ATTORNEY FOR APPELLANT

Jon A. Keyes
Allen Wellman McNew Harvey, LLP
Greenfield, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney L. Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

L.W.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

November 23, 2022

Court of Appeals Case No. 22A-JV-1138

Appeal from the Hancock Circuit Court

The Honorable R. Scott Sirk, Judge

Trial Court Case No. 30C01-2111-JD-414

Friedlander, Senior Judge.

[1] The State of Indiana filed a petition alleging seventeen-year-old L.W. was a delinquent in connection with a vehicle accident that resulted in a fatality.

After the accident, a police officer obtained a sample of L.W.'s blood. L.W. subsequently moved to suppress all evidence obtained in connection with the blood draw, claiming the officer had infringed on her statutory right to consult with her mother prior to agreeing to the procedure. The juvenile court denied L.W.'s motion.

[2] In this interlocutory appeal, L.W. reiterates that the blood draw, absent an opportunity for parental consultation, violated her federal and state constitutional protections against unreasonable search and seizure. We reverse the juvenile court's denial of L.W.'s motion to suppress and remand with instructions.

Facts and Procedural History

[3] On April 6, 2021, Officer Matt Fox of the Fortville Police Department was dispatched to investigate a serious motor vehicle crash. Upon arrival at the scene, he learned L.W., who had been driving a sport utility vehicle, had collided with Guy Washburn, who had been riding a motorcycle. Washburn later died from severe injuries sustained in the crash, but L.W. was unhurt. Officer Fox found L.W. sitting on a curb, crying. L.W.'s mother, who L.W. had called to the scene, sat next to her. Officer Fox was wearing a body camera, which recorded his interactions with L.W. and her mother.

[4] Officer Fox asked L.W.'s mother to speak with him alone, so they walked a short distance away from L.W. L.W.'s mother told Officer Fox L.W. was seventeen. In turn, he told L.W.'s mother that whenever there is a crash with

serious injuries, "we have to draw your daughter's blood. Okay? That's just the law." Defendant's Ex. A, File FOX305_9C00629_1626490, at 3:12. The officer further stated he would read L.W. an implied consent advisement and transport her to the hospital for the blood draw. Officer Fox further stated L.W. was not under arrest, and "it's all a formality." *Id.* at 3:32. He further stated his investigation would not necessarily result in "criminal charges" being filed. *Id*. at 4:59.

[5] Officer Fox and L.W.'s mother then walked back to L.W. He told L.W. she was not under arrest, but he needed to read her something. Officer Fox then produced an implied consent advisement, which he told her he had discussed with her mother, and read the following:

> I have reason to believe you operated a motor vehicle that was involved in a fatal or serious bodily injury crash and must now offer you the opportunity to submit to a chemical test and inform you that your refusal to submit to a chemical test will result in your driving privileges [sic] for one year and is punishable by a Class C infraction. If you have at least one previous conviction for Operating While Intoxicated, your refusal to submit to a chemical test will result in your driving privileges [sic] for two years and is punishable as a Class A infraction.

Id. at 16:20.

[6] L.W. indicated she agreed to the blood draw. Officer Fox then explained to L.W. that he would transport her to the hospital for the procedure, with her mother driving separately. He said the blood draw was "required by state law." *Id.* at 7:52.

[7] At that point, Officer Fox asked L.W. to explain what happened, and she stated, while crying, that she did not remember the details of the accident, did not see the motorcycle, and may have fallen asleep while driving. He returned to the subject of the blood draw, stating "it's just a formality," all parties to the crash have to undergo the blood draw, and no one was accusing L.W. "of being impaired." *Id.* at 10:56, 11:10. Officer Fox then stated that after the blood draw was done, L.W. would be able to go home with her mother.

[8] Officer Fox put L.W. in his marked police vehicle and drove to a nearby hospital, with L.W.'s mother following. He did not activate his lights or siren, and he drove at a regular speed. Over the course of the twenty-four-minute drive, Officer Fox asked L.W. several questions about the crash but generally remained silent or communicated with his supervisor. L.W. did not volunteer any information.

[9] Upon arriving at the hospital, Officer Fox escorted L.W. and her mother to a room, where they waited for approximately fifteen minutes until a phlebotomist arrived. The phlebotomist had L.W.'s mother review and sign a form stating:

> I give consent for a chemical test on blood, urine, or other bodily substance to be collected and analyzed at Hancock Regional Hospital, with the full understanding that I am not required to give this consent.
>
> I understand the results of the chemical test on blood, urine, or other bodily substance obtained from me will be disclosed to any law enforcement officer who requests it as part of a criminal investigation. Samples and test results will be provided to the

> law enforcement officer even though my consent is not given. I understand that the results of the test might affect me adversely.

Tr. Vol. III, p. 4 (State's Ex. 2). Next, the phlebotomist took a blood sample from L.W. The State alleges subsequent testing of the sample revealed the presence of a metabolite of THC, a controlled substance.

[10] Officer Fox later admitted he had not advised L.W. at the crash site, or in the police vehicle, or at the hospital, that she had a right to consult with her mother before agreeing to a blood draw. He further agreed it would have taken only "ten seconds" at most to provide that advisement. Tr. Vol. II, p. 8. L.W. and her mother both subsequently testified that if they had been advised they could have spoken privately before agreeing to the blood draw, they would have had a private discussion.

[11] On November 23, 2021, the State filed with the juvenile court a request for leave to file a delinquent child petition against L.W. The court granted the State's request. The State ultimately filed an amended delinquency petition alleging L.W. was a delinquent child for acts that, if they had been committed by an adult, would have amounted to causing death when operating a vehicle with a schedule I or II controlled substance or its metabolite in the blood, a Level 4 felony;[1] and reckless homicide, a Level 5 felony.[2]

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[1] Ind. Code § 9-30-5-5 (2019).

[2] Ind. Code § 35-42-1-5 (2014). Specifically, the State alleged L.W. acted recklessly by "operating a vehicle with a schedule I or II controlled substance or its metabolite in her blood." Appellant's App Vol. 2, p. 48.

[12] On March 10, 2022, L.W. filed a motion to suppress all evidence obtained as a result of the blood draw, claiming the evidence was obtained in violation of her federal and state constitutional protections against unreasonable search and seizure. In a subsequent brief, she argued she had not been given an opportunity to speak privately with her mother prior to consenting to the blood draw, in violation of Indiana law. Appellant's App. Vol. 2, p. 101.

[13] The State filed a response to L.W.'s motion, and the juvenile court presided over an evidentiary hearing. On April 18, 2022, the court denied L.W.'s motion. The juvenile court and this Court granted L.W. permission to seek interlocutory review of the trial court's ruling, and this appeal followed.

Discussion and Decision

[14] L.W. argues the juvenile court erred in denying her motion to suppress. Generally, our review of a denial of a motion to suppress is similar to our review of other sufficiency matters. *Wright v. State*, 766 N.E.2d 1223 (Ind. Ct. App. 2002). That is, we will disturb the trial court's ruling only upon a showing of abuse of discretion. *Id.* But where, as in this case, the appellant challenges the constitutionality of a search or seizure via a motion to suppress, that challenge raises a "pure question of law that we review de novo." *Tigner v. State*, 142 N.E.3d 1064, 1068 (Ind. Ct. App. 2020).

[15] The act of drawing a person's blood by the State, or at the direction of the State, in furtherance of a police investigation is a type of search that is subject to the

warrant requirements of the Fourth Amendment[3] and article I, section 11 of the Indiana Constitution.[4] *See Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 185 L. Ed. 2d 696 (2013) (warrantless blood draw from a suspect is valid only if it falls under one of the exceptions to the Fourth Amendment's warrant requirement); *see also Clark v. State*, 175 Ind. App. 391, 398, 372 N.E.2d 185, 189 (Ind. Ct. App. 1978) ("the taking of a blood sample is an intrusion meant to be limited by [federal and state] constitutional protections").

[16] The State did not obtain a warrant for L.W.'s blood draw. Under the Fourth Amendment, a warrantless search is per se unreasonable, and the State must prove one of the exceptions to the warrant requirement applies. *M.O. v. State*, 63 N.E.3d 329 (Ind. 2016).

[17] "A warrantless search based on lawful consent is consistent with both the Indiana and Federal Constitutions." *Campos v. State*, 885 N.E.2d 590, 600 (Ind. 2008). The State points out that, by statute, drivers impliedly consent to blood draws in connection with accidents involving serious injury or death. Ind.

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[3] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[4] Section 11 provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Code § 9-30-7-2 (2001) (implied consent is a condition of operating a vehicle in Indiana). A driver may refuse to consent, and if consent is not given, the driver is guilty of an infraction and will experience suspension of driving privileges for at least a year. Ind. Code § 9-30-7-5 (2013). But the police may not simply require a driver to submit to a blood draw if the driver refuses consent. *See Hannoy v. State*, 789 N.E.2d 977, 983 (Ind. Ct. App. 2003) ("Nothing in Indiana Code Chapter 9-30-7 authorizes an officer to forcibly take a blood sample if actual consent to a chemical test is not obtained"), *on reh'g*, 793 N.E.2d 1109 (2003), *trans. denied*. Instead, when a driver refuses to consent, the officer must have probable cause to proceed with a blood draw over the driver's objection. *Id.* at 989.

[18] L.W. did consent to the blood draw after Officer Cox read her an implied consent advisement, but she argues her consent was invalid because she was deprived of any opportunity to speak privately with her mother. The General Assembly has set forth specific requirements that must be met before juveniles may waive their constitutional rights, including the protections against unreasonable search and seizure, as follows:

> Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:
>
> (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
>
> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
>
> (A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation hast occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver; or

(3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:

(A) the child knowingly and voluntarily consents to the waiver; and

(B) the child has been emancipated under IC 31-34-20-6 or IC 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction.

Ind. Code § 31-32-5-1 (1997).

[19] A child may waive the right to meaningful consultation with a parent, guardian, or custodian, but only if:

(1) the child is informed of that right;

(2) the child's waiver is made in the presence of the child's custodial parent, guardian, custodian, guardian ad litem, or attorney; and

(3) the waiver is made knowingly and voluntarily.

Ind. Code § 31-32-5-2 (1997).

[20] The State bears the burden of proving beyond a reasonable doubt that the juvenile received all of the protections of Indiana Code section 31-32-5-1, and that both the juvenile and the parent or guardian knowingly, intelligently, and voluntarily waived the juvenile's rights. *D.M. v. State*, 949 N.E.2d 327 (Ind. 2011). In L.W.'s case, the evidence is undisputed that Officer Fox did not inform L.W. of her right to speak with her mother or allow them to talk in

private at any time prior to the blood draw. He later conceded that advising L.W. and her mother of their right to speak privately would have taken less than ten seconds. As a result, L.W. did not receive the protections mandated by Indiana Code section 31-32-5-1.

[21] The State does not dispute that the protections of Indiana Code section 31-32-5-1 are applicable to juveniles undergoing breath or chemical tests pursuant to Indiana's implied consent laws. To the contrary, the State "assum[es] for the sake of argument" that Indiana Code section 31-32-5-1 requires an officer to provide a juvenile with an opportunity for meaningful consultation prior to providing consent for such tests. Appellee's Br. p. 13. The State instead argues the blood draw did not violate her federal and state constitutional protections against unreasonable search and seizure despite the lack of meaningful consultation.

[22] Turning to the Fourth Amendment, the State argues that, even without a valid consent from L.W. or her mother, the warrantless blood draw was justified by exigent circumstances, specifically the loss of the evidence of possible controlled substances in her blood. "Among the exigencies that may properly excuse the warrant requirement are threats to the lives and safety of officers and others and the imminent destruction of evidence." *Holder v. State*, 847 N.E.2d 930, 937 (Ind. 2006). With respect to warrantless blood draws, this Court has stated:

> It is acceptable for police to draw a person's blood without their consent if (1) there is probable cause to believe that the person has operated a vehicle while intoxicated; (2) the dissipation of

> alcohol in the blood creates exigent circumstances under which there is no time to secure a search warrant; (3) the test chosen to measure the person's blood alcohol concentration is a reasonable one; and (4) the test is performed in a reasonable manner.

Duncan v. State, 799 N.E.2d 538, 542 (Ind. Ct. App. 2003) (citing *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

[23] In L.W.'s case, the State failed to present any evidence that Officer Fox observed signs of intoxication, whether from alcohol or controlled substances. He did not note bloodshot eyes, slurred speech, poor dexterity, or other indicators. To the contrary, Officer Fox later testified only that he developed probable cause to believe L.W. "was the driver of a vehicle involved in a fatal or near fatal crash." Tr. Vol. II, p. 11. The State points out L.W. told Officer Fox she did not remember the accident, did not see the motorcycle, and may have fallen asleep, but these factors, standing alone, are not indicative of intoxication. L.W. was crying at the time, and Officer Fox noted she was "emotionally upset," which might have affected her ability to recall the accident. *Id.* at 13.

[24] Further, Officer Fox repeatedly told L.W. and her mother the blood draw was merely a formality, and no one was accusing her of being impaired. Finally, he drove her to the hospital at a normal speed, with no apparent urgency. Under these circumstances, the State did not have probable cause to believe evidence of intoxication existed, and the State's claim of exigent circumstances must fail. *See Duncan*, 799 N.E.2d at 544 (evidence was insufficient to establish probable cause of intoxication; officer stated he saw alcoholic beverage containers in

Duncan's car and that Duncan's "speech and mannerisms" demonstrated intoxication). Absent a valid consent or exigent circumstances, the State's warrantless draw of L.W.'s blood violated her Fourth Amendment rights.[5]

[25] The State argues any error resulting from the warrantless blood draw was harmless at best because: (1) L.W. and her mother were advised the blood draw was not mandatory; and (2) neither L.W. nor her mother testified they would have declined the blood draw if they had been given the chance to talk privately. We disagree.

[26] The admission of evidence that was obtained in violation of the Fourth Amendment is subject to harmless error analysis. *Zanders v. State*, 118 N.E.3d 736 (Ind. 2019). But claims of harmless error are generally raised after a trial, in the context of all of the evidence presented to the finder of fact. *See Alford v. State*, 699 N.E.2d 247 (Ind. 1998) (determining erroneously admitted evidence was harmless in light of other evidence presented to the jury). All of the authorities cited by the State on this point consider the question of harmless error in the admission of evidence after a trial has occurred.

[27] Further, the State bears the burden of showing the erroneous admission of evidence was harmless. *Zanders*, 118 N.E.3d 736. The evidence of THC metabolite in L.W.'s blood was obtained only after L.W. and her mother

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[5] We do not need to address the State's arguments under the Indiana Constitution because we conclude L.W.'s Fourth Amendment rights were violated.

consented to the blood draw. Their consent was invalid, despite the implied consent advisement and the advisement provided by the phlebotomist, because they were not advised of their right to talk privately in advance of deciding whether to consent. Further, they both testified they would have exercised their right to talk privately if Officer Fox had informed them of that right. The State's claim that L.W. was required to prove she would have declined to consent after conferring with her mother improperly places the burden of proof on L.W. in the harmless error analysis. Further, because L.W. and her mother were deprived of their right to privately discuss the blood draw, any conclusions as to what they would have decided to do if they had been allowed to converse would be speculative at best.

Conclusion

[28] For the reasons stated above, we reverse the judgment of the juvenile court and remand with instructions to grant L.W.'s motion to suppress.

[29] Judgment reversed and remanded with instructions.

Mathias, J., and Foley, J., concur.