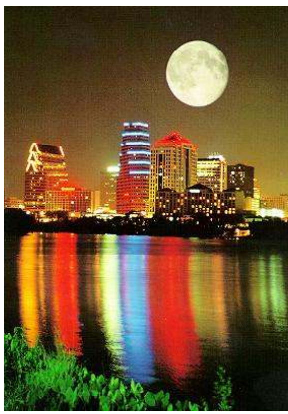
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G&S Vol. 22, No. 24 - June 16, 2014

Case Name: Kenneth Lee Douds v. The State of Texas

- OFFENSE: Driving While Intoxicated
- COUNTY: Brazoria
- C/A CASE No. 14-12-0642-CR
- DATE OF OPINION: June 5, 2014
- DISPOSITION: Conviction Reversed OPINION: Busby, J.
- TRIAL COURT: CCL 1 & Probate Ct 1;
- LAWYERS: Charles Adams (Defense); Jeri Yenne (State)

Ed Note: (Procedural History) The Court of Appeals originally affirmed this conviction last October (see G&S, Vol. 21, No. 42; 10/21/2013). This the en banc opinion on rehearing.

> (Background Facts) On May 16, 2010, Officer Andre Tran of the Pearland Police Department responded to a call regarding a car accident that had been reported at 2:33 a.m. Two cars were involved in the accident, and the occupants of both cars were friends. Appellant and his wife were in one car, and appellant was driving when he failed to stop and struck the other car from behind. Officer Timothy Niemeyer and Pearland Emergency Medical Services (EMS) were already at the scene when Tran arrived at 2:36 a.m. and began investigating the crash. Niemeyer had called Pearland EMS to address injuries at the scene. Appellant's wife complained of chest and rib pain and said she could not move her right arm, but she refused to be taken to the hospital by Pearland EMS. Tran suggested to the driver of the other car that appellant's wife needed to be checked out and possibly have some X-rays taken. The driver replied "we're taking her," which Tran testified he understood to mean she would be taking appellant's wife to a hospital or emergency center. After conducting field sobriety tests, which reinforced his initial suspicion that appellant was intoxicated, Officer Tran placed appellant under arrest.

Ed Note: On rehearing, the State argued that Appellant's Fourth Amendment challenges were not preserved. The Court of Appeals, however, disagreed. It held that, because Appellant had raised his claim prior to trial, "It then became the State's burden to argue and prove an exception to the warrant requirement, not -- as the State argues -- Appellant's burden to address and negate the exigent circumstances exception."

G&S 31.111 Search & Seizure / Warrantless Searches / Mandatory Blood Draws: At the police department, Tran read a statutory warning to appellant regarding his ability to refuse to supply a breath sample voluntarily. The DWI Specimen Report reflects that Tran delivered the warning at 3:45 a.m. When Tran requested a breath sample, Appellant refused to consent. At that point, "based on the total circumstances" and his belief that Appellant's wife was hurt and needed

medical attention, Tran took Appellant to a local medical center, Texas Emergency Care, for a mandatory blood draw. Tran testified his decision to obtain a blood draw was based on his reasonable belief that section 724.012 of the Transportation Code had been satisfied and allowed him to do so. On appeal, Appellant contends the trial court should have granted his motion to suppress because Tran did not have statutory authority to require the taking of a blood specimen.

Holding: Although there was evidence that Appellant's wife and her friends intended to go at least initially to Santa Fe, when Officer Tran stated that appellant's wife was "not OK" and should get checked out and possibly have X-rays taken, the driver of the other vehicle replied "we're taking her." Officer Tran testified he understood this statement to mean the friends would be taking appellant's wife to a hospital or emergency center. This evidence supports a determination that Officer Tran reasonably believed appellant's wife had been transported to a medical facility to treat her injuries. *** Therefore, the trial court could conclude that section 724.012 required Officer Tran to obtain a breath or blood sample even though appellant refused to submit a sample voluntarily.

Sidebars: (David A. Schulman) This holding is directly in opposition to the holdings of the San Antonio Court in Weems v. State (see G&S, Vol. 22, No. 20; 05/12/2014), and the Corpus Christi Court in State v. Villarreal (see G&S, Vol. 22, No. 5; 02/03/2014), that while the mandatory blood draw statute "required the officer to obtain a breath or blood sample, it did not require the officer to do so without first obtaining a warrant." Another issue which the Court of Criminal Appeals might have to determine.

G&S 31.016 Search & Seizure / Warrantless Searches / Good Faith Exception: On rehearing, the State offers additional legal arguments it says it would have made had it known about McNeely. In particular, the State argues that Appellant's motion to suppress was properly denied because Tran acted in good-faith reliance on (1) existing Texas precedent interpreting Schmerber, as well as (2) the Texas statute requiring a blood draw.

Holding: The good-faith reliance cases on which the State's argument rests are federal cases that do not apply in Texas. Federal courts have a judge-made rule that excludes evidence obtained in violation of the Fourth Amendment, and its purpose is to deter such violations. *** In Texas, by contrast, the exclusionary rule is statutory. *** The Court of Criminal Appeals has held that exceptions to the federal exclusionary rule only apply to the Texas statutory exclusionary rule if they are consistent with the plain language of the statute. Here, the statutory exclusionary rule already has an exception for "a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." *** Because no warrant was issued in this case, this good-faith exception does not apply. *** The Court of Criminal Appeals has previously rejected an effort to broaden the good-faith exception using federal precedent, and it has refused to adopt federal exceptions inconsistent with the text of our statutory exclusionary rule. *** Based on these precedents, we hold the good-faith exceptions of Davis v. United States, 09-11328 (U.S. 06/16/2011), and Illinois v. Krull, 480 U.S. 340 (1987), do not apply to the Texas exclusionary rule.

G&S 31.02 Search & Seizure / Warrantless Searches / Exigent Circumstances: Appellant argues that (1) section 724.012 is unconstitutional when employed to require a blood draw for a misdemeanor offense; and (2) the warrantless blood draw violated the Fourth Amendment because there were no exigent circumstances here.

Holding: Because the evidence in this case does not mention a warrant at all, there is nothing whatsoever in the record regarding what Officer Tran knew about the time needed to obtain a warrant. Thus, there are no facts to support a reasonable conclusion that it was impractical for the police to obtain a warrant between 2:36 a.m. -- when at least two officers and EMS were on the scene of the accident—and 4:45 a.m. when appellant's blood was drawn. *** Nor is there evidence that any "further delay in order to secure a warrant" beyond 4:45 a.m. "would have threatened the destruction of evidence" that "is lost gradually and relatively predictably." *** In sum, applying the legal standard of exigent circumstances found in McNeely and Schmerber, and implying in

favor of the trial court's ruling all findings of historical fact supported by the record, we hold these facts do not support an objectively reasonable conclusion that obtaining a warrant was impractical. Accordingly, the State has not carried its burden to prove exigent circumstances that justify an exception to the Fourth Amendment's warrant requirement.

Concurring / Dissenting Opinions: Justice McCally concurred. He believes that the arresting officer's statement about his belief that Appellant's wife was hurt and needed medical attention "supplies no facts from which I am able to objectively glean exigent circumstances." Justice Boyce filed a dissenting opinion, as she believes the record demonstrates exigent circumstances.