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TIBA's Case of the Week

Case Name: Michael Anthony McGruder v. The State of Texas

- OFFENSE: DWI
- COUNTY: Brazos
- C/A CASE No. 10-13-00109-CR
- DATE OF OPINION: August 14, 2014
- DISPOSITION: Conviction Affirmed OPINION: Gray, CJ.
- TRIAL COURT: 85th D/C; Hon. J.D. Langley
- LAWYERS: Mary Jo Holloway (Defense); Bobby Mims, Gena Bunn, Angela Moore & David Schulman)(Amicus Curiae); Douglas Howell & Jarvis Parsons (State)

(Background Facts) Appellant was stopped by a College Station police officer because Appellant's pickup matched the description of a suspicious vehicle in the area. After Appellant got out of his pickup, the officer who initially stopped Appellant and another officer who had arrived at the scene noted that, even from a distance, Appellant smelled of alcohol. Appellant responded to questioning by the officers and gave "nonsensical" and conflicting answers. He also refused to perform any field sobriety exercises. Appellant was arrested and refused to submit to a breath or blood test.

31.111 Search & Seizure / Warrantless Searches / Mandatory Blood Draws: After Appellant's pickup was inventoried and towed, Appellant was taken to the police department where an officer began to prepare a search warrant to obtain a sample of Appellant's blood. During the process of preparing the warrant, the officer learned that Appellant had two prior DWI convictions. At that time, the officer discontinued preparing the warrant and began working on the "mandatory blood draw" paperwork. The officer testified that a blood draw becomes mandatory when a DWI suspect has two prior DWI convictions. Appellant was then taken to the hospital and his blood was drawn. At his trial in 2013, Appellant objected to the State's introduction of the blood draw kit and the blood draw vial on the basis that Transportation Code section 724.012 , the section which contains the mandatory blood draw provision, is unconstitutional in that it allows for the seizure of evidence without a warrant. The trial court overruled his objection. On appeal, Appellant contends in one issue that, absent exigent circumstances or consent, section 724.012(b)(3)(B) violates the Texas and United States Constitutional provisions against unreasonable searches and seizures. Relying on the recent opinion from the United States Supreme Court in Missouri v. McNeely, No. 11-1425 (see , Vol. 21, No. 16; 04/22/2013), Appellant argues that because section 724.012(b)(3)(B) does not

require any exigent circumstance for a warrantless blood draw, it impermissibly narrows the constitutional right to be free from unreasonable searches and seizures and should be declared unconstitutional.

Holding: We construe [Appellant]'s argument to be a facial challenge to the constitutionality of that portion of the statute. *** To prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances. *** Section 724.012(b) merely requires an officer to take a blood or breath specimen in certain circumstances. What makes the statute mandatory is that the officer has no discretion in those situations to obtain either a blood or a breath specimen. It does not mandate, nor does it purport to authorize, a specimen be taken without compliance with the Fourth Amendment. *** We agree with the Houston Court of Appeals when it aptly noted, "We have no reason to fault the constitutionality of the mandatory blood draw statute in this case because it did not require [the officer] to obtain a blood draw without first securing a warrant. It is the officer's failure to obtain a warrant and the State's failure to prove an exception to the warrant requirement, not the mandatory nature of the blood draw statute, that violate the Fourth Amendment." Douds v. State, _____ S.W.3d _____ (Tex.App. - Houston [14th] No. 14-12-00642-CR; June 5, 2014)(see ꝟ, Vol. 22, No. 24; 06/16/2014). *** [Appellant] has failed to point us to anything else that would show the statute to be unconstitutional. Thus, [Appellant]'s facial challenge to the statute must fail, and we presume the statute to be constitutionally valid.

Concurring / Dissenting Opinions: Justice Davis dissented, pointing out that "at least six of our sister courts" have held that a warrantless, nonconsensual blood draw under Transportation Code section 724.012(b), absent exigent circumstances, violates the Fourth Amendment. He stated that he was unable to agree with the majority that the facial challenge to section 724.012(b) failed, "because of the statute's silence on warrants and the indisputable practice of warrantless blood draws based solely on the silent statute, and based on the Texas progeny of McNeely that border on a finding of facial unconstitutionality."

Sidebars: (John G. Jasuta) Like Douds , this holding is directly in opposition to the holdings of the several opinions from other Courts of Appeals. The issue is, thus, ripe for review by the Court of Criminal Appeals. The State filed its PDR in Aviles v. State; No. 04-11-00877 (see ꝟ, Vol. 22, No. 32; 08/11/2014), only two days after the Court of Appeals' opinion, demonstrating their perception of urgency. Whether the CCA will resolve the issue of whether a warrant is required in State v. Baker (PD-1592-13; review granted January 29, 2014), or one of the other mandatory blood draw cases remains to be seen, but, as 5th Circuit senior judge Pete Benavides used to say when he was on the CCA, the issue has "percolated" long enough.