RECEIVED
10-05-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP1113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILIP J. HAWLEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICK J. TAGGART PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539 (Phone), (608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

Page

STATUTES

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2015AP1113-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILIP J. HAWLEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICK J. TAGGART PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did exigent circumstances justify the blood draw that was performed on Philip Hawley?

Circuit court answered: Yes. In a memorandum decision, the court stated: "Under all the circumstances of

this case, the Court finds that Sergeant Jon Hanson and Officer Matt Shaw were faced with an exigent circumstance that relieved them of the duty to obtain a warrant before drawing the defendant's blood at University Hospital" (33:4).

2. Alternatively, did Hawley's consent to the blood draw, pursuant to Wisconsin's implied consent statute, justify the blood draw that was performed on him?

The circuit court did not decide this issue.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

I. Factual background.

On August 29, 2013, at approximately 11:22 a.m., Sergeant Jon Hanson of the Sauk County Sheriff's Department was dispatched to a "serious" single-vehicle motorcycle accident in the Town of Sumpter on Old Bluff Trail (70:13-15). He arrived at the accident scene approximately two minutes after he was dispatched (70:16). He estimated that the accident occurred shortly before he arrived (70:41). He was the first responder (70:16). He

observed Philip Hawley lying next to his crashed motorcycle in the ditch alongside the highway (70:16).

Sergeant Hanson's "major concern was the nature of [Hawley's] injuries" (70:16). Hawley was not wearing a helmet, he appeared to have gone airborne during the crash, and his motorcycle ended up approximately 194 feet from the point where it left the highway (70:23, 27). Hawley was semiconscious and incoherent (70:18).

Sergeant Hanson was concerned that Hawley may have suffered a spinal injury during the crash (70:18). Sergeant Hanson knew that a spinal injury could result in paralysis and could be exacerbated if Hawley moved further (70:18). Accordingly, Sergeant Hanson placed his hand on the back of Hawley's neck to stabilize it and prevent Hawley from moving (70:18). Sergeant Hanson attempted to stabilize Hawley's neck until emergency medical services (EMS) personnel arrived (70:18).

While stabilizing Hawley's neck, Sergeant Hanson observed that Hawley's left eye was bloodshot and "reddish" (70:19-20). Hawley's right eye was closed (70:19). Sergeant Hanson also noticed that "there was a strong odor of intoxicants coming from [Hawley's] breath" (70:20). Sergeant Hanson asked Hawley whether he had been drinking, and Hawley responded by saying "fuck you" (70:19). Sergeant Hanson could not tell whether Hawley's speech was slurred (70:36).

When EMS personnel arrived in an ambulance, Sergeant Hanson gave them a "quick synopsis" of Hawley's situation and "turned patient care over to them" (70:20). While EMS personnel were attempting to place Hawley on a back board to transport him to the ambulance, he was uncooperative, stood up, and then went back down to the ground (70:21). Sergeant Hanson noted in the complaint that Hawley's inability to stand up "could have been the result of the accident, drinking, or a combination of both" (1:3).

EMS personnel then placed Hawley on a back board and a stretcher and wheeled him to the ambulance (70:21). They drove him a short distance in the ambulance to a field where Medflight, a helicopter, had landed (70:21). Hawley arrived at the helicopter's location at 11:54 a.m. (70:32).

After Hawley left the scene of the accident, Sergeant Hanson and a sheriff's deputy began investigating the accident scene (70:23). In particular, they took measurements, took photographs, and ordered a towing service to remove Hawley's motorcycle (70:23). Sergeant Hanson ran the registration information for Hawley's motorcycle as well as Hawley's driver license and driver record (70:24). Sergeant Hanson then learned that Hawley "had five prior offenses for operating while intoxicated" (70:24). Sergeant Hanson knew that, due to the number of Hawley's prior drunk driving-related convictions, Hawley's blood alcohol concentration (BAC) legal limit was 0.02

(70:24).[1] Sergeant Hanson also knew that it does not "take a lot of alcohol to get to .02" (70:24).

While Sergeant Hanson was investigating the accident scene, EMS personnel requested that he drive to the location where Medflight was sitting (70:24). EMS personnel wanted Sergeant Hanson's assistance because Hawley was being uncooperative with EMS personnel's attempt to transfer Hawley from the ambulance onto Medflight (70:24). By the time Sergeant Hanson arrived at Hawley's location, Hawley was unconscious because EMS personnel had given him a sedative (70:25). Sergeant Hanson had not asked them to sedate him (70:41). While EMS personnel were loading Hawley onto Medflight, Sergeant Hanson returned to his squad car nearby, printed a citation for sixth-offense operating while intoxicated, returned to Medflight, and had Medflight personnel place the citation in Hawley's pocket (70:25-26). Sergeant Hanson did not arrest Hawley (70:25-27). EMS personnel loaded Hawley onto Medflight at 12:24 p.m. (70:32). Medflight transported Hawley to the University of Wisconsin Hospital in Madison sometime thereafter (70:26).

At 12:24 p.m., the Sauk County Sheriff's Department contacted the University of Wisconsin Police Department and requested that an officer ensure that hospital staff

[1] "Alcohol concentration" means "[t]he number of grams of alcohol per 100 milliliters of a person's blood" or "[t]he number of grams of alcohol per 210 liters of a person's breath." Wis. Stat. § 340.01(1v)(a) & (b).

would draw Hawley's blood (70:30, 33). The UW Police Department confirmed that it would have a blood draw performed on Hawley (70:30). The blood-draw request was dispatched to Officer Matthew Shaw of the UW Police Department (70:4).

After Hawley was loaded onto Medflight, Sergeant Hanson cleared the accident scene (70:39). After doing that, Sergeant Hanson left the accident scene at 12:37 p.m. (70:34). He went to "another location to begin working on the report" of the accident and to contact the UW Police Department to confirm that it was going to have a blood draw performed on Hawley (70:33-34).

Sergeant Hanson called Officer Shaw sometime after 1:23 p.m. to ensure that Hawley's blood would be drawn (70:40). Sergeant Hanson told Officer Shaw that Hawley was suspected of "operating while intoxicated 6th offense" and that Hawley had been in a motorcycle crash (70:6, 11, 40). Sergeant Hanson asked Officer Shaw to read the Informing the Accused form[2] to Hawley (70:29, 40).

Sergeant Hanson told Officer Shaw that exigent circumstances justified the blood draw (70:28). Sergeant Hanson did not know what kind of treatment Medflight personnel had given to Hawley or what kind of treatment Hawley would need to have at the hospital (70:28). Sergeant

[2] The implied consent statute requires an officer to read the Informing the Accused information to certain persons. *See* Wis. Stat. § 343.305(4).

Hanson was concerned that Hawley might receive medical care that could affect a blood test result (70:28).

Officer Shaw went to the trauma room at the UW Hospital's emergency room where Hawley was being treated (70:5). At 1:35 p.m., Officer Shaw read the Informing the Accused form verbatim to Hawley while Hawley was unconscious (70:5-6, 8). Because Hawley "was unconscious" and therefore "unable to revoke consent," Officer Shaw checked a box on the form indicating that Hawley consented to a blood draw (70:7-8). There was a lot of medical staff in Hawley's trauma room at the time (70:9). The staff was treating Hawley for, in Officer Shaw's view, a "serious situation" (70:10). Officer Shaw was not in a position to smell Hawley's breath (70:11-12). At 1:50 p.m., a registered nurse "drew two specimens of blood from [Hawley]" (1:3; *see also* 74:42), which Officer Shaw observed (70:8). Officer Shaw did not arrest Hawley (70:6, 9, 11). A report from the State Laboratory of Hygiene stated that Hawley's BAC was 0.312 percent by weight (1:3). On a later day, the UW Police Department arrested Hawley pursuant to a warrant (70:9).

Sergeant Hanson testified at a motion hearing that he had never requested an electronic search warrant before (70:35). He testified that he was "not exactly sure how long it takes officers" to request an electronic warrant, but he "would say" that it takes his officers "half hour, 45 minutes" (70:35). Sergeant Hanson did not discuss with other officers the possibility of getting an electronic warrant in this case

(70:35). Similarly, Officer Shaw did not discuss with the Sauk County Sheriff's Department the possibility of getting an electronic warrant (70:12). At a motion hearing, when asked whether he would have had time to get an electronic warrant between his leaving the scene and the blood draw, Sergeant Hanson answered, "I would have had time, yes" (70:39). However, Sergeant Hanson did not attempt to get an electronic warrant because he did not think he needed one, due to exigent circumstances (70:28-29, 39).

II. Procedural history.

On September 19, 2013, the State filed a complaint that charged Hawley with one count of operating while intoxicated and one count of operating with a prohibited alcohol concentration, both as a fifth or sixth offense (1:1-2). On December 20, 2013, the State filed an information charging Hawley with the same two counts (10:1).

On March 20, 2014, Hawley filed a motion to suppress the evidence resulting from his blood draw, arguing that the blood draw was an illegal search (17). On July 11, 2014, Hawley filed a motion requesting the circuit court to declare that Wisconsin's implied consent statute, Wis. Stat. 343.305, is "unconstitutional to the extent that the legislature has allowed a warrantless search of the defendant's blood without the defendant's informed consent. The Statute allows law enforcement to draw blood on a person who is unconscious or otherwise not capable of withdrawing consent" (30).

On July 14, 2014, the State filed an amended information that charged Hawley with one count of operating while intoxicated and one count of operating with a prohibited alcohol concentration, both as a seventh, eighth, or ninth offense (38:1-2).

On June 25, 2014, the circuit court held a hearing on the motions that Hawley filed on March 20 and July 11, 2014 (70:1-3). Sergeant Hanson and Officer Shaw testified at the hearing (70:3, 13).

On July 9, 2014, the circuit court issued a memorandum decision denying the motions that Hawley filed on March 20 and July 11, 2014 (33). The court concluded that exigent circumstances justified the warrantless blood draw (33:4). The court reasoned, in part, that Sergeant Hanson "did not know how much time he had to obtain the warrant" (33:4). Sergeant Hanson's "first concern was the medical condition of the defendant and he did everything in a reasonable manner to protect the defendant from possible further injury" (33:4). The court also noted that Sergeant Hanson knew that Hawley "had five prior OWIs" and, as a result, knew that Hawley was "only allowed a [BAC] level of .02 and that you do not need much alcohol to get to that .02" (33:2). The court denied Hawley's motion to declare the implied consent statute unconstitutional (33:3-4).

On July 17, 2014, Hawley was tried before a jury (61:1; 74:1). The jury found Hawley guilty of both counts (74:180-82). On September 23, 2014, the circuit court sentenced Hawley on count one to nine years of imprisonment, consisting of four years of initial confinement and five years of extended supervision (61:1; 62:33).

On March 20, 2015, Hawley filed a postconviction motion requesting that his "conviction be vacated and that he be granted a new trial in which the blood draw evidence is properly excluded" (75:1, 6). Hawley also requested that "Wis. Stat. § 343.305 be deemed unconstitutional to the extent it conflicts with the US Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)" (75:1). On May 12, 2015, the circuit court filed an order denying Hawley's postconviction motion, reasoning that "these issues have undergone sufficient scrutiny in prior hearings" (78).

On appeal, Hawley argues that he should be granted a new trial in which the blood-draw evidence would be suppressed (Hawley's Br. at 11). He argues that the blood draw was unlawful because it was not justified by exigent circumstances (Hawley's Br. at 10).

For the reasons set forth below, the blood draw was lawful because it was justified by exigent circumstances. Alternatively, the blood draw was lawful because Hawley

consented to it pursuant to the implied consent statute, Wis. Stat. § 343.305.[3]

STANDARD OF REVIEW

This Court's "'review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact.'" *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). "'When presented with a question of constitutional fact, this court engages in a two-step inquiry.'" *Id.* (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22). "'First, [this Court] review[s] the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous.'" *Id.* (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22).

---

[3] In the conclusion section of Hawley's brief, he requests "that Wis. Stat. § 343.305 be deemed unconstitutional to the extent it conflicts with the Supreme Court's decision in *McNeely*" (Hawley's Br. at 11). However, he does not argue anywhere in his brief that the implied consent statute is unconstitutional or set forth any law or principles to support such a result (*see* Hawley's Br. at 1-11). Because Hawley did not develop that argument, the State does not address it further and this Court should decline to reach the constitutionality of this statute. *See State v. Hull*, 2015 WI App 46, ¶ 37, 363 Wis. 2d 603, 867 N.W.2d 419 (citation omitted) (noting that this Court "ordinarily do[es] not address undeveloped arguments"). If this Court nevertheless reaches this issue, concludes that the implied consent statute is unconstitutional, and concludes that exigent circumstances did not justify the blood draw here, it should allow the parties to brief the issue of whether the good faith exception to the exclusionary rule applies because the officers obtained the blood draw pursuant to a then-valid statute. *See Illinois v. Krull*, 480 U.S. 340, 349-55 (1987) (holding that the Fourth Amendment exclusionary rule does not apply if an officer relied in good faith on a statute that authorized a warrantless search).

"'Second, [this Court] independently appl[ies] constitutional principles to those facts.'" *Id.* (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22). This two-step inquiry applies when determining whether exigent circumstances or consent justified a warrantless search. *Id.*, ¶ 28 (citation omitted); *State v. Kolk*, 2006 WI App 261, ¶ 10, 298 Wis. 2d 99, 726 N.W.2d 337 (citations omitted).

ARGUMENT

I. The blood draw that was performed on Hawley was lawful because it was justified by exigent circumstances.

A. Applicable legal standards.

"The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Tullberg*, 359 Wis. 2d 421, ¶ 29 (alteration in *Tullberg*) (quotation marks and quoted source omitted). "'The touchstone of the Fourth Amendment is reasonableness.'" *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "'The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.'" *Id.* (quoting *Jimeno*, 500 U.S. at 250).

"A warrantless search is presumptively unreasonable, and is constitutional only if it falls under an exception to the

warrant requirement[.]" *Id.*, ¶ 30 (citations omitted). "One exception to the warrant requirement is the exigent circumstances doctrine, which holds that a warrantless search complies with the Fourth Amendment if the need for a search is urgent and insufficient time to obtain a warrant exists." *Id.* (citation omitted).

> Consistent with the U.S. Supreme Court, [the Wisconsin Supreme Court] has recognized four circumstances which, when measured against the time required to procure a warrant, constitute exigent circumstances that justify a warrantless [search]: (1) an arrest made in 'hot pursuit,' (2) a threat to the safety of the suspect or others, (3) a *risk that evidence will be destroyed*, and (4) a likelihood that the suspect will flee.

Robinson, 327 Wis. 2d 302, ¶ 30 (emphasis added) (citations omitted).

"A blood draw to uncover evidence of a crime is a search within the meaning of the Fourth Amendment." *Tullberg*, 359 Wis. 2d 421, ¶ 31 (citation omitted).

> A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if: (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw."

Id. (citations omitted).[4]

---

[4] By not arguing otherwise, Hawley has conceded that there was probable cause to draw his blood, his blood was drawn in a reasonable manner, and he did not reasonably object to the blood draw. *See Arnold v. Cincinnati Ins. Co.*, 2004 WI App 195, ¶ 52, 276 Wis. 2d 762, 688 N.W.2d 708 (citation omitted) (holding that a party conceded a point of

(continued on next page)

"[A]s a result of the human body's natural metabolic processes, the amount of alcohol in an individual's blood dissipates over time, which may result in the loss of evidence." *State v. Reese*, 2014 WI App 27, ¶ 16, 353 Wis. 2d 266, 844 N.W.2d 396 (citing *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). *See also Tullberg*, 359 Wis. 2d 421, ¶ 42 (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013)) ("Evidence of a crime is destroyed as alcohol is eliminated from the bloodstream of a drunken driver.").

"'[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.'" *Tullberg*, 359 Wis. 2d 421, ¶ 42 (alterations in *Tullberg*) (quoting *McNeely*, 133 S. Ct. at 1563). "[N]o single fact is dispositive." *Id.*, ¶ 42 n.23 (citation omitted). "Ultimately, '[i]n 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.*, ¶ 42 (alteration in *Tullberg*) (quoting *McNeely*, 133 S. Ct. at 1561).

---

law by not arguing otherwise). Accordingly, Section I.B. of this brief will focus on whether exigent circumstances justified the blood draw. Nonetheless, Section II.B. of this brief, which addresses the State's alternative argument regarding the implied consent statute, will explain that there was probable cause to draw Hawley's blood.

B. Exigent circumstances justified the blood draw that was performed on Hawley.

Under the totality of the circumstances, the warrantless blood draw was justified because Sergeant Hanson knew that Hawley's BAC legal limit was 0.02, Sergeant Hanson reasonably spent more than an hour investigating and attending to the accident scene, Hawley was transported to a hospital for unknown treatment for a serious injury, and Hawley's blood was drawn approximately two and a half hours after the accident.

1. Sergeant Hanson knew that Hawley's BAC legal limit was 0.02, which contributed to the exigent need for a blood draw.

One of the most important facts in this case is that Sergeant Hanson knew that Hawley had a BAC legal limit of 0.02 because he had at least five prior drunk-driving-related convictions (70:24; 33:2). *See also* Wis. Stat. § 340.01(46m)(c) (stating that operating a motor vehicle with a BAC of "more than 0.02" is prohibited for a person with three or more drunk-driving-related convictions). Sergeant Hanson learned that information while Hawley was being transferred from an ambulance to the Medflight helicopter, near the accident scene (70:21, 24-26). Further, Sergeant Hanson learned that information before he contacted the UW Police Department to request a blood draw (74:97-98). Sergeant Hanson also knew that it does not "take a lot of alcohol to get to .02" (70:24; *see also* 33:2). Before Hawley's blood was drawn,

Sergeant Hanson told Officer Shaw that he cited Hawley for sixth-offense operating while intoxicated (70:6, 11, 40).

At a "normal" rate, a human body eliminates 0.015 to 0.02 grams of alcohol per deciliter of blood per hour. J. Nicholas Bostic, *Alcohol–Related Offenses: Retrograde Extrapolation after Wager*, 79 Michigan Bar J. 668, 672 (June 2000) (citation omitted). *See also McNeely*, 133 S. Ct. at 1560 ("Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed."); *Mata v. State*, 46 S.W.3d 902, 914-15 (Tex. Crim. App. 2001) (discussing expert testimony and scientific literature on normal rates at which alcohol is eliminated from the bloodstream). "The least alcohol-tolerant drinker would eliminate alcohol at a rate of .01 percent per hour, while the most tolerant drinker would eliminate alcohol at a rate of up to .025 percent per hour." *State v. Eumana-Moranchel*, 277 P.3d 549, 551 (Or. 2012).

For example, if a person's bloodstream eliminates 0.02 grams of alcohol per deciliter of blood per hour, then the person's BAC will drop from 0.04 to 0.02 after one hour, and from 0.02 to zero after one more hour. *See State v. Ritz*, 347 P.3d 1052, 1059-60 (Or. App. 2015), *review allowed* (Or. July 9, 2015) ("With a dissipation rate of 0.015 per hour, it would take approximately five hours and twenty minutes for a person's BAC to drop from 0.08 to 0.00."); *see also State v.*

Giese, 2014 WI App 92, ¶¶ 6, 8, 356 Wis. 2d 796, 854 N.W.2d 687 (discussing blood-alcohol elimination rates and backwards extrapolation); Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. Rev. 141, 152 (April 1989) (same). Thus, if Hawley's BAC were slightly beyond his 0.02 legal limit when he crashed his motorcycle, his BAC could have gone from 0.02 to zero in *one hour* if his bloodstream had an hourly elimination rate of 0.02. Similarly, at an hourly elimination rate of 0.015, his BAC could have gone from 0.02 to zero a mere *one hour and twenty minutes* after the motorcycle crash. Even at a low elimination rate of 0.01 per hour, his BAC could have gone from 0.02 to zero in *two hours*. At a high elimination rate of 0.025, his BAC could have gone from 0.02 to zero in *forty-eight minutes*.[5] Hawley very well might have a high blood-alcohol elimination rate like 0.025—because he was driving a motorcycle with a very high BAC of 0.312, he appears to have a high tolerance for alcohol and therefore a high elimination rate. *See Eumana-Moranchel*, 277 P.3d at 551.

[5] These figures assume that Hawley's bloodstream was eliminating, rather than absorbing, alcohol at the time of the blood draw. *See generally Mata v. State*, 46 S.W.3d 902, 909-10 (Tex. Crim. App. 2001) (discussing the bloodstream's absorption and elimination of alcohol); *see also State v. Giese*, 2014 WI App 92, ¶ 26, 356 Wis. 2d 796, 854 N.W.2d 687 (accepting an expert witness's assumption that Giese's bloodstream had finished absorbing alcohol by the time of his blood draw).

Applying these standard elimination rates shows that Hawley's BAC could have dropped from slightly over his 0.02 legal limit to zero before he was flown to the hospital. Hawley was placed in the Medflight helicopter at 12:24 p.m., and his flight from Sauk County to the UW Hospital began sometime afterward (70:25-26, 32). Assuming that Hawley crashed his motorcycle at approximately 11:20 a.m.,[6] his BAC could have dropped from slightly above 0.02 to zero by 12:20 p.m., with a typical elimination rate of 0.02. If he crashed his motorcycle well before 11:20 a.m., then his BAC could have gone from 0.02 to zero well before noon.

Further, Hawley's BAC could have dropped from slightly over 0.02 to zero well before his blood was ultimately drawn at 1:50 p.m. (*see* 1:3). Although Sergeant Hanson testified that he thought he could have obtained an electronic warrant before Hawley's blood was drawn (70:39), that hindsight observation is irrelevant to the exigency analysis here. A court "do[es] not apply hindsight to the exigency analysis; [the court] consider[s] only the circumstances known to the officer at the time he made the [search] and evaluate the reasonableness of the officer's action in light of those circumstances." *State v. Richter*, 2000 WI 58, ¶ 43, 235 Wis. 2d 524, 612 N.W.2d 29 (citation

[6] Sergeant Hanson arrived at the accident scene somewhere between 11:22 and 11:24 a.m. (70:13-16). He estimated that the crash occurred shortly before he arrived (70:41). The circuit court found that "[i]t was reasonable to assume that the accident had just happened before" Sergeant Hanson arrived (33:3).

omitted). The circuit court found that Sergeant Hanson "did not know how much time he had to obtain a warrant" (33:4).[7] That finding is not clearly erroneous.

In any event, the exigency test is not whether Sergeant Hanson subjectively thought that he could have obtained a warrant, period, before the blood draw occurred. "To determine if exigent circumstances justified a search, a reviewing court determines whether the police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would . . . risk the destruction of evidence." *Tullberg*, 359 Wis. 2d 421, ¶ 41 (alteration in *Tullberg*) (quotation marks and quoted source omitted). This standard is an objective one. *Id.* An officer's decision to forgo a warrant will be upheld if the officer "reasonably concluded" that seeking a warrant "would have 'significantly undermin[ed] the efficacy' of the blood draw." *Id.*, ¶ 50 n.26 (alteration in *Tullberg*) (quoting *McNeely*, 133 S. Ct. at 1561).

Sergeant Hanson reasonably concluded that, if he applied for a warrant, he would have "risk[ed] the destruction of evidence" that Hawley was operating with a prohibited alcohol concentration of more than 0.02. *See id.*,

---

[7] The circuit court made this finding in its memorandum decision denying Hawley's suppression motion. "Facts which are stated in a trial court's memorandum decision will be accorded the same weight as if they had been contained in formal findings." *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 59 n.18, 364 Wis. 2d 1, 866 N.W.2d 717 (quotation marks and quoted source omitted).

¶ 41 (quotation marks and quoted source omitted). Sergeant Hanson estimated that his officers could generally obtain an electronic search warrant in thirty to forty-five minutes (70:35). He left the accident scene at 12:37 p.m. once he finished clearing the scene (70:34, 39). Thus, if he began applying for an electronic warrant at 12:37 p.m., he could have obtained one around 1:07 or 1:22 p.m. As indicated earlier, Hawley's BAC could have gone from slightly over his 0.02 legal limit to zero by 12:08, 12:20, 12:40, or 1:20 p.m.—with respective elimination rates of 0.025, 0.02, 0.015, and 0.01. Under these circumstances, Sergeant Hanson had a reasonable basis to think that waiting for a warrant could have allowed Hawley's BAC to drop to zero. *Cf. Ritz*, 347 P.3d at 1059-60 (holding that exigent circumstances justified a warrantless blood draw because "the police had an objectively reasonable basis to believe that waiting for a warrant would have resulted in the complete loss of evidence" by allowing Ritz's BAC to drop "to zero").

The fact that Hawley's BAC turned out to be 0.312 does not undercut the reasonableness of Sergeant Hanson's conclusion that he had an exigent need to have Hawley's blood drawn. As noted earlier, hindsight is not part of "the exigency analysis." *Richter*, 235 Wis. 2d 524, ¶ 43 (citation omitted). Based on Sergeant Hanson's observations and beliefs, it was reasonable for him to pursue an investigation into whether Hawley was operating with a prohibited alcohol concentration of more than 0.02, rather than

assuming that Hawley's BAC was well beyond his legal limit.

In particular, Sergeant Hanson observed that one of Hawley's eyes was reddish and bloodshot and that Hawley's breath emitted "a strong odor of intoxicants" (70:19-20). However, Sergeant Hanson testified that Hawley's eye could have been bloodshot due to the injuries he suffered in the motorcycle accident (70:36). Sergeant Hanson could not tell whether Hawley's speech was slurred (70:36). Sergeant Hanson did not administer a preliminary breath test (70:37). Sergeant Hanson thought that Hawley's inability to stand could have been due to the motorcycle crash rather than intoxication (1:3). When Sergeant Hanson asked him whether he had been drinking, Hawley did not admit to drinking but instead responded by saying "fuck you" (70:19). Sergeant Hanson believed that Hawley was unconscious due to a sedative that EMS personnel administered, not due to intoxication (70:37).

The State briefly notes two of Hawley's assertions that are not supported by the record. First, he claims that Sergeant Hanson "simply stopped working on the case" after 12:24 p.m. (Hawley's Br. at 6). To the contrary, at 12:24 p.m., Hawley was loaded onto the Medflight helicopter, so Sergeant Hanson returned to the accident scene to clear it (70:33-34, 39). At 12:37 p.m., Sergeant Hanson left the scene and thereafter began writing a report for this case and called Officer Shaw (70:34). The preceding discussion shows that

Sergeant Hanson reasonably chose not to seek a warrant after Hawley was loaded onto Medflight or after Sergeant Hanson left the scene.

Second, Hawley incorrectly argues that, "[c]ritically, Officer Shaw received the blood draw request at 12:24 p.m.," which "means that Officer Shaw had more than an hour to obtain a warrant" (Hawley's Br. at 4-5). The record does not support Hawley's claim that Officer Shaw received the blood-draw request at 12:24 p.m. Sergeant Hanson testified that "[t]he UW PD was contacted by teletype from our sheriff's department requesting an officer to respond to the location" (70:30). This contact occurred at 12:24 p.m. (70:30). Sergeant Hanson reiterated moments later that "UW PD was contacted for the blood draw" at 12:24 p.m. (70:33). Sergeant Hanson never testified that anyone contacted *Officer Shaw* at 12:24 p.m. Rather, Sergeant Hanson testified that he spoke to Officer Shaw over the phone sometime after 1:23 p.m. (70:40). Officer Shaw testified that he received Sergeant Hanson's request for a blood draw "through our dispatch" (70:4). When asked whether he recalled receiving the request "at approximately 1:00 p.m. in the afternoon, or sometime that day," he said, "I do remember that, yes" (70:4).[8] In short, the record shows that, after receiving the

[8] At one point during the suppression-motion hearing, Officer Shaw was asked whether he remembered when he talked with the Sauk County Sheriff's Department, and he answered, "I believe the request came in 11:30, approximately" (70:12). It is unclear whether Officer Shaw meant that the UW Police Department or he personally received the blood-

(continued on next page)

blood-draw request by dispatch around 1:00 p.m., Officer Shaw went to the hospital, spoke to hospital staff, spoke to Sergeant Hanson over the phone, read the Informing the Accused information to Hawley, and then observed a nurse draw Hawley's blood (70:4-6, 8, 40). Hawley is incorrect in arguing that Officer Shaw had much time or was otherwise free to seek a search warrant.

2. Sergeant Hanson reasonably investigated and attended to the accident scene, thereby delaying his ability to apply for a warrant.

Another factor supporting the exigency in this case is that Sergeant Hanson had to investigate and attend to Hawley's serious motorcycle accident. *See McNeely*, 133 S. Ct. at 1568 (holding that "the need for the police to attend to a car accident" is one factor that the exigency analysis may consider); *Schmerber*, 384 U.S. at 769, 770–71 (holding that exigent circumstances justified a warrantless draw of a suspected drunken driver's blood partly because the police officer needed to investigate the scene of a car accident). "An accident scene . . . can create exigent circumstances which would justify a warrantless blood draw." *Tullberg*, 359 Wis. 2d 421, ¶ 49.

---

draw request at that time. In any event, that statement was uncertain and inconsistent with Sergeant Hanson's testimony, based on sheriff's department documents that logged the various times when these events occurred, that the Sauk County Sheriff's Department contacted the UW Police Department at 12:24 and that he called Officer Shaw sometime after 1:23 (70:30, 32-33, 40).

Sergeant Hanson complied with the supreme court's directive that "[a] law enforcement officer, . . . who is confronted with an accident scene, should first attend to the emergency circumstances at hand." *Id.* Sergeant Hanson was the first responder at the accident scene, and his "major concern" was Hawley's injuries (70:16). In order to prevent exacerbation of a possible spinal injury, Sergeant Hanson attempted to hold Hawley's neck in place until EMS personnel arrived (70:18). When EMS personnel arrived, Sergeant Hanson gave them a "quick synopsis" of Hawley's situation and "turned patient care over to them" (70:20).

While EMS personnel were transporting Hawley from the accident scene to the nearby Medflight helicopter, Sergeant Hanson and a sheriff's deputy investigated the accident scene (70:23). They took measurements and photographs and ordered a towing service to remove Hawley's motorcycle (70:23). Sergeant Hanson ran the registration information for Hawley's motorcycle as well as Hawley's driver license and driver record (70:24). At the request of EMS personnel, Sergeant Hanson then drove to the area where the Medflight helicopter was sitting because Hawley was being uncooperative (70:24-25). After Hawley was loaded onto Medflight at 12:24 p.m., Sergeant Hanson cleared the accident scene until 12:37 p.m., when he left to begin writing a report on the incident (70:32, 34-39).

In short, Sergeant Hanson spent approximately one hour and fifteen minutes attending to and investigating the

accident (*see* 70:13-15, 32, 40). Those duties reasonably delayed his ability to apply for a search warrant. *See Tullberg*, 359 Wis. 2d 421, ¶¶ 49-50.

3. Hawley was transported to a hospital for unknown treatment for a serious injury, all of which contributed to the exigent need for a blood draw.

Sergeant Hanson believed that Hawley sustained "quite serious injuries" in a "very, very serious traffic accident" (70:27, 29). Similarly, Officer Shaw thought that Hawley's injuries were "serious" (70:10). These observations were reasonable because Hawley was not wearing a helmet, he appeared to have gone airborne during the crash, and his motorcycle ended up approximately 194 feet from the point where it left the highway (70:23, 27). Hawley was semiconscious and incoherent (70:18). Accordingly, Sergeant Hanson's "main concern" was that Hawley could have sustained a neck injury that could result in paralysis (70:18).

Sergeant Hanson testified that he was concerned that Hawley's medical care could affect the result of a blood test (70:28). Sergeant Hanson did not know what kind of medication the Medflight personnel had given to Hawley (70:28). He also did not know what kind of treatment Hawley would need to have at the hospital (70:28). He believed that Hawley would need to be in the emergency room for quite some time (70:29).

Although Sergeant Hanson left the accident scene approximately one hour and fifteen minutes before the blood

draw occurred, he "did not know how much time he had to obtain [a] warrant" (33:4). Further, given the seriousness and uncertainty of Hawley's medical condition, Sergeant Hanson did not know whether Hawley would be available for a blood draw by the time a warrant could be issued. *See, e.g.*, *Tullberg*, 359 Wis. 2d 421, ¶ 48; *accord State v. Stavish*, 868 N.W.2d 670, 677-78 (Minn. Aug. 19, 2015). Accordingly, Hawley's serious medical condition, transport to a hospital in another county, and need for unknown treatment contributed to the exigency of the need for the warrantless blood draw. *See Schmerber*, 384 U.S. at 770–71 (holding that exigent circumstances justified a warrantless draw of a suspected drunken driver's blood partly because the driver went to a hospital after a car accident); *Tullberg*, 359 Wis. 2d 421, ¶¶ 46, 48 (finding exigent circumstances partly because the officer did not know how much time Tullberg's CT scan would take, whether Tullberg would need subsequent medical care, or how much time any subsequent care would take); *accord Stavish*, 868 N.W.2d at 678 (holding that an exigency justified a warrantless blood draw because "Stavish's medical condition and need for treatment rendered his future availability for a blood draw uncertain").

Hawley argues that "[n]o explanation exists in the record as to how law enforcement's application for a warrant would interfere with Mr. Hawley's medical care" (Hawley's Br. at 6). However, the exigency analysis considers whether delaying a blood draw to wait for a warrant would have

risked the destruction of evidence, not whether such a delay would have interfered with a defendant's medical care. *See Tullberg*, 359 Wis. 2d 421, ¶¶ 48, 50. Hawley's medical condition supported Sergeant Hanson's conclusion that such a delay would have risked the destruction of Hawley's BAC evidence. *See id.*

4. Hawley's blood was drawn barely within the three-hour limit for automatic admissibility of the blood test result, which contributed to the exigency in this case.

Sergeant Hanson estimated that he arrived at the accident scene shortly after Hawley crashed his motorcycle (70:41). Sergeant Hanson arrived at the accident scene somewhere between 11:22 and 11:24 a.m. (70:14-16). The circuit court found that "[i]t was reasonable to assume that the accident had just happened before" Sergeant Hanson arrived (33:3). Hawley's blood was drawn at 1:50 p.m., approximately two and a half hours after his motorcycle accident (1:3).

"[A] suspected drunken driver's blood should be drawn within three hours of an automobile accident in which the driver was involved." *Tullberg*, 359 Wis. 2d 421, ¶ 19. "If a blood sample is taken more than three hours after an automobile accident, the blood draw evidence is admissible only if an expert testifies to its accuracy." *Id.*, ¶ 19 n.7 (citing Wis. Stat. § 885.235(1g) & (3) (2009-10)). But blood test evidence "is admissible . . . if the [blood] sample was taken

within 3 hours after the event to be proved." Wis. Stat. § 885.235(1g).

"[B]ecause an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." *McNeely*, 133 S. Ct. at 1561. "While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation." *Id.* at 1563. A gap of "over two hours" between an automobile accident and a blood draw "is a significant length of time and seriously affects the reliability of any extrapolation."[9] *Mata*, 46 S.W.3d at 917.

Accordingly, the fact that Hawley's blood was drawn barely within three hours of the accident contributes to the exigency of this case. *See Tullberg*, 359 Wis. 2d 421, ¶¶ 47-48 (relying on Wis. Stat. § 885.235's three-hour rule to conclude that exigent circumstances justified a blood draw that occurred more than two and a half hours after an automobile accident); *Schmerber*, 384 U.S. at 769, 771 (holding that an exigency justified a warrantless draw of a suspected drunken driver's blood that was performed more than two hours after a car accident); *accord Stavish*, 868 N.W.2d at

[9] "Retrograde extrapolation is the computation back in time of the blood-alcohol level—that is, the estimation of the level at the time of driving based on a test result from some later time." *Mata v. State*, 46 S.W.3d 902, 908-09 (Tex. Crim. App. 2001) (citation omitted).

677-78 (relying on a Minnesota statute that requires a blood draw "within 2 hours of the accident to ensure the reliability and admissibility of the alcohol concentration evidence" to conclude that exigent circumstances justified a blood draw that occurred fifty minutes after an automobile accident).

Even Hawley notes that Wis. Stat. § 885.235's three-hour rule was important to the supreme court's analysis in *Tullberg* (Hawley's Br. at 9-10). He argues, however, that *Tullberg* is distinguishable because "Sergeant Hanson acknowledged that he had time to apply for a warrant" (Hawley's Br. at 10). As explained earlier, that hindsight observation by Sergeant Hanson is irrelevant. The circuit court found that Sergeant Hanson "did not know how much time he had to obtain the warrant" (33:4). There was more of an exigency in this case than in *Tullberg* because Sergeant Hanson knew that Hawley's BAC legal limit was 0.02 and that it does not take much alcohol to reach that limit. Thus, Sergeant Hanson had a reasonable basis to conclude that Hawley's blood needed to be drawn well before the three-hour limit under § 885.235.

In sum, this Court may affirm on the basis that exigent circumstances justified the blood draw.

II. Alternatively, the blood draw that was performed on Hawley was lawful because it was administered with Hawley's consent under the implied consent statute.

A. Applicable legal standards.

Like exigent circumstances, consent is an exception to the warrant requirement. *State v. Krajewski*, 2002 WI 97, ¶ 24, 255 Wis. 2d 98, 648 N.W.2d 385 (citations omitted). A warrantless blood draw is lawful if "based upon exigent circumstances" or if drawn "under the implied consent statute." *See id.*, ¶ 42. To be lawful, a blood draw does *not* need to be both supported by exigent circumstances and performed under the implied consent statute. *Id.*, ¶¶ 24-26, 42.

By operating a motor vehicle on a public highway, a person consents to submit to a blood draw as authorized under Wisconsin's implied consent statute. *Id.*, ¶¶ 19, 36 n.15; *Washburn County v. Smith*, 2008 WI 23, ¶ 40 n.36, 308 Wis. 2d 65, 746 N.W.2d 243; Wis. Stat. § 343.305(2). "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent" to a blood draw. Wis. Stat. § 343.305(3)(b). If a law enforcement officer has probable cause to believe that an *unconscious* person has violated Wis. Stat. § 346.63(1), a blood draw "may be administered to the person." Wis. Stat. § 343.305(3)(b); *see also State v. Lange*, 2009 WI 49, ¶ 17 n.5, 317 Wis. 2d 383, 766 N.W.2d 551; *State v. Disch*, 129 Wis. 2d

225, 231, 237-38, 385 N.W.2d 140 (1986). Violations of § 346.63(1) include operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration. Wis. Stat. § 346.63(1)(a) & (b).

B. Hawley consented to the blood draw pursuant to the implied consent statute.

If this Court holds that exigent circumstances did not justify the blood draw, it should nevertheless affirm because Hawley consented to the draw under the implied consent statute. *See Krajewski*, 255 Wis. 2d 98, ¶¶ 24-26, 42 (noting that exigent circumstances and the implied consent statute are independent bases for a warrantless blood draw).

Hawley was unconscious when Officer Shaw read the Informing the Accused information to him and when his blood was drawn (70:6, 8, 11).[10] The implied consent statute authorizes a blood sample to be taken from an unconscious person if there is probable cause to believe that the person operated a motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration. *See* Wis. Stat. §§ 343.305(3)(b) & 346.63(1); *Lange*, 317 Wis. 2d 383, ¶ 17 n.5; *see also Disch*, 129 Wis. 2d at 237-38.

[10] The implied consent statute does not require an officer to read the Informing the Accused information to an unconscious person. *State v. Disch*, 129 Wis. 2d 225, 233-34, 237-38, 385 N.W.2d 140 (1986); *see also State v. Piddington*, 2001 WI 24, ¶ 24 & n.13, 241 Wis. 2d 754, 623 N.W.2d 528.

There was probable cause to believe that Hawley operated a motor vehicle while under the influence or with a prohibited alcohol concentration. Sergeant Hanson smelled "a strong odor of intoxicants" on Hawley's breath, Hawley had difficulty standing, his one open eye was reddish and bloodshot, and he was lying injured next to a motorcycle that had just crashed (70:16, 19-21). Furthermore, before Hawley's blood was drawn, Sergeant Hanson knew that Hawley's BAC legal limit was 0.02 due to Hawley's prior drunk-driving convictions and that it does not "take a lot of alcohol to get to .02" (70:24). Hawley's prior convictions and BAC legal limit of 0.02 strongly support the conclusion that there was probable cause to believe that he operated while under the influence or with a prohibited alcohol concentration. *See State v. Blatterman*, 2015 WI 46, ¶¶ 36-38, 362 Wis. 2d 138, 864 N.W.2d 26. This evidence of intoxication—although some of it may have had an innocent explanation—established probable cause to believe that a test of Hawley's blood would produce evidence of a drunk-driving-related crime.

Indeed, the circumstances here are on all fours with other cases in which Wisconsin appellate courts have assessed probable cause for drunk driving. *See Tullberg*, 359 Wis. 2d 421, ¶¶ 34-35 (holding that there was probable cause for a blood draw because "Tullberg's speech was slurred, his eyes were glassy and bloodshot, . . . his breath smelled of intoxicants," and he admitted to having "multiple alcoholic

drinks that night," although his "eye descriptors may have an innocent explanation"); *State v. Erickson*, 2003 WI App 43, ¶¶ 15-16, 260 Wis. 2d 279, 659 N.W.2d 407 (holding that an officer had probable cause to have Erickson's blood drawn because she smelled strongly of intoxicants, crashed her truck into another vehicle, admitted to drinking one to three beers, and had recently left an all-night party); *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (holding that an officer had probable cause to arrest Kasian for operating while intoxicated because he smelled of intoxicants, his speech was slurred, he was injured, and he was lying next to his van which had struck a telephone pole); *see also State v. Kennedy*, 2014 WI 132, ¶ 22, 359 Wis. 2d 454, 856 N.W.2d 834 (citations omitted) (noting that in various cases, "factors sufficient to support a finding of probable cause have included bloodshot eyes, an odor of intoxicants, and slurred speech, together with a motor vehicle accident or erratic driving").

By operating a motor vehicle on a public highway, Hawley consented to submit to a blood draw as authorized under the implied consent statute. Wis. Stat. § 343.305(2); *Smith*, 308 Wis. 2d 65, ¶ 40 n.36; *Krajewski*, 255 Wis. 2d 98, ¶¶ 19, 36 n.15. As noted above, there was probable cause to believe that Hawley operated a motor vehicle while under the influence or with a prohibited alcohol concentration, and he could not withdraw that consent to submit to the blood draw at issue here because he was unconscious at the time of

the blood draw. Wis. Stat. § 343.305(3)(b); *Lange*, 317 Wis. 2d 383, ¶ 17 n.5. Therefore, the blood draw was constitutional because Hawley consented to it by operation of the implied consent statute. *See Krajewski*, 255 Wis. 2d 98, ¶¶ 24-26, 36 n.15.[11]

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction and order denying Hawley's motion for postconviction relief.

Dated this 5th day of October, 2015.

BRAD D. SCHIMEL
Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539 (Phone), (608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

[11] The State notes that *State v. David W. Howes*, Case No. 2014AP1870-CR, is pending before District IV of this Court. The issue presented in *Howes* is whether the provisions of the implied consent statute that authorize a warrantless blood draw of an unconscious person are constitutional.

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 7734 words.

_____
Scott E. Rosenow
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 5th day of October, 2015.

_____
Scott E. Rosenow
Assistant Attorney General