STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP450-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ADAM M. BLACKMAN,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY R. SHARPE, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

This court has ordered supplemental briefing to address the following question:

> Assuming that Adam Blackman did not voluntarily consent to the blood test, may the good faith exception to the exclusionary rule

nonetheless permit admission of the results because the officer acted in good faith reliance on Wis. Stat. § 343.305(4)?

ARGUMENT

EVEN IF BLACKMAN'S CONSENT TO A BLOOD DRAW WAS NOT VOLUNTARY, THE RESULTS OF A TEST OF HIS BLOOD SHOULD NOT BE SUPPRESSED BECAUSE THE OFFICER ACTED IN GOOD FAITH RELIANCE ON WIS. STAT. § 343.305(4) WHEN HE REQUESTED THE BLOOD SAMPLE.

In its initial brief, the State explained that Blackman's consent to a blood draw was not involuntary because it did not result from "actual coercion or improper police conduct." (State's Br. 8.) As this court has recognized, "Where police engage in 'no actual coercion or improper police conduct,' consent is voluntary." *State v. Padley*, 2014 WI App 65, ¶ 62, 354 Wis. 2d 545, 849 N.W.2d 867.

The State's position remains that Blackman's consent to a blood draw was voluntary. But if this court concludes that Blackman's consent was involuntary, it should also conclude that suppression of the blood test results would be unnecessary and inappropriate. The officer who requested the blood sample was acting in good faith reliance on Wis. Stat. § 343.305(4), which requires an officer to inform a person that if the person refuses a proper request for a sample, the person's operating privilege will be revoked. Accordingly, there is no need to apply the exclusionary rule and suppress the test results.

The officer in this case did precisely what the statute required him to do. If the information the officer gave Blackman was incorrect, it was incorrect because of a legislative error in another section of the implied consent law, not because of an error by the officer. Application of the exclusionary rule would not deter misconduct by the officer or the legislature, and suppression of the blood test results is unnecessary and inappropriate.

A. The officer in this case relied on Wis. Stat. § 343.305(4) when he read the Informing the Accused information to Blackman and requested a blood sample.

Deputy Abler requested that Blackman consent to a blood draw under the implied consent law. (36:7-8, R-Ap. 125-26.) He read the Informing the Accused form to Blackman, and Blackman agreed to a blood draw. (36:7-9, R-Ap. 125-27.) A test revealed a blood alcohol concentration of .10. (35:8.)

There is no dispute that Deputy Adler correctly read the Informing the Accused form to Blackman, or that the form states that if a person refuses a proper request for sample of his or her blood, breath, or urine, the person's operating privilege will be revoked.

In his motion to suppress evidence, Blackman asserted that the Informing the Accused information in Wis. Stat. § 343.305(4) is incorrect. (19:7-8, R-Ap. 112-13.) At the hearing on his motion, Blackman argued that "[t]here is an error in the Informing the Accused form. The error comes in telling someone in Mr. Blackman's position that they are facing license revocation and are subjected to other penalties if they refuse consent." (36:27, R-Ap. 145.) Blackman argued that because he would have prevailed at a refusal hearing, the information the officer gave him about revocation was incorrect. (36:28-29, R-Ap. 146-47.)

The circuit court agreed, concluding, "Clearly a motorist like Mr. Blackman would have had his revocation reversed had he refused a test and been revoked because there was no probable cause to believe impairment existed under Section 343.305(9)(a)5.a. at the time of driving." (23:4, R-Ap. 104.) The court queried, "If his revocation was statutorily unenforceable at the time he was read the

Informing the Accused and threatened with just such a revocation, how could he not be improperly coerced into consenting to a test?" (23:4, R-Ap. 104.) The court noted that this court had pointed out this "legislative disconnect" in *Padley*, 354 Wis. 2d 545. (23:4-5, R-Ap. 104-05.)

As the State explained in its initial brief, however, the Informing the Accused information in Wis. Stat. § 343.305(4), which is reflected in the Informing the Accused form, is correct, because if Blackman had refused a blood draw, his operating privilege would have been revoked. The statute is therefore not unenforceable. (State's Br. 8-15.)

The State acknowledges that if Blackman had refused a blood draw, and then timely challenged the resulting revocation, he may have prevailed and the revocation may have been rescinded. But had that result occurred, it would have been due to an error in § 343.305(9)(a)5.a., not an error in § 343.305(4).

As the State explained in its initial brief, when the legislature amended the implied consent law to authorize officers to request samples under § 343.305(3)(ar) when a person is involved in an accident resulting in death or great bodily harm, and the officer has probable cause to believe the person has violated a traffic law, it intended that a refusal would result in revocation. (State's Br. 21-22.) If Blackman's consent was involuntary, it was not because the officer failed to read the form to him, or misread it, or because of any other error by the officer.

If Blackman's consent was involuntary, it was because of a legislative error in § 343.305(9)(a)5.a., which sets forth the issues that can be raised at a refusal hearing if a person refuses a request for chemical testing and then timely requests a hearing.

In *Padley*, this court recognized "an apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2.

and the statutes governing refusal hearings," specifically § 343.305(9)(a)5.a. *Padley*, 354 Wis. 2d 545, ¶ 66 n.12. This court noted that under § 343.305(3)(ar)2., an officer can request a sample when there is an accident involving death or great bodily harm when the officer believes that the driver violated a traffic law, but the issues include whether the officer had probable cause to arrest for an OWI-related offense, and whether the person was arrested for an OWI-related offense. *Id.* This court concluded that "contextual clues" indicate that "the legislature intended to allow a driver at a refusal hearing the opportunity to challenge each element necessary for an officer to have requested that the driver submit to a blood draw." *Id.* The court concluded that because of a drafting error, the legislature failed to incorporate language referring to the officer believing that the person was involved in an accident that caused death or great bodily harm, and believing that the person committed a traffic violation. *Id.*

In its initial brief, the State asserted that when the legislature amended the implied consent law to authorize officers to request samples from a person when there is an accident involving death or great bodily harm and the officer believes that the driver violated a traffic law, it did not intend to allow the person to challenge the basis for the request at a refusal hearing. (State's Br. 22-25.) But whether the State is correct, or this court was correct in *Padley*, it is clear that the legislature did not intend to allow a person who refuses under § 343.305(3)(ar) to escape revocation because the officer did not have probable cause to arrest for an OWI-related offense, or did not lawfully place the person under arrest for an OWI-related offense.

In this case, the officer read the Informing the Accused form to Blackman, and correctly informed him of the consequence the legislature mandates for improper refusal—revocation of his operating privilege. This is precisely what the officer was required to do. As the circuit court recognized, "reading the Informing the Accused is mandated by Section 343.305(4) and had the officer not read that Informing the Accused, we would be here considering the

defense argument that the officer failed to comply with the statute." (23:3, R-Ap. 103.)

Blackman then submitted to the officer's request for a blood sample, and the officer ensured that a sample was taken. The officer did nothing wrong. He relied in good faith on § 343.305(4), and did exactly what the statute required him to do. As the State will next explain, application of the exclusionary rule to suppress the results of the test of Blackman's blood is therefore unnecessary and inappropriate.

B. The good faith exception to the exclusionary rule applies when an officer acts in good faith reliance on a statute, even if the statute is later found to be unconstitutional.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citations omitted). "The exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1, 10-11 (1995)). The exclusionary rule does not apply to all constitutional violations. *Id.* (citation omitted). Instead, "exclusion is the last resort." *Id.* (citation omitted).

The good faith exception to the exclusionary rule provides that the exclusionary rule should not apply when officers act in good faith. *Id.* ¶ 36 (citing *Herring*, 555 U.S. at 142; *United States v. Leon*, 468 U.S. 897 (1984)). The Supreme Court has concluded that:

> "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." As laid out in our cases, the exclusionary rule serves to deter deliberate,

> reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Dearborn, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 144).

In *Krull*, the Supreme Court held that the good faith exception applies when an officer acts in good faith reliance on a statute that is later determined to be unconstitutional, stating:

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.

Krull, 480 U.S. at 349-50.

The Wisconsin Supreme Court adopted the good faith exception in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The court extended the rule from *Krull*, and concluded that the good faith exception applies in cases in which the officers act in "objectively reasonable reliance in settled law subsequently overruled." *Dearborn*, 327 Wis. 2d 252, ¶¶ 37, 43 (citing *Ward*, 231 Wis. 2d 723).

In *Dearborn*, the supreme court affirmed that the good faith exception applies in Wisconsin when officers reasonably rely on clear and settled precedent. *Id.* ¶ 44. The issue in *Dearborn* was whether a police search of a vehicle, after the suspect was placed under arrest and into a squad car, was constitutional. The Wisconsin Supreme Court concluded that "even though the search the officers conducted in this case was done in accordance with the law as declared at the time of the search, we are still required to

hold that the search of Dearborn's truck was unconstitutional." *Id.* ¶ 32.

But the supreme court concluded that suppression was inappropriate, because "[a]pplication of the exclusionary rule would have absolutely no deterrent effect on officer misconduct, while at the same time coming with the cost of allowing evidence of wrongdoing to be excluded." *Id.* ¶ 44. The supreme court stated that:

> [T]he benefits of applying the exclusionary rule in this case are exceedingly low. The deterrent effect on officer misconduct, which is the most important factor in our analysis, would be nonexistent. For this reason, we conclude that the good faith exception to the exclusionary rule should preclude the suppression of the illegally obtained evidence in this case because the officers reasonably relied on clear and settled Wisconsin Supreme Court precedent in carrying out the search.

Id. ¶ 49.

In *Davis v. United States*, 564 U.S. 229 (2011), the Supreme Court reached a similar result. It concluded that "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' [*Leon*, 468 U.S.] at 919. Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis,* 564 U.S. 229.

In the current case, if this court determines that Blackman's consent to a blood draw was involuntary, it should conclude that the good faith exception to the exclusionary rule applies, and the blood test results should not be suppressed.

As the Supreme Court held in *Krull*, the exclusionary rule need not be applied when an officer acts in good faith reliance on a statute, even if the statute is later determined to be unconstitutional. *Krull*, 480 U.S. at 349-50.

The statute that the officer relied upon in this case, Wis. Stat. § 343.305(4), is not clearly unconstitutional or

invalid. At most, as this court recognized in *Padley*, another portion of the implied consent law—§ 343.305(9)(a)5.a., concerning the issues at a refusal hearing—demonstrates a "disconnect" in the statute. But this court did not find any part of the implied consent law unconstitutional in *Padley*. Instead, it rejected the defendant's argument that § 343.305(3)(ar)2. is unconstitutional. *Padley*, 354 Wis. 2d 545, ¶ 3.

Even if this court had found part of the implied consent law unconstitutional in *Padley*, the officer's reliance on the statute in this case would have been entirely reasonable. After all, the officer read the Informing the Accused form to Blackman on June 22, 2013, and this court issued the *Padley* decision on May 22, 2014.

Any possible misinformation that the officer gave Blackman by reading the Informing the Accused form to him was due to an error by the legislature, not an error by the officer. As the Supreme Court has concluded, a legislative error should not result in suppression of evidence: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Krull*, 480 U.S. at 350 (citing *Leon*, 468 U.S. at 921.) As the Court explained,

> [T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute.

Id. at 352.

If the implied consent law is incorrect in regard to requests for samples under Wis. Stat. § 343.305(3)(ar), the legislature will need to amend the statute. But there is no justification for suppression of the results of a test of Blackman's blood.

The officer gave Blackman the implied consent warnings and told him that if he refused to give a sample, his operating privilege would be revoked. The legislature intended that under the circumstances of this case, an officer is to give the person the implied consent warnings and inform the person that a refusal will result in revocation, and that if the person refuses, his or her operating privilege be revoked. If the statute fails it does so only in regard to the third part, by allowing some revocations to be rescinded.

When the legislature amended the implied consent law with 2009 Wisconsin Act 163, it authorized chemical testing when there is an accident causing death or great bodily harm, and a law enforcement officer believes a person has violated a traffic law. Applying the exclusionary rule in this case—to suppress the results of a test under 2009 Wisconsin Act 163—obviosuly would be contrary to the purpose of the legislation. And even if suppressing evidence in this case could have some possible deterrent effect on the legislature, "that possible benefit must be weighed against the 'substantial social costs exacted by the exclusionary rule.'" *Krull*, 480 U.S. at 352-53 (quoting *Leon*, 468 U.S. at 907.)

The societal costs of applying the exclusionary rule in this case would be extremely high. It would result in suppression of evidence showing that a person who violated a traffic law and was involved in an accident that caused extremely serious injuries to another person had a prohibited alcohol concentration.

This cost clearly outweighs any benefit in the deterrent effect of suppressing evidence. As the circuit court recognized, the officer was required to read the Informing the Accused form to Blackman. (23:3, R-Ap. 103.) There was no misconduct by the officer. The only possible deterrence would be of the legislature, not the officer. But this court can point out any flaws in the statutory scheme, and the legislature can amend the statute, without the drastic measure of suppressing evidence, which is "a last resort." *Dearborn*, 327 Wis. 2d 252, ¶ 35 (citing *Herring*, 555 U.S. at

140.) In this case, there is no misconduct to deter, and suppression is inappropriate.

CONCLUSION

For the reasons explained above, if this court concludes that Blackman's consent to a blood draw was involuntary, it should also conclude that the good faith exception to the exclusionary rule applies, and suppression of the blood test results is unnecessary and inappropriate. Accordingly, the State respectfully requests that this court reverse the circuit court's order granting the motion to suppress evidence.

Dated this 12th day of May, 2016.

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 2,980 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 12th day of May, 2016.

_____
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