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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.

REPLY BRIEF 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

ARGUMENT

I. THE WARRANTLESS BLOOD DRAW WAS UNCONSTITUTIONAL AND SHOULD BE SUPPRESSED.

The State conceded in its brief that Mr. Pasch's blood was drawn unconstitutionally. Accordingly, the only remaining issue is whether Mr. Pasch is entitled to any relief for the State's unconstitutional conduct.

Thus, the State framed the sole issue in this case as whether the circuit court erred when it applied the good faith exception to the exclusionary rule. (State's br. at 1.)

II. THE GOOD FAITH EXCEPTION SHOULD NOT APPLY.

The State admitted in its brief that the exclusionary rule's purpose is to "deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (State's br. at 8.)(citing *State v. Dearborn*, 2010 WI 84, ¶¶34-36). Further, the State did not deny that it has been

unconstitutionally conducting forced blood draws on its citizens for 21 years. (*See* State's br. at 7, 8.) Thus, the purpose of the exclusionary rule fits perfectly here, i.e., to prevent this - and future other - recurrent, systematic constitutional violations.

Not surprisingly the State thinks it would be unfair for it to be penalized for its longstanding, systematic unconstitutional conduct, because it "won" the *Bohling* case. (State's br. at 8.)

In other words, the State is not satisfied with having benefited from 21 years of unconstitutional forced blood draws, it also wants to benefit from Mr. Pasch's unconstitutionally obtained forced blood draw.

Again, the State has unclean hands and should not succeed in its argument that it is entitled to a "good faith exception" to the exclusionary rule.

Specifically, the State made unconstitutional arguments and lead the *Bohling* court into making a decision contrary to a then existing and still controlling United States Supreme Court

decision, i.e., *Schmerber v California*, 384 U.S. 757 (1966). Not surprisingly, the State failed to discuss or even cite the *Schmerber* case in its brief.

Ironically, the State speculated in its brief that *McNeely* will not have a "retroactive effect." (State's br. at 5.) Importantly, Mr. Pasch is not seeking a new constitutional principal to be retroactively applied to him. Rather, Mr. Pasch is seeking to have a long standing and controlling United States Supreme Court constitutional principal applied to him,. Namely, as the *Schmerber* court held, lower courts must engage in a totality of the circumstances analysis in determining whether exigency permits a nonconsensual, warrantless blood draw.[1] (*See* R13. at 5.)(citing *Schmerber*, 384 U.S at 772.)

1 As the United 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).

The State asks this Court to assume that the uncontrovertibly poorly trained,[2] newly-hired law enforcement officer "acted in objective good faith on reliance of clear, well-settled Wisconsin precedent." (State's br. at 8.)

Further, the State argued that the officer's "actual" reason/basis for forcing the blood draw of Mr. Pasch is "irrelevant." (State's br. at 9.) It begs the question, if the exclusory rule is **not** to be applied when officers act in good faith, and good faith is to be assumed, then when can the exclusory rule be applied?

In a case where there is a real and present question about the officer's training, good faith reliance on proper training should not be automatic.

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2 As discussed in Mr. Pasch's Initial Brief, the officer mistakenly issued a Notice of Intent to Suspend form instead of the proper Notice of Intent to Revoke form to Mr. Pasch. This mistake appears to be due to the fact that the officer was a "recent, part-time hire and was undergoing field training…[and] this was the first case he handled where someone refused a blood test." (Initial Br. at 6.)

Lastly, the State indicates that Mr. Pasch never requested a hearing on his motion to suppress. (State's br. at 10.) The original motion was dated October 17, 2012, and requested a hearing, "on a date and time to be set by the court." (R13.) The circuit court, however, denied the motion on the merits without a hearing on November 16, 2012. (R16 at 3.)

When Mr. Pasch filed his motion for reconsideration, it is the State that argued that under *Dearbourn*, no evidentiary hearing was required. (R34 at 13.) Thus, the State, having convinced the circuit court to not hold a hearing, cannot now complain that the issue of having a hearing has been waived by Mr. Pasch. *See generally State v. Robles*, 157 Wis. 2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990)(Where a party has selected a course of action for strategic purposes, he cannot later be heard to complain of error [or in this case, waiver], precipitated by those actions.).

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 December, 2014.

Respectfully submitted,

LANNING LAW OFFICES, LLC

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

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 December, 2014.

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