Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-118086-001 DT

12/19/2022

HONORABLE ROY C. WHITEHEAD

CLERK OF THE COURT
A. Rowe
Deputy

STATE OF ARIZONA

ERIN O OTIS
JESSI WADE

v.

IAN L MITCHAM (001)

JEFFREY A KIRCHLER
MARTHA V. BARCO PENUNURI
RICHARD RANDALL

CAPITAL CASE MANAGER
JUDGE WHITEHEAD

JESSICA ANN GATTUSO

MINUTE ENTRY

The Court has read and considered Defendant's "Motion to Suppress Illegally Obtained DNA Evidence," the State's Response, and Defendant's Reply. Additionally, the Court has considered the evidence presented at the evidentiary hearing on December 9, 2022, along with the arguments of the parties.

The factual basis for Defendant's motion is undisputed. Scottsdale Police arrested Defendant on January 8, 2015, on suspicion of driving under the influence. During the DUI investigation, a Scottsdale Police officer read Defendant the "Admin Per Se/Implied Consent Affidavit" admonition (Exhibit 1). The admonition advised Defendant that he must consent to the collection and testing of a blood or breath sample, otherwise his license would be suspended for 12 months. Defendant consented and police collected two vials of his blood. One vial was meant to be tested by the State in the course of its investigation, while the other vial was meant to be independently tested on Defendant's behalf if he so elected. Defendant was told and signed a DUI Blood/Urine Results Destruction Notice which stated that the second vial of blood would be destroyed after 90 days if a request for testing was not made (Exhibit 2).

Defendant's blood, however, was never destroyed. Instead, Scottsdale Police retained custody of the vials until late 2017, when Defendant became a suspect in the 2015 killing and sexual assault of Allison Feldman. After Ms. Feldman died in 2015, police collected biological evidence from the crime scene and developed a DNA profile of her suspected killer. Police entered the DNA profile into the CODIS database, but found no matches. The case went cold until then Sgt. Lockerby received approval to conduct a familial DNA investigation in 2017. Pursuant to the new investigative technique police learned that the unknown DNA profile belonged to a first-degree male relation, either a son, brother, or father, of Mark Mitcham.

Police soon learned that Mark Mitcham had two brothers in the Phoenix-Metro area, including Defendant Ian Mitcham. Police began surveilling the brothers, but focused on Defendant based on his arrest history in Scottsdale. After reviewing his files in the Scottsdale Police Department, Sgt. Lockerby learned about the two blood vials in the agency's possession. Sgt. Lockerby, now Lt. Lockerby, testified at the evidentiary hearing that he requested the analysis of Defendant's blood without getting a warrant because he did not think he needed to get one, and that Defendant did not have a reasonable expectation of privacy in the two blood vials. A subsequent analysis of the blood vials generated a DNA profile that matched the profile found at the scene of the crime. Police later obtained a search warrant to collect a buccal swap from Defendant, and the evidence collected pursuant to that warrant matched as well.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). While "[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable.... [i]t is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (internal quotations omitted); *see also State v. Butler*, 232 Ariz. 84, 88 ¶¶ 16–18 (2013) (discussing consent for warrantless blood draw under Arizona implied consent statute, A.R.S. § 28–1321(A)).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401, 65 L. Ed. 2d 410 (1980). "Determining the validity of a law enforcement officer's search based on consent generally involves two factors: (1) whether the consent was voluntarily given and (2) whether the search was within the scope of the consent." *State v. Becerra*, 239 Ariz. 90, 92 ¶ 8 (App. 2016);

see also Walter, 447 U.S. at 654 ("The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents.") Because Defendant consented to the taking and analysis of his blood for drug or alcohol testing, the subsequent DNA analysis of his blood exceeded the scope of his consent.

The State argues that this case represents an analog to that in *Maryland v. King*, 569 U.S. 435 (2013), and that because Defendant's blood was collected for a proper purpose then he had no reasonable expectation of privacy in that blood and the State could properly conduct a DNA analysis without first obtaining a warrant. As the Court summarized in *King*, "[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." 569 U.S. at 465–66. Insofar as Defendant was arrested for a misdemeanor offense, this Court finds *King* largely inapplicble.

Where *King* may be applicable, because Defendant consented to having his blood drawn, is in the context of the subsequent DNA analysis of his blood. As *King* notes, "[t]he argument that the testing at issue in this case reveals any private medical information at all is open to dispute." *Id.* at 464. The Court reasons that the 13 CODIS loci used for DNA identification did not "reveal the genetic traits of the arrestee" but that additional privacy concerns may be implicated in the future if police begin using DNA analysis for purposes other than identification. *Id.* at 464–65. *But see Mario W. v. Kaipio*, 230 Ariz. 122, 128 ¶ 27 (2012) ("This second search presents a greater privacy concern than the buccal swab because it involves the extraction (and subsequent publication to law enforcement nationwide) of thirteen genetic markers from the arrestee's DNA sample that create a DNA profile effectively unique to that individual.") As Defendant notes in his reply, law enforcement DNA testing has progressed beyond that discussed in *King*, and appears to provide the very kind of information the Court thought could transform the privacy interest an individual has in their DNA. Finally, however, the Court reasoned that the subsequent DNA analysis did not infringe on a reasonable expectation of privacy because the Maryland statute at issue "provides statutory protections that guard against further invasion of privacy." *King*, 569 U.S. at 465.

The DNA analysis here, of course, was not conducted pursuant to any statutory authority, aside from the general authority bestowed upon the State to investigate crime. That authority, however, is constrained by the strictures of the Fourth Amendment. Because the touchstone of the Fourth Amendment is reasonableness, this Court finds that, under these facts, Defendant had an objectively reasonable expectation of privacy in his blood and that the State did not have a compelling interest to search his blood through a DNA analysis without first obtaining a warrant. *See e.g.*, *State v. Martinez*, 570 S.W.3d 278, 292 (Tex. Crim. App. 2019) ("[T]here is a Fourth Amendment privacy interest in blood that has already been drawn for medical purposes. In this

case, Appellee had a subjective expectation of such a privacy interest in his blood, and the State's subsequent testing of the blood was a Fourth Amendment search separate and apart from the seizure of the blood by the State."); *see also State v. Granville*, 423 S.W.3d 399, 426 (Tex. Crim. App. 2014) ("What *Walter* [*v. United States*, 447 U.S. 649 (1980)] shows is that some types of property have both a physical dimension and an informational dimension and that a defendant's subjective expectation of privacy can attach to either or both. Even if a defendant's subjective expectation of privacy has been entirely frustrated with respect to the physical dimension of such property, he may yet retain a subjective expectation with respect to the informational dimension.")

"[E]vidence seized during an unlawful search [cannot] constitute proof against the victim of the search" and "extends as well to the indirect as the direct products of the search." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The State argues that identification evidence is not suppressible, but this Court finds that the DNA evidence at issue is much like fingerprint evidence, which the Supreme Court has long held may be suppressed. *See Davis v. Mississippi*, 394 U.S. 721, 723–24 (1969); *Hayes v. Florida*, 470 U.S. 811, 813–15 (1985). Accordingly, absent come exception to the exclusionary rule, the evidence at issue must be suppressed.

The State argues that the inevitable discovery doctrine applies in this case, because the State would have obtained a DNA sample from Defendant by surveillance, a ruse, or through the disposition of Defendant's aggravated DUI or possession of narcotic drug cases. "Illegally obtained physical evidence may be admitted if the State can demonstrate by a preponderance of the evidence that such evidence inevitably would have been discovered by lawful means." *State v. Davolt*, 207 Ariz. 191, 204 (2004) (citing *Nix v. Williams*, 467 U.S. 431, 111 (1984)). But, as Defendant notes in his reply, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix*, 467 U.S. at 444 n.5.

At the evidentiary hearing the State did not provide evidence concerning lawful efforts to obtain Defendant's DNA through surveillance or ruse, or how successful law enforcement is in obtaining DNA through those methods. And, as Defendant notes, the State cannot demonstrate that it would have been able to obtain his DNA sample through the disposition of his pending cases without assuming that Defendant was guilty of those offenses. This is all to say that application of the inevitable discovery doctrine in this relies solely on speculation, and such speculation alone cannot sustain the State's burden. Because the State failed to demonstrate by a preponderance of the evidence that it would have been able to lawfully obtain Defendant's DNA sample by surveillance, ruse, or through the disposition of his pending criminal cases, inevitable discovery is not appropriate.

"[E]ven assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *United States v. Leon*, 468 U.S. 897, 918–19 (1984). The good-faith exception accordingly sanctions "searches conducted in objectively reasonable reliance on binding appellate precedent" and does not subject the fruits of such searches to exclusion. *Davis v. United States*, 564 U.S. 229, 232 (2011). As the Arizona Supreme Court recently propounded on the topic of exclusion:

> "The exclusionary rule, which allows suppression of evidence obtained in violation of the Fourth Amendment, is a prudential doctrine invoked [solely] to deter future violations." *Valenzuela II*, 239 Ariz. at 308–09 ¶ 31, 371 P.3d at 636–37 (citing *Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)). "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Davis*, 564 U.S. at 236, 131 S.Ct. 2419 (quoting *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). Because "a deterrence purpose can only be served when the evidence to be suppressed is derived from a search which the [police] knew or should have known was unconstitutional under the Fourth Amendment," *United States v. Johnson*, 457 U.S. 537, 565, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (White, J., dissenting), the rule is intended to deter only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). Therefore, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence," the good-faith exception applies because "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis*, 564 U.S. at 238, 131 S.Ct. 2419 (internal citations and quotation marks omitted); see also A.R.S. § 13-3925 (codifying good-faith exception to the exclusionary rule).
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> "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." *Davis*, 564 U.S. at 237, 131 S.Ct. 2419 (quoting *Hudson v. Michigan*, 547 U.S. 586, 596, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)). "For exclusion to be appropriate, the deterrence benefits of suppression must [also] outweigh its heavy costs." Id. (noting that exclusion's "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment"). Consequently, exclusion of evidence should be a "last resort." *Id.* (quoting *Hudson*, 547 U.S. at 591, 126 S.Ct. 2159). The state bears the

> burden of establishing that the good-faith exception applies. *Havatone*, 241 Ariz. at 511 ¶ 19, 389 P.3d at 1256.

State v. Weakland, 246 Ariz. 67, 69 ¶¶ 6–7 (2019).

This Court cannot ignore Lt. Lockerby's testimony that he chose to forgo the warrant requirement and order the analysis of Defendant's blood because he did not think Defendant had a reasonable expectation of privacy in the blood. Lt. Lockerby did not testify that he sought legal counsel on the issue, nor did he testify that he conferred with any other colleague to determine the best path forward. Lt. Lockerby gave no indication that the State's investigation had stalled or that some exigency existed necessitating the speedy testing of Defendant's blood without a warrant. Instead, it seems that the State's investigation was gaining steam through the use of familial DNA, and that the State may have been able to secure a warrant for Defendant's DNA through further diligent investigation. Unfortunately, Lt. Lockerby chose a different path forward and secured the analysis of Defendant's blood without securing a warrant. Such action could be fairly characterized as deliberate, but it was at least a reckless violation of Defendant's constitutional rights. The good-faith exception is therefore inapplicable under these circumstances.

The Court finds it troubling that the State essentially asserts that it has the unfettered ability to conduct subsequent searches of items held in custody for unrelated reasons.

The extraction of the DNA profile is suppressed. Additionally, the resulting DNA analysis, and the subsequent DNA swabs collected pursuant to the warrant are also suppressed as they are the direct result of the improper DNA extraction.

Based on the foregoing, Defendant's motion is accordingly GRANTED.