

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-1136-05

THE STATE OF TEXAS

v.

EVON KELLY, Appellee

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

Hervey, J., delivered the opinion of the Court in which Keller, PJ., Keasler, Holcomb and Cochran JJ., joined. Price and Johnson, JJ., concurred. Meyers and Womack, JJ., not participating.

OPINION

The issue in this case is whether the Court of Appeals misapplied the appellate standard of review in reversing the trial court's order granting appellee's motion to suppress. We will affirm the judgment of the Court of Appeals.

At approximately 8:00 a.m. on March 5, 2001, appellee and her minor son were

involved in an accident in a car that appellee was driving. They were taken to a hospital emergency room for emergency medical treatment. An emergency-room technician/phlebotomist (Gosson) drew appellee's blood for medical treatment purposes. Hospital testing of this blood indicated that appellee's blood-alcohol concentration was above the legal limit. Soon after this, the police came to the emergency room and asked appellee for a specimen of her blood. She refused. Several days later, the State obtained appellee's hospital blood-test results through a grand-jury subpoena.

On May 5, 2001, an information was filed charging appellee with DWI. On May 14, 2003, appellee filed a motion to suppress her hospital blood-test results. This motion alleged that the "use of the results of testing on [appellee's] blood is not authorized by law and violates [appellee's] Federal and State constitutional rights."¹ The only factual claim that appellee made in her motion to suppress was that Gosson drew appellee's blood without appellee's "effective and informed consent."

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Appellee's motion to suppress further alleged that the failure to suppress appellee's hospital blood-test results would "violate [appellee's] rights under the Texas Code of Criminal Procedure, including Articles 1.04, 1.05, 1.051, 1.06, 18.01, 18.02, and 38.23; and her rights under the Texas Constitution, including her rights under Article I, §§ 9, 10, and 19; and her rights under the United States Constitution, including her rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments."

The trial court held a hearing on appellee's motion to suppress on July 31, 2003. At the beginning of this hearing, appellee abandoned any claim that Gosson obtained her blood in violation of the Fourth Amendment and that the Fourth Amendment's exclusionary rule, therefore, excluded her hospital blood-test results. Instead, she claimed that Gosson assaulted her in the emergency room when he drew her blood for medical treatment purposes without her consent,² and that her hospital blood-test results, therefore, should be suppressed under our state-law exclusionary rule in Article 38.23(a), TEX. CODE CRIM. PROC., which requires exclusion of evidence that is "obtained" in violation of the law.³

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See Section 22.01(a)(1), TEX. PEN. CODE, (person commits assault if he intentionally, knowingly or recklessly causes bodily injury to another); Section 1.07(a)(8), TEX. PEN. CODE, (defining bodily injury as physical pain, illness, or any impairment of physical condition).

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In support of this claim, appellee relied on the Waco Court of Appeals' decision in *Hailey v. State* which this Court reversed on grounds not applicable here. *See Hailey v. State*, 50 S.W.3d 636 (Tex.App.-Waco 2001), *rev'd*, *Hailey v. State*, 87 S.W.3d 118 (Tex.Cr.App. 2002), *cert. denied*, 538

Appellee explained to the trial court:

[THE DEFENSE]: The law states that the hospital—if they’re not being directed by police officers to draw blood, the police—the hospital workers have to have consent of the person who is being treated to draw blood; otherwise, unless there’s been life-threatening injuries or unless they’re incoherent or unable to consent, they have to have consent; otherwise, it’s an assault, and it’s excludable under 38.23 of the Code of Criminal Procedure.

* * *

U.S. 1060 (2003). In *Hailey*, the Waco Court of Appeals decided that blood drawn from the defendant by hospital personnel for medical treatment purposes without the defendant’s consent “was an assault, and therefore illegal” for Article 38.23(a) state exclusionary rule purposes. See *Hailey*, 50 S.W.3d at 639-40. This Court reversed the Waco Court of Appeals’ decision in *Hailey* because this theory was not raised or litigated in the trial court or even raised in the Court of Appeals. See *Hailey*, 87 S.W.3d at 120-22; see also *Hailey*, 50 S.W.3d at 641-43 (Gray, J., dissenting). This Court’s decision in *Hailey* does not control the disposition of this case because appellee timely raised the issue of her consent to Gosson’s blood draw.

The way it occurred in this case and the way we're prepared to develop, Judge, is there was an automobile accident. My client was taken to the hospital. She did not give consent for a blood draw. I believe her husband gave consent,^[4] but she did not give consent for a blood draw, but they just took blood from her. She did give consent later on for a surgical procedure [to treat a collapsed lung] but not to the blood draw. And—and if—I'll show the Court our cases. Judge, in Hailey the situation was almost identical, Judge. That—that contains not only Hailey but also the cases that are cited in Hailey.

In Hailey the police took a guy who had been involved in an accident to the hospital. They wanted him tested for possible alcohol poisoning. The Defendant refused to permit the blood draw. The hospital employee took it anyway, and the Court held that that was an assault and it was excludable under 38.23. Because the—38.23, the exclusionary rule, says the actions of a peace officer or other individual if they commit an illegal act to obtain evidence, then it's excludable.

* * *

Okay. So we're not talking about a Fourth Amendment seizure. And, in fact, if you look at the Hailey case, it specifically addresses that issue, and it says, "Look, under the Fourth Amendment of the Constitution of the United States it would be admissible, but under 38.23 and under the laws of the State of Texas we can be more cautious than the United States Constitution." And 38.23 says that if the State or any other person illegally seizes the evidence, then it's not admissible. If you look at the J. Johnson case, that case is a Court of Criminal Appeals En Banc case in a capital murder case which you know there's never any good law out for a Defendant in a capital murder case where they suppressed evidence that was taken from the scene by private citizens. And they said, "Look, 38.23 says other people—" plain reading of the statute says nobody else—I mean, that that's illegal. It's basically a theft and so it's suppressed, and they suppressed this in a capital murder case. What happened in this case is there's a car wreck, she's taken to the hospital, she's alert as the medical records and the ambulance records that are—that have been filed with the Court shows. She is alert and oriented.

She is answering questions. If you look at the neurological scale she makes a 15 on a scale of 15 as far as being oriented and able to answer questions and spontaneous. They take her in. Her husband signs a consent to treatment. She doesn't sign it. So once she doesn't sign that consent to treat, and I think we have two statutes, Judge, on—and these may be what the Court was referring to, consent for medical care under 773.008 of the Texas Health & Safety Code is a consent for emergency care and outlines that they have [sic] to be consent unless an individual is unable to communicate because of injury, accident, illness or is unconscious and

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No one claims here that appellee's husband's consent was binding on appellee.

suffering from what appears to be life-threatening injuries or illness, so it's conjunctive, meaning all of those things have to be there. 313.004 is consent for medical treatment in a non-emergency situation but basically has the same language. If an adult patient in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communication, an adult surrogate from the following list can consent. The problem is under the State's own records that they have admitted into court, [appellee] was alert. She was conscious. She responded to questions appropriately. She was able to answer questions about her medical history. And I can direct the Court—I have tabbed some of these things for the Court to see. The first one is one of their records talking about her neurological, and it has a scale over here on how well she was oriented and the questions that they asked her. Let's see. The second one also talks about being alert. The GC scale is 15. That's the neurological scale. That she is cooperative. That she is not drowsy. She is not comatose and that [sic] she is not disoriented. And this is all on this second page in the medical records that the State has offered to you. The consent is also in here, and I'm sure I marked it, and I can find it for the Court, but it is—here it is. It's signed by Mr. Kelly, William Kelly.

Whether appellee consented to Gosson's blood draw was the only factual issue litigated at the suppression hearing. Gosson testified at this hearing that he obtained appellee's consent to draw her blood and that he would not have drawn her blood without her consent.

Q. [PROSECUTION]: Can you please describe the procedure as to how you went about drawing [appellee's] blood on that day?

A. [GOSSON]: First, I obtained the orders on meditech, which is a set of orders that tells us the type of blood draw to draw, and I went to the patient's room after obtaining the necessary materials that are needed for that blood draw and I identified myself to the patient, and I took her arm which had an arm band on it, and I made sure that the arm band and the meditech orders matched, that her name matched on the meditech orders, and I told her what my job title was, what I needed to do, and asked for a consent to draw her blood.

Q. Did you obtain that consent?

A. I obtained her consent.

Q. She didn't tell you "No, you can't have my blood"?

A. I wouldn't have drew [sic] it.

Q. Okay.

A. She didn't tell me no.

Q. If she had told you you can't draw her blood you indicated that you wouldn't have done it. What would you have done after that?

A. If she had stated that I could not obtain her blood from her I would have told her that's okay. I wouldn't have drew [sic] her blood. I would have left. I would have reported that to the nurse and, you know, that's all I can do.

On cross-examination, Gosson testified that appellee did not refuse to let him draw her blood which he interpreted to be consent.

Q. [THE DEFENSE]: All right. So when you're talking about consent, she merely acquiesced and she didn't withdraw or recoil, is that true—correct?

A. [GOSSON]: She did not refuse.

Q. So she didn't affirmatively refuse?

A. Correct, she didn't.

Q. That's your testimony here today?

A. Correct.

Q. And you're interpreting that lack of refusal to be consent?

A. Yes, sir.

When called by the defense to testify at the suppression hearing, appellee initially testified that she did not recall consenting to Gosson's blood draw. She eventually testified that she did not consent to this blood draw, which caused her physical pain.

Q. [THE DEFENSE]: Did they ever ask you for consent to do that?

A. [APPELLEE]: Not that I recall, no.

Q. When they drew the sample were you conscious?

A. Yes, I was.

Q. Were you aware of your circumstances?

A. Yes.

Q. Were you able to answer questions of people who were treating you?

A. Yes.

Q. Do you recall any-any person asking you whether or not you gave consent or approval for the blood draw?

A. No, I do not.

Q. Okay. And you did not consent to the blood draw?

A. No.

Q. Were you ever presented a-any documentation so that you could consent?

A. No.

Q. You were given documentation to consent to a surgical procedure that happened sometime later at your stay at the hospital, is that correct?

A. Yes.

Q. Do you remember the blood draw?

A. Yes, I do.

Q. Did it hurt you?

A. Yes.

Q. Okay. Caused you physical pain?

A. Yes.

Appellee later testified on direct examination that Gosson never asked her for

permission to draw her blood. She also testified that, when she was later given a choice by the police to refuse or to consent to a blood draw, she refused.

Q. [THE DEFENSE]: And is it basically true that [Gosson] just went in and said he was going to draw blood and you—

A. [APPELLEE]: Yes.

Q. Now, he never asked permission to draw blood, is that correct?

A. No.

Q. All right. And he never—and you never consented to this blood draw, is that correct?

A. No, I did not.

Q. As a matter of fact, when somebody gave you the choices as to whether or not you would allow a blood draw or not you refused, is that correct?

A. Yes, I did.

Q. And that came when the police officer after this blood draw came and told you that you had—that they wanted a blood draw and that you had a right to either consent or refuse, is that right?

A. That's right.

Q. And at that point once you were given a choice you refused, is that correct?

A. Yes, I did.

On cross-examination by the prosecution, appellee testified that Gosson told her “that blood needed to be drawn, so [she] put [her] arm out.” Appellee testified that she guessed that she consented to Gosson's blood draw.

Q. [PROSECUTION]: But you're saying you didn't understand what the gentleman here, Mr. Gosson, was explaining to you with respect to the blood draw?

A. [APPELLEE]: He didn't explain anything to me.

Q. What is your recollection of what happened when he walked into the room?

A. My recollection is he said, "I'm here to take your blood." And that—I mean, there were people doing all kinds of things. I was horizontal.

Q. Let me just stop. We'll go one at a time. And when he says, "I'm here to take your blood," did you say to Mr. Gosson "Not a chance"?

A. No, I did not.

Q. Did you tell him under no circumstances did you want him to draw any blood from you?

A. No, I did not.

Q. And what's the next thing that he said to you?

A. I really don't recall.

Q. Okay. And at the time did you think it would be in your best medical interests to have the blood drawn so you could be treated by the medical staff?

A. That was what needed to be done.

Q. So then you understood that it needed to be—the blood needed to be drawn; you understood that, correct?

A. I was told that blood needed to be drawn, so I put my arm out.

Q. Okay. And you understood you were receiving medical treatment at that time, correct?

A. Yes, I did.

Q. And you had what was called—did you subsequently become aware that you had a pneumothorax?

A. A collapsed lung?

Q. Yes, ma'am.

A. Yes.

Q. Now, you knew that they needed to draw blood to adequately treat you medically, is that correct?

A. I did not know that. I was just told that the blood was going to be drawn from me.

Q. And you consented by not refusing because you knew that was part of your medical treatment, is that correct?

A. I consented.

Q. You did consent?

A. Well, I put my arm out.

Q. So you did consent—you would agree with me you did consent?

A. I guess so.

On re-direct examination by the defense, appellee testified that she did not consent to Gosson's blood draw.

Q. [THE DEFENSE]: Okay. And I guess you know you got talked into saying that you consented, but did you consent?

A. [APPELLEE]: No.

During closing arguments to the trial court, appellee claimed that Gosson "obtained" her blood in violation of the law for Article 38.23(a) exclusionary-rule purposes because Gosson assaulted her when he drew her blood for medical treatment purposes with only her "mere acquiescence."

[THE DEFENSE]: –Article 10, okay. Since it was a non-police, then the Fourth Amendment doesn't apply because the Fourth Amendment of the Constitution only applies if it's a police action, okay, but 38.23 still applies. And so then we got to look at 38.23 and decide whether or not this was a consensual drawing of the blood by a private citizen. Because 38.23 says as it says in the Johnson case "or other person". The testimony here, the records are that she was oriented, she knew who she was, she knew where she was, she knew what was going on, and she did not consent to the blood draw. She never—she merely **acquiesced**. There are reams of case law

from the United States Supreme Court—I didn’t bring it today because I didn’t realize this was going to be such a prominent issue—but the Court is well aware that mere **acquiescence** is not consent, and that’s throughout Texas case law and throughout the United States Constitutional case law. But the issue before the Court is to determine whether or not she consented to the blood draw. And if she did not consent then, technically, it’s an assault. Whether or not she filed charges doesn’t matter. Whether or not she filed a civil suit doesn’t matter. The question is whether or not it was drawn without consent. The consent form is signed by her husband. If you look at the time on the blood alcohol test I believe it’s 9:30 in the morning. There’s a subsequent consent to the procedure, and I don’t want to call it a surgery because they did it right there in the Emergency Room where they put the tube in between the ribs to reinflate the lung. And there is a consent for that specific procedure, but there is no consent for the blood draw. If there’s no consent for the blood draw, then it is technically whether actionable or whether it should be actioned on, it is technically an assault under 22.01 of the Texas Penal Code because we’ve shown that it was intentionally done. He testified he went in there intentionally to do it; you know, that it hurt, so we’ve got intentionally caused bodily injury—pain. And that’s directly the logic that is followed by the Hailey case.^[5]

Following arguments by counsel, the trial court indicated that it wanted additional briefing from the parties on the “acquiescence question” and “anything else” about the “question of doing this end run thing.”⁶

[THE DEFENSE]: What particular points do you want? The mere acquiescence question?

[TRIAL COURT]: That’s one question, and if there’s anything else either one of you can glean about this question of doing this end run thing. Okay.

[PROSECUTION]: Yes, Your Honor.

[TRIAL COURT]: I’d like it about two weeks from now.

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Emphasis added.

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This appears to be a reference to the State obtaining appellee’s medical records through a grand-jury subpoena.

[THE DEFENSE]: Do you want it briefed or just cases, Your Honor?

[TRIAL COURT]: I want a brief.

On August 8, 2003, appellee filed a brief in the trial court on “inadmissibility of blood evidence.” This brief appears at pages 131 to 137 in the Clerk’s transcript. Appellee’s brief asserted:

The evidence, viewed in light most favorable to the State, shows that [appellee] merely acquiesced to Gosson’s statement that he was going to draw her blood. This acquiescence was obtained at a time when she was being treated for her injuries by several hospital employees. Voluntary consent is not shown by mere acquiescence to authority. (Citations omitted).

Appellee’s brief also raised a new factual claim--that hospital personnel illegally disclosed appellee’s hospital blood-test results to the police before the police requested appellee to provide a blood specimen.⁷ Appellee’s brief asserted that the police learned of appellee’s hospital blood-test results only “through disclosures by an ER nurse [Hertsch] and a treating physician [Blanchard].”⁸ Appellee’s brief claimed that her hospital blood-test results should have been suppressed as “fruits” of this initial illegality by hospital personnel. Appellee’s brief asserted:

Neither nurse Hertsch, nor Dr. Blanchard had [appellee’s] written or, for that matter, oral authority to disclose information regarding her blood alcohol content to the officers. (That she did not wish for the police to have this information is made clear by her refusal to submit to a voluntary blood draw.) It is also clear that, but for the disclosures, the officers would not have pursued their DWI investigation.

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See Section 241.152(a), TEX. HEALTH & SAFETY CODE, (generally prohibiting hospital personnel from disclosing patient’s health-care information without patient’s written authorization).

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Attached as an exhibit to appellee’s motion is a police offense report stating that Hertsch made unsolicited statements to the police that appellee was intoxicated “based on the hospital’s blood screening.”

The disclosures were unauthorized and made in violation of Texas Health and Safety Code Section 241.151 et seq, and are thus not admissible under 38.23 of the Texas Code of Criminal procedure. Although 241.153(20) does allow for disclosure in order to comply with a subpoena, if it had not been for the illegal acts of Nurse Hertsch and Dr. Blanchard, the State would not have had knowledge of the test results and would not have subpoenaed the records. The results are therefore inadmissible under the provisions of Art. 38.23, as “fruit of the poisonous tree.” (Citations omitted).[⁹]

The next document at pages 138 to 156 in the Clerk’s transcript is entitled “State’s Brief In Opposition Of Motion To Suppress.” This brief contains no file-stamp showing when it was filed, it is not signed, and it contains no certificate of service showing that it was sent to the defense. This brief addresses three issues: whether appellee consented to Gosson’s blood draw, whether Gosson assaulted appellee when he drew her blood, and whether appellee had a reasonable expectation of privacy in her medical records which, according to the State’s brief, was relevant to whether the State could obtain these medical records pursuant to a grand-jury subpoena. The State’s brief did not address appellee’s new factual claim that hospital personnel (Hertsch and Blanchard) illegally disclosed the results of appellee’s hospital blood-test results to the police.

On February 17, 2004, the trial court signed an order granting appellee’s motion to suppress without making any written findings of fact or conclusions of law explaining the

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This claim, therefore, turned on whether hospital personnel (Hertsch and Blanchard) illegally disclosed the results of appellee’s hospital blood-test results to the police, and not on whether appellee consented to Gosson’s blood draw.

factual or legal basis for its ruling. The State appealed. The only question presented in the State's brief on direct appeal was whether the trial court abused its discretion "in suppressing blood-alcohol test results where there is no reasonable expectation of privacy in medical records showing blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident?" In its brief on direct appeal, the State argued that there is "no Fourth Amendment reasonable expectation of privacy and no statutory physician-patient privilege of confidentiality that protects the record of blood test results of an injured motorist from being given to law enforcement officers pursuant to a grand jury subpoena."

Appellee's brief on direct appeal responded that the State was attempting "to change the focus of the trial court's concerns" from "whether the appellant's [sic] blood was seized illegally in the first place to whether the State's subsequent grand jury subpoena somehow made the results of an otherwise illegal search admissible."¹⁰ *See also Spebar v. State*, 121 S.W.3d 61, 63-64

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Appellee made the same claim when the prosecution made the same argument to the trial court at the suppression hearing.

[THE PROSECUTION]: The blood evidence is admissible. As far as *State v. Hardy*, it's a Court of Criminal Appeals, 963 S.W.2d 516. It examines as far as the admissibility of blood evidence and whether or not there's a [sic] expectation of privacy and the results of the blood taken from the hospital. Specifically it cites *Clark v. State*, which is a Corpus Court of Criminal Appeals [sic]. It says, "We note that five Texas appellate courts have addressed, in published opinions, whether, after the promulgation of Rule 509, a reasonable expectation of privacy exists in medical records containing blood test results where the records were made for medical purposes but were later subpoenaed by a Grand Jury. Four out of five held that society does not recognize as reasonable an expectation of privacy in those kinds of records." And one of those courts is the Corpus Christi Court of Appeals, Your Honor.

[TRIAL COURT]: Response.

(Tex.App.–San Antonio 2003, no pet.) (rejecting similar claim made by prosecution because defendant did not claim violation of right to privacy, but claimed that results of his blood-test were inadmissible because hospital personnel assaulted him by taking his blood). Appellee’s brief on direct appeal also claimed that the trial court properly suppressed appellee’s hospital blood-test results because “the evidence, viewed in light most favorable to the State, shows that appellee passively **acquiesced**^[11] to the hospital’s blood draw” which, according to appellee, did not equal consent. Appellee’s brief also reasserted her new factual claim that hospital personnel (Hertsch and Blanchard) illegally disclosed appellee’s hospital blood-test results to the police.

[THE DEFENSE]: Your Honor, we’re not talking about—we’re not talking about—we’re talking about the legality of the initial seizure of the blood evidence, not the—not the propriety of subpoenaing hospital records. We’re talking about the initial seizure of the blood evidence by the hospital.

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Emphasis added.

The Court of Appeals decided that the Fourth Amendment's exclusionary rule did not exclude appellee's hospital blood-test results *obtained by the State* through the grand-jury subpoena because no reasonable expectation of privacy existed in the medical records containing appellee's hospital blood-test results. See *State v. Kelly*, 166 S.W.3d 905, 911 (Tex.App.–Corpus Christi 2005) *citing State v. Hardy*, 963 S.W.2d 516, 527 (Tex.Cr.App. 1997) (any interests society has in safeguarding privacy of medical records “are not sufficiently strong to require protection of blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident”).¹² The Court of Appeals also decided that the blood draw *by Gosson* did not implicate the Fourth Amendment because that involved purely private action and not police conduct. See *Kelly*, 166 S.W.3d at 910.¹³

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Appellee did not challenge this decision in her discretionary review petition. And, we have noted elsewhere in this opinion that she did not challenge in the trial court or in the Court of Appeals the grand-jury subpoena process by which the State obtained her medical records. See, e.g., Footnote 10.

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Appellee did not challenge this decision in her discretionary review petition.

The Court of Appeals also declined to address several other theories, including appellee's new factual theory that hospital personnel illegally disclosed appellee's hospital blood-tests to the police, that might have supported the trial court's ruling granting appellee's motion to suppress. *See Kelly*, 166 S.W.3d at 909-10.¹⁴ The Court of Appeals further decided that, even if appellee did not consent to Gosson's blood draw, the record does not support "exclusion of the evidence on grounds of assault" because Gosson reasonably believed that appellee consented and the drawing of her blood neither threatened nor inflicted serious bodily injury. *See Kelly*, 166 S.W.3d at 915; *see also* Section 22.06 (1), TEX. PEN. CODE, (actor's reasonable belief that victim consented to actor's conduct is a defense to assault prosecution if the conduct did not threaten or inflict serious bodily injury).¹⁵

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Appellee did not challenge these decisions in her discretionary review petition.

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Appellee did not challenge this decision in her discretionary review petition. We further note that two other courts of appeals have declined to find an assault in cases similar to this. *See Ramos v. State*, 124 S.W.3d 326, 334-36 (Tex.App.—Fort Worth, 2003, pet. ref'd); *Spebar v. State*, 121 S.W.3d at 63-64.

Finally, in considering whether Gosson's blood draw violated a provision of the Texas Health and Safety Code apparently requiring a patient's consent for emergency medical care,¹⁶ the Court of Appeals ultimately decided that appellee "consented to the blood extraction, despite her inconsistent testimony to the contrary."¹⁷ See *Kelly*, 166 S.W.3d at 915-16.¹⁸ We exercised our discretionary authority to review this decision and to

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See Section 773.008, TEX. HEALTH & SAFETY CODE.

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Exceptions authorized by Section 773.008 do not apply here.

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The decision of the Court of Appeals states:

Viewed in the light most favorable to the trial court's ruling, the evidence shows that Kelly was "conscious and able to communicate" as she asserts. The evidence reasonably infers that she could have signed a written consent for treatment. Even so, the evidence also establishes that she unequivocally admitted, under oath, that she consented to the extraction of blood. Oral consent is sufficient. (Citation omitted). Further, the objective physical manifestation of Kelly's consent is established by the admitted extension of her arm to allow the extraction of the blood. Kelly allowed multiple procedures on her person, including bracing her body for transport and the transportation for the sole purpose of emergency medical care. Indeed, these are not manifestations of a "mere acquiescence of authority." The blood extraction was solely for medical purposes. Consent for the blood sample reasonably contemplates the use of blood in furtherance of her emergency medical diagnosis and treatment. To isolate the blood extraction, admittedly done in furtherance of her medical treatment, and attest in hindsight that it was the sole act she did not consent to belies the evidence in the case. "It is axiomatic that if there was consent to or a request for treatment, any complaint by [the defendant] that blood was taken illegally would be negated." (Citations omitted). We conclude that the evidence establishes that Kelly consented to the blood extraction, despite her inconsistent testimony to the contrary. Accordingly, we conclude that Kelly's theory that the alcohol-blood test results are inadmissible under article 38.23, because she did not consent to the blood extraction for medical purposes, is not reasonably supported by the record. We cannot uphold a trial court's ruling on a suppression motion if it is not reasonably supported by the record and is not correct on any theory of law applicable to the case. (Citations omitted).

address the claim that the Court of Appeals misapplied the appellate standard of review by failing to view the evidence in the light most favorable to an implied finding that appellee did not consent to Gosson’s blood draw. The ground upon which we granted discretionary review states:

The Court of Appeals has decided an important question of state and federal law in a way that conflicts with the applicable, controlling decisions of the Texas Court of Criminal Appeals.

In reviewing a trial court’s ruling on a motion to suppress, an appellate court must view the evidence in the light most favorable to the trial court’s ruling.¹⁹ When a trial court makes explicit fact findings, the appellate court determines whether the evidence (viewed in the light most favorable to the trial court’s ruling) supports these fact findings. The appellate court then reviews the trial court’s legal ruling *de novo* unless the trial court’s supported-by-the-record explicit fact findings are also dispositive of the legal ruling.

Kelly, 166 S.W.3d at 916.

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Because the trial court granted appellee’s motion to suppress, the Court of Appeals was required to view the evidence in the light most favorable to the appellee, not the State.

The appellate standard of review is very similar when the record is silent on the reasons for the trial court's ruling or when the trial court makes no explicit fact findings and neither party has timely requested findings and conclusions from the trial court.²⁰ Under these circumstances, the appellate court implies the necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings. The appellate court then reviews the trial court's legal ruling *de novo* unless the supported-by-the-record implied fact findings are also dispositive of the legal ruling.²¹

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See State v. Cullen, 195 S.W.3d 696, 700 (Tex.Cr.App. 2006) (requiring a “trial court to express its findings of fact and conclusions of law when requested by the losing party”).

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This description of the appellate standard of review is consistent with case law. *See State v.*

Ross, 32 S.W.3d 853, 855-56 (Tex.Cr.App. 2000); *Carmouche v. State*, 10 S.W.3d 323, 328-28 (Tex.Cr.App. 2000); *Guzman v. State*, 955 S.W.2d 85, 85-89 (Tex.Cr.App. 1997); *see also State v. Terrazas*, 4 S.W.3d 720, 725 (Tex.Cr.App. 1999) (since trial court made no express fact findings, appellate court was required to infer all necessary fact findings that would support the trial court's ruling). Illustrative of when supported-by-the-record implied fact findings are not dispositive of the trial court's legal ruling is our decision in *Terrazas*, in which the trial court's supported-by-the-record implied fact finding was not dispositive of the trial court's legal ruling that the defendant's confession was involuntary. *See Terrazas*, 4 S.W.3d at 725-27. We have also stated that the appellate court should uphold the trial court's decision if it is correct on any theory of law applicable to the case. *See Ross*, 32 S.W.3d at 855-56; *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Cr.App. 1990). Appellee has challenged only the Court of Appeals' decision on the issue of her consent to Gosson's blood draw and has not challenged the Court of Appeals' decisions on the alternate legal theories that might have supported the trial court's ruling granting appellee's motion to suppress.

Appellate courts should also keep in mind that the party with the burden of proof assumes the risk of nonpersuasion. If this party loses in the trial court and the trial court makes no explicit fact findings, then this party should usually lose on appeal. Our decision in *Ross* illustrates this. See *Ross*, 32 S.W.3d at 855-59 and at 857 (“Given the absence of any factual findings, the appellate presumption of the regularity of a trial court’s judgment, and which party had the burden of proof, the trial court’s implied factual findings were dispositive of the ultimate constitutional question of probable cause.”) quoting *Villarreal v. State*, 935 S.W.2d 134, 140 (Tex.Cr.App. 1996).²² We understand appellee to argue in her discretionary review petition and in her brief that the Court of Appeals misapplied the appellate standard of review by not viewing the evidence on the issue of appellee’s consent to Gosson’s blood draw in the light most favorable to appellee and the trial court’s ruling granting appellee’s motion to suppress. We also understand appellee to argue that the evidence, viewed in the light most favorable to the trial court’s ruling granting her motion to suppress, supports an implied fact finding that she did not consent to Gosson’s blood draw.

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It is important to note that appellee had the initial burden to produce evidence to support a finding that she did not consent to Gosson’s blood draw. See *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Cr.App. 2005) (to establish Fourth Amendment violation, defendant bears initial burden of producing evidence to support finding of improper police conduct such as proving that a search occurred without a warrant shifting the burden to the State to establish the validity of the search); *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex.Cr.App. 1986) (as movant in a Fourth Amendment motion to suppress evidence, defendant must produce evidence that defeats presumption of proper police conduct); *Mattei v. State*, 455 S.W.2d 761, 766 (Tex.Cr.App. 1970); see also *Terrazas*, 4 S.W.3d at 725-28 (defendant claiming that her confession was involuntary had burden to present evidence raising a voluntariness question). Unless appellee carried this initial burden, it cannot be argued that the prosecution ever assumed the burden of proof with the risk of nonpersuasion. Compare *Terrazas*, 4 S.W.3d at 727 (prosecution never assumed burden of proof with risk of nonpersuasion on issue of voluntariness of defendant’s confession because defendant did not carry her initial burden to present evidence to support a finding of involuntariness).

For example, in her discretionary review petition, appellee asserted:

The trial court, the judicial officer charged with weighing the demeanor and the credibility of witnesses was free to believe any witness in favor of other witnesses; and, he was free to believe some portions of an individual's testimony and disregard other portions. As this Honorable Court has stated, great deference should be given to a trial court's findings of fact.

Nevertheless, the Court of Appeals did not review, *de novo*, the law as it applied to the facts; instead, it chose to weigh the credibility of certain portions of the appellant's [sic] testimony against other portions; and, having done so, it then determined that those portions were more credible than certain other portions. It then found the appellant had consented to her blood being drawn. The problem with doing this sort of thing is that it violates the dictates of *Guzman* and *Carmouche*.

In this case, however, we find it difficult to conclude that the record is silent on the factual basis for the trial court's ruling granting appellee's motion to suppress. Following the suppression hearing, appellee argued several times that she "merely acquiesced" to Gosson's blood draw. The trial court also indicated that it wanted additional briefing on the "acquiescence" question. A fair reading of the record indicates that appellee ultimately claimed, and the trial court found, that she "merely acquiesced" to Gosson's blood draw.²³

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We also do not read appellee's brief on direct appeal in the Court of Appeals to claim that the evidence supports an implied fact finding that she did not consent to Gosson's blood draw. She

And, viewed in the light most favorable to the trial court's ruling, the evidence supports this finding.

Even if the record is silent on the factual basis of the trial court's ruling, the evidence, viewed in the light most favorable to the trial court's ruling, does not support an implied fact finding that appellee did not consent to Gosson's blood draw. Though appellee testified (and the record would support an implied finding) that she did not consent by expressly giving Gosson permission to draw her blood, no one testified that she expressly refused to give Gosson permission to draw her blood. On the contrary, appellee testified that, when Gosson told her that he was in the emergency room to draw her blood, she did not refuse or tell him "not a chance." Viewed in the light most favorable to the trial court's ruling, the evidence supports only an implied finding that appellee put her arm out when Gosson told her that he was in the emergency room to draw her blood for medical treatment purposes. In other words, viewed in the light most favorable to the trial court's ruling, the evidence supports only an implied finding that appellee "merely acquiesced" to

argued in her brief on direct appeal:

In the instant case, the evidence, viewed in light most favorable to the State, shows that the appellee passively acquiesced to the hospital's blood draw. Voluntary consent is not shown by a mere acquiescence to authority. (Citations omitted). The State bears the burden of proving voluntary consent by clear and convincing evidence. (Citation omitted). In this case, the State failed to carry that burden.

Gosson’s blood draw. See Webster’s II *New Collegiate Dictionary* 10 (1999) (defining “acquiescence” as, among other things, “[u]nprotesting assent”).

And, we decide that an express or implied finding of “mere acquiescence” to Gosson’s blood draw also constitutes a finding of consent to the blood draw. Webster’s II *New Collegiate Dictionary* defines “consent” as, among other things, “[v]oluntary allowance of what is planned or done by another.” Webster’s II *New Collegiate Dictionary* 240 (1999).

We further note that this same dictionary defines “acquiesce” as, among other things, “[t]o consent or comply without protest.” Webster’s II *New Collegiate Dictionary* 10 (1999). Also, according to the *Roget’s Desk Thesaurus*, “consent” and “acquiesce” are synonymous terms. *Roget’s Desk Thesaurus* 9, 111 (2001).

Appellee nevertheless relies on the United States Supreme Court’s decision in *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968), to argue that “voluntary consent is not shown by a mere acquiescence to authority.” *Bumper* held that the prosecution did not sustain its burden to prove that a consent to a search was lawful “by showing no more than acquiescence to a claim of lawful authority.” See *id.* In *Bumper*, the defendant’s mother told the police to “go ahead” and search her house when one of four officers who appeared at her front door announced that he had a search warrant to search the house. See *Bumper*, 391 U.S. at 546. The Supreme Court held that a search cannot be justified as lawful on the basis of consent when that “consent” has “been given only after the official conducting the search has asserted that he possesses a warrant.” In *Bumper*, 391 U.S. at 550, the Court stated:

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful

coercion. Where there is coercion there cannot be consent.

This case clearly does not present the same situation as that presented in *Bumper*. We decline to hold that Gosson's informing appellee that he was in the emergency room to draw her blood (for medical treatment purposes) is a claim of lawful authority to draw her blood without her consent, which could be used against her later, effectively announcing that appellee had no right to resist the blood draw. The other United States Supreme Court case cited in appellee's brief actually supports the proposition that appellee did not have to be told that she could refuse to consent to Gosson's blood draw in order for her acquiescence to be considered a valid consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent).

The judgment of the Court of Appeals is affirmed.

Hervey, J.

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