STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2015 AP 450-CR
Trial Court Case No. 13 CF 659

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent.

SUPPLEMENTAL BRIEF OF DEFENDANT-RESPONDENT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Fond du Lac County
The Honorable Gary Sharpe Presiding

Respectfully Submitted:

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STATEMENT OF FACTS AND CASE (Cont.)

On April 12, 2016, this Court requested additional briefing on the limited following issue[1]:

> 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 [test] results because the officer acted in good faith reliance on Wis. Stat. § 343.305(4)?

(Court of Appeals' Order dated April 12, 2016.)

Further, this Court requested that the parties file simultaneous briefs which comply with the requirements for reply briefs no later than May 13, 2016.

Mr. Blackman now files his supplemental brief.

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1 Accordingly, this Supplemental Brief will not refute arguments in the State's Reply Brief. One example of an issue Mr. Blackman would have argued is how the State now argues for the first time in its Reply Brief that it disagrees with *State v. Padley*, on when a person gives consent, i.e., at the time of driving or when asked by the arresting officer to take the chemical test. *Compare* (State's Initial Br. at 7 n.2) *with* (State's Reply Br. at 2 n.1). Mr. Blackman will just note that appellate courts "will not ... blindside trial courts with reversals based on theories which did not originate in their forum." *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). "[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." *Id*. at 828-29.

ARGUMENT

I. THE OFFICER DID NOT ACT IN GOOD FAITH RELIANCE ON SECTION 343.305(4) BECAUSE HE KNEW THE LAW WAS NOT "WELL SETTLED" AS IT PROVIDED INFORMATION TO MR. BLACKMAN WHICH CONFLICTED WITH SECTION 343.305(3)(AR)2.

As stated in Mr. Blackman's previously filed Response Brief, the circuit court found that Mr. Blackman was requested to submit to a blood test pursuant to Wisconsin Statute Section 343.305(3)(ar)2. (R23 at 1.)

Section 343.305(3)(ar)2 states, in part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm to any person and the law enforcement officer has any reason to believe that the person violated any state or local traffic law, the officer may request the operator to provide one or more samples of his breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**

Wisconsin Statute § 343.305(3)(ar)2 (emphasis added).

Mr. Blackman, however, was not informed by the arresting officer that if he refused to take the requested test, that

the officer "may" arrest him. Rather, the arresting officer read Mr. Blackman the Informing the Accused form which stated, in relevant part:

> **If you refuse** to take any test that this agency requests, **your operating privilege will be revoked and you will be subject to other penalties.**

See (R36 at 7,12-13.); Wisconsin Statute § 343.305(4).

Assuming that this misinformation made Mr. Blackman's consent to the blood test involuntary (as this Court has asked us to do), the question becomes may the good faith exception to the exclusionary rule permit the State to rely on the blood test results because the officer acted in good faith reliance on Section 343.305(4)?

The answer is "no."

A. The Exclusionary Rule.

When law enforcement unconstitutionally searches a citizen, the evidence obtained as a result of the illegal search is excluded, i.e. suppressed as a consequence of the misconduct.

See State v. Dearborn, 2010 WI 84, ¶14, 327 Wis. 2d 252. The exclusionary rule is a judicially created remedy for constitutional violations. *See Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700, 172, L.Ed.2d 496 (2009); *United States v. Leon*, 468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The United States Supreme Court has stated:

> 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.

Herring, 129 S.Ct. at 702.

In other words, the application of the exclusionary rule should focus on deterring future Fourth Amendment violations. *Id*. at 700. In our case, the law enforcement conduct in question is recurring in a systematic fashion because neither the appellate courts nor the legislature has yet to fix the obvious problem

noted by the *Padley* court or the circuit court below. Accordingly the exclusionary rule should be applied in this case.

B. The Good Faith Exception to the Exclusionary Rule.

Appellate courts have, however, adopted a "good faith exception" to the exclusionary rule in certain circumstances. *See State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517 (applying the good faith exception to law enforcement's objectively reasonable reliance on settled law subsequently overruled); *State v. Eason*, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625 (applying the good faith exception to an officer's objectively reasonable reliance on a warrant subsequently invalidated).

The test of whether a law enforcement officer's reliance was reasonable is an objective one. *Dearborn*, 327 Wis. 2d at ¶36. For example, courts are to examine "whether a reasonably well trained officer would have known that the search was

illegal in light of all of the facts and circumstances." *Id*. at 703 (internal quotations and citations omitted).

In the present case, the objective test is modified to "whether a reasonably trained officer would have known that the information provided to the driver in the Informing the Accused form accurately informed the driver of his precise legal situation or involved any deceit or trickery?" *See generally State v. Padley*, 2014 WI App 65, ¶72, 354 Wis. 2d at 545, 849 N.W.2d 867.

Importantly, the State has conceded that Implied Consent Law provided unclear guidance to law enforcement. Specifically, the State admits that it is "unclear what would have happened had Blackman refused." (State's Initial Br. at 18.)

In fact, the State's brief is littered with statements regarding what an officer should or could have done after a refusal under Section 343.305(3)(ar)2:

· The officer might learn that the person has three or more prior offenses; (State's Initial Br. at 17.)

· A refusal under Section 343.305(3)(ar)2 might be sufficient to give the officer probable cause to arrest for an OWI-related offense; *Id*.

· The officer might have probable cause to administer a preliminary breath test or field sobriety tests; *Id*.

· In any of these situations, an officer could have probable cause to arrest for an OWI-related offense. (State's Initial Br. at 18.)

The State, however, failed to contest the circuit court's finding that the arresting officer had no "probable cause" to arrest Mr. Blackman. *See* (R23 at 4.); (Blackman's Br. at 19.) Specifically, the circuit court held, "there was no probable cause to believe impairment existed… at the time of driving." (R23 at 4.)

Thus, the circuit court found that since the "statutory scheme does not support the revocation that is threatened [in Section 343.305(4)], the Court finds that coercion has occurred." *Id*. at 5.

Further, as demonstrated by the State's list of possible actions the officer could have taken, there is no allegation in this case that the arresting officer relied on "well settled law" or on a warrant issued by in impartial judge. *See Ward*, 2000 WI App 3; *Eason*, 2001 WI 98. To the contrary, the arresting officer was faced with conflicting statutes. I have found no cases in my research where the good faith exception to the exclusionary rule was applied to a situation where an officer was facing contradictory statutes with no clarifying case law.

As the Wisconsin Supreme Court held in *Dearborn*, "under our holding here today, the exclusionary rule is inappropriate only when the officer reasonably relies on clear and settle precedent. Our holding does not affect the vast

majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation.

3. What the Arresting Officer Objectively Knew.

First, the State failed to argue to the circuit court or previously to this Court, that the good faith exception to the exclusionary rule should be applied to this case.[2] Thus, the trial court did not make any factual findings on this issue. However, the circuit court and the *Padley* court noted the problematic internal inconsistencies with the Implied Consent Law. The *Padley* court acknowledged, but did not resolve, "an apparent disconnect between the terms of Section 343.305(3)(ar)2 and the statutes governing refusal[s]" attributing them to an "inadvertent" drafting error." *Padley*, 2014 WI App at ¶66 n.12.

2 Again, appellate courts "will not ... blindside trial courts with reversals based on theories which did not originate in their forum." *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). "[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." *Id*. at 828-29.

Thus, one cannot find with the record before this Court that the arresting officer relied in good faith on Section 343.305(4) – when it so clearly contradicted with the officer's lawful authority to only arrest Mr. Blackman had he refused the requested test under Section 343.305(3)(ar)2. Most importantly, the State has conceded that the arresting officer lacked probable cause to arrest Mr. Blackman – so the reality is that Mr. Blackman was never in danger of being arrested. Without a valid arrest, Mr. Blackman could never have been facing a Refusal hearing after refusing a chemical test under Section 343.305(3)(a). Lastly, as the circuit court found – Mr. Blackman's driver's license could never have been revoked. (R23 at 5.)

Accordingly, the arresting officer in this case knew that he lacked probable cause to arrest Mr. Blackman and that the threatened license revocation in the Informing the Accused form in Section 343.305(4) read to Mr. Blackman was impossible to

occur. Accordingly, the officer in this case did not rely in good faith on Section 343.305(4), such that the good faith exception to the exclusionary rule should be applied to Mr. Blackman's case.

CONCLUSION

WHEREFOR, Mr. Blackman respectfully requests this Court affirm the circuit court's decision below to suppress evidence.

Dated this ____ day of May, 2016.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 1,922 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 13th day of May, 2016.

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