NUMBER 13-15-00147-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SANDRA COY BRIGGS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 186th District Court of Bexar County, Texas.

OPINION ON RECONSIDERATION

Before the Court En Banc
Opinion on Reconsideration by Justice Rodriguez

Pending before the Court is the State's Amended Motion for Rehearing En Banc, which the Court construes as a motion for en banc reconsideration. *See* TEX. R. APP. P. 49.7. We grant the motion and withdraw our original opinion and judgment, dated March 9, 2017, and we substitute the following opinion, dissenting opinion, and the

accompanying judgment.

Appellant Sandra Coy Briggs challenges the trial court's denial of her motion for new trial. By three issues, which we have reorganized and renumbered, Briggs contends the trial court abused its discretion when it denied her motion for new trial because: (1) it failed to rule on the issues presented; (2) Briggs's plea was not voluntary because it was induced by a misrepresentation of the law; and (3) the trial court's findings regarding exigent circumstances are not supported by the record. We reverse and remand.

I. BACKGROUND[1]

It is undisputed that on January 12, 2012, after being admonished by the trial court, Briggs pleaded no contest to the charge of intoxication manslaughter of a public servant without a plea bargain agreement and elected to have a jury assess her punishment. *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1) (West, Westlaw through 2017 1st C.S.). On January 20, 2012, after a hearing where the trial court admitted Briggs's blood results that showed a blood-alcohol level of .14 percent at the time of the draw, the jury found Briggs guilty of intoxication manslaughter of a public servant, found her vehicle a deadly weapon used or exhibited during the commission of the offense, and sentenced Briggs to forty-five years in the Texas Department of Criminal Justice–Institutional Division.

Briggs filed neither a timely motion for new trial nor a timely notice of appeal. However, the Texas Court of Criminal Appeals granted Briggs's application for a writ of

[1] This case is before the Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.). Because this is a transfer case, we apply the precedent of the San Antonio Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

habeas corpus, finding that Briggs was "entitled to the opportunity to file an out-of-time appeal" in this matter.[2] *Ex parte Briggs*, No. WR-82,035-01, 2014 WL 5369818, at *1 (Tex. Crim. App. Sept. 24, 2014) (per curiam) (not designated for publication). The court of criminal appeals also determined that "[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issued," which was December 10, 2014. *Id.* In other words, the court concluded that Briggs's case was not yet final.[3] *See id.*

After mandate issued from the court of criminal appeals, Briggs filed her motion for new trial, urging, in relevant part, that she did not enter her plea voluntarily because counsel misrepresented the admissibility of her blood alcohol results under Texas Transportation Code section 724.012.[4] *See* TEX. TRANSP. CODE ANN. § 724.012. Briggs

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[2] The Texas Court of Criminal Appeals noted that the trial court determined that Briggs's counsel failed to file a notice of appeal timely. *Ex parte Briggs*, No. WR-82,035-01, 2014 WL 5369818, at *1 (Tex. Crim. App. Sept. 24, 2014) (per curiam) (not designated for publication).

[3] Although the court of criminal appeals spoke in terms of filing of an out-of-time appeal, the timeframe, calculated from December 10, allowed for the filing of Briggs's motion for new trial and a notice of appeal. *See id.* The trial court also found that the court of criminal appeals put Briggs in a position to "validly request a new trial." The State does not complain on appeal that the new trial motion was not properly before the trial court.

[4] Briggs also argued that the trial court should grant a new trial in the interest of justice. *See State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007) (explaining that although a judge may grant a new trial in the interest of justice, "[h]e cannot grant a new trial on mere sympathy, an inarticulate hunch, or simply because he personally believes that the defendant is innocent or received a raw deal") (internal quotations omitted)). The trial court made no findings on this ground, and Briggs does not develop an interest-of-justice appellate argument. So we need not address it. *See* TEX. R. APP. P. 47.1. We also note that Briggs makes no express argument in this direct appeal that she received ineffective assistance of counsel. *See Ex parte Palmberg*, 491 S.W.3d 804, 810 (Tex. Crim. App. 2016) ("In any event [Palmberg] does not bring an ineffective assistance of counsel claim . . . , nor has he explicitly alleged any incompetence on the part of trial counsel. For that reason, we limit our analysis and holding today to the voluntariness argument in his application."). We will not construe Briggs's voluntariness argument as an ineffective assistance of counsel claim and apply the *Strickland* standard of review as the dissent suggests. Instead, we limit our analysis and holding today to the voluntariness argument in Briggs's appeal. *See id.*

noted that, according to the police report attached to her motion, her warrantless blood draw was not taken pursuant to a recognized exception to the warrant requirement. Instead, according to the report, the warrantless draw was accomplished pursuant to the mandatory provisions of section 724.012 because an individual had suffered serious bodily injury and later death from the accident. *See id.* Briggs claimed that the admissibility of her blood test results was a determining factor in deciding to plead no contest to the charges, instead of exercising her right to a trial. Briggs also discussed the applicability of *Missouri v. McNeely* and opinions issued by Texas courts subsequent to her sentencing. *See* 133 S.Ct. 1552, 1558 (2013); *see also, e.g., State v. Villarreal*, 475 S.W.3d 784, 813 (Tex. Crim. App. 2015) (op. on reh'g); *Weems v. State*, 434 S.W.3d 655, 659–60 (Tex. App.—San Antonio 2014), *aff'd,* 493 S.W3d 574, 582 (Tex. Crim. App. 2016).

On February 18, 2015, at the hearing on her motion for new trial, Briggs's trial counsel Ed Piker explained that his chief concern in the case had been the blood evidence secured as a result of a warrantless search. According to Piker, because the blood evidence was a significant problem for the defense, his ultimate goal had been to either discredit the blood evidence or keep it from coming in at trial. Piker testified that they considered a number of ways to challenge the admission of the blood evidence, but were unable to come up with an approach that would form the basis for a motion to suppress or that would keep the evidence out at trial. Instead, based on Piker's understanding of the law at the time—that a mandatory blood draw without the necessity of a warrant was proper in the event of serious bodily injury or death resulting from an accident—they

decided Piker would not file a motion to suppress and Briggs would plead no contest and would allow a jury to assess punishment. Piker explained that he would have filed a motion to suppress had he understood the cases to hold that the transportation code cannot mandate a warrantless blood draw absent exigent circumstances, which he did not believe existed in this case "because [Briggs] was in custody from the very beginning." *See, e.g., McNeely,* 133 S.Ct. at 1558 (reaffirming *Schmerber v. California*, 384 U.S. 757, 767 (1966)); *Villarreal,* 475 S.W.3d at 813; *Weems*, 434 S.W.3d at 659–60. Piker stated that he would have advised Briggs to proceed to trial if the trial court had ordered the blood evidence suppressed.

Briggs also testified at the hearing on her motion for new trial. Briggs explained that she did not consent to have her blood drawn, but that an officer ordered it drawn based on the Texas blood-draw statute. *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1). Briggs testified that she discussed the matter with Piker and was aware that the blood evidence would be problematic if she went to trial. She believed that the trial court would admit her blood evidence at trial, and if there had been a way to keep it from being used against her at trial, she would have wanted a trial.[5]

After Briggs and the State rested and presented closing arguments at the motion-for-new-trial hearing, the trial court asked the State if it had "any exigent circumstances it [could] point to in this case with Ms. Briggs, assuming that the statute is unconstitutional

[5] At the hearing, the State offered Exhibits A (Court's Admonishment and Defendant's Waivers and Affidavit of Admonitions), B (Waiver, Consent to Stipulation of Testimony and Stipulations), and C (Trial Court's Certification of Defendant's Right of Appeal), and Briggs offered Defense Exhibit A (Piker's affidavit). The trial court admitted the exhibits into evidence.

and could not be effective for the State in this case?" The trial court continued: "Was there any other procedure that the officers could rely upon or the State could rely upon to say this was an exigent circumstance in this particular case and that's why a warrant would not have been able to have been obtained in the first place?"

In response to the trial court's questions, counsel for the State identified what he believed were exigent circumstances that night, but also informed the court that he "was not the trial attorney on that case at trial" and did not "know if the detectives handling the case were asked about [other fatalities going on that night] at trial." Counsel commented that he "didn't know if [the court] wanted to hear from an additional witness specifically regarding exigent circumstances or not." The trial court responded, "I'd like to," and allowed the State to call Sergeant Scott Foulke, a detective with the San Antonio Police Department's Traffic Investigation Unit, Homicide Division, who was at the scene that night.

Before Sgt. Foulke testified, Briggs made the following objection:

> I object to this line of testimony for one issue. We're not here on factual exigency circumstance basis in the Motion for New Trial. It's on whether or not the misrepresentations about the law to Ms. Briggs would have changed the course of how they proceeded with the case. And Mr. Piker and Ms. Briggs both testified that they would have done something differently. That's the standard that she needs to prove in order to obtain a new trial on an involuntary plea, so I would object to this line of testimony.

The trial court overruled this objection.

Sgt. Foulke provided testimony regarding the events of the night in question and his investigation, testimony that Briggs now argues completely contradicted the testimony of other officers at the punishment hearing in 2012. Nonetheless, at the hearing Sgt.

Foulke explained, among other things, that "[a]nytime it involves a crash or a fatal or a near-fatal incident, it's always exigent because you want that sample as close to the time of the crash so it's the most accurate. And so anytime we deal with something like this, we're under exigent circumstances." After Sgt. Foulke testified, the trial court recessed the hearing.

When the trial court reconvened the hearing two days later, it made the following oral findings:

> After considering the motion, the testimony, exhibits, the case law, arguments, and the defendant's latest filing of Supplemental Motion for New Trial, I find that the defendant is in a posture to request a new trial. Once the appellate courts granted an out-of-time appeal, that puts her in a position to validly request a new trial.
>
> I also find that she is no longer under a final judgment due to the out-of-time appeal. That being the case, she's entitled to have the law applied to her case that is in effect now and not at the time of the trial. Therefore, I find that *McNeely* can be applied retroactively to the defendant's case. However, when applying *McNeely*, I do not believe that *McNeely* affords relief for the defendant.
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> *McNeely* provided that the deterioration of blood evidence alone is not an exigent circumstance to obtain blood from a suspect without a warrant. *McNeely* requires a case-by-case analysis of the facts on the totality of the circumstances. *McNeely* did not prohibit warrantless searches in all circumstances.
>
> Here, the facts show that the police unit dedicated to traffic fatalities was already involved in investigating an earlier fatality the same night this defendant caused her collision. The police relocated to defendant's crime scene and began their investigation. Due to the circumstances normal to any collision scene, such as allowing emergency medical personnel to conduct their procedures, to include ensuring that the defendant did not need further medical care, the police were delayed in determining that it was the defendant's actions that caused the collision. At that point, nearly three hours had lapsed since the time of the collision.

> This case was not a regular or normal driving while intoxicated case. It seems that the time period to obtain blood in a traffic stop resulting in a DWI arrest is closer to 1.3 hours. Here, it seems that the time was of the essence before the blood decayed. There were other factors, however.
>
> There was testimony as to Night CID, or Night Criminal Investigation Division, could have assisted the traffic unit in obtaining a warrant to draw the blood. Sergeant Foulke testified that he did not know the status of Night CID at the time and whether they were already engaged in their own investigations that night. Common sense would dictate that it would have taken longer to wait for a Night CID officer to appear and to have him or her be briefed on the situation in order for that officer to draft up a search warrant application.
>
> In addition, Sergeant Foulke testified that to obtain a warrant would have added an additional 1.5 hours to obtaining blood evidence. Furthermore, the resources available at the time of the crime were different than they are now. The training or manpower for obtaining DWI warrants has, since the time of the crime, been improved, and the process is now streamlined under the, quote, "no refusal," unquote, program.
>
> For instance, now police officers have laptop computers at their disposal to draft warrant applications on scene without returning to the police headquarters, as it would have been in the defendant's case at that time.
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> When looking at all the factors in determining whether the blood could have been drawn without a warrant and considering that no mention—no Motion to Suppress was filed, it appears that the application of *McNeely* does not afford the defendant relief under new trial procedures via a Motion for New Trial because I believe obtaining a warrant in this situation would significantly undermine the efficacy of this search . . . .

The trial court made no express oral findings regarding the voluntariness of Briggs's plea. No written findings regarding voluntariness appear in the record. *See* TEX. R. APP. 21.8(b) ("In ruling on a motion for new trial, the court may make oral or written findings of fact."). The trial court denied Briggs's motion for new trial, and this appeal followed.

II. APPLICATION OF *MCNEELY* AND ITS PROGENY

As a threshold matter, we must determine whether *McNeely* and subsequent Texas cases that rely on *McNeely* apply in this case. Briggs contends that *McNeely* applies because it did not create a new rule but, instead, followed Fourth Amendment precedent on warrantless searches. Briggs also asserts that even if *McNeely* created a new rule, it still applies because her case is not yet final.

A. *McNeely* Did Not Set Out a New Rule

We agree that *McNeely* did not set out a new constitutional rule. *See State v. Tercero*, 467 S.W.3d 1, 9 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (citing *McNeely*, 133 S.Ct. at 1556–58). *McNeely* clarified its 1966 *Schmerber* holding. *Id.* (citing *McNeely*, 133 S.Ct. at 1556–58). In *Schmerber,* after observing that the blood-alcohol evidence could have been lost, "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant," the Court determined that there were exigent circumstances that supported a warrantless blood draw. 384 U.S. at 770. The *McNeely* Court explained that it applied the totality of the circumstances approach in *Schmerber*—considering all of the facts and circumstances of that particular case—and recognized that exigent circumstances might, in limited circumstances, provide an exception to the warrant requirement. *See Tercero*, 467 S.W.3d at 9 (citing *McNeely*, 133 S.Ct. at 1556–58). The *McNeely* Court explained that each case must be decided on its facts, as it did in *Schmerber*, and not on a "'considerable overgeneralization" that a per se rule would reflect. *McNeely*, 133 S.Ct. at 1561 (quoting

Richards v. Wisconsin, 520 U.S. 385, 393 (1997)). Thus, consistent with its *Schmerber* review, the *McNeely* Court determined that the natural metabolization of alcohol in the bloodstream is not a per se exigency that justifies an exigency exception to the Fourth Amendment's warrant requirement. *Id.* at 1556; *see also Weems v. State*, 493 S.W.3d 574, 578 (Tex. Crim. App. 2016) (determining that sections of the transportation code that require a blood draw in certain circumstances do not provide an exception to the warrant requirement absent exigent circumstances); *Villarreal*, 475 S.W.3d at 813 (same); *see also Pearson v. State*, No. 13-11-00137-CR, 2014 WL 895509, at *2–4 (Tex. App.—Corpus Christi Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (upholding a warrantless, exigent-circumstances blood draw).[6]

B. Even if Setting Out a New Rule, *McNeely* Would Apply

Moreover, even were we to conclude that *McNeely* created a new rule, "newly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception.'" *Davis v. U.S.*, 564 U.S. 229, 243 (2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *see McClintock v. State*, 444 S.W.3d 15, 18 n.8 (Tex. Crim. App. 2014); *Steadman v. State*, 360 S.W.3d 499, 504 n.13 (Tex. Crim. App. 2012); *Taylor v. State*, 10 S.W.3d 673, 678 (Tex. Crim. App. 2000); *Tercero*, 467 S.W.3d at 9–10; *see also Bowman v. State*,

[6] We disagree with the dissent and the State that *Brady v. United States* and *McMann v. Richardson* control. *See Brady*, 397 U.S. 742, 757 (1970) (concluding that a subsequent change in the law did not invalidate an earlier plea; counsel did not present a faulty premise); *McMann*, 397 U.S. 759, 774 (1970) (granting review to consider "whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions of proof that the plea was motivated by a prior coerced confession" and explaining that when a "defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk [of] ordinary error in either his or his attorney's assessment of the law and facts.").

No. 05-13-01349-CR, 2015 WL 557205, at *10 (Tex. App.—Dallas 2015, no pet.) (not designated for publication). This is so whether or not the new rules constitute a clear break from past precedent. *Davis*, 564 U.S. at 253 (citing *Griffith*, 479 U.S. at 328).

As the trial court found, Briggs "is no longer under a final judgment due to the out-of-time appeal," and "[o]nce the appellate courts granted an out-of-time appeal, that puts her in a position to validly request a new trial." *See Griffith*, 479 U.S. at 321 n.6, 326–27 ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). In this case, the court of criminal appeals determined that the availability of Briggs's appeal had not been exhausted. *Ex parte Briggs*, 2014 WL 5369818, at *1; *see Griffith*, 479 U.S. at 326–28. The 2013 *McNeely* opinion, the 2015 *Villarreal* opinion, and the 2016 *Weems* opinion, among others, were, thus, delivered before Briggs's conviction became final. *See Griffith*, 479 U.S. at 326–28. Because Briggs is here on direct appeal in a procedural posture where her conviction is not yet final, *McNeely* and its progeny apply retroactively. *See id.*; *Tercero,* 467 S.W.3d at 9–10.

C. Summary

We conclude that *McNeely* and its progeny apply in this case because *McNeely* did not create a new rule and because, even had it done so, Briggs's conviction has not become final.

III. PRESERVATION

We next address the State's preservation argument. The State claims that Briggs failed to preserve "error relative to the blood evidence" because she did not file a pretrial motion to suppress the evidence, because she did not complain about the evidence at any time, and because she did not object to the introduction of the evidence at the punishment hearing. Briggs's complaint on appeal, however, is not that the trial court abused its discretion in admitting the blood-draw evidence. Instead, Briggs challenges the denial of her motion for new trial on the basis that her plea was not voluntary because counsel misrepresented the admissibility of the blood-draw evidence to her. The State's preservation argument has no merit.

IV. VOLUNTARINESS

A. Standard of Review

> We review a trial judge's denial of a motion for new trial under an abuse of discretion standard. We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable. A trial judge abuses his discretion in denying a motion for new trial when no reasonable view of the record could support his ruling.

Colyer v. State, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014) (internal quotations and citations omitted). Under the facts of this case then, we will review the voluntariness of Briggs's plea through this abuse of discretion standard of review. *See Cueva v. State*, 339 S.W.3d 839, 856–57 (Tex. App.—Corpus Christi 2011, pet. ref'd). We will reverse the trial court's decision as to the claims raised in Briggs's motion only if it is arbitrary or unreasonable. *See id*.

We also presume that all reasonable factual findings the court could have made against the losing party were made against that losing party. *See Colyer*, 428 S.W.3d at 122. And where the trial court has not made explicit fact findings in denying a motion for new trial—in this case, findings regarding voluntariness of Briggs's plea—we will imply all findings necessary to support the ruling "when such implicit factual findings are both reasonable and supported in the record." *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005); *see State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007) (noting that appellate courts must defer to any reasonable implied fact findings the court might have made in denying a motion for new trial).

B. Applicable Law

1. Voluntariness of a Plea

A guilty plea or a plea of nolo contendere must be free and voluntary. TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West, Westlaw through 2017 1st C.S.). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Brady*, 397 U.S. 742, 748 (1970). We must set aside an involuntary guilty plea. *Fimberg*, 922 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975)).

An accused, who attests that she understands the nature of her plea when she enters her plea of no contest and that it is voluntary, as in this case, has a heavy burden on appeal to show that her plea was involuntary. *See Fielding v. State,* 266 S.W.3d 627,

636 (Tex. App.—El Paso 2008, pet. ref'd); *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). However, a plea of no contest based on erroneous information conveyed to the defendant by her trial counsel is involuntary. *See Ex parte Barnaby*, 475 S.W.3d 316, 322 n.8 (Tex. Crim. App. 2015) (per curiam) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010) (involving defense counsel's failure to advise the defendant about the immigration consequences of a guilty plea); *Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012) (addressing defense counsel's misinformation regarding parole eligibility, on which the defendant relied in pleading guilty); *Ex parte Griffin*, 679 S.W.2d 15, 18 (Tex. Crim. App.1984) (concerning a defense counsel who told the defendant that his plea agreement included the disposition of an earlier criminal case, when in fact it did not) (en banc)).

2. Warrantless Search and Seizure

The Fourth Amendment provides in relevant part that "'[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV; *see* TEX. CONST. art. 1, § 9; TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (providing that evidence obtained in violation "of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America" shall not be admitted in evidence against the accused"). The taking of a blood specimen is a search and seizure under the Fourth Amendment and the Texas Constitution. *Schmerber*, 384 U.S. at 767; *Aliff v. State*, 627 S.W.2d 166, 169 (Tex. Crim. App. 1982).

A warrantless search or seizure is per se unreasonable unless it falls under a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Weems*, 493 S.W.3d at 578 (citing *Villarreal,* 475 S.W.3d at 808–09). There are several exceptions to the warrant requirement including "a warrantless search performed to prevent imminent evidence destruction." *Weems*, 493 S.W.3d at 577–78. Yet while the imminent destruction of the evidence may be the antagonizing factor central to law enforcement's decision, the totality of the circumstances, including factors such as alcohol's natural dissipation, what procedures were in place for obtaining a warrant, the availability of a magistrate judge, and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence," must also be considered to determine whether there are exigent circumstances that support a warrantless blood draw. *Id.* at 580 (quoting *McNeely,* 133 S.Ct. at 1558 (reaffirming *Schmerber*). In other words, neither the natural metabolization of alcohol in the bloodstream, *see McNeely*, 133 S.Ct. at 1556, nor, as in this case, an accident resulting in a serious injury or death, alone, creates a per se exigency that justifies an exception to the warrant requirement. *See Weems*, 493 S.W.3d at 578. Instead, there must "be circumstances surrounding law enforcement's decision to forego obtaining a warrant [in the blood-draw context] that withstand Fourth Amendment scrutiny." *Id.* at 580. The State must "meet its burden and establish that exigent circumstances existed to satisfy the Fourth Amendment's reasonableness standard." *Id.* at 582.

3. Texas Transportation Code Section 724.012

Section 724.012 of the transportation code, titled "Taking of Specimen," provides, in relevant part, the following:

> (b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:
>
> (1) the person was the operator of a motor vehicle or a watercraft Involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:
>
> (A) any individual has died or will die;
>
> (B) an individual other than the person has suffered serious bodily injury; or
>
> (C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment . . . .

TEX. TRANSP. CODE ANN. § 724.012(b)(1).

After *McNeely*, the Texas Court of Criminal Appeals has held that section 724.012, which requires a blood draw under certain circumstances, does not create a Fourth Amendment exception. *Villarreal,* 475 S.W.3d at 813 (discussing section 724.012 of the Texas Transportation Code). Our Court has observed that although the Texas mandatory blood-draw statute "required the officer to obtain a breath or blood sample, it did not require the officer to do so without first obtaining a warrant"; section 724.012 provides for a mandatory blood draw in certain circumstances, but not a mandatory, warrantless blood draw. *State v. Villarreal*, 476 S.W.3d 45, 58 (Tex. App.—Corpus

Christi 2014), *aff'd* 475 S.W.3d 784 (Tex. Crim. App. 2014). So section 724.012 does not provide an exception to the warrant requirement absent exigent circumstances. *See Weems*, 493 S.W.3d at 578; *see also* TEX. TRANS. CODE ANN. § 724.012.

C. Analysis

By her first issue, Briggs contends that the trial court abused its discretion when it denied her motion for new trial without ruling on the voluntariness issue raised in her motion. She asserts that the trial court, instead, denied her motion for new trial only on a finding that the blood evidence met the exigent-circumstances exception to the warrant requirement under *McNeely*. *See* 133 S.Ct. at 1558. By her second issue, Briggs claims that the trial court should have found that her plea was not voluntary because her counsel misrepresented the law regarding the admissibility of her warrantless blood-draw evidence and that the trial court should have granted her motion on that basis.

In response, while the State acknowledges that the trial court made express findings regarding the presence of exigent circumstances in the instant case but did not make any express findings regarding the voluntariness of Briggs's plea, it contends that the trial court implicitly found that Briggs's plea was knowing and voluntary at the time of trial. The State argues that because this implicit factual finding of voluntariness was reasonable and supported by the record, we should give deference to it. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

We agree with the State that the trial court expressly found that *McNeely* applied and expressly found that there were exigent circumstances that allowed for a mandatory,

warrantless blood draw. As the trial court expressed in the following, it denied Briggs's motion for new trial based on its exigent-circumstances findings:

> When looking at all the factors in determining whether the blood could have been drawn without a warrant and considering that no mention—no Motion to Suppress was filed, it appears that the application of *McNeely* does not afford the defendant relief under new trial procedures via a Motion for New Trial because I believe obtaining a warrant in this situation would significantly undermine the efficacy of this search . . . .

We also agree that the trial court made no express findings regarding the voluntariness of Briggs's plea. But we cannot agree with the State that the trial court implicitly found Briggs's plea was knowing and voluntary because, as discussed below, such an implicit factual finding of voluntariness is not reasonable and is not supported by the record, and we cannot give deference to it. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

Arresting Officer David Luther's report and the statutory warning form that appear in the appellate record provide that Officer Luther explained to Briggs that he was drawing her blood without a warrant pursuant to the mandatory provisions of the transportation code "because [of] injuries sustained by the victims in the accident she caused."[7] *See*

[7] At the motion-for-new-trial hearing, the State asked the trial court to take judicial notice of the entire record. Officer David Luther's report is from the trial court record and is a part of the appellate record, as is the statutory warning form.

According to arresting Officer Luther's report, Briggs "was advised of the mandatory blood draw because [of] the injuries sustained by the victims in the accident she caused." In addition, the "Statutory Authorization—Mandatory Blood Specimen" form provided that it invoked Officer Luther's authority under section 724.012(b) of the transportation code "to require the suspect to submit to the taking of a specimen of the suspect's blood as required by . . . Section 724.012(b)." *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1) (West, Westlaw through 2017 1st C.S.). On the form, Officer Luther attested that he "reasonably believed" the accident occurred as the result of Briggs's int**o**xication. Officer Luther explained that when he arrested Briggs, he "reasonably believed that as a direct result of the accident" another person had died or would die, suffered serious bodily injuries, or suffered bodily injuries and was transported to a medical facility for medical treatment. *See id.*

TEX. TRANSP. CODE ANN. § 724.012(b)(1). The report revealed that after Briggs refused to provide a blood specimen, Officer Luther informed her "there would be a mandatory blood draw." He explained that the blood draw became mandatory after Briggs refused to provide a blood specimen.

Piker testified at the motion-for-new-trial hearing that when he represented Briggs, he, too, understood that "in the event of a serious bodily injury or death caused by or presumed to be caused by the introduction of alcohol and/or drugs that the blood draw was mandatory under the [Texas] Transportation Code." *See id.* He explained that he "advised Ms. Briggs of her rights at that time under the law, that [he] was aware of at that time." In addition, Piker testified that because of recent case law regarding warrantless blood draws, including *Villarreal*, he would have filed a motion to suppress and if it were granted, would have advised Briggs to proceed to trial. *See* 475 S.W.3d at 813.

Briggs also testified at the hearing. She explained that based on her discussions with Piker, she understood that the blood evidence from the mandatory, warrantless blood draw would be admitted and used against her at trial. According to Briggs, Piker's misrepresentation of the law regarding the admissibility of the results of her warrantless blood draw induced her to plead no contest.

Following *McNeely* with its clarification of *Schmerber*, Texas courts have determined that sections of the Texas Transportation Code requiring a blood draw in certain circumstances, including section 724.012, do not provide exceptions to the warrant requirement absent exigent circumstances. *See, e.g., Weems*, 493 S.W.3d at

578. An accident resulting in a serious injury or death, alone, does not create an exception to the warrant requirement. *See id*.

Having the benefit of *McNeely* and its progeny, cases that apply retroactively to Briggs, we conclude that Piker misrepresented the law to Briggs as it relates to the admissibility of her blood-draw evidence. Piker's explanation of the law as he understood it at the time of the accident stopped short of informing Briggs that the transportation code, specifically section 724.012, cannot mandate a warrantless blood draw absent exigent circumstances or that the State needed to show exigent circumstances before the trial court would admit the blood evidence from her warrantless blood draw.[8] This erroneous information conveyed to Briggs by her trial counsel resulted in Briggs's plea of no contest being involuntary. *See Ex parte Barnaby*, 475 S.W.3d at 322 (citing *Fimberg*, 922 S.W.2d at 207).

Briggs's motion for new trial challenged the voluntariness of her plea—whether Briggs's counsel misinformed her regarding the admissibility of blood evidence obtained through a warrantless blood draw. This was the issue before the trial court and not the presence of exigent circumstances. We cannot conclude that the trial court could have implicitly found that Briggs's plea was knowing and voluntary at the time of trial: such a factual finding would be unreasonable and unsupported by the record. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

[8] It is undisputed that counsel was not alone in his misunderstanding of the law. The San Antonio Police Department, at that time, worked with forms that set forth the procedure under section 724.012 of the transportation code for a mandatory, warrantless blood draw when a person refused to provide a blood specimen in this situation. *See id.* As noted above, such forms are a part of the record in this case.

Reviewing the trial court's denial of Briggs's motion for new trial under an abuse of discretion standard and the voluntariness of Briggs's plea through that same standard, we conclude that the trial court abused its discretion in denying Briggs's motion for new trial because no reasonable view of the record could support an implied ruling of voluntariness. *See Colyer*, 428 S.W.3d at 122; *Cueva*, 339 S.W.3d at 856–57. We sustain Briggs's first and second issues.[9]

V. CONCLUSION

We reverse and remand for a new trial.

NELDA V. RODRIGUEZ
Justice

Dissenting Opinion on Reconsideration by
Justice Contreras joined by Justice Longoria

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the 21st
day of November, 2017.

[9] Briggs's third issue asserts that the record does not support the trial court's exigent-circumstances findings. Briggs's motion for new trial, however, did not challenge the admission of her blood evidence on the basis that there were no exigent circumstances to overcome the warrant requirement. The State acknowledges that the only claim properly before the Court is whether Briggs's plea was voluntary. And even though the trial court found exigent circumstances, our determination that counsel misrepresented the law to Briggs does not change. There is nothing in the record that supports a finding that counsel's advice to Briggs was based on his consideration of exigent circumstances: the evidence establishes that it was based on the mandatory blood draw statute. Because the challenged findings are not dispositive of this appeal, we need not address them. *See* TEX. R. APP. P. 47.1.

Moreover, we offer no opinion as to whether exigent circumstances existed in this case. Such an opinion would be premature. We are reversing and remanding for a new trial on the basis that Briggs's plea was not voluntary—the sole issue before the trial court in Briggs's motion for new trial proceeding and now before this Court.