STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP1267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDY J. PARISI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR WINNEBAGO COUNTY,
DANIEL J. BISSETT, JUDGE

# BRIEF FOR PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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## ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

## ARGUMENT

### I. The Police Could Reasonably Rely In Good Faith On Controlling Precedent Of Wisconsin's Highest Court Which Clearly Established A Per Se Rule Allowing Them To Seize Blood Without First Obtaining A Warrant To Obtain Evidence That Rapidly Dissipates With Time.

The police seized blood from the defendant-appellant, Andy J. Parisi, on October 16, 2012 (30:5).

On the day the police seized Parisi's blood, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), had not yet been decided by the United States Supreme Court. On the day the police seized Parisi's blood, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), decided almost twenty years earlier by the Wisconsin Supreme Court, was still the law in this state.

*Bohling* interpreted *Schmerber v. California*, 384 U.S. 757 (1966). *Bohling*, 173 Wis. 2d at 539-40.

In *Schmerber*, the Supreme Court held that the rapid dissipation of alcohol in the blood presented an exigent circumstance that allowed the police to seize a suspect's blood without a warrant. *Schmerber*, 384 U.S. at 770-71.

The same rationale applies when the purpose of the draw is to test for controlled drugs. 3 Wayne R. LaFave, Search and Seizure, § 5.3(c) at 226, 228 & n.132 (5th ed. 2012). Therefore, *Schmerber* applies to the seizure of blood to test for controlled substances as well as to the seizure of blood to test for alcohol. *See* LaFave, § 5.3(c) at 226, 228 & n.132.

But *Schmerber* could be interpreted in two different ways: first, that the dissipation of alcohol in the blood was an exigent

circumstance sufficient by itself to justify dispensing with a warrant, or second, that dissipation of alcohol in the blood could justify a warrantless seizure of blood only when considered in combination with other facts in a particular case which together created a sufficient exigency. *Bohling*, 173 Wis. 2d at 539.

In *Bohling*, the court determined that the more reasonable reading of *Schmerber* was that it held that an exigency based solely on the fact that alcohol dissipated rapidly in the blood was enough to draw blood without a warrant. *Bohling*, 173 Wis. 2d at 533, 539-40, 547-48. So in *Bohling*, the 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. *Bohling*, 173 Wis. 2d at 539, 547-48.

In *McNeely*, the Supreme Court recognized that lower courts had interpreted *Schmerber* differently. *McNeely*, 133 S. Ct. at 1558 & n.2. However, the Court said that the correct interpretation of *Schmerber* was that it did not create a per se rule. *McNeely*, 133 S. Ct. at 1559-60, 1563. The Supreme Court ruled that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant, and that whether a warrantless blood test is reasonable must be determined case by case based on the totality of the circumstances. *McNeely*, 133 S. Ct. at 1563, 1568.

Thus, in the hindsight of *McNeely*, *Bohling* was wrongly decided because it interpreted *Schmerber* differently than the Supreme Court eventually interpreted *Schmerber*. So *McNeely* abrogated *Bohling*. *State v. Reese*, 2014 WI App 27, ¶¶ 17-18, 353 Wis. 2d 266, 844 N.W.2d 396 (petition for review pending).

The usual rule is that newly declared constitutional rules, including Fourth Amendment rules, must be applied retroactively to all pending cases that are not yet final at the time the decision was rendered, whether or not the new rule constitutes a clear break with the past. *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 786 N.W.2d 97.

But the fact that a constitutional rule applies retroactively to a pending case does not necessarily mean that the exclusionary rule should also be applied. Whether the exclusionary rule should be applied to an unlawful seizure is an issue that is separate and analytically distinct from the issue of whether a new constitutional rule should be applied to render the seizure unlawful. *Davis v. United States*, 131 S. Ct. 2419, 2430-31 (2011); *State v. Oberst*, 2014 WI App 58, ¶ 9, 354 Wis. 2d 278, 847 N.W.2d 892 (petition for review pending). *See Dearborn*, 327 Wis. 2d 252, ¶¶ 32-33.

In *Dearborn*, the court reaffirmed that "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance on clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." *Dearborn*, 327 Wis. 2d 252, ¶ 51. *Accord Davis*, 131 S. Ct. at 2423-24; *Oberst*, 354 Wis. 2d 278, ¶¶ 5-9; *State v. Loranger*, 2002 WI App 5, ¶¶ 13-16, 250 Wis. 2d 198, 640 N.W.2d 555; *State v. Ward*, 2000 WI 3, ¶¶ 62-63, 231 Wis. 2d 723, 604 N.W.2d 517.

Applying *Dearborn*, this court held in *Reese* that the good faith exception precludes application of the exclusionary rule where police officers seized a suspect's blood without a warrant or exigent circumstances in addition to dissipation of alcohol in the blood, relying on the decision in *Bohling* that no additional exigency was required. *Reese*, 353 Wis. 2d 266, ¶ 22.

Because there is no legal difference between the seizure of blood to test for alcohol or controlled substances, LaFave, § 5.3(c) at 226, 228 & n.132, *Reese* is controlling precedent applicable to this case.

Admittedly, the law is in flux because a petition for review was filed in *Reese*, and the supreme court has taken three other cases, *State v. Kennedy*, Case No. 2012AP523-CR, *State v. Foster*, Case No. 2011AP1673-CRNM, and *State v. Tullberg*, Case No. 2012AP1593-CR, to assess the effect of *McNeely* on Wisconsin law. But until *Reese* may be overruled or abrogated by the supreme court, it continues to be the law at this time.

Although the district attorney did not argue good faith in the circuit court, the court of appeals may affirm the ruling of the circuit court regardless of whether the correct legal argument was made in that court by the respondent on appeal. *State v. Marhal*, 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758 (Ct. App. 1992); *State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989).

Moreover, it does not matter whether the police officers who were involved in taking Parisi's blood testified that they were relying on *Bohling* when they did so.

The good faith exception is objective, not subjective. It applies "where officers conduct a search in objectively reasonable reliance on clear and settled Wisconsin precedent." *Dearborn*, 327 Wis. 2d 252, ¶ 51. The question is "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." *Dearborn*, 327 Wis. 2d 252, ¶ 36.

Therefore, *Reese* is binding law in this case at this time. So regardless of whether the seizure of Parisi's blood may or may not have been retroactively unlawful under *McNeely*, the good faith exception to the exclusionary rule precludes application of that rule to exclude the evidence of controlled substances found in his blood.

## II. Exigent Circumstances Excused The Police From Obtaining A Warrant To Seize Parisi's Blood.

Even if the good faith exception would not apply to this case, and *McNeely* would apply, the seizure of Parisi's blood would be lawful because exigent circumstances excused the police from obtaining a warrant before taking it.

The test for assessing the exigencies of the situation is objective, turning on the reasonableness of a belief that evidence might be lost if the police did not act promptly under the circumstances. *State v. Leutenegger*, 2004 WI App 127, ¶ 11, 275 Wis. 2d 512, 685 N.W.2d 536; *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29.

It is not known when Parisi ingested the heroin that caused him to overdose. He was found sometime after midnight (30:7). The police were dispatched at 12:38 a.m. (30:5). They arrived about five to ten minutes later (30:10).

The Oshkosh police testified that it usually takes them about two hours to get a warrant, and about three to five hours after the application process is started to execute the warrant (30:20-21).

So even if the police had tried to obtain a warrant as soon as they arrived on the scene, it would have been more than three hours after Parisi ingested the heroin before they could

have executed a warrant to seize his blood to obtain evidence of his ingestion of that drug. By that time the best evidence of heroin use would have been long gone.

Heroin is diacetylmorphine, a semi-synthetic morphine derivative. Elisabeth J. Rook et al., *Pharmacokinetics and Pharmacokinetic Variability of Heroin and its Metabolites: Review of the Literature*, Current Clinical Pharmacology, 109, 109-10 (2006, Vol. 1, No. 1) (attached as Exhibit 1 to State's Response to Defendant's Motion to Suppress (7)).

Morphine is a natural alkaloid harvested from poppies. Rook at 110. In the synthesis of heroin, morphine molecules are acetylated in an excess of acetic anhydroxide at higher temperatures. Rook at 110. The molecular structure of heroin shows that it derives its scientific name from the fact that the base morphine acquires two acetyl molecules during the synthesis. *See* Rook at 110, fig. 1.

In human plasma, heroin is rapidly hydrolyzed to 6-monoacetylmorphine, i.e. morphine with one acetyl molecule instead of two, and finally into morphine with no remaining acetyl molecules. Rook at 110.

Heroin completely devolves into 6-monoacetylmorphine within ten to forty minutes and becomes undetectable after that time. Rook at 111. 6-Monoacetylmorphine is still detectable in plasma for only one to three hours after ingestion of heroin. Rook at 111.

The final byproduct of the breakdown of heroin, non-acetyl morphine, also forms very quickly, and maximal concentrations can be measured from three and one-half to eight minutes after ingestion of heroin. Rook at 112. However, morphine has a half-life of 100 to 280 minutes in blood, Rook at

112, which means that half the morphine that was initially in the blood can still be detected from about one and two-thirds to four and two-thirds hours after formation. One quarter of the morphine that was initially in the blood can still be detected from about three to nine hours after formation.

So the police can still obtain some evidence of heroin ingestion more than three hours after the heroin was ingested.

The problem is that the evidence that can be obtained more than three hours after ingestion of heroin is not the best evidence that the defendant possessed heroin.

6-Monoacetylmorphine is specific evidence that the defendant ingested heroin because it is acetylated morphine, which is what heroin is. The only difference between 6-monoacetylmorphine and heroin, i.e. diacetylmorphine, is that heroin has two acetyl molecules (di) rather than just one (mono). In breaking down, heroin loses one of its acetyl molecules very quickly, and the second acetyl molecule less quickly.

Morphine is some evidence that the defendant ingested heroin because it is the base component of heroin. If there is morphine in the defendant's blood, it is possible that the morphine previously had an acetyl component, making it heroin, that has since broken down and dissipated.

But in the absence of any present acetyl molecules, morphine is not specific evidence of heroin ingestion. Morphine in the blood means the defendant could have ingested heroin, but also could have ingested morphine.

This difference is important because the presence of drugs in the blood, standing alone, is not sufficient evidence to

support a conviction for possessing a controlled substance. *State v. Patterson*, 2009 WI App 161, ¶ 25, 321 Wis. 2d 752, 776 N.W.2d 602, *aff'd*, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909; *State v. Griffin*, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). The presence of drugs in the blood is circumstantial evidence of possession that can support other evidence showing that the defendant has control over the substance. *Patterson*, 321 Wis. 2d 752, ¶ 25; *Griffin*, 220 Wis. 2d at 381.

In this case, the other evidence indicated that Parisi had access to heroin. A bindle of heroin was found in a place to which Parisi had access in the house where he overdosed (30:8-9, 13). So the probative value of the evidence found in Parisi's blood depended on the extent to which it tended to circumstantially prove that he possessed the heroin found in the house. *See generally State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 768 N.W.2d 832 (probative value is the degree to which evidence is relevant, i.e., the degree to which the evidence tends to make a fact more probable or less probable); 29 Am. Jur. 2d, *Evidence* § 333 at 351-52 (2008) (same).

The presence of 6-monoacetylmorphine, which could only come from heroin, in Parisi's blood would be compelling circumstantial evidence that he possessed the heroin to which he had access. If Parisi had heroin in his blood at the time and place he had access to the remaining uningested heroin, he probably possessed that heroin, a portion of which he ingested.

The presence of morphine in Parisi's blood would be some circumstantial evidence that he possessed the uningested heroin because the presence of the base component of heroin means that Parisi could have had heroin in his blood at the time and place he had access to that heroin. But this evidence would be less probative because it would not be certain that Parisi had heroin in his blood.

Exigent circumstances exist when, regardless of the exact elimination rate, "a significant delay in testing will negatively affect the probative value of the results" of a test of the defendant's blood. *McNeely*, 133 S. Ct. at 1560-61. The police must obtain a warrant before a blood sample can be drawn when they can do so "without significantly undermining the efficacy of the search." *McNeely*, 133 S. Ct. at 1561.

In this case, waiting three hours or more to obtain and execute a warrant would have significantly undermined the efficacy of the search of Parisi's blood and negatively affected the probative value of the results of a test of that blood because such a belated search would have found only morphine rather than heroin in the blood.

Under these circumstances, the police could take a sample of Parisi's blood without obtaining a warrant so that they could obtain evidence with significantly greater probative value than they could have recovered if they waited for a warrant.

## III. Parisi Fails To Show That A Seizure Of Blood To Obtain Evidence Of Heroin Use Is Unreasonable.

Parisi concedes that it is reasonable to draw blood to prove impaired driving because the state has a significant interest in protecting the public from impaired drivers. Brief for Defendant-Appellant at 11. He argues, though, that the state has less of an interest in drug enforcement, and therefore an insufficient government interest to warrant the drawing of blood for that purpose. Brief for Defendant-Appellant at 11-12.

But Parisi offers no evidence that the state has any less interest in stopping drug use than it has in stopping impaired driving. Indeed, as this case illustrates, ingestion of either drugs

or alcohol can lead to death, which the state has an important interest in preventing. We do not read Parisi's brief to suggest that it was no big thing that the government exhibited an interest in saving his life when he overdosed on drugs.

Moreover, even if the state might have any less interest in stopping drug use than it has in stopping drunk driving, Parisi fails to show that this interest would be so much less that the police could not draw blood to obtain evidence.

"'It is a common error . . . to assume that the converse of a statement is necessarily true or intended or because X is included in Z that Y is necessarily excluded.'" *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 758-59, 425 N.W.2d 21 (Ct. App. 1988) (quoting *Berg v. State*, 63 Wis. 2d 228, 238, 216 N.W.2d 521 (1974)). So the fact that a rule of law applies in one particular situation does not mean that the rule applies only in that situation and not in others. *Cornellier*, 144 Wis. 2d at 758-59.

The Supreme Court has stated that blood tests are reasonable not only in drunk driving cases, but also in other "appropriate circumstances."*McNeely*, 133 S. Ct. at 1565. Parisi fails to suggest any reason why blood tests to determine heroin use are not one of these appropriate circumstances.

When a party's arguments fail to cite factual or legal authority, or to develop themes reflecting legal reasoning, but rely instead only on general assertions of error, the court may decline to consider them. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

## CONCLUSION

It is therefore respectfully submitted that the judgment of the circuit court convicting Parisi of a second offense of possessing narcotic drugs should be affirmed.

Dated September 22, 2014.

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,887 words.

Dated this 22nd day of September, 2014.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this 22nd day of September, 2014.

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Thomas J. Balistreri
Assistant Attorney General