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

REPLACEMENT SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

In its initial brief, the State's primary argument was that the warrantless blood draw administered when Defendant-Appellant Philip J. Hawley was unconscious was permissible because of exigent circumstances. The State also made an alternative argument that the blood draw was justified under the implied consent law because Hawley impliedly consented to the blood draw by driving on a Wisconsin highway and never withdrew that consent.

On August 7, 2018, this Court ordered supplemental briefs to address the Supreme Court of Wisconsin's recent opinion in *State v. Mitchell*, 2018 WI 84, 914 N.W.2d 151. This Court asked six questions and directed the State to "provide an answer or statement as appropriate." (Order at 6.) This Court "ask[ed] that questions be answered either 'yes' or 'no,'" followed by an explanation if the State desired to give one. (Order at 6.)

The State filed a supplemental brief that it believes complied with this Court's order. However, on August 29, 2018, this Court issued a second order for a replacement supplemental brief "that answers all of the questions in our August 7, 2018 order." (Second Order at 3.) The State will again attempt to comply with this Court's order by "provid[ing] an answer or statement as appropriate." (Order at 6.)

Two of this Court's questions concern whether Hawley was arrested for purposes of the search incident to arrest exception to the warrant requirement. As the State will explain, Hawley was arrested for purposes of the search incident to arrest exception.

The remaining four questions concern whether the opinions of the two concurring justices and two dissenting justices in *Mitchell*, when combined, demonstrate that those

four justices have rejected the State's alternative argument—that the warrantless draw of Hawley's blood was justified under the implied consent law. As the State will explain, the dissenting opinion in *Mitchell* may not properly be counted to determine whether a majority of the Wisconsin Supreme Court justices have reached a binding agreement on the State's implied consent argument.

In light of the supreme court decisions in *Mitchell*, *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, and *State v. Dalton*, 2018 WI 85, 914 N.W.2d 120, there are three avenues under which this Court can properly decide this case. Under any of the three, the blood draw was permissible, and the circuit court's order denying Hawley's motion to suppress was correct. This Court can conclude that the blood draw was justified: (1) under the supreme court's determination in *Mitchell* that a blood draw of an unconscious person arrested for OWI is reasonable; (2) because Hawley impliedly consented to the blood draw by operating a motor vehicle on a Wisconsin highway, and never withdrew that consent; or (3) under the exigent circumstances exception as explained in *Howes* and *Dalton*. The State will begin by addressing the six questions asked by this Court.

ARGUMENT

A. The blood draw was permissible under general reasonableness principles and under the implied consent law.

1. Was there an arrest in this case that might support the blood draw as a proper search incident to arrest?

Yes. But as the State will explain in its response to question two, the arrest alone does not support a blood draw as a search incident to arrest.

In its initial brief, the State pointed out that officers did not formally arrest Hawley on the day he crashed his motorcycle after drinking. (State's Br. 5, 7; R. 70:6, 9, 11, 25–27.) But Hawley was legally arrested when his freedom of movement was restrained and an officer issued him a citation while he was unconscious.

"[T]he test for whether a person has been arrested is whether a 'reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances.'" *State v. Blatterman*, 2015 WI 46, ¶ 30, 362 Wis. 2d 138, 864 N.W.2d 26 (citation omitted). "The inquiry is 'whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest.'" *State v. Bartelt*, 2018 WI 16, ¶ 31, 379 Wis. 2d 588, 906 N.W.2d 684 (citation omitted).

Hawley's freedom of movement was restrained when he was stabilized for transport by Medflight. (R. 70:24–25.) Hawley was initially uncooperative, but he was sedated and then was unable to respond. (R. 70:24–25.) Sergeant John Hanson completed a citation for OWI as a sixth offense, and placed it in Hawley's shirt pocket. (R. 70:25–26.)

Sergeant Hanson did not tell Hawley that he was under arrest. He testified that Hawley had been sedated, could not respond, and was "out." (R. 70:25.) Sergeant Hanson testified that he "would be filing charges against" Hawley, but did not formally arrest him because Hawley had "quite serious injuries," and needed medical care. (R. 70:27.) He said that Hawley's medical care "came first and legal issues could be dealt with later." (R. 70:27.)

Even though the officer did not formally arrest Hawley at the scene, Hawley was arrested when his freedom of movement was restrained, and the officer issued him a citation when he was unconscious. Because Hawley was unconscious, it is not required that he be formally placed

under arrest, or that he understand that he had been arrested.

The situation here is akin to the one in *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974). In *Scales*, the defendant drove drunk and crashed his vehicle, seriously injuring himself and killing his passenger. *Id.* at 487. Investigating officers encountered the defendant in the emergency room. *Id.* at 487–88. The defendant was unable to respond to their questions, and officers did not know whether he was conscious. *Id.* at 488. The officers did not formally arrest the defendant, but one officer placed two citations on the defendant's chest, one for OWI. *Id.* When the defendant awoke, officers questioned him. *Id.*

The defendant claimed that he was arrested when he was unconscious and an officer placed the citations on his chest, and that any statements he later gave were involuntary. *Id.* at 488–89. The supreme court agreed. It concluded that even though the defendant was not formally arrested, he was under arrest. *Id.* at 492. It noted that the defendant was restrained because he was in the presence of police officers and unable to move. *Id.* It rejected the argument that the defendant had to know he was arrested, stating, "To say that he was not in custody, either because he was not conscious and did not realize he was arrested or because he was not explicitly told that he was in custody, is sophistry." *Id.*

In *State v. Disch*, 129 Wis. 2d 225, 236–37, 385 N.W.2d 140 (1986), the supreme court applied the principles of *Scales* in concluding that a defendant who was conscious but "in a stupor" was arrested even though the officer did not tell her she was under arrest, and she was unaware that she had been arrested. The court concluded that the defendant's liberty was restricted, and that the officer intended to arrest her. *Id.* at 237. It rejected the notions that a formal declaration of arrest was necessary under the circumstances, or that the

defendant's lack of awareness of the arrest meant that she was not arrested. *Id.*

Like the defendants in *Scales* and *Disch*, Hawley was arrested. His freedom of movement was restrained, he was about to be transported to the hospital, and he was unconscious. Sergeant Hanson had probable cause that Hawley had operated a motor vehicle while under the influence of an intoxicant, and with a blood alcohol concentration in excess of .02, and he intended to formally arrest him. But Sergeant Hanson delayed the formal arrest so that Hawley could receive medical care, and instead placed a citation for OWI in Hawley's pocket. (R. 70:24–27.) Under these circumstances, Hawley was under arrest.

2. If the State takes the position that there was a qualifying arrest, the State should provide a complete analysis as to why the blood draw here was justified as a search incident to arrest.

Although Hawley was arrested, the drawing of his blood cannot be justified as a search incident to arrest, because in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016), the Supreme Court determined that "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample."

This Court describes Justice Kelly's concurrence in *Mitchell* as concluding that the blood draw in that case was permissible as a search incident to arrest. (Order at 2.) But Justice Kelly did could not have tethered his analysis solely to the search incident to arrest doctrine without running afoul of *Birchfield*.

Justice Kelly concluded that under *Schmerber v. California*, 384 U.S. 757 (1966), *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield*, "no warrant is necessary to perform a blood draw when an individual has been arrested

for OWI, the suspect is unconscious, and there is a risk of losing critical evidence through the human body's natural metabolization of alcohol." *Mitchell*, 2018 WI 84, ¶ 74 (Kelly, J., concurring). Justice Kelly concluded that the warrantless blood draw in *Mitchell* was reasonable because the defendant "had been arrested for OWI, evidence of the offense was continually dissipating, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence." *Id.* ¶ 80. Justice Kelly seemingly based his analysis on a general reasonableness exception to the warrant requirement for drivers who have been arrested for OWI and who are unconscious.

In *Mitchell*, five justices agreed that warrantless blood draws on unconscious, arrested drivers are permissible because they are not unreasonable. That holding is binding.

Even if the three justices in the lead opinion in *Mitchell* did not agree with Justice Kelly's rationale, the result of *Mitchell*—that a blood draw from an unconscious, arrested driver was permissible because it was reasonable—is binding in this case because Hawley is in a substantially identical position to the defendant in Mitchell.

In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court concluded that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Id.* at 193 (citation omitted).

The Wisconsin Supreme Court of Wisconsin has adopted the *Marks* rule, and utilized it for analyzing its own fractured opinion in *Vincent v. Voight*, 2000 WI 93, ¶ 46 & n.18, 236 Wis. 2d 588, 614 N.W.2d 388. In *Vincent*, the court concluded that the lead opinion in *Kukor v. Grover*, 148

Wis. 2d 469, 436 N.W.2d 568 (1989), which three justices joined, along with the concurrence of a single justice, formed the holding of *Kukor*. *Vincent*, 236 Wis. 2d 588, ¶ 46. The court noted that it followed the *Marks* rule to reach that determination. *Id.* ¶ 46 n.18.

In *State v. Deadwiller*, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362, the Supreme Court of Wisconsin applied the *Marks* rule in determining the precedential value of fractured United States Supreme Court opinions regarding the Confrontation Clause. It noted that the *Marks* Rule applies to fractured majority and concurring opinions "only when 'at least two rationales for the majority disposition fit or nest into each other like Russian dolls.'" *Id.* (citation omitted.) The court also explained that "If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, 'the only binding aspect of the fragmented decision . . . is its "specific result."'" *Id.* (quoting *Berwind Corp. v. Comm'r of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002)). "A fractured opinion mandates a specific result when the parties are in a 'substantially identical position.'" *Id.*

Hawley is in a substantially identical position to the defendant in *Mitchell*. Just as in *Mitchell*, Hawley was deemed to have consented to a blood draw by driving on a Wisconsin highway, he did not affirm or withdraw that consent, he was legally arrested for OWI, he was unconscious, and there was a risk of losing critical evidence of his alcohol concentration. Five justices have determined that on these facts, the blood draw was proper.

3. Do the four concurring and dissenting justices in *Mitchell* agree with each other that "implied consent" is not consent for purposes of the consent exception to the Fourth Amendment's warrant requirement?

Likely, no. In her dissent, Justice Ann Walsh Bradley indicates that she agrees with the concurrence. Justice Abrahamson joined the dissent. But the concurrence by Justice Kelly does not mention the dissent, except to explain the concurrence's disagreement with the dissent. Justice Kelly followed *Birchfield*, which supports the notion that the conduct of implied consent justifies searches in some circumstances, namely where there are only civil penalties imposed. Perhaps there is some high-level agreement on the issue between the concurrence and the dissent. In any event, it makes no difference, because under *Marks*, the dissent cannot be combined with the concurrence to form a holding on any point. In sum, notwithstanding any common ground between the concurrence and dissent, there was no explicit agreement between the two opinions on this issue.

4. Do the four concurring and dissenting justices in *Mitchell* agree with each other that, under the "implied consent" scheme, an OWI suspect either gives or refuses to give consent to testing for Fourth Amendment purposes when a police officer requests that the suspect submit to testing after the suspect is given the required statutory warnings?

Likely, no. In her dissent, Justice Ann Walsh Bradley indicates that she agrees with the concurrence. Justice Abrahamson joined the dissent. But the concurrence by Justice Kelly does not mention the dissent, except to explain the concurrence's disagreement with the dissent. Justice

Kelly followed *Birchfield*, which supports the notion that the conduct of implied consent justifies searches in some circumstances, namely where there are only civil penalties imposed. Perhaps there is some high-level agreement on the issue between the concurrence and the dissent. In any event, it makes no difference, because under *Marks*, the dissent cannot be combined with the concurrence to form a holding on any point. In sum, notwithstanding any common ground between the concurrence and dissent, there was no explicit agreement between the two opinions on this issue.

5. If the answers to the third and fourth questions are yes, is there any reason why these agreed-on conclusions of these four justices do not constitute a rejection of the implied consent argument the State makes here?

The answers to the third and fourth questions are not "yes." And even if the concurrence and dissent did agree, it would make no difference because a dissent may not be considered in determining a case's holding.

6. Is there any reason why these agreed-on conclusions do not constitute precedent that binds this court?

There are no "agreed-on conclusions" among the concurring and dissenting justices in *Mitchell*. But any "agreed-on conclusions" among the concurrence and dissent can provide no binding precedent rejecting the implied consent argument the State raised in its initial brief. This Court may never properly look to a dissenting opinion to determine whether a majority of the Wisconsin Supreme Court has reached a binding agreement on a legal opinion.

In *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, the Supreme Court of Wisconsin rejected the proposition that dissenting opinions may be combined with

concurring opinions to provide a holding of a case. The court stated that "Under *Marks*, the positions of the justices who dissented from the judgment are not counted in examining the divided opinions for holdings." *Id.* ¶ 37 n.16 (citing *Marks*, 430 U. S. at 193). The court added, "Rather, *Marks* instructs that the holding is the narrowest position "taken by those Members who concurred in the judgment [ ]." *Id.* (citing *Marks*, 430 U.S. at 193). The court added that "*Marks* rejects any contention that the holding of *Williams v. Illinois* [132 S. Ct. 2221 (2012)] is Justice Thomas' and the dissent's rejection of the plurality's not-for-the-truth rationale." *Id.* (citation omitted).

The Seventh Circuit Court of Appeals has similarly recognized that "under *Marks*, the positions of those Justices who dissented from the judgment are not counted in trying to discern a governing holding from divided opinions." *Gibson v. American Cyanamid Co.*, 760 F.3d 600, 620 (2014). The court concluded that "It makes sense to exclude the dissenting opinions," because "by definition, the dissenters have disagreed with both the plurality and any concurring Justice on the outcome of the case, so by definition, the dissenters have disagreed with the plurality and the concurrence on *how* the governing standard applies to the facts and issues at hand." *Id.*

Under the *Marks* rule, *Mitchell* is precedential only to the extent that the lead opinion and the concurrence agree. *Marks* authorizes the counting of votes by justices "*who concurred in the judgments*." *Marks*, 430 U. S. at 193 (citation omitted) (emphasis added). A justice who dissented from the court's mandate did not concur in the judgment. The concurring and dissenting opinions in *Mitchell*, even on any point on which they agree, are not binding precedent.

The concurrence in *Mitchell* seemingly recognized that it was not providing a holding, as it did not even mention any point of agreement with the dissent. The concurrence noted

its disagreement with the lead opinion's view of the implied consent law. But it addressed the dissent only to explain why it disagreed with the dissent's analysis. *Mitchell*, 2018 WI 84, ¶ 81 n.2 (Kelly, J., concurring).

In *State v. Dowe*, the supreme court stated that an opinion of a seven-member court requires four votes: "It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court." State v. *Dowe*, 120 Wis. 2d 192, 194, 352 N.W.2d 660 (1984). But the court did not hold that *any* point on which four justices agree is the holding of the court. Its conclusion that a concurrence joined by four justices who agreed with the mandate sets forth the law on that point falls neatly in line with *Marks*.

In *Dowe*, the supreme court addressed "whether the opinion of the majority of a multimember court controls on a point of law where it is given in a concurring rather than lead opinion." *Id.* at 192–93. It concluded that the lead opinion in *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), in which three justices reached a holding on one issue, and two concurring opinions agreed, was controlling. *Id.* at 193. But on another issue, on which two concurrences of two justices each agreed with each other, but disagreed with the lead opinion, the concurrences controlled. *Id.* at 195.

The supreme court in *Dowe* noted that "Numerous cases have expressly held that a concurring opinion becomes the opinion of the court when joined in by a majority." *Id.* at 194. The court also noted that in a prior case, it had "recognized that a concurrence in a prior case represented the decision of a majority and was therefore the opinion of the court." *Id.*

Dowe did not hold that a dissenting opinion can be counted, along with a concurrence, to make an opinion of the court. And none of the authorities upon which the supreme court relied in *Dowe* stand for that proposition.

Dowe and *Marks* have been applied many times by Wisconsin courts. But the State's research has uncovered no case in which a Wisconsin court has added a dissent in a supreme court opinion to a concurrence to reach a binding agreement on a legal question. Doing so would be improper because "[a] dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722, 724 (Ct. App. 1993).

Therefore, even if, as this Court put it, "there does appear to be agreement, by a majority of justices in *Mitchell*, on a legal conclusion that defeats the State's implied consent argument in this appeal," (Order at 3), that legal conclusion is not binding or precedential.

In its order for an amended supplemental brief, this Court stated that it does not read *Marks* as addressing the counting of dissenting votes. (Second order at 2.) It acknowledges, however, that both the Supreme Court of Wisconsin and the Seventh Circuit Court of Appeals "appear to read *Marks* differently." (Second order at 2.) This Court notes that this Court could certify this case, and "our supreme court is free to revisit the issue." (Second order at 2.)

But the supreme court's application of the *Marks* rule in *Griep* is binding on this Court. And under *Marks* and *Griep,* the dissenting opinion in Mitchell cannot be considered in determining the holding on any point in *Mitchell*.

Because Mitchell does not provide binding precedent on the implied consent issue, this Court is bound by prior opinions of the supreme court and this Court, under which the State's implied consent argument is correct.

For instance, in *Disch*, the supreme court concluded that "those who drive consent to chemical testing," 129 Wis. 2d at 231, and that the unconscious driver provision of the law, concluding that the provision "obviates the necessity of an officer's request for a test or a blood sample." *Id.* at 233. The court concluded that when the requirements of the

unconscious driver provision "are met, an officer may administer a test without complying with sec. 343.305(3)(a)." *Id.* at 234. No Wisconsin or United States Supreme Court case has overruled *Disch*, and it remains good law that binds this Court. *See Howes*, 373 Wis. 2d 468, ¶ 76 (Gableman, J., concurring).

This Court is also bound by *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, in which this Court rejected the argument that the consent that authorizes a chemical test under the implied consent law is given when a law enforcement officer reads the Informing the Accused form to the driver, and thus the driver's consent is coerced and invalid. *Id.* ¶¶ 2, 8.

In *Wintlend*, this court concluded that a person's implied consent is sufficient to authorize a search under the Fourth Amendment. *Id.* ¶¶ 8–19. This Court rejected Wintlend's argument that consent occurs when an officer reads the Informing the Accused form to a person as "directly contrary to the specific language found in *Neitzel*," in which "our supreme court has declared that when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." *Id.* ¶¶ 12, 14 (citing *State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980)).

This Court explained that the issue under the Fourth Amendment is whether the intrusion the implied consent law authorizes is independently reasonable. *Id.* ¶ 10 (citing *Wyman v. James*, 400 U.S. 309, 318 (1971)). This Court concluded that "there is a compelling need to get intoxicated drivers off the highways," and accordingly, "[t]he implied consent law is for a compelling purpose and is not overly intrusive. It is not unreasonable." *Id.* ¶ 18.

In *Disch*, *Wintlend*, and numerous other cases, the supreme court and this Court have recognized that the consent a person impliedly gives by operating a motor vehicle on a Wisconsin highway authorizes a blood draw unless it is withdrawn. The only case to reach a different conclusion is *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. But as the lead opinion in *Mitchell* recognized, *Padley* "has no precedential effect because its holding is in direct conflict with" *Wintlend*. *Mitchell*, 2018 WI 84, ¶ 60. As the lead opinion also recognized, "*Padley* is simply wrong as a matter of law." *Id.*

When language in a decision of the court of appeals "is inconsistent with controlling supreme court precedent," the court of appeals is "not obligated to apply it" but "must, instead, 'reiterate the law under previous supreme court . . . precedent.'" *State v. Matke*, 2005 WI App 4, ¶ 15, 278 Wis. 2d 403, 692 N.W.2d 265 (citing *State v. Noll*, 2002 WI App 273, ¶ 16 n.4, 258 Wis. 2d 573, 653 N.W.2d 895).

When a court of appeals' opinion conflicts with a prior court of appeals' opinion, the first opinion controls. *See State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452 (citing *State v. Bolden*, 2003 WI App 155, ¶¶ 9–11, 265 Wis. 2d 853, 667 N.W.2d 364 ("if two court of appeals decisions conflict, the first governs").

As this Court recognized in certifying *Mitchell* to the supreme court, it reached one conclusion in *Wintlend*, and the opposite conclusion in *Padley*. Because *Wintlend* was issued before *Padley*, this Court was required to follow *Wintlend* in *Padley*. And this Court remains bound by the supreme court's decisions in *Disch* and numerous other cases, and by this Court's decision in *Wintlend*, not its decision in *Padley*.

B. The Supreme Court of Wisconsin's decisions in *Howes* and *Dalton* support the State's exigent circumstances argument.

In its initial brief, the State explained that the blood draw in this case was justified by the exigent circumstances exception to the warrant requirement. (State's Br. 12–27.) The Supreme Court of Wisconsin has since issued two opinions that support the State's argument.

In *Howes*, the defendant's blood was drawn approximately two hours after the crash and one hour after officers asked hospital staff to draw the blood. *Howes*, 373 Wis. 2d 468, ¶ 13. The court concluded that exigent circumstances justified a blood draw because: (1) the driver was critically injured and the ability to obtain a blood draw in the future was uncertain; (2) the driver was prohibited from driving with an alcohol concentration exceeding 0.02; (3) the officer had responsibilities at the scene of the crash; and (4) the driver was unconscious. *Id.* ¶¶ 45–48.

In *Dalton*, the defendant's blood was drawn a little more than two hours after the crash. *Dalton*, 2018 WI 85, ¶¶ 7, 14. The court concluded that exigent circumstances justified a blood draw because: (1) injured people—including the driver—needed medical attention; (2) officers needed to secure and examine the scene; (3) officers needed to speak with the passenger; and (4) officers had responsibilities in other cases that evening. *Id.* ¶¶ 45–48. The court noted that at a crash scene police "are present to investigate the cause of the accident and gather evidence of wrongdoing, but they are also there as first responders to injuries." *Id.* ¶ 50 (citation omitted).

The situation facing officers in this case was similar to the ones in *Howes* and *Dalton*. Officers reasonably believed that Hawley was seriously injured (R. 70:18, 23, 27), Sergeant Hanson's "major concern" was Hawley's injuries. (R. 70:16.)

Officers knew that Hanson was being transported to the hospital by Medflight. (R. 70:21, 24.) Hawley was unconscious when he was about to be transported, and at the hospital. (R. 70:5–6, 8, 25.) Officers knew that Hawley could not legally drive with an alcohol concentration in excess of 0.02. (R. 70:24.) Officers had responsibilities at the scene of the crash, including investigation. (R. 70:23–24.) Sergeant Hanson and a sheriff's deputy took measurements and photographs and ordered a towing service to remove Hawley's motorcycle. (R. 70:23.) Hawley's blood was drawn approximately two and a half hours after his crash. (R. 1:3; 70:14–16.)

Just like in *Howes* and *Dalton*, the warrantless blood draw in this case was justified under the exigent circumstances exception to the warrant requirement.

CONCLUSION

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

Dated this 10th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,697 words.

Dated this 10th day of September, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of September, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General