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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP001267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDY J. PARISI,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District II, Affirming a Judgment of Conviction
Entered in the Circuit Court for Winnebago County,
the Honorable Daniel J. Bissett, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. *Bohling* is Not "Clear and Settled" Precedent For This Non-Driving Drug Possession Case.

The exclusionary rule should apply because it would be unreasonable to rely on ***Bohling***, a drunk driving case, in this non-driving drug possession case.

A. The state ignores the differences between ***Bohling*** and this case and the limiting language of ***Dearborn***.

The state argues the exclusionary rule should not apply because the officer relied in good faith on settled precedent in drawing Parisi's blood without a warrant. Yet the state fails to establish why ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), a drunk driving case about testing for alcohol concentration in a specific amount, provides "clear and settled" precedent for this non-driving possession case involving testing for evidence of drug use in any detectable amount. ***Bohling*** was clearly about alcohol and driving. The opinion used the word alcohol thirty-four times and referenced driving nineteen times. Further, ***Bohling*** specifically limited its rule to drunk driving cases, saying repeatedly that the rule applied to people "lawfully arrested for a drunk-driving related violation or crime." ***Id***. at 533-34, 548. ***Bohling*** also discussed the state's interest in enforcing its drunk driving laws in reaching its decision. ***Id***. at 545. An objectively reasonable officer would not read ***Bohling*** and believe it applied to this entirely different context which did not involve drugs or driving.

The state argues that ***Bohling*** is applicable because the opinion said nothing to exclude its application to drug cases. But such a statement implies this Court should broadly interpret cases to allow for more warrantless searches. Such an interpretation is contrary to the rule that exceptions to the warrant requirement be "jealously and carefully drawn." ***Jones v. U.S.***, 357 U.S. 493, 499 (1958). The state's broad interpretation is in conflict with the language of ***Dearborn***, which limits the reach of the good faith exception. ***State v. Dearborn***, 2010 WI 84, ¶46, 327 Wis. 2d 252, 786 N.W.2d 97 ("Our holding does not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation.").

The state fails to address Parisi's argument that it would be unreasonable to rely on ***Bohling*** because it is commonsense that alcohol dissipates faster than drugs and their metabolites. The state also fails to address the fact that drunk driving cases are fundamentally different from drug possession cases in that the specific amount of alcohol in the blood is relevant, whereas any detectable amount is sufficient to support a drug possession conviction. An objectively reasonable officer would understand these differences and would not believe ***Bohling*** applied to this non-driving drug case.

The state asserts that "if an objectively reasonable police officer would have made a diligent study of the law on October 16, 2012," he would have discovered ***State v. Malinowski,*** 2011 WI App 1, 2010 WL 4840092 (Nov. 30, 2010) (unpublished), which held there were exigent circumstances when a defendant was suspected of driving under the influence of a controlled substance, and thus would have believed ***Bohling*** applied to drug cases as well as

alcohol cases. Is the state suggesting that it is objectively reasonable for police officers to engage in legal research without any training to do so? Is it suggesting that officers should rely on unpublished cases in deciding what conduct is constitutional? This cannot be correct as unpublished cases may not be relied on as precedent or authority. *See* Wis. Stat. § 809.23(3)a. Further, the state's reliance on ***Malinowski*** is misplaced because that case preceded ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), and involved driving and this case did not.

The state similarly relies on LaFave's footnote that states that a "clear majority" of jurisdictions make no distinction between the metabolization of alcohol and drugs. (Resp. Br. at 10). Yet the state does not cite to cases that make up this "clear majority" or explain their reasoning for treating drug and alcohol cases the same when drugs and alcohol dissipate at markedly different rates. The state discusses ***People v. Ritchie***, 181 Cal. Rptr. 773, 775 (Cal. Ct. App. 1982), which held that drug and alcohol blood draws should be treated the same because both drugs and alcohol dissipate and diminish over time. But science does not support the over-simplified reasoning employed in ***Ritchie***. Alcohol actually dissipates more rapidly than drug metabolites. *Compare* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966) (percentage of alcohol in blood necessary for conviction and diminishes shortly after drinking stops) *with* Alain G. Verstraete, *Detection Times of Drugs of Abuse in Blood, Urine, and Oral Fluid*, Ther Drug Monit, 26, 200 (April 2004) ("in blood or plasma, most drugs…can be detected…for 1 to 2 days. In urine the detection time of a single dose is 1.5 to 4 days."). Some detectable amount of drug metabolite (all that is required for a drug possession charge) would be in a person's body for many hours, or even days, making it possible to get a warrant and still

obtain required evidence in drug cases.[1] ***McNeely*** prohibited the oversimplified logic used in ***Ritchie*** in holding that the actual circumstances of each case must be evaluated in determining if a warrant was required. Here, the metabolites of heroin remained in Parisi's system for many hours, allowing time to obtain a warrant.

B. The exclusionary rule should be applied to deter police misconduct and because finding that reliance on ***Bohling*** was reasonable would greatly expand the good faith exception.

The state offers no response to Parisi's argument that the exclusionary rule should be applied to deter police misconduct. This Court should discourage Officer Fenhouse's actions in drawing blood without reliance on a warrant, a statute, or a factually similar case. This Court should also discourage police from acting as these officers did in making no attempt to secure a warrant when they had ample time to start that process at the scene and especially after finding out the blood draw would be delayed to stabilize Parisi.

The state also fails to address Parisi's argument that a finding of reasonable reliance on ***Bohling*** would greatly expand the good faith exception. As discussed in Parisi's brief-in-chief, such a finding would affect all types of Fourth Amendment cases and would allow officers to extrapolate holdings from cases with entirely different facts to justify warrantless searches.

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[1] An officer does not need to know what drug was ingested or exactly when, as the state asserts, because metabolites of virtually every type of illegal drug remain in the system for many hours. (Verstraete at 200-03).

II. ***Heien*** and ***Houghton*** Do Not Apply and It Would Not Have Been A Reasonable Mistake to Assume ***Bohling*** Applied.

The state argues Officer Fenhouse made a mistake of law excusable under ***Heien v. North Carolina***, 135 S. Ct. 530 (2014) and ***State v. Houghton***, 2015 WI 79, __ Wis. 2d __, __ N.W.2d __, 2015 WL 4208659, in relying on ***Bohling*** to draw Parisi's blood. This argument fails first because Officer Fenhouse never testified he was relying on ***Bohling***. Further, ***Heien*** and ***Houghton*** do not apply because they involved: (1) questions of whether it was reasonable to suspect conduct was illegal, (2) reliance on ambiguous statutes, and (3) traffic stops. Additionally, assuming ***Bohling*** applied would not have been a reasonable mistake of law because ***Bohling*** is a drunk driving case about testing for specific alcohol concentration levels and this is a non-driving case about testing for drugs in any detectable amount.

A. ***Heien*** and ***Houghton*** do not apply because this case does not involve: (1) questioning whether it was reasonable to suspect conduct was illegal, (2) reliance on an ambiguous statute, or (3) a traffic stop.

In ***Heien***, the Supreme Court held that reasonable suspicion required for an investigatory traffic stop can rest on a reasonable mistake of law. 135 S. Ct. at 536-37. The Court held that the officer's mistaken belief that driving with only one working brake light was a statute violation was reasonable given that the relevant statute was ambiguous. ***Id***. at 540.

In ***Houghton***, this Court adopted the Supreme Court's view and held an officer's objectively reasonable mistake of law could form the basis of reasonable suspicion to support a

traffic stop. 2015 WL 4208659 at ¶52. This Court held that the officer's mistaken interpretation of Wis. Stat. § 346.88 was reasonable because it was a "close call" as to how the statute would be interpreted. ***Id***. at ¶70.

Heien and ***Houghton*** do not apply in this case. ***Heien***'s language indicates it applies only to cases where there is a question of whether it was reasonable to suspect that the defendant's conduct was illegal, not to cases like this one, where the court is deciding whether the application of the exclusionary rule is the appropriate remedy for a constitutional violation. 135 S. Ct. at 539. Here the officer never questioned whether it was illegal for Parisi to ingest illegal drugs rather the question is whether the exclusionary rule should remedy the unconstitutional blood draw or if the good faith exception should apply.

Further, both ***Heien*** and ***Houghton*** were about officers' mistaken interpretations of statutes, not case law, and their holdings applied only to mistakes in statutory interpretation. *See* ***Id***. at 539 (discussing officers application of ambiguous statute); ***Id***. at 541 (Kagan, J., concurring) (evaluation of a potential mistake of law presents a "straightforward question of statutory construction."); ***Id***. at 544, 546 (Sotomayor, J., dissenting) (discussing officer application of unclear statute and statutory interpretation); ***Houghton***, 2015 WL 4208659, ¶¶54-55, 68 (discussing statutory interpretation and quoting Justice Kagan's ***Heien*** concurrence in stating the court faced a straightforward question of statutory construction).

The state says ***Heien*** should also apply where police were mistaken about case law, rather than a statute. However, the state cites no authority for its proposition and there are

many reasons why such an expansion of ***Heien*** would be problematic.

Officers are untrained in the law and cannot reliably determine whether principles from one case apply to another. That job is better left to the courts. Officers are also untrained in binding authority. Thus, an officer might think it was appropriate to rely on an unpublished case or a case from another jurisdiction. Expanding ***Heien*** to apply to mistakes in case law interpretation would incentivize conducting illegal searches and seizures and arguing after the fact that they were done in reliance on some marginally relevant case. This slippery slope would lead to many illegal searches and would leave the courts with the time-consuming duty of determining whether officer case interpretations were correct on a case-by-case basis.

The language of ***Heien*** also indicates the Supreme Court did not want or expect its holding to be greatly expanded to case law, as the state suggests. *See* 135 S. Ct. at 541 (Kagan, J., concurring) (mistake of law only in the "exceedingly rare" cases where the statute is ambiguous to the point of posing a "really difficult" or "very hard question of statutory interpretation.").

Finally, ***Heien*** and ***Houghton*** are also not applicable because they are about mistakes of law regarding reasonable suspicion for investigatory traffic stops and Parisi's case did not involve a traffic stop. As the state pointed out (Resp. Br. at 7), a warrantless blood draw requires not only reasonable suspicion but also exigent circumstances. ***Heien*** and ***Houghton*** therefore do not cover this factually distinct case. Justice Sotomayor pointed out that investigative stops are "annoying, frightening, and perhaps humiliating." ***Heien,*** 135 S. Ct. at 543-44 (Sotomayor, J., dissenting). Warrantless

blood draws are substantially more frightening and intrusive. As such, the analysis used for investigative stops should not be presumed to be appropriate for warrantless blood draw cases.

B. Even if ***Heien*** and ***Houghton*** apply, the mistaken belief that ***Bohling*** applied would not have been reasonable.

It would not have been reasonable to assume that ***Bohling*** applied because it was about drunk driving and testing for specific alcohol concentration levels and this is a non-driving case about testing for evidence of drug use in any detectable amount. Further, any layperson, and especially any police officer, would understand the any detectable amount distinction and that drug and alcohol cases are different because drug metabolites remain in the system long enough to obtain a warrant.

The state proposes interpreting "reasonable" much more liberally than it was interpreted in ***Heien*** and ***Houghton***. *See* ***Heien***, 135 S. Ct. at 541 (Kagan, J., concurring) (mistake only reasonable if statute posed a "very hard question of statutory interpretation."); ***Houghton***, 2015 WL 4208659, ¶¶73-78 (officer's interpretation of license plate statute unreasonable because the officer could not know whether the driver needed to display a front plate).

Bohling differs significantly from this case. If the court adopts the state's view that it was a reasonable mistake of law to rely on ***Bohling***, it will create a slippery slope and lead to many more warrantless searches.

III. There Were No Exigent Circumstances That Excused the Warrantless Blood Draw.

There were no exigent circumstances because morphine provides proof of heroin use and remains in the body for many hours, leaving ample time to secure a warrant.

Officer Fenhouse testified it takes two hours to obtain a warrant. (30:21). The state says that morphine remains in blood for up to nine hours after it is formed from heroin. (Resp. Br. at 13). As such, the state has not met its burden to prove there was a threat evidence would be destroyed if the police failed to act without a warrant. ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548. The fact that morphine was found in 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.

The test is whether it would be reasonable for an officer to believe evidence would be lost if he took time to get a warrant. ***State v. Leutenegger,*** 2004 WI App 127, ¶11, 275 Wis. 2d 512, 685 N.W.2d 536. It would not be reasonable for an officer to believe that heroin's metabolite, morphine, dissipates at the same rate or more rapidly than alcohol because it is commonsense that evidence of drug use is detectable for many hours or even days. Further, any reasonable officer understands that blood alcohol tests must be done quickly because drunk driving charges and penalties rely on specific blood alcohol levels. The same is not true for drug possession.

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. But ***McNeely*** does not state, nor does any other case Parisi is aware of, that the warrant exception should apply if obtaining a warrant might mean losing the "best evidence." Rather, ***McNeely*** says the exigent circumstances 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 to get the "best evidence" 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." A new law allowing warrantless searches to preserve the "best evidence" would greatly expand the exigent circumstances 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 in order to prove possession, there must be: (1) evidence of drug use in the person's system, and (2) some other evidence showing the defendant's control over the substance. But the state has failed to prove why the presence of morphine, a metabolite of heroin, in the blood, coupled with 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 would be sufficient. Indeed, the facts of this case prove why the distinction is irrelevant – Parisi was convicted of drug possession based on the presence of morphine in his blood and evidence of control of heroin

found in the apartment. Because morphine can form a basis for a heroin conviction, as it did here, the state fails to establish why waiting for a warrant and finding morphine would "negatively affect the probative value" of the test results or "significantly undermine the efficacy of the search." (Resp. Br. at 15).

Further, the dissipation rates the state provided for heroin and 6-monoacetylmorphine (10-40 minutes and 1-3 hours, respectively[2]) are so rapid it would be nearly impossible for officers to ever draw blood 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 no warrant is required in any case that possibly involves heroin. 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 drunk driving cases in ***McNeely.***

[2] The state is incorrect that Verstraete's article does not support Parisi's statement that 6-monoacetylmorphine remains detectable in urine for up to 34.5 hours. (Resp. Br. at 16). The article states "In the Lübeck study, 6-acetylmorphine (LOD10ng/mL) was detectable for 5 hours on average (maximum 34.5 hours)." (Verstraete at 203).

CONCLUSION

For all the reasons stated in his brief-in-chief and above, Andy J. Parisi contends that the evidence found pursuant to his warrantless blood draw must be suppressed. Mr. Parisi therefore requests that this Court reverse the decision of the court of appeals.

Dated this 14th day of August, 2015.

Respectfully submitted,

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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 2,994 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.

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Dated this 14th day of August, 2015.

Signed:

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