APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1615-14

WILLIAM SMITH, Appellant

v.

THE STATE OF TEXAS

Plurality opinion

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRTEENTH COURT OF APPEALS
NUECES COUNTY

KELLER, P.J., announced the judgment of the Court and delivered an opinion in which KEASLER, HERVEY and YEARY, JJ., joined. RICHARDSON, J., filed a dissenting opinion in which MEYERS, JOHNSON and ALCALA, JJ., joined. NEWELL, J., concurred.

Appellant was convicted of driving while intoxicated. His conviction was based in part upon evidence obtained as a result of a warrantless mandatory blood draw conducted pursuant to Chapter 724 of the Health and Safety Code.[1] The court of appeals reversed appellant's conviction on the basis that drawing appellant's blood without a warrant violated the Fourth Amendment. In its petition for discretionary review, the State contends, *inter alia*, that appellant failed to preserve error

[1] *See* TEX. HEALTH & SAFETY CODE § 724.012(b).

Appendix A

with respect to this Fourth Amendment complaint. We agree, because appellant never obtained a ruling on this complaint. Consequently, we reverse the judgment of the court of appeals.

I. BACKGROUND

A. The Stop

State Trooper David Anguiano stopped appellant for driving without wearing a seatbelt. After the stop was initiated, Trooper Anguiano smelled an "extremely strong smell of alcohol" coming from appellant. Appellant's movement was slightly delayed, and his eyes were a little glassy and bloodshot. Suspecting intoxication, the trooper conducted various tests. On the horizontal-gaze-nystagmus test, appellant exhibited all six possible clues of intoxication. On the walk-and-turn test, appellant exhibited two clues of intoxication.[2] Appellant also exhibited clues of intoxication on the one-leg-stand test by swaying slightly and raising his arms for balance. He performed satisfactorily on reciting the alphabet but "was kind of slow or kind of struggling with it." On the finger touch-and-count test, appellant seemed to fumble with his fingers at one point, and he performed four cycles of the test instead of the three he was told to perform.

After these tests, appellant was arrested. He insisted that he was not intoxicated, and Trooper Anguiano offered to allow him to take a breath test. At first, appellant appeared inclined to take that test, but after talking to the passenger in his vehicle, he refused to do so. After being placed in the patrol car, appellant became belligerent, kicking his feet and "cussing." In appellant's car, the trooper found at least three open containers of alcoholic beverages that were cold to the touch. The entire stop was captured on video.

B. Blood Draw

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[2] Appellant missed heel to toe on a few steps, and he turned the wrong way.

Upon discovering that appellant had two prior convictions for driving while intoxicated, Trooper Anguiano determined that appellant would be taken to a hospital for a blood draw.[3] Because appellant was uncooperative when the trooper tried to transport him in a patrol unit, Trooper Anguiano ordered a "caged unit" to transport appellant. Appellant's blood was drawn at the hospital, and the analysis of the blood sample revealed that he had a blood-alcohol concentration of .21 grams of alcohol per 100 milliliters of blood.

C. Trial

Appellant's guilt was determined in a bench trial. The blood sample was part of State's Exhibit 2, which forensic scientist Emily Bonvino referred to as "a blood box, blood tube mailer box that has a blood tube in it." Bonvino testified about how blood samples are analyzed, and she said that she analyzed the blood sample in question. At some point during this discussion, defense counsel said, "I'm going to object to testifying about this vial. It's not in evidence, Your Honor." The State then stated that it was "[s]etting the predicate to introduce it into evidence." Defense counsel then stated, "We're going to go ahead and – well, we'll wait until it's admitted, I guess, to object." The trial judge responded, "Okay."

The prosecutor then asked some questions regarding the vial and its packaging, along with questions about the blood-test machine. After that, the prosecutor asked Bonvino what the test results were. Without objection, Bonvino testified that the analysis showed .21 grams of alcohol per 100 milliliters of blood. Bonvino also testified, without objection, that the blood vial taken from appellant contained above .08 percent alcohol, from which she concluded that appellant was "more than likely above a .08" at the time of the offense.

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[3] *See id.* § 724.012(b).

The prosecutor then sought to introduce State's Exhibit 2 into evidence. At that point, defense counsel objected on various grounds, including that "[t]here's no order for a mandatory blood draw that we know of that's in evidence." Defense counsel further stated, "[Y]ou don't need a court order from a judge, but you would need an order from the officer, and we don't have the order from the officer in evidence."

The prosecutor responded that he did not think an order was required. The trial judge then quoted from § 724.012, and the parties and the judge discussed the language. Defense counsel then said, "I would submit my objection, Your Honor, on constitutional grounds, and that it should be inferred from the statute that there should be a written order." The trial judge then asked, "You're making a constitutional challenge?" Defense counsel responded affirmatively and added that the defendant "is deserving of a right to due process of law" including "substantive, procedural and, in fact, that – and in fact, that there is no order signed –" The trial judge interjected, "By a magistrate or a judge." Defense counsel responded, "[B]y a magistrate, and there's – and additional, no order signed by even the police officer." The trial judge then stated that "the police officer doesn't have any authority to sign an order, but a magistrate or a judge brings up an interesting issue." The prosecutor responded that the police officer was operating under the laws of the State, but the trial judge responded, "No . . . the legislature allows for this . . . but that doesn't mean that the law is constitutional." The prosecutor agreed with that observation, and the trial judge continued, "So you're making, I guess, a Fourth Amendment search and seizure . . . constitutional challenge."

Defense counsel responded, "Yes, Your Honor, I am" and stated that the particular case was egregious. He continued, "There's nothing in the evidence that shows that he didn't have the time to get an order from the – from a judge or a magistrate." The trial judge observed that the officer

followed the statute, so "[t]he only question is whether 724.012 is constitutional, whether it passes the muster of the Federal Constitution." Defense counsel responded that his "brief research did not indicate that it had ever been brought up." The trial judge then stated, "Okay. Well, I'll carry that. I'll carry that because I think that's an interesting issue."

After eliciting further testimony about the procedures surrounding the analysis of the sample, the prosecutor again elicited, without objection, testimony that the analysis showed a blood-alcohol-concentration of .21. The prosecutor then moved, for a second time, to admit State's Exhibit 2 into evidence. Defense counsel reprised several of his objections, including "the constitutional issue regarding the – no order for the blood draw." After rejecting some of appellant's non-constitutional objections, the trial judge stated, "In terms of the constitutional issue, I'll reserve that – that issue, but it's admitted at this time." Defense counsel then asked, "Regarding that issue, will we have an opportunity to brief that issue?" The trial judge responded, "You will." After discussing the probability that cases have been decided that are relevant to the issue, the trial judge stated, "All right. And I guess State's Exhibit No. 2 is admitted into evidence."

After the close of the evidence, defense counsel moved for an instructed verdict. He gave numerous reasons why he thought his client was entitled to one. In the midst of these reasons was the statement that "the Defendant's blood was illegally seized without Court order and/or written order in violation of due process, his Constitutional right of due process in particular." The trial judge denied the motion.

After closing arguments, the trial judge found appellant guilty. The trial judge stated that the video of appellant showed "some signs of intoxication," but the judge was surprised when he heard the blood-test results that appellant "did anywhere near as well as he did on the video." Given the

video, the judge said, it "was kind of a close call" whether appellant had lost the normal use of his mental or physical faculties beyond a reasonable doubt, but the .21 result was far in excess of the .08 standard set by the legislature.[4]

The trial judge then stated that defense counsel had "raised an interesting constitutional question about the fact that the blood draw was taken without a warrant." The trial judge further stated, "I'm not sure if this has been litigated or not, but I'm – I'm not certain that the legislature can – can do this or not. I mean, the Fourth Amendment is still the law of the land and regardless of what the State legislatures or even Congress does, but you're going to have to do me some research, [defense counsel], and show me." Defense counsel responded that he was sorry that he did not do any research the night before. The trial court replied, "No, I mean, we're not done with the trial, and I'll consider it certainly." Defense counsel then stated that the "Texas Court of Criminal Appeals looks like they kind of said it was okay, but they didn't rule directly it looked like on the constitutional issues. That's what my research indicated." The trial judge responded, "Well, you're going to have to brief me on the issue if you want me to consider it. I need to know what the Courts have said and how far it's gone up."

Nothing in the record suggests that the constitutional issue was ever mentioned at the trial level again. The trial judge sentenced appellant to twenty-five years in prison, the minimum punishment due to the existence of prior felony convictions used for enhancement purposes.[5]

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[4] The law provides two different methods of proving intoxication in a driving while intoxicated case: (1) "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body" or (2) "having an alcohol concentration of 0.08 or more." TEX. PENAL CODE § 49.01(2).

[5] *See* TEX. PENAL CODE § 12.42(d).

D. Appeal

On appeal, appellant complained that the trial court erred in admitting the blood sample because the blood was drawn without a warrant in violation of the Fourth Amendment. The court of appeals addressed the issue of error preservation in two sentences in its opinion. First, the court of appeals stated, "Over appellant's objection on constitutional grounds, the trial court admitted the blood evidence."[6] In a footnote to that sentence, the court of appeals said, "Appellant did not file a motion to suppress the blood evidence, but rather objected on the basis of a violation of the Fourth Amendment prior to the admission of the results of the blood analysis."[7] The court of appeals addressed the merits of appellant's Fourth Amendment complaint, and it concluded that the evidence was inadmissible.[8] After a brief harm analysis, the court of appeals concluded that the error was harmful.[9] Consequently, the court of appeals reversed appellant's conviction and remanded the case to the trial court for further proceedings.[10]

E. Discretionary Review

The State claims that appellant failed to preserve error because he failed to object to testimony about the blood-test results. Alternatively, the State claims that appellant failed to preserve error because he failed to secure a final ruling until after the close of the evidence.

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[6] *Smith v. State*, ___ S.W.3d ___, ___, 2014 Tex. App. LEXIS 12372, *4 (Tex. App.–Corpus Christi-Edinburg November 13, 2014).

[7] *Id.* at *4 n.5.

[8] *Id.* at *4-19

[9] *Id.* at *19-21.

[10] *Id.* at *21.

Appellant contends that, because the trial was a *bench* trial, "the time at which a motion is re-urged or a ruling is obtained is not as crucial, because the judge, as fact-finder, is aware of the substance of the motion regardless of when the defendant finally argues it."[11]

II. ANALYSIS

To preserve error, a party must, among other things, obtain a ruling on the complaint or object to the trial judge's refusal to rule.[12] In the present case, the trial judge declined to rule on the Fourth Amendment issue at the time the evidence was admitted but "carried" the issue through the trial.[13] Although the trial judge admitted the evidence, that admission, unaccompanied by a ruling on appellant's complaint, was not sufficient to preserve error.[14]

Both parties seem to agree that a ruling on appellant's Fourth Amendment complaint was obtained after the close of the evidence, but we disagree. The ruling that was made after the close of the evidence was on appellant's motion for instructed verdict. A ruling on a motion for instructed

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[11] *See Garza v. State*, 126 S.W.3d 79, 83 (Tex. Crim. App. 2004).

[12] TEX. R. APP. P. 33.1(a)(2) ("As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.").

[13] *See Garza*, 126 S.W.3d at 84 (trial judge did not rule on pre-trial motion to suppress at the time, when he directed it to be carried with trial).

[14] *Darty v. State*, 709 S.W.2d 652, 653-55 (Tex. Crim. App. 1986) ("The issue before us is whether the admission of evidence by the trial court over objection implies that the objection is overruled, and error is preserved, when no precise ruling by the trial court appears in the record. We hold that absent an adverse ruling that appears of record, such an admission of evidence does not preserve error.").

verdict is not the same as a ruling on the admission of evidence.[15] A motion for instructed verdict is essentially a trial level challenge to the sufficiency of the evidence.[16] Even evidence that is improperly admitted is considered in determining whether the evidence is sufficient to support a conviction,[17] and in any event, there was other evidence to support appellant's conviction aside from the blood-test results. Moreover, after finding appellant guilty, the trial judge reiterated that the Fourth Amendment issue had not been resolved. Appellant never asked for a ruling on the issue, nor did he object to the trial judge's failure to rule. Because he failed to obtain a ruling on the Fourth Amendment complaint, he failed to preserve error with respect to that complaint.

Moreover, appellant failed to object when Bonvino testified on three occasions about the results of the blood test. Even if appellant had obtained a ruling on his objection to the blood vial itself, the test results were already in evidence. It is well settled that the erroneous admission of

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[15] *See Moff v. State*, 131 S.W.3d 485, 489-90 (Tex. Crim. App. 2004) ("Sometimes a claim of trial court evidentiary error and a claim of insufficient evidence overlap so much that it is hard to separate them. For example, suppose that the identity of a bank robber is proven through the testimony of one and only one witness at trial. Suppose further that this witness' testimony is rank hearsay: 'Little Nell told me that Simon was the bank robber.' On appeal a defendant might raise a hearsay claim and a claim of sufficiency of the evidence to prove identity. He will have the right to have the hearsay question considered on its merits only if he objected properly at trial; he will have the right to have the question of the sufficiency of evidence to prove identity considered on its merits whether or not he objected. . . . Both litigants and reviewing courts should be careful to distinguish claims of improperly admitted evidence (trial error) from legal insufficiency of all admitted evidence—even improperly admitted evidence."); *id.* at 492 & n.30 ("Appellant, like those before him, improperly sought to have his evidentiary question incorporated into his sufficiency question. . . . Appellant did not bring an independent point of error in the court of appeals disputing the admissibility [of certain evidence].").

[16] *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) ("We treat a point of error complaining about a trial court's failure to grant a motion for directed verdict as a challenge to the legal sufficiency of the evidence."); *Lucio v. State*, 351 S.W.3d 878, 905 (Tex. Crim. App. 2011) (citing *Williams*).

[17] *Soliz v. State*, 432 S.W.3d 895, 900 (Tex. Crim. App. 2014).

testimony is not cause for reversal "if the same fact is proven by other testimony not objected to."[18]

We reverse the judgment of the court of appeals and remand the case to the court of appeals to consider appellant's remaining points of error.

Delivered: June 8, 2016
Publish

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[18] *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) (citing *Wagner v. State*, 109 S.W. 169 (Tex. Crim. App. 1908)).

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1615-14

WILLIAM SMITH, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEAL NUECES COUNTY

RICHARDSON, J., filed a dissenting opinion in which MEYERS, JOHNSON, and ALCALA, JJ., joined.

DISSENTING OPINION

Respectfully, I disagree with the majority's holding that appellant failed to preserve his Fourth Amendment challenge to the warrantless blood draw. I would hold that appellant did preserve error and that the appellate court's decision to reverse his conviction in accordance with *Missouri v. McNeely*[1] should be affirmed.

Missouri v. McNeely was decided by the U.S. Supreme Court in April of 2013. This Court's opinion interpreting *McNeely*, *Villarreal v. State,* was handed down in November of

[1] 133 S. Ct. 1552 (2013).

2014.[2] Appellant's case was tried in September of 2011, before review was granted in *Villarreal*, which was in March of 2014. Even without guidance from *McNeely* and *Villarreal*, appellant's defense counsel argued to the trial court judge that his client's Fourth Amendment rights had been violated by the warrantless blood draw. He objected to the admission of the blood-draw kit, State's Exhibit 2, and he sought an instructed verdict, in part, on that basis. The trial court nevertheless admitted State's Exhibit 2, despite indicating a willingness to "carry" appellant's constitutional challenge. After denying appellant's motion for instructed verdict, the trial judge found appellant guilty of felony DWI. Appellant's blood alcohol content weighed heavily in favor of the trial judge's decision. Ultimately, appellant was sentenced to 25 years in prison.

On direct appeal, the Thirteenth Court of Appeals reversed appellant's conviction in light of the Supreme Court's decision in *Missouri v. McNeely*.[3] The appellate court held that "the warrantless search of appellant's blood was conducted in violation of his Fourth Amendment rights."[4] The majority reverses the decision of the Thirteenth Court of Appeals, deciding that, because appellant failed to obtain a ruling on his Fourth Amendment complaint, he failed to preserve error. I, however, would hold that the trial court implicitly

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[2] 475 S.W.3d 784 (Tex. Crim. App. 2014) (reh'g granted Feb. 25, 2014; op. on denial of reh'g Dec. 16, 2015).

[3] *Smith v. State*, No. 13-11-00694-CR, 2014 WL 5901759, at *1 (Crim. App.—Corpus Christi/Edinburg Nov. 13, 2014).

[4] *Id.*

ruled against appellant's Fourth Amendment challenge by admitting the actual blood-draw kit into evidence, (which formed the basis of the expert witness's testimony as to what appellant's blood alcohol content was), and by strongly considering the blood-draw evidence in finding appellant guilty.

A. Preservation of Error

To preserve error for appellate review under Texas Rule of Appellate Procedure 33.1(a), the record must show that (1) the complaining party made a timely and specific request, objection, or motion; and (2) the trial judge either ruled on the request, objection, or motion (expressly or implicitly), or he refused to rule and the complaining party objected to that refusal.[5] There are two main purposes behind requiring a timely and specific objection. First, the judge needs to be sufficiently informed of the basis of the objection and at a time when he has the chance to rule on the issue at hand. Second, opposing counsel must have the chance to remove the objection or provide other testimony.[6] The preservation rule "ensures that trial courts are provided an opportunity to correct their own mistakes at the most convenient and appropriate time–when the mistakes are alleged to have been made."[7] We recently observed in *Douds v. State*, that "in resolving questions of preservation of error,

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[5] *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003) (citing to TEX. R. APP. P. 33.1(a)).

[6] *Garza v. State*, 126 S.W.3d 79, 82 (Tex. Crim. App. 2004) (citing to *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977)).

[7] *Hull v. State*, 67 S.W.3d 215, 217 (Tex. Crim. App. 2002).

we may not consider arguments in isolation, but we instead must look to the context of the entire record."[8]

In a jury trial, by affording the judge an opportunity to rule on an objection before the evidence is admitted, he is able to decide whether the evidence is admissible, and if the judge decides the evidence is inadmissible, the jury is shielded from hearing it. This is critical since, in a jury trial, the judge cannot "unring the bell" that the jury just heard. However, in a bench trial, the judge must hear the evidence in order to decide on its admissibility. In a bench trial, a judge is presumed to disregard inadmissible evidence in deciding on the merits of a case. Thus, the bell *can* be "unrung":

> [T]he judge assumes dual roles: He acts as a judge in ruling on the admissibility of the evidence, and he acts as a juror in weighing the credibility of the evidence. Consequently, the time at which a motion is re-urged or a ruling is obtained is not as crucial, because the judge, as fact-finder, is aware of the substance of the motion regardless of when the defendant finally argues it.[9]

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[8] *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015). Although this Court held in *Douds* that the appellant had not preserved error, *Douds* is distinguishable. *Douds* involved the issue of whether the specificity requirement for preservation had been met. In *Douds*, we held that the appellant's constitutional complaint "would not have fairly placed the trial court on notice of any argument that an officer acting pursuant to the statute's authority is additionally required by the Fourth Amendment to obtain a warrant prior to conducting a blood draw." We therefore concluded that "the trial court would not have been placed on notice as to appellant's constitutional complaint and would not have had any opportunity to rule on it." *Id.* at 677.

[9] *Garza v. State*, 126 S.W.3d at 82-83.

Therefore, in a jury trial, the timing of an objection and a ruling on that objection is much more important than in a bench trial.[10]

B. Appellant's Challenge To The Warrantless Blood Draw

The State's first witness at trial was the officer who stopped appellant and administered the standard field sobriety tests. Officer Anguiano testified that, because he had probable cause to believe that appellant had two previous convictions for DWI, he was authorized by statute to conduct a mandatory blood draw. On cross examination, appellant's counsel asked the officer if he had "an order from a judge" to conduct the mandatory blood draw, and the officer replied that he did not because he was statutorily mandated to take appellant's blood.

The next witness to testify was Emily Bonvino, a forensic scientist for the Texas Department of Public Safety. The following excerpt from the trial record reflects that appellant's objection to the admission of the blood-draw kit, which supported Bonvino's expert opinion regarding appellant's blood alcohol content, was sufficiently timely and specific, particularly since this was a bench trial.

[Prosecutor]: I'm going to hand you what's been previously marked for identification as State's Exhibit No. 2. Do you recognize that?

[Bonvino]: Yes, I do.

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[10] *Id.*

[Prosecutor]: And what is it?

[Bonvino]: It is a blood box, blood tube mailer box that has a blood tube in it.

* * *

[Defense Counsel]: I'm going to object to testifying about this vial. It's not in evidence, Your Honor.

[Prosecutor]: Setting the predicate to introduce it into evidence, Your Honor.

[Defense Counsel]: We're going to go ahead and – well, we'll wait until it's admitted, I guess, to object.

[Trial Judge]: Okay.

* * *

[Prosecutor]: Did you follow the protocol for testing the blood using that machine?

[Bonvino]: Yes, sir.

[Prosecutor]: Okay. And what were the results of our [*sic*] analysis?

[Bonvino]: The results of this analysis were that the sample contained .21 grams of alcohol per 100 milliliters of blood.

* * *

[Prosecutor]: And at this time, the State seeks to introduce State's Exhibit No. 2 into evidence.

[Trial Judge]: All right.

[Defense Counsel]: Your Honor, I'm going to go ahead and object. There's no order for a mandatory blood draw that we know of that's in evidence. . . .

* * *

[Trial Judge]: All right, let's start from the beginning.

[Defense Counsel]: Okay. No order for mandatory blood draw is my first [objection].

[Trial Judge]: Okay. Well, that part is true.

* * *

[Defense Counsel]: . . . [Y]ou would need an order from the officer, and we don't have the order from the officer in evidence." That's my understanding. . . . I think that you're correct that 724.012 doesn't specify a written order. That's – that's the way it appears.

[Trial Judge]: Yeah, it says, "One or more specimens of breath or blood may be taken if the person is arrested," which they were arrested, "and at the request of the peace officer having reasonable grounds to believe the person while op – intoxicated while it [*sic*] was operating a motor vehicle in a public place" – yeah, and then – and then it goes on, and the, you know, that he can – he can voluntarily comply with the request, but then –

[Defense Counsel]: Having – having admitted that, it doesn't appear that the statute requires –

[Trial Judge]: It doesn't require.

[Defense Counsel]: – a written order. I'm – I would submit my objection, Your Honor, on constitutional grounds, and that it should be inferred from the statute that there should be a written order.

[Trial Judge]: You're making a constitutional challenge?

[Defense Counsel]: Yes, Your Honor. I believe, you know, given the fact that the claimant is – is deserving of a right to due process of law, you know, substantive procedural and, in fact, that – and in fact, that there is no order signed.

[Trial Judge]: By a magistrate or a judge.

[Defense Counsel]: – by a magistrate, and there's – and additional, no order signed by even the police officer, Your Honor.

[Trial Judge]: Well, I – the police officer doesn't have any authority to sign an order, but a magistrate or a judge brings up an interesting issue.

[Prosecutor]: Well, I mean, the officer operated under the laws of the State –

[Trial Judge]: No, no, no, clearly, clearly the legislature allows for this, okay, but that doesn't mean that the law is constitutional.

[Prosecutor]: This is true.

[Trial Judge]: *So you're making, I guess, a Fourth Amendment search and seizure –*

[Defense Counsel]: *Yes, sir.*

[Trial Judge]: *– constitutional challenge.*

[Defense Counsel]: Yes, Your Honor, I am. I mean, in this particular case, it's – to me it's rather aggregious [*sic*]. There's nothing in the evidence that shows that he didn't have the time to get an order from the – from a judge or a magistrate. He went ahead and did it, apparently, orally in – in addition, even though the Court is of the opinion that that in itself is not –

[Trial Judge]: I mean, he followed the statute.

[Defense Counsel]: He did.

[Trial Judge]: The only question is whether 724.012 is constitutional, whether it passes the muster of the Federal Constitution.

[Defense Counsel]: I didn't see – my brief research did not indicate that it had ever been brought up.

[Trial Judge]: Okay. Well, I'll carry that. I'll carry that because I think that's an interesting issue.

(Emphasis added).

The State resumed questioning of Bonvino, and, after she testified that "the blood tube results for this particular case are that the blood tube was for a suspect, William Perry Smith, and that the sample contained .21 grams of alcohol per 100 milliliters of blood," the State again "move[d] to admit State's Exhibit No. 2." The trial court judge then turned to appellant's counsel, who responded as follows:

[Defense Counsel]: Your Honor, we had made a series of objections before, including chain of custody, the evidence of the qualified technician, and the – the constitutional issue regarding the – no order for the blood draw.

The trial judge then stated that, "[i]n terms of the constitutional issue, I'll reserve that – that issue, *but it's admitted at this time.*"

After the State rested, defense counsel moved for an instructed verdict based on several grounds, one of which was that "[d]efendant's blood was illegally seized without Court order and/or written order in violation of due process, his Constitutional right of due process in particular." The trial court denied his motion for an instructed verdict. After both sides rested and argued their case, the trial judge explained that his reason for rendering a guilty verdict was based upon the appellant's high blood alcohol content:

> Well, as I watched the video I think there were some signs of intoxication, but quite frankly, I was surprised when I heard the results of the blood alcohol that Mr. Smith did anywhere near as well as he did on the video. I mean, good, I mean, because it was – I mean, signs of intoxication, but I don't know, was he intoxicated where he lost the normal use of his mental or physical faculties? It was a kind of a close call, quite frankly, at a beyond a reasonable doubt standard; but I mean, the fact of the matter is a .21 is far in excess of .08, so – I mean, the legislature has drawn that as a bright line rule, *so based upon that* I find you guilty of this offense beyond a reasonable doubt. . . [Defense counsel] raised an interesting constitutional question about the fact that the blood draw was taken without a warrant. I'm not sure if this has been litigated or not, but I'm – I'm not certain that the legislature can – can do this or not. I mean, the Fourth Amendment is still the law of the land and regardless of what the State legislature or even Congress does, but you're going to have to do me some research, [Defense counsel], and show me because . . . we're not done with the trial, and I'll consider it certainly.

The court reiterated that he would consider the issue *if* the defense counsel brought him authority on "what the courts have said and how far it's gone up." However, at the conclusion of the trial, the issue had not been addressed again, and the trial judge said that

he considered "the evidence presented at the guilt or innocence phase," and that "[h]e's already been found guilty by this Court."

C. The Trial Court's Ruling Was Made Implicitly

Defense counsel's complaints, that there was no consent by appellant to the taking of his blood and that there was no warrant permitting his blood to be drawn, were neither perfectly timed nor expertly articulated. However, the trial court judge and the prosecutor were well aware of the nature of appellant's objections in time to act upon them.[11] And, the majority opinion does not appear to base its decision on the timing or specificity of appellant's objections. Rather, the majority reverses the appellate court's decision on the basis that appellant failed to obtain a ruling on his Fourth Amendment challenge as required by Texas Rule of Appellate Procedure 33.1(a). I would hold, however, that a ruling was made by the trial court judge.

Rule 33.1(a) allows for the trial court's ruling on an objection to be made "implicitly." A trial court's ruling on a matter need not be expressly stated if its actions or other statements

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[11] When the specific basis for the objection can be determined from the context, a general objection may be enough to preserve error. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977); *Taylor v. State*, 939 S.W.2d 148, 154-55 (Tex. Crim. App. 1996) (citing to *Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994) ("Of critical importance is whether the trial court understood appellant's objection, including the legal basis for the objection. Where the record makes clear that the trial court understood an objection and its legal basis, a trial court's ruling on that objection will be preserved for appeal, despite an appellant's failure to clearly articulate the objection.").

otherwise unquestionably indicate a ruling.[12] In this case, the majority holds that a ruling on a motion for instructed verdict is not the same as a ruling on the admission of evidence. Generally speaking, that may be true. But, based on what transpired here, I would hold that, when the trial judge denied appellant's motion for instructed verdict (which was based, in part, on the unconstitutionality of the warrantless blood draw), and expressly found appellant guilty based upon his blood alcohol content, he was implicitly ruling on appellant's Fourth Amendment challenge. This Court recognized a similar implicit ruling in *Pena v. State*, holding that, "the Brady issue is sufficiently clear from the record, and when the trial judge denied appellant's motion for new trial, he was implicitly ruling on the Brady claim."[13] In this case, although the trial court judge promised to "carry" appellant's Fourth Amendment objection, the judge admitted the evidence and clearly relied on it as a basis for his finding of guilt. Therefore, a ruling was made.

It is true that there is nothing in the record indicating that defense counsel responded to the trial judge's invitation to provide him case law on the issue. But I do not interpret this as a failure to obtain a ruling from the trial court. I read the trial judge's promise—that he will "consider" the issue *if* counsel brings him case law on that issue—as a promise to

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[12] *Montanez v. State*, 195 S.W.3d 101, 104 (Tex. Crim. App. 2006) (quoting *Rey v. State*, 897 S.W.2d 333, 336 (Tex. Crim. App. 1995)).

[13] 353 S.W.3d 797, 809 (Tex. Crim. App. 2011).

*re*consider his decision finding appellant guilty based on the blood alcohol evidence. A promise to reconsider a ruling is not the same as not ruling.

I agree with the decision reached by the Thirteenth Court of Appeals. Therefore, respectfully, I dissent.

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