STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	Appeal No. 2015 AP 1827-CR
	)	
	)	
MELVIN P. VONGVAY,	)	
	)	
	)	
Defendant-Appellant.	)	

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal of the Judgment of Conviction Entered in the Walworth County Circuit Court and Denial of the Motion to Suppress Warrantless Blood Draw, Case No. 13 CT 391, the Honorable James L. Carlson Presiding

Respectfully Submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1. Do law enforcement mistaken beliefs, lack of information, or inadequacy in police procedures that result in delay constitute exigent circumstances justifying warrantless blood draws?

2. Is the presumption of admissibility of a blood draw if performed within three-hour window, pursuant to Wis. Stat. § 885.235(1g), sufficient on its own to constitute an exigency?

STATEMENT ON ORAL ARGUMENT

The defendant-appellant believes oral argument may be helpful in this case. Pursuant to Rule 809.22(2)(b), while the briefs may develop and explain the issues, arguments pertaining to the exigency exception to the warrant requirement for non-consensual blood draws can be better explained in oral argument.

STATEMENT ON PUBLICATION

Pursuant to Rule 809.23(1)(b), the defendant-appellant believes publication of this case would clarify existing law, specifically with regards to the issue of what constitutes exigent circumstances within the context of a Fourth Amendment seizure in the form of a blood draw. This is not a routine application of law to a common fact situation, as some aspects of the law remain unclear.

STATEMENT OF THE CASE

A criminal complaint was filed on November 18, 2013 (R8), charging Melvin P. Vongvay, the defendant-appellant, with Operating While Intoxicated - 2nd Offense, and Operating with a PAC – 2nd Offense. After entering a not guilty plea, Vongvay filed a Motion to Suppress Warrantless Blood Draw (R15), moving to suppress the blood test evidence on the grounds that his blood was drawn in violation of the Fourth Amendment's warrant requirement, as no warrant was sought by the arresting officer. After a motion hearing, the suppression motion was denied (R17), as the court found exigent circumstances to be present. Subsequently thereafter, Vongvay entered a plea to the charge on December 16, 2014 (R18), and was sentenced on January 9, 2015, with a stay being entered by the Court in order for Vongvay to pursue an appeal.

The defendant-appellant now appeals to this Court, seeking a reversal of the Circuit Order's order denying his motion to suppress (R17) and the judgment of conviction (R21).

STATEMENT OF FACTS

The following facts were adduced from the motion hearing held on May 19, 2014 (R27): On November 3, 2013, Officer Derrick Goetsch of the Village of Sharon Police Department, was on duty and conducted a traffic stop of the defendant-appellant's vehicle, at approximately 3:43 A.M. (R27 at 5). The vehicle of the defendant-appellant, Melvin P. Vongvay, was clocked traveling 13 miles per hour over the twenty-five miles per hour speed limit. (R27 at 6).

Upon contact with Vongvay, Office Goetsch observed an odor of intoxicants, red, bloodshot, and glassy eyes. (R27 at 7). Vongvay admitted to drinking earlier that night with his friends. (R27 at 7). Vongvay performed various field sobriety tests, however, these were not to Officer Goetsch's satisfaction, and Vongvay was asked to provide a PBT sample, to which Vongvay refused. (R27 at 10). Vongvay was placed under arrest for OWI and was read the Informing the Accused form by Officer Goetsch. (R27 at 11). Vongvay refused to consent to an evidentiary chemical test of his breath. This was at approximately 4:49 A.M. (R27 at 14). After transporting Vongvay to the jail, Officer Goetsch learned that Vongvay had a prior conviction. This was approximately at 5:55 A.M. (R27 at 15).

Officer Goetsch contacted his supervisor, Chief Brad Buccholz. (R27 at 15). He was advised to contact ADA Diane Donohoo, who advised that Vongvay should be read the Informing the Accused form again, in regards to submitting to an evidentiary blood test. After being read the form once again in regards to a blood draw, Vongvay refused. This was noted on the form to be at approximately 6:12 A.M. (R27 at 18). Then, Vongvay was taken across the street from the jail to the Lakeland Medical

Center for a blood draw. The blood was collected at 6:41 A.M, 2 hours and 58 minutes from the time of the traffic stop. (R27 at 18). Officer Goetsch testified that it was important to have the blood drawn within 3 hours of the time of the traffic stop. (R27 at 20).

On cross-examination, Officer Goetsch described the "Time" system, a records management system that maintains driving records and vehicle registration information of drivers. (R27 at 22). He had access to these records from the convenience of his squad car, via his laptop computer. (R27 at 23). Officer Goetsch testified that he did not remember whether he checked to see using his squad car computer if Vongvay had any prior convictions; however, he was advised by dispatch that the Time system was down and it was taking long periods of time to get the history back. (R27 at 25).

Officer Goetsch also described Walworth County's procedure for obtaining a warrant. If a driver is placed under arrest for OWI second offense or higher, and refuses to consent to a blood draw, law enforcement officers are instructed to complete a warrant affidavit and submit it via e-mail to the on duty judge or court commissioner. (R27 at 24). The affidavit is sworn over the phone and the judge or commissioner informs the officer whether or not the warrant to perform the blood draw is granted. (R27 at 24).

Officer Goetsch testified that Vongvay was arrested around 4:07 A.M. (R27 at 24). Vongvay arrived at the jail at 5:55 A.M, which was when Officer Goetsch learned that Vongvay had one prior conviction. (R27 at 25). Vongvay would have been brought to the jail, regardless of whether the offense was a first or second. After arresting

Vongvay, Goetsch requested Vongvay's criminal history and received it approximately 1 hour and 45 minutes later. Officer Goetsch testified that, to his knowledge, the criminal history is obtained via the "Time" system as well. (R27 at 27).

Furthermore, on cross-examination, Officer Goetsch testified that he was not sure as to why, but he was told that for evidentiary purposes, the blood sample had to be collected within three hours. (R27 at 28). He did not know if the blood sample could be used if the sample was taken after three hours from the time of the traffic stop had elapsed. (R27 at 28).

Officer Goetsch testified that in order to obtain draft a warrant affidavit for the blood draw, he would have had to have returned to the Sharon Police Department to generate such an affidavit. Such a trip would have taken approximately twenty-five minutes or so. (R27 at 30). However, Officer Goetsch also testified that he did not check to see if the Sherriff's office (at the jail) had the resources for him to apply for a warrant via email. Finally, Officer Goetsch testified that it takes perhaps fifteen to twenty minutes for him to apply for the warrant and another fifteen to twenty minutes to receive the warrant from the judge or commissioner that has granted it. (R27 at 40).

The Court concluded that exigent circumstances existed to justify the warrantless blood draw. The Court reasoned that Officer Goetsch acted reasonably when, upon learning of the need to obtain a blood sample from the defendant, at approximately 5:55 A.M., with too much time required to draft an affidavit and apply for a warrant, the officer took the defendant to the hospital for a warrantless blood draw. (R27 at 42).

ARGUMENT

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Robinson*, 327 Wis.2d 302, ¶ 22, 786 N.W.2d 463 (2010). When presented with such a question, an appellate court engages in a two-step inquiry. *Id.* First, the Court reviews the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. *Id.* Second, the Court independently applies constitutional principles to those facts. *Id.*

I. VONGVAY'S FOURTH AMENDMENT RIGHTS PURSUANT TO *MISSOURI V. MCNEELY* WERE VIOLATED WHEN OFFICER GOETSCH OBTAINED A WARRANTLESS BLOOD DRAW

The United States Supreme Court's ruling in *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct 1552 (2013), which overruled previous precedent in Wisconsin, requires law enforcement officers to obtain a warrant in blood draws for the purposes of evidence in drunk-driving arrests, unless exigent circumstances were present. Furthermore, the *McNeely* Court held 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. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 1563. "In drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1561.

In this case, Officer Goetsch could have reasonably obtained a warrant before the blood sample was taken, but did not do so, which was a violation of Vongvay's Fourth Amendment rights.

a. The trial court erred in finding that exigent circumstances existed, as no such facts supported such a finding.

The test for determining the existence of exigent circumstances is an objective one. *State v. Robinson*, 327 Wis.2d 302, ¶ 30, 786 N.W.2d 463. 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.*

Here, the trial court found that there was an exigency, although the trial court did not specifically state why. (R27 at 41). Rather, it summarized the actions Officer Goetsch took prior to obtaining the warrantless blood draw. (R27 at 42). The court stated that the Officer demonstrated a good faith effort to find out what the correct procedure was and he acted upon that, which went to the reasonableness of his conduct. (R27 at 43).

However, none of the facts summarized by the trial court go to the actual facts of the investigation or arrest. Rather, Vongvay's case was rather routine and did not have specific facts that demonstrated exigent circumstances. This court can consider the facts of other cases where exigent circumstances existed.

In *State v. Tullberg*, the defendant was involved in a fatal, one-vehicle accident when his truck ran off the road, struck a rock, flipped one or two times, and came to rest 70 feet from the rock. 359 Wis.2d 421, 857 N.W.2d 120 (2014). Several passengers were in the vehicle in addition to the defendant. One of the passengers, M.A., was

deceased. Law enforcement was initially informed by the defendant and other passengers that M.A. was the driver and Tullberg was the front passenger. *Id.* at 447.

However, throughout the course of the investigation, law enforcement noticed that Tullberg was heavily intoxicated, and showed signs of being struck by an airbag. *Id.* at 432. Law enforcement concluded that Tullberg was the driver because the passenger's side airbag did not deploy but the driver's side airbag did deploy in the vehicle. Other observations also confirmed law enforcement's suspicions that Tullberg was the driver, such as positioning and injuries sustained. Over two and a half hours after the accident, Tullberg was subjected to a warrantless blood draw.

In its opinion, the Supreme Court of Wisconsin found that the nature of the accident and the surrounding circumstances rendered a warrantless blood draw necessary. *Id.* at 447. Other facts the Court considered were that Tullberg, who was hospitalized, was in need of a CT scan. The officer on scene made a decision to have the blood draw performed absent a warrant because it was unclear how long the CT scan would take. *Id.* at ¶ 48. The Court noted that the officer, based on his training and experienced, knew that it was important to obtain the blood sample within three hours to ensure its accuracy and admissibility. Ultimately, the Court concluded that the accident, coupled with the time necessary to investigate, and the potential unavailability of the defendant for a blood draw due to the CT scan were enough to constitute an exigency under the totality of the circumstances. *Id.* at ¶ 49. The Court also noted that officer did not improperly delay in obtaining a warrant. *Id.* at ¶ 44. The officer's actions did not contribute or necessitate the warrantless blood draw. *Id.*

However, in Vongvay's case, the arresting officer's actions did wholly contribute to the delay.

b. The officer's mistaken beliefs, lack of training, or inadequate police procedures cannot be considered in whether there was an exigency.

Contrary to the facts in *Tullberg*, here, Officer Goetsch's mistaken beliefs, actions, as well as departmental procedures all contributed to delay. Officer Goetsch testified that if a driver is arrested for a OWI second offense or higher, a blood draw is to be obtained, through a warrant if the request for the sample is refused. (R27 at 23). However, Vongvay had a prior conviction, yet despite this, Goetsch first tried obtaining a breath sample, upon which Vongvay refused. (R27 at 13). Goetsch also testified that once a breath test is refused, then a blood sample is to be taken. (R27 at 15). However, from the record, it appears that Goetsch did not know how to proceed at that time.

Because Goetsch did not know whether to obtain a warrant in the first place, he called his supervisor, and was then instructed to call an assistant with the District Attorney's Office. (R27 at 15-16). Upon her instruction, Goetsch sought a blood sample and then read the defendant the Informing the Accused form again, specifically requesting an evidentiary chemical test of the defendant's blood. (R27 at 16). Vongvay once again refused.

Goetsch could have obtained a warrant prior to arriving at the county jail at 5:55 A.M. (R27 at 25). But because of departmental procedure OWI first offenses and because of Goetsch's lack of training or experience, as the record shows he did not know how to proceed, Goetsch initially only requested a breath test, and not a blood test. This was due to his mistaken belief that Vongvay did not have any prior OWI

convictions. Goetsch never saw the need to even consider securing a warrant after the defendant's arrest, but he certainly could have done so. Once the breath test was refused, Goetsch did not know how to proceed, resulting in even further delay.

Ultimately, Goetsch's mistaken beliefs about the defendant's prior criminal history, and his lack of knowledge both contributed to the delay in that, only once he arrived at the jail at 5:55 A.M., there was less than an hour left until the three-hour window of the blood draw under Wis. Stat. § 885.235(1g) had elapsed.

c. The three-hour window that renders a blood sample to be presumptively admissible, under Wis. Stat. § 885.235(1g) cannot by itself create an exigency.

Implicit within the arguments made at the motion hearing and the basis for the circuit court's findings that an exigency existed was that the three-hour window under Wis. Stat. 885.235(1g) constitutes such circumstances to create an exigency. The statute reads, in relevant part:

> In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or utility terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved.
>
> *Id.*

While the three-hour window allows the State to avoid laying any foundation for the admissibility of a blood sample if taken within three hours from the time of

driving, it by itself cannot create an exigency. If this was the case, the State could argue that in every drunk-driving arrest, the necessity to take a blood sample within three-hours from the time of driving constitutes an exigency. Such a position depreciates the holding of *McNeely*, as it is a generalized and categorical argument, which *McNeely* specifically rejected.

The *McNeely* court, in rejecting the dissipation of alcohol alone as an exigent circumstance, stated: "[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, … it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*. at 1563.

Similarly, to hold that the three-hour requirement (which is necessary for a blood sample to be presumptively admissible) categorically constitutes a finding of exigency would be in direct conflict with *McNeely's* mandate for case by case analysis based on the totality of the circumstances. Just because Officer Goetsch had only thirty minutes or so to obtain a blood sample from the defendant, from the time once he realized it was necessary at 6:12 A.M., to the time the three-hour window would have elapsed, at 6:43 A.M., that by itself does not constitute any exigency. Moreover, the blood result would still have been admissible even if drawn after three hours, if an expert witness testified to lay the proper foundation as to its reliability. It was the officer's own erroneous actions and mistaken beliefs that caused in the delay; had he initially requested a blood draw from the defendant, he could have obtained a warrant in ample time upon refusal to submit to one.

Essentially, simply because the evidence would have been less readily admissible had Officer Goetsch obtained a warrant and taken the blood sample at some point after 6:43 A.M., does not justify the need to circumvent the warrant requirement of the Fourth Amendment. The defendant's constitutional rights to be free from unreasonable search and seizure cannot be trumped by the need to conform to state statute.

d. Suppression of the evidentiary chemical blood test is required, as no good-faith exception applies.

The defendant was arrested for Operating While Intoxicated on November 3, 2013, which was after the United States Supreme Court issued its decision in *Missouri v. McNeely*. Therefore, the warrant requirement in non-consensual blood draws was in full effect as the law of the land. In cases that have litigated this issue before this Court, the good-faith exception doctrine under *State v. Dearborn*, has applied to preclude suppression as a remedy. *See* 327 Wis.2d 252, 786 N.W.2d 97 (2010).

However, in this case, Officer Goetsch's testimony indicates that his police department had procedures in place to accommodate the warrant requirement. (R27 at 39-40). Yet, because of the officer's mistaken beliefs, his location upon learning of the need for a blood draw, and his lack of training and/or experience in knowing how to proceed in such a situation, as evidenced by the call to his supervisor and to the Assistant District Attorney, Vongvay's rights were violated due to unnecessary delay, through no fault of his own. Therefore, suppression is an available and appropriate remedy, as Vongvay should not be penalized for a police agency's and its personnel's failure to comply with the requirements of *McNeely*.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant respectfully requests this Court to reverse the denial of his suppression motion on the grounds that exigent circumstances did not exist to circumvent the Fourth Amendment's warrant requirement of the blood draw.

Dated this ____ day of January, 2016.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 11 point type and the length of the brief is 3562 words.

Dated this ___ day of January, 2016.

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CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as 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 or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ___ day of January, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 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 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 ___ day of January, 2016.

Respectfully submitted,

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CERTIFICATE OF DELIVERY AND PROOF OF SERVICE

I hereby certify that this brief and appendix was served upon the opposing party, **Gregory M. Weber, Office of the Attorney General, P.O. Box 7857, Madison, WI, 53707-7857**, and **the Walworth County District Attorney's Office, 1800 County Road NN, Elkhorn, WI 53121**, by mail on January 12, ___, 2015.

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APPENDIX