



**TO:** Mayor and Members of Troy City Council  
**FROM:** Lori Grigg Bluhm, City Attorney  
Allan T. Motzny, Assistant City Attorney  
**DATE:** November 3, 2009  
**SUBJECT:** City of Troy v Chowdhury

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In 1995, the Michigan legislature enacted tougher laws to curb underage drinking. Several communities, including Troy, adopted regulations that mirrored these state statutory provisions. One such regulation is Troy's ordinance, Chapter 98, Section 10.03, which is very similar to MCL 436.1703 (1) and (7). Troy's ordinance provides:

*A person less than 21 years of age shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, or possess or attempt to possess alcoholic liquor. A person who violates this section is guilty of a misdemeanor. . . . 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 test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor.*

Under Chapter 98, Section 10.04, *“(a) person less than 21 years of age who refuses to submit to a preliminary chemical breath analysis. . . . is responsible for a civil infraction and may be ordered to pay a civil fine of not more than \$100.00.”*

These ordinance provisions were recently challenged as unconstitutional in a case of first impression, *People of the City of Troy v. Chowdhury*. In *Chowdhury*, Troy police officers were dispatched to a party where underage minors were drinking alcohol. When the officers arrived at the scene, there were several young adults, under the legal drinking age, who were leaving the party. Several of these young adults admitted that they illegally consumed alcohol at the party. Troy's police officers then administered a PBT test to these persons who were outside the residence, including Mr. Chowdhury. Since the PBT results indicated that Mr. Chowdhury had consumed alcohol, and since he was under 21 years old, he was charged as a minor in possession of alcohol, in violation of Chapter 98.10.03. Subsequently, he filed a motion in the 52-4 District Court to suppress the PBT results, arguing that the administration of the PBT test was in violation of his Fourth Amendment right against unlawful search and seizure. The District Court Judge granted his motion, and this was affirmed by the Oakland County Circuit Court Judge, who determined that the trial court judge had not abused his discretion. However, since this was an issue of first impression in the Michigan state courts, the Michigan Court of Appeals granted the City's application for leave to appeal.

The Michigan Court of Appeals affirmed the trial court in the attached decision. As a result, relief can only be obtained through the filing and grant of an application for leave to appeal with the Michigan Supreme Court.

The *Chowdhury* decision directly impacts both state statutory provisions and local ordinances that allow police officers to administer PBT tests to minors who are suspected of illegally drinking alcohol. However, the Attorney General's Office, and the Prosecuting Attorney's Association of Michigan, and also the Michigan Municipal League's Legal Defense Fund have all informally indicated their reluctance to seek relief from the Michigan Supreme Court.

If the City chooses not to file an application for leave to appeal with the Michigan Supreme Court, then the City will need to amend its ordinance. A proposed amendment to Chapter 98, Section 10.03 and a repeal of Chapter 98.10.04 is attached for your future review and consideration. Absent any objections from City Council, this proposed amendment will be brought back as an action item on the November 23, 2009 City Council agenda.

Please let us know if you have any questions concerning this matter.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE CITY OF TROY,  
Plaintiff-Appellant,

v

EMRAN CHOWDHURY,  
Defendant-Appellee.

FOR PUBLICATION  
September 10, 2009  
9:00 a.m.

No. 288696  
Oakland Circuit Court  
LC No. 2008-008862-AR

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Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff City of Troy (City) appeals by leave granted the circuit court's denial of leave to appeal, which allowed to stand the district court's order striking down a City ordinance and suppressing certain evidence collected from defendant during a preliminary breath test. Having found no error in the district court's ruling or the circuit court's denial of leave to appeal, we now affirm.

I

A number of young adults under 21 years of age were allegedly drinking alcoholic beverages at a house party in the City. Police officers responded to a call and arrived to find a group of individuals leaving the party on foot. The officers detained the group of young adults, which included defendant. An officer asked each of the young adults whether he or she had been drinking alcohol. Some of the young adults indicated that they had been drinking, and others indicated that they had not. The officer divided the young adults into two smaller groups, separating those who admitted that they had been drinking from those who denied drinking at the party. The officers then proceeded to administer preliminary breath tests (PBTs) to the young adults. One of the officers administered a PBT to defendant, which resulted in a reading of 0.025. It is undisputed that the officer did not request defendant's consent before administering the PBT. Neither that particular officer, nor any other officer, obtained a search warrant before administering the PBTs.

The City ordinance at issue in this case, Troy Ordinance § 98.10.03, provides in relevant part:

A person less than 21 years of age shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, or possess or

attempt to possess alcoholic liquor. A person who violates this section is guilty of a misdemeanor . . . .

\* \* \*

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 test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor.

Furthermore, Troy Ordinance § 98.10.04 provides in relevant part that “[a] person less than 21 years of age who refuses to submit to a preliminary chemical breath analysis . . . is responsible for a civil infraction and may be ordered to pay a civil fine of not more than \$100.00.”

Defendant testified before the district court that the officers had indicated that he and the others were required take the PBT. According to defendant and other witnesses, the officers informed the young adults that they would be taken to the police station—and possibly go to jail—if they did not comply by submitting to the PBTs. Defendant testified that he believed that he had no choice but to submit to the PBT. Defendant and other witnesses stated that the officers had been aggressive and had used profane language toward the young adults. Defendant testified that he had felt intimidated and that he had therefore submitted to the PBT without verbally objecting and without asking any questions of the officers.

After having been charged with violating Troy Ordinance § 98-10-03, defendant moved in the district court to suppress the results of the PBT. Defendant argued that Troy Ordinance § 98-10-03 was unconstitutional because it purported to allow a police officer to perform a warrantless search, because warrantless searches are generally considered unreasonable unless an exception applies, and because no exception to the warrant requirement was applicable in this case. In support of his position, defendant cited two cases in which the United States District Court for the Eastern District of Michigan had ruled that a similarly worded ordinance and a similarly worded state statute were unconstitutional. Defendant at all times maintained that the police officers had been aggressive, that he had felt compelled to comply with the officers’ directions, and that he had not voluntarily submitted to the PBT.

The district court held oral argument on defendant’s motion and heard the testimony of several witnesses. The district court ruled that Troy Ordinance § 98-10-03 was unconstitutional on its face, that the warrantless search of defendant’s person had been unreasonable, and that no exception to the warrant requirement had been applicable on the facts of this case. Therefore, the district court suppressed the evidence collected from defendant during the PBT.<sup>1</sup>

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<sup>1</sup> Although the district court suppressed the evidence collected from defendant during the PBT, it did not grant defendant’s motion to dismiss. The district court remarked, “I’m not going to  
(continued...) ”

The City subsequently sought leave to appeal the district court's ruling in the Oakland Circuit Court. The circuit court held no oral argument, and decided the City's application for leave to appeal on the basis of the written submissions alone. In a succinct but complete opinion and order, the circuit court observed that it had surveyed the relevant case law and had found no decisions on point, other than the two federal cases cited by defendant before the district court. The circuit court opined that "[t]here is nothing from the appellate courts upon which to base the reversal of the district court" and that "[t]he district court's decision was correct insofar as the ordinance is unconstitutional . . . ." Accordingly, the circuit court denied the City's application for leave to appeal the district court's ruling.

We granted leave to appeal to consider this issue of first impression for the Michigan appellate courts. *People of Troy v Chowdhury*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 288696).

## II

The constitutionality of an ordinance is reviewed de novo, *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002), as are all other questions of constitutional law, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We will not disturb a trial court's<sup>2</sup> findings of fact at a suppression hearing unless they are found to be clearly erroneous. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). However, the ultimate question whether evidence should be suppressed is an issue of law for the court. *People v Dungey*, 235 Mich 144, 146-147; 209 NW 57 (1926). "Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Hawkins*, 468 Mich 488, 496-497; 668 NW2d 602 (2003).

## III

We cannot conclude that the circuit court erred by denying the City's application for leave to appeal, thereby allowing to stand the district court's order striking down Troy Ordinance § 98.10.03 and suppressing the evidence collected from defendant during the PBT.

The United States District Court for the Eastern District of Michigan has already held a substantially similar Bay City ordinance and a substantially similar state statute unconstitutional. *Spencer v Bay City*, 292 F Supp 2d 932 (ED Mich, 2003); *Platte v Thomas Twp*, 504 F Supp 2d 227 (ED Mich, 2007). In the instant matter, the district court cited these two federal cases as persuasive authority, ruling that Troy Ordinance § 98.10.03 "is too broad," that "requesting someone to submit to a PBT is a search," and that the police were required to obtain a warrant before administering the PBTs unless it could be shown that one of the exceptions to the search warrant requirement applied. As discussed previously, the circuit court agreed, finding no Michigan case law upon which to base a reversal of the district court's ruling.

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(...continued)

dismiss the case yet [because] the People might be able to prove it without a PBT test, I don't know whether they can or not, but I am not going to go so far as to dismiss it yet."

<sup>2</sup> In cases such as this, wherein a district court ruling has been appealed to the circuit court, we refer to the district court as the "trial court." See MCR 7.101(A)(1).

A

The City argues that the federal case law relied on by the district and circuit court failed to adequately address the “special needs” exception to the search warrant requirement. The City contends that the “special needs” exception should be applied in this case because there is a compelling state interest in protecting young people from the dangers of alcohol abuse and in protecting the general public from the potential consequences of alcohol abuse by young persons.

It is true, as the City points out, that we are not bound by the decisions of lower federal courts. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). However, both *Spencer* and *Platte* thoroughly discuss the issues presented in the instant case, and specifically refute the City’s argument that the “special needs” exception to the search warrant requirement should apply.

“Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment to the United States Constitution.” *People v Jones*, 279 Mich App 86, 90-91; 755 NW2d 224 (2008) (citations omitted); see also US Const, Am IV; Const 1963, art 1, § 11. ““The constitutions do not forbid all searches and seizures, only unreasonable ones . . . . The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual’s privacy.” *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005) (citation omitted).

“Ordinarily, searches or seizures conducted without a warrant are unreasonable per se. And, generally, when evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial.” *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). “There are, however, a number of recognized exceptions to the warrant requirement . . . .” *Id.* Among others, these exceptions include “exigent circumstance[s], searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause.” *People v Brzezinski*, 243 Mich App 431, 433-434; 622 NW2d 528 (2000) (citation omitted). In addition, under “the governmental ‘special needs’ or regulatory exception,” “[a] warrant or probable cause will not be required . . . as long as the searches meet ‘reasonable legislative or administrative standards.’” *People v Woods*, 211 Mich App 314, 317; 535 NW2d 259 (1995), quoting *Griffin v Wisconsin*, 483 US 868, 873; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

In *Spencer*, 292 F Supp 2d at 935, the federal district court considered a Bay City ordinance that provided:

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 test 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 \$ 100.00.

Bay City defended its ordinance against a claim that it violated the Fourth Amendment by asserting “that the so-called ‘special needs’ exception excuses the requirement for a search warrant, and the searches are reasonable because they are based on reasonable suspicion.” *Id.* at 938-939. The *Spencer* court disagreed, concluding:

There is nothing “special” in the need of law enforcement to detect evidence of ordinary criminal wrongdoing; even where crime is on the rise and the disorder and insecurity caused by criminal behavior in a community is grave, the Supreme Court has consistently held that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” *City of Indianapolis v Edmond*, 531 US 32, 42; 121 S Ct 447; 148 L Ed 2d 333 (2000). “Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, th[e Supreme] Court has said that reasonableness generally requires the obtaining of a judicial warrant.” *Vernonia School Dist [v Acton]*, 515 US [646,] 654; 115 S Ct 2386; 132 L Ed 2d 564 [(1995)]. [*Spencer*, 292 F Supp 2d at 941.]

Moreover, as the *Spencer* court explained, “[t]he Supreme Court made clear . . . that laudable, non-criminal purposes of a law authorizing warrantless searches will not exempt the practice from the traditional mandate of a warrant issued upon probable cause when an objective to gather evidence also exists.” *Id.* at 941-942; see also *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001). The *Spencer* court concluded that “Bay City’s ordinance cannot be justified under the ‘special needs’ exception to the requirement that a search of a person, including a search and seizure of breath samples, must be authorized by a judicial officer through the search warrant process.” *Spencer*, 292 F Supp 2d at 942.

Bay City had also argued that “the warrantless searches called for by the ordinance are justified by exigent circumstances, due to the length of time required in Bay City to obtain a search warrant for breath samples.” *Id.* at 939. However, the *Spencer* court found that exigent circumstances must be considered on a case-by-case basis because “the time necessary to obtain a warrant in cases that fall within the scope of the ordinance does not create an exigency as a matter of legislative fact, nor does it serve to establish an automatic exemption from the warrant requirement.” *Id.* at 944.

In *Platte*, 504 F Supp 2d at 230-231, the federal district court considered MCL 436.1703(6), which provides:

A peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content 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 test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had

any bodily alcohol content. A minor 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 \$100.00.

In *Platte*, several plaintiffs brought claims under 42 USC 1983 against Thomas Township and other municipalities, as well as the governor of Michigan and the director of the Michigan State Police, arguing that MCL 436.1703(6) was “unconstitutional insofar as it authorized police officers to compel minors to submit to breath tests for alcohol in the absence of a warrant or circumstances excusing the requirement of a search warrant.” *Platte*, 504 F Supp 2d at 230. In response, the defendants argued, as does the City in the case at bar, “that the statute is constitutional on its face because warrantless searches pursuant thereto can be justified on the basis of exigent circumstances and special needs.” *Id.* at 231.

Relying on *Spencer* and *Skinner v Railway Labor Executives Ass’n*, 489 US 602, 616-617; 109 S Ct 1402; 103 L Ed 2d 639 (1989), the *Platte* court observed that “[i]t is well established that the taking of a breath sample to test for the presence of alcohol constitutes a search under the Fourth Amendment . . . . As such, the search must be reasonable.” *Platte*, 504 F Supp 2d at 236 (citations omitted). Regarding the plaintiffs’ facial challenge to MCL 436.1703(6), the *Platte* court explained that “the text and context of the statute must be examined to determine if it can be construed in such a way that an unconstitutional interpretation can be avoided, or, on the other hand, whether the statute’s plain language authorizes unconstitutional conduct on the part of the government.” *Platte*, 504 F Supp 2d at 238.

The *Platte* court went on to observe that MCL 436.1703(6) “plainly does not require the police officer to obtain a warrant before taking a breath sample from a minor . . . . There is no dispute that there is a preference expressed in the Fourth Amendment that searches, to be reasonable, be sanctioned by the issuance of a warrant by a neutral and detached judicial officer. Nor does the statute require that any of the recognized exceptions to the warrant requirement exist before the police officer compels a minor to submit to a breath test.” *Platte*, 504 F Supp 2d at 238 (citation omitted). Although the defendants in *Platte* argued that the “exigent circumstances” exception to the search warrant requirement should apply, as did Bay City in *Spencer*, the *Platte* court explained that “to say that there are some circumstances under which breath samples can be taken from minors in a constitutional way *does little to answer the question whether the statute itself is constitutional*, when the statute allows searches and seizures absent the condition of a warrant or an excuse for proceeding without one.” *Platte*, 504 F Supp 2d at 238 (emphasis added).

One of the defendants in *Platte* contended that “exigent circumstances always exist as a matter of law because search warrants cannot be obtained before a teenager’s blood alcohol content dissipates. Therefore . . . the statute is valid and the procedures employed by [the] officers thereunder are constitutional.” *Id.* at 241. Again, the court rejected the “exigent circumstances” argument, explaining that it “ignores the general rule that in the criminal context, warrantless searches are presumptively unreasonable; the government bears the burden of establishing an exception to the warrant requirement in the case at hand; the resulting reasonableness *vel non* of the search must turn on the facts of each case; and blanket exceptions to the warrant requirement are disfavored.” *Id.* at 241-242 (citations omitted). The *Platte* court concluded that the defendant in question had “not demonstrated that [MCL] 436.1703(6) can

survive constitutional challenge by means of a blanket exigent circumstances exception to the Warrant Clause of the Fourth Amendment . . . .” *Id.* at 245.

With respect to the defendants’ “special needs” argument, the *Platte* court stated that “[t]he Supreme Court has held that some searches can be reasonable absent both a warrant and exigent circumstances, specifically ‘when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”” *Id.* at 238 (citations omitted). Referring to the decision in *Spencer*, 292 F Supp 2d at 939-941, the *Platte* court observed, “It is enough to note that the weight of authority relegates the ‘special needs’ exception to non-criminal governmental activity . . . .” *Platte*, 504 F Supp at 239. The court concluded that MCL 436.1703(6) ““endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment,”” and therefore that the statute “is unconstitutional on its face.” *Platte*, 504 F Supp at 239 (citation omitted).<sup>3</sup>

The decisions in *Spencer* and *Platte* are both well-reasoned and consistent with existing Fourth Amendment law. Accordingly, we find *Spencer* and *Platte* to be persuasive, see *Abela*, 469 Mich at 607, and conclude that Troy Ordinance § 98.10.03 is unconstitutional on its face. Moreover, we agree with the *Spencer* court that “[t]here is nothing ‘special’ in the need of law enforcement to detect evidence of ordinary criminal wrongdoing,” and that ““reasonableness generally requires the obtaining of a judicial warrant.”” *Spencer*, 292 F Supp 2d at 941 (citation omitted). The “special needs” exception to the search warrant requirement is quite simply not applicable on the facts of this case. *Id.*

## B

The City argues that even if Troy Ordinance § 98.10.03 is unconstitutional on its face, the district and circuit court decisions should still be reversed because defendant’s Fourth Amendment rights were not violated. Specifically, the City argues that the PBT did not constitute a search within the meaning of the Fourth Amendment and that when the police asked defendant to submit to the PBT, he consented. In addition, the City contends that even if the PBT was a search, the likely dissipation of defendant’s bodily alcohol content was an exigency that justified the warrantless search in this case.

As an initial matter, we disagree with the City’s contention that because a PBT is different and less intrusive than a “Breathalyzer” test, it is not a search for purposes of the Fourth Amendment. “A search within the meaning of the Fourth Amendment ‘occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.’” *People v*

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<sup>3</sup> The *Platte* court was “not prepared to conclude as a matter of law that the offense of minor in possession of alcohol is so insignificant a transgression that warrantless searches can never be conducted to gather evidence of this crime. If officers must act so quickly to prevent the immediate destruction of evidence that they cannot obtain a search warrant within the time it would reasonably take to procure one, then administration of a PBT without a warrant may be consistent with the Fourth Amendment . . . .” *Platte*, 504 F Supp at 246. The *Platte* court noted that, on the specific facts of that case, there remained “fact questions on the material issue of whether exigent circumstances existed. . . .” *Id.*

*Jones*, 279 Mich App 86, 91; 755 NW2d 224 (2008), quoting *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). “Because the Fourth Amendment protects people, as opposed to places or areas . . . a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual’s reasonable, or justifiable, expectation of privacy.” *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). “Indeed, what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”” *Id.*, quoting *People v Clark*, 133 Mich App 619, 625; 350 NW2d 754 (1983), in turn quoting *Katz v United States*, 389 US 347, 351-352; 88 S Ct 507; 19 L Ed 2d 576 (1967).

As discussed previously, the *Platte* court held that a PBT was a search under the Fourth Amendment: “It is well established that the taking of a breath sample to test for the presence of alcohol constitutes a search under the Fourth Amendment . . . . As such, the search must be reasonable.” *Platte*, 504 F Supp 2d at 238. Other courts have also held that breath tests constitute searches for Fourth Amendment purposes. See, e.g., *State v McGuigan*, 965 A2d 511, 515-516 (Vt, 2008); *Milwaukee Co v Proegler*, 95 Wis 2d 614, 623; 291 NW2d 608 (Wis App, 1980). Indeed, the United States Supreme Court has held that although breath and urine tests for may be less intrusive than blood tests,<sup>4</sup> they nonetheless rise to the level of searches within the meaning of the Fourth Amendment. *Skinner*, 489 US at 616-617. On the basis of this authority, we have no difficulty concluding that the PBT administered to defendant in this case constituted a search under the Fourth Amendment.

Nor can we agree with the City’s argument that defendant consented to the PBT and that a search warrant was consequently not required. “To validate an otherwise unreasonable search or seizure . . . consent must be unequivocal, specific, and freely and intelligently given.” *Dagwan*, 269 Mich App at 342. “Consent [to search] is not voluntary if it is the result of coercion or duress.” *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004).

“When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” *Farrow*, 461 Mich at 207 (citation omitted). “[K]nowledge of the right to refuse consent is not a prerequisite to effective consent. Rather, knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances. However . . . the people need not prove that the person giving consent knew of the right to withhold consent.” *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999) (citations omitted).

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<sup>4</sup> It is true, as the City notes, that the United States Supreme Court in *Skinner* found breath tests to be less intrusive than blood tests. *Skinner*, 489 US at 625-626. But this conclusion was in the context of a broader holding that chemical tests administered to railroad employees for safety reasons—and *not* for the purpose of ordinary crime detection—met the “special needs” exception to the search warrant requirement. See *id.* at 633-634. As discussed previously, the “special needs” exception is inapplicable to law enforcement’s desire to detect evidence of ordinary criminal wrongdoing, such as in the case at bar. *Spencer*, 292 F Supp 2d at 941.

In the case at bar, the district court did not address the issue of consent, which generally presents a question of fact and normally involves credibility determinations. Nonetheless, it is clear from the record that defendant was never asked for his consent. Although there was conflicting testimony regarding which officer administered certain of the PBTs in this case, both officers testified that they did not ask defendant and the other young adults for their consent. Defendant testified, as did the others, that he had not consented to the PBT, and that he had felt as though he had no choice in the matter. Indeed, defendant testified that he believed that he would go to jail if he refused to submit to the PBT.<sup>5</sup> Defendant also testified that one officer “was really aggressive and intimidating. I didn’t want to say anything to tick him off.” Even one of the officers admitted that he was “pretty sure it was implied that [the young adults] were not able to leave until I finished the investigation.”

The record plainly establishes that defendant was never asked for his consent and did not give his consent at any time. The City does not cite any case law to suggest that a mere failure to object to a proposed search constitutes actual consent. Nor could the City do so, as no such authority exists. Indeed, as noted earlier, the prosecution bears the burden of proving that consent to search was freely and voluntarily given. *Farrow*, 461 Mich at 207. “This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” *Id.* (citation omitted). Defendant did not consent to the police officers’ administration of the PBT in this case.

Lastly, we disagree with the City’s argument that there were exigent circumstances that precluded the need for a search warrant in the present case. The City asserts that because the Troy police were dealing with a group of several young adults, it would have taken too long to secure search warrants authorizing the administration of a PBT to each of the minors. Specifically, the City asserts that during the time it would have taken to obtain search warrants, the minors’ bodily alcohol content would have dissipated and any evidence of illegal alcohol consumption would have been lost.

The existence of exigent circumstances must be considered on a case-by-case basis. The “exigent circumstances” exception to the search warrant requirement provides that the police may search without a warrant in cases of “actual emergency” if there are “specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.” *People v Beuschlein*, 245 Mich App 744, 749-750; 630 NW2d 921 (2001) (citation omitted).

As in *Platte*, we perceive no exigencies in the case at bar that would have permitted a PBT search without a valid search warrant. Similar to the City’s argument in this case, one of

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<sup>5</sup> According to the testimony of certain witnesses, one of the officers had stated that anyone who refused to take the PBT would go to jail. Other witnesses testified somewhat differently. However, even these other witnesses testified that the officer had told them that if they refused to take the PBT, he would “take us to the station” or to “the police station.” One witness testified that although he could not recall the exact words used by the officer, he had assumed that he would go to jail if he refused to take the PBT.

the defendants in *Platte* complained of “the rapid rate of dissipation of alcohol in the bloodstream compared to the time it takes its police officers to obtain a search warrant.” *Platte*, 504 F Supp 2d at 242. The *Platte* court found that “[t]he record in this case . . . fails to establish that the evidence sought ‘would probably be destroyed within the time necessary to obtain a search warrant,’ . . . when measured against the time the . . . police officers loitered at the scene in this case.” *Id.* (citation omitted). Moreover, while one of the police officers in *Platte* testified that “a search warrant could be obtained . . . in an hour and fifteen minutes,” the defendant’s expert witness testified that “alcohol would not dissipate from the average male’s blood until two hours and twenty minutes after consumption ceases; for an average female, dissipation would not occur until three hours after consumption.” *Id.* at 243. The *Platte* court concluded that “the record in this case establishes that the . . . police officers had time to request a search warrant to take breath samples from [the defendants].” *Id.*

In the instant case, the City presented no evidence at the district court suppression hearing to establish that the police officers could not have sought and obtained search warrants before dissipation of the minors’ bodily alcohol content. Nor did the City present evidence of any other exigent circumstances. In short, the City failed to substantiate its claim that “it would have taken a long time to secure search warrants specifically authorizing the administration of a PBT” to each of the young adults. The district court did not clearly err by declining to find the existence of exigent circumstances in this case. See *Farrow*, 461 Mich at 209. No exigent circumstances having been established, we conclude that the police were required to procure a valid search warrant before administering the PBT to defendant.

### C

The PBT administered to defendant in this case constituted a search within the meaning of the Fourth Amendment, to which defendant did not consent. None of the exceptions to the search warrant requirement applied, and the police officers were accordingly required to seek and obtain a valid search warrant before administering the PBT to defendant. The district court did not err by ruling that Troy Ordinance § 98.10.03 is unconstitutional on its face or by suppressing the evidence collected from defendant during the warrantless PBT search. Nor did the circuit court err by denying the City’s application for leave to appeal.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder

CITY OF TROY  
AN ORDINANCE TO AMEND  
CHAPTER 98 OF THE CODE  
OF THE CITY OF TROY

The City of Troy ordains:

Section 1. Short Title

This Ordinance shall be known and may be cited as an amendment to Chapter 98 of the Code of the City of Troy.

Section 2. Amendment

Section 98.10.03 is amended and Section 98.10.04 is repealed as follows: (*Underlining and strikeout denote changes*)

98.10.03     Under 21 – Purchase, Consume or Possess Alcohol. A person less than 21 years of age shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, or possess or attempt to possess alcoholic liquor. A person who violates this section is guilty of a misdemeanor punishable as follows:

- a. For the first violation a fine of not more than \$100.00, and the court may order all applicable sanctions and programs provided in the State of Michigan minor in possession of alcohol statutes.
- b. For a second violation of this section or a local ordinance or state law which substantially corresponds to this section a fine of not more than \$200.00 and the court may order all applicable sanctions and programs provided in the State of Michigan minor in possession of alcohol statutes.
- c. For a third or subsequent violation of this section or a local ordinance or state law which substantially corresponds to this section a fine of not more than \$500.00 and the court may order all applicable sanctions and programs provided in the State of Michigan minor in possession of alcohol statutes.

A peace officer who has reasonable cause to believe a person less than 21 years of age has consumed alcoholic liquor may ~~require~~ request 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 test are

admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor.

A police officer who witnesses a violation of this ordinance may stop and detain the person for purposes of obtaining satisfactory identification, seizing illegally possessed alcoholic liquor, and issuing an appearance ticket.

This section does not prohibit a person less than 21 years of age from possessing alcoholic liquor where permitted by state law.

~~98.10.04 Under 21 — PBT Refusal. 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 person less than 21 years of age who refuses to submit to a preliminary chemical breath analysis as required in this section is responsible for a civil infraction and may be ordered to pay a civil fine of not more than \$100.00.~~

### Section 3. Savings

All proceedings pending, and all rights and liabilities existing, acquired or incurred, at the time this Ordinance takes effect, are hereby saved. Such proceedings may be consummated under and according to the ordinance in force at the time such proceedings were commenced. This ordinance shall not be construed to alter, affect, or abate any pending prosecution, or prevent prosecution hereafter instituted under any ordinance specifically or impliedly repealed or amended by this ordinance adopting this penal regulation, for offenses committed prior to the effective date of this ordinance; and new prosecutions may be instituted and all prosecutions pending at the effective date of this ordinance may be continued, for offenses committed prior to the effective date of this ordinance, under and in accordance with the provisions of any ordinance in force at the time of the commission of such offense.

### Section 4. Severability Clause

Should any word, phrase, sentence, paragraph or section of this Ordinance be held invalid or unconstitutional, the remaining provision of this ordinance shall remain in full force and effect.

### Section 5. Effective Date

This Ordinance shall become effective ten (10) days from the date hereof or upon publication, whichever shall later occur.

This Ordinance is enacted by the Council of the City of Troy, Oakland County, Michigan, at a regular meeting of the City Council held at City Hall, 500 W. Big Beaver, Troy, MI, on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Louise E. Schilling, Mayor

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Tonni Bartholomew. City Clerk