RECEIVED
10-03-2014
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2014 AP 1193-CR
Trial Court Case No. 12 CT 15

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TYLER M. PASCH,

Defendant-Appellant.

CORRECTED BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Pierce County
The Honorable Joseph D. Boles Presiding

Respectfully Submitted:

Lanning Law Offices, LLC
2100 Gateway Court, Suite 200
West Bend, WI 53095
Telephone: (262) 334-9900

By: **Chad A. Lanning**
State Bar No. 1027573
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases:

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED WHEN IT APPLIED THE GOOD FAITH EXCEPTION TO A WARRENTLESS "COMPELLED BLOOD DRAW" AFTER THE STATE CONCEEDED IT DID NOT WANT A "MCNEELY-TYPE HEARING"?

Trial Court Answered: **No.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes publication of this case is warranted. Pursuant to Rule 809.23(1)(a), Stats., this case involves an issue of first impression. Notably, while the Court of Appeals recently held that the "good faith exception to the exclusionary rule" articulated in *State v. Dearborn*, 2010 WI

84, 327 Wis. 2d 252, 786 N.W.2d 97, could be applied in a forced blood draw case, the *Reese* decision failed to consider that *State v. Bohling,* was **never** good law, i.e, it always violated the Fourth Amendment (and Art. 1, sec. 11, Wis. Const.), and was from its onset contrary to previous controlling United States Supreme Court decisions. *See generally State v. Reese*, 2014 WI App 27, ¶18-19, 353 Wis. 2d 266, 844 N.W.2d 386, *see also Schmerber v. California*, 384 U.S. 757 (1966).[1]

More importantly, the *Reese* decision failed to consider that the State did not have clean hands in applying the good faith exception. In other words, the State argued and successfully induced the *Bohling* Court into making a decision that violated the Fourth Amendment (and Art. 1, sec. 11, Wis. Const.) and the State has subsequently been violating the citizens' of Wisconsin

1 As the Unitied States Supreme Court noted in *Missouri v. McNeely*, "*Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw." *Missouri v. McNeely*, 133 S.Ct. 1552, 1557(2013)(affirming the Missouri Supreme Court).

rights for years. Accordingly, the State should not be allowed to continue using the results of unconstitutional forced blood draws.

Moreover, the State was aware that after *Schmerber v. California*, 384 U.S. 757, and *Bohling* that "jurisdictions were split on whether the natural dissipation of alcohol in [a person's] blood stream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations," and as such, the State bore the risk that *Bohling* would be reviewed by the United States Supreme Court and be declared wrong. *See Reese*, 2014 WI App at ¶14 (citing *McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 1558.).

Accordingly, the State having chosen to continue to seek constitutionally questionable forced blood draws cannot now complain –after the United States Supreme Court's decision in

McNeely confirming that said blood draws were and are unconstitutional—that they relied on *Bohling* in good faith.

Lastly, Mr. Pasch is aware of three cases pending before the Wisconsin Supreme Court where one of the issues involves the applicability of the good faith exception in forced blood draw situations. *See State v. Tullberg*, 2012 AP 1593-CR, *State v. Kennedy*, 12 AP 523-CR, *State v. Foster*, 11 AP 1673 CRNM (all cases have unpublished Court of Appeals' decisions).

Thus, a decision in one or more of those cases would affect this Court's decision to publish its decision in this case.

STATEMENT OF FACTS AND CASE

On January 14, 2012, at approximately 2:12 a.m. Mr. Tyler Pasch, the Defendant-Appellant, was arrested for Operating a Motor Vehicle While Intoxicated (Second Offense). (R13 at 2.); (R37 at 6.).

Subsequent to his arrest, Mr. Pasch refused chemical testing. (R13 at 2.); (R37 at 8, 13). Specifically, Deputy Mitchell Rhiel, the arresting officer, testified as follows:

> Q: And did he agree to submit to a blood test [after reading him the Informing the Accused form]?
>
> A: No.
>
> Q: And did you obtain a blood sample from him regardless of that?
>
> A: Yes.
>
> ….
>
> Q: He communicated a refusal to you?
>
> A: Yes.
>
> Q: Nevertheless, you proceeded to the hospital anyway?
>
> A: Yes.
>
> Q: With the idea at [sic] that you were going to do a compelled blood draw?
>
> A: Yes.

(R37 at 8, 13)

Mr. Pasch's blood was drawn over his objection at 3:05 a.m., less than an hour after Mr. Pasch was driving. (R13 at 6.) At no point did law enforcement make any effort or inquiry into obtaining a warrant. *Id*.

The arresting officer was a recent, part-time hire and was undergoing field training on the night of Mr. Pasch's arrest. (R37 at 11-12). In fact, the officer admitted that he had worked on less than 5 drunk driving cases and that this was the first case he handled where someone refused a blood test and "there was a forced blood draw." (R37 at 12-13).

Further, the arresting officer admitted he mistakenly issued a Notice of Intent to Suspend to Mr. Pasch, instead of a Notice of Intent to Revoke.[2] (R37 at 9).

Mr. Pasch was subsequently charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant

---

2 Mr. Pasch filed a motion to dismiss the Refusal Charge based on this error, which is not at issue in this appeal. (R8.)

(Second Offense), Operating a Motor Vehicle With a Prohibited Alcohol Concentration (Second Offense), Refusing Chemical Testing, and other charges which are not relevant to this appeal. *See* (R2.)

Through a written motion dated May 29, 2013, Mr. Pasch, by counsel, moved to dismiss the Refusal Charge based on the deputy's mistake regarding the improper notice being provided on the night of his arrest. (R8.) A motion hearing was held on August 28, 2014. (R37.). Deputy Rhiel was the only person to testify at the hearing.

On October 17, 2012, and before the trial court ruled on the previous motion, Mr. Pasch, by counsel, filed a Motion for Suppression of Defendant's Blood Test Result Based Upon Unconstitutional Search and Seizure. (R13.)

Specifically, Mr. Pasch argued that *State v. Bohling*, 173 Wis. 2d 529 (1993) incorrectly and unconstitutionally interpreted the United States Supreme Court's decision in

Schmerber v. California, 384 U.S. 767 (1966). To the contrary, Mr. Pasch stated:

> *Schmerber* directs lower courts to engage in a totality of the circumstances analysis in determining whether exigency permits a nonconsensual, warrantless blood draw. It requires more than the mere dissipation of the blood alcohol evidence to support a warrantless blood draw in an alcohol-related case.

(R13 at 5.)

Further, Mr. Pasch informed the trial court that the United States Supreme Court had accepted for review *Missouri v. McNeely*, which would be deciding this exact issue. (R13 at 7).

On November 16, 2012, and without another hearing, the trial court denied both defense motions. In relevant part, the trial court stated:

> Forced blood draws under the facts of this case are permitted under existing law as set forth in *State v. Bohling*, 273 Wis. 2d 529 (1993)….
>
> Because *State v. Bohling* is still the law in Wisconsin, Defendant's motion to suppress evidence based on the forced blood draw is hereby DENIED.

(R16 at 3.)

On April 17, 2013, the United States Supreme Court's decision in *Missouri v. McNeely* was released.

On April 29, 2013, Mr. Pasch filed a motion for reconsideration because the *McNeely* decision abrogated *Bohling*. (R21.)

A hearing was held on May 8, 2014, where the impact of *McNeely* was discussed. At the hearing, Mr. Pasch again argued that *Schmerber* was the law of the land at the time his blood was drawn, despite *Bohling*, because *Schmerber* was a United States Supreme Court decision. (R34 at 4-8.)

Further, Mr. Pasch requested "at the very least, there needs to be a hearing in this case for the Court to make a factual determination of whether or not there was an exigency to justify the warrantless [blood] draw." (R34 at 8.)

The State responded that it would simple rely on *State v. Dearborn* for the proposition that the exclusionary rule should

not apply in this case because Deputy Rhiel "performed his duties in accordance with the law, and the State should not be penalized for doing that." (R34 at 8-9.)

The Court then asked the State if it wanted a "McNeely-type hearing" regarding exigent circumstances. (R34 at 13.) The State declined such a hearing, again, relying on *Dearbourn*. *Id*.

On November 12, 2013, the trial court denied Mr. Pasch's motion for reconsideration because "the good faith exception applies to that and that [*McNeely*] would not be then applied retroactively." (R35 at 5.)

Subsequently, Mr. Pasch plead guilty and was convicted of Operating a Motor Vehicle With a Prohibited Alcohol Concentration (Second Offense) in violation of Wisconsin Statute sec. 346.63(1)(b). (R30 at 10.) The remaining charges were dismissed.

Mr. Pasch now appeals the denial of his Motion to Suppress and the Motion for Reconsideration.

STANDARD OF REVIEW

Whether a warrantless blood draw falls within the exigent circumstances exception to the warrant requirement is a question of law subject to a de novo review by appellate courts. *State v. Faust*, 274 Wis. 2d 183, 682 N.W.2d 371 (2004); *State v. Bohling*, 173 Wis. 2d 529, 533 (1993), *abrogated by Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013).

ARGUMENT

I. THE WARRANTLESS BLOOD DRAW WAS UNREASONABLE.

Citizens have the right to be free from "unreasonable searches and seizures."[3] *State v. Richardson*, 156 Wis. 2d 128,

---

3 The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

137, 456 N.W.2d 830 (1990)(citing the fourth amendment to the United States Constitution and Article I sec. 11 of the Wisconsin Constitution).

Warrantless searches are per se unreasonable unless they fall into a recognized exception. *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Murdock*, 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990). Exigent circumstances are a recognized exception if, under the circumstances, a delay to obtain a warrant would threaten the destruction of evidence. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

Recently, the United States Supreme Court held:

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the persons or things to be seized.

> … while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Missouri v. McNeely, 133 S.Ct. 1552, 1563 (2013).

The burden of proof is on the State to demonstrate that an exigent circumstance existed, and that burden is both heavy and difficult to rebut. *See United States v. Cisneros-Gutierrez*, 598 F.3d 997, 1004 (8th Cir. 2010).

In the present case, the State did not seek to prove that there were exigent circumstances to justify the warrantless forced blood draw. (May 8, 2013 Trans. at 8-9, 13.) Rather, the State only relied on the good faith exception to the exclusionary rule.

Thus, the State has failed to meet its burden to prove an exception to the warrant requirement, and the forced blood draw of Mr. Pasch violated his right to be free from unreasonable searches and seizures. *See Schmerber*, 384 U.S. 757. "[A]ll

evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in . . . court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The State, however, is relying on *Dearborn*, which held that evidence should not be excluded for a constitutional violation when the officer acted with the "objectively reasonable reliance upon clear and settled" law that is later determined unconstitutional by the United States Supreme Court. *Id*. at ¶4.

II. THE GOOD FAITH EXCEPTION SHOULD NOT APPLY.

As stated above, the Court of Appeals recently held that the "good faith exception to the exclusionary rule" articulated in *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, could be applied in a forced blood draw case. *State v. Reese*, 2014 WI App 27, ¶18-19, 327 Wis.2d 252, 786 N.W.2d 97.

In *Dearborn*, the Wisconsin Supreme Court held 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 United States Supreme Court.

State v. Dearborn, 2010 WI 84, ¶4, 327 Wis. 2d 252, 786 N.W.2d 97.

First, there is no evidence that the arresting officer in this case acted in good faith reliance anything when he obtained a forced blood draw from Mr. Pasch. Deputy Rhiel was a very new officer. Accordingly, perhaps he was taught regarding the conflicting case law regarding warrantless forced blood draws and instructed to always make a case by case assessment regarding exigent circumstances. Conversely, the Deputy could have been very poorly trained and he might have acted in this case on his own initiative. Again, the arresting officer was dealing with his first refusal and forced blood draw case of his career.

Without a hearing and with no testimony from the arresting officer, the trial court below should not have applied the good faith exception.

Further, the *Reese* decision failed to consider that *State v. Bohling,* was **never** good law, i.e, it always violated the Fourth Amendment (and Art. 1, sec. 11, Wis. Const.), and was from its onset contrary to previous controlling United States Supreme Court decisions. *See State v. Jennings*, 2002 WI 44, ¶18, 252 Wis. 2d 228, 238, 647 N.W.2d 142 ("[a]ll state courts, of course, are bound by decisions of the United States Supreme Court on matters of federal law.").

In other words, *McNeely* was not new law, and thus, *Bohling* could not be considered "clear and settled law" when it violated *Schmerber*, a long settle United States Supreme Court Decision.

More importantly, the *Reese* decision failed to consider that the State did not have clean hands in applying the good faith

exception. In other words, the State argued and successfully induced the *Bohling* Court into making a decision that violated the Fourth Amendment (and Art. 1, sec. 11, Wis. Const.) and the State has subsequently been violating the citizens' of Wisconsin rights for years. Accordingly, the State should not be allowed to continue using the results of unconstitutional forced blood draws.

Moreover, the State was aware that after *Schmerber v. California*, 384 U.S. 757, and *Bohling* that "jurisdictions were split on whether the natural dissipation of alcohol in [a person's] blood stream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations," and as such, the State bore the risk that *Bohling* would be declared wrong. *See Reese*, 2014 WI App at ¶14 (citing *McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 1558.).

Accordingly, the State having chosen to continue to seek constitutionally questionable forced blood draws cannot now complain—after the United States Supreme Court's decision in *McNeely* confirming that said blood draws were and are unconstitutional—that they relied on *Bohling* in good faith.

CONCLUSION

WHEREFOR, Mr. Pasch respectfully requests this Court to reverse his conviction based on the circuit court's failure to suppress evidence because the blood drew was unreasonable and the good faith exception to the exclusionary rule should not apply.

Dated this ___ day of October, 2014.

Respectfully submitted,

LANNING LAW OFFICES, LLC

By: _____
Chad A. Lanning
State Bar No. 1027573
Attorneys for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2014 AP 1193-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TYLER M. PASCH,

Defendant-Appellant.

APPENDIX

Table of Contents

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,092 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 3rd day of October, 2014.

Respectfully submitted:
By:_____
Chad A. Lanning
State Bar No. 1027573
Attorney for Defendant-Appellant