STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal Case No. 2014 AP 001193-CR
Pierce County Case Number 2012CT000015

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYLER M. PASCH,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE PIERCE COUNTY CIRCUIT COURT,
THE HONORABLE JOSEPH D. BOLES PRESIDING

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ISSUES

I. WHETHER THE TRIAL COURT ERRED WHEN IT APPLIED THE GOOD FAITH EXCEPTION

The circuit court did not err in applying the good faith exception.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

2014AP0001193 (Pierce County case number 2012CT0000015)

The facts as stated in Mr. Pasch's brief are accepted as stated.

The procedural history is as follows:

- on February 9th 2012 the criminal complaint was filed (R. 2);
- on May 29th 2012 Mr. Pasch filed a notice of motion and motion to dismiss refusal charge and to preclude the State from relying upon the statutory presumptions concerning the admissibility of the Defendant's blood test result (the "**automatic admissibility motion**") (R. 8);
- on August 28th 2012 a motion hearing was held on the automatic admissibility motion (R. 37, appellant's appendix C);
- on September 27th 2012 the State filed a brief in opposition to the automatic admissibility motion (R. 10);
- on October 12th 2012 Mr. Pasch filed a brief in support of the automatic admissibility motion (R. 11);
- on October 17th 2012 Mr. Pasch filed a notice of motion and motion for suppression of Defendant's blood test result based upon unconstitutional search and seizure (the "***McNeely* motion**") (R. 13);
- on October 17th 2012 the State objected to the *McNeely* motion as untimely;

- on October 22nd 2012 Mr. Pasch responded on the issue of the timeliness of the *McNeely* motion (R. 14);

- on November 1st 2012 the State responded on the issues of the timeliness and relevance of the *McNeely* motion (R. 15);

- on November 16th 2012 the circuit court denied the automatic admissibility motion and specifically acknowledged and denied the *McNeely* motion, stating:

> *The defense asks the Court to suppress the blood test result based on an unconstitutional search and seizure claiming that the forced blood draw was unconstitutional.*
>
> *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). The defense pointed out to this court that the United States Supreme Court has accepted for review a Missouri Supreme Court case,* Missouri v McNeely. *The defense claims that if the United States Supreme Court upholds the decision of the Missouri Supreme Court in the [sic.]* Missouri v. McNeely *that it would also then overrule* State v. Bohling*, 73 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.*

(R. 16, pg. 3; appellant's appendix D pg. 3);

- on April 17th 2013 the U.S. Supreme Court decided *Missouri v McNeely* ("***McNeely***");

- on May 1st 2013 Mr. Pasch filed a notice of motion and motion to reconsider the denial of the *McNeely* motion (the "**reconsideration motion**") (R. 21);

- on May 8th 2013 a motion hearing was held on the reconsideration motion at which hearing the court and the parties decided to defer a ruling on the reconsideration motion until *McNeely* was ruled upon by the Wisconsin Supreme Court (R. 34, appellant's appendix A);

- on July 18th 2013 Mr. Pasch filed a brief in support of the denied *McNeely* motion (R. 23);

- on November 12th 2014 a final pretrial was held, at which time Mr. Pasch invited the court to "*put its ruling on the record*" (R. 35, pg. 5, lines 14-15; appellant's appendix B, pg. 3, lines 14-15) with respect to the reconsideration motion, which motion had apparently already been discussed by the court and the parties in July 2013 and tentatively ruled on off the record at that time (R. 35, pp. 4-6; appellant's appendix B, pp. 2-4);

- accordingly, at that same hearing on November 12th 2014 the court denied the reconsideration motion (R. 35, pg. 5, lines 16-17; appellant's appendix B, pg. 3, lines 16-17);

- on December 5th 2013 Mr. Pasch entered a guilty plea to the charge of operating with a prohibited alcohol concentration as a second offense (R. 36).

Mr. Pasch then appealed his conviction, arguing that the *McNeely* motion was improperly denied.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED WHEN IT APPLIED THE GOOD FAITH EXCEPTION

In *State v. Bohling*, 173 Wis. 2d 529 (1993) at 539, 547-48, the Wisconsin Supreme Court recognized a *per se* rule that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for drunk driving.

In *Missouri v. McNeely*, 133 S. Ct. 1563 at 1568, the United States Supreme court ruled that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case and that whether a warrantless blood test is reasonable must be determined case by case based on the totality of the circumstances.

Whether the decision in *McNeely* has retroactive effect has not yet been conclusively established in Wisconsin, although *State v. Reese*, 2014 WI App 27, ¶¶ 17-18, 353 Wis.2d 266, 844 N.W.2d 396 (2014, Court of Appeals – recommended for publication – petition for review held in abeyance pending the Wisconsin Supreme Court's ruling in *State v. Foster*, Case No. 2011AP1673-CRNM; *State v. Kennedy*, No. 2012AP523-CR; and *State v. Tullberg*, Case No. 2012AP1593-CR) indicates that it will not be retroactively effective.

In *Reese* the Court of Appeals, applying the good faith exception of *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (2010), concluded that the exclusionary rule should not be applied in these circumstances, as

> *[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."*

Id. at ¶ 22 (quoting *Dearborn*, 327 Wis.2d 252 at ¶ 44).

Mr. Pasch argues, first, that the *Dearborn* good faith exception, which was applied in *Reese*, should not apply to his case and, secondly, that it, in any event, cannot be applied by the circuit court unless that court first holds an evidentiary hearing.

The State believes that this appeal should be denied for three reasons:

- first, because the *Dearborn* good faith exception applies to Mr. Pasch's case;
- secondly, because the application of the good faith exception does not first require an evidentiary hearing; and
- thirdly, because the issue of whether an evidentiary hearing is required before the good faith exception can be applied is not properly before the court.

A. THE *DEARBORN* GOOD FAITH EXCEPTION APPLIES TO MR. PASCH

The facts in Mr. Pasch's case are analogous to those in *Reese* and *Reese* should be followed here. The Court of Appeals in *Reese* held at ¶22 that:

> *As was the case in* Dearborn*, the police officer here was following the "clear and settled precedent" when he obtained a blood draw of Reese without a warrant. The 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. See id., ¶49. At the time of the blood draw the officer was following clear, well-settled precedent established by the Wisconsin Supreme Court, which the court has stated "is exactly what officers should do." Id., ¶44. Accordingly, because the officer reasonably relied on clear and settled*

> *Wisconsin Supreme Court precedent in obtaining the warrantless blood draw and because exclusion in this case would have no deterrent effect, we conclude that the blood draw evidence should not be suppressed.*

Mr. Pasch acknowledges that *Reese* would be controlling in his case but argues that *Reese* was wrongly decided because:

> *… 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 force blood draw case, the* Reese *decision failed to consider that* State v. Bohling*, was never good law... [and] failed to consider that the State did not have clean hands in applying the good faith exception.*

(appellant's brief at pp. 1-2)

In particular, Mr. Pasch argues that the court should not apply the *Dearborn* good faith exception as the State of Wisconsin has "unclean hands" because:

> *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.*

(appellant's brief at pg. 2) and because:

> *the State was aware that… "jurisdictions were split on whether the natural dissipation of alcohol in [a person's] blood stream establishes a per se exigency…" and as such, the State bore the risk that* Bohling *would be reviewed by the United States Supreme Court and be declared wrong.*

(appellant's brief at pg. 3).

This argument fails for two reasons: first, Mr. Pasch does not explain how the State "induced" the *Bohling* court to make its decision (other than by convincing it) nor why the State "bore the risk" that *Bohling* would be reversed. In our adversarial system, the State was not merely entitled but required to offer the best possible argument to the court in *Bohling*. Mr.

Pasch does not explain why it is now necessary, 21 years later, to penalize the State of Wisconsin for winning the argument.

Secondly, it misunderstands the purpose of the exclusionary rule, which is to deter the State from intruding into the constitutional rights of defendants by punishing the State when it does so, see *Dearborn*, at ¶ 35-36:

> *just because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies [*Herring v. United States, *555 U.S. 135, 129 S. Ct. 695 at 700, 172 L.Ed.2d 496 (2009)];*
>
> *…*
>
> *to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence [*Herring *at 107]*

The exclusionary rule is not applied as a matter of course, see *Dearborn*, at ¶ 35 (citing *Herring* and *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L.Ed.2d 34 (1995)):

> *he exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served*

and should not be applied when the officers act in good faith, see *Dearborn*, at ¶ 36:

> *the exclusionary rule should not apply when the police act in good faith*

The law at the time of Mr. Pasch's arrest did not require law enforcement to obtain a warrant before carrying out the blood draw. Indeed, one can speculate that, if this officer had applied for a warrant he likely would have been scolded by the magistrate for unnecessarily requesting one when he did not need one. Accordingly, the officer acted in objective good faith on reliance of clear, well-settled Wisconsin precedent and the *Dearborn* good faith exception should be applied.

B. THE APPLICATION OF THE *DEARBORN* GOOD FAITH EXCEPTION IN A PARTICULAR CASE DOES NOT REQUIRE AN EVIDENTIARY HEARING

Mr. Pasch then argues that, if he is subject to the *Dearborn* good faith exception, that it should not have been applied to him with a preliminary evidentiary hearing on that exception first. This is wrong.

An officer's familiarity with decisions of the Missouri Supreme Court is not constitutionally significant. Indeed, reliance by law enforcement on the ruling of the Missouri Supreme Court, rather than on binding Wisconsin precedent, would have been objectively unreasonable in Mr. Pasch's case.

In applying the good faith exception it is not necessary for the State to show actual, as well as objectively reasonable, reliance. The *Dearborn* court stated that the test for determining whether an officer behaved reasonably

> *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".*

Dearborn, quoting *Herring* at 145. Indeed, the United States Supreme Court further stated in *Herring* that:

> *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".*

Id. at 143.

An evidentiary hearing in Mr. Pasch's case would have served no purpose whatsoever, as the objective reasonableness of the officer's actions is a question of law, which is to be determined by the court only and no hearing is required. Under this objective test, whether the officer was actually relying on *Bohling* is irrelevant.

C. THE ISSUE OF WHETHER AN EVIDENTIARY HEARING IS REQUIRED BEFORE THE GOOD FAITH EXCEPTION CAN BE APPLIED IS NOT PROPERLY BEFORE THE COURT

Finally, the court should decline to rule on the necessity of an evidentiary hearing, as Mr. Pasch raises that argument for the first time on appeal, when he had ample opportunity to raise this issue in the circuit court.

Mr. Pasch's *McNeely* motion was denied on November 16th 2012 (R. 16, pg. 3; appellant's appendix D pg. 3) and his reconsideration motion was denied on November 12th 2013 (R. 35, pg. 5, lines 16-17; appellant's appendix B, pg. 3, lines 16-17). Mr. Pasch did not plead guilty, however, until December 5th 2013.

Mr. Pasch now argues that the *Dearborn* good faith exception cannot be applied to him without an evidentiary hearing. However, at no point did Mr. Pasch request such an evidentiary hearing in the circuit court, whether in any of his pleadings, at the hearing on May 8th 2013, the hearing on November 16th 2013 or at hearing on December 5th 2013.

Indeed, at the hearing on November 16th 2013 Mr. Pasch's attorney specifically stated that:

> *[I]t was my understanding that the court was going to deny the motion based on the fact that the* McNeely *decision should not be applied retroactively to Mr. Pasch's case. I'm not trying to get you to change your mind on that, Judge. I understand your – your reasoning for that. However, I don't think there has been a – a formal decision by the court denying the motion on those grounds. So, I guess, just for closure's sake, I would ask the court to just make a – put its ruling on the record with respect to that.*

(R. 35, pg. 5, lines 5-15; appellant's appendix B, pg. 3, lines 5-15). Moreover, when making its decision the court then specifically asked Mr. Pasch's attorney "*Is there any other record you want me to make here?*" and he

confirmed that there was not (R. 35, pg. 6, lines 6-9; appellant's appendix B, pg. 4, lines 6-9).

The court should not "*blindside trial courts with reversals based on theories which did not originate in their forum*" see *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). See also *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis.2d 486, 611 N.W.2d 727 (2000):

> *It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal . . . . The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court.*

Accordingly, as Mr. Pasch never raised the issue of an evidentiary hearing with the circuit court (and indeed, specifically declined to do so), he forfeited it and cannot now have it considered on appeal.

CONCLUSION

First, the *Dearborn* good faith exception applies to Mr. Pasch. Secondly, no evidentiary hearing is necessary before applying that good faith exception to Mr. Pasch's *McNeely* motion. Thirdly, Mr. Pasch did not request and, thus, waived any possible entitlement to an evidentiary hearing.

This appeal should be denied and the circuit court's judgment affirmed.

Dated November 3rd 2014.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font.

The length of this brief is 2,704 words.

Dated November 3rd 2014.

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CERTIFICATION OF COMPLIANCE

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 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 November 3rd 2014.

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