STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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. The warrantless blood draw cannot be justified by reasonable reliance on ***Bohling***.

The state argues that because ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) had not yet been decided on the day Mr. Parisi's blood was drawn, Officer Fenhouse reasonably relied on ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993)(abrogated by ***McNeely***, 133 S. Ct. 1552) in obtaining Mr. Parisi's blood without a warrant. (State's Br. at 2). The court in ***Bohling*** held that warrantless blood draws were per se reasonable in OWI cases because of the rapid rate of dissipation of alcohol. ***Bohling***, 173 Wis. 2d at 533-34. Although ***Bohling's*** per se rule was reversed by ***McNeely***, this court stated in ***State v. Reese***, 2014 WI App 27, ¶¶19-22, 353 Wis. 2d 266, 844 N.W.2d 396, that evidence from a warrantless blood draw taken from an individual suspected of operating a vehicle while intoxicated should not be suppressed if the officer relied in good faith on ***Bohling's*** per se rule when he obtained the blood without a warrant.

The state never argued good faith reliance on ***Bohling*** at the circuit court level[1] nor did Officer Fenhouse testify that he relied on ***Bohling*** in obtaining a sample of Mr. Parisi's blood without a warrant. The state claims this point is irrelevant because the good faith reliance exception is objective, applying whenever the officer reasonably relies on "clear and settled Wisconsin precedent." (State's Br. at 5 (quoting ***State v. Dearborn***, 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97)). But the state fails to establish how the ***Bohling*** rule – that the rapid dissipation of alcohol alone constitutes a sufficient exigency for a warrantless blood draw in order to obtain evidence of intoxication in cases involving charges of operating while intoxicated ("OWI" cases) – provides "a clear and settled Wisconsin precedent" for dealing with Mr. Parisi's case. Indeed, Mr. Parisi's case involves an entirely different factual scenario – there was no OWI charge and no alcohol involved, rather the case centers on the ingestion of a drug which has a completely different dissipation rate than alcohol.

The state assumes that it would be reasonable for any police officer to extrapolate the holding in ***Bohling*** to apply it to a non-OWI drug case involving a different, unknown, dissipation rate. This, however, is not the type of reasonable reliance the court in ***Reese*** contemplated. Rather language in ***Reese*** refers specifically to officers relying on ***Bohling*** in good faith in OWI cases involving the rapid rate of dissipation of alcohol. ***Reese***, 353 Wis. 2d 266, ¶¶2-4. In ***Dearborn***, 327 Wis. 2d 252, ¶46, the court set limits on the

[1] Because the state never argued good faith reliance at the circuit court level, the argument is forfeited. *See* ***Mervosh v. Labor and Industry Review Com'n***, 2010 WI App 36, ¶10, 324 Wis. 2d 134, 781 N.W.2d 236 (party that fails to raise issue before the circuit court, forfeits it).

reach of the reasonable reliance argument specifically stating that there could be no reliance in cases involving different factual situations. This case presents an entirely different factual situation than ***Bohling***. It is not reasonable for an officer to assume that a law that allows for a warrantless blood draw in an OWI context involving alcohol also applies in a situation such as Mr. Parisi's, where alcohol was not involved, the dissipation rate is unknown, and an OWI is not suspected. As such, the warrantless blood draw in this case cannot be justified by reasonable reliance on ***Bohling's*** per se rule.

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

The state argues that even if the good faith exception set out in ***Reese*** does not apply, ***McNeely*** applies and exigent circumstances in this case allowed the police to draw Mr. Parisi's blood without a warrant. (State's Br. at 6). It is not clear that ***McNeely*** applies as that case dealt specifically with OWI cases and the specific rate of dissipation of alcohol and no Wisconsin case has yet applied ***McNeely*** to a non-OWI, drug case such as Mr. Parisi's. However, even if ***McNeely*** does apply, there were not exigent circumstances in this case sufficient to justify the warrantless blood draw.

Exigency exists when there is reason to believe that evidence will be destroyed if the police do not act immediately without a warrant. ***State v. Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. The fact that morphine was found in Mr. Parisi's blood multiple hours after he ingested heroin and multiple hours after the police first encountered him shows that there was not exigency and no

reason to allow the police to draw his blood without a warrant.

Further, the state has the burden of proving that an exception to the warrant requirement applies. ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548. The state has failed to meet that burden because at the circuit court level it never established the rate at which morphine, a metabolite of heroin, dissipates from one's system. Because exigency depends on whether evidence will be destroyed, this dissipation rate is of vital importance.

In its response brief, the state said that morphine, as a metabolite of heroin, remains in the blood for up to nine hours after it is formed from heroin. (State's Br. at 8). If morphine, which provides evidence of heroin use, is in one's system for up to nine hours after ingestion and it takes only two hours to obtain a warrant, as Officer Fenhouse testified, there was definitely no exigency in this case justifying a warrantless blood draw.

In addition, no officer involved in this case testified as to any assumptions he had about the rate of heroin dissipation which could have justified failing to seek a warrant in order to avoid the destruction of evidence. The state did not establish at the circuit court level or in its response brief that it would be reasonable for a police officer to believe that heroin or its metabolite, morphine, dissipates at the same rate, or at a more rapid rate, than alcohol. Indeed, such an assumption would be unreasonable because in OWI cases the amount of alcohol in the system must be established as quickly as possible because different amounts of alcohol in the blood can determine the level of offense a person is charged with or the severity of the sentence he faces. In contrast, an indication of any amount,

however trace, of an illegal drug in one's blood can be used to prove illegal activity.

The state argues that even though morphine is still in the system hours after ingestion, the presence of morphine, unlike the presence of heroin or 6-monoacetylmorphine, is not the "best evidence" of heroin ingestion because it indicates ingestion of either heroin or morphine. (State's Br. at 7-8). But ***McNeely*** does not state, nor does any other case Mr. Parisi is aware of, that the warrant exception should apply if obtaining a warrant might mean losing the "best evidence," rather ***McNeely*** says the exception applies when waiting for a warrant means the *only* evidence of the crime may be destroyed.

McNeely does not stand for the proposition the state advances, that police officers can skirt around the warrant requirement of the Fourth Amendment to get the evidence with the greatest probative value when sufficient evidence would still be available if they took the time to get a warrant. Thus, this court will be making new law if it adopts the state's argument that no warrant is required when seeking one will risk the destruction of the "best evidence" of drug ingestion. A new law allowing warrantless searches to preserve the "best evidence," when sufficient evidence would still be available if time were taken to get a warrant, would greatly expand the exigency warrant exception and open the door to many more warrantless searches.

The state argues the "best evidence" of heroin use – heroin or 6-monoacetylmorphine in the blood – is required in heroin cases because the presence of drugs alone in one's system is insufficient to prove possession and to prove possession other evidence showing the defendant's control over the substance must also be available. (State's Br. at 8-9).

But the requirement that there be evidence of ingestion in the blood and additional evidence of control is not changed based on the type of evidence of ingestion (heroin or 6-monoacetylmorphine or morphine). The state has failed to prove why the presence of morphine, a metabolite of heroin, in the blood, coupled with other evidence of control of heroin would be insufficient to establish heroin possession whereas that same evidence of control coupled with evidence of heroin or 6-monoacetylmorphine in the blood would be sufficient to prove possession. As such, it has failed to establish why the protection of what it deems to be the "best evidence" of heroin ingestion justifies warrantless blood draws.

The state calls for a rule that a warrant not be required in cases involving heroin because heroin and 6-monoacetylmorphine dissipate at rapid rates. However, as stated above, morphine has a relatively slow dissipation rate and its presence in one's system is sufficient to prove heroin possession making the proposed rule unnecessary. Further, the dissipation rates the state provided for heroin and 6-monoacetylmorphine (10-40 minutes and 1-3 hours, respectively) are so rapid it would be nearly impossible for police officers to ever respond to a 911 call, obtain a warrant, and transport an individual to a medical facility before the substances were fully dissipated. Thus, if the court accepts the state's "best evidence" argument it will in effect be endorsing a per se rule that in every case that possibly involves heroin, no warrant is required to draw blood. Such a per se rule was rejected by the circuit court in this case and struck down by the United States Supreme Court in the context of OWI cases involving alcohol in ***McNeely***.

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.

Not only was there no exigency because evidence of heroin use remained in Mr. Parisi's system many hours after ingestion and because, according to the state, morphine remains in the system for up to nine hours, there was also no exigency because police officers had additional time to seek a warrant in this case but simply chose not to seek one.

The Fourth Amendment requires a warrant to draw one's blood. This is the default position. *See* ***McNeely***, 133 S. Ct. at 1555 (when a warrant can be obtained without significantly undermining the efficacy of the search, the Fourth Amendment mandates that police officers obtain one.) Here five or six officers responded to the 911 call regarding Mr. Parisi, one of those officers could have easily started the process for obtaining a warrant upon arriving at the scene. Further and even more significantly, Officer Fenhouse was put on notice that there would be a delay in obtaining blood from Mr. Parisi because of his worsened condition at the hospital. At that point he could have started the process for obtaining a warrant but instead did nothing and waited for the medical staff to eventually draw the blood against Mr. Parisi's will and without a warrant. ***McNeely*** does not allow officers to take no action to obtain a warrant when they have the time to seek one. Rather, ***McNeely*** and other cases, establish that blood should only be taken without a warrant as a last resort.

In its response brief, the state ignored Mr. Parisi's argument that there was no exigency because the officers had additional time to seek a warrant but yet failed to seek one. In

failing to rebut Mr. Parisi's argument, the state has conceded there was no exigency. *See* ***Mervosh***, 324 Wis. 2d 134, ¶10 (arguments not rebutted are deemed admitted).

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

The state relies solely on cases involving OWI charges to support its conclusion that a warrant was not required in this case yet ignores the fact that warrantless blood draws were allowed in those cases in part because of a specific compelling government interest in protecting the public from drunk drivers. Indeed, in reaching their conclusions that warrantless blood draws were acceptable, both the ***Bohling*** and ***McNeely*** courts emphasized the government's interest in protecting the public from drunk drivers. ***Bohling***, 173 Wis. 2d at 540-41, 545; ***McNeely***, 133 S. Ct. at 1565-66.

The state criticizes Mr. Parisi for not naming or recognizing government interests in this case, but blood draws are intrusive and involve the invasion of an individual's deepest expectations of privacy and the state, not Mr. Parisi, has the burden to show that a blood draw was reasonable. ***McNeely***, 133 S. Ct. at 1558; ***Payano-Roman***, 290 Wis. 2d 380, ¶42. The state has not met its burden here. The state has failed to prove there is an equally or more important state interest at work in Mr. Parisi's case than protecting against drunk driving, that justifies the intrusive, nonconsensual blood draw that took place in this case. The state mentions two possible governmental interests that would justify the intrusive personal search – stopping drug use and preventing death from drug use – but cites no cases that discuss the existence of such governmental interests or how they justify the blood draw in this case. (State's Br. at 10-11).

Additionally, the state's assertion that the warrantless blood draw in this case is justified by the state's interest in protecting individuals from dying from drug use makes little sense. The police protected that particular interest by getting Mr. Parisi medical treatment after his overdose, obtaining a blood sample without a warrant to be used in a future prosecution does not advance that goal.

CONCLUSION

For all the reasons stated in his brief-in-chief and above, this court should vacate the judgment of conviction and order that the results of Mr. Parisi's blood draw be suppressed.

Dated this 7th day of October, 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 2,394 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 7th day of October, 2014.

Signed:

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