State of Wisconsin
Court of Appeals
District IV

Appeal No. 2015 AP 1113 - CR
Sauk County Case No. 2013 CF 318

State of Wisconsin,
Plaintiff-Respondent,

v.

Philip J. Hawley,
Defendant-Appellant.

Brief of Defendant-Appellant

On appeal from a judgment of the Sauk County Circuit Court,
The Honorable Patrick J. Taggart, presiding.

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I. Whether the warrantless blood draw was constitutional under the circumstances.

Statement of the Case

On 29 August 2013, Sergeant Jon Hanson reported to the scene of a single vehicle motorcycle accident. (R.70:14.) He found the defendant, Philip Hawley, in a semi-conscious state on the side of the highway. (R.70:18; App.34.) While waiting for emergency medical personnel to arrive, Sergeant Hanson rendered first aid and noticed several signs that Mr. Hawley was intoxicated. (R. 70:18-21; App.34-37.)

Upon arrival of emergency personnel, Sergeant Hanson contacted Officer Matthew Shaw at the UW Police Department and requested that a blood draw be performed on Mr. Hawley to test for intoxication. (R.70:27-28; App.43-44.) Neither Sergeant Hanson nor Officer Shaw applied for a warrant. (R.70; App. 17-64.) On the basis of the illegally-obtained blood draw, the State filed a criminal complaint charging Mr. Hawley first with Operating While Intoxicated as a sixth offense, then later amended the charge to allege a seventh offense (Count 2 included the PAC charge which did not result in conviction). (R.1, 38; App.1, 17.)

Mr. Hawley filed several motions, including a Motion to Suppress the warrantless blood draw and to find Wisconsin's implied consent law unconstitutional to the extent that it violates his right against unreasonable search and seizure. (R.17; R.30; R. 75-76.) The circuit court denied both the original and post-conviction motions on the basis that exigent circumstances justified a warrantless blood draw. (R.33; R.78; App.10-14, 65.)

The jury convicted Mr. Hawley of Operating While Intoxicated as a seventh offense. (R.61; App.63.)

He now appeals the order denying suppression of the warrantless blood draw as well as his subsequent conviction.

Standard of Review

This case involves the application of constitutional principles to undisputed facts as well as the constitutionality of a statute. Therefore, this court should review all issues de novo. *State v. Williams*, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981); *Farrell v. John Deere Co*., 151 Wis. 2d 45, 443 N.W.2d 50 (1989); *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

Argument

The warrantless blood draw was unconstitutional under the circumstances, and the circuit court should have suppressed it and all evidence stemming from it.

The constitutionality of a warrantless blood draw now hinges on proper interpretation and application of the US Supreme Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), which clarified the Court's earlier decision in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Specifically, the Supreme Court held as follows:

> "The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." *McNeely* at 1556.

In short, a warrantless blood draw is unconstitutional unless exigent circumstances make application for a warrant impossible under the totality of the circumstances. What exactly constitutes

exigent circumstances must be determined case by case. *McNeely* at 1561. However, the Supreme Court made one bright line rule clear:

> "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." *Id*.

Therefore, if the officers reasonably could have obtained a warrant before taking Mr. Hawley's blood, they were required to do so.

On 25 June 2014, this issue came before the circuit court. (R.70; App.17-64.) Officer Matthew Shaw testified that he visited the hospital and read aloud an "Informing the Accused" form while Mr. Hawley was unconscious. (R.70:5-8; App. 21-24.) Officer Shaw then filled out the form, indicating that the still-unconscious Mr. Hawley consented to a warrantless blood draw. (R.70:7-8; App. 23-24.)

Critically, Officer Shaw received the blood draw request at 12:24 p.m., and he read the "Informing the Accused" form at 1:35 p.m.,

just prior to the blood draw. (R.70:11-12, 30; App.27-28, 46.) This means that Officer Shaw had more than an hour to obtain a warrant. Officer Shaw testified, however, that he was unfamiliar with the procedure for electronically applying for a search warrant. (R.70:12; App.28.)

Further, Sergeant Jon Hanson testified that he instructed Officer Shaw to take the blood draw without a warrant under an exigent circumstances rationale. (R.70:28; App.44.) When asked why he thought exigent circumstances existed, Sergeant Hanson answered incoherently:

> "Because I was aware at that time, I believe, fairly new rule reference felony OWI charges. If the defendant denied a blood draw, a search warrant needs to be done. The case being here — information I received, once again, this was quite new. It just come out. If a person was unable to speak or was unconscious, et cetera, therefor, it would be exigent circumstances for the blood draw." (R. 70:28; App.44.)

The State offered Sergeant Hanson a lifeline: "Were you concerned about the medical care that the defendant was receiving affecting a blood test result?" (R.70:28; App.44.) Sergeant Hanson answered simply, "Yes." (R.70:28; App.44.)

This claim remains the sole basis ever provided to justify a finding of exigent circumstances in this case.

It is unreasonable that a vague, unsubstantiated concern, supported neither by express, factual observation nor any other evidence in the record, somehow might constitute a sufficient basis to forgo a warrant. Regardless of what medical care Mr. Hawley received en route to the hospital, foregoing a warrant offered no remedy; whatever legal procedure the officers followed, his medical care would remain unchanged. No explanation exists in the record as to how law enforcement's application for a warrant would interfere with Mr. Hawley's medical care. The most obvious reason for this absence is that no valid reason for such concern ever existed.

Crucially, both Officer Shaw and Sergeant Hanson had more than an hour to apply for a warrant between the blood draw request and its completion. Claiming exigent circumstances is especially unreasonable given the fact that Sergeant Hanson acknowledged that, subsequent to requesting the warrantless blood draw at 12:24 p.m., he simply stopped working on the case. (R.70:29;

App. 45.) He was only two hours and twenty-four minutes into his shift. (R.70:14; App.30.) More importantly, he specifically acknowledged that he had time to apply for a warrant:

> "Q: But between the time you left the scene and [the] time they took the blood draw, you would have had time to get [an] electronic warrant if you chose to do that?
>
> "A: I would have had time, yes." (R.70:39; App. 55.)

Nonetheless, the circuit court denied Mr. Hawley's motion to suppress the warrantless blood draw. (R.33; App.10-14.) The court reasoned that Sergeant Hanson faced a dilemma when he set aside law enforcement concerns long enough to tend to Mr. Hawley's medical needs, during which time, normal metabolic processes certainly reduced the concentration of alcohol in Mr. Hawley's blood. (R.33:4; App.13.) The court never discussed what exigent circumstances prevented either law enforcement officer from seeking a warrant in the hour after Mr. Hawley was transported from the accident and before the blood draw. (R.33; App.10-14.)

The dilemma, therefore, is irrelevant to the precise time period at issue. Sergeant Hanson admitted under oath that he had time to

seek a warrant after emergency personnel arrived. (R.70:39; App. 55.) This is a plain admission that exigent circumstances did not exist. No rationale has ever been given to explain how applying for a warrant would have interfered with either Mr. Hawley's medical care or the collection of evidence during the hour-long period between when Sergeant Hanson last saw Mr. Hawley and when the blood draw was actually performed.

Second, as made clear in *McNeely*, alcohol metabolism and the destruction of evidence is an issue in every intoxicated driving case and is in no way peculiar to this case. The totality of the circumstances specific to each case must show exigent circumstances before a warrantless blood draw can be deemed constitutional.

Our Supreme Court has applied the *McNeely* rule three times, and our Court of Appeals has applied the rule once. First, in *State v. Reese*, our Court of Appeals applied a good faith exception to the exclusionary rule because *McNeely* was decided subsequent to the events in that case, and law enforcement was entitled to rely on existing Wisconsin precedent, 2014 WI App 27, ¶¶ 19-22,

844 NW 2d 396. Our Supreme Court applied the same rule in *State v. Kennedy*, 2014 WI 132, 856 N.W.2d 834 as well as *State v. Foster*, 2014 WI 131, 856 N.W.2d 847.

The good faith exception does not apply in this case, as the *McNeely* case was decided on 17 April 2013, prior to the August 2013 events giving rise to this case.

In *State v. Tullberg*, our Supreme Court found exigency when law enforcement's reasonable investigation and the necessity of subsequent medical care delayed the decision to seek a blood draw until little time remained for useful evidence collection, 2014 WI 134, 857 N.W.2d 120. After a difficult investigation involving multiple possible drivers and rocky terrain, the officer faced the possibility of missing a three-hour deadline for the blood draw due to the necessity of lengthy medical treatment. *Id.* at ¶¶ 43-50. Our Supreme Court determined that the officer acted reasonably in the investigation and that the window of time within which the blood draw would be reliable was unavoidably curtailed by medical concerns outside the officer's control. *Id.* While the destruction of evidence inherent in the suspect's

normal metabolization of alcohol was a factor in determining the window of time within which the blood draw was necessary, it was not the only factor giving rise to exigency. *Id.* Instead, the totality of the circumstances demanded that the defendant's blood be taken without delay. *Id.*

For the reasons stated above, no such exigency existed in this case. Sergeant Hanson acknowledged that he had time to apply for a warrant; this court should take him at his word.

Conclusion

The officers in this case had an hour to apply for a warrant, which they chose to forgo without valid reason. As such, we request that Mr. Hawley's conviction be vacated and that he be granted a new trial in which the blood draw evidence is properly excluded. Finally, we request that Wis. Stat. § 343.305 be deemed unconstitutional to the extent it conflicts with the Supreme Court's decision in *McNeely*.

Dated this 27th day of August 2015.

Respectfully submitted,

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Rule 809.19(8)(d) Certificate

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,851 words.

Dated this 27th day of August 2015.

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Rule 809.19(12)(f) Certificate

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 27th day of August 2015.

Brandon Kuhl

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Certificate of Mailing

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that I caused ten copies of the Brief and Appendix of Defendant-Appellant to be mailed by Priority Mail to the Wisconsin Court of Appeals, PO Box 1688, Madison WI 53701-1688, three copies to the Attorney General, by Attorney Gregory Weber, P.O. Box 7857, Madison WI 53707-7857, and one copy to Philip Hawley #464467 at Prairie Du Chien Correctional Institution, 500 E. Parrish Street, Prairie Du Chien, WI 53821-2730.

Dated this 27th day of August 2015.

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Statement on Oral Argument and Publication

Neither oral argument nor publication is warranted in this case.

The brief fully presents and develops the issues on appeal, making oral argument unnecessary. Wis. Stat. (Rule) 809.22.(2)(b).

The issues are decided on the basis of controlling precedent, and no reason appears for questioning or qualifying the precedent. Wis. Stat. (Rule) 809.23(1)(b)3.