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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT II**

**Appellate Case No. 2015AP000304-CR**
**Trial Case No. 13-CF-365 (Sheboygan County)**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**GERALD P. MITCHELL,**

**Defendant-Appellant.**

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**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE PRESIDING**

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# DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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## STATEMENT OF THE ISSUE

**DID THE TRIAL COURT ERR WHEN IT DENIED MITCHELL'S MOTION TO SUPPRESS THE RESULTS OF THE UNREASONABLE AND WARRANTLESS BLOOD DRAW, EVEN THOUGH THERE WERE NO JUSTIFIABLE EXIGENCIES THAT WOULD HAVE OBVIATED THE NEED FOR A SEARCH WARRANT PRIOR TO THE BLOOD DRAW AND WISCONSIN'S "IMPLIED CONSENT" LAW WAS IMPROPERLY INVOKED?**

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented in this appeal is controlled by settled state and federal law and, therefore, the appellant does not recommend oral argument or publication.

## SUMMARY OF THE ARGUMENT

The trial court erred when it improperly denied Gerald Mitchell's motion to suppress the results of a blood draw taken from him as part of the investigation of a possible charge of operating while intoxicated. Any evidence resulting from the blood draw should have been suppressed because the investigating officer did not attempt to get a

warrant for the blood draw, even though he had adequate opportunity to apply for a search warrant, nor did exigent circumstances exist under which a warrantless blood draw might have been appropriate. Additionally, although Mitchell eventually became unconscious, leading the officer to treat the situation as appropriate for application of "implied consent" rules under Wis. Stat. 343.305(3)(b), nevertheless there was sufficient time after Mitchell was taken into custody and before he became unconscious for the officer to have gained Mitchell's consent or withdrawal of consent for the blood draw or to have applied for a search warrant for the blood draw. The circuit court should have granted Mitchell's Motion to Suppress, and all evidence obtained through the nonconsensual and warrantless blood draw, in violation of Mitchell's constitutional rights, should have been excluded from consideration at the trial which eventually followed.

## PROCEDURAL HISTORY

- On April 17, 2013 the U.S. Supreme Court decided ***Missouri v. McNeely***,133 S.Ct. 1552 (2013).

- On May 30, 2013, Gerald Mitchell was arrested on suspicion of Operating While Intoxicated (7th, 8th, or 9th), contrary to §346.63(1)(a)Wis. Stats. and Operating with a Prohibited Alcohol Concentration (7th, 8th, or 9th), contrary to §346.63(1)(a) Wis. Stats.. (R. 1.)

- The State filed a criminal complaint on July 1, 2013, when Mitchell made his initial appearance and bond was set. (R. 1.)

- The preliminary hearing occurred on July 17, 2013. (R. 81.)

- Mitchell's Motion to Suppress Evidence of Bodily Intrusion was heard on October 16, 2013. (R. 23 at 1.) The Motion was denied. (R. 23 at 52.)

- Mitchell's jury trial occurred on December 17, 2013, in Sheboygan County Circuit Court, Branch IV, the Honorable Terence T. Bourke presiding, at which Mitchell was convicted of Operating While Intoxicated ($7^{th}$, $8^{th}$, or $9^{th}$), contrary to §346.63(1)(a)Wis. Stats. and Operating with a Prohibited Alcohol Concentration ($7^{th}$, $8^{th}$, or $9^{th}$), contrary to §346.63(1)(a) Wis. Stats.. (R. 89 at 317.)

- Mitchell was sentenced on February 28, 2014; Mitchell was sentenced to six years (three years of initial confinement followed by three years of extended supervision) in the Wisconsin Prison System on each of the two counts, to run concurrently to each other. (R. 70 at 1) Mitchell was originally granted 274 days of credit for time served; on June 4, 2014 the Judgment of Conviction was amended to reflect 247 days of credit for time served. (R. 69 at 1; R. 70 at 1.)

- Mitchell filed a Notice of Intent to Pursue Post Conviction Relief on June 2, 2014, and this appeal ensued. (R. 66 at 1-2.)

## STATEMENT OF FACTS

This is an appeal from a denial of a suppression motion challenging a warrantless blood draw. (R. 23.)

During the afternoon of May 30, 2013 at approximately 3:17 pm, Officer Alex Jaeger [henceforth "Jaeger"] of the City of Sheboygan Police Department was dispatched to 1127 North Eighth Street in the City of Sheboygan in response to a call from a resident, a Mr. Alvin Swenson. (R. 81 at 3-5; R. 86 at 5.) Swenson reported to Jaeger that he had seen Gerald Mitchell [henceforth "Mitchell"] leave Mitchell's residence and that Mitchell stumbled and seemed intoxicated as he got into a gray van. (R. 81 at 6-7; R. 86 at 7.)

Jaeger testified that approximately half an hour to forty five minutes passed between his first contact with Swenson

and his eventual contact with Mitchell. (R. 81 at 11.) Jaeger testified that, a short time later when he arrested Mitchell, Mitchell was able to perform a preliminary breath test, but that he did not ask Mitchell to attempt any standardized field sobriety tests due to his condition. (R. 86 at 14-15.) Jaeger arrested Mitchell at 4:26 pm on May 30, 2013, immediately after Jaeger administered the preliminary breath test to Mitchell,.according to the Alcohol Influence Report. (R. 86 at 15; R. 86 at 21.) Although two officers were required to place Mitchell in the squad car due to Mitchell's instability and behavior, Jaeger nevertheless took Mitchell to the police station rather than to the hospital for medical clearance. (R. 81 at 13.)

Jaeger testified that it would take "about five minutes maybe" to travel from the initial contact with Mitchell to the Police Department. (R. 86 at 17.) It is approximately a four minute drive from the location of the arrest to the hospital, and approximately a two minute drive from the arrest location to the Police Department. (R. 23 at 2.)

Upon arrival at the police department Mitchell became somewhat unresponsive, although Jaeger testified that he did not know if it was because Mitchell "was so intoxicated or under the influence of something or having some type of a medical concern that he could no longer stand." (R. 81 at 13.) Mitchell was lethargic and fell asleep, but would wake up with stimulation. (R. 86 at 17.) Jaeger and his supervisor decided it was appropriate to take Mitchell to the hospital for a blood draw. (R. 86 at 38-40) Under oath, Jaeger testified as follows:

> Q: You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?
>
> A: Yes.
>
> Q: Why?
>
> A: Because of his current condition.
>
> Q: That being that he was unconscious?
>
> A: He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.

Q: Okay. If he was going progressively downhill in front of you, why didn't you read him the Informing the Accused at that time?

A: I don't know.

Q: Were you at that time concerned that he was going to pass out?

A: It was a concern.

(R. 86 at 38-40.)

Approximately one hour elapsed from the time of arrest to the time Mitchell arrived at the hospital. (R. 86 at 22.) Upon his arrival at the hospital, Mitchell was losing consciousness and could not respond to "Informing the Accused" when Jaeger finally read it to him. (R. 81 at 14; R. 86 at 18-19.) Jaeger signed and dated the form on May 30, 2013 at 1724 hours. (R. 86 at 19.) Mitchell's blood was eventually drawn at 1759 hours. (R. 81 at 14; R. 86 at 28.)

Jaeger testified at the hearing on Mitchell's Motion to Suppress Evidence of Warrantless Bodily Intrusion regarding Jaeger's failure to apply for a warrant to draw Mitchell's blood. (R. 86 at 37-40.) Jaeger testified as follows:

Q: You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?

A: I could have applied.

Q: I'm sorry. Yes. You could have applied, correct?

A: I suppose.

Q: Police do that on a fairly regular basis, don't they?

A: Now yes.

Q: How long does it typically take?

A: I don't know. I haven't done a warrant blood draw yet. We just started doing those.

Q: It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?

A: Yes.

(R. 86 at 37-38.)

At the end of the suppression hearing, Attorney Haberman, for the State, argued that the blood draw in this case was done pursuant to the implied consent law found in Wis. Stats. §343.305(3)(b), and that ***Missouri v. McNeely*** did not apply. (R. 86 at 44.) He concedes that there were no other

exigent circumstances surrounding the blood draw in the case. (R. 86 at 44.) Attorney Wingrove, for Mitchell, argued that there was a warrantless blood draw, and that the officer could have gotten a warrant but did not do so. (R. 86 at 47.) Attorney Wingrove further discussed issues raised by the manner in which implied consent was applied in this case. (R. 86 at 47-48.) Wingrove pointed out to the court that Jaeger could have given Mitchell the "Informing the Accused" when Jaeger first asked Mitchell to do field sobriety. (R. 86 at 48.)

Judge Bourke, in his decision, concluded that the State was correct in their position. (R. 86 at 50.) He comments that "[t]his is a simple OWI investigation. Nothing more, nothing less. … They go through the regular procedure. Blood is drawn." (R. 86 at 52.) Judge Bourke then denied the Motion to Suppress. (R. 86 at 52.)

After denial of the Motion to Suppress, the case continued to trial on December 17, 2013, at which a jury found Mitchell guilty of Operating While Intoxicated (7th, 8th,

or 9th), contrary to §346.63(1)(a)Wis. Stats. and one count of Operating with a Prohibited Alcohol Concentration (7th, 8th, or 9th), contrary to §346.63(1)(a) Wis. Stats. (R. 89 at 317.)

Mitchell now appeals the denial of his Motion to Suppress Evidence of Warrantless Bodily Intrusion.

## STANDARD OF REVIEW

Whether a warrantless blood draw falls within the exigent circumstances exception to the warrant requirement is a question of law subject to a *de novo* review by appellate courts. ***State v. Faust***, 274 Wis. 2d 183, 682 N.W.2d 371 (2004); ***State v. Bohling***, 173 Wis. 2d 529, 533 (1993)

## ARGUMENT

### Introduction

On May 30, 2013, Gerald Mitchell's Fourth Amendment right to protection from an unreasonable search and seizure was violated when he was subjected to a warrantless and nonconsensual taking of a blood sample from his body. The State took that sample of his blood without

giving him the opportunity either to consent to the blood draw or to withdraw his consent. Further, the State, in the person of Officer Jaeger, failed to properly apply for the necessary search warrant required before completing a nonconsensual blood draw. Finally, the State improperly invoked §343.305(3)(b) Wis. Stats. as a basis for the otherwise disallowed warrantless blood draw.

## I. THE TRIAL COURT ERRED WHEN IT DENIED MITCHELL'S MOTION TO SUPPRESS THE RESULTS OF THE UNREASONABLE AND WARRANTLESS BLOOD DRAW, EVEN THOUGH THERE WERE NO JUSTIFIABLE EXIGENCIES THAT WOULD HAVE OBVIATED THE NEED FOR A SEARCH WARRANT PRIOR TO THE BLOOD DRAW?

### a. Citizens Are Protected From Unreasonable Searches and Seizures.

Citizens are protected from unreasonable searches and seizures by the Fourth Amendment to the United States Constitution and by Article I, Section 11 of the Wisconsin Constitution. ***State v. Phillips***, 577 N.W.2d 794, 218 Wis. 2d 180, 195 (1998).

The U.S. Supreme Court has held that "[t]he integrity of an individual's person is a cherished value of our society." ***United States v. Schmerber*****,** 384 U.S. 757, 772 (1966). Further, "searches that intrude beyond the surface of the body require more than mere probable cause to arrest in order to pass constitutional muster. *Id*. at 770. And, finally, "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* at 772.

**b. A Nonconsensual Blood Draw Is A Search Subject To Fourth Amendment Protections.**

The United States Supreme Court held in ***Schmerber*** that a nonconsensual blood draw is, in fact, a search that is subject to the restrictions of the Fourth Amendment. *Id. at 767.* The US Supreme Court further held in ***Schmerber*** that a blood draw for evidentiary purposes is a Fourth Amendment search that necessitates a warrant, unless the particular facts of the case provide some acknowledged exception to the warrant requirement. *Id.* at 770. The ***Schmerber*** court established a three-pronged test to determine the

constitutionality of a warrantless, nonconsensual blood draw. *Id.* at 770-771. The three elements of the test for constitutionality are:

1. A clear indication that evidence of intoxication would be found in the blood;
2. The existent of exigent circumstances;
3. The blood draw is done by a reasonable method and in a reasonable manner.

*Id.*

**c. A Warrantless Search Of A Person Is *per se* Unreasonable Absent Exigent Circumstances Or Another Exception To Fourth Amendment Protections.**

Both the United States Supreme Court and the Wisconsin Supreme Court have held that a warrantless search of a person is *per se* unreasonable absent exigent circumstances or another exception to the Fourth Amendment. ***Katz v. United States***, 389 U.S. 347, 357 (1967); ***State v. Murdock*,** 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990).

Early case law in Wisconsin permitted warrantless blood draws in cases where officers believed that the dissipation of alcohol from the blood created an exigent circumstance that did not allow time for a search warrant to be obtained, and the dissipation of alcohol was specifically noted as an exigent circumstance that allowed for warrantless blood draws. ***State v. Bohling***, 173 Wis. 2d 529 at 533. ***Bohling,*** however, is no longer good law in Wisconsin following the U.S. Supreme Court decision in ***Missouri v. McNeely. State v. Reese*****,** 353 Wis. 2d 266, 844 N.W.2d 396 (Ct. App. 2014).

In ***McNeely,*** the U.S. Supreme Court held that dissipation of alcohol is not, per se, an emergency situation that permits a warrantless blood draw. ***Missouri v. McNeely***, 133 S.Ct. 1552 at 1556. The Court went on to hold that mere dissipation of alcohol is not a sufficient basis alone to permit a warrantless blood draw and that the *totality of circumstances* [emphasis added] in each situation must be considered. *Id.* The Wisconsin Supreme Court earlier held

that "[w]e reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the *totality of the circumstances* [emphasis added] of each individual case." ***State v. Faust,*** 274 Wis.2d 183, 682 N.W.2d 371 (2004) at 383, n. 16.

**d. Discussion**

In the case considered here, Jaeger contacted Mitchell on the street on suspicion that Mitchell had been driving while intoxicated. Mitchell showed signs of intoxication, although the Jaeger testified that he believed Mitchell was either intoxicated or had some other medical concern. Jaeger administered a preliminary breath test but did not attempt to have Mitchell perform any standardized field sobriety tests.

Both testimony and other unchallenged information in the record indicate that it was a matter of only a few minutes' drive from the location of the arrest to either the hospital or to the police station, but rather than take Mitchell to the hospital, Jaeger instead took Mitchell, who was still conscious, to the police station.

Eventually, at a point approximately one hour after arresting Mitchell, Jaeger took Mitchell to the hospital to have his blood drawn. By the time Mitchell arrived at the hospital, he was losing consciousness and could no longer respond appropriately when Jaeger finally read "Informing the Accused" to him. Most importantly, at no point during that hour, while Mitchell was still conscious and responsive, did Jaeger attempt to read him "Informing the Accused." In fact, the officer testified that he watched Mitchell's condition deteriorate visibly.

Once Mitchell lost consciousness, Wisconsin's statutory authority to draw blood was invoked under §343.305(3)(b) Wis. Stats., which is commonly known as the Implied Consent law. Mitchell's blood was taken without his consent or withdrawal of consent, and without a warrant, even though the officer had ample time prior to Mitchell's descent into unconsciousness either to secure Mitchell's consent or refusal or to follow established warrant procedures.

Jaeger knew that, absent consent or withdrawal for a blood draw through "Informing the Accused," the law

required a search warrant for a nonconsensual blood draw. At Mitchell's preliminary hearing, Jaeger testified that a process existed for obtaining a warrant for a blood draw, that he knew there was a process, that it had become a routine process, and that he could have applied for a warrant, but chose not to do so. He cited as grounds that he had not used that procedure yet, even though McNeely was enforceable at that time.

Jaeger took no steps to apply for a search warrant to draw Mitchell's blood or to obtain his consent/refusal for the blood draw during the time when such consent could have been obtained. No other exigent circumstances existed that would negate the need for a warrant before the blood draw. Therefore, based on the totality of the circumstances in this situation, the blood draw performed on Mitchell was not performed in accord with established rules and requirements and evidence obtained from the blood should have been excluded from the jury at trial.

## II. WISCONSIN'S IMPLIED CONSENT STATUTE SHOULD NOT APPLY IN A CASE WHERE CONSENT OR REFUSAL WAS NOT OBTAINED FROM A SUBJECT WHO COULD HAVE CONSENTED TO, OR REFUSED CONSENT, FOR A BLOOD DRAW AND WISCONSIN'S "IMPLIED CONSENT" LAW WAS IMPROPERLY INVOKED?.

Wis. Stats. 343.305(3)(b) clearly states that "a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection … and … one or more samples specified … may be administered to the person."

In the case at bar, Mitchell does not contest the fact that he was unconscious when the blood draw occurred. By the time Jaeger finally took him to the hospital for the blood draw, Mitchell was no longer able to consent or withdraw consent to the blood draw. However, he was in custody for approximately an hour before he arrived at the hospital, and before he lost consciousness, during which time he could communicate. Jaeger did not attempt to obtain his consent or withdrawal of consent until after Mitchell lost consciousness; in fact, Jaeger testified that he actually watched Mitchell's

condition deteriorate before taking him to the hospital. Therefore, because Jaeger did not make a reasonable attempt to obtain Mitchell's consent or withdrawal of consent to the blood draw while Mitchell was still conscious, Wis. Stats. 343.305(3)(b) should not have been invoked to permit a warrantless blood draw after Jaeger waited until Mitchell lost consciousness before proceeding with the blood draw. Since implied consent was improperly invoked, the evidence obtained from the blood draw should have been excluded from the jury at trial.

## CONCLUSION

WHEREFOR, Mitchell respectfully requests this Court to reverse his conviction in Sheboygan County Case Number 13-CF-365 because the circuit court erred when it denied Mitchell's Motion to Suppress The Results of the Warrantless Blood Draw, even though there were no justifiable exigencies that would have obviated the need for a search warrant prior to the blood draw, and because §343.305(3)(b) Wis. Stats was improperly invoked.

Dated this 11th day of May, 2015.

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 4,076 words.

Dated this 11th day of May, 2015

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## 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.

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