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.

Reply 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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Argument

In its brief, the State seeks to justify the warrantless blood draw not only due to allegedly exigent circumstances but also on the basis of consent under Wisconsin's implied consent statute.

I.

Exigent circumstances did not exist, as the officers admitted to having ample time to seek a warrant, and application for a warrant would not have delayed the blood draw.

The State's brief confuses the record of when events occurred. It is important to remember that multiple officers had ample time to seek a warrant and simply chose not to do so.

The record is clear that Sergeant Hanson was dispatched to the scene of the accident between 11:20 and 11:22 a.m. on 29 August 2013. (R.70:15; App. 33.) He arrived at the scene within approximately two minutes. (R.70:16; App. 34.) He stabilized Mr. Hawley's neck and noticed several indications that Mr. Hawley was intoxicated while they waited for emergency personnel to arrive. (R.70:18-20; App. 36-38.) When asked

whether he had been drinking, Mr. Hawley was sufficiently conscious to respond, "Fuck you." (R.70:19; App. 37.) An ambulance arrived and took Mr. Hawley to the nearby landing site of a "Medflight" helicopter. (R.70:21; App. 39.) After the ambulance left with Mr. Hawley, Sergeant Hanson performed his investigation of the scene and Mr. Hawley's driver's record, during which he learned of Mr. Hawley's reduced legal BAC limit of 0.02%. (R.70:23-24; App. 41-42.) Sergeant Hanson then received a request to help subdue Mr. Hawley at the site of the emergency helicopter, as he was "not being cooperative," but the situation resolved before his arrival. (R.70:24-25; App. 42-43.) Mr. Hawley received medication that calmed him and rendered him unconscious. (R.70:37; App. 55.) Sergeant Hanson then filled out a citation for OWI and gave it to Mr. Hawley. (R.70:25; App. 43.) Sergeant Hanson contacted UW PD to request a blood draw at 12:24 p.m. and left the scene at 12:37 p.m. (R.70:33-34; App. 51-52.) The only tasks Sergeant Hanson testified to having done after leaving the scene were to begin drafting his report and to call Officer Shaw, who was attending the blood draw at the hospital. (R:70:34; App. 52.) Officer Shaw then read the

"Informing the Accused" form to an unconscious Mr. Hawley in the hospital at 1:35 p.m., nearly an hour after Sergeant Hanson left the scene. Medical staff then performed the blood draw. (R. 70:8; App. 26.)

For exigent circumstances to have existed, none of the police responding to the accident could have had time to apply for a warrant. From 12:37 p.m., when Sergeant Hanson left the scene, to 1:35 p.m., when Officer Shaw read the "Informing the Accused" form to Mr. Hawley, nothing in the record shows that either officer was prevented from applying for a warrant. Further, another officer, Deputy Matthews, attended to the investigation and was available to seek a warrant. (R.70:33; App. 51.)

The State's brief attempts to cast doubt on the clarity of the record as to when Officer Shaw first heard of the request for a blood draw by conflating the time he heard from dispatch and when Sergeant Hanson called him. This alleged lack of clarity should not accrue to the benefit of the State, as it has the burden of proving exigent circumstances. *Missouri v. McNeely*, 133 S.Ct. 1552, 1567 (2013). If the record is insufficiently clear to show

that police lacked time to obtain a warrant, the State has failed to satisfy its burden.

Ultimately, the record never shows that applying for a warrant somehow would have delayed the blood draw at all, much less result in a loss of evidence. Instead, the record shows that three police personnel were available to seek a warrant and simply chose not to do so.

The *McNeely* court found significant the "advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple." 133 S.Ct. 1552 at 1561-1562. Both Sergeant Hanson and Officer Shaw admitted that, in their years of experience, neither of them had ever sought an electronic warrant. (R.70:12, 35; App. 30, 53.) Sergeant Hanson acknowledged, though, that he kept a record of the procedure for obtaining an electronic warrant was in his squad car. (R.70:35; App. 53.) The only evidence as to how long an electronic warrant might have taken to obtain was from Sergeant

Hanson's estimate that it might take a "half hour, forty-five minutes." (R.70:35; App. 53.) Allowing police to forgo seeking a warrant due to exigent circumstances created by their willful ignorance of modern procedures is unreasonable under the Fourth Amendment. This is especially true when the police admit, as Sergeant Hanson did, that they had enough time. (R. 70:39; App. 57.)

Ultimately, police could have secured a warrant while Mr. Hawley was being taken to the hospital, but they simply chose not to do so. Finding exigent circumstances despite these facts ignores the very meaning of the word "exigent." If police are so unconcerned about the Fourth Amendment that they cannot be bothered even to know how to seek an electronic warrant, the courts are the last venue available to rectify this unfortunate failure to respect our Constitution.

A.

The fact that Mr. Hawley's legal BAC limit was 0.02 does not change the McNeeely *analysis.*

The *McNeely* court rejected the categorical rule sought by the state of Missouri that the metabolism of alcohol necessarily constitutes exigent circumstances and, thus, an exception to the requirement of a warrant prior to a blood draw. The State argues that Mr. Hawley's lower BAC limit of 0.02 effectively should result in exactly the same sort of categorical rule.

Again, it is important to remember that the State has not satisfied its burden to show that applying for a warrant would have delayed the blood draw at all, let alone to the extent that doing so would have unacceptably interfered with the gathering of reliable evidence.

Even if the application would have delayed the blood draw, the State fails to show precisely what about the lower limit suddenly warrants a categorical rule essentially identical to that which the *McNeely* court rejected.

B.

Unlike the circumstances in Tullberg*, the need for an investigation and the rendering of first aid did not interfere with the officers' ability to seek a warrant.*

The State cites *State v. Tullberg*, in which our Supreme Court found it reasonable to forgo warrant application when insufficient time remained after providing first aid and performing an investigation, 2014 WI 134, 857 N.W.2d 120.

Again, police in this case admitted they had time to seek a warrant and could have done so without any delay of the blood draw. They could have done so while Mr. Hawley was en route to the hospital where the blood draw would ultimately occur.

Sergeant Hanson's investigation was over at or before 12:24 p.m., when he handed Mr. Hawley a citation for OWI. The only first aid he provided preceded that investigation. In the ensuing hour, nothing prevented him from securing an electronic warrant. Certainly, he called Officer Shaw to confirm he was attending the blood draw and began drafting his report, but these duties are not so pressing as to justify neglecting the duties set forth in McNeely.

C.

Unlike the circumstances in Tullberg*, there was no known treatment that officers could reasonably believe would have interfered with the blood draw.*

The State argues that police were reasonably concerned about unknown medical treatment potentially interfering with the results of Mr. Hawley's blood draw. *Tullberg*, in part, stands for the reasonableness of the particularized concern of police in the face of known medical treatment excessively delaying a blood draw. 2014 WI 134, ¶ 48, 857 N.W.2d 120. In *Tullberg*, police "knew that hospital staff was about to perform a CT scan… [that] could very well have taken a considerable amount of time." *Id*. That fact, along with other reasonable delays, interfered with police attempts to seek a warrant, and thus constituted exigency under the totality of the circumstances.

Again, the key distinction between *Tullberg* and this case is that police, by their own admission, had ample time to secure a warrant but never bothered to try.

Instead, the State has repeatedly raised the vague threats of the unknown as justification for that casual neglect. The State

argued, and the Circuit Court found persuasive, that unawareness as to what medical treatment might lie ahead or the length of time an application for an electronic warrant might take constitute a valid excuse to forgo a search warrant.

This attempt to present evidence-by-ignorance-of-the-unknowable is conveniently available in every case. At its core, it is a categorical rule prohibited by *McNeely* and aptly dismissed in *Terry v. Ohio*:

> "And in justifying the particular intrusion the police officer must be able to point to *specific and articulable facts* which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be *subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances*." (Emphasis added) 392 US 1, 21 (1968).

Detached, neutral courts can only review the reasonableness of searches when the State satisfies its burden to present sufficient, specific facts showing the reasonableness of any particular intrusion. This court should reject the State's repeated attempts to

use indefinite, inarticulable premonitions to justify searches. Such premonitions become magic words pronounced ad nauseam to skirt judicial scrutiny and make review impossible.

D.

Additional statutory requirements for the admission of test results taken more than three hours after an incident do not constitute "destruction of evidence" giving rise to exigent circumstances, and seeking a warrant would not have delayed the results.

The State raises the specter of a statutory, three-hour deadline recognized in *Tullberg* and found at Wis. Stat. § 885.235(1g) & (3). Ultimately, the statute is merely a rule of evidence that requires the addition of expert testimony at trial to render admissible evidence gathered more than three hours after an incident.

Again, the State never explains how seeking a warrant would have delayed the blood draw at all, let alone beyond the three hour "deadline." Neither does it explain why the additional hassle of occasionally presenting expert testimony at the rare

criminal trial is so burdensome that it somehow negates the Fourth Amendment's warrant requirement.

II.

The State's attempt to justify the blood draw as implicitly consented to is inapt, as Mr. Hawley (A) withdrew consent, (B) was never expressly allowed an opportunity to give or withdraw informed consent while conscious, (C) and was rendered unconscious only by medical intervention. Additionally, (D) the statute is unconstitutional both as applied and on its face.

A.

Mr. Hawley made sufficiently clear that he did not consent to any search and that he withdrew consent.

Sergeant Hanson asked Mr. Hawley whether he had been drinking, and Mr. Hawley stated succinctly, "Fuck you." (R. 70:19; App. 37.) This is sufficient to make clear to any reasonable person that Mr. Hawley did not consent to a search and that any "implied consent" was withdrawn at that point.

The State seeks to use Mr. Hawley's subsequent, medically-induced unconsciousness to justify the warrantless search, but the dystopian absurdity of allowing police to ignore a plainly-stated objection to a search by simply waiting until the suspect/patient is rendered unconscious by inevitable medical treatment is not reasonable under the Fourth Amendment.

If magic words are required to withdraw consent, it is incumbent upon the legislature to provide sufficient due process notice of what those words might be.

B.

Even if some specific expression of withdrawal of consent were necessary, police never gave Mr. Hawley a good-faith opportunity to do so.

Police had ample opportunity to read Mr. Hawley the "Informing the Accused" form and give him a chance to reassert his refusal to allow the search. Sergeant Hanson acknowledges that he was not the only police personnel on the scene of the accident. (R. 70:42; App. 60.) He testified that "Deputy Matthews" was present to assist the investigation. (R.70:42; App. 60.) If Deputy

Matthews were unable, for some reason, to read a consent form to the still-conscious Mr. Hawley while Sergeant Hanson was stabilizing his neck, it would have been the State's burden to show why that might be. They have never done so, and nothing in the record provides any such indication.

Additionally, Sergeant Hanson estimated that Mr. Hawley was still conscious for at least a half-hour after his arrival. (R.70:31; App. 49.) The State provides no reason to have waited until he was rendered unconscious before pantomiming a chance for him to withdraw his consent to the search.

C.

Even if some specific expression of withdrawal of consent were necessary, police never gave Mr. Hawley a good-faith opportunity to do so.

Again, only medically-induced unconsciousness via an unknown sedative provided the State with a convenient, retrospective justification for the warrantless search under Wisconsin's "implied consent" statute. The Circuit Court barely touched on

this analysis, an indication of how unreasonable it deemed the argument. (R.33; App. 10-14.)

The thought that authorities might have casual free reign to circumvent Fourth Amendment protections once citizens are incapable of stating their refusal in sufficiently formalistic terms ought to scare any reasonable American.

D.

The portion of the "implied consent" statute allowing warrantless blood draws on unconscious individuals is unconstitutional on its face or, barring that, as applied.

Warrantless searches based on consent require courts to engage in a two-part inquiry: (1) the existence of consent, and (2) whether consent was voluntary. *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).

"Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct." *Id.* at 197. The State argues that the implied consent statute deems every driver to have

consented to a blood draw by virtue of having used Wisconsin's roads.

Never has the State explained, however, why conduct or words might be insufficient to have withdrawn consent. If consent is so easily conveyed that an action occurring potentially hours earlier renders a search consensual, no reason exists to make revocation of that consent as difficult as the State implies. Mr. Hawley was held down, and his clear response ("Fuck you.") was ignored. Police never bothered to engage in their usual procedure of reading the "Informing the Accused" form to him until he was no longer conscious and able to express himself. The State's view of consent is unusual under these circumstances.

Voluntariness of an expression of consent is the State's burden to prove:

> "When, as here, the State attempts to justify a warrantless search on the basis of consent, the Fourth Amendment requires that the State demonstrate that the consent was voluntarily given. The State has the burden of proving by clear and convincing evidence that the defendant's consent was voluntary." (Citations omitted) *Id*.

The State has shown no reason to believe that either Mr. Hawley or any other individual voluntarily consents to a search while unconscious, let alone establish voluntariness by clear and convincing evidence.

The portion of the implied consent statute that implies consent on behalf of unconscious individuals should be deemed unconstitutional on its face or as applied under that circumstances presented here. It creates a categorical rule that flies in the face of Fourth Amendment precedent requiring individual analysis of each case upon its facts. The notion that a mere statute can convert normal conduct into a convenient waiver of long-guaranteed constitutional rights is the type of unfair trap that disillusions entirely reasonable people about our system of law.

Conclusion

Neither exigent circumstances nor consent to the blood draw existed here. Police had time to apply for a warrant but made a habit of never bothering to do so. They ignored Mr. Hawley's clear refusal of consent and instead waited until he was rendered

unconscious. Mr. Hawley's conviction should be vacated, and the blood draw evidence should be suppressed.

Dated this 6th day of November 2015.

Respectfully submitted,

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Rule 809.19(8)(d) Certificates

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 2,787 words.

Dated this 6th day of November 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).

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 6th day of November 2015.

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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 Scott E. Rosenow, 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.

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