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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2015 AP 001581

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

v.

ALPESH D. SHAH,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED JULY 1, 2015, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable John Siefert, Presiding
Trial Court Case No. 2013TR015163

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ISSUES PRESENTED

I. WHETHER A POLICE OFFICER CAN CLAIM "EXIGENT CIRCUMSTANCES" TO JUSTIFY A FORCIBLE BLOOD DRAW FROM A DRIVER THE OFFICER IS INVESTIGATING FOR A CIVIL CHARGE, WHEN THE ONLY EVIDENCE THERE IS PROBABLE CAUSE TO BELIEVE MAY BE FOUND IS THE MERE *PRESENCE* OF THC, WHICH THE OFFICER BELIEVES THE DRIVER HAS VERY RECENTLY INGESTED, WHEN THE OFFICER KNOWS, AND THE PROSECUTION CONCEDES, THAT THC WILL REMAIN IN THE BLOODSTREAM FOR A PROLONGED PERIOD OF TIME.

The circuit court: Answered Yes.

II. WHETHER IT WAS OBJECTIVELY REASONABLE TO APPLY THE *PER SE* EXIGENCY RATIONALE OF *STATE V. BOHLING*, WHICH WAS A CASE INVOLVING ALCOHOL AND AN OFFENSE WHERE THE PRECISE MEASUREMENT OF ALCOHOL WAS CRITICAL, TO CIRCUMSTANCES INVOLVING THC, WHERE ONLY ITS MERE PRESENCE MATTERED.

The circuit court: Did not reach or otherwise answer this question.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion will meet the criteria for publication.

STATEMENT ON ORAL ARGUMENT

The appellant requests oral argument to further explicate the facts and law necessary for the Court to decide the issues presented in this case.

STATEMENT OF THE CASE

This is an appeal from an order finding the defendant-appellant, Alpesh Shah, guilty of Operating a Motor Vehicle with a detectable amount of Restricted Controlled Substance (THC) in his blood, contrary to section 346.63(1)(am), Stats. (R1; R2). On December 4, 2012, Shah was stopped, arrested and cited for operating with a Restricted Controlled Substance (THC) in his blood. (R2). When Shah refused to consent to a blood test under the Implied Consent Law, a warrantless blood draw was forcibly taken from Shah, the results of which Shah sought to suppress. (R3). On January 29, 2015, the circuit court conducted a hearing on that issue and ultimately denied Shah's motion to suppress. (R16).

On June 30, 2015, the circuit court presided over a bench trial on the charge. (R17). On July 1, 2015, the circuit court rendered its decision and found Shah guilty of the charge. (R18). This appeal followed.[1] (R14).

STATEMENT OF THE FACTS

On December 2, 2012, at approximately 8:30 a.m., Milwaukee County Sheriff's Deputy Christopher Leranth was patrolling on I-94 westbound in the area of College Avenue when he observed a sedan pass him at an elevated rate of speed. (R16-6-10). Deputy Leranth activated his emergency lights

[1] It should be noted that the County, conceding there was insufficient evidence to prove the possession of marijuana charge, and no evidence of ethyl alcohol by which to prove a prohibited alcohol concentration, voluntarily dismissed both of those charges. (R18-2). Moreover, the trial court found Shah not guilty of possession of drug paraphernalia. (R18-9).

and stopped the sedan, which he paced at approximately 84 MPH. (R16-10-11). The driver of the vehicle, who immediately pulled over in the right distress lane when Deputy Leranth activated his emergency lights, was Shah. (R16-11). Nothing about the manner in which Shah reacted or stopped suggested any evidence of impairment to Deputy Leranth. (R16-22). Shah, as it turned out, was on his way to Green Bay to meet clients and associates. (R16-37-38).

Deputy Leranth testified he immediately took note of the fact that Shah, the sole occupant in the vehicle, only rolled his window down about four inches, whereupon the deputy quickly detected the strong odor of burnt marijuana. (R16-11-13). Deputy Leranth asked Shah to roll the window down a bit more and when Shah complied, the odor of burnt marijuana became more prominent. (R16-11). Deputy Leranth also perceived Shah's eyes to be red, glassy and bloodshot, and claimed the vehicle was "smoky." (R16-12-13). He did not, however, notice Shah's pupils to be dilated. (R16-22-23). He also ascertained that the vehicle did not belong to Shah. (R16-23). Nevertheless, he described the marijuana smell as "overpowering," though he did not smell the odor of marijuana on Shah after removing him from the vehicle. (R16-29-30).

Deputy Leranth had called for backup and asked Shah to step out and to the rear of his vehicle, and Shah complied. (R16-14-15). Deputy Leranth then searched Shah's vehicle and found, in the center console, a reddish glass pipe about half full of freshly burned marijuana, and a glass cylinder containing what he believed to be fresh marijuana. (R16-16). Deputy

Leranth never observed any odor of alcohol on or about Shah, and his speech was in no way slurred.[1] (R16-26).

When Deputy James Jarvis arrived as back-up, Deputy Leranth turned Shah over to Deputy Jarvis for field sobriety tests. (R16-17-18). Deputy Jarvis arrived to find Shah in the back seat of Deputy Leranth's squad car. (R16-35). Deputy Jarvis began by asking Shah if he had any medical problems, whereupon Shah informed him he had a congenital inner ear problem, and a left knee injury, both of which would make performing field sobriety tests problematic. (R16-37, 41). Deputy Jarvis believed Shah's report of medical issues to be true, and thus asked Shah to instead recite the alphabet, starting with D and ending with Z, which Shah did flawlessly. (R16-42, 46-49). Like Deputy Leranth, Deputy Jarvis also did not detect any odor of alcohol on or about Shah. (R16-38). Moreover, the record is devoid of any suggestion that any deputy involved in the case ever observed Shah to display any unsteadiness or balance problems as he moved about the scene. Nevertheless, Shah was arrested. (R16-19-20, 42).

Deputy Leranth escorted Shah to Froedtert Hospital for what he testified would be a "legal blood draw." (R16-20). Deputy Leranth read the Informing the Accused Form to Shah.

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[1]Deputy Leranth also found two powdery substances in the vehicle's glove compartment which Shah advised him were sacraments used for religious purposes. (R16-24-25). This was confirmed by field testing. (R16-25). When Shah attempted to explore the circumstances surrounding those substances during the evidentiary hearing, the County objected and the circuit court sustained the objection on the grounds this case involved only marijuana, and not the other substances. (R16-26).

(R16-20). Shah refused to consent to a blood draw, whereupon Deputy Leranth forced a warrantless blood draw from Shah, because, *inter alia*, he felt that Shah "had marijuana in his system while driving." (R16-21). Deputy Leranth conceded that there were no circumstances that would have prevented him from getting a warrant for a blood draw, just that he felt he did not need to do so at that time. (R16-28). The blood test results revealed Delta-9 THC in Shah's blood, and he eventually was convicted of the charge issued - Operating a Motor Vehicle with a detectable amount of a Controlled Substance. (R17-49-53; R18).

ARGUMENT

I. THE WARRANTLESS BLOOD DRAW WAS UNLAWFUL BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES.

The Fourth Amendment to the United States Constitution provides for "the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." Article I, § 11 of the Wisconsin Constitution also prohibits "unreasonable searches and seizures." When police draw a sample of a person's blood to test it for evidence of a crime, a search under the Fourth Amendment has occurred. *See State v. Tullberg*, 2014 WI 134, ¶ 31, 359 Wis. 2d 421, 857 N.W.2d 120; *State v. Faust*, 2004 WI 99, ¶ 10, 274 Wis. 2d 183, 682 N.W.2d 371. As noted above, Deputy Leranth directed that Shah's blood be drawn without making any effort to obtain a warrant.

Warrantless searches are per se unreasonable unless they fall within a well-recognized exception to the warrant requirement. *State v. Foster*, 2014 WI 131, ¶ 32, 360 Wis. 2d 12, 856 N.W.2d 847. One well-recognized exception - the exception at issue in the case *sub judice* - is where there is probable cause to believe the search will reveal evidence of a crime *and* exigent circumstances exist in the form of a threat that evidence will be lost or destroyed if time is taken to obtain a warrant. *State v. Bohling*, 173 Wis. 2d 529, 537–38, 494 N.W.2d 399 (1993). *State v. Parisi*, 2016 WI 10, 367 Wis. 2d 1, 875 N.W.2d 619. Here, the burden was on the County to establish both. *State v. Hughes*, 2000 WI 24, ¶¶ 17–18, 233 Wis.2d 280, 607 N.W.2d 621. The burden was heavy, as the

County was required to do so by clear and convincing evidence. *State v. St. Martin*, 2011 WI 44, ¶ 19, 334 Wis. 2d 290, 800 N.W.2d 858. The touchstone of the Fourth Amendment is "reasonableness." *Faust*, 2004 WI 99 at ¶ 32, *quoting Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

This Court will review an order granting or denying a motion to suppress evidence as a question of constitutional fact, which calls for a two-step inquiry. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463. This Court will accept the circuit court's findings of historical fact unless they are clearly erroneous and then review the application of constitutional principles to those historical facts de novo. *Foster*, 2014 WI 131 at ¶ 27; *Tullberg*, 2014 WI 134 at ¶28. Here, the circuit court made no findings of historical fact. (R16). Thus, this Court should simply review the legal issue presented de novo, with no deference to the circuit court's decision.

Shah was arrested, charged, prosecuted, and convicted of Operating a Motor Vehicle with a Detectable Amount of a Restricted Controlled Substance in his system. The statute underlying this charge is section 346.63(1)(am), Stats., which states:

> No person may drive or operate a motor vehicle while . . . [t]he person has a detectable amount of a restricted controlled substance in his or her blood.

The record reveals the "detectable amount of a restricted controlled substance" Deputy Leranth believed was in Shah's blood was THC. Section 340.01(50m), Stats., defines

"restricted controlled substance" in this context as "Delta-9-tetrahydrocannabinol." Shah concedes the circuit court could have determined there was probable cause for Deputy Leranth to believe this substance was in his system. The question before this Court is whether exigent circumstances justified forcibly entering Shah's body without a warrant to extract blood in the search for it.

To that end, it should be noted Shah was not arrested or charged with operating under the influence of THC, but instead, of operating with a detectable amount of THC in his system. The *amount* of THC in Shah's system was therefore irrelevant; only its *presence* mattered. Moreover, every fact available to police to establish probable cause to believe THC could be found in Shah's blood also established the overwhelming likelihood that Shah had ingested the substance just prior to the stop. Both deputies testified to the strong odor of burned marijuana emanating from the vehicle, the alleged smoky interior, and the partially burned marijuana found in the marijuana pipe.

The trial court, unfortunately, did not offer anything helpful in terms of analysis, simply stating:

> All right. Well, I'm ready to rule on this issue. I don't see anything wrong with this arrest, quite frankly. I think there was probable cause for the arrest. There's probable cause to require that he submit to the blood draw. All three motions are going to be denied.

(R16-64). Conspicuous by its absence is any discussion of whether there were exigent circumstances to justify a warrantless blood draw.

Largely dispositive, against this backdrop, is the well-known fact that delta-9-tetrahydrocannabinol, following ingestion, remains in an individual's blood for a relatively lengthy period of time. This fact is further established by the record in this case. Indeed, it is the only conclusion that can be drawn from the record below, which is a critical point given the County's burden of proof on the matter. *Hughes*, 2000 WI 24 at ¶¶ 17–18. Deputy Leranth, who ordered the blood draw, testified that although the level may dissipate, "you're still going to find it." (R16-21). The County's expert in this case testified it will remain for a period of nine to twelve hours. (R17-62). This presents the very antithesis of an exigency. *See also Pruitt v. State*, 589 S.E.2d 864 (Ga. App. 2003)(presence of THC metabolites in urine sample signified defendant had ingested marijuana within 48 to 72 hours of when urine sample taken).

The test for determining the existence of exigent circumstances is an objective one." *Robinson*, 2010 WI 80 at ¶ 30. 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." *Id*. The County did not, and cannot, meet that legal standard in this case. Deputy Leranth did **not** testify that he drew blood because he believed a delay in procuring a warrant would risk the destruction of evidence. On the contrary, he testified that: (1) nothing prevented him from getting a warrant; (2) which he did not get simply because he

did not think it necessary; and (3) despite the fact he knew the evidence would still be findable.

The County, of course, relied on *Bohling*, *supra*, which held that the dissipation of "alcohol" in the bloodstream created a *per se* exigency that justified a warrantless blood draw in the case of suspected drunk drivers. (R16-54-55). *Bohling*, however, and as this Court knows, was abrogated by *Missouri v. McNeely,* 569 U.S. ——, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013). Moreover, *Bohling* was a case involving *alcohol* while this case involves *THC*. This critical distinction was not lost on Wisconsin's Attorney General when, in a recent case involving the dissipation of a synthetic substance (heroin) in an individual's blood, he conceded the absence of any exigency under the very circumstances posed by this case:

> What I am saying is that because this really good evidence, this really probative evidence dissipates so quickly, at least in the case of heroin, and the public defender brought up some other drugs like marijuana and things like that, this is a whole different animal. **I agree if this is a marijuana case, we would be done. We would be done because marijuana being a natural substance . . . it doesn't break down.**

Id. at ¶73. (Emphasis added: dissenting opinion, J. Bradley). The County's expert in this case referred to this characteristic of THC as "marijuana [being] very sticky." (R17-62).

It is not, however, merely the protracted presence of THC in the system that blunts any exigency. It is also the nature of the motor vehicle law pertaining to THC under which Shah

was arrested and prosecuted which, unlike alcohol-related prosecutions, does not have a prohibited level with a corresponding presumption of impairment. *See* section 885.235(4), Stats. There is therefore no corresponding urgency to obtain a blood sample from a suspect before his THC level crosses a particular Rubicon between illegality and legality, as is the case with alcohol, because no such divide exists. On the contrary, the mere presence of THC is all that is needed for a conviction. To that end, the qualitative aspect of the test is primary, while any quantitative aspects of the test are largely redundant. And as applied to the particular facts of this case, the only reasonable conclusion was that Shah's THC levels were on the rise, not the decline, because the officers testified that every indication was that Shah had been smoking marijuana just before being pulled over.

Under these circumstances, the good faith exception to the exclusionary rule cannot get any traction. When the police act in accordance with clear and settled Wisconsin precedent in ordering the warrantless investigatory blood draw, application of the exclusionary rule would be both inappropriate and unnecessary. *State v. Kennedy*, 2014 WI 132, ¶ 37, 359 Wis. 2d 454, 856 N.W.2d 834. The good-faith exception precludes application of the exclusionary rule where officers conduct a search or seizure in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court. *Id*. However, the Wisconsin Supreme Court has noted that the good faith exception to the exclusionary rule should only be employed when the case upon which law enforcement purports to rely has "spoken with specificity in a particular fact situation." *State v. Dearborn*, 2010 WI 84, ¶46, 327 Wis. 2d 252, 786 N.W.2d 97. *Dearborn* further noted that "[t]he vast

majority of cases, particularly in the fact-intensive Fourth Amendment context, will not fall into this category." *Id*.

It is true *Bohling* was the settled law in Wisconsin at the time Deputy Leranth foisted a warrantless blood draw on Shah. However, what was "clear and settled" following *Bohling* was that the dissipation of *alcohol* from a person's bloodstream, *in a case where its precise measurement is the most critical piece of evidence for the crime under investigation*, constitutes a sufficient exigency to justify a warrantless blood draw. *Bohling,* 173 Wis. 2d at 547. (Emphasis added). *Bohling* neither clarified nor settled the law as it pertained to marijuana. Indeed, section 346.63(1)(am), Stats. – the section under which Shah was arrested and prosecuted - did not even exist at the time *Bohling* was decided.

Bohling, in other words, did not involve THC nor did it involve a case where the mere presence of the substance was dispositive of the charge in question. On the contrary, *Bohling* involved *ethyl alcohol* and it was a case where the precise measurement was critical. This case, by contrasts, involves *marijuana* and is a case where all that mattered was the "presence" of Delta-9-tetrahydrocannabinol, regardless of any measured level. Deputy Leranth, by his own admission, understood the difference between the dissipation of alcohol and the dissipation of THC. He also knew that unlike alcohol, the mere presence of THC was all the evidence needed to sustain the charge for which he had arrested Shah. It was therefore not objectively reasonable for Deputy Leranth to believe he could simply push the square peg of *Bohling* into the round hole of this case. Indeed, the entire reasoning underlying *Bohling* pertained to the unique properties of alcohol, vis-à-vis the underlying charge to be proven:

> Delayed testing can significantly prejudice the state's case, if the accused's BAC level drops below the above-mentioned critical amounts before a blood test is administered. Although delayed test results can be used to estimate BAC level at the time of the alleged criminal conduct, such extrapolations can be speculative. Delay in obtaining a blood sample also creates potential problems for drunk-driving defendants. It is recognized that a person's BAC level initially rises for a period of time after drinking stops while alcohol is being absorbed. If a blood sample is not obtained soon after the alleged drunk-driving offense, a defendant may be hampered in demonstrating that, at the time of the alleged offense, alcohol was still being absorbed into the bloodstream and that, therefore, his BAC was actually lower than that obtained by chemical testing of the blood sample.

Bohling at 546-47. None of these bedrock principles upon which *Bohling* was based were or are present in this case.

Finally, it should be taken into consideration that the offense for which Shah was being investigated was not a criminal offense, but instead, a civil forfeiture case. Both *McNeely* and *Bohling* involved the potential destruction of evidence of "a crime" due to the elimination of alcohol from the bloodstream of a drunken driver. *McNeely*, 133 S.Ct. at 1556. Even in that scenario *McNeely* noted that while the

natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, it does not do so categorically, but instead, must be determined case by case based on the totality of the circumstances. *Id*. at 1563.

Part of the totality of the circumstances in this case is that neither a crime nor a charge implicating public safety (because it had nothing to do with impairment) was at issue here. As the United States Supreme Court once observed in a case originating in Wisconsin:

> Even assuming . . . that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify [OWI-1st Offense] as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

Welsh v. Wisconsin, 446 U.S. 740, 754 (1984)(citations omitted).

The totality of the circumstances here include the following important observations. Deputy Leranth was investigating Shah for a non-criminal offense. All of the facts gathered on the scene led Deputy Leranth to believe Shah had just ingested marijuana, in which case the level of THC in his system was on the rise. By Deputy Leranth's own admission, there were no impediments to getting a warrant. Moreover, he only needed to show "the presence" of Delta-9-tetrahydrocannabinol in Shah's system, with the precise measurement or level being irrelevant. Deputy Leranth knew that THC would remain in Shah's system for a prolonged period of time. The County's own expert put that time frame at nine-to-twelve hours. To forcibly take blood from Shah under all of these circumstances was unlawful because the situation did not present an exigency. And to rely on *Bohling* to justify this significant intrusion into Shah's body, when *Bohling* was a case specific to alcohol, a case where the precise measurement of alcohol was important, and a case decided when the civil forfeiture violation Deputy Leranth was investigating did not even exist, was not objectively reasonable.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the appellant respectfully requests this Court vacate the judgment and remand the matter for a new trial with instructions that the results of the warrantless blood draw be suppressed.

Dated this 1st day of May, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,525 words.

Dated this 1st day of May, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of May, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix in *County of Milwaukee v. Shah*, Appeal No. 2015 AP 1581, which complies with the requirements of s. 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 1st day of May, 2016.

/s/ Rex Anderegg
Rex Anderegg