No. 14-24-00507-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT

JAMES NEWTON LEGGETT, II
APPELLANT

V.

THE STATE OF TEXAS
APPELLEE

Appeal from Cause Number 23CCR0027
In the County Court at Law
of Chambers County, Texas

DEFENDANT'S APPELLATE BRIEF

Oral Argument Requested

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS

COMES NOW James Newton Leggett, II by and through his attorney of record Shannon T. Nash and files this, his Appellate brief in this cause.

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A) (TRAP 38.2(a)(1)(A)), Appellants Supplement the identity of Counsel:

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Appellee	State of Texas

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STATEMENT OF THE CASE

This is an interlocutory appeal of an Order denying a Motion to Suppress improperly gathered evidence in a Driving While Intoxicated case in the Chambers County, Texas County Court at law. The County Court at Law Judge granted permission to the Appellant to file and pursue this appeal. The Appellant wants the Court of Appeals to Reverse the Trial Court's Denial of his Motion to Suppress.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request Oral Argument because it would be helpful in explaining and clarifying the different and complicated issues governing this case. The Appellant and his attorney would like the video of the blood draw and the failure to follow the established protocols to be presented during the oral argument. The video will support that a detailed and concise explanation of what was done in accordance with the protocol and what was NOT done in accordance with that precludes the tainted blood evidence from being legally admitted into evidence. An oral argument will help the Court understand how State failed to properly collect and preserve evidence.

ISSUES PRESENTED

1. Whether the trial court erred in not suppressing improperly collected evidence, i.e. evidence not collected in accordance with the legally required protocols established by law.

2. Whether the trial Court erred in not suppressing evidence that was contaminated by the State Trooper in an alleged sanitary area by handling the samples and tubes with unclean hands, without gloves, an unclean uniform and without wearing a proper facemask.

3. Whether the trial court erred in not suppressing the evidence against all reasonable evidence that the proper and required protocols were not followed in accordance with law and Court of Criminal Appeals precedent.

STATEMENT OF FACTS

On July 4, 2022, Appellant, James Newton Leggett, II was arrested and charged with Driving While Intoxicated (DWI), Second Offense. Following the arrest, the arresting officer obtained a search warrant to retrieve a sample of the Appellant's blood.

A medical technician, Anthony Tamba, at the Omni Point Hospital in Anahuac, Texas, took a sample of the Appellant's blood. Although Mr. Tamba cleaned the draw site, the arresting officer was present and handled the tubes with unwashed hands, no gloves and an end-of-shift uniform in the month of July in Texas.

Mr. Tamba collected two samples in "Gray Top" tubes that were provided to him from a Texas Department of Safety Blood Kit and handed to him by Trooper Rocz. The tubes were not sanitized prior to use by Mr. Tamba.

After collecting the two samples, Mr. Tamba can be seen inverting one of the samples approximately four times and not the minimum of eight times required by the mandatory protocol and against instructions by the

manufacturer. Mr. Tamba did not invert the second sample at all in violation of the mandatory protocol.

Trooper Rocz had just come from the field and did not wear gloves when handling the blood sample tubes and did not wash his hands . RR Vol. at pps. 17:18-25, 18:1-12.

After failing to follow the mandatory collection and preparation protocol, the two samples were mailed to the Texas Department of Public Safety Crime Laboratory in Houston, Texas.

SUMMARY OF THE ARGUMENT

When depriving any citizen of his or her liberty, fining them or suspending or revoking an important privilege, our laws and constitution guarantee that the rights of the accused are completely observed and protected. There cannot be any assumption of guilt. The State must present strict proof beyond a reasonable doubt, and the evidence to be used against the accused must not be tainted or compromised in form or in the way it was secured and processed.

The qualifications alone of a lab technician and a peace officer are not enough when securing and processing evidence. The qualified technician and

peace officer must also closely and accurately follow the mandatory steps, procedures and protocols when gathering blood samples from citizens suspected of DWI. Otherwise, misinformation, disinformation and completely erroneous information can and will be used against the innocent with little or no recourse.

The case against Mr. Leggett is just such a case where the evidence was not gathered in accordance with the law. The law enforcement officer and the Court failed in their respective duties they owed to the accused and to the legal system to ensure our laws and protocols were strictly followed. They were not strictly followed in violation of the rights of the accused.

The law requires that a blood sample must be taken in a sanitary place and requires those handling the samples to also be clean so that incidental handling does not taint and contaminate the samples. It matters not that the facility was deemed to be sanitary if the people handling the samples in the sanitary place are themselves incapable of handling samples without tainting and contaminating the samples.

The law requires that when blood samples are being taken, as evidence of the amount of alcohol in a suspect's blood, or lack thereof, a strict protocol must be followed. Failure to follow the mandatory protocol only leaves us

wondering what the true result would have been if the protocol had indeed been strictly followed. When it comes to the "beyond a reasonable doubt" standard, one cannot be convicted of a crime when there is an overriding question of what the evidence might have been had it been gathered in strict accordance with the law.

The last protection of the rights of the accused is in the hands of the judge and the trier of the facts. In this case, the judge assumed both roles as judge and trier of the facts. As such, the Court was required to properly review the evidence and know how to apply the law to the facts.

When an experienced jurist sees that the mandatory protocol was not followed, that the trustworthiness of the evidence was placed in doubt by contamination, but still rules the evidence admissible, she has failed to follow the law without properly applying the law to the facts. The Trial Court's ruling was not based on the facts and the law, but rather was an outcome-based finding that was predisposed despite clear evidence to the contrary negating that finding. It is, therefore, the duty of the supervisory Court of Appeals to correct the error made by the Trial Court

ARGUMENT

In accordance with Texas Law, a Law Enforcement Officer may order the involuntary taking of a blood sample if the officer has reasonable grounds to believe the person, while intoxicated was operating a motor vehicle in a public place. If the person refuses to submit a blood sample and the person is suspected of being the operator involved in an accident as a result of the offense of being intoxicated while driving, a blood sample may be taken without a warrant. TEX. TRANS. CODE §724.012(a)(1)(a-1)(1),(2),(3). Subject to section (a-1), the officer shall require the taking of a blood sample if the person refuses and the officer reasonably believes that as a direct result of the accident, a person other than the person arrested, has been injured. TEX. TRANS. CODE §724.012(b)(1). In the present case, the blood sample was taken pursuant to a warrant.

If no one has been injured, and the person from whom the specimen has been requested refuses to provide a specimen, a specimen may not be taken by the arresting officer except as provided by section 724.012(a-1) or (b). TEX. TRANS. CODE §724.013.

Before the officer requests a person suspected of DWI to provide a blood specimen, the officer shall inform the person either orally or in writing

that a refusal may be admissible in court and the person may have his license suspended for not less than 180 days. TEX. TRANS. CODE §724.015(a)(1)(2). Once the arresting officer has met the requirements of the law contained in the Transportation Code, the officer may proceed in obtaining a blood specimen from the person suspected of DWI. Regardless, however, of whether the specimen was taken voluntarily or pursuant to a warrant, the specimen must be taken strictly in accordance with Texas Law. See TEX. TRANS. CODE §724.017.

In addition to providing guidance as to when and under what circumstances a specimen may be taken from a DWI suspect, the Texas Legislature has also set standards for the process of as to how the specimen ***must*** be taken. See TEX. TRANS. CODE §724.017 et seq.

The collection of a blood specimen from a person suspected of DWI is a two-step process. (1) First, the arresting officer must prove he had legal authority to take a blood specimen; and (2) the arresting officer must prove that the blood specimen was taken in strict compliance with the recognized medical procedures. TEX. TRANS. CODE §724.017(b). Anything less compromises the sample(s) and eliminates the sample's trustworthiness.

This lack of trustworthiness reduces the results to, at best, a guess. The legal term for the compromised sample(s) is "Inadmissible Evidence."

The blood specimens must be taken according to a protocol developed by the Medical Director that provides the direction to the technician. "Medical Director" means a licensed physician who supervises the provision of emergency medical services by a public or private entity. TEX. TRANS. CODE §724.017(c).

Established Protocols Were not Followed

There is no dispute that the arresting officer followed the law in seeking and demanding a blood specimen from Mr. Leggett. Up to that point, Trooper Rocz had taken the appropriate steps in protecting the civil rights of Mr. Leggett. See RR Vol. I at 9 through 14. Trooper Rocz and the Lab Technician, however, failed to ensure that the specimens were collected in strict accordance with the appropriate, correct, and established medical procedures. It is quite apparent from viewing the specimen collection video, that the Lab Technician was negligent in how the specimens were handled and collected and/or was grossly ignorant of the mandatory protocol set forth in TEX. TRANS. CODE §724.017 and by the National Highway Safety Administration. See RR vol. 1 at 30:1-25 – 37:1-12

It is also quite obvious when viewing the specimen collection video, that Trooper Rocz was himself grossly ignorant of the strict requirements of section 714.017 of the Transportation Code at the time the specimens were collected, or ignored them altogether. Although Trooper Rocz was present during the specimen collections from Mr. Leggett, and was able to observe the collection process, Trooper Rocz clearly did not know what steps were missed, and what steps were ***not*** taken by the technician or failed to correct them. He even goes as far as taking the samples from Tamba before Tamba fulfilled the inversion requirement of the collection protocol. Without knowing or following the correct and accepted specimen collection procedures, Trooper Rocz was unable to ensure the proper protocol was followed and, therefore, he failed to protect the rights of Mr. Leggett.

In March of 2019, the United States Department of Transportation through the National Highway Traffic Safety Administration (NHTSA) established a "Blood Specimen Collection" protocol. It is the same universal protocol used by emergency medical facilities in Texas and throughout the United States. It was intended to help law enforcement agencies with developing and implementing a "Phlebotomy Program" that is consistent and most importantly, ***admissible in court*** and protects both the State and the

rights of the accused. Among other things, NHTSA established a consistent and nationally recognized method/protocol for the collection of blood specimens from people suspected of DWI.

According to the protocol of the NHTSA, when a specimen is collected in the tube, be it glass or plastic, the tube ***shall be*** gently inverted no less than 8 to 10 times. Additional inversions may be necessary to mix the anticoagulant with the blood specimen. In viewing the Leggett/Rocz video, the technician did not invert any of the blood filled tubes even half of the required times and one not at all. That means the blood specimens could not have been mixed sufficiently with the anticoagulation chemicals and preservatives used to prevent a ruined specimen. The specimens were, therefore, compromised and not admissible as evidence.

In addition to not following the mandated NHTSA protocol, the technician did not disinfect the physical area where the blood draw took place. Trooper Rocz himself was not wearing any gloves and was in extreme close proximity to the blood draw and had unclean hands both figuratively and literally. RR Vol. I at pps. 17:18-25, 18:1-12. Trooper Rocz was still in his field uniform and Cowboy Hat. Trooper Rocz was wearing his utility belt, gun,

holster and other tools of his trade. These tools of the trade were not cleaned and disinfected prior to the specimen draw.

Troop Rocz was not covered in a protective gown and any dirt on him and his uniform and equipment was easily transferred to the specimen collection area. As such, the specimens were not collected in a clean and disinfected physical location in accordance with mandatory requirements.

The blood specimens collected were negligently collected and are, therefore, compromised and carry no evidentiary weight. As such, the specimens should have been suppressed by the trial court.

Court's Findings of Fact was Against the Great Weight and Preponderance of the Evidence

Trial Courts are given almost complete deference their findings. The Appellate court's reasoning is that the Judge was in a unique position to rule because she was present during the testimony. However, we live in a time where video and audio records of disputed events are now consistently made and preserved. So too has the world of law enforcement adopted such modern techniques and methods for memorializing events where there is disagreement among the participants as to what actually happened. In the

present case, we have a video of the blood draw so crucial to the outcome of the case. (See Clerk's Record Video)

The video allows for a post event review of the call by the Trial Court. This "instant replay" allows the Court of Appeals to make a ruling based on the objective evidence in the video. It was stated during the Suppression hearing, the video speaks for itself. That is true, but being guided by the testimony through the video is certainly helpful in determining several factors: (1) Did the Trooper handle the sample tubes without wearing gloves; (2) were the tubes inverted the mandated number of times; and (3) was the Trooper wearing a sanitary protective gown.

Trooper Rocz admitted to not wearing gloves and admitted he did not wash his hands before handling the specimen tubes before and after use. RR Vol. I at 17:18-25, 18:1-12.

In addition to the admission by Mr. Tamba and Trooper Rocz, the State called Mr. Benny Rosales as their expert. RR Vol. I at 39:13-25. Mr. Rosales claims that he is a "Forensic Toxicologist." RR Vol. I at 39:8. Mr. Rosales consistently testified that the tubes are supposed to be inverted 8 to 10 times once the blood specimen has been placed in the tube. RR Vol. I at 42:14.

Mr. Rosales testified that the specimen tubes are intended to be kept uncontaminated. RR Vol. I at 50:1-3. He also testified that the technician should be wearing gloves and that he was unaware that Trooper Rocz was not wearing gloves. RR Vol. I at 50:4-20.

When asked if the technician should have inverted the specimen tubes 8 to 10 time and how many times he observed the tubes being inverted, Mr. Rosales answered that 8 to 10 times was correct and that the tubes were only inverted a couple of times. RR Vol. I at 53:7-17.

Mr. Rosales went on to testify that he had not heard of a qualified phlebotomist not inverting the tubes the sufficient number of times. RR Vol. I at 54:1-25, 54:1.

The protocol was well established and the Court was made aware of the standard. Despite knowledge of the protocol and the mandatory standards, the Court did not dismiss the evidence as tainted and contaminated and most importantly, as not admissible. Ergo, the "instant replay" to assure the call was correct. The video does, indeed, speak for itself.

The State has the burden of proof to show by clear and convincing evidence that the scientific evidence is reliable. *Hernandez v. State,* 116 S.W.3d 26, 30 (Tex.Crim.App. 2003). The court reviews the trial courts

application of the law to the facts *de novo* in search and seizure case. *State v. Ross,* 32 S.W.3d 853, 856 (Tex.Crim.App. 2000). The taking of a blood specimen is considered a search and a seizure under both the federal and Texas Constitutions. *Aliff v. State,* 627 S.W.2d 166, 170 (Tex.Crim.App. 1982).

"To be admissible, the blood specimens must be taken in a sanitary place . . ." TEX. TRANS. CODE §724.017(a). The failure of the Trooper to wash up and wear gloves reduced what might have been a sanitary place to an unsanitary place. His handling of the sample tubes, both before and after the draw, without gloves is inexplicable and inexcusable. The failure of the "phlebotomist" to ascertain the mixing of the chemicals with the blood is likewise, inexplicable and inexcusable. The Trooper's failure to observe minimum hygiene protocol compromised the blood draw and preservation process. Test results are only admissible when performed in accordance with statutory guidelines mandated by the Texas Transportation Code. Id.

As stated above, the evidence is overwhelming and it is without question that the protocol(s) were not followed in strict compliance with the law. The Trial Court allowing the admission of the tainted and compromised blood specimens was improper and an abuse of discretion. The admission of

the blood specimens flies in the face of established law and protocol at the state and federal level.

The Appellate Court should reverse the ruling of the trial court because the admission of the blood specimen evidence is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson v. State,* 23 S.W.3d 1, 7(Tex.Crim.App. 2003) (Overruled on other grounds).

PRAYER

For the reasons set forth above, Defendant prays that the Court overrule the Trial Court and grant the Motion to Suppress the tainted and compromised Blood Specimen evidence. .

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Appellants' Brief consists of 4,069 words and is within the limit set by Appellate Rule 9.3(i)(2)(B). TEX. R. APP. P 9.3.

CERTIFICATE OF SERVICE

I certify that on September 23, 2024 a true and correct copy of this Defendant's Appellate Brief was served on each attorney of record or party in accordance with Rule 21a of the Texas Rules of Civil Procedure.

By electronic filing manager.

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