2013 WL 2186987 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-dade County

State of Florida, Plaintiff,
v.
Juan AGUILAR, Defendant.

No. F08-23160.
May 16, 2013.

*1 Section 15

Omnibus Order Denying Defendant's Motions to Suppress

Miguel M. De La O, Judge.

THIS CAUSE came before this Court on Defendant, Juan Aguilar's ("Aguilar"), Motions to Suppress (1) All Evidence Gained by Law Enforcement in Violation of HIPAA Confidentiality Protections ("HIPAA Motion"); (2) Blood Results for Lack of Probable Cause; and (3) Blood Draw and Blood Test Results Due to Lack of Warrant (collectively referred to as the "Motions"). The Court has reviewed the Motions and depositions submitted to it by the parties, heard testimony of witnesses and argument of counsel, and conducted its own research.

I. INTRODUCTION

The State alleges that at 4:22 am on Sunday, December 9, 2007, Aguilar lost control of his black Ford Mustang, striking multiple cars and persons. One person received minor injuries, two suffered serious bodily injuries, and one died almost instantly. Fire rescue transported Aguilar to Ryder Trauma Center with serious injuries, including a collapsed lung. Medical personnel at Ryder Trauma Center induced Aguilar into a coma and intubated him shortly after his arrival. Soon thereafter, Trooper Christopher Adkinson ("Trooper Adkinson") directed a nurse to obtain a nonconsensual blood sample from Aguilar. The blood sample showed that at 5:42 am Aguilar had a blood alcohol level of 0.112.

Aguilar has filed three motions with one goal: to suppress the introduction of this blood alcohol result to the jury at trial. For the reasons set forth in this Order, the Motions are denied.

II. MOTION TO SUPPRESS ALL EVIDENCE GAINED BY LAW ENFORCEMENT IN VIOLATION OF HIPAA CONFIDENTIALITY PROTECTIONS.

Aguilar asserts that Trooper Adkinson asked a hospital employee where Aguilar was located, in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Pub.L. 104-191, 110 Stat. 1936. Regardless of whether the question and answer violated HIPAA, the Trooper's question - and the hospital's answer - did not violate the Fourth Amendment.

> The Court does not believe that a police officer asking a third-party questions and receiving voluntary answers is a search under the Fourth Amendment. To hold otherwise would make almost all routine police work and investigation subject to the Fourth Amendment's limitations. The Court does not believe that police questioning and voluntary responses constitute a search to which the Fourth Amendment applies.

Chavez v. Martinez, 2008 WL 6045509 (D.N.M. 2008).

Aguilar also asserts it was a violation of HIPAA for Trooper Adkinson to be present in Aguilar's treatment room at the hospital. Aguilar cites no authority for this assertion. A plain reading of the definition of "health information" in HIPAA does not support this argument. *See* 45 C.F.R. § 160.103.

"HIPAA was passed to ensure an individual's right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings." *United States v. Zamora*, 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006). Even if this Court found a violation of HIPAA, it could not afford Aguilar the remedy he seeks: suppression of the blood draw and its results.

***2** First, Trooper Adkinson and the State are not subject to penalties under HIPAA.

> Throughout this proceeding, the defendant has characterized the Government's action of serving the improper subpoena on the hospital in terms of the Government "violating" HIPAA. HIPAA prohibits a "covered entity" from receiving and using protected health information. 45 CFR § 164.502(a). Law enforcement agencies, including the office of the prosecuting attorney, are not covered entities under HIPAA. *United States v. Abdallah*, 2009 WL 1918401 at *6, No. H-07-155 (S.D. Texas July 1, 2009). In this case [the hospital] is a "covered entity" and it, arguably, violated HIPAA when, as a "covered entity," it provided the defendant's records to the Government in response to the improper subpoena.... HIPAA provides for criminal and civil penalties against entities that fail to comply with its provisions. 42 USC §§ 1320d-5, 1320d-6. The Court does not find that the Government violated HIPAA because it served an improper subpoena on the hospital. The Government's conduct is not governed by the provisions of HIPAA.

United States v. Elliott, 676 F. Supp. 2d 431, 439-40 (D. Md. 2009); *accord State v. Straehler*, 745 N.W.2d 431, 435 (Wisc. Ct. App. 2007) ("HIPAA applies to 'covered entities,' but police officers are not listed as one of the covered entities. Therefore HIPAA does not control the conduct of law enforcement officers.").

Second, Aguilar cites no authority for the proposition that a violation of HIPAA should result in the suppression of evidence. On the other hand, the First DCA has expressly held that suppression is not a remedy for a violation of HIPAA.

> Even where evidence is disclosed by a covered entity in violation of HIPAA standards, suppression of the records is not provided for by HIPAA and is thus not a proper remedy. Fines and imprisonment, not suppression of evidence, are the remedies expressed in the Act for violations of the disclosure standards by a covered entity. 42 U.S.C. §§ 1320d-5, 1320d-6. Exclusion of evidence is proper only where the statute violated provides for such exclusion, or where a constitutional violation has occurred. *See generally Jenkins v. State*, 978 So. 2d 116 (Fla. 2008).

State v. Carter, 23 So. 3d 798, 801 (Fla. 1st DCA 2009) (citations omitted).

Besides the fact that *Carter* is binding on this Court, [1] the First DCA is not alone in its view. Every authority this Court has found holds that suppression is not a remedy available for violations of HIPAA. *See State v. Yenzer*, 713, 195 P.3d 271, 273 (Kan. Ct. App. 2008) (even if dental assistant violated HIPAA by disclosing to police defendant's next appointment so police could make arrest on outstanding warrant, defendant did not make "a constitutional claim warranting suppression. Nor has she presented any authority to support her assertion that suppression is a proper remedy for a HIPAA violation."); *State v. Straehler*, 745 N.W.2d 431, 435 (Wis. Ct. App. 2007) ("HIPAA does not provide for suppression of the evidence as a remedy for a HIPAA violation. Suppression is warranted only when evidence has been obtained in violation of a defendant's constitutional rights or if a statute specifically provides for suppression as a remedy."); *Elder-Evins v. Casey*, 88 Fed. R. Evid. Serv. 1132 (N.D.

Cal. 2012) ("HIPAA's general penalty provision, 42 U.S.C. § 1320d-5(a)(1), does not include a suppression remedy.... As other courts have noted, HIPAA does not have a suppression remedy. And where this is the case, it is inappropriate for the court to exclude evidence on this basis."); *State v. Mubita*, 188 P.3d 867, 878-79 (*Id.* 2008) ("even if the State had violated HIPAA Standards, suppression of the evidence is not the proper remedy for a HIPAA violation. HIPAA expressly provides for monetary fines in the event of a violation. Thus, the proper remedy for a HIPAA violation is a monetary fine, consistent with the express provisions of the statute. The district court did not err when it denied Mubita's motion to suppress the documents based on the alleged HIPAA violation."), *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 265 P.3d 502 (*Id.* 2011); *State v. Eichhorst*, 879 N.E. 2d 1144, 1154 (Ind. Ct. App. 2008) ("Eichhorst cites no authority for the proposition that evidence given in violation of HIPAA should be suppressed or excluded in a criminal setting. HIPAA does not contain such a remedy.").

***3** This Court finds that (a) Trooper Adkinson [2] did not violate HIPAA by going to the Ryder Trauma Center, inquiring about Aguilar's whereabouts, and/or stepping into the treatment room to conducting a further investigation into whether Aguilar was under the influence of alcohol; and (b) even if these actions were a violation of HIPAA by Trooper Adkinson, HIPAA does not provided for suppression of the evidence obtained as a remedy.

III. MOTION TO SUPPRESS BLOOD DRAW AND BLOOD TEST RESULTS DUE TO LACK OF WARRANT.

Aguilar argues that the blood draw in this case was conducted in violation of the Fourth Amendment. The U.S. Supreme Court addressed the legality of warrantless nonconsensual blood draws for DUI investigative purposes in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the Court noted that:

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test.

Id. at 770. The Court concluded the officer was not required to obtain a warrant.

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' *Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 881, 883, 11 L. Ed. 2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was appropriate incident to petitioner's arrest.

Id. at 770-71. In *Schmerber*, as here, the blood draw occurred within two hours of the accident. *Id.* at 796.

In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Court recently addressed the limits of *Schmerber*. Over the years, some courts have interpreted *Schmerber* as authorizing an exception to the warrant requirement in all cases of suspected DUI because natural metabolization of alcohol in the bloodstream constitutes a *per se* exigent circumstance. [3] As a result, as happened in *McNeely*, some law enforcement officers were obtaining nonconsensual blood draws in all cases where they suspected a driver of driving under the influence. *See, e.g.*, *State v. Bohling*, 494 N.W.2d 399 (1993), *abrogated by McNeely*. The Court held that there is no such blanket exception to the warrant requirement. *McNeely*, at 1556 ("exigency in this context must be determined case by case based on the totality of the circumstances").

***4** The Court did not change its interpretation of the Fourth Amendment with regards to nonconsensual blood draws in *McNeely*. Rather, it clarified that *Schmerber* did not recognize a *per se* exigent circumstance exception to the warrant requirement based on the natural metabolization of alcohol in the bloodstream. *McNeely*, at 1559 ("Our decision in Schmerber applied this totality of the circumstances approach."). *McNeely* reaffirms that courts should employ a totality of the circumstances test to determine if an officer does not have sufficient time to obtain a warrant, which - as under *Schmerber* - means the exigent circumstances exist (because of the natural metabolization of alcohol) to justify an exception to the warrant requirement. The *Schmerber* decision was also grounded in the fact that the officer did not have sufficient time to obtain a warrant. *See Schmerber*, at 770-71 ("in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."). Nevertheless, some courts interpreted *Schmerber* as suggesting that the metabolization of alcohol in the bloodstream constitutes a *per se* (or single-factor) exigent circumstance justifying a warrantless nonconsensual blood draw. *Schmerber* never stood for this principle, a fact made clear by *Schmerber* - and now *McNeely*. *See Schmerber*, at 772 ("We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record.").

McNeely holds that one of the factors for courts to consider, when making a totality of the circumstances determination if exigent circumstances were present to justify a warrantless nonconsensual blood draw, is if it was reasonably possible for the police to obtain a warrant prior to the forced blood draw.

> 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, at 1561. Here, the State introduced evidence that it would have taken *at least* two hours, possibly more, to obtain a warrant. The State introduced evidence that Trooper Adkinson had to wait for a Traffic Homicide Investigator to draft the warrant; locate and wake the Assistant State Attorney on duty to review and approve the warrant; locate and wake the judge on warrant duty; travel to the Judge's residence (who may reside anywhere in Miami-Dade County);[4] wait for the judge to review and approve the warrant; and then travel to the Ryder Trauma Center to serve the warrant and obtain the blood sample. *See id.* at 1568 (factors "such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search."). Such a lapse of time is a factor which militates in favor of a finding of exigent circumstances because of the natural metabolization of alcohol in the bloodstream.

While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.

Id. at 1563.[5]

The circumstances of this case fall squarely within the "special facts" parameters of *Schmerber*. *See Schmerber*, at 771. Under a totality of the circumstances test, as required by *Schmerber* and *McNeely*, this Court finds that sufficient exigent circumstances existed to justify an exception to the warrant requirement. Consequently, the blood draw conducted by the nurse at Ryder Trauma Center, at the direction of Trooper Adkinson, did not violate the Fourth Amendment.

IV. MOTION TO SUPPRESS BLOOD RESULTS FOR LACK OF PROBABLE CAUSE.

***5** Although the blood draw did not violate the Fourth Amendment, it does not end the inquiry because Florida law imposes higher requirements before an officer can obtain a nonconsensual blood sample.

[I]t is the established law of this state that Florida's implied consent statutes impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and blood samples from a defendant in a DUI case than those required by the Fourth Amendment. The Florida Supreme Court in *Sambrine v. State*, 386 So. 2d 546, 548 (Fla. 1980), has so stated: "What is at issue here ... is ... the right of the state of Florida to extend to its citizenry protections against unreasonable searches and seizures greater than those afforded by the federal constitution [through the Fourth Amendment]. This it has done through the enactment of section 322.261, Florida Statues (1975) [now sections 316.1932, 316.1933, Florida Statutes (1991)]." As further stated by the Fifth District Court of Appeal in *State v. McInnis*, 581 So. 2d 1370, 1374 (Fla. 5th DCA), *cause dismissed*, 584 So. 2d 998 (Fla. 1991)," One public policy reason for enacting such a statutory scheme [Florida's implied consent statutes] is the legislature's decision to extend to some motorists driving in Florida greater protection and rights of privacy than are provided by the state or federal constitutions."

State v. Slaney, 653 So. 2d 422, 425 (Fla. 3d DCA 1995) (citations omitted). For example, under Florida's implied consent law, the blood draw at issue in *McNeely* was unlawful - regardless of any Fourth Amendment analysis - because the defendant did not "cause[ ] the death or serious bodily injury of a human being." 316.1933(1)(a), Fla. Stat.

The key requirement of section 316.1933 is probable cause; conversely, the gravamen of Aguilar's argument is a lack of probable cause. Aguilar does not argue that the State failed to comply with any other portion of section 316.1933.

The State claims Trooper Adkinson had probable cause for ordering a nonconsensual [6] blood draw because he observed Aguilar immediately after the accident sitting behind the wheel of his car, which had just caused serious injury to three pedestrians (killing one). While Aguilar sat behind the steering wheel, Trooper Adkinson smelled the odor of alcoholic beverages on Aguilar's breath, observed his eyes were red and watery, his face flushed, and his speech slurred and incoherent. Approximately an hour and a half later, Trooper Adkinson again smelled alcoholic beverages emanating from around Aguilar's mouth while at Ryder Trauma Center.

Aguilar raises questions as to the probativeness of each factor identified by Trooper Adkinson. Although some of the questions he raises are substantial, they are ultimately arguments for trial. The observations made by Trooper Adkinson are sufficient to establish that he had probable cause to order a nonconsensual blood sample from Aguilar. [7] We need look no further than *Schmerber* to conclude that these factors constitute sufficient probable cause.

***6** In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor. The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, sort of a glassy appearance.' The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness.

Schmerber v. California, 384 U.S. 757, 768-69 (1966)

DONE and ORDERED in Miami-Dade County, Florida this 16th day of May, 2013.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

2 This Court finds that Ryder Trauma Center did not violate HIPAA either because it did not disclose "health information" within the meaning of HIPAA to Trooper Adkinson. In fact, Florida law expressly exempts health care providers from "any provision of law pertaining to the confidentiality of hospital records or other medical records." Fla. Stat. § 316.1933(2)(a)(1) & (4) (2013). Whether HIPAA preempts these Florida statutory provisions is beyond the scope of this Order, and unnecessary to resolve the issues presented by the HIPAA Motion.

3 The Court "granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013).

4 The Court takes judicial notice that, according to the United States Census Bureau, Miami-Dade County is spans a geographic area of 1897.72 square miles. *http://quickfacts.census.gov/qfd/states/12/12086.html.*

5 The State argued that a further exigent circumstance existed because Aguilar was about to undergo surgery for his injuries from the traffic accident, which may have involved the injection of substances which could alter his blood alcohol readings. Although this claim makes intuitive sense, the State introduced no evidence to support this assertion.

6 Trooper Adkinson could not ask for a consensual blood sample because Aguilar was incoherent at the accident scene and intubated and unconscious at the hospital. Regardless, section 316.1933 does not contain an exception to the probable cause requirement if the suspect is unable to consent.

7 Ironically, even Aguilar's expert on traffic homicide investigations, John Buchanan, testified during trial the Trooper Adkinson had sufficient probable cause to order a blood draw at the scene.

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