STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED FOR REVIEW

The question addressed in this case is whether implied consent, as outlined in ***Wis. Stat***. ¶ 343.305(3)(b), constitutes voluntary consent to a search such that a blood sample may be taken from an unconscious driver under the Fourth Amendment.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Through its grant of review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

The State of Wisconsin violated Gerald Mitchell's right to protection from unreasonable search and seizure under the Fourth Amendment to the United States Constitution on May 30, 2013. On that date, he was subjected to a nonconsensual, warrantless blood draw on the occasion of arrest on suspicion of driving while intoxicated. A blood sample was taken without Mitchell's consent, without any other exception to the warrant requirement of the

Fourth Amendment, and without a warrant. The question before this court is nothing more, or less, than whether or not Mitchell gave his consent to the blood draw that was performed on him on May 30, 2013.

This Court should reverse the trial court's decision denying Mitchell's suppression motion and remand the matter to the trial court with instructions to grant Mitchell's suppression motion for two reasons:

First, Mitchell did not give actual consent to the blood draw. Law enforcement officers could not reasonably conclude that Mitchell made any meaningful response to the "Informing the Accused" form when it was only read to him after he became unconscious.

Second, any consent that the state may have imputed to Mitchell was not voluntary because it was not based on the totality of the circumstances surrounding Mitchell's arrest.

Third, there were no other exceptions, such as the existence of exigent circumstances, to the Fourth Amendment

warrant requirement that justified law enforcement officers' taking of Mitchell's blood without his consent or a search warrant.

STATEMENT OF THE CASE

On May 30, 2013, Gerald Mitchell was arrested on suspicion of Operating While Intoxicated (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a) and Operating with a Prohibited Alcohol Concentration (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a). (1.) The State filed a criminal complaint on July 1, 2013, when Mitchell made his initial appearance and bond was set, (1.) and a preliminary hearing occurred on July 17, 2013. (81.)

Mitchell filed a Motion to Suppress Evidence of Bodily Intrusion, which was heard on October 16, 2013. (23:1.) The Motion was denied. (23:52.) The case then proceeded to a jury trial on December 17, 2013, in Sheboygan County Circuit Court, Branch IV, the Honorable Terence T. Bourke presiding. (89.) Mitchell was convicted of Operating While Intoxicated (7th, 8th, or 9th), contrary to ***Wis. Stat.*** §346.63(1)(a) and Operating with a Prohibited Alcohol

Concentration (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a). (89:317.)

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. (70:1.) Mitchell was originally granted 274 days of credit for time served, but on June 4, 2014 his Judgment of Conviction was amended to reflect 247 days of credit for time served. (69:1; 70:1.)

Mitchell filed a Notice of Intent to Pursue Post Conviction Relief on June 2, 2014, and this appeal ensued. (66:1-2.) Mitchell filed his Notice of Appeal on February 10, 2015, followed by his Brief of Defendant-Appellant on May 11, 2015. After submission on briefs to the Court of Appeals, Mitchell's case was held in abeyance pending the decision in ***State v. Howes,*** 2017 WI 18. Ultimately, the Court of Appeals filed a Petition for Certification to the Wisconsin Supreme Court on May 17, 2017, which was granted on September 11, 2017.

STATEMENT OF FACTS

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. (81:3-5; 86:5.) 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. (81:6-7.)

Jaeger testified that approximately half an hour to forty five minutes passed between his first contact with Swenson and his eventual contact with Mitchell. (81:11.) 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. (86:14-15.) Jaeger arrested Mitchell at 4:26 pm on May 30, 2013, immediately after Jaeger administered the preliminary breath test to Mitchell.

(86:15, 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. (81:13.)

Jaeger testified that it would take "about five minutes maybe" to travel from the initial contact with Mitchell to the Police Department. (86:17.) 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. (23:2.)

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." (81:13.) Mitchell was lethargic and fell asleep, but would wake up with stimulation. (86:17.) At that time, Jaeger and his supervisor decided it was appropriate to take Mitchell to the

hospital for a blood draw. (86:38-40) 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.

(86:38-40.)

Approximately one hour elapsed from the time of arrest to the time Mitchell arrived at the hospital. (86:22.) 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. (81:14; 86:18-

19.) Jaeger signed and dated the form on May 30, 2013 at 1724 hours. (86:19.) Mitchell's blood was eventually drawn at 1759 hours. (81:14; 86:28.)

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. (86:37-40.) 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.

(86:37-38.)

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. Stat. § 343.305(3)(b), and that ***Missouri v. McNeely***, 133 S.Ct. 1552, 81 USLW 4250, 185 L.Ed.2d 696 (2013) did not apply. (86:44.) He conceded that there were no other exigent circumstances surrounding the blood draw in the case. (86:44.) 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. (86:47.) Attorney Wingrove further discussed issues raised by the manner in which implied consent was applied in this case. (86:47-48.) 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. (86:48.)

Judge Bourke, in his decision, concluded that the State was correct in their position. (86:50.) The judge commented that "[t]his is a simple OWI investigation. Nothing more, nothing less. … They go through the regular procedure.

Blood is drawn." (86:52.) Judge Bourke denied Mitchell's Motion to Suppress. (86:52.)

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

Mitchell now appeals.

STANDARD OF REVIEW

An appellate court reviews a motion to suppress under a two-step analysis. ***State v. Padley***, 2014 WI App 65, ¶¶ 15-16, 354 Wis.2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695 (citing ***State v. Robinson***, 2009 WI App 97, 320 Wis.2d 689, 779 N.W.2d 721). First, the appellate court will uphold the factual findings of the circuit court unless they are clearly erroneous. ***Padley,*** 2014 WI App 65, ¶ 15. Second, the constitutionality of a statute is a question that an appellate court will review de novo. ***Padley,***

2014 WI App 65, ¶ 16, (citing ***State v. Cole***, 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d 328). The appellate court presumes that a statute is constitutional, and the challenger must prove beyond a reasonable doubt that it is unconstitutional. ***Padley,*** 2014 WI App 65, ¶ 16.

ARGUMENT

I. IMPLIED CONSENT AS OUTLINED IN WIS. STAT. § 343.305(3)(b) DOES NOT CONSTITUTE CONSENT TO A SEARCH UNDER THE FOURTH AMENDMENT.

Both the United States Supreme Court and the Wisconsin Supreme Court have held that a warrantless search of a person is unreasonable absent exigent circumstances or another exception to the Fourth Amendment. ***Katz v. United States***, 389 U.S. 347, 357, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); ***State v. Murdock*****,** 155 Wis.2d 217, 227, 455 N.W.2d 618 (1990). Although unreasonable, warrantless searches conducted pursuant to "voluntarily given consent" nevertheless do fall within a well-established exception to the Fourth

Amendment's warrant requirement. ***State v. Williams***, 2002 WI 94, ¶ 18, 255 Wis.2d 1, 646 N.W.2d 834; ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wi.2d 392, 786 N.W.2d 430 ("Warrantless searches are *per se* unreasonable, subject to several clearly delineated exceptions.").

Wisconsin, like all states, has an implied consent statute. Wis.Stat. § 343.305 (relevant excerpts in Appendix E) provides a basis for law enforcement to request a blood, breath, or urine sample from a driver under certain circumstances. Two sections of the statute permit a law enforcement officer to request a breath, blood or urine sample from a conscious person suspected of driving while intoxicated. Wis.Stat. § 343.305(a), (am). Further, when the person is unconscious, samples of breath, blood, or urine may be administered, because the person did not withdraw his implied consent. Wis.Stat. § 343.305(3)(b). If a person should refuse to provide a sample of breath, blood, or urine, that conduct is punishable. Wis.Stat. § 343.305(4). All of this information comes to the driver when the law enforcement

officer, as required, reads to him "Informing the Accused," which is provided in Wis.Stat. § 343.305(4).[1]

Law enforcement officers may request a sample of breath, blood, or urine. The act of requesting implies the possibility that the person may refuse the request, and in fact that possibility is addressed in "Informing the Accused," a specific statement to the person from whom a sample is requested. That statement describes the penalties that devolve upon refusal to give consent to the blood sample. Importantly for this discussion, law enforcement officers *"shall"* read the required statement. Wis. Stat. § 343.305(4).

Wisconsin courts distinguish between implied consent and actual consent. Actual consent to a blood draw is not "implied consent." ***Padley***, 2014 WI App 65, ¶ 25 ("…actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.").

[1]Mitchell's "Informing the Accused" is found at Appendix E.

Thus, the ***Padley*** court concluded that the implied consent law by itself does not permit law enforcement officers to require a driver to provide a blood sample, but rather the statute permits law enforcement officers to request a blood sample from a driver who has previously agreed that the law allows an officer to ask for such a sample. ***Padley***, 2014 WI App 65, ¶¶ 26-27. ("[A] proper implied consent law authorizes law enforcement to present drivers with a difficult, but permissible, choice between consent or penalties for violating the implied consent law,…".). ***Padley***, 2014 WI App 65, ¶ 28. "The purpose of the implied consent statute is to "persuad[e] drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***Padley***, 2014 WI App 65, ¶ 24, "The implied consent law does not compel a blood sample as a driver has the right to refuse to give a sample. …the choice is solely with the driver." ***State v. Blackman,*** 371 Wis.2d 635, ¶ 11, 886 N.W.2d 94 (Wis. App. 2016). ***Padley*** also provides that actual consent is given after being read the "Informing the 'Accused" form and giving affirmative consent to the blood draw. ***Padley***, 2014 WI App

65, ¶ 39. ("…the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. … choosing the "yes" option [to the "Informing the Accused" Form] affirms the driver's implied consent and constitutes actual consent for the blood draw.") If the driver refuses to consent, he or she thereby withdraws "implied consent" and accepts the consequences of that choice." ***Padley***, 2014 WI App 65, ¶ 39. The consequence for refusal to submit to a chemical test of breath, blood, or urine is significant: it leads to a separate criminal offense. ***State v. Zielke***, 137 Wis.2d 39, 41, 403 N.W.2d 427 (1987). ("the implied consent law…creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood, or urine.")

Logic demands that if there is a provision for an alternative, then the alternative must exist. When alternatives exist, a choice exists. Therefore, since refusal is a statutory

alternative for a driver faced with a request by law enforcement for a blood sample, then that driver may make a choice between the alternatives. Since consent or withdrawal of consent are the only two alternatives contemplated in Wisconsin's implied consent statute, the prior "implied" consent can logically be denied or revoked. The choice is meaningless without some mechanism by which a person may reasonably assert his choice. The mechanism by which a person confirms their consent (or withdraws their consent) to a blood draw is through the use of the "Informing the Accused" Form.

Clearly, then, law enforcement officers may not assume that, at some time in the past, a driver irrevocably consented to having his blood taken. By its own provisions the implied consent law is revocable and establishes a mechanism for a person to revoke that consent and refuse the blood draw at the time law enforcement requests the sample. Because implied consent is revocable, and can thus be withdrawn, it cannot function as an automatic consent for a

blood sample. Actual consent is a different kind of consent and happens at the time of the blood test.

Here, Mitchell was conscious when he was taken into custody. He was conscious upon arrival at the police station. He was still conscious when he arrived at the hospital after being detained at the police station. During this entire time, a period of almost two hours, provisions of Wis. Stat. § 343.305(3)(a) or (am) applied because Mitchell was conscious and capable of consenting to the blood draw, yet law enforcement made no attempt to inform Mitchell of his right to withdraw his consent. Mitchell had no opportunity to give or withdraw his consent.

Once Mitchell lost consciousness, law enforcement applied a different subsection of the Wisconsin implied consent statute, namely the "unconscious driver provision."| Wis. Stat. § 343.305(3)(b). Under this provision, the driver's actual consent is not needed because his consent deemed not withdrawn. The blood sample may be taken without further consent or warrant. In Mitchell's case, law enforcement

waited until he lost consciousness, and only then read him "Informing the Accused." Mitchell was unable to withdraw his consent to the blood sample at that point, and law enforcement obtained a sample of his blood with his "consent" because failure to withdraw consent amounts to consent under Wis. Stat. § 343.305(3)(b).

"[T]he Fourth Amendment does not allow such per se rules [regarding exigency] in the context of warrantless investigatory blood draws." ***State v. Kennedy,*** 2014 WI 132, ¶ 29, 359 Wis.2d 454, 856 N.W.2d 834. It is not a long jump from a prohibition against categorical rules regarding exigency to categorical rules regarding consent. However, Wis. Stat. § 343.305(3)(b) presents just such a categorical rule as it permits warrantless blood draws on a *per se* basis from unconscious persons, while consent or a warrant is required to take the same sample from a conscious person. The law presumes that all unconscious persons, unable by definition to provide actual consent to a blood sample, have impliedly given actual and voluntary consent to blood testing, while conscious drivers may choose whether or not to

consent. By virtue of his physical situation, regardless of the reason for that situation, an unconscious person has apparently lost the protection against unreasonable search and seizure that is guaranteed to all citizens under the Fourth Amendment.[2]

The unconscious driver provisions of Wis. Stat. § 343.305(b) do not further any legitimate state interest and offer no compelling reason why an unconscious driver should be afforded less constitutional protection than another driver simply on the basis of his state of consciousness. The process of taking a blood sample is effectively the same in either case. The process of obtaining a warrant is the same in either case. The Wisconsin implied consent law creates an unreasonable situation in which a person who actively violates the law, e.g. refuses to submit to a blood sample, has greater constitutional protection via the warrant requirement than does a person

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[2] Although the Fourth Amendment does not contain specific language requiring the government to obtain search warrants, ***McNeely*** teaches that "warrants must generally be obtained." ***Missouri v. McNeely,*** 133 S.Ct. 1552, 1569.

who is unconscious and unable to respond, and who does not have the protection of the warrant requirement. The state thus imposes a greater burden on the person who cannot comply with the law than it imposes upon the person who affirmatively violates the law. There is simply no compelling reason for the Fourth Amendment rights of an unconscious person to be respected any less than the Fourth Amendment rights of a conscious person.

It is unreasonable to conclude that an unconscious Mitchell gave actual consent to the blood draw. Law enforcement used a legal fiction to assert consent given not by Mitchell but rather through a statutory construction essentially dispensing with Mitchell's Fourth Amendment protection against unreasonable search and seizure. Mitchell did not give consent to the warrantless blood draw performed on his person on May 30, 2013.

II. "IMPLIED CONSENT" DEEMED TO HAVE OCCURRED BEFORE A DEFENDANT IS A SUSPECT IS NOT VOLUNTARY CONSENT FOR PURPOSES OF THE CONSENT EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT BECAUSE IMPLIED CONSENT DOES NOT ADDRESS THE TOTALITY OF THE CIRCUMSTANCES AT THE TIME OF ARREST.

Even if the State can demonstrate that consent was given in fact, it must also prove that consent was given freely and voluntarily. ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854. The voluntariness of a person's consent to a search is "to be determined from the totality of all the circumstances." ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 248. In determining voluntariness of consent, the court will consider the totality of the circumstances, including the circumstances surrounding consent and the characteristics of the defendant. ***Artic***, 2010 WI 83, ¶¶ 32-33.

Well before the ***McNeely*** decision, holding that the totality of circumstances in each situation must be considered, ***Missouri v. McNeely***, 133 S.Ct. 1552, 1556, the Wisconsin Supreme Court held 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,*** 2004 WI 99, 274 Wis.2d 183, 682 N.W.2d 371, n. 16.

The "totality of the circumstances" as a determining factor in consent represents a somewhat flexible concept. ***Schneckloth v. Bustamonte*** provides one list of factors that together make up the "totality of the circumstances," including, among others: mental illness or intoxication of the person; that the person was under arrest at the time of consent; that the person was subject to physical restriction. ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 226-227.

Since the totality of the circumstances is a determinant of the voluntariness of a person's consent to a search, it is necessary then to consider Mitchell's circumstances during

his time in police custody on May 30, 2013. At trial, the state proved to the jury's satisfaction that Mitchell was intoxicated at the time of his arrest. Mitchell was certainly in custody, as he was not free to leave and go about his business; law enforcement officers restrained Mitchell and controlled his movements. Although Mitchell maintained consciousness for most of the period of time while he was in custody and before being taken to the hospital, he lost consciousness at some point after arriving at the hospital.

Significantly, Officer Jaeger failed to read Mitchell the "Informing the Accused" form until after Mitchell lost consciousness. Obviously, Mitchell could not respond at that time, due to his unconscious state, even though he could have responded earlier; to infer that his consent to the blood draw was voluntary when in fact he was unconscious is an unreasonable conclusion. It is equally unreasonable to conclude that, while unconscious, Mitchell gave voluntary consent to the blood sample because he did not (could not) withdraw his implied consent.

Mitchell was intoxicated, he was in custody and his freedom of movement was restricted by law enforcement, and the police officer did not inform him of his right to withdraw his consent to a blood sample until after he became functionally unable to hear or respond to the officer's request. The totality of the circumstances surrounding Mitchell's situation leads to the inescapable conclusion that his "consent" to the blood draw was not voluntary.

III. THE RESULTS OF MITCHELL'S BLOOD TEST SHOULD BE SUPPRESSED BECAUSE NO EXCEPTION JUSTIFIED A WARRANTLESS BLOOD DRAW.

The Fourth Amendment to the Constitution of the United States, as well as Article I, Section 11 of the Wisconsin Constitution, protect against "unreasonable searches and seizures." ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794 (1998). "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause…". U.S. Const. amend. IV.

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, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). ***Schmerber*** established that "[s]earches that intrude beyond the surface of the body require more than mere probable cause to arrest in order to pass constitutional muster." ***Schmerber***, 384 U.S. 757, 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." ***Schmerber***, 384 U.S. 757, 772. From Wisconsin case law, "[a] warrantless search is presumptively unreasonable" unless the search falls within an exception to the warrant requirement. ***State v. Tullberg***, 2014 WI 134, ¶ 30, 359 Wis.2d 421, 857 N.W.2d 120.

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, 533, 494 N.W.2d 399 (1993). ***Bohling,*** however, is no longer good law in Wisconsin following the U.S. Supreme Court decision in ***Missouri v. McNeely,*** 133 S.Ct. 155. ***State v. Reese*****,** 2014 WI App 27, ¶ 18, 353 Wis.2d 266, 844 N.W.2d 396.

As recently as March 1, 2017, in ***State v. Howes***, the Wisconsin Supreme Court addressed the exigent circumstances exception to the general Fourth Amendment warrant requirement. ***State v. Howes***, 2017 WI 18. In ***Howes***, the circuit court granted a defense motion to suppress the report of the blood test taken at the hospital from an unconscious Howes. ***Howes***, 2017 WI 18, ¶ 15. The trial court concluded that the unconscious driver provision of Wisconsin's Implied Consent law is unconstitutional when the blood draw is done without a warrant or the presence of exigent circumstances. ***Howes***, 2017 WI 18, ¶ 15. The state appealed, and this Court reversed the circuit court***.*** ***Howes***, 2017 WI 18, ¶ 16.

Under the specific facts of ***Howes,*** the Wisconsin Supreme Court decided that exigent circumstances justified the search (blood draw) without reaching the question of consent. In reversing the circuit court, the Wisconsin Supreme Court concluded that because Howes was unconscious and seriously injured, and because his PAC threshold was .02%, a reasonable officer could have concluded that further delay would result in destruction of necessary evidence. ***Howes***, 2017 WI 18, ¶ 3. Therefore, the Fourth Amendment exception for exigent circumstances permitted Howe's blood to be taken without consent and without a warrant.

Mitchell's situation is clearly distinguishable from that of Howes. Mitchell only became unconscious after a significant period of time in police custody. In fact, it was not until he arrived at the hospital that he lost consciousness. Howes was unconscious during the entire time that he was in the control of law enforcement leading up to the blood draw. The officer who had custody and control of Mitchell, on the

other hand, had a conscious suspect and plenty of time to obtain either Mitchell's consent or a warrant before taking Mitchell's blood sample. Ultimately, though, both situations resulted in warrantless blood draws from unconscious persons.

While exigent circumstances ultimately led to Howes' blood draw being found constitutional, no exigencies existed in Mitchell's case. The location of the arrest, the police station, and the hospital are all within short distances of each other. No situation caused an unexpected or overly long delay that might have led to undue dissipation of alcohol from Mitchell's blood. There was no investigation requiring the officer's attention before he could get around to Mitchell's blood draw. No injured people needed immediate assistance. No traffic blockages existed. In short, exigent circumstances did not exist to prevent law enforcement from complying with the requirements of the Fourth Amendment, Wisconsin Statutes, and federal and state case law.

Officer Jaeger contacted Mitchell on the street at approximately 3:17 pm (1517 in the afternoon). Testimony shows that this contact occurred approximately 30-45 minutes after the initial call to law enforcement. Jaeger testified that he believed Mitchell was either intoxicated or had some other medical concern. Jaeger did not attempt to obtain Mitchell's consent for a blood sample at this point in the stop.

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 either to the hospital or to the police station, but rather than take Mitchell to the hospital, Jaeger instead took Mitchell, still conscious, to the police station. Eventually, at a point approximately one hour after taking Mitchell into custody (one and a half to two hours after the initial call to police), Jaeger took Mitchell to the hospital to have his blood drawn. By the time Mitchell arrived at the hospital, he could no longer respond appropriately when Jaeger attempted to obtain Mitchell's consent by reading "Informing the Accused" to him. Jaeger was aware that Mitchell was losing consciousness; he testified that he

watched Mitchell's condition deteriorate visibly. Once Mitchell lost consciousness, law enforcement caused a sample of his blood to be taken.

At least two hours passed while Jaeger held Mitchell in custody and before Mitchell became unconscious. Jaeger took no steps during that time to apply for a search warrant to draw Mitchell's blood or to obtain his consent/refusal for the blood sample. No other exigent circumstances existed that would negate the need for a warrant before the blood draw. In total, less than three hours passed from the time that law enforcement personnel received the call concerning Mitchell until Mitchell became unconscious; had Jaeger obtained consent or a warrant, Mitchell's blood would still have been drawn within the three hour window of automatic admissibility established in the Wisconsin Statutes.[3]

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[3] "evidence of the amount of alcohol in the person's blood at the time in question … is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved." Wis. Stat. § 885.235(1g).

The totality of the circumstances is the proper test of whether the State must obtain a search warrant. Mitchell's situation embodied circumstances that weigh in favor of the need for a warrant, including Mitchell's conscious state and the lack of timely use of "Informing the Accused." The only factor that may favor a warrantless search is that Mitchell eventually lost consciousness, and this factor must be tempered with the knowledge that law enforcement had time to either obtain his consent or a warrant for the blood sample before Mitchell became unconscious. The totality of the circumstances supports Mitchell's position: he did not reasonably give either actual or voluntary consent to the blood sample that was taken, that no other exception to the warrant requirement of the Fourth Amendment was present, and that no warrant was obtained. Evidence obtained from the blood sample taken from Mitchell should have been excluded from the jury at trial.

CONCLUSION

For all the reasons discussed above, Mitchell requests that this Supreme Court of Wisconsin find that the Fourth Amendment to the United States Constitution should have protected him from a nonconsensual, nonexigent, and warrantless blood test. Mitchell further requests that the Circuit Court of Sheboygan County's decision to deny his Motion to Suppress the Evidence of Warrantless Blood Draw be reversed and his case remanded to the circuit court with an Order suppressing the results of the warrantless blood draw.

Dated this 23rd day of October, 2017.

Signed:

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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 6,261 words.

Dated this 23rd day of October, 2017.

Signed:

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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.

Dated this 23rd day of October, 2017.

Signed:

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A P P E N D I X

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant-Petitioner.

APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of October, 2017.

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