STATE OF WISCONSIN

WISCONSIN COURT OF APPEALS

DISTRICT III

Case No. 2014AP000792 – CR

WASHBURN COUNTY

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JAMES MICHAEL WARREN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE WASHBURN COUNTY CIRCUIT COURT, THE HONORABLE EUGENE D. HARRINGTON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Angeline E. Winton (#1060223)
Assistant District Attorney
Washburn County
PO Box 344
Shell Lake, WI 54871
1(715) 468-4670

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUE

I. Did Officer Ricci reasonably rely in good faith upon his knowledge of the binding legal precedent which existed on February 10, 2013 when he obtained the defendant's blood sample after the defendant refused, claiming he was not properly secured in the squad?

The trial court held: The defendant had a reasonable basis for refusing to consent to the blood draw but never expressed it to Officer Ricci. The trial court also held that the officer reasonably relied, in good faith, on the City of Spooner Police Department Policy and Procedures manual "in ignoring the four-part test of *Bohling*.." and therefore, relying upon the good faith doctrine, denied the defendant's motion to suppress.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent does not believe oral arguments are necessary in this case, because the briefs presented can fully address the issues and develop the theories and legal authorities on either side.

The respondent does not believe that the decision in this case should be published, because the issues on appeal can be resolved by the application of established legal principals to the facts of record.

STATEMENT OF THE CASE

Introduction

On the early morning hours of February 10, 2013, Spooner Officer Derek Ricci conducted a traffic stop on a vehicle James Warren was driving in the City of Spooner (34: 3-4). Accompanying Officer Ricci on the traffic stop was Officer Daniel Botty (34:6).

Although the initial reason for the stop was loud exhaust and unnecessary acceleration, Officer Ricci soon suspected that Mr. Warren was intoxicated (34:4). Officer Ricci's suspicions were based on the time of the defendant's driving, which was close to bar closing time, the location of Mr. Warren's vehicle in downtown Spooner, the odor of intoxicants emanating from the vehicle, Mr. Warren's watery eyes, his slurred speech, and the fact he was smoking a cigarette (34:4).

Based on his suspicions of intoxication, Officer Ricci had Mr. Warren perform a series of standardized field sobriety tests (34:4-5). Based on Mr. Warren's performance during those tests, Officer Ricci formed the opinion that Mr. Warren was indeed under the influence of alcohol, to such a degree he was not able to drive safely (34:5).

Officer Ricci then placed Mr. Warren under arrest, put him in the back seat of his patrol squad, secured the defendant's vehicle, and then transported him to the Spooner Emergency Room (34:5). At the Emergency Room, Officer Ricci was joined by Washburn County Sheriff's Department Deputy Wayne Johnston (34:6).

At the Emergency Room, Officer Ricci read the defendant the Informing the Accused and asked him to submit to an evidentiary test of his blood (34:6-7). When the defendant refused to provide a sample of his blood, Officer Ricci then proceeded to obtain the defendant's forced blood draw sample (34:6).

The criminal complaint, filed in this matter on March 5, 2013, described that when Officer Ricci informed the defendant he was going to have a forced blood draw performed, the defendant became so resistive and combative, that it created a disturbance at the Emergency Room (1:3). Following the blood draw, the defendant refused to walk and had to be carried to the squad car where he refused to enter the squad (1:3). Once he was placed inside the squad, the defendant continued resisting and began kicking and hitting

the cage so forcibly that he damaged part of the squad's plastic door sill (1:3).

At the ensuing July 1, 2013 motion hearing, the defendant testified he was not asked why he refused to take a blood test, while Officer Ricci read him the Informing the Accused (34:7). During the ride to the Emergency Room, however, the defendant spontaneously told Officer Ricci he would not submit to a blood test because he was not secured by a seatbelt while he was transported in the officer's squad (34:19). As Officer Ricci further explained, the defendant specifically volunteered that because he was unsecured, the Officer could not take his blood, and the defendant knew his rights (34:7).

Despite never having mentioned any fears associated with having his blood drawn on the date of the incident, the defendant nonetheless testified at the eventual motion hearing that he had back fusion surgery on December 18, 2012, was given discharge instructions which advised him to watch for redness, swelling and a high temperature, and in fact said he had some issues with infection between December 2012 and February 2013 and thereafter (34:14; 17; 21).

On July 1, 2013, however, both Officer Ricci and the defendant testified that the defendant never mentioned any fear of infection, medical reason, or even a generalized fear of having his blood draw at any time as he was transported to the hospital, when he arrived at the hospital, or when Officer Ricci went through the Informing the Accused document (34:7; 18-19).

Ultimately, the defendant was charged in Washburn County Case 13CT17 with Count 1: Operating a Motor Vehicle While Intoxicated-3rd Offense and Count II: Operating with a Prohibited Alcohol Concentration-3rd Offense (1:2).

On September 20, 2013, during a hearing to determine the basis for Officer Ricci's reliance on the former case law, *Officer* Ricci testified he had familiarized himself with cases dealing with OWI related blood draws and had been told about the four-part test (36:8). Officer Ricci also testified, however, that he did not know that the fourth part of the analysis was that the arrestee presents no reasonable objection to the blood draw (36:9).

The trial court ultimately found that the City of Spooner Police Department Policies and Procedurals Manual

indicated only that "if the subject refuses to allow blood to be taken, it can be taken as evidence of a crime" and that "on a second or – offense or higher where there is an OWI test refusal, blood shall be taken even if the suspect refuses consent" (36:12; 15).

Disposition in Trial Court

On August 26, 2013, the Honorable Eugene D. Harrington found Officer Ricci had reasonable suspicion to conduct the traffic stop and had probable cause to ultimately arrest the defendant (29:6).

Regarding the blood draw, the trial court specifically found that the Informing the Accused was read to the defendant, and that although the defendant told the officers he did not want his blood drawn, "the Defendant did not express to the officers his health reasons for refusing to submit to the blood sample" (29:6). The trial court noted "[a]s it turned out, the Defendant did have a valid reason to decline. He recently had surgery where postoperative instructions included that he avoid any risk of infection (29:6).

The trial court concluded the officers made no effort to procure a search warrant prior to the blood draw and there were no exigent circumstances present (29:8).

Finally, the court explained the following about the officer's reasonable reliance:

> .. [A] reasonable reliance presumably means the officers knew or had been previously informed about the case in Wisconsin. The cases in Wisconsin are *Bohling* and *Faust*, where in *Bohling* the Supreme Court essentially adopted the per se rule that alcohol in the blood stream dissipates at such a rate that law enforcement officers did not need a warrant to involuntarily take the blood draw..

(29:8).

In discussing whether the Informing the Accused document complies with the criteria set forth in *Bohling*, the trial court noted, "well, but the form does follow *Bohling* because *Bohling* says it's a per se exigent circumstance. The alcohol dissipation from the blood on a fairly quick basis, in and of itself, is an exigent circumstance authorizing the warrantless blood draw" (29:11).

Finally, on September 20, 2013, the trial court concluded that the officer reasonably relied upon the procedure outline in the Spooner Police Department Manual

"in ignoring the four-part test of *Bohling* and the warrant requirement" (36:23).

The court focused on the fact that Officer Ricci, a relatively young officer, should have, in good faith, been able to rely upon the Department of Transportation and the State Supreme Court to provide him with the appropriate forms and he should not have been expected to change the Informing the Accused (36:24).

ARGUMENT

I. The trial court properly denied the defendant's suppression motion because although he may have secretly had a medically-based objection to the blood draw, he never conveyed that objection to Officer Ricci who then properly proceeded, in good-faith reliance on *Bohling*, to draw the defendant's blood.

A. The law and standard of review.

On appeal, the trial court's findings of fact are upheld unless they are clearly erroneous while its applications of law are reviewed de novo. *State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis. 2d 252, 261, 786 N.W.2d 97, 102.

On January 26, 1993, the Wisconsin Supreme Court in *State v. Bohling* held that "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw". *State v. Bohling*, 173 Wis. 2d 529, 533, 494 N.W.2d 399, 400 (1993). Specifically, the Wisconsin Supreme Court held:

> [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.

Bohling, 173 Wis. 2d 529, 533-534, 494 N.W.2d 399, 400.

Until recently, when the United States Supreme Court made its determination in *Missouri v. McNeely*, for approximately twenty years, *Bohling* remained good law in Wisconsin. Relying upon that law, officers permissibly obtained blood in Operating While Intoxicated related cases from defendants even when they refused to comply. *Id.*

On April 17, 2013, however, the United States Supreme Court effectively overruled *Bohling*, holding instead that although in some instances the dissipation of alcohol from an arrestee's blood stream may constitute exigent circumstances, there is no categorical exigency that supports a

forced blood draw in every case where an owi-related arrestee refuses to provide a blood sample. *Missouri v. McNeely*, 133 S. Ct. 1552, 1563 (2013).

This drastic shift in the law, however, created uncertainty for those cases pending when *McNeely* was decided, because members of law enforcement, such as Officer Ricci here, followed procedures developed to comply with *Bohling* at the time of the incident. Before those cases concluded, however, *McNeely* dictated that those previously acceptable procedures were no longer proper. *McNeely*, 133 S.Ct. 1552 (2013).

On December 26, 2014, clarifying this uncertainty, the Wisconsin Supreme Court determined that *McNeely* applied retroactively to those cases currently pending as *McNeely* was being decided. *State v. Foster*, 2014 WI 131, ¶ 8, 856 N.W.2d 847, 851.

Perhaps more importantly, the *Foster* Court also determined that the good faith exception to the exclusionary rule applies to those cases which began when *Bohling* was still considered good law but which had not concluded when *McNeely* was decided. *Foster*, 2014 WI 131, ¶ 8.

As a result, the Wisconsin Supreme Court concluded that blood draw evidence taken by officers prior to the *McNeely* law change should not be suppressed as long as law enforcement acted "in objectively reasonable reliance on the clear and settled precedent of *Bohling* in effectuating the search and seizure". *Id.*

B. The trial court appropriately found that the defendant refused to consent to the blood draw, and the only reason he expressed for his refusal was that he was not properly seated in the squad.

For purposes of this appeal, the only *Bohling* factor the defendant-appellant has placed in contention is whether the arrestee presented a reasonable objection to the blood draw.

In the present case, therefore, the context of the trial court's findings is particularly significant. Judge Harrington properly found that the defendant never told the officers that he was refusing to allow his blood to be drawn because he feared infection (29:6). The only reason the defendant presented to Officer Ricci for his refusal was that he wasn't seat belted in the squad during transport (34:7).

Instead, reviewing the complete record, the uncontroverted testimony of both Officer Ricci and the defendant make it indisputable that the defendant's claimed

risk of infection was not verbalized to any of the law enforcement officers on scene, or at the time of the blood draw, and it only materialized weeks later during motion practice (29:6; 34).

Focusing on the only reason that the defendant presented to the officer for his refusal, namely that he wasn't seat-belted in the back of the squad, this was not a reasonable basis for ignoring the Implied Consent Law, nor does defendant claim it was.

Thus, the trial court properly found, for purposes of *Bohling*, that the arrestee did not present to Officer Ricci any objectively reasonable basis for his refusal.

C. Officer Ricci did not ignore the four-factor test in *Bohling*, and therefore the trial court properly determined that the officer reasonably relied in good faith upon his knowledge of the binding legal precedent in place on February 10, 2013.

Here, the defendant appears to claim the trial court erred in failing to suppress the blood draw evidence, because the defendant argues that the fourth criterion in *Bohling* was ignored.

Unfortunately, however, both the defendant and the trial court misunderstood this issue, by focusing, not on what

the defendant presented to the officer on the date of the blood draw in way of a reason for his refusal, as the plain language of *Bohling* requires, but rather on what the officer asked or did not ask of the defendant. *Bohling*, 173 Wis.2d at 534. This analysis inappropriately shifts the burden from the defendant who properly must express himself in this regard, instead to the officer, who would, in that case, be expected to know information concealed within the mind of the defendant.

While it is the state's burden to show the factual circumstances supporting an exigency to the warrant requirement, *Bohling* specifically addresses the required exigent circumstances which support a forced blood draw. *Bohling*, 173 Wis. 2d 529, 533-534, 494 N.W.2d 399, 400; *State v. Payano-Roman*, 2006 WI 47, ¶ 59, 290 Wis. 2d 380, 405-06, 714 N.W.2d 548, 561.

Analysis of *Bohling* reveals that the fourth criterion is that "the arrestee presents no reasonable objection to the blood draw". *Bohling*, 173 Wis. 2d 529, 533-534, 494 N.W.2d 399, 400.

Had the Wisconsin Supreme Court wanted the officer, to not only consider the reasons the arrestee presents for

his/her refusal, but also to further inquire of the arrestee if he/she also has a previously undisclosed reasonable objection to the blood draw, surely the Court would have phrased the fourth criterion in that manner. Instead, it is evident from *Bohling* that the arrestee, rather than the officer, must himself/herself present no reasonable objection. *Id.* Reaching any other conclusion on this issue not only contorts the clear language of *Bohling* but would also impose an impossible and unreasonable burden on law enforcement to be clairvoyant and know everything about a particular arrestee's circumstances, which they have failed to disclose themselves.

Indeed, *Bohling* makes sense because were the arresting officer burdened by having to ask the arrestee such a leading question, without a doubt most arrestees would, on the spot, manufacture some medically based reason for their refusal and thus circumvent the intent of *Bohling*.

Once again, it's important to keep in perspective what the *Bohling* decision did and did not do. *Bohling* was meant to facilitate the efficient collection of evidence in intoxicated driving cases in light of the recognized dissipation of alcohol

in an arrestee's blood stream. *Bohling*, 173 Wis. 2d 529, 533, 494 N.W.2d 399, 400.

Bohling certainly did not make it legal to defy the Implied Consent Law, encourage arrestees to manufacture reasons for refusals, or otherwise shift the burden to law enforcement to make a detailed inquiry about why the arrestee was ignoring the law by refusing.

Instead, the forth criteria of *Bohling* was created to recognize the limited circumstances in which a defendant refuses to consent to a blood draw and clearly expresses an objectively reasonable basis for his/her objection at the time of the blood draw. *Bohling*, 173 Wis. 2d 529, 533-534, 494 N.W.2d 399, 400.

Again, applying common sense, the language of *Bohling* indicates an officer may proceed to do a forced blood draw if the other three criteria are met and "the arrestee presents no reasonable objection to the blood draw". *Bohling*, 173 Wis. 2d 529, 533-534, 494 N.W.2d 399, 400. This language presupposes that a reasonable objection has to be verbalized by the defendant so the officer is made aware of it at the time of the blood draw, in order for him to make a determination of whether he can or cannot proceed.

Therefore, the analysis is not, whether weeks or months later an arrestee remembers that he may have had a previously undisclosed reasonable excuse for his earlier refusal, but rather did the arrestee, at the time of the blood draw, tell the officer that he/she had a reasonable basis for refusing to want his/her blood drawn. Hence, it is just as irrelevant now on review, as it was during the original suppression motion, that the defendant apparently had some medically-based reason to object to the blood draw but never verbalized the reason to Officer Ricci.

Indeed, in 2002, the Wisconsin Supreme Court made a similar determination when it specifically analyzed the fourth *Bohling* criterion. *State v. Krajewski*, 2002 WI 97 ¶ 49, 255 Wis. 2d 98, 125, 648 N.W.2d 385, 396. In *Krajewski,* at the time of his arrest the defendant explicitly requested to take a breath test, instead of the blood draw, because of fear of needles. *State v. Krajewski*, 2002 WI 97 ¶ 49. The Wisconsin Supreme Court placed the burden squarely on Krajewski, noting that "[t]he record does not provide evidence that *Krajewski*, explained the reason for his alleged fear"… *Id.*

In reaching its ultimate determination that the blood draw complied with *Bohling* and thereby affirming the Court of Appeals, in its reversal of the trial court's suppression of the evidence, the *Krajewski* Court considered *State v. Krause. State v. Krajewski*, 2002 WI 97 ¶¶50; 65.

In *State v. Krause*, the arrestee told law enforcement he "did not believe in needles and that he did not want to get *AIDS*. *State v. Krause*, 168 Wis. 2d 578, 585, 484 N.W.2d 347, 349 (Ct. App. 1992).

In 2002, the Wisconsin Supreme Court discussed *Krause*, noting, "The court of appeals correctly observed that 'These isolated comments do not establish that Krause is "one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing."'" *State v. Krajewski*, 2002 WI 97 ¶50.

As explained above, here the only reason the defendant presented to Officer Ricci for his refusal was that he believed his rights were violated, because the officer had not seat-belted him into the squad during the ride from the scene of the stop to the Spooner ER (34:7). Unlike in *Krajewski* or *Krause*, here at the time of the blood draw, the defendant

made no mention of a fear of needles, a preference for another test, much less a fear of infection.

Therefore, as officer complied with the fourth criterion set forth in *Bohling*, rather than ignoring it, because the defendant presented no reasonable objection to the blood draw at the time of the incident, the trial court properly found that the good faith exception applies, and the blood draw evidence should not be suppressed.

CONCLUSION

For the reasons stated herein, the respondent respectfully requests that this court affirm the trial court's decision not to suppress the blood draw evidence and the defendant's conviction.

Dated this 1st day of April, 2015.

Respectfully Submitted,

Angeline E. Winton
Assistant District Attorney
Washburn County, Wisconsin
State Bar Number 1060223
P.O. Box 344
Shell Lake, Wisconsin 54871
1 (715) 468-4670
angeline.winton@da.wi.gov

Attorney for Plaintiff- Respondent

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wisconsin Statute section 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif, 13 point font. The length of this brief is 18 pages and it contains 3, 164 words.

Dated this 1st day of April, 2015.

Angeline E. Winton
Assistant District Attorney
Washburn County, Wisconsin
State Bar Number 1060223
P.O. Box 344
Shell Lake, Wisconsin 54871
1 (715) 468-4670
angeline.winton@da.wi.gov

Attorney for Plaintiff- Respondent

CERTIFICATE OF SERVICE

I, Angeline E. Winton, hereby certify that I served three true and correct copies of the brief of Plaintiff-Respondent, State of Wisconsin, via U.S. mail on this date to the following:

Eileen A. Hirsch
Attorney for the Defendant-Appellant
Assistant State Public Defender
Office of the State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Dated this 1st day of April, 2015.

Angeline E. Winton
Assistant District Attorney
Washburn County, Wisconsin
State Bar Number 1060223
P.O. Box 344
Shell Lake, Wisconsin 54871
1 (715) 468-4670
angeline.winton@da.wi.gov

Attorney for Plaintiff- Respondent

CERTIFICATE OF E-FILING

I, Angeline E. Winton, hereby certify that I have filed an identical copy of this document with the e-filing system.

Dated this 1st day of April, 2015.

Angeline E. Winton
Assistant District Attorney
Washburn County, Wisconsin
State Bar Number 1060223
P.O. Box 344
Shell Lake, Wisconsin 54871
1 (715) 468-4670
angeline.winton@da.wi.gov

Attorney for Plaintiff- Respondent