STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Gerald P. Mitchell, appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI), and with a prohibited alcohol concentration (PAC), both as seventh, eighth, or ninth offenses (65; 70).[1]

Mitchell was charged after a man, Alvin Swanson, called police to report that Mitchell was driving and that he appeared to be intoxicated. Officer Alex Jaeger responded to a dispatch and spoke to Swanson, who said that Mitchell's mother had told Swanson that she was concerned about Mitchell's welfare (86:6). Swanson told Officer Jaeger that he had witnessed Mitchell leave his residence and that he observed that Mitchell appeared disoriented, was stumbling, had difficulty maintaining his balance, and nearly fell several times before leaving the scene in a minivan (86:6-7).

Officer Jaeger was contacted approximately half an hour later by a community services officer who had located a man matching Mitchell's description (86:9). Officer Jaeger saw Mitchell walking towards him (86:9). He testified that Mitchell was slurring his words, stumbling, had on jeans but no shirt, was wet, and had sand on his body (86:11). Officer Jaeger said that Mitchell had difficulty maintaining his balance, and nearly fell several times (86:12). He said that Mitchell admitted to drinking (86:12-13). Another officer located the van that Mitchell had reportedly driven, and observed that there was minor damage to the van (86:14).

Officer Jaeger did not have Mitchell perform field sobriety tests, because Mitchell "was stumbling, could barely stand without being held" (86:14-15). He administered a preliminary breath test (PBT), which indicated a blood

[1] The circuit court imposed concurrent sentences for the OWI and PAC convictions.

alcohol concentration of .24 (86:16). Officer Jaeger arrested Mitchell for OWI, and put him in the back of his squad car to go to police headquarters (86:16-17).

Officer Jaeger testified that the trip to the police station took about five minutes (86:17). He said that during this period, Mitchell became more lethargic, and had greater difficulty maintaining his balance, and when they arrived at the police station, Mitchell had to be helped out of the squad car (86:17). Officer Jaeger testified that when he placed Mitchell in a holding cell, Mitchell began to close his eyes, but that he would wake up with stimulation (86:17).

Officer Jaeger spoke to his lieutenant, and they determined that due to Mitchell's condition, a blood test would make more sense than a breath test, so he transported Mitchell to the hospital for a blood test (86:17-18). He said that during the approximately eight minute trip to the hospital, Mitchell became "completely incapacitated," and would not wake up even when stimulation was applied (86:18). Mitchell was taken into the hospital in a wheelchair (86:18). Officer Jaeger said that he completed the blood draw paperwork, and read the Informing the Accused form to Mitchell, but that Mitchell "was so incapacitated he could not answer" (86:19-20). A phlebotomist obtained a blood sample from Mitchell (86:23). A test of the blood revealed a blood alcohol concentration of .222 (12).

Mitchell moved to suppress the blood test results on the ground that his blood was improperly drawn without a warrant (23). The circuit court, the Honorable Terence T. Bourke, denied the motion after a hearing (86).

Mitchell was then tried, and a jury found him guilty of OWI and PAC (52; 53; 65). The circuit court imposed judgment of conviction for OWI and PAC as seventh, eighth, or ninth offenses, and imposed concurrent three-year sentences (65). Mitchell now appeals the judgment of conviction (77).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED MITCHELL'S MOTION TO SUPPRESS EVIDENCE.

A. Introduction.

The circuit court denied Mitchell's motion to suppress evidence because it concluded that his blood was properly drawn under the implied consent law (86:50-51). The court concluded that Officer Jaeger had probable cause to request the blood draw, and that Mitchell did not withdraw the consent that he gave under the implied consent law (86:50-51).

The circuit court concluded that "no warrant was required because Mr. Mitchell was unconscious." The court explained:

> The officer's testimony was that he took Mr. Mitchell after the arrest to the Police Department. Mr. Mitchell was -- it sounded to me like he was kind of with it initially, but he was deteriorating. And they get to the police station, and they're not sure that he can submit to a breath sample. So they take him to the hospital. And on the way to the hospital, he deteriorates to the point where he cannot be shaken awake. To me that's unconscious.
>
> And the law -- when I refer to the law I'm referring to 343.305(3)(b) -- makes clear that an unconscious operator has -- cannot withdraw their consent to a blood sample. The only issue really regarding the warrantless draw is whether or not there is probable cause. That's the threshold question to whether or not you can do the blood sample.
>
> And I find there is probable cause.

(86:50.)[2]

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[2] The court also rejected Mitchell's argument that his rights were violated because his blood was drawn at a hospital, and the test results were disclosed in violation of federal law (86:51-52). Mitchell

Mitchell makes two arguments on appeal, both concerning the circuit court's decision denying his motion to suppress the results of a test of his blood. He asserts that the test results should have been suppressed because his blood was drawn without a warrant, without his consent, and without a showing of exigency (Mitchell's Br. at 17-18). Mitchell also asserts that the blood draw was not proper under Wis. Stat. § 343.305(3)(b), under which a person who is unconscious is presumed not to have withdrawn consent to a request for a blood draw, because the officer could have requested a blood draw while he was conscious, but did not do so (Mitchell's Br. at 19-20).

As the State will explain, the circuit court correctly denied Mitchell's motion to suppress evidence. Mitchell's first argument fails because his blood was drawn with his consent, under the implied consent law. His second argument fails because nothing in the implied consent law requires that the unconscious driver provision does not apply when an officer failed to request a sample when the person was conscious, and because nothing in the record indicates that the officer did anything wrong in not requesting a blood sample from Mitchell when he was conscious. The circuit court properly denied Mitchell's motion to suppress evidence, and properly imposed judgment of conviction, and this court should affirm the judgment of conviction.

B. Standard of review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* (citation omitted). The circuit court's findings of historical fact are reviewed under the

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does not challenge the court's ruling on this issue, or its ruling on probable cause, in this appeal.

clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

C. Mitchell's blood was properly drawn under Wis. Stat. § 343.305(2), Wisconsin's implied consent law.

Mitchell argues that the results of a test of his blood should have been suppressed because Officer Jaeger did not obtain a search warrant, and none of the exceptions to the warrant requirement apply (Mitchell's Br. at 17-18). Specifically, he argues that his blood was drawn without a warrant, "without his consent or withdrawal of consent," and without a showing of exigency (Mitchell's Br. at 17).

Mitchell points out that in *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552, 1556 (2013), the Supreme Court held that "dissipation of alcohol is not per se, an emergency situation that permits a warrantless blood draw" (Mitchell's Br. at 15). As the Wisconsin Supreme Court has stated, "The Supreme Court held in *McNeely* that the dissipation of alcohol in the bloodstream by itself does not create a per se exigency so as to justify a warrantless investigatory blood draw of an OWI suspect." *State v. Kennedy*, 2014 WI 132 ¶ 14, 359 Wis. 2d 454, 856 N.W.2d 834 (citing *McNeely*, 133 S. Ct. at 1563).

McNeely has no bearing on this case because it dealt only with the exigent circumstance exception to the warrant requirement. In the current case, Mitchell's blood was not drawn on the basis of an exigent circumstance. It was drawn on the basis of another exception to the warrant requirement—consent.

In *McNeely*, the Supreme Court explicitly recognized that consent, and specifically implied consent, is an exception to the warrant requirement. The Court noted that implied consent laws are "legal tools" to enforce drunk-driving laws, and that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically

the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 133 S. Ct. at 1566.

Mitchell's argument that his blood was drawn without his consent is simply wrong. As he acknowledges, "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 Br. at 17). Under the implied consent law, any person who operates a motor vehicle upon a Wisconsin highway "is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol . . . when requested to do so by a law enforcement officer under sub. (3) (a)." Wis. Stat. § 343.305(2). Subsection (3)(a) provides that "[u]pon arrest of a person for violation of s. 346.63 (1) . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2)." Wis. Stat. § 343.305(3)(a).

Subsection (3)(b) provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1) . . . one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. § 343.305(3)(b).

In this case, it is undisputed that Officer Jaeger arrested Mitchell for OWI in violation of § 346.63(1). Officer Jaeger was therefore authorized to request one or more samples from Mitchell under § 343.305(3)(a). It is also undisputed that when Officer Jaeger requested a blood sample, Mitchell was unconscious, or otherwise not capable of withdrawing the consent to a request for a sample that he

gave under § 343.305(2) when he operated a motor vehicle on a Wisconsin highway.

Under the plain language of the implied consent law, by operating a motor vehicle on a Wisconsin highway, Mitchell gave consent to a blood draw when it was requested by a law enforcement officer. Wis. Stat. § 343.305(3)(a). Under the plain language of the law, a person who is unconscious is presumed not to have withdrawn that consent. Wis. Stat. § 343.305(3)(b). As the circuit court concluded, Mitchell was unconscious, and his blood was properly drawn under the implied consent law (86:50).

Mitchell's second argument is that it was improper to invoke the implied consent law in this case. He acknowledges that he was unconscious when his blood was drawn (Mitchell's Br. at 19). But he argues that the implied consent law should not apply when an officer could request a blood sample from a person when the person is conscious, but instead waits until the person is unconscious to request a blood sample (Mitchell's Br. at 19-20).

Mitchell asserts that he was in custody for approximately an hour before he arrived at the hospital, and that he could communicate during this time period. He argues that

> 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.

(Mitchell's Br. at 20.)

Mitchell's argument fails for at least two reasons. First, there is nothing in the statute that requires an officer to request a sample before a person becomes unconscious. And Mitchell cites no case providing that a blood draw is improper if the officer could have requested a blood sample

from a person before the person becomes unconscious but failed to do so.

Second, the facts of the case do not demonstrate that Officer Jaeger did anything even arguably unreasonable in not requesting a blood sample from Mitchell before he became unconscious. Officer Jaeger arrested Mitchell for OWI at 4:26 p.m. (86:35). He took Mitchell to the police station "for further processing" (86:16-17). Officer Jaeger testified that it took "about five minutes" to get to the police station, and that during this period, Mitchell's condition was "declining" (86:17). He said that Mitchell

> was becoming more lethargic in his movements, had greater difficulty in maintaining balance, had to be physically helped out of the squad car when we got there. And once he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out.

(86:17.)

Officer Jaeger testified that Mitchell "would wake up with stimulation" (86:17). He said that "based on that condition, I didn't feel that a breath test would be appropriate" (86:17). Officer Jaeger said he spoke to his lieutentant, and they decided that a blood test would be appropriate, so Officer Jaeger took Mitchell to the hospital (86:17).

Officer Jaeger said it took "[e]ight minutes maybe" to get to the hospital, and that during this period, Mitchell "appeared to be completely incapacitated, would not wake up to any type of stimulation" (86:18). He said that when they arrived at the hospital, Mitchell "had to be escorted into the hospital by wheelchair" (86:18-19).

Officer Jaeger's testimony makes clear that there was no reasonable opportunity to request a sample from Mitchell, and that even if he would have had an opportunity, he would have requested a breath sample, not a blood

sample. Officer Jaeger could not have requested a sample from Mitchell until after Jaeger placed him under arrest. *See* Wis. Stat. § 343.305(3)(a). He testifed that he put Mitchell in the squad car and took him to the hospital, intending to request a breath test (86:17). He could not reasonably have requested a sample while driving, because he had to read the Informing the Accused form to Mitchell, and because Mitchell was "declining" (86:17). When they arrived, Officer Jaeger put Mitchell into a holding cell, and Mitchell closed his eyes and fell asleep or passed out (86:17). Officer Jaeger could not reasonably have requested a sample at this point, because Mitchell was not conscious.

Officer Jaeger spoke to his lieutenant, and they decided that Mitchell was so intoxicated that they could not conduct a breath test (86:17). By this point, Mitchell was obviously unconscious or otherwise not capable of withdrawing his consent. During the short drive to the hospital, Mitchell was "completely incapacitated" (86:18). There is no evidence that he regained consciousness before his blood was withdrawn.

Even if it were required that an officer make a reasonable effort to request a sample from a person while the person is conscious, Officer Jaeger had no real opportunity to request a sample while Mitchell was conscious and capable of deciding whether to affirm the consent he had already given to a blood draw, or withdraw that consent. Officer Jaeger complied with the implied consent law by requesting a sample after he arrested Mitchell for OWI. Mitchell was unconscious, and did not withdraw the consent he impliedly gave when he operated a motor vehicle on a Wisconsin highway. Under § 343.305(3)(b), because Mitchell was unconscious or otherwise not capable of withdrawing his consent, it is presumed that he did not withdraw it. Officer Jaeger therefore had hospital personnel draw the sample. Nothing that Officer Jaeger did was improper or unreasonable under the implied consent law.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting Gerald P. Mitchell of operating a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration.

Dated this 14th day of August, 2015

Respectfully submitted,

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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 2,794 words.

_____
Michael C. Sanders
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 14th day of August, 2015.

_____
Michael C. Sanders
Assistant Attorney General