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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)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. MITCHELL'S BLOOD TEST RESULTS SHOULD HAVE BEEN SUPPRESSED BECAUSE HIS BLOOD WAS DRAWN WITHOUT HIS CONSENT, WITHOUT EXIGENT CIRCUMSTANCES, AND WITHOUT A SEARCH WARRANT.

Mitchell agrees with the State that there were no exigent circumstances that would have allowed the State to bypass their need for a search warrant precedent to performing a blood draw in this case.

The State incorrectly argues that ***Missouri v. McNeely***, 569 U.S.___, 133 S.Ct. 1552 (2013) does not apply in the case of Gerald Mitchell. On the contrary, the ***McNeely*** decision does in fact apply in this case. While ***McNeely*** certainly deals with the issue of exigent circumstances, there are other important statements in the case as well. ***McNeely*** refers specifically to ***McDonald v. United States***, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and affirms that "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the

search, the Fourth Amendment mandates that they do so." ***McNeely,*** 133 S.Ct. 1552, at 1561 (2013).

The Court then gives an example: "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement." *Id.*

In Mitchell's case, the warrant process would not have significantly increased the delay before the blood test could be conducted. Rather, the delay that led to Mitchell's losing consciousness before the blood draw was due entirely to the actions of Officer Jaeger. It is undisputed that the officer chose to take Mitchell to the police department rather than to the hospital immediately upon taking him into custody. (R. 86 at 18-19.) Between the time that Mitchell was taken into custody and the time he lost consciousness, Officer Jaeger

had most of an hour in which to apply for a search warrant to draw Mitchell's blood, or in the alternative to have gained his consent/withdrawal of consent before subjecting him to a warrantless blood draw. (R. 86 at 22.) Officer Jaeger testified that he was aware of the warrant requirement and decided not to apply for one. (R. 86 at 37-38.)

A. MITCHELL HAD NO OPPORTUNITY TO CONSENT OR TO REFUSE CONSENT FOR THE BLOOD DRAW.

It is undisputed in this case that neither Officer Jaeger nor any other officer read Mitchell the "Informing The Accused" statement that forms the basis for consent or refusal of consent for a blood draw during the time when Mitchell could have responded; rather, they waited until he was unconscious. (R. 86 at 18-19.)

Officer Jaeger himself testified that he wasn't sure if Mitchell was intoxicated or having a medical issue. (R. 81 at 13.) It is somewhat disingenuous, then, for the officer to claim on the one hand that Mitchell's condition was deteriorating such that basic procedures could not be followed, and on the other hand to have taken him to the

police station rather than directly to the hospital. This is especially concerning if Officer Jaeger had concerns, as he stated he had, regarding Mitchell's health and safety.

II. MITCHELL'S BLOOD TEST RESULTS SHOULD HAVE BEEN SUPPRESSED AS IMPROPERLY TAKEN UNDER WIS. STAT. §343.305(3)(b) BECAUSE HE WAS CONSCIOUS DURING MUCH OF THE PERIOD BEFORE HIS BLOOD WAS DRAWN.

Mitchell agrees that Wis. Stat. §343.305(3)(b) applies in the case of an unconscious driver, in a situation where a person has been continuously unconscious from the time he was taken into custody. However, when an individual is and has been conscious for some period of time up to and including the point at which the State decides to take a blood sample, then it is improper to characterize that individual as "unconscious." He certainly may become unconscious at some later point, but he was not unconscious when the State had opportunities to obtain his consent or refusal of consent. It is improper to apply Wis. Stat. §343.305(3)(b) in Mitchell's case because he remained conscious until after the decision was made to take a blood sample from him.

The State argues that there is nothing in the implied consent statute that requires an officer to request a sample before a person becomes unconscious. This defies logic. If an individual is conscious for a period of time up to and including the point at which the decision to draw blood is taken, as Mitchell was, then the officer is duty bound as a matter of public policy and community protection to obtain consent for that blood sample during the period of consciousness. In order to assure the Fourth Amendment rights of a conscious detainee, the police ought to perform the condition precedent to enforcement, which is to request consent before unilaterally deciding to take a sample of a person's blood.

The State further argues that there was no reasonable opportunity to request a sample from Mitchell. This also defies logic. It is undisputed that Mitchell was conscious when he was taken into custody. He was conscious upon arrival at the police station, and remained conscious after the decision was made to take him to the hospital. It was not until he arrived at the hospital that he became unresponsive.

(R. 81 at 14; R. 86 at 18-19.) Mitchell could have either consented to the blood draw or withdrawn his consent at any point in the period of time during which Officer Jaeger knew he could have complied with the law and obtained a search warrant but chose instead not to do so.

Invoking the provisions of the implied consent law was certainly "easier" for Officer Jaeger. It was a more familiar process. However, the warrant requirement was known in May, 2013, and the officer testified that he knew what was expected of him in that regard. (R. 86 at 37-38.) He simply chose not to comply with the warrant requirement, and instead took an easy and more familiar solution, albeit incorrect.

The unconscious driver provision of Wisconsin's Implied Consent law does not apply in this case because Mitchell was not an unconscious driver and because Officer Jaeger had ample opportunity to obtain either consent or withdrawal of consent from Mitchell while Mitchell was 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.

CONCLUSION

The State's position in this case creates a logical inconsistency. If a conscious person refuses a blood draw, which is arguably contrary to the State's interest in enforcing drunk driving laws, then the State is required to protect that person's Fourth Amendment right to be secure in their person by applying for and receiving a search warrant before drawing a blood sample for testing. On the other hand, a person who falls into unconsciousness without being given the opportunity to consent or withdraw consent before falling uncosncious, is denied that same Fourth Amendment protection. The State can unilaterally take that person's blood without regard for his Fourth Amendment right to be secure in his person. The implication is clear: the "refuser" is entitled to greater Constitutional protection under the Fourth Amendment than the person who has neither agreed nor

refused. This outcome cannot be the result envisioned by the legislatures and courts responsible for these laws and their interpretation.

For all the reasons stated above, Mitchell's conviction in Sheboygan County Case Number 13-CF-365 should be reversed because the circuit court erred when it denied Mitchell's Motion to Suppress the Results of the Warrantless Blood Draw because his blood was drawn without his consent, without exigent circumstances, and with out a search warrant, and because §343.305(3)(b) Wis. Stats., was improperly applied in Mitchell's case.

Dated this 1st day of October, 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 1,778 words.

Dated this 1st day of October, 2015

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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Dated this 1st day of October, 2015

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