol or drugs.

The causes of vehicular accidents are many and varied, not the least of which are drivers under the influence of alcohol or other drugs. However, to permit a nonconsensual, warrantless blood draw from any driver of a vehicle involved in an accident resulting in death or great bodily injury without some exigent circumstances or evidence that the driver was under the influence or that alcohol was leaving the suspect's blood stream violates the Fourth Amendment. We know a search warrant is required for the investigation of a residence where a homicide occurred absent some indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant and where a warrant could be easily and conveniently obtained. *See Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Therefore, a search warrant should be required to draw blood - "an invasion of bodily integrity implicating a person's most personal and deep-rooted expectations of privacy" *McNeely*, 133 S.Ct. at 1558 (internal quotation omitted), in a vehicular accident resulting in death or great bodily injury. In the present case, the facts do not support a finding of exigent circumstances. Therefore the warrantless, nonconsensual blood draw was not reasonable.

As I stated in my separate writing in *Cripps*, we cannot foresee what the U.S. Supreme Court will eventually decide is a sufficiently narrowed statute which would be reasonable and allow a nonconsensual blood draw. Because we do not have that crystal ball, we must continue to follow the case by case method of determining whether the facts presented justify a reasonable search under *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908

(1966). As we set out in *State v. Shepherd*, 1992 OK CR 69, ¶ 6, 840 P.2d 644, 646, our statutes on when police officers may obtain a blood sample are not unconstitutional on their face and can be applied in a constitutional manner if we analyze the facts in each case to determine the reasonableness of the blood draw under the totality of the facts and evidence. While we might hope the narrow language of our statutes is sufficient on its face, we cannot with any certainty make that leap at this time. Therefore, I find the trial court did not abuse its discretion in suppressing evidence of the warrantless, nonconsensual blood draw in this case.

JOHNSON, JUDGE, CONCURRING IN RESULT:

I find *Cripps v. State,* 2016 OK CR 14, ___P.3d___, governs the decision to reverse the district court's order sustaining Wright's motion to suppress the nonconsensual blood draw evidence. Under the totality of the circumstances, the exigent circumstances present in this case justified the nonconsensual blood draw under 47 O.S.2011, § 10-104(B).

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

A warrantless compulsory blood draw is unreasonable and therefore forbidden under the Fourth Amendment unless supported by both probable cause and exigent circumstances. *See Missouri v. McNeely*, __U.S.__, 133 S. Ct. 1552, 1561, 1563, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); *Winston v. Lee*, 470 U.S. 753, 759, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 768, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *Loman v. State*, 1991 OK CR 24, ¶ 20, 806 P.2d 663, 667; *Marshall v. Columbia Lea Regional Hosp.*, 474 F.3d 733, 741 (10th Cir. 2007).

In the present case, the State shows neither. However, as explained below, I find that the good faith exception applies and the blood evidence in this case should not have been suppressed. *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). I therefore concur in the decision to reverse the trial court's ruling which suppressed the evidence in this case but write separately to express my fundamental disagreement with the majority's approach to these types of cases.

First, I dissent to the majority's continued disregard 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). As discussed in my special writings both in *Cripps v. State*, 2016 OK CR 14, __P.3d__ (Hudson, J., Concurring in Part/Dissenting in Part) and *Cudjo v. State*, No. S-2015-25, slip op. (Okl.Cr. Aug. 5, 2016) (Hudson, J., Concurring in Part/Dissenting in Part) (unpublished), police are required to obtain a search

warrant before performing a forced blood draw notwithstanding § 10-104(B)'s *per se* rule unless justified by the exigencies of the circumstances. Here, the totality of circumstances fails to show exigent circumstances justifying the officers' failure to obtain a warrant prior to drawing Appellee's blood at the hospital. The officers therefore violated the Fourth Amendment by failing to obtain a search warrant for the forced blood draw in this case.

The majority's analysis is flawed for a second reason—this one even more fundamental. The existence of probable cause is a necessary prerequisite to making a warrantless blood draw of the type at issue here. Translated to the facts of this case, that means investigators needed probable cause to believe that a blood test would provide evidence showing Appellee was driving under the influence of alcohol or drugs when he caused the fatality accident. The officers in this case, however, testified they had neither reasonable suspicion nor probable cause to believe Appellee was under the influence of alcohol or drugs at any point prior to the blood draw. Instead, the officers relied *solely* upon § 10-104(B)'s mandate that blood shall be drawn from each and every person who 1) has violated a traffic law and 2) caused an accident involving death or great bodily injury to any person.

Section 10-104(B) provides that "[t]he traffic offense violation shall constitute probable cause" to support a forced blood draw. However, the officers in this case did not have probable cause to believe Appellee had been driving under the influence of alcohol or drugs. Instead, they only had probable cause to believe Appellee had committed the crimes of speeding and

driving without a license and therefore could cite him for those offenses only. As the majority observes, probable cause exists when, considering the totality of the circumstances, there is "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The mere fact that Appellant caused a vehicular accident resulting in death and great bodily injury while speeding and/or driving without a license, without more, does not show a fair probability that a blood test would provide evidence Appellee was under the influence of alcohol or drugs at the time of the crash.

The majority relies exclusively upon statistics from the National Highway Traffic Safety Administration (NHTSA) to justify the statutorily-created probable cause established by § 10-104(B). In this regard, the majority concludes that "there exists a fair probability that drugs or alcohol will be found in a person's blood stream if they are involved in an accident involving death or great bodily injury and they have committed a traffic violation." Majority Op. at 6. The majority's statistics show that 9,878 people were killed in alcohol-impaired driving crashes in 2011—an average of one fatality every 53 minutes. But those numbers don't tell the whole story. Review of the 2011 NHTSA report cited by the majority shows that the 9,878 alcohol-impaired driving fatalities for that year represented only 31% of all traffic fatalities in 2011. A similar NHTSA report for 2014 shows the total number is slightly higher—9,967 people were killed in alcohol-impaired driving crashes in 2014 (again, 31% of all traffic fatalities). However, this report indicates that 154 of the 669 fatality accidents

in Oklahoma in 2014 were alcohol-related. Hence, 23% of all fatality accidents involved alcohol-impaired drivers—far less than the national average. NHTSA, *Traffic Safety Facts: Alcohol-Impaired Driving*, 2014 Data (No. 812 231, Dec. 2015).

At bottom, the statistics relied upon by the majority do not show a fair probability that blood evidence taken from any driver of a vehicle involved in an accident resulting in death or great bodily injury who can also be cited for some non-alcohol related traffic offense will confirm the driver was under the influence of drugs or alcohol. At best, the statistics show *mere suspicion* that evidence of a DUI crime may be obtained through a forced blood draw of a driver under these circumstances. More is required to show probable cause. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949) (probable cause "mean[s] more than bare suspicion[.]"). Worse yet, by relying exclusively upon general statistical evidence of this type to show probable cause to draw blood in the present case and every other similar factual situation, the majority guts the probable cause requirement itself.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). The majority's exclusive reliance upon government statistics to find probable cause in the present case fails this requirement. These statistics tell us nothing about the particular circumstances of *this case*. In the context of domestic assault arrests, the Tenth Circuit has noted that:

> Whether or not probable cause exists is not susceptible to statistical quantification. It represents a judgment call on the part of the officer or officers at the scene taking into account the particular circumstances. Although there are clearly guidelines, much depends on the individual officers' assessment.

Watson v. City of Kansas City, Kan., 857 F.2d 690, 695 (10th Cir. 1988). The majority's approach is inconsistent with the notion that "[t]he rule of probable cause is a practical, nontechnical conception . . . ." *Brinegar*, 338 U.S. at 176. Simply, the majority's exclusive reliance upon government highway safety statistics to establish probable cause in this case "suggest[s] that probable cause might be usefully defined by reference to some one-size-fits-all mathematical equation." *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011). This is contrary to the Supreme Court's pronouncement that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt *and that the belief of guilt must be particularized with respect to the person to be searched or seized*[.]" *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003) (internal quotation omitted) (emphasis added).

The majority compounds its faulty probable cause analysis by invoking decisions from the Supreme Court upholding administrative and regulatory searches in a variety of contexts involving special needs beyond the normal need for law enforcement. Majority Op. at 7-8 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (and cases cited therein)). Those cases, however, do not govern the case at hand. The

probable cause rule established in § 10-104(B) has as its primary purpose uncovering evidence of ordinary criminal wrongdoing. The present case is not one where "special needs, beyond the normal need for law enforcement[,]" *Chandler*, 520 U.S. at 313 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)), can be invoked to create an exception to justify what amounts to a suspicionless search of Appellee's blood for purposes of ordinary criminal investigation. *Cf. City of Indianapolis*, 531 U.S. at 41-42 ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."); *Chandler*, 520 U.S. at 313-14 ("When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."); *Skinner*, 489 U.S. at 620-21 ("The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'") (quoting 49 CFR § 219.1(a) (1987)). Hence, the majority wrongly invokes here Supreme Court decisions upholding random school drug testing of student athletes; drug testing of Customs Service employees; drug and alcohol testing of railroad employees involved in train accidents; and municipal inspections of private property to ensure local code compliance.

Despite these fundamental flaws in the majority's analysis, I find that the good faith exception applies to the officers' actions in this case. Thus, the trial court abused its discretion in suppressing the evidence. The officers' actions in this case were reasonably based on their training and the law as known to them at the time of the crash. Eleven years prior to the crash in this case this Court upheld § 10-104(B) against a Fourth Amendment challenge in *Guest v. State*, 2002 OK CR 5, 42 P.3d 289. Just four months prior to the crash in this matter, this Court handed down *Bemo* wherein we reinforced our holding in *Guest*. *Bemo v. State*, 2013 OK CR 4, ¶ 5, 298 P.3d 1190, 1191 (blood was properly withdrawn under the provisions of § 10–104(B) as Appellant was the driver of a vehicle involved in a fatality accident and he could have been cited for a traffic offense at the scene). A month later on April 17, 2013, *McNeely* was handed down—a mere three (3) months prior to this incident. From the time *McNeely* was decided, over three years passed before this Court published its first, and at this point only, opinion addressing the impact of *McNeely* on § 10-104(B. *See Cripps v. State*, 2016 OK CR 14, ___ P.3d ___ (decided on June 30, 2016).

In the three months between *McNeely* and the crash in this case, it is unreasonable to expect the investigators here not only to have been aware of the *McNeely* decision, but to have had the opportunity to receive education and training on the potential legal ramifications of *McNeely* in relation to § 10-104(B). That is especially so considering it took this Court three years before we addressed this issue—one which has proven to be divisive and

controversial. *See, e.g., Cripps, supra.* Under the circumstances presented in this case, I find law enforcement acted in objectively reasonable reliance on settled law from this Court in drawing Appellee's blood without a warrant. 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, 180 L. Ed. 2d 285 (2011).[1]

[1]As I cautioned in *Cudjo*, law enforcement must be attentive to the fact that application of the good-faith exception in cases similar to this one will likely cease to be appropriate at some point in the future. *See Birchfield v. North Dakota*, __U.S.__, 136 S. Ct. 2160, 2184-85, __L. Ed. 2d__ (U.S. Jun. 23, 2016) ("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."); *Cripps*, 2016 OK CR 14, ¶ 11 n. 2 (Hudson Concurring in Part/Dissenting in Part).