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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014AP962CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDALL L. SHEPARD,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON JANUARY 29, 2014 IN THE CIRCUIT COURT FOR MARQUETTE COUNTY, THE HON. BERNARD BULT PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully Submitted,

STATE OF WISCONSIN
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STATEMENT OF ISSUES FOR REVIEW

I. Did the circuit court erroneously deny the Defendant's Motion to Suppress - Blood Test Results based upon the good faith exception?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin (herein after "State") recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought. The State does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF CASE

I. PROCEDURAL BACKGROUND

The matter before the Court is brought by Defendant Appellant Randall L. Shepard (hereafter "Shepard") after the circuit court denied his Motion to Suppress - Blood Test Results. R. 26. This was after briefing by the parties and after further argument at a hearing on September 26, 2013. R. 32. Shepard subsequent plead no contest to the charge of Operating with a Prohibited Alcohol Concentration as a fourth offense on January 29, 2014. R. 33. He then filed his Notice of Intent to Pursue Postconviction Relief and this appeal followed. R. 38, 39.

II. FACTUAL BACKGROUND

On March 25, 2012, at approximately 6:41 p.m., Marquette County Sheriff's Deputy Mike Ciezadlo was dispatched to a one car roll over on CTH E in the Town of Newton, Marquette County, Wisconsin. R.30, p. 8. There he came into contact with the defendant, Randall Shepard who said he had been driving and swerved to miss a deer that ran into the road. Deputy Ciezadlo observed Shepard's eyes to be bloodshot and glossy and detected an odor of an intoxicant as he stood closer to him. *Id.* Shepard admitted to finishing off an 18 pack of Old Milwaukee beer with a friend and admitted to drinking between approximately noon and 5:30 or 6:00 that evening. R.30, p. 9. Shepard then performed field sobriety testing and Deputy Ciezadlo observed multiple clues on each test. R.30, p. 9-10.

Then, Shepard refused to submit to a preliminary breath test (PBT). R.30, p. 11. Based on his observations of Shepard and the results of the field sobriety testing, Deputy Ciezadlo placed Shepard under arrest. He then subsequently read him the informing the accused form and Shepard refused an evidentiary test of his blood. A sample of his blood was then taken without a warrant. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

A court should uphold the circuit court's findings of fact unless those findings are clearly erroneous. *See State v. Hindsley*, 2000 WI App 130, ¶ 22, 237 Wis.2d 358, 614 N.W.2d 48. The court will determine independently whether the facts found by the circuit court satisfy applicable constitutional principles. *Id*.

II. THE GOOD FAITH DOCTRINE APPLIES TO THE WARRANTLESS DRAW OF SHEPARD'S BLOOD.

A. Exigency, Other Than Normal Dissipation, Is Not the Issue Before This Court.

Shepard spent a good portion of his argument setting forth the reasons why exigency does not allow warrantless blood draws. App. Brief, pp. 12-19. However, as he noted at the beginning of that argument, the State conceded and continues to concede that under the current state of the law after *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (decided April 17,

2013)., the actions taken by Deputy Ciezadlo would not survive a suppression motion if the actions had been taken after the finding in *McNeely*. In conceding the point, the State would note that this concession relates to the scenario if the fact scenario was occurring now. This is not meant to imply that prior to *McNeely* that there would not have been exigency based on the natural dissipation of alcohol from one's blood.

Prior to the Supreme Court decision in *McNeely*, Wisconsin had one well-established exception to the warrant requirement. This exception was a warrantless blood draw conducted pursuant to exigent circumstances. *See State v. Bohling*, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993) (holding that "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw" if there is a lawful arrest and clear indication that the blood draw will produce evidence of intoxication); and *State v. Thorstad*, 2000 WI App 199, ¶17, 238 Wis. 2d 666, 618 N.W.2d 240 (holding that it is a reasonable search to withdraw blood without a warrant incident to a lawful OWI arrest).

The only real issue before this Court is whether the actions taken by Deputy Ciezadlo are covered by the good faith exception to the exclusionary rule.

B. Deputy Ciezadlo Actions Are Covered by the Good Faith Exception.

The parties stipulated to the facts as set forth in the police report of Deputy Ciezadlo. Shepard argues that:

> The officer did not allege he was following *Bohling, supra*. He merely said he was doing a forced blood draw due to the Implied Consent Law. The Implied Consent Law, however, does not say that blood can be taken from an individual who refuses an evidential test.

App. Brief, p. 19

This argument ignores the reality of law enforcement. Just because Deputy Ciezadlo did not state something similar to "Relying on Bohling, I decided to go ahead with a warrantless blood draw," does not mean that this court should interpret the situation any differently. Shepard seems to ask this court to make a finding that an officer should clearly state what legal basis he or she is acting upon as a reason for a warrantless blood draw for it to survive. However, that is not reasonable and is not the state of the law. In *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 the court noted that the test for determining whether an officer's reliance on current precedent was reasonable "is an *objective* one, querying 'whether a reasonably well trained officer would have known that the search was *illegal* ' in light of 'all of the circumstances.'" *Id.* (quoting ***Herring v. United States***, 555 U.S. 135, 145, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (emphasis added). As the United States Supreme Court stated in *Herring*, a case relied upon by the *Dearborn* court, "evidence should be suppressed *'only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search

was *unconstitutional* under the Fourth Amendment.'" *Herring*, 555 U.S. at 143 (emphasis added). The circuit court in this case made a factual finding that Deputy Ciezadlo had acted according to settled precedent: "Looking at the limited record that I have before me, the officer's report, I do find that the officer did conduct his search in an objectively reasonable reliance upon the precedent." R. 32, p.10.

Wisconsin courts have recognized the "good faith" exception to the exclusionary rule when officers act with a reasonable reliance on settled law that is subsequently overruled. *See State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517 and *Dearborn*, 2010 WI 84, ¶ 4, (holding that "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the Supreme Court").

This court has been active in 2014 in cases that consider the numerous cases that were pending when *McNeely* was decided.

In *State v. Reese*, 2014 WI App 27, 353 Wis.2d 266, 844 N.W.2d 396, this very question was dealt with. Reese sought suppression related to a warrantless blood draw because although the blood sample was obtained consistent with the supreme court's long-standing holding in *Bohling* that the natural dissipation of alcohol alone constitutes an exigent circumstance justifying a warrantless blood draw, Reese's case was still pending when the

United States Supreme Court in *McNeely* rendered *Bohling* bad law. *Reese*, 353 Wis.2d 266, ¶¶ 1, 18–19, 844 N.W.2d 396. This court held in *Reese* that evidence related to the blood sample should not be excluded because "[a]t the time of the blood draw the officer was following clear, well-settled precedent established by the Wisconsin Supreme Court, which [as the supreme court stated in *Dearborn*] 'is exactly what officers should do.' " *Reese*, 353 Wis.2d 266, ¶ 22, 844 N.W.2d 96 (quoting *Dearborn*, 327 Wis.2d 252, ¶ 44, 786 N.W.2d 97).

The *Reese* court concluded that any deterrent effect on officer misconduct, "which our supreme court characterized as 'the most important factor' in determining whether to apply the good faith exception, would, as in *Dearborn*, be nonexistent in this case because the officer did not and could not have known at the time that he was violating the Fourth Amendment." *Reese*, 353 Wis.2d 266, ¶ 22, 844 N.W.2d 396 (quoting *Dearborn*, 327 Wis.2d 252, ¶ 49, 786 N.W.2d 97). That is exactly the case that is before this court. This case is also similar to four cases decided by the Court of Appeals this year. The four cases, along with the *Reese* case, all dealt with the same situation facing this court; blood draw cases that were pending at the time of McNeely and all found that the good faith exception applied. The four following cases are all unpublished , given for persuasive value and attached in Respondent's Appendix; *State v. Morton*, No. 2013AP2366–CR, unpublished slip op., (WI App April 17, 2014);

County of Waukesha v. Patel, No. 2013AP2292, unpublished slip op., (WI App May 14, 2014); *State v. Godard*, No. 2014AP396–CR, unpublished slip op., (WI App August 28, 2014); *State v. Thom*, No. 2014AP613, unpublished slip op., (WI App September 9, 2014). Though Shepard may want this court to come to a different result, the facts and law do not support overturning the factual findings made by the circuit court.

CONCLUSION

For the above stated reasons the State requests that this Court affirm the trial court's denial of Shepard's Motion to Suppress - Blood Test Results.

Respectfully Submitted this 3rd day of November, 2014.

STATE OF WISCONSIN

By:_____

Chad A. Hendee
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this entire document is 1634 words.

I hereby certify that filed as a part of this brief is a supplemental appendix that complies with s. 809.19 (2) (a) and that contains, (1) a table of contents; (2) 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 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 November, 2014.

By: _____

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, 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 November, 2014.

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