IN THE SUPERIOR COURT OF

THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1510007362
	)	
CODY HARTMETZ,	)	
	)	
Defendant.	)	

Submitted: April 15, 2016
Decided: July 6, 2016

Defendant's Motion to Suppress – DENIED

MEMORANDUM OPINION

Christopher Marques, Esquire, Deputy Attorney General, Delaware Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for State of Delaware.

Edmund Daniel Lyons, Esquire, 1526 Gilpin Avenue, P.O. Box 579, Wilmington, DE 19899. Attorney for Defendant.

CARPENTER, J.

Before the Court is a Motion to Suppress hospital records obtained by the State pursuant to 29 *Del. C.* §§ 2504(4), 2508(a). The contested records reflect Defendant Cody Hartmetz's ("Defendant") blood alcohol content ("BAC"), which had been determined and documented by medical personnel in the course of Defendant's treatment at Christiana Hospital following an automobile collision.[1] For the reasons that follow, Defendant's Motion to Suppress is DENIED.

BACKGROUND

On October 11, 2015, Defendant was driving northbound on U.S. Route 301 in a Volkswagen with Alexander Adams ("Adams") riding in the passenger seat. At around 9:35 p.m., Defendant allegedly turned left at a red light into oncoming traffic and struck another vehicle. Sgt. Raymond Howard ("Sgt. Howard")[2] of the Middletown Police Department responded to the accident and testified at the hearing on March 21, 2016 regarding his investigation. When Sgt. Howard arrived at the scene, he observed significant front-end damage to both vehicles and that fire and medical personnel had already arrived to assist the injured. Defendant suffered

[1] Defense Counsel filed two motions to suppress. The first was filed January 14, 2016 and pertains to evidence accumulated after a stop occurring November 17, 2015. Hardly any details have been provided to the Court regarding these events and the matter was not touched upon at the Suppression Hearing or in the briefing submitted by counsel. Ultimately, the Court assumes for purposes of this motion that either Defense Counsel has abandoned the position asserted in the January 14th Motion or that the Court's ruling on this Motion could potentially moot the issue presented in the other.

[2] Sgt. Howard has worked for the department for 9 years, prior to which he served 27 years as an Officer in the Baltimore City Police Department. Hearing Tr. 3.

a serious head injury and was airlifted to Christiana Hospital.[3] Shortly after arriving at the hospital, a staff member drew a sample of Defendant's blood for testing and recorded his BAC.[4] Importantly, the blood draw was performed at the direction of hospital personnel for treatment purposes, not for or at the request of law enforcement officials.

Sgt. Howard did not proceed directly to the hospital because he had to "process the crash site."[5] During that time, he confirmed that the traffic lights at the scene were functioning properly and spoke with two witnesses, one of whom was off-duty Maryland State Trooper Nelson ("Trooper Nelson"). Trooper Nelson observed the collision from his vehicle while stopped at a red light facing eastbound and proceeded to the scene to lend his assistance. He informed Sgt. Howard that: (1) Defendant was seated behind the steering wheel of the Volkswagen;[6] (2) the vehicle reeked of alcohol; (3) Defendant was noticeably injured in the accident and his head was badly bleeding; and (4) Defendant exited the vehicle and urinated on the side of the roadway.[7] Sgt. Howard then conducted

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[3] Adams was also seriously injured in the accident and transported to Christiana, it is unclear whether he was likewise airlifted to the hospital. *See id.* at 4.

[4] When asked when the hospital blood draw occurred, Sgt. Howard stated he believed the records indicated the test was conducted about a half hour after the accident. *See id.* at 10-11.

[5] *See id.* at 7 (stating "there were no other units" available to do so).

[6] According to Sgt. Howard's testimony, Trooper Nelson was able to identify Defendant because he was already personally familiar with Defendant and his brother. *Id.* at 12-13.

[7] *Id.* at 6-7.

a search of the Volkswagen and observed several empty and full beer cans strewn about the vehicle.[8]

By the time Sgt. Howard arrived at Christiana Hospital, approximately two hours had passed since the collision occurred. At the hearing, he testified that he went to the hospital "mainly to…find out if [Defendant and Adams] had survived and what their condition[s] [were]."[9] After speaking with a nurse in the emergency room and discovering that Defendant and Adams were able to be interviewed, Sgt. Howard was directed back to the treatment area[10] and first spoke with Adams. He claimed the pair had been at a bar in Galena that evening and were driving around to "kill time" before heading to see a movie at the Middletown theater. Adams confirmed Defendant was operating the Volkswagen when the accident occurred, but maintained he did not see Defendant consume any alcohol that evening.[11] Sgt. Howard then spoke with Defendant, who claimed that he and Adams dined at Texas Road House in Middletown prior to the accident, that he consumed approximately 1.5 beers, and that he was driving the vehicle when the accident

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[8] *Id.* at 8 ("There were several empty and full cans of Miller Light strewn about the passenger floorboard on the front of the rear and also there were some in a box...sitting on the seat in the rear. There were also some empty Peroni alcoholic beverage beer bottles…on the front floorboard and also in the box in the back there was some empty and there were also ones that were capped. The vehicle reeked of alcohol itself.").

[9] *Id.* at 8-9.

[10] *Id.* at 8-10, 13-14. According to Sgt. Howard, this was his only contact with medical personnel while at the hospital and he did not request blood testing for purposes of the investigation. *Id.*

[11] *Id.* at 9-10.

occurred.[12] No further investigation occurred at the hospital, nor did Sgt. Howard request any action be performed by medical personnel.

The Attorney General's office subsequently issued a subpoena to Christiana Hospital requesting that they produce records pertaining to Defendant's treatment following the accident.[13] The hospital records included the results of Defendant's blood test indicating that he possessed a BAC in excess of the legal limit on the night of the accident. Defendant was subsequently indicted by the Grand Jury on December 21, 2015 for Driving a Vehicle While Under the Influence of Alcohol or With a Prohibited Alcohol Content ("DUI"), Vehicular Assault First Degree, two

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[12] *Id.* at 10.

[13] *See also* Att'y Gen Subp., State v. Cody Joshua Hartmetz, Complaint #34-15-009944 (Oct. 21, 2015) The subpoena demanded the following be produced by Christiana Care Health Services and delivered to the Office of the Attorney General:

> RECORDS TO BE PRODUCED: a **certified complete copy** of **the entire medical record file**, including but not limited to: **SIGNED CONSENT TO DRAW BLOOD FORM**, the complete Emergency Department Records, Admission Records, all Laboratory Reports, Operative/Procedure Reports, Forensic Nurse Examiner Records (with photographs if applicable), Nursing Records, Progress Notes, Doctors' Orders, Consultations, Paramedic Reports/Pre-Hospital Information, Rehabilitation Records, Discharge Records and any other records, whether in electronic or paper form, pertaining to **Cody Joshua Hartmez, DOB 9/14/1992**, for any treatment or medical services rendered on or about 10/11/2015 until discharge.

Id. (emphasis in original). The subpoena also provided that it was an investigative subpoena authorized and issued "under state law for law enforcement purposes" and noted that "federal privacy regulations under 45 § CFR 164.512(f)(1)(ii)(C) permit disclosure…of otherwise protected health information in compliance with this subpoena." *Id.* The subpoena is signed by Deputy Attorney General Danielle Brennan. *Id.*

counts of Vehicular Assault Second Degree, Driving a Vehicle While License is Suspended or Revoked, and Disregarding a Red Light.[14]

Defense counsel moved to suppress the hospital records containing Defendant's BAC on January 26, 2016. Relying on *State v. Mary Robinson*,[15] Defendant contends that the Fourth Amendment requires such evidence be procured only pursuant to a search warrant or with the defendant's consent.[16] At the suppression hearing, Sgt. Howard testified that while he believed he had probable cause sufficient to support a blood draw warrant,[17] he did not believe he would be able to timely procure a warrant. He remained at the accident site for two hours, had to travel to get to the hospital from Middletown, believed Defendant's injuries were extensive, and felt the time it would take to procure a warrant would exceed the four hour time frame he believed was required under the DUI law.[18] He emphasized that he was not expecting to have the opportunity to speak with Defendant that evening considering Defendant had just been "airlifted [with] a serious head injury" and would likely require surgery.[19] Sgt. Howard also testified

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[14] Defendant was initially indicted with three counts of Vehicular Assault Second Degree, but one count was dismissed.
[15] 2015 WL 3793363 (Del. Com. Pl. May 15, 2015).
[16] There are several "Robinson" decisions, so to avoid confusion the first name of the defendant will also be included in the case title.
[17] Hearing Tr. 16.
[18] *Id.* at 11.
[19] *Id.*

that he assumed the hospital would have already tested Defendant's BAC for purposes of determining which medications and/or treatments to administer.[20] According to Sgt. Howard, Defendant smelled strongly of alcohol and was in the process of receiving sutures for a scalp laceration at the time of their conversation at the hospital. Despite finding Defendant conscious, responsive, and cooperative throughout their discussion, Sgt. Howard testified that he "didn't think to" ask Defendant to consent to a blood draw for investigatory purposes and speculated that Defendant's ability to consent would be vulnerable to attack given the nature of his injuries.

At the conclusion of the hearing, the Court reserved decision on the Motion and requested further briefing from the parties. Having considered the submissions, the Court finds Defendant's Motion to Suppress will be DENIED.

DISCUSSION

The Fourth Amendment of the U.S. Constitution and Article I, § 6 of the Delaware Constitution protect from "unreasonable searches and seizures."[21] Taking a blood sample "for use as evidence in a criminal investigation" without a

[20] *Id.* at 14 ("I would assume that they draw blood because if they start putting medications into a victim that has alcohol and drugs in their system and it counteracts, that could be deadly.").
[21] *U.S. Const. amend. IV*; *Del. C. Ann. Const. art. 1 § 6*. The General Assembly has acknowledged that these protections extend to determinations regarding "the admissibility of a chemical test in 'any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol.'" *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015) (citing 21 *Del. C.* § 2750(a)).

warrant is an unreasonable search absent a recognized exception, such as consent or exigent circumstances.[22] With regard to the admissibility of BAC test results, courts consider: (1) "whether the actual taking of Defendant's blood constituted a search or seizure under the Fourth Amendment" and (2) "whether the State's acquisition of the blood test results infringed on Defendant's Fourth Amendment privacy interests."[23]

Here, the blood draw occurred during the course of Defendant's treatment at a private hospital under the direction of medical personnel and without any influence or involvement on behalf of law enforcement officials. It is thus undisputed that the "actual taking" and testing of the blood sample in this case occurred outside the scope of the Fourth Amendment.[24] Thus, the focus of the

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[22] *See Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) ("[T]he type of search at issue in this case...involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy.") (citing *Winston v. Lee,* 470 U.S. 753, 760 (1985)).

[23] *See State v. Onumonu*, 2001 WL 695539, at *2 (Del. Super. June 18, 2001).

[24] *See United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (emphasizing that the Fourth Amendment does not apply to "'a search or seizure... by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" (quoting *Walter v. United States,* 447 U.S. 649, 662 (1980) (BLACKMUN, J., dissenting))); *State v. Leonard Robinson*, 2006 WL 1148477, at *3 (Del. Super. May 1, 2006) ("[W]hile the taking of blood from an individual, as here, has been held to fall within the coverage of the Fourth Amendment, that protection is only implicated where the hospital tests an individual's blood with some involvement of law enforcement officials."); *Onumonu*, 2001 WL 695539, at *2-3 ("Defendant does not allege that Christiana Hospital is a publicly owned facility. There is no evidence to suggest that the police, or other governmental agents, compelled the hospital to analyze Defendant's blood or otherwise acted in more than a passive role in the hospital's performance of the BAC test. Thus, the Fourth Amendment was not implicated when the hospital

Court's inquiry is the constitutionality of the State's conduct in acquiring evidence of Defendant's BAC from Christiana Hospital with an Attorney General's subpoena. Defendant urges the Court to assess the State's use of the subpoena to obtain medical records according to a recent Delaware Court of Common Pleas decision, *State v. Mary Robinson*. In response, the State asks this Court to overrule the *Mary Robinson* decision.

In *Mary Robinson*, the defendant was transported to Christiana Hospital for injuries sustained in a two-car collision attributable to her failure to stop at a red light.[25] At the hospital, defendant told the investigating officer she ingested a Xanax pill prior to the accident and the officer observed her to be "incoherent[,] unable to understand his questions[,] and indicated that she kept falling asleep."[26] As a result, the officer directed hospital personnel to conduct a blood draw.[27] Nearly three years later, the State subpoenaed the hospital to produce records from the accident and the defendant moved to suppress her hospital records on doctor-patient privilege and the Fourth Amendment grounds.[28] With regard to the State's

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drew Defendant's blood to conduct a BAC test.").

[25] *See Mary Robinson*, 2015 WL 3793363, at *1.

[26] *See id.*

[27] *See id.*

[28] *See id.* at *1-2. At the suppression hearing, the State agreed to suppress the blood test results as a result of the Delaware Supreme Court's ruling in *Flonnory*. *See id.* at *1. Moreover, despite the fact that the sample was taken *at the direction of the investigating officer*, the *Mary Robinson* Court found, and the defendant conceded, that the blood draw was not a "search" under the Fourth Amendment because it was "performed by medical personnel." *See id.* at *2. While the

acquisition of the records, the Court discussed two Superior Court decisions, *State v. Onumonu* and *State v. Leonard Robinson*, and interpreted the latter as *implicitly* proposing "that a search warrant is the appropriate method of forcefully obtaining private medical records without consent."[29] The *Mary Robinson* Court concluded:

> The State's subpoena of the medical records, rather than an application for a search warrant, *compelled* Christiana Care to produce the records, and therefore does not meet the requirements of the Fourth Amendment.[30]

The Court declines to follow the *Mary Robinson* Opinion for several reasons. First, the Court disagrees that *Leonard Robinson* implies that a search warrant is the only permissible means of obtaining private medical records under the Fourth Amendment. The officer in *Leonard Robinson* secured a warrant to take hospital-drawn samples of the defendant's blood for independent police testing. As such, an issue of whether that was the only appropriate means to obtain medical records was not discussed or decided. The Court is unwilling to find that the fact a warrant was obtained in *Leonard Robinson* somehow precludes the production and/or admissibility of hospital records subpoenaed by the Attorney General. The *Mary Robinson* Opinion fails to distinguish between the forcible taking of a blood

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language of the opinion is unclear, it would appear that the instant case is factually distinguishable from *Mary Robinson* in that there is no dispute the actual taking of blood here occurred outside the ambit of the Fourth Amendment.

[29] *See id.* at *3.

[30] *Id.* at *4 (emphasis in original).

sample, which was the subject of *Leonard Robinson,* and forcing the production of medical records. That distinction is central here.

Furthermore, the facts in *Leonard Robinson* are easily distinguishable..[31] The warrant obtained in *Leonard Robinson* was for *physical samples of the defendant's blood*, which had already been drawn and tested by the hospital for medical purposes, for further *independent testing* by the police.[32] This difference is significant. The *extraction* of a blood sample and the *testing* of that sample are two separate searches for Fourth Amendment purposes. The officer in *Leonard Robinson* was not seeking to obtain records reflecting the results of the hospital's "private search," but to take the defendant's blood for independent police testing.[33] These are simply not the facts presented here. Moreover, unlike the blood sample in *Mary Robinson*, which was apparently extracted at the direction of a police officer, law enforcement played absolutely no role in the Christiana Hospital personnel's decision to draw and test Defendant's blood.[34]

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[31] While the *Mary Robinson* Court discussed *Leonard Robinson* as involving a warrant for blood "results" and "records, " the warrant procured in *Leonard Robinson* was for the physical samples of the defendant's blood extracted and originally tested by the hospital. *Id.* at *3

[32] *See Leonard Robinson*, 2006 WL 1148477, at *4.

[33] *See Jacobsen*, 466 U.S. 409 ("The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search.").

[34] *See supra* note 30.

Further, both Defendant and the *Mary Robinson* Court appear to ignore[35] the statutory power "'confer[red] upon the Attorney General, in the investigation of crime and other matters of public concern,...similar to those inherent in grand juries', including the grand jury's power to 'compel the appearance of witnesses and the production of documents.'"[36] Indeed, the "Attorney General's right to seize evidence pursuant to a subpoena" arises under title 29, sections 2504(4) and 2508(a) of the Delaware Code,[37] and is "treated as coextensive with the constitutional powers of the office of the Attorney General."[38] Section 2504(4) bestows upon the Attorney General "the power, duty and authority '[t]o investigate matters involving the public peace, safety and justice and subpoena witnesses and evidence in connection therewith....'"[39] Under Section 2508(a), "[t]he Attorney

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[35] The *Mary Robinson* Court does not cite to or address the statutory provisions covering the Attorney General's investigative authority.

[36] *See Johnson v. State*, 983 A.2d 904, 920 (Del. 2009) (quoting *In re McGowen,* 303 A.2d 645, a 647 (Del. 1973)). *See also* Grand Jury Law and Practice § 6:2 (2d ed.) ("In states that follow the federal model, the prosecutor exercises the subpoena power to assemble the evidence to be presented to the grand jury.") (citing Super. Ct. Crim. R. P. 17). In states such as Delaware, commentators have observed "as long as it is fairly clear that the grand jury's subpoenas are being used to further the grand jury's investigation—and not some separate interest of the prosecutor's—the courts have permitted the prosecutors to make their own decisions as to the issuance of the subpoenas." *See id.*

[37] *See Johnson*, 983 A.2d at 920 (acknowledging that, in terms of defining the scope of the subpoena power granted to the Attorney General, Delaware case law seems to interpret these statutes as interchangeable).

[38] *See In re Blue Hen Country Network, Inc.*, 314 A.2d 197, 199 (Del. Super. Ct. 1973) ("The statute may be treated as coextensive with the constitutional powers of the office of the Attorney General.").

[39] *See Johnson,* 983 A.2d at 920.

General or any assistant may ... compel the attendance of persons, witnesses and evidence at the office of the Attorney General or at such other place as designated."[40] While this investigative authority is "purposefully and legitimately broad," the Attorney General's subpoena power remains subject to constitutional limitations.[41] Specifically, the Fourth Amendment requires a subpoena for the seizure of documents be "reasonable."[42] A subpoena is reasonable if it: (1) specifies the materials to be produced with reasonable particularity, (2) requires the production only of materials relevant to the investigation, and (3) requests materials that do not cover an unreasonable amount of time.[43]

Defendant does not argue that the subpoena at issue here was unreasonable. Rather, he relies on the reasonable expectation of privacy held by patients with respect to medical records to support the position that such information should be accessible only upon securing a warrant. It is true that patients undergoing diagnostic tests at a hospital generally enjoy a reasonable expectation of privacy in that the results of those tests will not be disclosed to non-medical personnel without their consent.[44] However, the expectation of privacy is not absolute.[45] In

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[40] *See id.*
[41] *See In re Blue Hen Country Network, Inc.*, 314 A.2d at 200.
[42] *See Johnson,* 983 A.2d at 921.
[43] *See id.*
[44] *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).
[45] *See id.* at 80-86; *In re Search Warrant*, 810 F.2d 67, 71-72 (3d. Cir. 1987). *See also State v. Salasky*, 2013 WL 5487363, at *16 (Del. Super. Sept. 26, 2013) ("[T]his protection is not

this context, 21 *Del. C.* § 2750(b) has been said to remove any reasonable expectation of privacy with regard to BAC results:[46]

> The doctor-patient privilege *shall not apply* to the *disclosure to law-enforcement personnel nor the admissibility* into evidence in any criminal proceeding of the *results of a chemical test of a person's blood*...for the purpose of determining the alcohol or drug content of that person's blood *irrespective of* whether such test was done *at the request of a treating physician*, other medical personnel or a peace officer.[47]

Thus, whatever insulation Fourth Amendment privacy considerations provide with respect to the nondisclosure of medical records *generally*, does not extend to the disclosure of BAC tests conducted by hospital personnel solely for medical purposes following an automobile accident. While the subpoena here requested information beyond the BAC tests, it does not invalidate the procedure used to obtain that information. Of course, to the extent the State seeks to introduce other medical information from Defendant's hospital records beyond the blood test

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absolute and an individual's protected health information can be disclosed without...consent 'for law-enforcement purposes in accordance with 16 *Del. C.* § 1232(d)(2) and 45 C.F.R. Parts 160, 162, and 164....' Further,...'[a] covered entity may disclose protected health information...to a law enforcement official if' it constitutes a 'permitted disclosure,' which includes a court order, court-ordered warrant, subpoena or summons by a judicial officer, grand jury subpoena, administrative subpoena or summons, civil or authorized investigative demand, or similar process authorized under the law.'").

[46] *See Leonard Robinson*, 2006 WL 1148477, at *6 ("If he is relying on the statutorily created doctor/patient privilege, that privilege does not apply to the disclosure of the B.A.C. test results to law enforcement personnel, pursuant to 21 Del.C. § 2750(b). In light of that statute, the defendant has no reasonable expectation of privacy in preventing such disclosure...").

[47] 21 *Del. C.* § 2750(b) (emphasis added). *See also Onumonu*, 2001 WL 695539, at *4 ("The Court finds that the proper interpretation of § 2750(b) is that, when evidence of blood alcohol content is admissible under the relevant search and seizure law...doctor-patient privilege does not apply to the disclosure or admissibility at trial of those results.").

results, the admissibility of such evidence would be subject to an analysis under existing federal and state law and consideration of the doctor-patient privilege.

CONCLUSION

The Court believes its holding today is consistent with the U.S. Supreme Court's decision in *Missouri v. McNeely*.[48] Of course, where a non-consensual blood sample is sought or tested by, for, or at the direction of law enforcement officials, the Fourth Amendment requires a warrant, consent, or exigent circumstances. However, this case involved the obtaining of *hospital records* for the narrow purpose of collecting the results of a privately conducted blood test done with no law enforcement involvement. Under the circumstances presented, the State's acquisition of the BAC evidence was reasonable and did not run afoul of Fourth Amendment constraints. The Motion to Suppress is DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[48] 133 S. Ct. 1552 (2013) (holding that the natural dissipation of alcohol does not constitute a per se exigency justifying a blood draw without a warrant or consent and that the analysis of whether a warrantless blood draw is reasonable must be determined on a case-by-case basis).