IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-160365 C-160366
Plaintiff-Appellee,	:	C-160367 TRIAL NOS. 15TRC-8462 A
vs.	:	15TRC-8462 C 15TRC-8462 B
EUGENE MERRIWEATHER	:	
Defendant-Appellant.	:	*JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

While driving, defendant-appellant Eugene Merriweather was involved in a one-car accident and taken to the hospital for treatment. Police later charged Merriweather with operating a motor vehicle while under the influence of alcohol ("OVI"), driving while under a license suspension ("DUS"), and operating a vehicle without reasonable control ("failure to control"), in violation of R.C 4511.10(A)(1)(a), R.C. 4510.11, and R.C. 4511.202, respectively.

Merriweather filed a motion in limine to determine the admissibility of, inter alia, medical records, allegedly obtained by the state, containing the results of a blood test administered as a part of his treatment on the night of his accident. Merriweather asserted that the records were privileged and obtaining them violated his constitutional rights. The state initially contended that Merriweather's constitutional rights were not implicated because the records were properly obtained on the authority of R.C. 2317.022—"request to healthcare provider for results of

alcohol or drug tests for use in criminal proceedings." The court set Merriweather's motion for a hearing, but only heard arguments from counsel. The trial court took the matter under submission and invited further briefing on issues raised at the hearing. At the next court setting, the trial court did not decide the matter and did not take testimony, but indicated that it would otherwise convert the motion in limine to a motion to suppress, while also granting Merriweather leave to file a new motion to suppress, which he did. The trial court also urged counsel to prepare to present testimony or to submit a set of stipulated facts.

While Merriweather's motion to suppress was pending, the state allegedly obtained a warrant for the previously-obtained records.

In his motion, Merriweather contended that the state had seized the results of his blood test pursuant to R.C. 2317.02 and .022, statutes that Merriweather acknowledged waived physician-patient privilege, but did not circumvent the Fourth Amendment warrant requirement. Merriweather further argued that an after-the-fact search warrant that was allegedly obtained by the state did not serve to cure the state's initial unconstitutional seizure.

After several months and continuances, and without taking any evidence, the trial court denied Merriweather's motion to suppress as moot on the basis that an after-the-fact warrant had allegedly issued. Merriweather then pleaded no contest to all charges. The trial court accepted the pleas and found him guilty. On the OVI count, the court sentenced Merriweather to 180 days' incarceration, suspended, with credit for three days served, one year of community control, a one-year driver's license suspension, costs, and fines. The trial court did not impose a sentence on the remaining counts, but merely imposed and remitted costs. This appeal followed.

Our Appellate Jurisdiction

Merriweather raises no assignments of error concerning his DUS and failure-to-control charges. We hereby dismiss the appeals from those charges, but not because Merriweather does not challenge them. Instead, we dismiss them because there is no final order in either case. *See* Ohio Constitution Art. IV, Section 3(B)(2)(the jurisdiction of the court of appeals is limited to the review of final orders or judgments).

In a criminal case a final order must, among other things, include a sentence. *State v. Bennett*, 1st District App. Nos. C-140507, C-140508, 2015-Ohio-3246, ¶ 4, citing *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus. Here, after finding Merriweather guilty of DUS and failure to control, the trial court imposed and remitted costs on each charge. Costs do not constitute a sanction that can be imposed as a sentence. *Bennett* at ¶ 4-6; *see State v. Threatt,* 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15. Without a sentence, there is no final order. Accordingly, the appeals from those charges, numbered C-160366 and C-160367, are hereby dismissed.

Motion to Suppress

There is a final order in the appeal from Merriweather's OVI conviction, numbered C-160365, and Merriweather raises one assignment of error in connection with it contending that the trial court erred when it held that his motion to suppress was moot upon the alleged issuance of a search warrant concerning the very records that had allegedly been seized without a warrant. We sustain this assignment of error for two reasons. First, the court's basis for denying Merriweather's motion was erroneous as a matter of law. Second, because the trial court took no evidence, the record cannot be said to support the court's judgment.

The Fourth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, secures the right of individuals to be free from

unreasonable searches and seizures. Under the Fourth Amendment, a warrantless search or seizure is per se unreasonable, absent a recognized exception to the warrant requirement. *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 15, citing *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), citing *Katz v. United States*, 389 U.S. 374, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Although we do not reach the issue of whether a request for medical records made pursuant to R.C. 2317.02 and .022 obviates the need for a warrant, we do conclude that a warrant issued after the fact does not render moot a pending motion to suppress. "[S]earches 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." *Katz* at 357 (emphasis added). We find no exception to the warrant requirement on the record before us. Nor is there any argument made by the state that a warrant can be retroactively applied to automatically legitimize a prior search.

Further—even if the trial court's conclusion had been arguably correct—its determination that the state obtained a warrant is not supported by the record. Here, there is merely a representation made by counsel that a warrant had been obtained—albeit after the fact—and nothing in the record to support the representation. *See State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8 (holding that an appeals court reviewing a trial court's ruling on a motion to suppress must accept the trial court's findings of fact as true if they are supported by competent, credible evidence). Consequently, the trial court erred by denying Merriweather's motion to suppress as moot on these grounds.

Nor does the record support any alternative theories concerning the propriety of the state's alleged seizure of Merriweather's medical records. *See Burnside*. Although the state

argues on appeal that there were stipulations made at one of the court appearances, the only stipulation was that the blood draw was not done at the behest of the police.

We therefore sustain Merriweather's assignment of error and remand this cause to the trial court for an evidentiary hearing on Merriweather's motion to suppress. Whether the state violated the Fourth Amendment by obtaining medical records via R.C. 2317.02 and .022 in the absence of a prior warrant is an issue for the trial court to determine following a hearing.

In sum, Merriweather's appeals numbered C-160366 and C-160367 are dismissed. In the appeal numbered C-160365, the trial court's judgment denying Merriweather's motion to suppress is reversed. This cause is remanded for the trial court to conduct an evidentiary hearing on Merriweather's motion to suppress or for other proceedings consistent with law and this decision.

HENDON, P.J. and **STAUTBERG, JJ.**

CUNNINGHAM, J., concurs in judgment only.

To the clerk:

Enter upon the journal of the court on December 2, 2016
per order of the court _____.

Presiding Judge