STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP000792 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES MICHAEL WARREN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in the Washburn Circuit Court, the
Honorable Eugene D. Harrington, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

At the time of the search of Mr. Warren's blood, the Wisconsin Supreme Court had held that exigent circumstances justified blood draws from persons who had been arrested for drunk driving, if four criteria were met. ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W. 2d 399 (1993).

The circuit court found that the fourth criterion was not satisfied in Mr. Warren's case because he had a reasonable objection to having his blood drawn.

Given Mr. Warren's reasonable objection, should the court have suppressed the evidence resulting from the blood draw, because it violated Mr. Warren's constitutional right to be free from unreasonable searches under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?

The circuit court held: the intrusive search was unreasonable and unconstitutional. It also held that the police officer reasonably relied on the City of Spooner Police Department Policy and Procedures Manual "in ignoring the four-part test of ***Bohling***. . . ." It denied the motion to suppress on the basis of the officer's good faith.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Warren does not request publication or oral argument.

STATEMENT OF THE CASE AND FACTS

Shortly after a Spooner Police Officer saw Mr. Warren leave a bar, he saw him driving his truck. The officer stopped Mr. Warren for "unnecessary acceleration" and a loud exhaust. (29:5; App. 103). The officer saw signs of intoxication, Mr. Warren admitted to consuming alcohol, and Mr. Warren failed field sobriety tests. He was arrested for operating while intoxicated and transported to a local hospital. (29:5-7; App. 103-105).

Mr. Warren did not consent to have his blood drawn. When the officer read the "Informing the Accused" form, Mr. Warren refused, saying he did not want to have his blood drawn. He did not give a specific reason for his refusal, and the officer did not ask him why he refused. (34:19). Instead, the officer told Mr. Warren that police would do a forced blood draw, which was accomplished. (34:19).

Mr. Warren "did have a valid reason to decline. He recently had surgery where postoperative instructions included that he avoid any risk of infection," the court found. (29:6; App. 104).

After Mr. Warren was charged with operating while intoxicated, defense counsel sought to suppress the results of the blood draw, arguing that the warrantless nonconsensual search was not reasonable under the United States Supreme Court decisions in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) and ***Schmerber v. California***, 384 U.S. 757 (1966). Counsel argued that exigent circumstances beyond the normal dissipation of alcohol from the blood did not exist in this case. (5).

At a suppression hearing, Mr. Warren testified that he had a valid medical reason to refuse the blood draw, and offered relevant medical documents. (34:14-19).

The court agreed that no exigent circumstances were present here. There was no accident or injuries, and Mr. Warren was at the hospital within half an hour of the arrest. (29:8; App. 106). The court concluded that under ***Missouri v. McNeely***, ***supra,*** the blood draw was an unreasonable search in violation of the Fourth Amendment to the United States Constitution. (36:36; App. 112). However, the court refused to exclude the evidence based on the officer's good faith. (36:36; App. 112).

The court also found that Mr. Warren did have a valid reason to decline the blood draw. (29:6; App. 104). It noted that the "Informing the Accused" form does not have a "box" for an officer to note whether the person has a reasonable objection to the blood draw, as required by ***State v. Bohling, supra.*** (36:23-24; App. 110-11). The form, the court opined, needs to be amended. ***Id.***

However, the court concluded that the officer reasonably relied on the City of Spooner Police Department's Policy and Procedures Manual, "in ignoring the four-part test of ***Bohling*** and the warrant requirement." It denied the motion to suppress on that basis. (36:23; App. 110).

Mr. Warren pled no contest to a charge of operating while intoxicated, 3rd offense. He was sentenced to 45 days in jail, and was required to participate in a victim impact panel and to use an ignition interlock device. (18; App. 101).

Mr. Warren appeals from the judgment of conviction.

ARGUMENT

The Results of the Warrantless, Nonconsensual Draw of Mr. Warren's Blood Should be Suppressed Because he Had a Reasonable, Medically-Based Objection to the Blood Draw.

A. Introduction and summary of argument.

Two months after Mr. Warren's arrest and blood draw, the United States Supreme Court held that the natural dissipation of alcohol in a person's bloodstream, alone, does not create an exigency in every drunk driving arrest. ***Missouri v. McNeely, supra***, 133 S. Ct. 1552.

McNeely abrogated the decision in ***State v. Bohling,*** 173 Wis. 2d at 533-34 "to the extent that we held the natural dissipation of alcohol in a person's bloodstream constitutes a per se exigency so as to justify a warrantless nonconsensual blood draw under certain circumstances." ***State v. Kennedy,*** 2014 WI 132, __ Wis. 2d ___, ¶ 32, 856 N.W. 2d 834, *see also,* ***State v. Foster,*** 2014 WI 131, __ Wis. 2d ___, ¶ 6, 856 N.W. 2d 847,

Although the ***McNeely*** issue was litigated in the circuit court, Mr. Warren does not appeal that part of the circuit court's decision. In ***Kennedy, supra***, at ¶ 37, the Wisconsin Supreme Court determined that law enforcement reasonably relied on the "clear and settled precedent" of ***Bohling***, when officers failed to make individualized assessments of the exigency of preserving evidence in drunk driving cases. Therefore, the results of the blood draw were not suppressed in ***Kennedy***. That decision governs this case.

Rather, Mr. Warren argues that under the controlling law at the time he was arrested, as stated in ***Bohling***, the state failed to prove that exigent circumstances justified the compelled blood draw because it was unable to prove that Mr. Warren had no reasonable objection to the blood draw.

B. The state failed to prove that Mr. Warren had no reasonable objection to the blood draw, which is one of the four requirements required to prove that "exigent circumstances" make it unnecessary to obtain a warrant.

At the time Mr. Warren was arrested, the United States Supreme Court had recognized that intrusions "under the skin" and into the body implicate the "most personal and deep-rooted expectations of privacy," and are governed by the Fourth Amendment to the United States Constitution. ***Winston v. Lee***, 470 U.S. 753, 760 (1985). *See also* ***Schmerber v. California***, ***supra***, 384 U.S. at 770.

In ***Schmerber***, the court considered various circumstances of the case to determine whether exigent circumstances justified a search without a warrant. It noted the possible loss of evidence resulting from alcohol dissipation, the likelihood that relevant evidence would be found, the manner in which the blood was drawn, and the fact that "for most people the procedure involves virtually no risk, trauma or pain." It noted that Mr. Schmerber was "not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing . . . ." ***Id.*** at 768-771. The court concluded that under the circumstances of that case, the blood draw was a reasonable search.

The Wisconsin Supreme Court interpreted ***Schmerber*** as holding that exigency was "caused solely by the fact that the amount of alcohol in a person's blood stream diminishes over time." ***State v. Bohling, supra***, 173 Wis. 2d at 539-540. However, the court also recognized the importance of other factors discussed in ***Schmerber***. It made religious or medical objections part of the analysis of exigent circumstances. The ***Bohling*** court concluded:

> Consequently, a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

173 Wis. 2d at 533-34.

The language of ***Bohling*** is important. By saying a warrantless blood draw "is permissible under the following circumstances" it requires that all four factors be present. It also establishes the presumption that the warrantless search is not permissible unless the state proves that all four factors were satisfied. That reading of the statute was recently confirmed in ***Kennedy***, which described blood draws under ***Bohling*** as "lawful so long as" the four factors were proved. ***Id.***, ¶ 28.

Using the ***Bohling*** test, police in this case failed to prove exigency justifying the intrusion of Mr. Warren's privacy, because he did have a reasonable objection to the blood draw.

One of the questions argued by the parties was whether the officer was obligated to ask Mr. Warren the reason for his objection to the blood draw, or whether Mr. Warren was responsible for spontaneously explaining it to the officer. (34:19). The circuit court suggested, by its comments, that the police were responsible for obtaining the information. The court concluded that the procedure manual the officer was following "ignored" the ***Bohling*** test. (36:23; App. 110). The court noted that the "informing the accused" form "doesn't have a box" for the arrestee's reason for refusing, and concluded that the form "needs to be amended." (36:23-24; App. 110-11).

The circuit court was right. Warrantless searches are per se unreasonable unless they fall into a recognized exception. ***Katz v. United States***, 389 U.S. 347, 357 (1967). Exceptions to the warrant requirement are "specifically established and well delineated." ***Id.*** It is the state's burden to prove facts that establish the exception. ***State v. Payano-Roman***, 2006 WI 47, ¶ 59, 290 Wis. 2d 380, 714 N.W. 2d 548.

Because the state bears the burden of proving the exception to the warrant requirement, it is the state's burden to gather the relevant information and consider that information in determining whether it is justified to conduct a search without a warrant. In this case, the state failed to do so.

Here, because the circuit court found that Mr. Warren had a valid medical reason to refuse a blood test, the state failed to meet its burden of proving exigent circumstances, using the factors set forth by the Wisconsin Supreme Court in ***State v. Bohling, supra.***

Therefore, the search which intruded into Mr. Warren's body and which implicated his "most personal and deep-rooted expectations of privacy," was an unreasonable and unconstitutional search. ***Kennedy, supra,*** ¶ 29.

C. The evidence of the constitutionally unreasonable search must be suppressed because the officer did not conduct the search in objectively reasonable reliance upon clear and settled precedent.

The usual remedy for a violation of the Fourth Amendment is exclusion of the evidence. However, the Wisconsin Supreme court has pointed out that the exclusionary rule is a "judicially created remedy," best applied when it serves to deter unlawful police conduct. ***State v. Foster, supra,*** 2014 WI 131, ¶ 47.

In ***Foster***, the court concluded that a warrantless blood draw, based upon "objectively reasonable reliance on the clear and settled precedent of ***Bohling***," was unconstitutional under ***McNeely***, but would not be subject to the exclusionary rule. ***Id.***, ¶ 56. *See also,* ***State v. Kennedy, supra,*** 2014 WI 132, ¶ 37 ("Where police officers have acted in accordance with clear and settled Wisconsin precedent, there is no misconduct to deter").

The opposite is true here. ***Bohling*** specifically set fourth four numbered criteria that had to be met for a warrantless blood draw to be "permissible." ***Id.,*** 173 Wis. 2d 529, 533-534. Police "ignored" the fourth criteria and ordered the blood draw without pausing to ask Mr. Warren about the reason for his denial. (36:23; App. 110). Rather than reasonable reliance on Wisconsin Supreme Court precedent, the state unreasonably ignored that precedent.

The circuit court took an unwarranted step, however, when it found that the individual officer had acted in good faith because he relied upon his local policy and procedure manual. The manual ignored the ***Bohling*** criteria. As summarized by the circuit court, it said, "blood shall be taken even if the suspect refuses consent." (36:23; App. 110).

The issue the court determines, in weighing the applicability of the exclusionary rule, is not whether an individual officer followed the local policy and procedure manual. Rather, the court must determine whether application of the exclusionary rule will deter law enforcement from willful or negligent action. ***Kennedy, supra,*** at ¶ 36.

The legal question is whether the officer acted in "objectively reasonable reliance upon clear and settled Wisconsin precedent." ***Id.,*** ¶ 37. Here, the local police manual wrongly interpreted the "clear and settled" precedent in ***Bohling.*** Because it did not accurately reflect the established law in Wisconsin, no officer could reasonably rely on the manual, rather than the Wisconsin Supreme Court's statement of the law.

Therefore, in this case, the application of the exclusionary rule would deter willful or negligent police conduct. It would require all Spooner police officers to ask suspects about their reasons for refusing the blood test, and to make a determination of the reasonableness of the response.

Therefore, the results of the unreasonable and unconstitutional search of Mr. Warren's body, should be suppressed.

CONCLUSION

For the reasons stated in this brief, Mr. Warren respectfully requests that the court vacate his conviction and order that the results of his blood test be suppressed.

Dated this 3rd day of February, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,066 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 February, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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.

Dated this 3rd day of February, 2015.

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