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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2014AP001267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDY J. PARISI,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in the Circuit Court, Winnebago County,
the Honorable Daniel J. Bissett, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

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ISSUE PRESENTED

Should the results of Mr. Parisi's warrantless blood draw have been suppressed due to a lack of exigent circumstances, because the officers had time to pursue a warrant, and because the nature of the search was unreasonable?

The trial court answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is unwarranted because the issues can be decided by applying established legal principles to the facts of this case. Mr. Parisi anticipates that the issues will be fully presented in the briefs, but would welcome oral argument if the court would find it helpful to resolving the case.

STATEMENT OF THE CASE

The state filed a complaint charging Andy J. Parisi with possession of narcotic drugs, in violation of Wis. Stat. § 961.41(3g)(am). (1). An information charging the same was filed on May 2, 2013. (3). Mr. Parisi filed a motion asking the court to suppress the results of his warrantless blood draw. (6). After holding a hearing, the court denied the suppression motion. (30:41; App. 109). On September 13, 2013, Mr. Parisi entered a no contest plea to possession of narcotic drugs. (32:2). The court, the Honorable Daniel J. Bissett presiding, held a sentencing hearing on November 25, 2013, and withheld sentence, imposed 24 months of probation, and ordered that Mr. Parisi serve 90 days of condition time, which

the court stayed pending appeal. (33:15). A notice of appeal was filed on May 23, 2014. (26).

STATEMENT OF FACTS

Police were called to a residence in Oshkosh, Wisconsin on October 16, 2012, at 12:38 a.m. to attend to an individual that was possibly not breathing. (1:1-2; 30:5). When police arrived five to ten minutes later, they found Mr. Parisi laying motionless in the living room with vomit on the floor and sofa near him. (1:1-2; 30:5-6, 10). He was unresponsive after initial efforts were taken by paramedics to revive him but was eventually revived when Narcan, a medication used to reverse the effects of opiate overdoses, was administered. (1:2).

After Mr. Parisi was revived, he was transported in an ambulance by paramedics to Aurora Medical Center. (30:16). He was transported approximately 20-30 minutes after the police arrived and revived him. (30:17). At some point before arriving at the hospital, Mr. Parisi was asked if he would consent to having his blood taken. (30:17-18). He refused. (30:17-18). Officer Benjamin Fenhouse followed the ambulance to the hospital. (30:16). At the hospital, Officer Fenhouse instructed the medical staff to obtain a blood sample from Mr. Parisi. (30:18). However, Mr. Parisi's medical condition was unstable at the hospital with him sometimes showing signs of improvement but then deteriorating again. (30:17). The medical staff initially tried to obtain the blood sample at 1:55 a.m. but because of Mr. Parisi's unstable condition, they were unable to get the sample until 3:10 a.m. (13; 30:23-24). At no point did Officer Fenhouse apply for a warrant. (30:22). The blood sample, when tested, indicated the presence of morphine

(which can appear in blood as a metabolite of heroin) in Mr. Parisi's blood. (1:2).

While Mr. Parisi was being transported to and treated at the Aurora Medical Center, Officer Kaosinu Moua interviewed witnesses back at the residence. (1:2). The witnesses reported that Mr. Parisi did not live there and had come over to watch a football game around 9:00 or 9:30 p.m. that evening. (1:2; 30:7). At some point during the course of the night, he left to go to a nearby gas station to get something to eat and drink. (1:2; 30:10). He returned to the residence after the occupants had gone to bed. (1:2; 30:7). One of the residents woke up and discovered Mr. Parisi in the living room having problems breathing or choking on his own vomit. (1:2; 30:7-8).

Although Mr. Parisi did not live at the residence and was found in the living room, Officer Moua searched the upstairs of the residence and found a marijuana pipe and a substance that was later confirmed to be heroin in one of the bedrooms. (1:2; 30:8-9). The residents denied any knowledge of how the drugs and paraphernalia entered the home. (1:2).

Mr. Parisi filed a motion to suppress the results of the warrantless blood draw. At the suppression hearing, Officer Fenhouse admitted he never tried to obtain a warrant. (30:22). He testified that in his experience, it usually took two hours to get a warrant signed and between three and five hours from the time the officer started the warrant application process for a warrant to be executed. (30:20-21, 24).

Relying on an academic article, the state argued that both heroin and 6-monoacetylmorphine, the first metabolite of heroin which provides conclusive evidence of heroin use, dissipate quickly from blood. (7:2; 30:27-28). The state admitted that morphine, a metabolite of heroin, stays in the

blood longer but did not provide information on its rate of dissipation. (7:2). The state argued that the presence of morphine, while relevant to a charge of heroin possession, does not provide conclusive evidence of heroin use and thus officers need to be permitted to draw blood quickly without a warrant in order to get evidence of the presence of heroin or 6-monoacetylmorphine in the blood. (7:2; 30:28-29). The state argued for a per se rule that any case involving heroin be considered a case of exigency, justifying a warrantless blood draw. (30:30).

Citing ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), Mr. Parisi argued that the court should reject the state's proposed per se rule and instead should examine the totality of the circumstances. (30:31-32). He argued that the Fourth Amendment mandates that officers must obtain a warrant when doing so will not significantly undermine the efficacy of the search. (30:35). In this case, six officers were working on the case and one of them easily could have started the warrant application process right away. (30:35-36). Further, the officer at the hospital sat around waiting during the time it took to get Mr. Parisi stabilized, when he could have used that time to try to obtain a warrant. (30:34). Mr. Parisi also noted that a forced blood draw implicates an individual's expectation of privacy, there was no evidence the officer knew how long it took for heroin to dissipate when he made his decision to pursue a warrantless blood draw, and the state could prove possession with any amount of morphine detected in Mr. Parisi's blood. (30:31-33).

The circuit court denied the suppression motion. Citing ***McNeely*** and it's totality of the circumstances test (30:40; App. 108), the court stated that the warrantless blood draw was justified because: (1) officers did not know when Mr. Parisi consumed heroin, (2) Narcan was administered and

officers had reason to suspect criminal activity, (3) there was a delay in figuring out what Mr. Parisi had taken, as well as delays in figuring out what his medical condition was and how to treat it, and (4) heroin dissipates quickly. (30:38-41; App. 106-09). The court refused, however, to adopt the state's proposed per se rule that a warrantless blood draw is acceptable in all heroin cases because of the rate of dissipation. (30:40; App. 108).

ARGUMENT

I. The Results of Mr. Parisi's Warrantless Blood Draw Should Have Been Suppressed Due to a Lack of Exigent Circumstances, Because the Officers Had Time to Pursue a Warrant, and Because the Nature of the Search Was Unreasonable.

A. Legal principles and standard of review.

Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches. The Fourth Amendment provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" U.S. Const. amend. IV. A warrantless search is per se unreasonable unless it falls within a recognized exception to the warrant requirement. ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983).

The state has the burden of proving that an exception to the warrant requirement exists. ***State v. Payano-Roman***, 2006 WI 47, ¶ 30, 290 Wis. 2d 380, 714 N.W.2d 548. One recognized exception to the warrant requirement is exigency;

this exception applies when the exigency of a situation makes the needs of law enforcement so compelling that a warrantless search is objectively reasonable. ***Kentucky v. King***, 131 S. Ct. 1849, 1856 (2011). One such exigent circumstance is the threat that evidence will be destroyed if time is taken to obtain a warrant. ***State v. Faust***, 2004 WI 99, ¶ 11, 274 Wis. 2d 183, 682 N.W.2d 371. This exception applies only when a reasonable officer would have believed he was encountering an emergency that threatened to destroy evidence. ***Id***., ¶ 12. The test is an objective one - whether a police officer under the circumstances would reasonably believe that delay in procuring a warrant would risk destruction of evidence. ***Id***., ¶ 12.

In reviewing a circuit court's ruling on a motion to suppress, this court will only overturn findings of fact if they are clearly erroneous. ***State v. Guard***, 2012 WI App 8, ¶ 14, 338 Wis. 2d 385, 808 N.W.2d 718. However, this court reviews the circuit court's application of constitutional principles to the findings of fact de novo. ***Id***.

B. The results of the blood test should have been suppressed because there were not exigent circumstances.

The state has the burden to prove that an exception to the warrant requirement applies. ***Payano-Roman***, 290 Wis. 2d 380, ¶ 30. Here the state failed to prove that the circumstances amounted to an exigency sufficient to justify the warrantless draw of Mr. Parisi's blood. Relying on an article titled *Pharmacokinetics and Pharmacokinetic Variability of Heroin and its Metabolites*, the state argued that exigent circumstances existed because heroin rapidly

dissipates from blood.[1] According to the state, heroin dissipates rapidly with a half-life of 1.3 minutes and the first metabolite of heroin, 6-monoacetylmorphine, which provides conclusive evidence of heroin use, also dissipates rapidly with a half-life of 5.4 minutes. (7:2). The state admitted in its response to the suppression motion that after heroin and 6-monoacetylmorphine have fully dissipated, morphine, a metabolite of heroin, still remains in a person's system. (7:2). The state did not, however, offer any data on how long the metabolite morphine remains in the blood. This, of course, is the key question the state needed to answer to prove exigency because the detection of morphine in the blood indicates that a person ingested either heroin or morphine and thus a positive test for morphine is sufficient to prove a person ingested a Schedule I narcotic.[2] If morphine stays in the system for many hours, the officers would have had plenty of time to obtain a warrant.

The state focused on the rate of dissipation of heroin and 6-monoacetylmorphine, stating the presence of these substances provides stronger evidence of heroin use. (7:2). But the dissipation rates the state provided for those substances are so rapid it would be nearly impossible for an officer to respond to a 911 call and transport an individual to a medical facility for testing before the substances became undetectable. This means in nearly all heroin cases, the only evidence available in the blood will be evidence of the

[1] The state also attached to its response to the suppression motion a transcript from a different criminal case in which an expert testified regarding heroin, 6-monoacetylmorphine and morphine. (7:4-37). The circuit court, however, did not admit or consider it. (30:26-27).

[2] Both heroin and morphine are Schedule I narcotics. *See* Wis. Stat. § 961.14(3).

presence of morphine, and yet the state here failed to prove the rate at which morphine dissipates.

Although the state failed to establish the rate of morphine dissipation, the very facts of this case prove why there was no exigency. Mr. Parisi ingested heroin at least two hours and thirty-two minutes before his blood was drawn and the sample still tested positive for morphine. That positive test was then used as grounds to secure Mr. Parisi's conviction for possession of narcotic drugs. The fact that morphine was present in Mr. Parisi's blood more than two and a half hours after he ingested the drug illustrates that the officers had significant time to draw the blood before the evidence would disappear and thus had time to obtain a warrant.

Additionally, the test for determining exigency is whether a police officer would reasonably believe the delay in procuring a warrant would risk destruction of evidence. ***Faust***, 274 Wis. 2d 183, ¶ 12. In this case, Officer Fenhouse did not testify about his knowledge or assumptions regarding how fast heroin dissipates or how such information informed his decision to draw blood without a warrant. The state did not establish or argue that a reasonable police officer would believe that heroin dissipates as quickly as or more quickly than alcohol thereby requiring a warrantless blood draw. Indeed, such an assumption on the part of an officer would not be reasonable because, unlike in operating while intoxicated (OWI) cases, an indication of any amount, however trace, of an illegal drug in one's blood can be used to prove illegal activity. In contrast, in OWI cases, the concentration of the alcohol in the blood can make the difference between guilt and innocence or between the degree of the crime or punishment. *See* ***McNeely***, 133 S. Ct. at 1561, 1571 (Roberts, J., concurring) (in OWI cases, delaying testing

can negatively affect the probative value of the blood results and may make the difference between guilt and innocence).

To determine if a warrantless search is reasonable requires the court to evaluate whether a warrant could have been obtained within a timeframe that would allow for the preservation of evidence. ***Id***. at 1568. Here morphine was still in Mr. Parisi's blood hours after ingestion. Thus, this case is like those where test results were suppressed for lack of exigency because the evidence the police officers sought would still have been available if they took the time to get a warrant. *See* ***State v. Palmer***, 803 P.2d 1249, 1253 (Utah Ct. App. 1990) (holding no exigent circumstances existed that warranted x-ray test because ring individual was suspected of swallowing would have passed safely through the suspect's system without the x-ray); ***People v. Bracamonte***, 15 Cal. 3d 394, 397, 403-04 (Cal. 1975) (holding no exigent circumstances existed that required that an emetic solution be administered to induce regurgitation of drug balloons because balloons would have passed through the body naturally without the procedure).

The fact that the state failed to establish the rate of dissipation of morphine and the fact that morphine was still in Mr. Parisi's system more than two and a half hours after the police were called, both illustrate that the rate of dissipation is not rapid and thus there were no exigent circumstances requiring the warrantless blood draw.

C. The results of the blood test should have been suppressed because the police officers had the opportunity to secure a warrant but failed to attempt to obtain one.

Police officers have to obtain a warrant whenever they can do so without risking destruction of evidence. Here the

officers had time to secure a warrant and yet made no efforts to obtain one.

The exigency exception to the warrant requirement only applies if "there is a compelling need for official action and no time to secure a warrant." ***Michigan v. Tyler***, 436 U.S. 499, 509 (1978). When a warrant can be obtained without significantly undermining the efficacy of the search, the Fourth Amendment mandates that police officers obtain one. ***McNeely***, 133 S. Ct. at 1555 (citing ***McDonald v. United States***, 335 U.S. 451, 456 (1948)). The reason for this is that "[r]equiring police to apply for a warrant if practicable increases the likelihood that a neutral, detached judicial officer will review the case, helping to ensure that there is probable cause for any search and that any search is reasonable." ***McNeely***, 133 S. Ct. at 1573 (Roberts, J., concurring); *see also* ***Schmerber v. California***, 384 U.S. 757, 770 (1966) (describing the "importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt" as "indisputable and great").

Five to six officers responded to the 911 call regarding Mr. Parisi. (30:21). One of those officers could have started the process for obtaining a warrant shortly after arrival at the scene. Had an officer started that process promptly, the blood draw could have been done pursuant to a warrant within two hours, in time to capture the evidence the police desired.

Further, ***McNeely*** states that police officers need to get a warrant whenever they can do so without undermining the efficacy of the search. 133 S. Ct. at 1555. Officer Fenhouse was alerted at the hospital that the medical staff was unable to carry out his requested warrantless blood draw due to Mr. Parisi's medical condition. At that point,

Officer Fenhouse was on notice that he would be waiting for some time for the blood to be taken. He thus could have started the process for obtaining a warrant but instead just sat in the hospital and did nothing, an approach ***McNeely*** does not authorize and which flies in the face of the principle that a warrantless blood draw should only be done as a last resort.

D. The results of the blood test should have been suppressed because the search was unreasonable.

Even when the exigency exception to the warrant requirement applies, the search must still be reasonable. *See* ***Payano-Roman***, 290 Wis. 2d 380, ¶ 42 (even if a warrant exception is present, "an intrusion into the body demands something more: The scope and nature of the intrusion must be reasonable. The reasonableness of a search depends on all of the circumstances."). The state bears the burden of proof as to the reasonableness of the search. ***Id***.

Although blood draws are less intrusive than some other types of searches, the United States Supreme Court has recognized that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. ***McNeely***, 133 S. Ct. at 1565. Here the search was a physical intrusion beneath Mr. Parisi's skin, into his veins. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" ***Id***. at 1558 (quoting ***Winston v. Lee***, 470 U.S. 753, 760 (1985)).

Blood draws have been upheld as reasonable in OWI cases in which the state had a significant interest in protecting the public from drunk drivers. However, unlike in ***McNeely*** and other OWI cases, the police officers here did not have the governmental interests of combating drunk driving and

protecting citizens driving on the roads when it forcibly drew Mr. Parisi's blood. 133 S. Ct. at 1565. Mr. Parisi never drove a car or subjected others to danger in the way a drunk driver does. As such, the government interest in obtaining his blood through a warrantless blood draw was less significant than the interest in OWI cases and was insufficient to justify the physically intrusive and unnecessary warrantless blood draw.

CONCLUSION

In sum, the results of Mr. Parisi's blood draw should have been suppressed because there were no exigent circumstances, the officers had time to obtain a warrant and because the search was unreasonable. Because Mr. Parisi's charge of possession of narcotics was clearly dependent on the results of the warrantless blood draw, this court should vacate the judgment of conviction and order that the results of Mr. Parisi's warrantless blood draw be suppressed.

Dated this 21st day of August, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,165 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 on or after 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 21st day of August, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 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.

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