STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 13-AP-2366-CR
Circuit Court Case No. 12-CT-1089

v.

NEIL A. MORTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE IMPOSED IN THE CIRCUIT COURT OF DANE COUNTY ON JULY 26, 2013, DANE COUNTY CASE NO. 12-CT-1089, THE HONORABLE JULIE GENOVESE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THIS COURT'S DECISION IN STATE V. REESE, 2012-AP-2114-CR, AN UNPUBLISHED DECISION, IS NOT BINDING ON THIS COURT AND IS NOT DISPOSITIVE OF THE ISSUES RAISED IN THIS APPEAL.

The State, in its responsive brief, asserts that "[t]his Court was recently presented with the identical issues raised here…" referring to State v. Reese, 2012AP2114-CR. State's Brief at p. 2. However, even a cursory review of the facts between this appeal and Reese demonstrate that they are factually dissimilar. The issue of a warrantless blood draw was never specifically raised in the trial court by Mr. Reese and the trial court record does not demonstrate any challenge to the warrantless blood draw, instead there was a challenge raised as to whether there was probable cause to arrest Mr. Reese.[1] (App. A-1-A-). This is not unusual given the fact that the state of the law regarding warrantless blood draws on June 18, 2009, the day Reese was stopped by Beaver Dam Police, was controlled by the decision in State v. Bohling, 173 Wis.2d 529 (1993). The criminal complaint in Reese was filed on August 14, 2009 and while his case was in the appellate pipeline at the time McNeely was decided on April 17, 2013 Reese's case languished in the trial court for approximately thirty one months, likely due to the fact that he had five different trial attorneys representing him through the course of the trial court proceedings. By the time a writ of certiorari was filed in McNeely on May 22,

[1] The Appendix contains the relevant motions filed in the trial court relating to the illegal stop and unlawful arrest of Mr. Reese. In response to a motion to dismiss the preliminary examination the trial court made specific factual findings which were reincorporated in the denial of the defendant's motion to suppress. A challenge to the warrantless blood draw, unlike this case, was never raised in the trial court. Appellate Record State v. Reese, Appellate Case No. 12AP2114CR: R. 16, 18, 27, 71 (App. A-1-A-13). In Reese, the trial court simply adopted its findings on the motion to dismiss preliminary examination as factual findings on the motion challenging probable cause to arrest. (App. A-3-A-13).

2012, a notice of intent to pursue post-conviction relief had already been filed in Reese.

The State also asserts that the case at bar is "…indistinguishable from Reese." State's Brief at p. 4. Unlike this appeal the Reese case was already concluded in the trial court by the time McNeely was even decided. This case is clearly distinguishable from Reese and the State's reliance on an unpublished opinion which it concedes can only be cited for its persuasive value, should be discarded by the court. Indeed, pursuant to Rule 809.23 (3) (b) Wis. Stats. this court "need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research it or cite it." Yet the State goes on to argue that a departure from this court's decision in Reese would "undermine reliability of court decisions" and undermine the principle of stare decisis. State's Brief at 4-5. The State did not even address the defendant's argument that Bohling was wrongly decided or whether the doctrine of judicial integrity and fundamental fairness requires adherence to the exclusionary rule for a violation of a non-consensual warrantless blood draw in Wisconsin. The State failed to address the fact that Wisconsin courts have also recognized that suppression in some cases is necessary "to preserve the integrity of the judicial process." State v. Dearborn, 2010 WI 84, ¶78 (Abrahmson, CJ dissenting); State v. Knapp, 2005 WI 137, ¶79 ("aside from deterring police misconduct there is another fundamental reason for excluding the evidence under the circumstances present here, the preservation of judicial integrity."). The State further failed to address the Article I, Section 11 argument raised by the defendant and whether that constitutional provision requires that greater protection be given to Wisconsin citizens with respect to non-consensual warrantless blood draws than that under the Fourth Amendment.

The State has not appropriately addressed the arguments raised in the defendant's brief, instead relying on a unpublished decision and characterizing it as "indistinguishable" from the case at bar. The Court of Appeals cannot serve as both an advocate and judge and does not need to consider inadequately developed arguments. State v. Pettit, 171 Wis.2d 627, 646 (Ct. App. 1992). The failure to respond to arguments in a brief can be deemed as a concession. See Schlieper v. DNR, 188 Wis.2d 318, 322 (Ct. App. 1994) (an argument to which no response is made may be deemed conceded for purposes of appeal). This court should disregard the State's reliance on an unpublished decision and further determine that the State's failure to specifically respond to the defendant's second and third arguments results in a concession of those arguments. [2]

[2] The Supreme Court has recently granted review in three cases relating to Missouri v. McNeely. In State v. Cassius A. Foster, 2011 AP1673-CRNM the court granted review to address a McNeely issue from the review of summary disposition by the Court of Appeals. A review of CCAP indicates that a motion to suppress based on a lack of probable cause was filed in the trial court on April 23, 2010. A Notice of Intent to Pursue Post-Conviction Relief was filed on October 7, 2010.

In State v. Michael R. Tullberg, 2012AP1593-CR, the Court granted review from an unpublished Court of Appeal's decision where the court determined that exigent circumstances existed supporting a warrantless blood draw. The blood draw in that case occurred on or about July 30, 2009, long before McNeely was decided. A pretrial motion to suppress the blood draw was filed in the trial court.

Finally, the Court granted review in State v. Alvernest Floyd Kennedy, 2012AP523-CR from review of an unpublished Court of Appeal's decision. The Kennedy case also occurred prior to the McNeely decision with the blood draw occurring on or about August 3, 2006. A motion to suppress based on an unreasonably lengthy detention was filed in the trial court. Thus, all three cases currently pending for review by the Supreme Court are pre McNeely cases unlike the case at bar.

CONCLUSION

The State has failed to respond specifically to the defendants arguments instead arguing that this court's unpublished decision in State v. Reese, 2012 AP2114-CR is indistinguishable from this appeal despite the ready factual distinctions between the trial court records. While the case is recommended for publication, it remains unpublished as of this date.[3] Pursuant to Rule 809.23 (3) (b) Wis. Stats. the Reese decision is not binding on any court and indeed this court need not even discuss it. Because the State has failed to specifically address the defendant's argument relating to the doctrine of judicial integrity and Article I, Section 11 of the Wisconsin Constitution that argument should be deemed conceded.

Respectfully submitted this 17th day of March, 2014.

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[3] It is counsel's understanding that the Publication Committee will meet at the end of March to determine whether Reese will be published or not. Even if Reese becomes a published opinion it is not dispositive of this appeal for the reasons cited herein.

CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19 (8) (b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this brief is 1,837 words.

Signed:

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Patrick J. Stangl

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

The undersigned certifies that an electronic copy of this brief, excluding the appendix, if any, complies with the requirement of §809.19 (12). The electronic brief is identical in content and format to the printed brief filed this date.

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

Signed:

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Patrick J. Stangl

CERTIFICATION OF APPENDIX

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Signed:

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Patrick J. Stangl

APPENDIX

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