UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JAMIE SPENCER,

Plaintiff,

vs.

CITY OF BAY CITY,

Defendant.

Civil Action No. 02-10280

Hon. David M. Lawson

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFF'S CONCISE STATEMENT OF THE ISSUE

Whether the Defendant's enforcement of Bay City Ordinance 10-57(e) against Plaintiff violated her Fourth Amendment rights by forcing her to submit to a chemical test where no warrant had been obtained and the encounter did not fall within any warrant exception?

Plaintiff answers "yes."

INTRODUCTION

Plaintiff Jamie Spencer requests, pursuant to Fed.R.Civ.P. 56, that this court grant partial summary judgment on the issue of liability. There are no disputes of material fact, as it is undisputed that Mrs. Spencer, a pedestrian, was required to take a warrantless Breathalyzer test by two Bay City police officers on the night of August 20-21, 2001, and it is undisputed that the officers acted pursuant to the policy and practice of the Bay City Police Department to enforce Bay City Ordinance 10-57(e). The only issue in dispute is purely legal: whether 10-57(e) violates the Fourth Amendment by requiring persons who are not driving motor vehicles to either submit to warrantless breath tests or face citation for refusing to do so.

STATEMENT OF FACTS

For the purpose of this motion for partial summary judgment, Plaintiff Jamie Spencer, as she must, sets forth all salient facts in a light most favorable to the defendants.

The Ordinance and its Enforcement

Bay City Ordinance 10-57(e) ("the Ordinance") provides:

> **A peace officer who has reasonable cause to believe a person less than 21 years of age has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath analysis**. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol tests are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor. **A person less than 21 years of age who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100**.

(Exh. A, Bay City Ordinance 10-57(e) (emphasis added).[1] The Ordinance is designed to gather evidence to enforce Bay City's "minor in possession" ordinance, 10-57(a), which provides that a person under 21 who possesses or consumes alcohol is guilty of a misdemeanor and may be ordered to perform community service and/or participate in substance abuse treatment programs, and be fined up to $100 for a first infraction and up to $500 for subsequent infractions. Incarceration is not an authorized punishment for minor in possession of alcohol. (See Exh. A).

It is the official policy and practice of the Bay City Police Department to enforce the Ordinance. Both of the officers involved in the testing of Mrs. Spencer, Officer Roderick Schanck and Officer Brian Schroer, confirmed that they were trained to enforce the Ordinance by requiring persons under 21 to take preliminary breath tests (PBT) upon reasonable cause that they had been drinking (Exh. B, Schanck Deposition at 11-12; Exh. C., Schroer Deposition at 8, 27-28). Officer Schanck explained that if one person in a group of minors appeared to have consumed alcohol, it was standard procedure to require every minor in the group to take a PBT (Exh. B, Schanck Deposition at 14-16).

Bay City police officers carry a standard laminated card to read to persons under 21 before requiring those persons to take a PBT (Exh. B, Schanck Deposition at 27; Exh. C, Schroer Deposition at 18). In the incident at issue in this litigation, Officer Schanck explained to Mrs. Spencer and her companions that if they refused to take the PBT, "they would be given a ticket with a civil infraction where the fines were up to a hundred dollars." (Exh. B, Schanck Deposition at 27). Officer Schroer confirmed that it was standard policy to issue a citation to a minor who refused to take a PBT (Exh. C, Schroer Deposition at 29).

The Encounter on August 20-21, 2001

[1]The Ordinance tracks the language of a state statute, Mich. Comp. Laws 436.33b(7).

It is undisputed that the Ordinance was applied to Mrs. Spencer in Veteran's Park in Bay City on the night of August 20-21, 2001. Mrs. Spencer, who was 19 years old at the time, went rollerblading around Bay City that evening with her fiancée and several other friends and arrived back in the park around midnight where her fiancée had parked his car (Exh. D, J. Spencer Deposition at 14-16). As Mrs. Spencer was removing her rollerblades, Officers Schroer and Schanck arrived in the park in response to a call about a fight in the boat launch area of the park (Exh. D, J. Spencer Deposition at 17; Exh. B, Schanck Deposition at 17).

The officers first encountered Eric Tweddle in the park. After the officers determined that Mr. Tweddle was 15 years old and had been drinking, Mr. Tweddle told the officers that he had obtained a ride with the group of young people, including Mrs. Spencer, who were parked further south in the parking lot (Exh. B, Schanck Deposition at 20-22).

Officer Schanck concluded that it was a reasonable inference that these other youths had also been drinking and therefore decided to require all of the youths under the age of 21 in the parking lot to submit to a PBT pursuant to the Ordinance (Exh. B., Schanck Deposition at 23-26; Exh D., J. Spencer Deposition at 23). After obtaining identification from the youths, Officer Schanck determined that only Van Spencer (Mrs. Spencer's fiancee) was over 21 (Exh. B, Schanck Deposition at 25). Therefore, using the laminated card issued by the Bay City Police Department, Officer Schanck read the other youths their "PBT rights" and informed them that they would be issued a citation if they refused to submit to a PBT (Exh. B, Schanck Deposition at 26-28). Officer Schanck recalled that it may have been Mrs. Spencer who asked what would happen if she refused to take the test (Exh. B., Schanck Deposition at 30; Exh. D, J. Spencer Deposition at 23).

Officer Schanck then proceeded to administer the PBT to Matt McDaniel, Ashley Ball, and Mrs. Spencer (Exh. D, J. Spencer Deposition at 25). Officer Schanck confirmed that Mrs. Spencer was one of the young persons in that group who was required to take the PBT that night (Exh. B, Schanck Deposition at 40). Mrs. Spencer took the PBT only because the officers told her of the consequences that would follow if she refused (Exh. D, J. Spencer Deposition at 34).

Mrs. Spencer estimated that she was detained from 45 to 75 minutes during the encounter (Exh. D, J. Spencer Deposition at 33). Officer Schanck confirmed that policy required him had wait at least 15 minutes after encountering the youths before administering the PBT and that the youths were not free to leave until after he had completed the testing and returned their identifications (Exh. B, Schanck Deposition at 29-30).

Mrs. Spencer and the other youths who took the PBT did not test positive for alcohol and, therefore, were not ticketed for minor in possession (Exh. B, Schanck Deposition at 28-29; Exh. C, Schroer Deposition at 23). Timothy Kolka refused the test and was eventually arrested on an outstanding warrant after a scuffle with the officers (Exh. B., Schanck Deposition at 30-32).

Mrs. Spencer subsequently brought this lawsuit against the City of Bay City.

STANDARD OF REVIEW

In *Hummel v. Couty of Saginaw*, 118 F.Supp.2d 811, 814 (E.D.Mich. 2000) (Lawson, J.), this Court set for the standard of review for Rule 56 summary judgment motions as follows:

> A motion for summary judgment under Fed.R.Civ.P. 56 presumes the absence of a genuine issue of material fact for trial. A party opposing a motion for summary judgment must show by affidavits, depositions or other factual material that there is "evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, the Court must view the evidence and draw all reasonable inferences in favor of the non- moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251-52, 106 S.Ct. 2505.

A party may support a motion for summary judgment by demonstrating that an opposite party, after sufficient opportunity for discovery, is unable to meet her burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986). The non-moving party may not merely rely upon the pleadings to oppose a motion for summary judgment but must come forward with affirmative evidence in the form of materials described in Rule 56(c) to establish a genuine issue on a material fact. *Id.* at 324, 106 S.Ct. 2548. Even in complex cases, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587; 106 S.Ct. 1348; 89 L.Ed.2d 538 (1986).

The party opposing the motion may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact," but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989)

ARGUMENT

THE CITY'S ENFORCEMENT OF THE ORDINANCE VIOLATED MRS. SPENCER'S FOURTH AMENDMENT RIGHTS BY FORCING HER TO SUBMIT TO A WARRANTLESS CHEMICAL TEST WHERE THE ENCOUNTER DID NOT FALL WITHIN ANY WARRANT EXCEPTION.

There are no material facts in dispute. As demonstrated in the Statement of Facts, the City of Bay City routinely enforces the Ordinance as a matter of practice and policy and did so against Mrs. Spencer on the night of August 20-21, 2001. The only question remaining, therefore, is whether the Ordinance violates the Fourth Amendment.

It appears that no American jurisdiction, outside of Michigan, has ever authorized its police to conduct warrantless chemical tests on non-driving persons suspected of petty offenses. As Mrs. Spencer shall demonstrate in this brief, this absence of similar statutes and ordinances in other states is not at all surprising because such testing plainly violates the Fourth Amendment.

A. Since the Ordinance require persons to submit to a warrantless search, it is unconstitutional unless the search falls within a warrant exception.

The Ordinance (Exhibit A) permits an officer to require a minor to submit to a warrantless breath test upon reasonable cause that the minor has consumed alcohol. A Breathalyzer or PBT is unquestionably a search within the meaning of the Fourth Amendment and is therefore subject to the same constitutional restrictions as other chemical tests such as blood and urine sampling. As the Supreme Court explained in *Skinner v. Railway Labor Executives= Association*, 489 U.S. 602, 616-17 (1989), A[s]ubjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung= breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber v. California*, 384 U.S. 757 (1966)] should also be deemed a search. (Internal citations omitted).

As the Supreme Court explained in *Mincey v. Arizona*, 437 U.S. 385, 390 (1978), "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." (Internal quotation marks and citation omitted).

In short, since the Ordinance authorizes the police to conduct warrantless searches within the meaning of the Fourth Amendment, the Ordinance is per se unconstitutional unless the searches so authorized fall within a "specifically established and well-delineated" warrant exception. Mrs. Spencer shall now demonstrate that the search to which she was subjected does not even arguably fall within any warrant exception.

B. The warrantless searches authorized by the Ordinance do not fall within any warrant exceptions.

There are only four exceptions to the warrant requirement that are even conceivable as justifications for the sort of forced chemical testing to which Mrs. Spencer was subjected: consent searches, searches incident to arrest, exigencies, and "special needs" searches. Mrs. Spencer shall consider each of these exceptions in turn.

1. The search of Mrs. Spencer was non-consensual.

The police, of course, do not have to obtain a warrant if the subject consents to a search. *See, generally, Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). But there is no plausible claim that Mrs. Spencer consented to the PBT test at issue here. The undisputed record establishes that the police advised Mrs. Spencer that she would be issued a citation, with a fine of up to $100, if she refused to take the test. Clearly, a minor who submits to a search only after being advised that she will be fined up to $100 for refusing to submit does not thereby consent to the search.

Cf. Kaupp v. Texas, 538 U.S. ___, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (unanimously rejecting state's claim that minor "consented" to his seizure because he did not resist officers' actions and orders).

Unlike the driver of a motor vehicle, a pedestrian in a public area does not give "implied consent" to mandatory chemical testing. The implied consent laws are based on the principle that driving a motor vehicle on a public road is a privilege subject to reasonable state regulation, not a right. Pedestrians in public areas, by contrast, do not impliedly consent to any kind of search. Therefore, implied consent has no application to this case.

2. The search was not incident to arrest.

In certain limited circumstances, the police may perform warrantless chemical testing incident to a lawful custodial arrest. *Schmerber v. California*, 384 U.S. 757 (1966). In this case, however, there was no custodial arrest.

In *Schmerber*, the defendant was arrested for driving under the influence after he drove his car into a tree. At the hospital where the defendant was taken for treatment, the police directed a physician to take a blood sample of the defendant=s blood, which was later used as evidence against him at his trial. The Court confirmed that search warrants are normally required to obtain chemical information from a suspect=s body. *Id.*, 384 U.S. at 770. The Court, however, upheld the warrantless taking of the defendant=s blood because two conditions were met: the defendant had been validly arrested and the defendant's blood alcohol level would decrease significantly before the police could obtain a warrant: "Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner=s arrest." *Id*. at 771.

Since it is undisputed here that Mrs. Spencer was not under arrest, she could not be subjected to a search incident to an arrest. *Cf. Knowles v. Iowa*, 525 U.S. 113 (1998) (holding that officer cannot conduct search incident to arrest unless the officer actually makes an arrest).

In more recent caselaw, the warrantless search at issue in *Schmerber* has been recast as falling within the exigency exception, rather than as a search incident to arrest. *See Cupp v. Murphy*, 412 U.S. 291, 292, 296 (1973); *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989). Thus, in *Cupp*, the Court upheld the warrantless taking of fingernail scrapings from a murder suspect who was not under arrest on the ground that the incriminating stains observed under his fingernails would likely disappear before the police could obtain a warrant.

In other words, an arrest may not always be required to perform the type of search at issue in *Schmerber* and *Cupp*, but a genuine exigency is always required. Therefore, Mrs. Spencer shall now demonstrate why searches under the Ordinance cannot be justified under the exigency exception.

3. The exigency exception does not apply because the sole purpose of the search is to gather evidence for a petty, non-jailable offense.

As *Schmerber* and *Cupp* make clear, involuntary searches to gather evidence from the bodies of suspects can be conducted without a warrant only in exigent circumstances. In *Schmerber*, the exigency arose from the fact that the defendant, who was apparently intoxicated and had been in a serious injury accident, was suspected of a serious offense and that the evidence of his intoxication would dissipate before a warrant could be obtained. In *Cupp*, the situation was exigent because the defendant was suspected of murder and the highly probative evidence under his fingernails would likely disappear before a warrant could be obtained.

In contrast to *Schmerber* and *Cupp,* the Supreme Court has squarely held that the exigent circumstances warrant exception cannot be used to obtain evidence of petty offenses not punishable by imprisonment. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, the state asserted that the exigent circumstances exception justified the police officer=s warrantless entry of the defendant=s home to arrest him for driving while intoxicated, an infraction that carried a maximum fine of $200. The Supreme Court flatly rejected this assertion:

> [**T]he only potential emergency claimed by the State was the need to ascertain the petitioner=s blood alcohol level**. Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. **The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible**. This is the best indication of the State=s interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. **Given this expression of the State=s interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner=s blood alcohol level might have dissipated while the police obtained a warrant**. To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

Welsh, 466 U.S. at 753-754 (emphasis added; internal citations omitted).

Application of *Welsh* to this case is straightforward. Even if Mrs. Spencer had been arrested, the only possible justification for allowing the police to compel her to take a warrantless breath test would be the very same Aexigent circumstance@ as in *Welsh*: the need to ascertain her alcohol level before it dissipated. However, exactly as in *Welsh*, the exigent circumstances exception is inapplicable because the offense under investigation, minor in possession of alcohol, is a petty offense not punishable by imprisonment.

Unlike the serious drunk driving offense in *Schmerber* or the murder involved in *Cupp*, the exigent circumstances warrant exception cannot be invoked for such a petty offense as minor

in possession of alcohol. Indeed, courts in at least three other states have recently applied *Welsh* to minor in possession statutes and concluded that such offenses are simply too petty to justify the application of the exigent circumstances warrant exception despite claims that the alcohol level could dissipate before the officers could obtain a warrant. *See City of Jamestown v. Dardis*, 618 N.W.2d 495 (N.D. 2000); *State v. Bessette*, 21 P.3d 518 (Wash. Ct. App. 2001); *Commonwealth v. Roland*, 637 A.2d 269 (Pa. 1994); *see also United States v. Rohrig*, 98 F.3d 506, 1516-1517, 1521 (6th Cir. 1996) (recognizing after *Welsh* that gravity of underlying offense is important factor to determine whether exigency warrant exception applies).

Indeed, a first-offense minor in possession of alcohol in Bay City is an even more minor crime that the first-offense drunken driving charge at issue in *Welsh*. The maximum penalty for first-offense minor in possession of alcohol is a $100.00 fine. Bay City Ordinance 10-57(a)(1) (Exhibit A). By contrast, the maximum penalty for first-offense drunk driving when Mr. Welsh was arrested in 1978 was $200.00. *Welsh*, 466 U.S. at 746. Subsequent minor in possession offenses are punishable only by larger fines, Bay City Ordinance 10-57(a)(2)-(3) (Exhibit A), while subsequent drunk driving offenses in Wisconsin were punishable by imprisonment. *Welsh* at 746.

Therefore, the minor in possession of alcohol offense at issue in this case is even more petty than the drunk driving charge at issue in *Welsh*. Since the "exigent circumstances" warrant exception could not be employed to save the warrantless entry in *Welsh* because the offense was too minor, the same result must apply to a warrantless chemical test in order to obtain evidence for minor in possession of alcohol.

Finally, even if minor in possession was not a petty offense, the very nature of the offense defeats any claim of exigency. Unlike the drunk driving offense in *Schmerber*, minor in

possession does not require the police to prove **any particular level of intoxication**. A minor's blood alcohol level might drop while the police obtain a warrant, but it will take many hours for the blood alcohol level to go completely to zero. Since any non-zero reading suffices to show that a minor has consumed alcohol, there is no need to perform the test immediately.

In short, the minor in possession ordinance cannot support the exigency warrant exception both because the offense is far too minor to justify a body search without a warrant and because the very nature of the offense defeats a claim that immediate action is required.

4. The searches authorized by the Ordinance are not "special needs" searches because they are intended to gather evidence of criminal wrongdoing.

Finally, the warrantless search of Mrs. Spencer's breath cannot possibly be justified as a "special needs" search. Special needs searches are carefully circumscribed, as the Supreme Court has explained: "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when `special needs' **other than the normal need for law enforcement** provide sufficient justification." *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n. 7 (2001) (emphasis added); *cf. Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (drug testing of student athletes upheld as special needs search where results of drug-testing used strictly for school discipline and not shared with law enforcement). In *Ferguson*, the Court rejected the claim that drug testing of pregnant women at a public hospital could be justified as a "special needs" search because the results were turned over to law enforcement:

> While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence **for law enforcement purposes** in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical. . . . Given the primary purpose of the Charleston program, which was to

> use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

Ferguson, 532 U.S. at 82-84 (emphasis in original; footnotes omitted). The Ordinance clearly does not set up a "special needs" program. On the contrary, the sole purpose of the warrantless searches authorized under the Ordinance is to generate evidence for use in ordinary law enforcement.

In sum, the Ordinance permits the police to conduct warrantless searches of persons in situations that do not even arguably fall within any warrant exceptions. Therefore, the Ordinance is unconstitutional.

As a final observation, Mrs. Spencer notes that this case perfectly illustrates the very purpose of the Warrant Clause of the Fourth Amendment. The officers here decided that the mere fact that Mrs. Spencer was found in the vicinity of another minor who had been drinking was enough cause to justify forcing her and the other young people to submit to an invasive chemical test. Presumably, a neutral and detached magistrate would not have concluded that there was probable cause for any kind of search under these circumstances.

Mrs. Spencer's Fourth Amendment rights were violated when she was searched pursuant to the Ordinance. Since it is the official policy and practice of the City of Bay City to enforce this unconstitutional Ordinance, the City is liable for Mrs. Spencer's damages. Accordingly, Mrs. Spencer is entitled to summary judgment on the issue of liability.