STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1113 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILIP J. HAWLEY,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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STATEMENT OF THE ISSUES AND CRITERIA FOR GRANTING REVIEW

I. The good faith exception to the warrant requirement should only apply to law on which an officer actually claimed to have relied.

While the issue raised in this petition is fairly specific, this case involves several issues that have confused police, attorneys, and courts for years, and these issues are currently being reviewed in Wisconsin and federal courts. Those issues concern the constitutionality of implied consent statutes, exigent circumstances, and the good faith exception to the warrant requirement.

In this petition, we request that this court consider the extent to which law enforcement must actually have relied on any law before courts may decide that it would have been reasonable to do so in good faith. The Court of Appeals found that officers' testimony showed that they reasonably relied on the implied consent statute (Wis. Stat. § 343.305(3)(b)) to forgo seeking a search warrant for a blood draw. However, the court raised questions as to the relevance of the officers'

subjective beliefs about which specific law they thought exempted them from the warrant requirement. In other words, the question is the extent to which law enforcement needed to rely in actual good faith on any then-existing law. The Court of Appeals implied that the correct analysis might be simply whether a hypothetical, reasonable officer could have relied on any law then in existence without regard to what the actual law enforcement officers actually believed.

STATEMENT OF THE CASE

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

Upon arrival of emergency personnel, Sergeant Hanson contacted Officer Matthew Shaw at the UW Police Department and requested that a blood draw be performed on Mr. Hawley to test for intoxication. (R.70:27-28.) Neither

Sergeant Hanson nor Officer Shaw applied for a warrant. (R.70.) On the basis of the illegally-obtained blood draw, the State filed a criminal complaint charging Mr. Hawley first with Operating While Intoxicated as a sixth offense, then later amended the charge to allege a seventh offense (Count 2 included the PAC charge which did not result in conviction). (R.1, 38.)

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

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

We initiated this appeal.

While the Court of Appeals reasserted its prior decision that the implied consent statute was unconstitutional, it also

decided that law enforcement relied on the statute in good faith. The court stated, "Hawley cites no authority for the proposition that, in order for the good-faith exception to apply, an officer must testify that he subjectively relied on the then-valid law authorizing the conduct. We observe that Fourth Amendment jurisprudence is typically analyzed using an objective test of what a reasonable officer would believe." (Ct. of Appeals Dec. ¶ 24.)

The court then found that law enforcement actually relied on the implied consent statute. This finding was based on the following testimonial statements from law enforcement:

> "When I read the form to Mr. Hawley, he was unconscious. Therefore, he was unable to revoke consent." (Id. at ¶ 25.)
>
> "[I]f it was circumstances such as this, when somebody is unconscious, et cetera, … reading [the] informing the accused [form] would suffice, and we wont have to go that route." (Id. at ¶ 26.)

As the court noted, the first statement was simply the officer's answer to "why he checked the 'yes' box to the question on the Informing the Accused form that asked whether Hawley

would submit to an evidentiary chemical test of his blood" if he was unconscious.

The second statement, prior to editing for inclusion in the decision, originally referenced something "rather new at that point." (R.70: 39.) It should be noted that the events in this case occurred very shortly after the US Supreme Court rendered its decision in *Missouri v. McNeely,* a case involving exigent circumstances, not implied consent. 133 S.Ct. 1552, 358 S. W. 3d 65 (2013). Earlier testimony from the same officer supports this conclusion:

> "Q. Now, in your report it says that you requested that Officer Shaw take the blood draw under exigent circumstances, is that right?
>
> A. Yes.
>
> Q. Why did you write that in your report?
>
> A. Because I was aware at that time, I believe, fairly new rule reference felony OWI charges. If the defendant denied a blood draw, a search warrant needs to be done. The case being here — information I received, once again, this was quite new. It just come out. If a person was unable to speak or was unconscious, et cetera, therefore, it would be exigent circumstances for the blood draw." (Id. at 28.)

It should be noted that this testimony, if in reference to *McNeely*, is a diametrically incorrect characterization of that decision.

ARGUMENT

If the purpose of the good faith exception is to ensure that the exclusionary rule prevents law enforcement from exploiting bad faith circumventions of a defendant's constitutional rights, it follows that courts should inquire into officers' actual, subjective reasoning rather than craft retrospective, good faith bases on which officers might otherwise have rested their decisions. While courts are clear that the test of good faith is an objective one, in every published case, courts appear to have used the objective test to evaluate whether to believe officers' testimony regarding their actual decision-making process.

The Court of Appeals suggests that this is unnecessary and that, instead, courts should try to conceive of a good faith reason police could have employed.

The problem is that this severs the analysis from the remedial purpose of the exclusionary rule: to deter police misconduct. Instead, it positions courts as retrospective excusers of potentially wrongful conduct.

In this case, the Court of Appeals found that law enforcement actually depended on the implied consent statute. However,

this finding is questionable if viewed in context, especially if the analysis was rooted in a disregard for the significance of law enforcement's actual reasoning process.

CONCLUSION

We request that this court reverse the decision of the Court of Appeals and remand to the Circuit Court for further proceedings as this court deems appropriate.

Dated this 21st day of December 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 1,139 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 21st day of December 2020.

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