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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. MITCHELL DID NOT CONSENT TO THE BLOOD DRAW PERFORMED ON HIM.

A. Actual Consent To A Blood Draw Occurs When Law Enforcement Reads "Informing The Accused" To The Suspect And Obtains The Suspect's Consent or Refusal of Consent.

The State argues that by driving on Wisconsin's public roads, Mitchell had impliedly given consent for law enforcement officials to take a blood sample from him should he be suspected of driving while intoxicated. State's Response Brief at p. 28. This interpretation is not correct. Reference to the right to refuse to give a sample is found in **Wis. Stat.** §343.305(4).[1] The Wisconsin Court of Appeals has interpreted this statute to mean that "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

[1] "At the time that a chemical test specimen is requested … , the law enforcement officer shall read the following to the person from whom the test specimen is requested: …" (then follows the text of "Informing the Accused.") **Wis. Stat.** §343.305(4).

driver." ***State v. Blackman,*** 371 Wis.2d 635, 643, 886 N.W.2d 94 (Wis. App. 2016).

Wis. Stat. §343.305(4) requires that a law enforcement officer read the suspect a document called "Informing The Accused," which contains statutorily specified language advising the accused person of the consequences of refusing the request for a blood sample. The Court of Appeals in ***State v. Padley*** takes this analysis a step further, stating that "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…". ***State v. Padley,*** 2014 WI App 65, ¶28, 354 Wis.2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695.

Since the implied consent statute explicitly states that the law enforcement officer "may request" a blood sample, then implied consent really means that citizens driving on Wisconsin public roads have consented, by their conduct, to make a choice in the event they are suspected of driving while intoxicated: either they will provide actual consent by an

affirmative response to "Informing the Accused," or, should they refuse to give actual consent, they will face the penalties described in **Wis. Stat.** §343.305(4). ***State v. Blackman,*** 371 Wis.2d 635, 642, 886 N.W.2d 94 (Wis. App. 2016).

The suspect provides actual consent at the point where a law enforcement officer meets his or her statutory obligation by reading him or her "Informing the Accused." It is at this point that the individual, by the nature of his response, either consents to or refuses to permit the taking of the requested blood sample. The consent implied in statute, then, is consent to the premise that a person will make a decision at some time in the future as to whether the person will provide a blood sample or face specified penalties. Statutory implied consent does not replace actual consent to an invasive, intrusive, and warrantless seizure of material from inside an individual's body.

Mitchell had no opportunity to give actual consent or to withdraw his consent to the blood draw that was eventually performed. The State argues that Mitchell always had the

opportunity to either consent or to withdraw his consent to the requested blood draw, at any time leading up to the procedure. The State is not correct. While the ability to speak may imply on some level that a person could make a statement consenting to a blood draw, nevertheless Wisconsin Statutes provide a required process by which consent is either confirmed or withdrawn. **Wis. Stat.** §343.305(4). The process is not discretionary, but is mandated. This process requires that a law enforcement officer read specific language to the accused and ascertain his consent or non-consent through the use of a written form. Mitchell asserts that he was not provided with this required opportunity to consent or withdraw his consent to the request for a blood sample during the time he was held in custody and was physically conscious and able to respond; thus, he did not have a statutory opportunity to declare his consent or refusal.

The State correctly points out that implied consent must be voluntary to be valid. ***State v. Phillips***, 218 Wis.2d 180, ¶26, 577 N.W.2d 794; ***State v. Brar,*** 2017 WI 73, ¶24

(lead op.), 376 Wis.2d 685, 898 N.W.2d 499. Consent is voluntary if "given in the absence of duress or coercion, either express or implied." ***State v. Phillips,*** 218 Wis.2d 180, ¶26. In Mitchell's case, the State failed to perform according to the statutory mandate of the implied consent law when it did not read him "Informing the Accused" during the time when he was conscious and could have responded. Officer Jaeger and his supervisor selectively decided to wait until Mitchell was nearly unconscious before attempting to obtain a blood sample. By not providing him the required opportunity to consent or to refuse the request before he lost consciousness, when he could have reasonably responded, they assumed Mitchell's fictional consent. Law enforcement certainly employed trickery, if not implied or outright coercion, in manipulating Mitchell's situation in order to avoid the necessity of obtaining a warrant before taking a forced blood sample.

A forced blood draw conducted by law enforcement, such as Mitchell experienced, falls within the definition of a

"search" under the Fourth Amendment and therefore must be reasonable. ***State v. Padley,*** 2014 WI App 65, ¶23, 354 WIs.2d at 562. Further, the U.S. Supreme Court established in ***United States v. Schmerber*** that a nonconsensual blood draw constitutes a search subject to the requirements of the Fourth Amendment. ***United States v. Schmerber***, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and, "[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." ***United States v. Schmerber***, 384 U.S. at 772. "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. Finally, 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,*** 274 Wis.2d 183, 682 N.W.2d 371, 383 (2004), n. 16.

After Mitchell was taken into custody, at least an hour passed during which Mitchell was conscious and before he became unconscious. Law enforcement had more than enough time to comply with the statutory requirement either to obtain Mitchell's statutory consent or to obtain a search warrant should he refuse. Not until Mitchell was essentially unconscious did Officer Jaeger finally read "Informing the Accused" to Mitchell. It is patently unreasonable, first of all, to read "Informing the Accused" to an unconscious person and to believe that this act fulfills the statutory mandate; second, and even more unreasonable, is the presumption that because an unconscious person did not respond either giving or refusing consent, that he therefore somehow gave actual consent to an intrusive internal search and seizure within his body. In fact, by "refusing" consent (through his loss of consciousness), Mitchell may well be presumed to have withdrawn his consent. ***State v. Blackman,*** 371 Wis.2d at 642, citing ***State v. Padley*** 354 Wis.2d 545, ¶38 and ***State v. Neitzel,*** 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980). Under

this interpretation, Mitchell's "refusal" should have triggered the warrant process before his blood sample was taken.

In any event, and under any interpretation of Mitchell's conduct and situation, the totality of the circumstances indicate that he did not give actual consent to the request for a blood sample. Therefore, since Mitchell did not give consent to the request for a blood sample and because there were no other exceptions to the fourth amendment warrant requirement, Mitchell's blood was improperly taken and the results of the alcohol testing done on that blood sample must be suppressed.

The State points out that "consent under the statute is not consent implied by law; it is a presumption of consent implied by a person's voluntary conduct undertaken against the backdrop of law…" State's Response Brief at p. 28. Mitchell denies that the presumption of consent is sufficient to create actual consent. If the presumption of consent were truly sufficient to allow such an intrusive search as a warrantless and unconsented blood draw, then there would be

no need for an implied consent statute, since the statutory construct of "presumed consent" would be sufficient to overcome any obstacles, including the warrant requirement of the Fourth Amendment.

Mitchell agrees with the State that "the best way to find out whether a motorist consents *presently*, at the moment of the search, is simply to ask." State's Response Brief at p. 32. "Informing the Accused" is the statutory vehicle through which law enforcement asks this question. Confirming a suspect's consent in this manner creates actual consent to the request for a blood sample, and is a necessary component to find the existence of a consent exception to the Fourth Amendment's warrant requirement. Importantly, Mitchell asserts that Officer Jaeger failed to "simply ask" whether Mitchell consented to the blood sample, and thus, by that omission, failed to obtain Mitchell's actual consent to the request for a blood sample. Without consent, and without any other exception to the Fourth Amendment warrant

requirement, the search and seizure of Mitchell's blood should have been suppressed.

B. Officer Jaeger Did Not Reasonably Convey The Implied Consent Warnings At The Time Mitchell Was Taken Into Custody.

In ***State v. Piddington***, the Court held that an accused driver is to be advised of the implied consent warnings by law enforcement officers who are required to use reasonable methods that reasonably convey the warnings. Whether the driver actually comprehends the warnings is not part of the inquiry, rather the focus rests upon the conduct of the officer. ***State v. Piddington,*** 2001 WI 24 ¶55, 241 Wis.2d 754, 623 N.W.2d 528. Piddington is easily distinguished from Mitchell because the suspect in Piddington was deaf, and wanted an interpreter to help him understand the warnings. The Court found that explaining the warning was not within the responsibility of the officer; the officer's responsibility was simply to convey the warning in a reasonable manner. In Mitchell's situation, there was no reasonable conveyance of "Informing the Accused," because Officer Jaeger knew that

Mitchell was unconscious and any person should have known that because Mitchell was unconscious, he could not reasonably receive the information being presented.

CONCLUSION

The decision of the Circuit Court of Sheboygan County to deny his Motion to Suppress the Evidence of Warrantless Blood Draw should be reversed and his case be remanded to the circuit court with an Order suppressing the results of the warrantless blood draw.

Dated this 13th day of December, 2017.

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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 2,322 words.

Dated this 15th day of December, 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 13th day of December, 2017.

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