STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014 AP 962 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RANDALL L. SHEPARD,

Defendant-Appellant

REPLY BRIEF OF 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.

Respectfully submitted,

RANDALL L. SHEPARD,
Defendant-Appellant

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ARGUMENT

I. THE GOOD FAITH DOCTRINE DOCTRINE DOES NOT APPLY TO THE BLOOD DRAW IN THIS CASE.

As noted in Shepard's original brief, the defense concedes that the case of *State v. Reese*, 353 Wis. 2d 266, 844 N.W.2d 396 (Ct. App. 2014) and the unpublished cases the State cites relying upon *Reese* apply to the situation in the instant case. Specifically, this Court has found that police officers in cases prior to *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013) were acting in good faith if they requested blood draws from operating while under the influence of an intoxicant arrestees in accordance with *State v. Bohling*, 173 Wis. 2d 529, 454 N.W.2d 395 (1993) and its progeny. *Bohling* permitted warrantless blood draws in these situations on a theory that the natural dissipation of alcohol alone constitutes exigent circumstances.

As noted in Shepard's original brief, the Wisconsin Supreme Court heard arguments in three cases which should determine once and for all whether the good faith doctrine excuses such violations of *McNeely, supra*. Those are the cases of State vs. Tullberg, appeal number 12 AP 1593-CR, State v. Foster, appeal number 11 AP 1673-CR, and State v. Kennedy, appeal number 12 AP 523-CR. Thus,

Shepard raises the issue of whether good faith can ever apply to an operating a motor vehicle while under the influence of an intoxicant warrantless blood draw taken in violation of *McNeely* to preserve his rights should the Wisconsin Supreme Court determine that good faith should not apply. Since the State has conceded there were no exigent circumstances in this case justifying a warrantless blood draw and relies upon a good faith argument only, no further argument is needed as to that first issue.

The second issue the parties have addressed is whether this officer was actually relying on established precedent, a prerequisite to a finding of good faith. The State argues this officer was relying on *Bohling*, *supra* and those cases holding that mere dissipation of alcohol was sufficient for a finding of exigent circumstances. Shepard disagrees.

The State argues the trial court made a factual finding that the search was conducted in objectively reasonable reliance upon precedent; however, the trial court's finding could also be deemed a legal conclusion, which is subject to a *de novo* review. To the extent that the trial court factually found something that was not in the stipulated police reports, that would be a clearly erroneous finding. See: *State v. Hindsley*, 237 Wis. 2d 358, 614 N.W.2d 48 (Ct. App.

2000). The officer states in the police report "Randall asked what's going on and I informed him of the Wisconsin Implied Consent law and informed him we would be going into the hospital for a blood draw." R. 26, p. 6 of narrative; R. 30. The State does not dispute the officer said he was doing the draw based upon the Implied Consent Law. The trial court held the draw was in reliance upon precedent, but the Implied Consent Law does not mandate or permit a blood draw after refusal. See: Wis. Stat. §343.305. The Implied Consent Law contemplates refusals and the penalties for refusing but is silent as to whether a test can be forced without warrant after a refusal.

The fairest reading of what the trial court did was find that generally good faith applies in warrantless blood draw cases pre-*McNeely*. The court noted the limited record, but that is what the parties stipulated to as evidence for the motion. As noted in Shepard's original brief, the officer was mistaken that the Implied Consent Law permits warrantless blood draws upon refusal. It was caselaw that permitted such draws, not the Implied Consent Law. The State did not dispute that argument in its brief. Shepard also made a reasonable objection to the forced blood—he did not want to give blood, given that he had a right to refuse; and he also wanted to speak with his wife and power of attorney. The State does not

dispute the argument that this was a reasonable objection, and that even under *Bohling, supra*, a reasonable objection mandates blood not be taken without warrant from an arrestee. Failure to dispute claims amounts to a concession of the claim. See: *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 297 N.W.2d 493 (Ct. App. 1979).

It is true that one of the unpublished cases cited by the State, *County of Waukesha v. Patel*, 354 Wis. 2d 624, 848 N.W.2d 905 (Ct. App. 2014) (unpublished but citable as persuasive authority) indicated that the officer did not have to specifically cite *Bohling* for good faith to apply.[1] However, the officer in that case and those in all the others cited by the State were not in violation of *Bohling*, as was this officer. If good faith is found to apply, those police departments with policies following *Bohling* will have those pre-*McNeely* warrantless blood draws excused. However, in a case such as the instant one where an improper basis for doing such a draw was asserted by the police, good faith should never excuse that behavior.

[1] The case of *State v. Morton*, 354 Wis. 2d 326, 847 N.W.2d 427 (Ct. App. 2014) (unpublished but citable as persuasive authority) attached to the State's brief actually notes that good faith applies to those situations where the "appellant has not argued that the officer was not following clear, well-settled Wisconsin precedent when obtaining the warrantless blood draw". (p. 7). In this case appellant has argued this officer did not follow clear precedent; thus, this is an issue for this Court to decide.

Good faith is a doctrine that is not intended to be used to excuse all police Fourth Amendment violations. This officer's own statements indicate he was not forcing a warrantless blood draw on Shepard for any reason permitted by law at any time in Wisconsin jurisprudence. Thus, the result of the blood draw should have been suppressed. Because Shepard would not have entered a plea to the charges had that blood draw result been suppressed, and the remaining evidence would have been insufficient to convict at trial, this Court should reverse.

CONCLUSION

For the reasons stated in this and appellant's original brief, Shepard respectfully requests this Court reverse the conviction and the trial court's denial of the suppression motion, with instructions to remand to the trial court with an Order suppressing the results of the warrantless blood draw.

Dated at Madison, Wisconsin, December 17, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,341 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: December 17, 2014.

Signed,

_____

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