1999 DRAFTING REQUEST

Assembly Amendment (AA-AB160)

Received: **03/30/99**

Received By: **nelsorp1**

Wanted: **Soon**

Identical to LRB:

For: **Robert Goetsch (608) 266-2540**

By/Representing: **Kent**

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Subject: **Drunk Driving - procedures**
Courts - miscellaneous

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No specific pre topic given

Topic:

Probable cause to take blood test

Instructions:

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10:30 a.m. Jeffrey

673 N.E.2d 281 printed in FULL format.

CHRISTOPHER J. FINK, Appellee, v. GEORGE RYAN, Secretary of State, Appellant.

Docket No. 79404

SUPREME COURT OF ILLINOIS

174 Ill. 2d 302; 673 N.E.2d 281; 1996 Ill. LEXIS 108; 220 Ill. Dec. 369; 65 U.S.L.W. 2260

October 18, 1996, FILED

SUBSEQUENT HISTORY: Certiorari Denied June 27, 1997, Reported at: *1997 U.S. LEXIS 4067.*

DISPOSITION: [***1]

Reversed and remanded.

CORE TERMS: driver, current statute, chemical testing, expectation of privacy, personal injury, amended statute, intrusive, chemically, chemical test, diminished, license, impaired, predecessor statute, testing, law enforcement, predecessor, arrested, blood-alcohol, scene, statute unconstitutional, probable cause, seizure, blood, minimally, chemical, criminal prosecution, warrantless search, incidental, evidenced, issuance

COUNSEL: James E. Ryan, Attorney General, of Springfield (Barbara A. Preiner, Solicitor General, and Daniel N. Malato, Assistant Attorney General, of Chicago, of counsel), for appellant.

Michael W. Feetterer, of Diamond, LeSueur, Roth & Feetterer, P.C., of McHenry, and Larry A. Davis, of Davis, & Riebman, Ltd., of Des Plaines, for appellee.

JUDGES: JUSTICE MILLER delivered the opinion of the court. CHIEF JUSTICE BILANDIC, dissenting. JUSTICES HARRISON and NICKELS join in this dissent.

OPINIONBY: MILLER

OPINION: [*303] [**283] JUSTICE MILLER delivered the opinion of the court:

This appeal results from a final order entered in the circuit court of Lake County finding a portion of the Illinois Vehicle Code (625 ILCS 5/11-501.6 (West 1994)) unconstitutional under the fourth amendment of the United States Constitution.

The portion of the Vehicle Code found unconstitutional provided that if a traffic accident occurred in which death or personal injury resulted and a driver involved in the accident had been issued a Uniform Traffic Ticket for a nonequipment offense, the driver would be subject to chemical testing to determine whether the person was impaired by drugs or alcohol. See 625 ILCS [*304] 5/11-501.6(a) (West 1994). Following the circuit court's ruling, the Secretary of State appealed directly to this court pursuant to Supreme [***2] Court Rule 302(a). 134 Ill. 2d R. 302(a). We reverse and remand.

I. BACKGROUND

The circuit court found section 11-501.6 of the Illinois Vehicle Code unconstitutional. The statute provides:

"Any person who drives or is in actual control of a motor vehicle upon the public highways of this State and who has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test *** or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or a similar provision of a local ordinance, with the exception of equipment violations contained in Chapter 12 of this Code, or similar provisions of local ordinances." 625 ILCS 5/11-501.6(a) (West 1994).

The statute further provides that a "personal injury shall include any type A injury." 625 ILCS 5/11-501.6(g) (West 1994). According to the statute, type A injuries "shall include severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from [***3] the scene." 625 ILCS 5/11-501.6(g) (West 1994).

The circuit court's rationale in finding the statute unconstitutional was that the statute was "no different, substantively" than a predecessor statute (Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-501.6) found unconstitutional by this court in *King v. Ryan, 153 Ill. 2d 449, 180 Ill. Dec. 260, 607 N.E.2d 154 (1992).* Because of the circuit court's

reliance on King, a review of King is necessary.

This court in King held that the predecessor statute (Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-501.6) violated [*305] the fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution of 1970. The court found that the "special needs" [**284] exception to the fourth amendment did not apply to the predecessor statute. *King, 153 Ill. 2d at 462.* The court therefore believed the predecessor statute's provision for chemical testing of a driver absent a warrant or probable cause determination was unconstitutional.

As expressed by the Supreme Court, the "special needs" exception to the fourth amendment states: "we have permitted exceptions [to the fourth amendment] when 'special needs, beyond the normal [***4] need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin v. Wisconsin, 483 U.S. 868, 873-74, 97 L. Ed. 2d 709, 717, 107 S. Ct. 3164, 3168 (1987),* quoting *New Jersey v. T.L.O., 469 U.S. 325, 351, 83 L. Ed. 2d 720, 741, 105 S. Ct. 733, 748 (1985)* (Blackmun, J., concurring in judgment). The Supreme Court has found the warrant and probable cause requirement impracticable in a variety of circumstances. Some of these circumstances include: searches of government employees' desks and offices (*O'Connor v. Ortega, 480 U.S. 709, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987));* searches of certain types of student property by school officials (*T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733);* roadblock searches identifying drunk drivers (*Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990));* roadblock searches identifying illegal immigrants (*United States v. Martinez-Fuerte, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976));* chemical testing of railroad employees (*Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989));* and administrative [***5] searches of regulated businesses (*New York v. Burger, 482 U.S. 691, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987)).*

[*306] The court in King noted that under the "special needs" exception, a search or seizure may be reasonable absent individualized suspicion in two types of cases: (1) when the intrusion upon the person to be searched is minor; or (2) when the person to be searched has a diminished expectation of privacy. *King, 153 Ill. 2d at 458-59.* The court concluded that the person to be tested under the predecessor statute in King fell into neither of these two categories.

In addition, the King court believed that under the Illinois Constitution's right of privacy (Ill. Const. 1970, art. I, § 6) a driver could not be subject to chemical testing when the driver had not been charged with an offense based upon probable cause. *King, 153 Ill. 2d at 464-65.* Accordingly, the court found that the statute violated the Illinois Constitution as well.

II. THE PRESENT CASE

On the evening of December 18, 1994, Christopher J. Fink drove his car into a telephone pole. Fink's friend, Jeffrey Almeit, was a passenger in the car. Fink and Almeit exited the car and found their way [***6] to a nearby house. Paramedics and the police were called. When the police arrived, paramedics were immobilizing Fink and Almeit with cervical collars and back boards. The two were transported to a local hospital. Before proceeding to the hospital, police officers investigated the accident scene.

At the hospital, Fink was issued a traffic ticket for failure to reduce speed to avoid an accident. See 625 ILCS 5/11-601(a) (West 1994). An officer requested that Fink submit to a blood-alcohol content test and Fink was warned of the consequences if he refused-the suspension of his driver's license. See 625 ILCS 5/11-501.6(c), (d) (West 1994). Fink consented to a blood test and a nurse drew a blood sample. The sample revealed a blood-alcohol concentration of 0.14. Later that night, Fink was released from the hospital.

[*307] The State attempted to proceed against Fink in two ways. First, the State sent Fink notice that his driver's license was to be suspended for three months pursuant to sections 11-501.6 and 6-208.1 (625 ILCS 5/11-501.6, 6-208.1 (West 1994)). Second, Fink was charged with driving under the influence of alcohol (DUI). See 625 ILCS 5/11-501(a)(1) (West 1994). The DUI citation was [***7] premised upon the 0.14 blood-alcohol content test result obtained under section 11-501.6 (625 ILCS 5/11-501.6 (West 1994)).

[**285] Fink filed a civil complaint for declaratory judgment asking the circuit court to declare section 11-501.6 (625 ILCS 5/11-501.6 (West 1994)) unconstitutional on its face as a violation of the fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution. In the federal constitutional claim, Fink argued that the statute allowed an unreasonable search of a driver without probable cause to believe that the driver was chemically impaired. In the state constitutional claim, Fink argued that chemical testing violated a driver's right to be free from unreasonable searches and that chemical testing invaded a driver's right of privacy.

The circuit court agreed with Fink, stating in its final order: "That because the chemical tests results can still be used in a criminal proceeding, the current version of Section 11-501.6 is no different, substantively, than the

1991 version of the Statute which was struck down as unconstitutional in the case of King v. Ryan ***." In addition, the circuit court stated "the 1994 version of [***8] 625 ILCS 5/11-501.6 is hereby declared unconstitutional in that it sanctions unreasonable searches and seizures in violation of the Fourth Amendment of the United States Constitution."

Because of the circuit court's ruling, Fink's driver's license was not suspended and the 0.14 blood-alcohol [*308] content test result became inadmissible in the DUI prosecution. Without this evidence, the State moved to dismiss the DUI prosecution. The circuit court allowed the State's motion. The Secretary of State appealed directly to this court (134 Ill. 2d R. 302(a)) for review of the circuit court's holding that section 11-501.6 is unconstitutional.

III. DISCUSSION

Because a statute is presumed to be constitutional (*People v. Miller, 171 Ill. 2d 330, 333, 216 Ill. Dec. 93, 664 N.E.2d 1021 (1996)),* Fink "has the burden of clearly establishing [the statute's] constitutional infirmity." *People v. Hickman, 163 Ill. 2d 250, 257, 206 Ill. Dec. 94, 644 N.E.2d 1147 (1994).* Given this court's ruling in King, we may assume the legislature enacted the changes found in section 11-501.6 to address the constitutional concerns expressed in that case. "Where statutes are enacted after judicial opinions [***9] are published, it must be presumed that the legislature acted with knowledge of the prevailing case law." *Hickman, 163 Ill. 2d at 262.*

The purpose of the amended statute, though not explicitly stated, may be found in its language and structure: to reduce the dangers posed by chemically impaired drivers by providing for the suspension of their licenses and by deterring others from engaging in similar misconduct. As King observed, "the State has a compelling interest in protecting its citizens from the hazards caused by intoxicated drivers." *King, 153 Ill. 2d at 461.* To the extent that a statute removes chemically impaired drivers from the road "without relying on criminal sanctions, it serves the State's interests beyond the need for normal law enforcement." *King, 153 Ill. 2d at 461.*

Illinois has a special need to suspend the licenses of chemically impaired drivers and to deter others from driving while chemically impaired. See *King, 153 Ill. 2d at 461.* This specialized need goes beyond the need for [*309] normal law enforcement. Thus, a search may be reasonable absent individualized suspicion if a chemical test is nonintrusive or a driver's expectation of privacy has [***10] been reduced. See *King, 153 Ill. 2d at 458-59.*

A. Constitutionality Under the Fourth Amendment of the United States Constitution

Presented with the problems caused by chemically impaired drivers in the state, the legislature enacted the statute later declared unconstitutional in King. In response to this court's holding in King, the legislature amended the statute by: (1) deleting the requirement that chemical testing be premised upon a driver's fault in causing an accident; (2) deleting the provision that chemical test results could be used in civil and criminal proceedings; (3) adding a requirement that chemical testing be premised upon the [**286] issuance of a Uniform Traffic Ticket for a non-equipment traffic offense; and (4) defining with more particularity the types of "personal injury" that trigger the chemical testing provision. Compare Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-501.6, with 625 ILCS 5/11-501.6 (West 1994).

The legislature did not alter two components in the statute. First, the legislature retained the implied-consent provision of the predecessor statute. Second, the legislature did not require an individualized suspicion of chemical impairment before [***11] subjecting a driver to chemical testing. Compare Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-501.6, with 625 ILCS 5/11-501.6 (West 1994).

We believe that the changes made by the legislature in response to King reduce the intrusiveness of chemical testing and allow for testing only in those situations in which a driver's expectation of privacy is diminished. Like the railroad industry in *Skinner, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402,* and the junkyard business in *Burger, 482 U.S. 691, 96 L. Ed. 2d 601, 107 S. Ct. 2636,* the highways of Illinois are highly regulated. The [*310] Vehicle Code comprises 404 pages in the Illinois Compiled Statutes (West 1994) covering a broad range of subjects from ambulances (625 ILCS 5/1-102.01 (West 1994)) to school zones (625 ILCS 5/11-605 (West 1994)).

Although a driver does not "lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation" (*Delaware v. Prouse, 440 U.S. 648, 662, 59 L. Ed. 2d 660, 673, 99 S. Ct. 1391, 1400 (1979)),* the regulation of automobiles in Illinois reduces a driver's expectation of privacy. While driving on the road, one reasonably expects less privacy [***12] than one expects within the confines of a residence. As the Supreme Court has noted in the context of border checkpoints, "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte, 428 U.S. at 561, 49 L. Ed. 2d at 1130, 96 S. Ct. at 3084-85.*

Further, under the predecessor statute, personal injury

included any injury requiring "immediate professional attention in either a doctor's office or a medical facility." Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-501.6(g). Under the amended statute, the legislature narrowed the spectrum of drivers subject to chemical testing. Under section 11-501.6(g), personal injuries "shall include any type A injury *** [which] *** shall include severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene." 625 ILCS 5/11-501.6(g) (West 1994). We believe that the legislature in amending the statute intended to limit the personal injury requirement of section 11-501.6 to type A injuries. We further believe that type A injuries are limited to those listed [***13] in section 11-501.6(g) (625 ILCS 5/11-501.6(g) (West 1994)).

Accidents involving a fatality still trigger the chemical [*311] testing provision. However, personal injury requiring only a visit to a doctor's office or a medical facility no longer can be the basis for testing. Thus, the legislature's more particularized definition of type A injuries subjects a driver to chemical testing in only the more serious accidents. No reasonable driver expects to leave the scene of a serious accident moments after its occurrence. With law enforcement personnel investigating the accident and other personnel attending to the participants' physical conditions, a driver expects less privacy.

In addition, any driver subject to chemical testing under the amended statute has a statutory duty to remain at the scene of the accident, render aid to injured parties, and exchange basic information with those involved. See 625 ILCS 5/11-401, 11-403 (West 1994). Given the amount of time required to attend to law enforcement and emergency medical needs, the addition of a chemical test is minimally intrusive. Thus, by the very nature of the circumstances in which drivers find themselves, the legislature has imposed [***14] testing only when a driver's expectation of privacy has been diminished and a test is minimally intrusive.

Finally, the amended statute premises chemical testing on an "arrest[ ] as evidenced by the issuance of a Uniform Traffic [**287] Ticket" for a nonequipment violation of the Vehicle Code. 625 ILCS 5/11-501.6(a) (West 1994). Drivers issued Uniform Traffic Tickets are released only after posting bail in the form of a current Illinois driver's license, a bond certificate, or cash. 155 Ill. 2d R. 526. In Terry v. Ohio, the Supreme Court noted that "an arrest *** is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry v. Ohio, 392 U.S. 1, 26, 20 L. Ed. 2d 889, 909, 88 S. Ct. 1868, 1882 (1968).* Because the movement of an arrested [*312] driver is already subject to restrictions, the administering of a chemical test poses a minimal additional intrusion.

In sum, we believe that under the amended statute (625 ILCS 5/11-501.6 (West 1994)), a driver will be subject to chemical testing only in situations in which the intrusiveness of the search has been reduced and a driver's expectation of privacy [***15] has been diminished. The intrusion upon an arrested driver is minimal or nonexistent depending upon the length of time required by law enforcement personnel to process the accident scene and emergency medical personnel to attend to the injured parties. Additionally, a driver's expectation of privacy is diminished because a driver is operating a vehicle in a highly regulated environment.

Thus, we conclude the legislature has enacted a statute that falls within the "special needs" exception to the fourth amendment. The State of Illinois has a special need beyond the normal needs of law enforcement to determine whether drivers are chemically impaired and to suspend those drivers' licenses. Under the limitations contained in the amended statute, drivers are subject to chemical testing only when testing will be minimally intrusive and only after a driver's expectations of privacy have been further diminished by the factors set forth in the statute.

Fink argues, however, that the "special needs" exception to the warrant and probable cause requirement is inapplicable because the chemical test results may be used in a criminal proceeding. For several reasons, Fink's claim fails.

In support [***16] of his argument, Fink points to comments by the King court that the predecessor statute fell outside the "special needs" exception because "one of the stated purposes of the search is to gather evidence for criminal prosecution." *King, 153 Ill. 2d at 462.* [*313] However, as noted elsewhere in *King (153 Ill. 2d at 459-60),* the Supreme Court has not yet determined whether evidence obtained under the "special needs" exception may be routinely used in criminal proceedings. See *Skinner, 489 U.S. at 621 n.5, 103 L. Ed. 2d at 662 n.5, 109 S. Ct. at 1415 n.5.* King recognized that "the Supreme Court has upheld searches under this special exception even though evidence obtained during the search was also used in a criminal trial." *King, 153 Ill. 2d at 462.* In those instances in which searches were upheld, "the evidence was found incidentally during a search which was constitutionally valid under the special needs exception." *King, 153 Ill. 2d at 462.* If the admission of chemical test results in a criminal proceeding is incidental to a statute's purpose, application of the "special needs" exception is not precluded.

Following King, the legislature chose to delete those [***17] provisions contained in the former statute that

allowed the use of chemical test results in criminal proceedings. Compare Ill. Rev. Stat. 1991, ch. 95 1/2, pars. 11-501.6(e), (f), with 625 ILCS 5/11-501.6(e), (f) (West 1994). As we have already noted, the purpose of the statute is to reduce the destruction caused by drunken drivers on Illinois highways. This goal can be accomplished through civil suspension proceedings of those who fail the test, as well as through the provisions suspending the licenses of persons who refuse to submit to chemical testing. By deleting any reference in the amended statute to the use of test results in criminal proceedings, the legislature has made clear that criminal prosecution is only incidental to the primary purpose of the statute. Because the use of test results in other proceedings is incidental to the amended statute's purpose, the "special needs" exception to the warrant and probable cause requirement [**288] remains applicable. *King, 153 Ill. 2d at 462, 180 Ill. Dec. 260, 607 N.E.2d 154.*

[*314] B. Constitutionality Under Article I, Section 6, of the Illinois Constitution

In the proceedings below, Fink also argued that the amended statute violated article I, section 6, of the Illinois [***18] Constitution. The trial judge did not resolve this issue and instead based his decision solely on the fourth amendment. Fink renews his state constitutional argument here in support of the circuit court's judgment in his favor.

Article I, section 6, of the Illinois Constitution provides:

"The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6.

This court has construed the search and seizure language found in section 6 in a manner that is consistent with the Supreme Court's fourth amendment jurisprudence. *People v. Mitchell, 165 Ill. 2d 211, 219, 209 Ill. Dec. 41, 650 N.E.2d 1014 (1995); People v. Tisler, 103 Ill. 2d 226, 245, 82 Ill. Dec. 613, 469 N.E.2d 147 (1984).* Because the amended statute falls within the "special needs" exception to the fourth amendment, we believe that it also comports with the search and seizure provision of article I, section 6, of our state constitution.

The additional recognition in section 6 of a zone of personal privacy does [***19] not alter our analysis. As we have already determined, a driver has a reduced expectation of privacy in those circumstances in which the amended statute is applicable, for the driver has been involved in a serious accident while operating a vehicle in a highly regulated environment and, moreover, is under arrest, as evidenced by the receipt of a traffic ticket.

Contrary to Fink's argument, this court's earlier decision in King does not control the resolution of this question. The King court believed that the prior statute violated the privacy provision of the Illinois Constitution [*315] because drivers could be tested even though they had not been arrested and even though there was no probable cause to believe they had committed an offense. *King, 153 Ill. 2d at 464-65.* Under the amended statute, however, no driver is chemically tested unless the person has been arrested, based on the existence of probable cause, for a nonequipment violation of the Vehicle Code. We thus believe that a driver's zone of privacy is not unconstitutionally invaded when a driver is chemically tested pursuant to section 11-501.6, and we therefore conclude the amended statute does not violate article [***20] I, section 6, of the Illinois Constitution.

IV. CONCLUSION

For the foregoing reasons, we uphold the constitutionality of section 11-501.6 (625 ILCS 5/11-501.6 (West 1994)). The statute passes constitutional scrutiny under both the fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution of 1970. Therefore, we reverse the circuit court's judgment. This cause is remanded to the circuit court of Lake County for further proceedings.

Reversed and remanded.

DISSENTBY: BILANDIC

DISSENT:
CHIEF JUSTICE BILANDIC, dissenting:

I am not persuaded by the majority's attempt to distinguish the instant statute from the 1991 version of the same statute that this court declared unconstitutional in *King v. Ryan, 153 Ill. 2d 449, 180 Ill. Dec. 260, 607 N.E.2d 154 (1992).* As the trial court determined, the current statute is "no different, substantively," from the 1991 statute. If King correctly declared the 1991 statute unconstitutional, then we should likewise hold that the current statute is unconstitutional. If, on the other hand, the court now wishes to reconsider and reject the majority opinion in King, it should do so expressly.

Instead, [***21] the majority makes a disingenuous and unpersuasive [*316] attempt to reconcile its decision with King. The majority claims that the current statute is different in several respects from its predecessor, and that these differences support a conclusion that the current statute is constitutional. The purported [**289] distinctions, however, are illusory and do not justify or permit a conclusion different from that reached in King.

The current statute, like its predecessor, essentially pro-

vides that drivers give implied consent to the chemical testing of their breath, blood or urine to determine its blood-alcohol or drug content whenever a police officer determines that the driver has been in an accident that resulted in death or personal injury and that the driver committed a traffic violation. Neither statute required any individualized suspicion that the driver was under the influence of alcohol or drugs. The only differences between the two statutes are that (1) the current statute defines "personal injury" slightly differently than the 1991 statute; (2) under the current statute, the police officer must give the driver involved in the accident a traffic ticket, while the former statute [***22] required the officer to determine that the affected driver was "at fault" in causing the accident; and (3) the current statute, unlike the 1991 version, does not expressly state that the test results may be used in criminal proceedings, but permits the use of test results in such proceedings.

In King this court declared the 1991 statute unconstitutional, in part, because it violated the fourth amendment of the United States Constitution. The court found that the provision that authorized chemical testing of a driver without a warrant or probable cause was unconstitutional. The King court concluded that the "special needs" exception to the fourth amendment's warrant requirement did not apply to the statute. *King, 153 Ill. 2d at 462.*

[*317] Despite the obvious similarity between the current statute and the 1991 version found unconstitutional in King, the majority nevertheless finds that the current statute does not violate the fourth amendment. In reaching this conclusion, the majority opinion, like the King opinion, considers the "special needs" test. Unlike King, however, the majority finds that the current statute satisfies all of the requirements of that test. [***23]

The majority first notes that the regulation of highways and automobiles reduces a driver's expectation of privacy. The majority acknowledges that the King opinion found that such regulation is insufficient to excuse the warrant requirement. The majority "distinguishes" King, however, on the basis of a supposedly "narrower" definition of "personal injury" in the current statute. In fact, the definition of "personal injury" under the current statute is no narrower than under its predecessor. Both statutes governed only those drivers involved in serious automobile accidents. The majority here, unlike the King majority, simply concludes that drivers involved in serious accidents have a diminished expectation of privacy that justifies a warrantless search. I continue to agree with the King court's conclusion that such drivers do not necessarily have a diminished expectation of privacy that justifies subjecting them to a warrantless search without any requirement of individualized suspicion.

The majority here also finds that the search authorized under the current statute is "minimally intrusive" and thus satisfies the second prong of the "special needs" test. In reaching [***24] this conclusion, the majority notes that the driver subjected to the search is already required to remain at the scene of a serious accident while medical assistance is rendered to injured persons. The opinion also notes that the search is permitted only when the driver is "arrested as evidenced by the issuance of a Uniform Traffic Ticket."

[*318] The majority fails to adequately explain why these two factors alter the King court's conclusion that the warrantless search at issue is not minimally intrusive. King concluded that a warrantless search to determine the blood-alcohol content of a person's breath, blood or urine is intrusive and that the 1991 statute authorizing such a search therefore did not satisfy the second prong of the "special needs" test. *King. 153 Ill. 2d at 462-63.* At the time the King court declared the 1991 statute unconstitutional, drivers were also required to remain at the scene of a serious accident. See Ill. Rev. Stat. 1991, ch. 95 1/2, par. 11-403. The King court nevertheless found that warrantless search at issue was an "intrusive" search. *King, 153 Ill. 2d at 462-63.* Similarly, King found the search intrusive even though the police [***25] officer conducting the [**290] search was first required to conclude that the driver was partially "at fault" in causing the accident. I fail to see why a different conclusion is permissible here simply because the officer must now issue a written traffic ticket. The current statute is arguably even more intrusive than its predecessor, which required a police officer to determine that there was some link between the motorist's driving and the accident. Under the current statute, no such causal link is required. If a motorist is charged with any offense under the motor vehicle code (with the exception of an equipment violation), then that person is susceptible to a search regardless of whether the motorist is responsible for the accident. The purported "distinctions" cited in the majority opinion between the current statute and the statute declared unconstitutional in King are not substantive differences, but simply excuses used to justify a conclusion inconsistent with that reached in King.

The majority finally concludes that the current statute serves the State's needs, beyond the need for normal [*319] law enforcement. The majority distinguishes the 1991 statute on the ground that [***26] the current statute deletes the provision which expressly authorized the use of test results in criminal proceedings. The King court cited this provision as evidence that the search permitted under the 1991 statute did not serve special needs, beyond the needs of law enforcement. because "one of the stated purposes of the search is to gather evidence

for criminal prosecution." *King, 153 Ill. 2d at 462.* The majority here finds that the legislature, by deleting the provision expressly authorizing the use of search results in criminal proceedings, has demonstrated that criminal prosecution is incidental to the primary purpose of the statute. I disagree.

The King court determined that, to the extent that the 1991 statute relied upon criminal sanctions to accomplish the State's goal of deterring drunk driving and removing drunk drivers from the road, the statute did not serve the state's interests beyond the need for law enforcement. The majority opinion acknowledges, as it must, that search results will routinely be used in criminal proceedings. Moreover, a review of the legislative history reveals that the current statute, like its predecessor, was intended to [***27] secure evidence for use in criminal proceedings against intoxicated motorists. To suggest that the deletion of the provision expressly authorizing the use of search results in criminal proceedings renders the statute constitutional simply exalts form over substance. If King correctly declared the 1991 statute unconstitutional, none of the distinctions raised in the majority opinion between the 1991 statute and the current statute justify a contrary finding here. The majority's analysis is consistent only with the dissenting opinions in King. Because I continue to adhere to King, I respectfully dissent.

[*320] JUSTICES HARRISON and NICKELS join in this dissent.

681 A.2d 472 printed in FULL format.

STATE OF MAINE v. WAYNE ROCHE

Decision No. 7774, Law Docket No. FRA-94-585

SUPREME JUDICIAL COURT OF MAINE

681 A.2d 472; 1996 Me. LEXIS 196

June 10, 1996, Argued

August 20, 1996, Decided

DISPOSITION: [**1]

Judgment affirmed.

CORE TERMS: probable cause, blood test, truck, testing, work site, intrusion, fatality, lane, regulation, highway, Fourth Amendment, warrant requirement, scenario, driving, blood, blood-alcohol, manslaughter, steamer, flagman, railway, drivers, fatal, individualized suspicion, test result, administered, admissible, impaired, seizure, determination of probable cause, exigent circumstances

COUNSEL: Attorneys for the State: Norman R. Croteau, Esq., District Attorney, Margot Joly, Esq. (orally), Assistant District Attorney, Farmington, Maine.

Attorney for the Defendant: John Alsop, Esq. (orally), ALSOP & MOHLAR, Norridgewock, Maine.

JUDGES: Before WATHEN, C.J., and ROBERTS, GLASSMAN, RUDMAN, and LIPEZ, JJ. All concurring.

OPINIONBY: WATHEN

OPINION: [*472]

WATHEN, C.J.

Defendant, Wayne Roche, appeals from the judgment entered in the Superior Court (Franklin County, Chandler, J.) following a jury trial that resulted in a verdict of not guilty on one count of manslaughter and guilty on one count of operating under the influence ("OUI") in violation of 29 M.R.S.A. § 1312 (1992). n1 The jury considered as part of the evidence relating to the OUI charge the result of a mandatory blood-alcohol test administered pursuant to 29 M.R.S.A. § 1312 in any accident in which a death has occurred or will occur. On appeal defendant challenges the constitutionality of the statute because it mandates testing without probable cause to believe the vehicle operator has been driving while impaired. Defendant also contends that the court erred in finding that probable cause existed [**2] independent of the blood test result to believe that he had operated [*473] his vehicle under the influence. Finally he contends that the court erred in admitting the blood test evidence without expert testimony to support its admission. We affirm the judgment.

n1 29 M.R.S.A. § 1312 has been replaced by 29-A M.R.S.A. § 2411 (1996), which states, in part, that a person commits OUI if that person operates a motor vehicle "while under the influence of intoxicants."

The text of 29 M.R.S.A. § 1312 (11)(D) as it appeared in 1993, which is the subsection at issue in this case, provided in pertinent part:

Notwithstanding any other provision of this section, each operator of a motor vehicle involved in a motor vehicle accident shall submit to and complete a chemical test to determine that person's blood-alcohol level or drug concentration by analysis of the person's blood, breath, or urine if there is probable cause to believe that a death has occurred or will occur as a result of the accident. . . . The result of a test taken pursuant to this paragraph is admissible at trial if the court, after reviewing all the evidence regardless of whether the evidence was gathered prior to, during, or after the administration of the test, is satisfied that probable cause exists, independent of the test result, to believe that the operator was under the influence of intoxication of liquor or drugs or had an excessive blood alcohol level.

29 M.R.S.A. § 1312 (11)(D) (emphasis added).

29 M.R.S.A. § 1312 has been repealed and replaced by 29-A M.R.S.A. § 2522 (1996).

[**3]

The facts giving rise to this case may be summarized as follows. Wayne Roche was employed as a professional truck driver. In March 1993 he was hauling logs in his tractor trailer north of Eustis when he came upon a Maine Department of Transportation ("DOT") work site where four workers were steaming a frozen culvert. One lane only was open where the work site was located, and there were two signs placed on the road north of the site to warn oncoming traffic of the position of the workers. A flagman stood on either end of the site. The flagmen used signs, which read "stop" on one side and "slow" on the other, to direct the traffic through the single lane. The third man was inside the steamer truck in the middle of the work site and the fourth man was working in the ditch with the steamer hose. The work site was at the bottom of a hill.

Defendant slowed his truck as he approached the work site, but he did not obey the flagman's signal to stop. He moved into the open lane of travel and proceeded southbound through the work site. At the same time a northbound truck was traveling through the single lane in the direction of the flagman. Defendant tried to avoid colliding with the truck [**4] by swerving to the right and reentering the single lane of travel. As he attempted the maneuver he realized that there were more cars traveling behind the truck and he was forced to pull off to the right again. He brought his truck to a halt on the right shoulder of the road and the truck slowly rolled over, spilling the logs it had carried. Lloyd Sweetser, who had been working in the ditch with the steamer hose, tried to run away but was crushed by the contents of the truck and died.

Defendant was taken to a local hospital for examination and treatment for minor injuries. At the hospital a blood test was ordered by an officer of the Farmington Police Department. The officer brought the blood test kit to the hospital at the request of the Franklin County Sheriffs office, which had informed him that the accident involved a fatality and that therefore defendant was required to be tested.

A few weeks after the accident a state trooper, who investigated the accident scene and interviewed defendant on the day following the accident, went to defendant's home and questioned him about his use of alcohol. Defendant stated that he drank about a fifth of whiskey on the night before the accident. [**5] These statements were considered by the court in its determination of probable cause independent of the blood test result pursuant to 29 M.R.S.A. § 1312 and were offered as admissions in the State's case.

Defendant was indicted on one count of manslaughter and one count of operating under the influence. He pleaded not guilty to both charges. His motion to suppress the blood test results was denied. The matter proceeded to trial and the jury returned a verdict of not guilty on the manslaughter count and guilty on the operating under the influence count. The court sentenced defendant to a 60 day jail term.

Defendant contends that although the State fully complied with the statutory requirements of section 1312 the statute itself "abrogates the requirements of the Fourth Amendment." The premise of defendant's argument is that a warrantless search is permissible only when a recognized exception to the warrant requirement is present, for example a search conducted on the basis of exigent circumstances and probable cause. He concedes that exigent circumstances exist in virtually every blood-alcohol testing situation, but he maintains that probable cause must exist simultaneously in order [**6] to administer the test.

Defendant cites as support for his argument *Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966),* which unquestionably establishes that a blood test is a search within the meaning of the Fourth Amendment. Schmerber considered the constitutionality of a blood test conducted incident to a lawful arrest. And were Schmerber the only case bearing on the constitutionality of a blood test conducted without a [*474] warrant we would have to hold the statute unconstitutional.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989), however, resolves any doubt that a blood test in certain limited circumstances may be conducted on less than probable cause and, indeed, on less than individualized suspicion. The justification for such a search is popularly known as the "special needs" exception to probable cause. The State contends that Skinner picks up where Schmerber left off on the question of justification for a governmentally compelled test to determine the presence of intoxicants in the blood. We agree.

In Skinner the Federal Railroad Administration promulgated regulations [**7] that required certain employees to be tested for the presence of drugs or alcohol following certain major train accidents (e.g., accidents involving a fatality or property damage in excess of $ .5 million). Railway labor organizations filed suit to enjoin the regulations.

The Supreme Court held that the tests were reasonable even though there was no reasonable suspicion that any

particular employee was impaired. The Court stated that the compelling governmental interests served by the regulations outweighed the employees' privacy concerns. It further stated that imposing a warrant requirement would do little to further the very purpose of a warrant because the circumstances permitting the testing and the limits of the intrusion were "narrowly and specifically" defined. According to the Court a warrant requirement would significantly hinder the purpose of the testing due to the perishable nature of the evidence. *Skinner, 489 U.S. at 622-24.* Moreover, the Court stated that an individualized suspicion requirement was also not necessary to render the search at issue reasonable. The testing posed only a limited threat to the employees' justifiable privacy expectation, especially because [**8] they participate in an industry subject to pervasive safety regulation.

We have once before been asked to consider the impact of Skinner on the constitutionality of the implied consent law at issue in this case. In *State v. Bento, 600 A.2d 1094 (Me. 1991),* we held that the statute may not be construed to require that probable cause of intoxication be established prior to a driver's submitting to a blood test. Further, we stated that the statute required only that probable cause be established at the trial in order for the test results to be admissible. We declined to address the impact of Skinner on the case because the constitutional argument was raised for the first time on appeal and because a remand was necessary to resolve inconsistent factual findings before we could determine whether the constitutional question was squarely presented.

We noted in Bento that the legislature did not intend to treat an operator involved in a vehicle fatality in the same manner as an operator involved in a routine OUI stop. *Bento, 600 A.2d at 1096.* That observation bears repeating here. In the latter scenario probable cause must exist at the time a blood test is administered. [**9] In the former scenario, the statute contemplates that probable cause is implicated only when admission of the test result is sought at the trial. The justification for the search is linked to the gravity of the accident as well as the evanescent nature of evidence of intoxication and the deterrent effect on drunk driving of immediate investigations of fatal accidents. The State, in effect, conditions the privilege of driving on every driver's willingness to submit to a test, if, and only if, he or she is involved in a fatal or near fatal car accident. In all other OUI scenarios the State may proceed to search an individual only on the basis of probable cause. We believe Skinner confirms the permissibility of such a scheme.

Skinner gauged the reasonableness of the search by looking at the surrounding circumstances: the fact the delay in testing would frustrate the government's purpose, the heavy regulation of the railway industry, and the minor intrusion occasioned by the tests. Certainly the State faces the same problems with testing delay, and the intrusion occasioned by Maine's scheme is no more than that in Skinner. Finally, although our state's highways may not [**10] be as regulated as railways, they are nonetheless highly regulated. [*475]

The Court's holding in *Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990),* provides further support for our decision. In Sitz the Court upheld the constitutionality of a highway sobriety checkpoint program. The Court held that a vehicle stop amounted to a seizure, but concluded that it was reasonable under the Fourth Amendment because there could be no dispute about the magnitude of, and the States' interest in, eradicating the problem of intoxicated drivers. Because the seizure was so limited in time and intrusion, the balance weighed in favor of the state. The balance also weighs in the State's favor in the case at hand. We are mindful of the fact that courts in other jurisdictions have taken a more restricted view of the impact of Skinner when applied to highway fatalities. See *King v. Ryan, 153 Ill. 2d 449, 607 N.E.2d 154, 180 Ill. Dec. 260 (1992); Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (Pa. 1992).* We are unable to conclude that the public's interest in preventing highway fatalities resulting from drunk drivers is less compelling than its [**11] interest in ensuring safety in rail transportation. Driving is an activity that is increasingly subject to regulation, and one involved in a fatal accident would ordinarily expect to be subjected to an investigation. Any intrusion added by section 1312 is not sufficient to constitutionally compel a requirement for a simultaneous determination of probable cause.

Defendant's argument that the blood test results were inadmissible because no independent probable cause was proved pursuant to 29 M.R.S.A. § 1312 is without merit. Our review of the court's ruling relative to the issue demonstrates competent evidence of independent probable cause.

The Defendant's remaining argument is without merits and requires no discussion.

The entry is:

Judgment affirmed.

All concurring.

Copy to JEO

Waiting for JEO

REPRESENTATIVE ROBERT G. GOETSCH

CHAIR: ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

Perhaps be better if
1) Restrict blood testing to person's ticketed
2) Restrict use to license revocation - not criminal prosecution
3) still have problem with persons not ticketed

TO: Bob Nelson, LRB

FROM: Representative Bob Goetsch

DATE: March 23, 1999

RE: AMENDMENT TO ASSEMBLY BILL 160

Thank you for your help this past week in drafting LRBa0193/1 in time for the public hearing on AB 160. Unfortunately, I think that draft will be inadequate to address all of the Assembly Committee on Highway Safety members' concerns.

Accordingly, I'd like a substitute amendment that incorporates the following changes:

1. Page 2, line 14: delete "each" and substitute "a".
2. Page 2, line 15: delete "knew any" and substitute "has probable cause to believe either".
3. Page 2, line 17: delete lines 17 and 18 and substitute:
"1. That a person died or is likely to die as a result of the operation of a motor vehicle involved in the accident.".
4. Page 3, line 8: delete lines 8 to 10 and substitute: "and keep a record of those results to be used for statistical purposes.".

Additionally, I'd like the substitute amendment to reflect the following:

1. ~~Within 3 hours after the accident, a law enforcement officer shall request that a blood specimen be withdrawn from a person described in s. 346.71 (2g) (b) 1. or 2. The blood shall be withdrawn as soon as practicable after the request.~~
2. A law enforcement officer shall have access to a blood specimen that a physician or a qualified person at the direction of a physician may withdraw for diagnostic or treatment purposes from a driver or operator described in s. 346.71 (2g). If no blood was withdrawn for diagnostic or treatment purposes, the law enforcement officer shall require that the blood be withdrawn for alcohol and drug testing purposes.
3. The department of transportation shall pay the cost of each blood alcohol and drug analysis.
4. The department of transportation shall pay the cost of withdrawing blood when the blood was withdrawn solely at the request of a law enforcement officer for the purpose of blood alcohol and drug testing.

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3/31 2000

State of Wisconsin
1999 – 2000 LEGISLATURE

LRBa0259/1
RPN....:....:....

D-Note

cmm + jg

ASSEMBLY AMENDMENT ,

TO 1999 ASSEMBLY BILL 160

At the locations indicated, amend the bill as follows:

1. Page 2, line 14: delete "each" and substitute "a".

2. Page 2, line 15: delete "knew" and substitute "has probable cause to believe".

3. Page 2, line 17: delete lines 17 and 18 and substitute:

"1. That a person died or is likely to die as a result of the operation of a motor vehicle involved in the accident.".

4. Page 2, line 22: after "accident." insert "If a blood specimen has been withdrawn from the person for medical reasons in an amount sufficient to provide 10 cc. of blood for testing under this paragraph, that blood shall be used for the testing and no additional blood specimen shall be withdrawn from the person.".

5. Page 3, line 8: delete that line and substitute "and the cost of withdrawing the blood specimen solely at the request of a law enforcement officer. The department".

6. Page 3, line 10: after that line insert:

"(d) The results of an analysis under par. (c) are admissible at trial if the court, after reviewing all of the evidence regardless of whether the evidence was gathered before, during or after taking the blood specimen for the analysis, is satisfied that probable causes exists, independent of the analysis results, to believe that at the time of the accident the operator was under the influence of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, or had a prohibited alcohol concentration.".

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa0259/1dn
RPN...:...:...

As requested, I have included language that is similar to that used in Maine and found constitutional by the supreme court of Maine. I am not totally convinced by the rationale of the Maine court, and would caution you that the Wisconsin supreme court may not agree with that decision. Under an Illinois statute similar to the Maine statute and to this proposal, blood may be taken only from operators who have been ticketed for some nonequipment violation. Do you may want to consider including such a limitation in this amendment to reduce the chance of a successful constitutional challenge?

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267–7511

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa0259/1dn
RPN:cmh&jlg:jf

March 31, 1999

As requested, I have included language that is similar to that used in Maine and found constitutional by the supreme court of Maine. I am not totally convinced by the rationale of the Maine court, and would caution you that the Wisconsin supreme court may not agree with that decision. Under an Illinois statute similar to the Maine statute and to this proposal, blood may be taken only from operators who have been ticketed for some nonequipment violation. Do you may want to consider including such a limitation in this amendment to reduce the chance of a successful constitutional challenge?

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