

## Scholarly Commons @ UNLV Boyd Law

---

Nevada Supreme Court Summaries

Law Journals

---

4-5-2018

### State v. Sample, 134 Nev. Adv. Op. 23 (Apr. 5, 2018)

Sara Schreiber

*University of Nevada, Las Vegas – William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Criminal Procedure Commons](#)

---

#### Recommended Citation

Schreiber, Sara, "State v. Sample, 134 Nev. Adv. Op. 23 (Apr. 5, 2018)" (2018). *Nevada Supreme Court Summaries*. 1151.

<https://scholars.law.unlv.edu/nvscs/1151>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

CRIMINAL PROCEDURE: SEARCH WARRANTS AND PRELIMINARY BREATH TESTS

**Summary**

Gregory Frank Allen Sample (“Sample”) was arrested for driving under the influence. He had failed a preliminary breath test (“PBT”). The results of the failed PBT were used to obtain a search warrant for an evidentiary blood draw. The district court suppressed the PBT results because it concluded that the results were obtained in violation of Sample’s Fourth Amendment rights. The district court also suppressed the evidentiary blood draw because it was the fruit of an illegal search. The Court held that the district court erred in invalidating the telephonic search warrant, and that the evidentiary blood draw should not have been suppressed because there was probable cause to support the search warrant, even without the PBT evidence.

**Background**

*FACTS AND PROCEDURAL HISTORY*

Deputy Swanson noticed a vehicle veering between lanes while he was on patrol. He attempted to conduct a traffic stop, but the vehicle did not stop. Instead, the driver, Sample, headed to his residence, and upon arriving, pulled into the driveway. Deputy Swanson also pulled into Sample’s driveway and approached Sample. He noticed that Sample had red, watery eyes. He also noticed the smell of alcohol emanating from the vehicle. When Deputy Swanson approached the vehicle, he observed Sample drinking a clear liquid from a plastic bottle. He ordered Sample to stop, but Sample disregarded the orders. Deputy Swanson then asked Sample how much he had to drink. Sample told him that he had drunk a couple of beers. Deputy Swanson took note that Sample’s speech was slow and that he slurred when he spoke.

Deputy Swanson’s partner arrived to the scene and both deputies asked Sample to exit the vehicle. Sample refused, so the deputies reached through the window and opened the vehicle’s door. Sample then unsteadily exited the vehicle. The deputies advised Sample to remain in front of the patrol vehicle while they gathered field sobriety test paperwork. Sample again disregarded their order, and tried to walk toward his residence’s front door. It was then that the deputies handcuffed Sample. Because of Sample’s uncooperative behavior, Deputy Swanson believed that Sample was intoxicated and did not conduct the field sobriety test. Sample was then placed in the back of the patrol vehicle.

A third deputy then arrived to the scene. Deputy Swanson used that deputy’s equipment to give Sample a PBT, which Sample failed. He blew a 0.172 blood-alcohol concentration. Deputy Swanson then formally placed Sample under arrest for driving under the influence (“DUI”).

Deputy Swanson then sought Sample’s consent to blood testing. Sample refused to give consent, so Deputy Swanson obtained a telephonic search warrant. Deputy Swanson described to the magistrate judge his observations of Sample’s intoxicated state. He also informed the judge that Sample had been previously convicted for a DUI. Deputy Swanson told the judge that Sample had consented to the PBT and blew a 0.172 blood-alcohol concentration. The judge granted the warrant, and the evidentiary blood draw was performed and subsequently analyzed.

---

<sup>1</sup> By Sara Schreiber.

Sample waived a preliminary hearing, and the State charged him with driving under the influence<sup>2</sup> which is punishable as a felony<sup>3</sup> because of Sample's 2009 DUI conviction. Sample moved to suppress the PBT because he argued that it violated his Fourth Amendment rights because it was a nonconsensual search. Without the PBT results, Sample argued, there was no probable cause to support his arrest. At the suppression hearing, Deputy Swanson testified that he only used the PBT results to confirm his observations and not as probable cause for the arrest. This testimony differed from a prior administrative hearing where Deputy Swanson had testified that he had obtained Sample's consent to administer the PBT. At the suppression hearing, he revealed that he had directed Sample to blow without Sample's consent.

The district court granted Sample's motion to suppress because of Deputy Swanson's inconsistent testimony. The district court found that the PBT was a warrantless search because Sample did not consent to the PBT. And, without the results of the PBT, there was no probable cause for Sample's arrest. Furthermore, Deputy Swanson's telephonic search warrant was not covered by the good-faith exception to the warrant requirement. Since PBT results are only admissible in criminal actions to show the grounds on which to make the arrest were reasonable,<sup>4</sup> the suppression order also invalidated the telephonic search warrant and therefore suppressed the evidentiary blood draw. Accordingly, the State appealed.

### **Discussion**

In regards to the district court's resolution of the motion to suppress, the Court reviewed the district court's factual findings for clear error as well as its legal conclusions de novo.<sup>5</sup>

*The district court did not err in finding that the PBT results were obtained in violation of Sample's Fourth Amendment rights*

The district court found that a warrant was necessary to administer the PBT, so the PBT was unlawfully administered without Sample's consent. The State conceded that Sample did not consent, but argued that Sample was under arrest at the time the PBT was administered as evidenced by the fact that he was handcuffed in the patrol vehicle. Therefore, the State argued, the PBT was a valid search incident to arrest.<sup>6</sup> However, the State made this argument for the first time on appeal, so the Court declined to consider it.<sup>7</sup> Since the PBT was not administered as the result of a warrant, and the exception to the warrant requirement did not apply, the Court found that the district court's decision to suppress the PBT evidence as an unconstitutional search was proper.<sup>8</sup>

---

<sup>2</sup> NEV. REV. STAT. § 484C.110 (2015).

<sup>3</sup> NEV. REV. STAT. § 484C.410 (2015).

<sup>4</sup> NEV. REV. STAT. § 484C.150(3) (2015).

<sup>5</sup> State v. Beckman, 305 P.3d 912, 916 (2013).

<sup>6</sup> See Birchfield, 136 S. Ct. at 2184.

<sup>7</sup> See McKenna v. State, 968 P.2d 739, 746 (1998).

<sup>8</sup> See Byars v. State, 336 P.3d 939, 943 (2014).

*The district court erroneously invalidated the telephonic search warrant used to obtain the evidentiary blood draw*

The district court both invalidated the search warrant and suppressed the subsequent blood draw because Deputy Swanson violated Sample's rights by not getting Sample's consent for the PBT. The State argued that this was error and the Court agreed. The Court held that this suppression was error because the PBT was still supported by other facts that showed probable cause. In addition to the results from the PBT, Deputy Swanson told the magistrate judge about Sample's erratic driving as well as his appearance. Additionally, he told the judge how Sample had behaved after he had been pulled over as well as the fact that Sample had at least one prior felony DUI conviction. Deputy Swanson's observations of Sample's intoxicated state were included in the district court's findings of fact. Under similar situations, this Court has found probable cause.<sup>9</sup> Even without the PBT evidence, the Court found that Deputy Swanson's observations were sufficient to support the magistrate judge's finding of probable cause. The remaining facts were sufficient to cause a reasonable person to believe that an evidentiary draw of Sample's blood would indicate that he had been driving under the influence of alcohol.

### **Conclusion**

The Court concluded that the district court's suppression of the PBT evidence was proper. However, the district court erred when it invalidated the telephonic search warrant and suppressed the evidentiary blood draw because the search warrant was supported by probable cause even without the PBT evidence. Therefore, the evidentiary blood draw was a valid search and seizure under that warrant. The Court affirmed in part the district court's order granting Sample's motion to suppress the PBT evidence, but reversed and remanded the suppression of the search warrant and the evidentiary blood draw.

---

<sup>9</sup> See *Dixon v. State*, 737 P.2d 1162, 1163-64 (1987).