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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

Although the state's brief discusses a wide variety of issues, the two points of disagreement are straightforward: (1) whether Mr. Warren forfeited his Constitutional right to privacy because he did not affirmatively assert a reasonable objection before the blood was drawn, and (2) whether the evidence should be suppressed when an officer relies on a local police procedure that contradicts controlling state law.

B. Mr. Warren did not forfeit his Fourth Amendment protection from unreasonable searches when he did not affirmatively assert a reasonable objection before his blood was drawn.

Both parties agree that the controlling state law at the time police drew Mr. Warren's blood, was the Wisconsin Supreme Court decision in ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W. 2d 399 (1993).

The ***Bohling*** decision is grounded in the constitutional principle that warrantless searches are presumably unreasonable. However, it carved out an exception making warrantless blood draws "permissible under the following circumstances," and set forth the four factors necessary to create the exception. The court's decision maintains the required Fourth Amendment analysis, placing the burden on

the state to prove that a warrantless search was nevertheless reasonable. Using the ***Bohling*** test, police in this case failed to prove exigency justifying the intrusion of Mr. Warren's privacy, because they failed to prove that he did not have a reasonable objection to the blood draw.

The state argues that Mr. Warren forfeited his Fourth Amendment right to privacy because he did not affirmatively assert a reasonable objection before his blood was drawn. It argues that the language of ***Bohling***, that the "arrestee *presents* no reasonable objection," (emphasis added) supports its position because "presents" indicates an affirmative burden. The flaw in this argument is that ***Bohling*** does not say "arrestee presents no reasonable objection *before* the blood is drawn." The decision does not specify when the arrestee must present his reasonable objection.

The rule in Fourth Amendment cases is that evidence relevant to the constitutionality of a search is presented by the state and the defendant at a hearing on a motion to suppress evidence resulting from the search. Therefore, ***Bohling*** should be interpreted as placing the burden on the defendant to *present* evidence of a reasonable objection at the suppression hearing. There is no language in ***Bohling*** suggesting that the court intended to stand Fourth Amendment procedure on its head by requiring presentation of a reasonable objection before the search.

The state argues that decision in ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W. 2d 385, supports its argument. To the contrary, ***Krajewski*** did not address the issue raised in this case. The issue in ***Krajewski*** was whether his "fear of needles" and offer to take a breath test instead of a blood test, was a reasonable objection. The court held that it was not, interpreting the reasonable objection to be limited

to a person who is a hemophiliac or "suffers from some other ailment that renders him or her unable to reasonably submit to a blood test." ***Id.***, ¶ 52.

The reasonableness of Mr. Warren's objection is not the subject of this appeal. The circuit court made a finding that Mr. Warren's recent surgery and the danger of infection constituted a reasonable objection, and the state has not argued that the fact finding was clearly erroneous. The issue in this case is the timing of the objection, and that question was not addressed by the ***Krajewski*** decision.

State v. Krause, 168 Wis. 2d 578, 484 N.W. 2d 347 (Ct. App. 1992), also cited by the state, offers no support for its argument. As in ***Krajewski,*** the question was the reasonableness, not the timing, of the defendant's objection.

The state makes two additional arguments, one based on the perceived purpose of the ***Bohling*** decision, one based on speculation. As to purpose, the state is wrong when it argues that ***Bohling*** "was meant to facilitate the efficient collection of evidence in intoxicated driving cases . . . ." (Brief, p. 14). If that had been its sole purpose, it would not have placed any restrictions on blood draws. Instead, it set forth four requirements, in an effort to balance the need to facilitate efficient collection of evidence with the Constitutionally-protected right of personal privacy. Respect for state and federal privacy interests and the goal of balancing privacy concerns with law enforcement needs, pervades the ***Bohling*** decision, from the first paragraph to the last. ***Id.,*** 173 Wis. 2d 533-548.

As to practical concerns, the state alleges that requiring an arresting officer to ask the arrestee the "leading question" whether he has a reasonable medical or religious objection to the blood draw would result in "most arrestees" inventing

some valid objection "on the spot." (Brief, p. 14). First, the question as to medical or religious objections is not leading. Second, the state asks the court to speculate, without any evidence supporting the speculation, that an intoxicated arrestee could instantaneously invent a convincing basis for an objection.

Most importantly, however, the state's argument supports Mr. Warren's interpretation of the statute. An objection to a blood draw should be presented in a court hearing, at which the credibility and reasonableness of the objection can be determined by the court. The suppression hearing is the proper place and time for presentation of the objection.

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 state's brief concludes that the "good faith" exception to the rule of suppression applies, but does not address the applicable legal analysis.

As stated in Mr. Warrant's brief-in-chief, suppression is not a remedy to be applied "[w]here police officers have acted in accordance with clear and settled Wisconsin precedent." ***State v. Kennedy,*** 2014 WI 132, ¶ 37, 359 Wis. 2d 454, 856 N.W. 2d 834. The clear and settled precedent, as the court held in ***Kennedy***, was the decision in ***Bohling. Id,*** ¶ 37.

Here, as the circuit court correctly commented, police "ignored" the fourth criteria of ***Bohling***, 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 clear and settled precedent, the state unreasonably ignored that precedent.

The officer's reliance on a local police manual that also "ignored" the holding in ***Bohling*** and directed all officers to order a blood draw even in the face of a reasonable objection, does not meet the objective test for "good faith" reliance. In light of clear and settled precedent, ordering a blood draw ordered despite a reasonable objection, violated Mr. Warren's right to privacy.

CONCLUSION

For the reasons stated in this brief and in his brief-in-chief, Mr. Warren's the blood draw in this case unreasonably interfered with his right to privacy under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Therefore, he respectfully requests that the court vacate his conviction and order that the results of his blood test be suppressed.

Dated this 17th day of April, 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 1,207 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 17th day of February, 2015.

Signed:

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