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.

Supplemental Reply Brief of Defendant-Appellant

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

Brandon Kuhl
State Bar No. 1074262

Kuhl Law, LLC
PO Box 5267
Madison Wisconsin 53705-0267
888.377.9193

Attorney for Defendant-Appellant

Argument

This brief is in response to the court's order of 7 August 2018 and the State's supplemental briefs. The State, in its briefs, argued as follows: (1) that Mr. Hawley was arrested at the time of his being taken to the hospital by emergency medical services; (2) that, despite having been arrested, the blood draw could not be justified as a search incident to arrest under the US Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016); (3) that the four concurring and dissenting justices in *Mitchell* "likely" do not agree with each other that "implied consent" is not valid consent for Fourth Amendment purposes; (4) that the four justices "likely" do not agree that, under an implied consent scheme, a suspect either gives or refuses consent upon request and proper warning by the officer; (5) that their answer to this question was unnecessary; (6) that no binding precedent may be found between concurring and dissenting justices.

In this brief, we argue as follows: (1) emergency medical treatment, without more, does not constitute an arrest; (2) we

agree with the State that no blood draw could be performed as a search incident to arrest under *Birchfield*; (3) that the four *Mitchell* concurring and dissenting justices agreed that implied consent is not valid consent for Fourth Amendment purposes; (4) that none of the opinions in *Mitchell* dealt with when a suspect withdraws consent; (5) four justices that joined the concurring and dissenting opinions expressly rejected the implied consent argument; (6) that no valid reason exists to presume that the express statements of the four concurring and dissenting justices is non-binding.

I.

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

Mr. Hawley was not arrested. The State cites *State v. Blatterman* for the notion that he was arrested, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26. In *Blatterman,* our Supreme Court did not think the defendant had been arrested on the basis of his having been detained and handcuffed. *Id*. at ¶ 33. Instead, the court found several facts tending to show that "a reasonable person in [his]

position would have believed that he was in custody due to an arrest because his transportation was involuntary, and he had experienced a significant level of force and restraint since the initial stop." *Id*. The *Blatterman* defendant had been stopped by police, who drew their weapons, and a police officer transported the defendant in handcuffs to the hospital, which was 10 miles away. ¶ 6, 26.

In this case Mr. Hawley was found on the side of the road after an accident and was taken by emergency medical services to the hospital. No law enforcement engaged in any "force" or "restraint," key factors in the *Blatterman* court's decision.

Even the officer who cited Mr. Hawley acknowledged, under oath, that he had not arrested him:

> "Q. Did you tell Mr. Hawley he was under arrest?
>
> A. I did not.
>
> Q. Was Mr. Hawley in handcuffs, to your knowledge?
>
> A. No."
>
> (R.70:6; App. 22.)
>
> "Did you place him under arrest in the hospital?

A. I did not.

Q. Did your agency ultimately arrest Mr. Hawley?

A. Yes.

Q. When was that?

A. I don't know the exact date. “

(R.70:9, App. 25.)

Under the totality of the circumstances, a reasonable person in Mr. Hawley’s position at the time would assume that he was simply in a car accident and receiving medical care as a result.

Further, it is difficult to see how a reasonable police officer would have had probable cause to effectuate an arrest without more information about his level of intoxication.

II.

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?

We agree with the State that, even if Mr. Hawley had been arrested, the US Supreme Court's decision in *Birchfield v. North Dakota* binds this court, 136 S. Ct. 2160, 2185 (2016):

> "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, **but not a blood test**, may be administered as a search incident to a lawful arrest for drunk driving." (Emphasis added)

III.

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?

All four justices clearly reject the "implied consent" argument on which the State rests.

The two concurring justices clearly and repeatedly rejected implied consent as a substitute for actual consent for Fourth Amendment purposes:

> "I do not believe the state can waive the people's constitutional protections against the state." ¶ 67.

> "[L]legislative consent cannot satisfy the mandates of our State and Federal Constitutions." ¶ 68.
>
> "[C]onsent implied by Wis. Stat. § 343.305 cannot justify [a] blood draw." ¶ 73.
>
> *Mitchell*, 2018 WI 84.

The two dissenting Mitchell justices similarly rejected the implied-consent-as-actual-consent argument:

> "I determine that "implied consent" is not the same as 'actual consent' for purposes of a Fourth Amendment search…Consent provided solely by way of an implied consent statute is constitutionally untenable." *Id* at ¶ 89.
>
> "[C]onsent provided solely by way of an implied consent statute is not constitutionally sufficient." *Id* at ¶ 112.

The State obfuscates these clear statements with vague discussion of different justices agreeing with each other without qualification as to the issue on which they agree.

Further, the State misrepresents the concurrence by claiming "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." (State's Supp. Br. 8.)

In fact, Justice Kelly explicitly rejected the implied consent argument advocated for application of the exigent circumstances exception. His opinion cited *Birchfield* for the proposition that the US Supreme Court may have reasoned similarly in an unconscious driver case like this one. *Mitchell* at ¶ 81. The notion that he followed his unqualified rejection of statutorily-implied consent with anything that could feasibly be characterized as support for implied-consent-as-actual-consent under "some circumstances" is wholly unreasonable.

Further, the reasoning in both the concurrence and dissent for rejecting the implied consent argument is, at times, effectively identical. For instance, the dissent explains,

> "[T]he implied consent law does not authorize searches. Rather, it authorizes law enforcement to require a driver to make a choice: provide actual consent and potentially give the state evidence that the driver committed a crime, or withdraw implied consent and thereby suffer the civil consequences of withdrawing consent." *Mitchell* at ¶ 110.

Similarly, the concurrence incorporates Justice Kelly's opinion in State v. *Brar*, 2017 WI 73, ¶ 56, 376 Wis. 2d 685, 898 N.W.2d 499:

> "It is part of a mechanism designed to obtain indirectly what it cannot (and does not) create directly — consent to a blood test. The Implied Consent Component works in tandem with the Penalty Component to cajole drivers into giving the real consent required by the Test Authorization Component. The Penalty Component punishes a driver by revoking his operating privileges if he refuses an officer's request for a blood sample."

Both the concurrence and dissent interpret the implied consent statute such that it gives a driver an incentive to provide actual consent when stopped for suspected OWI instead of attempting to thwart a constitutional right with nothing more than the power of a state statute.

IV.

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?

Neither the concurrence nor the dissent explicitly articulates when a suspect withdraws consent, aside from referring to the lead opinion. None of the *Mitchell* justices limited the timeframe within which one may withdraw consent or the means by which they withdraw it.

V.

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 that the State makes here?

The State did not answer this question, but we reiterate that the four justices that joined the concurring and dissenting opinions expressly rejected the implied consent argument.

VI.

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

The State argues that no binding precedent may be found in the combination of concurring and dissenting opinions.

For support, the State cites *Marks v. United States*, a US Supreme Court case in which the court briefly discussed one means of discerning the true holding of a divided court, 430 U.S. 188 (1977).

The State argues that this rule applies to Wisconsin courts due to footnote in *Vincent v. Voight*, in which the court notes ambiguously:

> "We have adopted the United States Supreme Court's treatment of plurality opinions in applying the holdings of **that Court**." (Emphasis added) 2000 WI 93, ¶ 46 & n.18, 236 Wis. 2d 588, 614 N.W.2d 388.

First, it is important to remember that the *Vincent* court never makes clear that the footnote is binding precedent. It is likely the court simply found the federal *Marks* precedent persuasive in its approach in that Wisconsin case.

Further, *Marks* and Wisconsin law are silent on the question at issue here: how to treat dissenting opinions that are consistent

with concurring opinions in cases where no clear majority exists. The State argues that *Marks* and Wisconsin law somehow prohibit finding binding precedent in this circumstance, despite the unequivocal expression of the majority of Wisconsin Supreme Court justices.

The State argues that, "[i]n *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 the holding of the case." (State's Supp. Br. 9-10.) This is untrue, as neither *Griep* nor *Marks* ever addressed the issue of when the dissenting and concurring justices ever constituted a majority.

In fact, the *Griep* court was applying the US Supreme Court's opinion in *Williams v. Illinois*, in which the dissent never agreed with any other justices to form a majority on any issue, 2015 WI 40, ¶ 37, 863 N.W.2d 567, 361 Wis. 2d 657, *citing* 132 S.Ct. 2221 (2012).

Ultimately, our Supreme Court was interpreting US Supreme Court precedent according to US Supreme Court rules that

remain non-binding regarding Wisconsin courts' interpretation of their own decisions. Even if *Marks* were binding on our courts, it is not relevant to the situation at hand. It was never intended to be interpreted as broadly as the State prefers.

Instead of the State's preferred, rigid view, Wisconsin law gives this court latitude: "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, 352 N.W.2d 660 (1984).

Next, the State argues that existing precedent supports its implied consent argument and cites *State v. Disch* for this proposition, 129 Wis. 2d 225, 385 N.W.2d 140 (1986). (State's Supp. Br. 12.) *Disch*, however, simply held that an officer is not required to read aloud the "informing the accused" information in Wis. Stat. ¶ 343.305 to an unconscious person. *Id*. at 238. It never raised the Fourth Amendment and is inapposite to this case.

The State notes, however, that a concurring opinion in *State v. Howes* argues that *Disch* supports its implied consent argument, 373 2017 WI 18, Wis. 2d 468, 893 N.W.2d 812. (State Supp. Br.

13.) The irony of the State citing a two-justice concurrence without more should be apparent. Further, Justice Gableman, the author, is no longer on the court, and Justice Kelly, who joined the concurrence, no longer supports this implied consent argument. That case was an exigent circumstances case, and the Gableman concurrence was simply a minority of the court arguing that a different analysis should apply.

Next, the State cites *State v. Wintlend* as supposed support, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745. (State Supp. Br. 13.) The defendant in *Wintlend* argued that the language of the "Informing the Accused" form was threatening and coercive and, therefore undermined the voluntariness of the consent. *Id*. at ¶ 1. The case never raises the implied-consent-as-actual-consent argument and is inapposite to this case.

Conclusion

Implied consent is not a viable doctrine in Wisconsin, and we urge the court to reject it.

Dated this 28th day of September 2018.

Respectfully submitted,

Brandon Kuhl
State Bar No. 1074262

Kuhl Law, LLC
PO Box 5267
Madison WI 53705-0267

888.377.9193
brandon@kuhl-law.com

Attorney for Defendant-Appellant

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 2,522 words.

Dated this 28th day of September 2018.

Brandon Kuhl
State Bar No. 1074262

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.

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 28th day of September 2018.

Brandon Kuhl

State Bar No. 1074262

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 Michael C. Sanders, P.O. Box 7857, Madison WI 53707-7857, and one copy to Philip Hawley at 605 6th Street Prairie Du Sac WI 53578.

Dated this 28th day of September 2018.

Brandon Kuhl
State Bar No. 1074262