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DISTRICT IV

03-03-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 13-AP-2366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Neil A Morton,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #13, THE HONORABLE JULIE GENOVESE, PRESIDING

Michelle L. Viste
Deputy District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1033841

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Publication of this case is unnecessary, as this Court recently decided the same issues presented here on February 20, 2014, by a three judge panel in State v. Reese, 2014 WL 642066, 2012AP2114, unpublished slip op. (Wis. App. Feb. 20, 2014), which is recommended for publication.

Oral argument is unnecessary as well as the issues presented here can be fully presented through briefing.

ARGUMENT

I. THE STATE CONCEDES THE HOLDING IN MISSOURI V. MCNEELY, 569 U.S. _____, 133 S.Ct. 1552 (2013) APPLIES TO THIS CASE.

Newly declared constitutional rules must apply "to all similar cases pending on direct review." Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987). In United States v. Johnson, 457 U.W. 537, 562 (1982), the Court held that any case construing the Fourth Amendment would be applied retroactively to cases that were not final at the time the decision was rendered. This is true even though a search was done in accordance with the law at the time of the search. State v. Dearborn, 327 Wis.2d 252, 269, 786 N.W. 2d 97 (2010).

This case was pending on April 17, 2013 when Missouri v. McNeely was decided. Thus, the law concerning retroactivity says that Morton receives the benefit of the McNeely decision because his case was not yet final at the time McNeely was decided. The trial court was correct in its determination that the warrantless blood draw on Morton was unconstitutional under Missouri v. McNeely.

II. THE BLOOD TEST RESULT SHOULD NOT BE SUPPRESSED, AS THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES TO THIS CASE.

This Court was recently presented with the identical issues raised here in State v. Reese, 2014 WL 642066, 2012AP2114, unpublished slip op. (Wis. App. Feb. 20, 2014).¹ On appeal, Reese raised for the first time in his reply brief the issue of whether his blood test result was inadmissible because his blood draw was done without a warrant and absent exigent circumstances. Reese at ¶ 14. Despite the fact that the State objected on the grounds that the issue was raised for the first time in his reply brief, the Reese court chose to address this issue because it believed the opinion would provide guidance for other cases. Id. at Footnote 2.

In Reese, the State agreed that following the McNeely decision, the dissipation of alcohol alone would not be enough to create exigent circumstances to justify a warrantless blood draw. Id. at ¶ 19. The State argued, however, that the Court should apply Dearborn, 2010 WI 84, and find that the "good faith exception" allowed for the admissibility of the blood test results, as the officers relied upon clear and settled Wisconsin precedent when a warrantless blood draw was performed on Reese. Id.

¹ Although Reese is currently an unpublished decision, it is recommended for publication, and is being cited in this brief for its persuasive value in accordance with Wis. Stats. § 809.23(3)(b). A copy of the Reese opinion is being filed with this brief, as required by Wis. Stats. § 809.23(3)(c).

In Dearborn, the court determined that although newly declared constitutional law applied to all similar cases pending on appeal, under the good faith exception, the exclusionary rule did not apply, and suppression of the evidence was not required. Dearborn at ¶33. The court in Dearborn determined the officers relied upon "clear and settled precedent" when conducting their search, and applying the exclusionary rule would have no deterrent effect on officer misconduct. Id. at ¶ 44. Applying Dearborn, this Court agreed. Reese at 22. It determined the police officer was acting under "clear and settled precedent" when he conducted a warrantless blood draw of Reese. Id. Specifically, the court of appeals determined the officer was acting under the law set forth in State v. Bohling, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). In Bohling, the Wisconsin Supreme Court determined that under Schmerber v. California, 384 U.S. 77 (1966), "the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication

that the blood draw will produce evidence of intoxication." Bohling, 173 Wis. 2d at 547-48.

As in Dearborn, there would be no deterrent effect on officer misconduct when the officer was acting in clear accordance with the law at the time. Id. Thus, this Court determined that Reese's blood test result should not be suppressed. Id.

Here, this Court is faced with the identical issue that was raised in Reese. Morton concedes that Officer McLendon operated correctly under the law as it was at the time of his arrest- the Informing the Accused was properly read to him and the other Bohling factors were met (Brief of Defendant-Appellant at 10). Morton only contends that the exclusionary rule should be applied to the case following the McNeely decision.

This case is indistinguishable from Reese. Although Reese is an unpublished decision at this point and can only be cited for its persuasive value, it is recommended for publication. The public policy reasoning behind adhering to the doctrine of *stare decisis* is applicable here. Departure from application of this Court's decision in Reese would stand to undermine reliability of court decisions. Progressive Northern Ins. Co. v. Romanshek, 281 Wis. 2d 300, 325, 697 N.W.2d 417 (2005). This Court

following its recent decision in Reese furthers the stare decisis principal that adhering to previous judicial action promotes "evenhanded, predictable, and consistent development of legal principles..." Id. Additionally, it supports the Court's purpose of addressing the warrantless blood draw issue in Reese - to provide guidance for other cases. Reese at ¶ 14, Footnote 2.

Morton's issue raised on appeal is entirely addressed by the Reese case- if McNeely is to be applied to cases pending at the time the decision was rendered (which the State concedes it is), whether a good faith exception to the exclusionary rule exists. Reese answers this question by clearly indicating that a good faith exception does apply.

Thus, the State believes this Court should follow its recent ruling in Reese and find that the good faith exception applies here, and that Morton's blood test result should not be suppressed.

CONCLUSION

The State respectfully requests this Court to apply its decision in the recent case of State v. Reese, and find that although the blood draw of Morton was unconstitutional under McNeely, the good faith exception to the exclusionary rule applies, and therefore, Morton's blood test result should not be suppressed.

Dated this 3rd day of March, 2014.

Michelle L. Viste
Deputy District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1033841

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is 6 pages.

Dated: _____.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of March, 2014.

Michelle L. Viste
Deputy District Attorney
Dane County, Wisconsin

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of March, 2014.

Michelle Viste
Deputy District Attorney
Dane County, Wisconsin
State Bar No. 1033841

APPENDIX