

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 2-13-28

v.

MICHAEL R. LITTLE,

OPINION

DEFENDANT-APPELLANT.

Appeal from Auglaize County Municipal Court
Trial Court No. 13 TRC 06117

Judgment Reversed and Remanded

Date of Decision: November 3, 2014

APPEARANCES:

Kenneth J. Rexford for Appellant

Alexander N. Fowler for Appellee

WILLAMOWSKI, P.J.

{¶1} Defendant-appellant, Michael Little (“Little”), appeals the November 5, 2013 judgment of the Auglaize County Municipal Court finding Little guilty of OVI (operation of a vehicle while under the influence of alcohol) in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor, and sentencing him to serve ten days in jail after Little pled “no contest” to the OVI charge. On appeal, Little challenges the trial court’s entry overruling his suppression motion.

{¶2} The facts relevant to this appeal are as follows. On July 31, 2013, Little was involved in a single car crash in Auglaize County, Ohio. Trooper Joseph Nartker of the Ohio State Highway Patrol was dispatched to the crash scene at approximately 1:30 a.m., where he found Little lying in the center of the roadway, bleeding heavily from the back of his head. Waynesfield EMS was already at the scene when Trooper Nartker arrived. Waynesfield EMS advised Trooper Nartker that Little was “verbally combative” and that there was a “strong” odor of an alcoholic beverage emitting from his person. Little was taken by Waynesfield EMS to Lima Memorial Hospital.

{¶3} Trooper Nartker went to Lima Memorial Hospital, where according to the State, Little admitted to consuming four Budweiser beers prior to driving. Trooper Nartker obtained a sample of Little’s blood, which was sent to the State Highway Patrol lab for testing. Separately from law enforcement involvement,

Lima Memorial Hospital also took a sample of Little's blood for diagnostic purposes. Subsequently, Little was charged with OVI in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor, and "Failure to Control" in violation of R.C. 4511.202, a minor misdemeanor. (R. at 1.) On August 7, 2013, Little was arraigned and pled not guilty to the charges. (R. at 9.)

{¶4} On August 20, 2013, Little filed a "Motion to Suppress," arguing that Trooper Nartker's action of obtaining his blood sample without a warrant constituted unreasonable search and seizure. (R. at 16.) The motion was set for a hearing on September 20, 2013, but prior to that, Little filed another motion to suppress, titled "Motion to Suppress II." (R. at 25.) In this motion, Little contended that the State had agreed not to use the blood test results that were the subject of the first suppression motion, but Trooper Nartker had since issued a request for hospital records of the blood test results done by hospital staff for medical reasons. (*Id.*) Trooper Nartker did not obtain a warrant prior to requesting Little's medical records. Instead, he utilized R.C. 2317.02(B)(2)(a), which states, in relevant part:

If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a

controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

R.C. 2317.02(B)(2)(a).

{¶5} Revised Code 2317.022, which is referenced in R.C. 2317.02(B)(2)(a), contains the following language detailing how the request for medical records should be made.

If an official criminal investigation has begun regarding a person or if a criminal action or proceeding is commenced against a person, any law enforcement officer who wishes to obtain from any health care provider a copy of any records the provider possesses that pertain to any test or the result of any test administered to the person to determine the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person's blood, breath, or urine at any time relevant to the criminal offense in question shall submit to the health care facility a written statement in the following form:

“WRITTEN STATEMENT REQUESTING THE RELEASE OF RECORDS

To: (insert name of the health care provider in question).

I hereby state that an official criminal investigation has begun regarding, or a criminal action or proceeding has been commenced against (insert the name of the person in question), and that I believe that one or more tests has been administered to that person by this health care provider to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a

controlled substance, or a metabolite of a controlled substance in that person's whole blood, blood serum or plasma, breath, or urine at a time relevant to the criminal offense in question. Therefore, I hereby request that, pursuant to division (B)(2) of section 2317.02 of the Revised Code, this health care provider supply me with copies of any records the provider possesses that pertain to any test or the results of any test administered to the person specified above to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in that person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question.[¹]

R.C. 2317.022(B).

{¶6} In his second suppression motion, Little argued that R.C. 2317.02 was unconstitutional. (R. at 25.) In the alternative, he asked for a finding that the statute did not allow a warrantless search in his case. (*Id.*)

{¶7} On September 16, 2013, the State filed a response to Little's first and second suppression motions. (R. at 26.) In its response, the State cited this Court's previous case of *State v. Meyers*, 146 Ohio App.3d 563, 767 N.E.2d 739 (3d Dist.2001), contending that the blood testing by the hospital "in the course of independent medical treatment and diagnostic care is not a traditionally exclusive state function that has been delegated to health care providers" and thus, the blood test that was the subject of the second suppression motion was not a government action. (*Id.*) Little filed a reply and provided supplemental authority for his

¹ The segment concludes with various lines for the Officer's contact information.

second suppression motion. (R. at 28, 29.) On October 2, 2013, the trial court filed a journal entry overruling Little's suppression motion.² (R. at 30.)

{¶8} On November 5, 2013, Little withdrew his previously tendered plea of not guilty and entered a plea of "No Contest" to OVI, his second in six years, in violation of R.C. 4511.19(A)(1)(a). In exchange, the State agreed to dismiss the Failure to Control charge. Ultimately the court found Little guilty of OVI and sentenced him to ten days in jail, fine, and license suspension. Additionally, the trial court imposed community control sanctions. A judgment entry reflecting this was filed on November 5, 2013. (R. at 34.) The execution of the sentence has been stayed pending this appeal.

{¶9} Little now appeals, asserting the following assignments of error for our review.

**ASSIGNMENT OF ERROR 1
THE TRIAL COURT ERRED BY DENYING MR. LITTLE'S
MOTION TO SUPPRESS, IN VIOLATION OF HIS RIGHT
TO PRIVACY AND OF THE PRINCIPLE OF SEPARATION
OF POWERS**

**ASSIGNMENT OF ERROR 2
THE TRIAL COURT ERRED BY RULING THE R.C. §2317.02
AND §2317.022 ARE CONSTITUTIONAL.**

{¶10} Before addressing the assignments of error, we note that Little chose to disregard the rules of appellate procedure, which require him to argue each

² It is not clear from the record whether an oral suppression hearing was actually held. If there was an oral suppression hearing, no transcript was filed.

assignment of error separately in his brief (*see* App.R. 16(A); App.R. 12(A)(2)), and combined the arguments related to his first two assignments of error under one section of his brief. We discourage this practice as contrary to the rules and disorderly. If Little felt that one argument supported his contentions, one assignment of error should have been sufficient. He expects the State and this court to pick and choose which of the statements in his discussion support the first assignment of error and which ones support the second assignment of error. Instead of doing so, this court may simply “disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as required under App.R. 16(A).” App.R. 12(A)(2). In the interest of justice, we nonetheless elect to consider Little’s arguments at this time.

***First and Second Assignments of Error—
Warrantless Search of Little’s Medical Records Pursuant to
R.C. 2317.02(B)(2)(a) and 2317.022***

{¶11} Little challenges the use of R.C. 2317.02(B)(2)(a) and 2317.022 to obtain his medical records as unconstitutional. He claims that the statutory scheme allows the government to access an individual’s private medical records without a warrant, probable cause, or even a reasonable and articulable suspicion and without any “procedural safeguards,” where no exigent circumstances exist to justify such actions. (App’t Br. at 6, 8, 11.) He further contends that the statute “has absolutely no substantial procedural safeguards to ensure against abuse by the

government agents taking advantage of that statute,” does not prohibit dissemination of the medical records, and does not provide for a notification to the citizen that the intrusion occurred. (*Id.* at 11-12.)

{¶12} Although Little discusses multiple legal concepts in his brief, mixing them together, he cites two United States Supreme Court cases, *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), which focus on the right to privacy and the Fourth Amendment protection against unreasonable search and seizure, and which seem to be relevant to the constitutional challenges brought herein. We discuss these two cases and address the legal concepts that stem from them in detail. The other concepts that are mentioned, but not briefed by Little, are not addressed in this opinion because of Little’s failure to support his other contentions with “reasons,” “citations to the authorities,” and “statutes,” as required by App.R. 16(A)(7).

A. *Whalen v. Roe*

{¶13} Among his other arguments, Little cites *Whalen* for the proposition that the government must “establish administrative procedures—procedural safeguards—to protect [the privacy right] whenever government legitimately has a need for medical records.” (App’t Br. at 7.) As explained by the Ohio Supreme Court, the concerns addressed in *Whalen* “related to the disclosure of information

to the *general public*.” (Emphasis sic.) *Stone v. City of Stow*, 64 Ohio St.3d 156, 160-161, 162, 593 N.E.2d 294 (1992) (explaining and following *Whalen*). Both the United States Supreme Court and the Ohio Supreme Court held that a mere “threat of unauthorized disclosure” is not sufficient to declare a statute unconstitutional. *Id.* at 162-163, citing *Whalen* 429 U.S. 589. The threat of unauthorized disclosure must be “significant” and inevitable in order “to cause [a statute] to be declared unconstitutional.” *Id.*; *see also Whalen*, 429 U.S. at 600, 603-604 (holding that the challenged government program did not, “on its face, pose a *sufficiently grievous threat*” to amount to a constitutional violation) (emphasis added). Therefore, *Whalen* does not prohibit disclosure of medical records per se, but merely limits disclosure of the information to the general public to ensure no “significant” threat of unauthorized disclosure to the public.

{¶14} Little seems to argue that the statutory provisions at issue in this case infringe upon his interest in avoiding disclosure of personal matters. (App’t Br. at 5, 12.) But he fails to establish a *significant and inevitable* threat of unauthorized disclosure of protected personal information *to the general public*. The statutes restrict the individuals who can make a request for medical records to “law enforcement officers,” alleviating Little’s concern that his protected personal information will be disclosed by the hospital to the general public. R.C. 2317.02(B)(2)(a). As discussed above, the concern addressed by procedural

safeguards in *Whalen* was the disclosure of the patients' information *to the general public* and not disclosure to the law enforcement officers in a criminal investigation.³

{¶15} Relying on the United States Supreme Court and the Ohio Supreme Court's holdings that a mere threat of disclosure to the general public does not make a statute unconstitutional, but that the threat must be significant and inevitable, we do not find that Little has satisfied his burden of proving that this statutory scheme is unconstitutional under *Whalen*.

B. Ferguson v. City of Charleston

{¶16} Relying on *Ferguson*, Little asserts that the statutory scheme at issue, which allows the police officer to request and review Little's medical records without a warrant, violates his Fourth Amendment interest in privacy, i.e., the protection against unreasonable searches and seizures.

The Fourth Amendment protects persons from "unreasonable searches and seizures" by the government. Section 14, Article I of the Ohio Constitution is interpreted to provide the same protections as the Fourth Amendment. Evidence seized in violation of the Fourth Amendment will be suppressed pursuant to the exclusionary rule. However, the defendant must have a reasonable expectation of privacy in the evidence seized for standing to challenge the search or seizure.

³ The parties in *Whalen* did not request suppression of the evidence. There were no "suspects," because that case did not involve prosecution of the patients who used Schedule II drugs, and the records were disclosed to the state health department rather than to the prosecution.

City of Marion v. Brewer, 3d Dist. Marion No. 9-08-12, 2008-Ohio-5401, ¶ 7, citing *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 8, and *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997). Little cites *Ferguson* in support of the federally recognized reasonable expectation of privacy in medical records.⁴

{¶17} *Ferguson* is relevant to the issue before us in that it concerned the criminal prosecution of patients whose medical records were obtained by law enforcement without a warrant. In *Ferguson*, a state hospital performed drug screens on maternity patients who were suspected of using cocaine. *Ferguson*, 532 U.S. at 71-72. That policy was implemented in conjunction with the police and local officials, and relied on a “threat of law enforcement intervention that ‘provided the necessary “leverage” to make the policy effective.’ ” *Id.* The United States Supreme Court, reviewing the hospital’s action under the Fourth Amendment challenge, held that

[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.

Id. at 78.

⁴ Although Little attempts to use *Whalen* in support of his argument that the statutory scheme at issue violates the Fourth Amendment’s protection against unreasonable search and seizure, it is important to note that the *Whalen* decision did not concern a Fourth Amendment right. Rather, the patients and physicians in *Whalen* were concerned with the possibility of public disclosure of their medical records and the stigma that would attach from it. There was no discussion of arrest or prosecution that would trigger the Fourth Amendment challenge, and the *Whalen* court expressly declined to resolve that case within the scope of the Fourth Amendment’s interest in privacy. *Whalen*, 429 U.S. at 604, fn. 32.

{¶18} The highest court noted that the policy implemented by the state hospital, which was a state actor, allowed for a search without a warrant, or even probable cause or any reasonable suspicion. *Id.* at 76-77. The Supreme Court disagreed with the “majority of the appellate panel, [which] held that the searches were reasonable as a matter of law under [a] line of cases recognizing that ‘special needs’ may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.” *Id.* at 74. Finding that no special needs that were unrelated to law enforcement were advanced by the hospital’s policy, the *Ferguson* court invalidated the policy as unconstitutional, notwithstanding the fact that the hospital’s “motive was benign rather than punitive.” *Id.* at 79, 85.

{¶19} Little points to *Ferguson*’s recognition of “an individual’s federally protected expectation of privacy in his medical records” and urges us to invalidate the Ohio statutory scheme that seemingly allows search and seizure of an individual’s medical records without a warrant, in contravention of this expectation of privacy. (App’t Br. at 13.)

{¶20} Little recognizes that “the constitutional proscriptions of the Fourth Amendment and the exclusionary rule apply only to government action and not to the actions of private persons.” *State v. Meyers*, 146 Ohio App.3d 563, 575, 767 N.E.2d 739 (3d Dist.2001). Therefore, he does not challenge the *hospital’s* action of drawing his blood and performing the medical tests. As such, *Meyers*, where

we reviewed the issue of “whether the conduct of the hospital constituted state action” and held that “the hospital’s blood test did not constitute state action necessary to implicate Fourth Amendment protections,” does not apply to our analysis herein. *See id.* at 575-578.

{¶21} Similarly, the *Ferguson* dicta about the hospital’s ability to draw blood from its patient and *independently* report it to the law enforcement “under rules of law or ethics”⁵ does not apply here. *See Ferguson*, 532 U.S. at 80-81 (distinguishing the case “from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here”).

{¶22} Here, at issue is not the *hospital’s* action of testing Little’s blood or of *independently* forwarding his medical records to the police “under rules of law or ethics.” *See id.* Rather, the focus is on the action of the police—a state actor, searching and seizing Little’s medical records without a warrant. (*See App’t Br.* at 18, 20.) This distinction is very important because the Supreme Court recognized

⁵ The United States Supreme Court recognized,

There are some circumstances in which state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment, see, *e.g.*, S.C.Code Ann. § 20–7–510 (2000) (physicians and nurses required to report to child welfare agency or law enforcement authority “when in the person’s professional capacity the person” receives information that a child has been abused or neglected).

Ferguson, 532 U.S. at 78, fn. 13. “We do not address a case in which doctors independently complied with reporting requirements.” *Id.* at 85, fn. 24.

that the existence of laws requiring the hospital to independently report evidence of criminal conduct to law enforcement, “*might* lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented,” thus *possibly* lowering the patient’s expectation of privacy. (Emphasis added.) *Ferguson*, 532 U.S. at 78, fn. 13. Yet, the Supreme Court has not held that a patient would have a lowered expectation of privacy and subject himself or herself to a warrantless search *by the police* in absence of such laws.

{¶23} Therefore, this case is about the power of the police to perform a warrantless search of a patient’s medical records; in particular, the results of medical tests that have been previously properly performed by the hospital and that show a concentration of alcohol or drugs of abuse at the time of a suspected criminal offense.

C. OVI Suspect’s Expectation of Privacy in Medical Records

{¶24} Although the United States Supreme Court in *Ferguson* held that a citizen has a *reasonable* expectation of privacy in medical records, some state courts have since held that the society does not recognize a suspect’s expectation of privacy in medical records as reasonable in situations involving an investigation for operating a vehicle under the influence of alcohol or drugs of abuse. For example, the New Hampshire Supreme Court, reviewing the constitutionality of a

New Hampshire statute that was similar to the Ohio statutory scheme at issue, held,

To the extent that the defendant may have a reasonable expectation of privacy in his medical records generally * * *, we conclude that society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes in connection with an incident giving rise to an investigation for driving while under the influence of intoxicating liquors or controlled drugs. *See* RSA 329:26.

State v. Davis, 161 N.H. 292, 298, 12 A.3d 1271 (2010).

{¶25} The New Hampshire Court arrived at this conclusion after reviewing decisions of courts in other jurisdictions:

Courts in other jurisdictions addressing whether a reasonable expectation of privacy exists in blood test results in the DWI context have reached different conclusions. Several courts have found that society does not recognize a reasonable expectation of privacy under the Fourth Amendment in “blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes only in the investigation of an automobile accident.” *Hannoy v. State*, 789 N.E.2d 977, 991 (Ind.Ct.App.2003); *see also Tims v. State*, 711 So.2d 1118, 1122–24 (Ala.Crim.App.1997); *People v. Perlos*, 436 Mich. 305, 462 N.W.2d 310, 319–21 (1990); *State v. Guido*, 698 A.2d 729, 733–34 (R.I.1997); *State v. Hardy*, 963 S.W.2d 516, 523–27 (Tex.Crim.App.1997); *State v. Jenkins*, 80 Wis.2d 426, 259 N.W.2d 109, 113 (1977). Others have held that the government’s acquisition of medical records under circumstances similar to those in this case violates the defendant’s rights under state constitutional provisions prohibiting unreasonable searches and seizures, *see, e.g., Com. v. Shaw*, 564 Pa. 617, 770 A.2d 295, 299 (2001), or state constitutional provisions that guarantee a right to privacy, *see, e.g., King v. State*,

272 Ga. 788, 535 S.E.2d 492, 494–97 (2000); *State v. Nelson*, 283 Mont. 231, 941 P.2d 441, 446–50 (1997).

While the decisions of courts in other jurisdictions are not binding upon us, we find persuasive the reasoning of those cases that focused upon the unique circumstances presented when the government requests and acquires the results of blood tests administered for the purpose of diagnosis and treatment of injuries sustained in an automobile accident. *See Tims*, 711 So.2d at 1122–24; *Hannoy*, 789 N.E.2d at 990–92; *Perlos*, 462 N.W.2d at 315–21; *Hardy*, 963 S.W.2d at 523–27. We also agree that, “although not determinative, one source in analyzing the reasonableness of an expectation is to look to the Legislature,” *Perlos*, 462 N.W.2d at 319, and that whether a privilege exists may be some evidence of societal expectations, *Hardy*, 963 S.W.2d at 524.

* * *

By its plain language, the statute now exempts from the physician-patient privilege blood alcohol test results of a person being investigated for driving under the influence of intoxicating liquor or controlled drugs where the blood alcohol tests were administered for the purpose of diagnosis and treatment. *See State v. Nickerson*, 147 N.H. 12, 13, 780 A.2d 1257 (2001).

By carving out an exception to the physician-patient privilege under this narrow set of circumstances, the legislature has reflected the societal “belief that when people drive, they encounter a diminished expectation of privacy.” *Perlos*, 462 N.W.2d at 320. The existence of the Implied Consent law further supports this conclusion.

* * *

Indeed, if a person refuses the request of a law enforcement officer to submit to physical tests or to a test of blood, urine or breath, the person’s license to drive will be suspended. *See RSA 265–A:14 (Supp.2010)*.

Id. at 296-298.

{¶26} We disagree with the line of reasoning adopted by the Supreme Court of New Hampshire in *Davis*, which would require us to strip from an OVI suspect the reasonable expectation of privacy in medical records, as recognized in *Ferguson*. First, we note that many of the cases on which the New Hampshire Court relied were decided prior to *Ferguson*. The New Hampshire Court in *Davis* distinguished *Ferguson* “because the testing [in *Ferguson*] was done for, and in conjunction with, law enforcement,” while “there was no law enforcement involvement in the taking or testing of the defendant’s blood sample in this case.” *Id.* at 298-299. Nevertheless, as we explained above, it is not “the taking or testing of the defendant’s blood sample” that we are reviewing in cases concerning search of a patient’s medical records by the law enforcement. Therefore, the distinction noted in *Davis* is not relevant to the case at hand.

{¶27} Second, the New Hampshire Supreme Court’s reliance on an exception to the physician-patient privilege to find a lack of reasonable expectation of privacy is misplaced because this testimonial privilege applies to testimony at trial and does not apply to search warrants. *See State v. Fairfield*, 8th Dist. Cuyahoga No. 97466, 2012-Ohio-5060, ¶ 16, *appeal not accepted*, 134 Ohio St.3d 1486, 2013-Ohio-902, 984 N.E.2d 30 (holding that a prohibition against “testifying” applied “to trials and not search warrants because warrants are used to aid in the investigation process and are ancillary to the criminal proceedings”).

“Proceedings for a search warrant differ from a trial in that the rules of evidence do not apply.” *State v. Jaschik*, 85 Ohio App.3d 589, 598, 620 N.E.2d 883 (11th Dist.1993). Therefore, the fact that the statutory scheme at issue waives the physician-patient privilege for the purpose of testifying *at trial* cannot be used to circumvent the Fourth Amendment protections against unreasonable searches and seizures.

{¶28} Furthermore, it cannot be argued that the existence of a physician-patient privilege waiver, “*might* lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented,” thus lowering the patient’s expectation of privacy. (Emphasis added.) *See Hannoy v. State*, 789 N.E.2d 977, 991 (Ind.App.2003), quoting *Ferguson*, 532 U.S. at 78, fn. 13. As explained above, the dicta in *Ferguson* referred to the requirement of *independently* reporting evidence of criminal conduct to law enforcement “under rules of law or ethics.” *Ferguson*, 532 U.S. at 80-81. The statutory scheme at issue does not mandate *independent* reporting of *evidence of the crime*. Rather, it mandates responding to a law enforcement request to provide any evidence “of any test administered” to the suspect, regardless of whether it shows criminal conduct or not. *See R.C. 2317.02(B)(2)(a)*. Here, at issue is not the independent reporting requirement but rather, the police action of searching and seizing a patient’s medical records.

{¶29} Third, the use by the New Hampshire Supreme Court of the implied consent statute to support obtaining medical records without a warrant overlooks several important distinctions between the implied consent statute and the situations covered by *Davis* and by the Ohio statutory scheme at issue. The implied consent statute operates only *after* the driver has been arrested for OVI. *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, ¶ 14, 23-24; R.C. 4511.191(A)(2). Conversely, the method adopted by New Hampshire and advanced by the State in this case would allow for a warrantless search of the medical records without the requirement that the person is first arrested. As such, unlike in the implied consent cases, these situations would not even require probable cause prior to performing the search. *See id.* at ¶ 19, 23-24. Such a low threshold for a warrantless search goes beyond the recognized exceptions to the warrant requirement.⁶ Furthermore, the warrantless search of a driver's body for evidence of intoxication in situations where the driver is arrested for OVI has been justified by an exigency, which is a risk of losing evidence because of the diminishing alcohol concentration level in the driver's blood. *See id.* at ¶ 19, citing *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).⁷ No such exigency exists in circumstances where, as here, the tests

⁶ See list of recognized exceptions to the warrant requirement in part D. below.

⁷ *But see Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (limiting *Schmerber* and mandating a case-by-case approach to the OVI cases to determine whether sufficient exigency exists to allow a warrantless search).

have already been performed and their results are safely stored by the hospital. Finally, the implied consent statutes provide the driver with an opportunity to limit or withdraw the consent, thus avoiding the warrantless search, although the refusal to consent results in certain consequences. *Id.*, at ¶ 20; *State v. Brown*, 158 Ohio App.3d 21, 2004-Ohio-3364, 813 N.E.2d 956, ¶ 13 (7th Dist.). Conversely, the statutory scheme at issue here does not provide for any possibility for the defendant to prevent the disclosure of his medical records to the law enforcement officials. In fact, it does not even include any notification to the defendant that his or her medical records are being searched. Thus, the situations addressed by the New Hampshire Supreme Court in *Davis*, as well as the situations covered by R.C. 2317.02(B)(2)(a) and 2317.022, are entirely distinct from the situations involving implied consent to a *test* for alcohol concentration level of a drunk driver *arrested* for OVI.

{¶30} In addition, we note that even under the reasoning of the New Hampshire Supreme Court in *Davis*, the Ohio statutory scheme could not function to authorize warrantless searches of a driver's medical records because of an important distinction between the Ohio statutory scheme and the statute upheld in *Davis*. The New Hampshire law permitted law enforcement to obtain medical records without a warrant only in connection with "the incident giving rise to the investigation for driving a motor vehicle while such person was under the

influence of intoxicating liquors or controlled drugs.” *Davis*, 161 N.H. at 297. The Ohio statutes would allow obtaining test results whenever there is any “criminal investigation,” not limited to only OVI investigations. R.C. 2317.02(B)(2)(a); R.C. 2317.022(B). In an Indiana case on which the *Davis* court relied, the Indiana court excluded “fishing expeditions” related to “any criminal investigation” from the scope of its statute. *Hannoy*, 789 N.E.2d at 992. The Indiana court held:

We do not want to be misunderstood as holding that Indiana Code Section 9-30-6-6(a) authorizes the release of toxicological test results or bodily fluid samples to law enforcement *anytime it is requested in relation to any criminal investigation*. We do not believe Section 9-30-6-6 authorizes broad “fishing expeditions” by law enforcement searching for evidence that some person has committed some crime. First, the placement of Section 9-30-6-6 in the Traffic Code clearly indicates that it applies only to criminal investigations concerning operating while intoxicated and its related crimes. Second, *Hannoy* was one of two drivers involved in a fatal motor vehicle accident, and we assume that law enforcement officers will limit their requests for toxicological test results specifically to drivers who have been hospitalized following an accident rather than requesting test results from patients at random for no reason whatsoever. This makes the request reasonable under the Fourth Amendment.

(Emphasis added.) *Id.*

{¶31} Unlike the statute in *Hannoy*, R.C. 2317.02(B)(2)(a) and R.C. 2317.022 are not included in Chapter 4511—“Traffic laws,” in contrast to the implied consent statute, R.C. 4511.191, which appears immediately after R.C. 4511.19—“Driving while under the influence of alcohol or drugs; tests;

presumptions; penalties; immunity for those withdrawing blood.” These sections are contained within the Revised Code sections for competency of witnesses, and Section R.C. 2317.02 is entitled “Privileged communications and acts.” As already discussed above, the physician-patient privilege does not apply to the search proceedings, and the fact that the statutory scheme at issue waives the physician-patient privilege for the purpose of testifying *at trial*, cannot be used to circumvent the Fourth Amendment protections against unreasonable searches and seizures.

{¶32} Neither the Ohio Supreme Court nor the United States Supreme Court have thus far held that an OVI suspect does not enjoy a reasonable expectation of privacy in his or her medical records that show an alcohol or drug concentration level in the suspect’s blood or urine. But the Ohio Fourth District Court of Appeals has recognized that an OVI suspect had a reasonable expectation of privacy in a urine sample obtained by a hospital as part of its routine treatment and later requested by a law enforcement officer. *State v. Funk*, 177 Ohio App.3d 814, 2008-Ohio-4086, 896 N.E.2d 203, ¶ 13 (4th Dist.).

{¶33} The recent decision of the United States Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), supports a holding that an OVI suspect’s expectation of privacy should not be diminished easily. In *McNeely*, the United States Supreme Court limited situations in which a police

officer can request a blood test of an OVI suspect without a warrant to only those individual instances in which obtaining a warrant would be “impractical.” *Id.* at 1561. The Supreme Court mandated a case-by-case approach, rejecting the state’s contention “that exigent circumstances necessarily exist when an officer has probable cause to believe a person has been driving under the influence of alcohol because BAC evidence is inherently evanescent.” *Id.* at 1554, 1561.

In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (“We cannot ... excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative”).

Id. at 1561.

{¶34} Although the *McNeely* decision focused on the exception to the warrant requirement rather than on the expectation of privacy, we find it relevant to the case at issue that the Supreme Court refused to allow warrantless searches even though “the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal” and the “governmental interest in combating drunk driving” compelling. *Id.* at 1564-1565. In spite of the recognized importance of preventing “drunk driving,” the Supreme Court declined to depart from the warrant requirement absent exigent circumstances:

“No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.” *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).

But the general importance of the government’s interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.

Id. at 1565-1566. The Supreme Court added that “the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.”

Id. at 1564.

{¶35} This holding is very instructive in the case at issue. It directs us to prevent the dilution of the warrant requirement in cases where a patient’s federally recognized privacy interest in his or her medical records is at stake and no reasons exist to diminish that privacy interest. While we recognize the threat that drunk drivers pose on Ohio roads and the important interest of preventing drunk driving, we must also acknowledge that “the requirements of the Fourth Amendment cannot be lowered based upon the heinousness of the particular crime police are investigating.” *Hannoy*, 789 N.E.2d at 988. Here, the State failed to point to any

reason that would justify diminishing a patient's privacy interest, so firmly protected by the United States Supreme Court, in securely-stored medical records.

{¶36} We are mindful of Ohio cases that have previously addressed obtaining medical records pursuant to R.C. 2317.02(B)(2)(a) and R.C. 2317.022, and found no constitutional violations. For example, in *State v. Tomkalski*, 11th Dist. Lake No. 2003-L-097, 2004-Ohio-5624, the defendant alleged that his “constitutional right of privacy” was violated. *Id.* at ¶ 27. The Eleventh District Court of Appeals rejected the defendant's challenge, without discussing *Ferguson* or the expectation of privacy. The court only noted that the medical records in Ohio were not protected by the constitutional right of privacy, but by the physician-patient privilege, which did not apply “ ‘[i]n any criminal action concerning * * * the results of any test that determines the presence or concentration of alcohol * * * in the patient's blood.’ ” *Id.* at ¶ 26-27, quoting R.C. 2317.02(B)(1)(c). In so far as the physician-patient privilege protects the medical records from *unauthorized disclosure*, the issues relevant here do not concern the *Whalen* right to privacy, which protects the medical records from unauthorized disclosure, as we noted in our discussion in section A. above. Instead, we are focusing on the *Ferguson*-recognized expectation of privacy in medical records as it relates to the warrantless search and seizure, and criminal prosecution that stems from it. The Eleventh District Court of Appeals did not address this issue.

{¶37} In *City of Cleveland v. Rollins*, 8th Dist. Cuyahoga No. 79614, 2002 WL 490040 (Mar. 14, 2002), the defendant raised the issue of expectation of privacy in medical records. The Eighth District Court of Appeals recognized that R.C. 2317.02(B)(2)(a) serves “merely” to “protect the health care provider from potential civil liability arising out of the release of arguably privileged information,” rather than to control admissibility of evidence. *Id.* at *2. Yet, in spite of this recognition of the statute’s limited purpose, the Eighth District Court of Appeals did not address the defendant’s concerns regarding a violation of his expectation of privacy in his medical records. Instead, the court implied that R.C. 2317.02(B)(2)(a) waives the “due process protections” of criminal defendants “who are suspected of drunk driving or other criminal activity.” *Id.* The court thus held that a constitutional violation did not occur where the defendant’s medical records were obtained pursuant to the statute because “any physician-patient privilege had already been waived per the terms of R.C. 2317.02(B)(1)(c),” and “the health care provider in question may have chosen to relinquish the test results without first receiving a written statement from the investigating officer.” *Id.* Relying on the physician-patient privilege, the Eighth District Court of Appeals ignored the defendant’s concerns over his expectation of privacy in medical records. The *Ferguson* opinion was not mentioned either.

{¶38} We find it necessary to re-emphasize the difference between physician-patient privilege, which applies to admissibility of (properly obtained) evidence at trial, and the Fourth Amendment protection against the government’s unauthorized invasion into the patient’s medical records, which applies to the government’s ability to obtain the evidence. *See State v. Fairfield*, 8th Dist. Cuyahoga No. 97466, 2012-Ohio-5060, ¶ 16, *appeal not accepted*, 134 Ohio St.3d 1486, 2013-Ohio-902, 984 N.E.2d 30; *State v. Jaschik*, 85 Ohio App.3d 589, 598, 620 N.E.2d 883 (11th Dist.1993). While R.C. 2317.02(B)(2)(a) and R.C. 2317.022 waive the physician-patient privilege, they do not strip an OVI defendant of his or her expectation of privacy in his medical records.

{¶39} The Ohio Supreme Court noted that “R.C. 2317.02(B)(2) *simply waives patient-physician privilege when law enforcement seeks to obtain certain test results.*” (Emphasis added.) *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 55. We have recognized in *Meyers*, 146 Ohio App.3d at 575, 767 N.E.2d 739, that “R.C. 2317.02(B)(2)(a) excluded related records from the privilege.” “The clear intent of the legislature was to abrogate the physician-patient privilege and provide the state access to blood-alcohol tests in criminal cases,” “ ‘except to the extent specifically prohibited by any law of this state or of the United States.’ ” *Id.* at 577, quoting R.C. 2317.02(B)(2)(a). We went even further to call R.C. 2317.02(B)(2)(a) a “mere[] * * * discovery tool through which

the state may request and receive the medical records described herein.” *Id.* at 578. We did not, however, exclude R.C. 2317.02(B)(2)(a) from the scope of the Fourth Amendment and we did not hold that an OVI suspect does not have a reasonable expectation of privacy in medical records. Rather, in response to the defendant’s arguments that the hospital was a state actor (*id.* at 576), we reviewed the case under the search and seizure principles, holding that “the hospital’s blood test did not constitute state action necessary to implicate Fourth Amendment protections.” *Id.* at 575-578. Other Ohio courts similarly recognize the statute’s purpose as a waiver of a physician-patient privilege. *See, e.g., Rollins*, 2002 WL 490040, at *2.

{¶40} Therefore, we hold that an OVI suspect in Ohio enjoys a reasonable expectation of privacy in his or her medical records “that pertain to any test or the result of any test administered to the person to determine the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the person’s blood, breath, or urine at any time relevant to the criminal offense in question,” which are stored securely in a hospital. R.C. 2317.022(B). It follows that, prior to obtaining such medical records a law enforcement officer must comply with the warrant requirement of the Fourth Amendment.

*D. The State's Practice of Obtaining Medical Records
Pursuant to R.C. 2317.02(B)(2)(a) and R.C. 2317.022*

{¶41} Here, the law enforcement officer did not obtain a warrant prior to searching and seizing Little's medical records. Warrantless searches are per se unreasonable unless one of the enumerated exceptions to the warrant requirement applies. *McNeely*, 133 S.Ct. at 1558; *State v. Kessler*, 53 Ohio St.2d 204, 207, 373 N.E.2d 1252 (1978). The burden is on the state to establish that a warrantless search is valid under one of those exceptions. *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988).

{¶42} The Ohio Supreme Court has explicitly recognized the following seven exceptions to the requirement that a warrant be obtained prior to a search:

- (a) a search incident to a lawful arrest;
- (b) consent signifying waiver of constitutional rights;
- (c) the stop-and-frisk doctrine;
- (d) hot pursuit;
- (e) probable cause to search, and the presence of exigent circumstances;
- (f) the plain view doctrine; and
- (g) administrative search.

Stone v. City of Stow, 64 Ohio St.3d 156, 165, 593 N.E.2d 294 (1992). The parties do not argue that any of these enumerated exceptions applied in this case.

Therefore, we will not attempt to determine at this point whether Little's particular situation would fit within one of those exceptions. Focusing on the statutory scheme at issue, we recognize that the seven exceptions above do not include a police officer requesting and searching records of medical tests, previously properly performed by the hospital, where no arrest, consent, hot pursuit, or probable cause and exigent circumstances exist.

{¶43} This conclusion does not, however, mean that the statutory scheme at issue is unconstitutional. We merely hold that R.C. 2317.02(B)(2)(a) and R.C. 2317.022 do not authorize a warrantless search and seizure of the patient's medical records where no recognized warrant exception exists. Accordingly, the use of R.C. 2317.02(B)(2)(a) and R.C. 2317.022 without a warrant to obtain Little's medical records violated his constitutional protection against unreasonable search and seizure. This conclusion means that on the basis presented to us, Little's motion to suppress was not properly denied⁸ by the trial court and that Little's first assignment of error is sustained.

{¶44} But because statutes enjoy a strong presumption of constitutionality and Little failed to sustain his burden of establishing beyond a reasonable doubt that R.C. 2317.02 and R.C. 2317.022 are unconstitutional, we overrule the second

⁸ We do not determine whether the exclusion of evidence is necessary herein, or if a good faith exception applies in this case.

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assignment of error. *See Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, at ¶ 8.

{¶45} Having reviewed the arguments, the briefs, and the record in this case, we find error prejudicial to Appellant in the particulars assigned and argued. The November 5, 2013 judgment of the Auglaize County Municipal Court is therefore reversed and we remand this matter for further proceedings consistent with this opinion.

***Judgment Reversed and
Cause Remanded***

ROGERS, J., concurs.

SHAW, J., dissents.

{¶46} While I concur with the judgment of the majority that neither the appellant's arguments nor the cases analyzed are sufficient to demonstrate that the statute at issue is unconstitutional, I dissent from the majority's opinion because I do not agree with their conclusion that the exclusionary rule might apply in this instance without regard to the constitutionality of the statute.

{¶47} The exclusionary rule was created as a judicial remedy for governmental violations of the Fourth Amendment. *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160 (1987) citing *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961). The "prime

purpose” of the exclusionary rule is to deter unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974). “[T]he [United States] Supreme Court has held suppression is not an available remedy when police officers conducted a search in good faith reliance on some higher authority, such as a warrant *or a statute*, even if the warrant *or statute* were later held invalid or unconstitutional (the ‘good faith exception’).” (Emphasis added.) *United States v. Gonzalez*, 598 F.3d 1095 (9th Cir.2010), citing *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160 (1987).

{¶48} In *Illinois v. Krull*, the United States Supreme Court held that the exclusionary rule does not apply where an officer is acting in a good-faith reliance on the validity of a law, and that is exactly what happened in this case. *Krull*, 480 U.S. at 349. The police utilized a statute that this court has unanimously found is not unconstitutional and there is no indication that the officer did not comply with the statute in obtaining the evidence at issue. It is both contrary to law and an abuse of judicial discretion for this court to remand this case to the trial court with instructions to consider application of the exclusionary rule in this circumstance. Accordingly, I would overrule the appellant’s assignments of error and I would affirm the judgment of the trial court.

/jlr