STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2015AP001827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELVIN P. VONGVAY,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF CONVICTION
THE HONORABLE JAMES L. CARLSON, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY

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STATEMENT OF THE ISSUES

Did exigent circumstances justify the blood draw that was performed on the Defendant-Appellant, hereinafter Vongvay?

The trial court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinions nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one-judge appeal. *See* Wis. Stat. § 809.23(1)(b)4, Wis. Court Rules and Procedures, 2013-2014.

STATEMENT OF THE FACTS

On November 3, 2013 between 3:43 a.m. to 3:47 a.m. Officer Goetsch stopped the vehicle Vongvay was driving for traveling 38 miles per hour in a posted 25 miles per hour speed zone in the Village of Sharon, Walworth County, Wisconsin (R27:5-6, 21). After observing several signs of intoxication, Officer Goetsch had Vongvay submit to field sobriety tests. Vongvay failed to satisfactorily complete those tests and refused to submit to a preliminary breath test (R27:7-10). Based on his observations of Vongvay, Officer Goetsch formed the opinion that Vongvay was under

the influence of an intoxicant and unsafe to operate a motor vehicle (R27:10-11). Officer Goetsch placed Vongvay under arrest at 4:07 a.m. and transported Vongvay to the Village of Sharon Police Department, arriving at approximately 4:15 a.m. (R27:24).

At the time of Vongvay's arrest at 4:07 a.m. Officer Goetsch contacted Walworth County dispatch, which is normal office procedure, and requested that they run Vongvay's criminal history (R27:11, 26-27). Walworth County dispatch advised Officer Goetsch that the TIME system was down and that it was taking long periods of time to get driving histories back (R27:22, 25). Officer Goetsch advised dispatch to inform him of any prior OWI convictions once they learned any information (R27:22). Because the TIME system was down, Officer Goetsch was unable to check Vongvay's prior record so Officer Goetsch asked Vongvay if he had any prior OWI convictions (R27:11, 22). Vongvay responded that he had no prior OWI or DUI convictions (R27:11).

Once inside the Sharon Police Department Officer Goetsch read Vongvay the Informing the Accused form, expecting Vongvay to submit to a breath test based on his first OWI offender status (R27:11-12). Vongvay refused to submit to a breath test at 4:49 a.m. (R27:14). Officer

Goetsch then issued Vongvay a Notice of Intent to Revoke, his citations, and a copy of the Informing the Accused form (R27:14). Because Vongvay, who had no ties to the community, was unable to post bond on his citations Officer Goetsch transported Vongvay to the Walworth County jail (R27:14).

Upon arrival in the parking lot of the Walworth County jail, Officer Goetsch received information from dispatch that Vongvay's records information came back and Vongvay had a prior OWI conviction making this now a criminal OWI second offense (R17:14-15, 23). This information was received from dispatch at 5:55 a.m. (R27:15). Because Officer Goetsch now had probable cause to believe this was a criminal OWI offense, Officer Goetsch knew he would normally have to obtain a warrant for a blood draw in the event of a refusal (R27:15). Officer Goetsch immediately called his Chief for advice on how to proceed (R27:15-16). Officer Goetsch was advised by his Chief to call Assistant District Attorney Donohoo (R27:15-16). As a result of his conversation with Assistant District Attorney Donohoo, while in his squad car, Officer Goetsch again read Vongvay the Informing the Accused form and requested a chemical test of Vongvay's blood (R27:16-17). Vongvay refused at 6:12 a.m. (R27:17-19).

Following Vongvay's refusal, Officer Goetsch made the decision to draw Vongvay's blood without a warrant (R27:17).

Officer Goetsch understood the importance of having Vongvay's blood drawn within three hours of the traffic stop (R27:20, 28). Officer Goetsch testified there was an electronic search warrant procedure in place, however, the search warrant forms were at the Sharon Police Department and he would have had to travel back to his department in order generate an affidavit for the search warrant. (R27:29-30). Officer Goetsch testified that it takes approximately twenty-five to thirty minutes to travel from the Sharon Police Department to the Walworth County jail (R27:30). Officer Goetsch further testified that he had used the phone and electronic warrant process on four or five prior occasions (R27:39). Officer Goetsch testified that it would have taken fifteen to twenty minutes to generate the affidavit and search warrant and then an additional fifteen to twenty minutes at least, if everything went smoothly, to get a judge, email the search warrant to the judge to review and sign, swear over the phone to the search warrant, have the judge email the search warrant back, and print the search warrant out (R27:39-40).

After making the decision to draw Vongvay's blood without a warrant, Officer Goetsch drove Vongvay from the Walworth County jail parking lot across the street to Lakeland Medical Center. Officer Goetsch immediately

escorted Vongvay into the building where they had to wait for a medical technician to draw Vongvay's blood (R27:17-20). The drive from the jail to Lakeland Medical Center took approximately ten seconds (R27:27-28). A medical technician drew Vongvay's blood on November 3, 2013 at 6:41 a.m., just short of three hours from the time of Vongvay's traffic stop (R27:18-19, 21-22).

ARGUMENT

I. The Circuit Court Properly Concluded That The Blood Draw Met The Exigent Circumstances Exception.

Officer Derrick Goetsch did not obtain a warrant. Therefore, the State must prove that the warrantless blood draw met one of the recognized exceptions to the warrant requirement. It met the requirements of the exigent circumstances exception, and therefore, the blood draw was constitutional.

A. Standard of Review.

This Court's "'review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact.'" *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). "'When presented with a question of constitutional fact, this court engages in a two-step inquiry.'" *Id.* (quoting *Robinson*, 327

Wis. 2d 302, ¶ 22). "'First, [this Court] review[s] the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous.'" *Id.* (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22). "'Second, [this Court] independently appl[ies] constitutional principles to those facts.'" *Id.* (quoting *Robinson*, 327 Wis. 2d 302, ¶ 22). This two-step inquiry applies when determining whether exigent circumstances or consent justified a warrantless search. *Id.*, ¶ 28 (citation omitted); *State v. Kolk*, 2006 WI App 261, ¶ 10, 298 Wis. 2d 99, 726 N.W.2d 337 (citations omitted).

B. Legal Principles.

"The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Tullberg*, 359 Wis. 2d 421, ¶ 29 (alteration in *Tullberg*) (quotation marks and quoted source omitted). "'The touchstone of the Fourth Amendment is reasonableness.'" *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "'The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.'" *Id.* (quoting *Jimeno*, 500 U.S. at 250).

"A warrantless search is presumptively unreasonable, and is constitutional only if it falls under an exception to the warrant requirement[.]" *Id.*, ¶ 30 (citations omitted). "One exception to the warrant requirement is the exigent circumstances doctrine, which holds that a warrantless search complies with the Fourth Amendment if the need for a search is urgent and insufficient time to obtain a warrant exists." *Id.* (citation omitted).

> Consistent with the U.S. Supreme Court, [the Wisconsin Supreme Court] has recognized four circumstances which, when measured against the time required to procure a warrant, constitute exigent circumstances that justify a warrantless [search]: (1) an arrest made in 'hot pursuit,' (2) a threat to the safety of the suspect or others, (3) a *risk that evidence will be destroyed*, and (4) a likelihood that the suspect will flee.

Robinson, 327 Wis. 2d 302, ¶ 30 (emphasis added) (citations omitted).

"A blood draw to uncover evidence of a crime is a search within the meaning of the Fourth Amendment." *Tullberg*, 359 Wis. 2d 421, ¶ 31 (citation omitted).

> A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if: (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw."

Id. (citations omitted).[1]

"[A]s a result of the human body's natural metabolic processes, the amount of alcohol in an individual's blood dissipates over time, which may result in the loss of evidence." *State v. Reese*, 2014 WI App 27, ¶ 16, 353 Wis. 2d 266, 844 N.W.2d 396 (citing *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). *See also Tullberg*, 359 Wis. 2d 421, ¶ 42 (citing *Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552, 1556 (2013)) ("Evidence of a crime is destroyed as alcohol is eliminated from the bloodstream of a drunken driver."). "[A] significant delay in testing will negatively affect the probative value of the results." *McNeely*, 133 S. Ct. at 1561. Longer intervals may raise questions about the accuracy of the blood alcohol content calculation. *Id.* at 1563.

"'[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

[1] By not arguing otherwise, Vongvay has conceded that there was probable cause to draw his blood, his blood was drawn in a reasonable manner, and he did not reasonably object to the blood draw. *See Arnold v. Cincinnati Ins. Co.*, 2004 WI App 195, ¶ 52, 276 Wis. 2d 762, 688 N.W.2d 708 (citation omitted) (holding that a party conceded a point of law by not arguing otherwise). Accordingly, the State's brief will focus on whether exigent circumstances justified the blood draw.

circumstances.'" *Tullberg*, 359 Wis. 2d 421, ¶ 42 (alterations in *Tullberg*) (quoting *McNeely*, 133 S. Ct. at 1563). "[N]o single fact is dispositive." *Id.*, ¶ 42 n.23 (citation omitted). "The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending on the circumstances in the case." *McNeely*, 133 S. Ct. at 1568. "Ultimately, '[i]n those 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.*, ¶ 42 (alteration in *Tullberg*) (quoting *McNeely*, 133 S. Ct. at 1561).

C. Exigent Circumstances Justified Vongvay's Warrantless Blood Draw.

Vongvay argues that exigent circumstances did not exist and therefore, the warrantless blood draw violated his Fourth Amendment rights. The circuit court concluded that the officer had probable cause to believe that the blood draw would uncover evidence of a crime and that exigent circumstances justified the warrantless blood draw (R27:40-43). The circuit court stated:

I'm going to find that there were exigent circumstances here. The McNeely case makes it clear that they are not overruling the implied consent, they are only saying that when there is – that there is time usually to get a search warrant, but I think they refer to distances away from officers who are far away from a judge or whatever to get a search warrant….Then you have to apply for a search warrant. And they refer to the Schmerber case, what might reasonably be believed by the officer to be an emergency. In which the delay necessarily to obtain the search warrant threaten the destruction of the evidence. I think it pertains to this case and the unusual facts. Based on the officer arrest, he did find a sufficient probable cause, clues to arrest…and the defendant refused a breathalyzer. [The defendant] also claimed he did not have a prior conviction. The officer called the…dispatcher, who told him the Time system was down. And that he asked for a criminal behavior background report. And that showed when he received it, at 5:55 a.m., a prior conviction. Which in the officer's understanding and policies of the offices that they should receive a blood draw. And he received this over here in Elkhorn either at the Sheriff's Department, I believe, or at the hospital…but his…computer system to apply for a search warrant would have taken him another half hour approximately to go back to the station to do the drawing up of the information on the computer, another 20 minutes. Making a telephone call to a judge, locating a judge, hopefully it would be a judge available immediately, but the judge then has to get on the computer and look at the…affidavits and if probable cause is there, swear the officer, put his signature on there, and then go to the portion – the warrant portion. The officer estimated that takes on the average at least 20 minutes. But that there have been times when--a significant amount of times when the warrant system didn't work as I understand it or the phone didn't work. So it is not a flawless procedure. So I think it was certainly reasonable at that time to ask for under the implied consent

> a withdrawal of blood without a warrant. Those will be my findings.
>
> …
>
> I didn't mention also that he did call his supervisor…[and] he called [the DA]…It shows his good faith effort to find out what is the correct procedure to do and he acted upon that also which goes to the reasonableness of his conduct in asking for the blood draw.

R27:40-43. This court should affirm that conclusion. Exigent circumstances justified the warrantless blood draw.

One factor creating exigent circumstances in this case is the passage of time. Officer Goetsch stopped the vehicle Vongvay was driving on November 3, 2013 between 3:43 a.m. to 3:47 a.m. (R27:5, 21). After investigating several signs of intoxication Officer Goetsch observed on Vongvay, Officer Goetsch placed Vongvay under arrest at 4:07 a.m. and transported Vongvay to the Village of Sharon Police Department, arriving at approximately 4:15 a.m. (R27:24). At the time of Vongvay's arrest at 4:07 a.m. Officer Goetsch contacted Walworth County dispatch, which is normal office procedure, and requested that they run Vongvay's criminal history (R27:11, 26-27). Walworth County dispatch advised Officer Goetsch that the TIME system was down and that it was taking long periods of time to get driving histories back (R27:22, 25). Officer Goetsch advised dispatch to inform him of any prior OWI convictions once they learned

any information (R27:22). Because the TIME system was down, Officer Goetsch was unable to check Vongvay's prior record so Officer Goetsch asked Vongvay if he had any prior OWI convictions (R27:11, 22) . Vongvay responded that he had no prior OWI or DUI arrests (R27:11). Based on Vongvay's assertions Officer Goetsch believed he was dealing with an OWI first offense, which is not a crime.

After being read the Informing the Accused form, Vongvay refused to submit to a breath test at 4:49 a.m. (R27:14). Officer Goetsch finished processing Vongvay's citations and transported Vongvay to the Walworth County jail arriving at 5:55 a.m. (R27:14-15).

Only after arriving at jail's parking lot did Officer Goetsch learn from dispatch that Vongvay had a prior OWI conviction making this now a criminal OWI second offense (R17:14-15, 23). At that point, Officer Goetsch wanted to draw blood (R27:15). He knew around two and a half hours had passed since the traffic stop. Officer Goetsch immediately called his Chief and Assistant District Attorney Donohoo for advice on how to proceed (R27:15-16). As a result of his conversation with Assistant District Attorney Donohoo, while in his squad car Officer Goetsch again read Vongvay the Informing the Accused form and requested a

chemical test of Vongvay's blood (R27:16-17). Vongvay refused at 6:12 a.m. (R27:17-19).

Officer Goetsch then made the decision to draw Vongvay's blood without a warrant (R27:17). Officer Goetsch understood the importance of having Vongvay's blood drawn within three hours of the traffic stop, and it was not feasible to accomplish this based on the time it would have taken him to travel to his department and obtain the warrant. (R27:20, 28, 30, 39-40).

After making the decision to draw Vongvay's blood without a warrant, Officer Goetsch immediately drove Vongvay from the Walworth County jail parking lot across the street to Lakeland Medical Center, and escorted Vongvay into the building where they had to wait for a medical technician to draw Vongvay's blood (R27:17-20). The drive from the jail to Lakeland Medical Center took approximately ten seconds (R27:27-28). A medical technician drew Vongvay's blood on November 3, 2013 at 6:41 a.m., just shy of three hours after Vongvay's traffic stop (R27:18-19, 21-22).

Contrary to Vongvay's assertion, this passage of time is a factor contributing to exigent circumstances. Vongvay's blood was drawn barely within the three hour limit for automatic admissibility of the blood test result. "[A] suspected drunken driver's blood should be drawn within

three hours of an automobile accident in which the driver was involved." *Tullberg*, 359 Wis. 2d 421, ¶ 19. "If a blood sample is taken more than three hours after an automobile accident, the blood draw evidence is admissible only if an expert testifies to its accuracy." *Id.*, ¶ 19 n.7 (citing Wis. Stat. § 885.235(1g) & (3) (2009-10)). But blood test evidence "is admissible . . . if the [blood] sample was taken within 3 hours after the event to be proved." Wis. Stat. § 885.235(1g).

"[B]ecause an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." *McNeely*, 133 S. Ct. at 1561. "While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation." *Id.* at 1563. In *Schmerber*, a time period of less than two hours created exigent circumstances. 384 U.S. at 769. The Court noted that time had lapsed bringing the accused to the hospital and to investigate the scene of the accident. *Id.* at 770-71.

Accordingly, the fact that Vongvay's blood was drawn barely within three hours of the traffic stop contributes to the exigency of this case. *See Tullberg*, 359 Wis. 2d 421,

¶¶ 47-48 (relying on Wis. Stat. § 885.235's three-hour rule to conclude that exigent circumstances justified a blood draw that occurred more than two and a half hours after an automobile accident); *Schmerber*, 384 U.S. at 769, 771 (holding that an exigency justified a warrantless draw of a suspected drunken driver's blood that was performed more than two hours after a car accident); *accord State v. Stavish*, 868 N.W.2d 670, 677-78 (Minn. 2015) (relying on a Minnesota statute that requires a blood draw "within 2 hours of the accident to ensure the reliability and admissibility of the alcohol concentration evidence" to conclude that exigent circumstances justified a blood draw that occurred fifty minutes after an automobile accident).

In addition, through no fault of Officer Goetsch, Goetsch was unaware that he had probable cause to draw Vongvay's blood until he was made aware of Vongvay's prior OWI arrest at 5:55 a.m.. Vongvay had previously told Officer Goetsch that he did not have any prior OWI convictions, and because the system used to check driver's license records was down, Officer Goetsch had no way of verifying Vongvay's claim. Thus, contrary to Vongvay's assertion, it was his own rather than Officer Goetsch's actions that contributed or necessitated the warrantless blood draw.

This factor weighs heavily in favor of finding that exigent circumstances justified the blood draw.

Another contributing factor is the dissipation of alcohol in Vongvay's blood stream. *See McNeely*, 133 S. Ct. at 1560 (“Testimony before the trial court in this case indicated that the percentage of alcohol in an individual’s blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed.”). A person's alcohol level gradually declines soon after he or she stops drinking. *McNeely*, 133 S. Ct. at 1561. A significant delay in testing will negatively affect the probative value of the results. *Id.* The dissipation of alcohol in the blood does not create a *per se* exigency, but it may support a finding of exigency in a specific case. *Id.* at 1563. The dissipation of alcohol in Vongvay's blood constituted a factor that helped create exigency.

Finally, Officer Goetsch reasonably concluded that, if he applied for a warrant, he would have risked the destruction of evidence. Justice Sotomayor’s opinion for the *McNeely* Court recognized:

> [T]he fact that a particular drunk-driving stop is “routine” in the sense that it does not involve “ ‘special facts,’ ” *ibid.,* such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a

> warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

McNeely, 133 S.Ct. at 1568. Thus, contrary to Vongvay's assertions, under *McNeely,* the existing procedure for obtaining a warrant is a factor among the "totality of the circumstances" that should be considered in determining whether a warrantless search is reasonable. *Id.* at 1559. Officer Goetsch estimated that he would have had to drive thirty minutes back to his office and then it would take an additional thirty to forty-five minutes to obtain an electronic search warrant. After obtaining the search warrant Officer Goetsch would have then still had to transport Vongvay to a hospital for the blood draw. This would have put Officer Goetsch conservatively over four hours from the time of Vongvay's traffic stop, before a blood draw would have been able to be performed. Under these circumstances, Officer Goetsch had a reasonable basis to think that waiting for a warrant could have allowed the destruction of evidence.

The warrantless blood draw was constitutionally justified by exigent circumstances. Officer Goetsch had probable cause to believe that Vongvay operated a motor vehicle under the influence. The passage of time, Vongvay's false claims regarding his prior record, the malfunction of the software used to check driver's prior records, the warrant process, and the dissipation of alcohol in Vongvay's bloodstream combined to create exigent circumstances justifying the blood draw without obtaining a warrant. Evidence would have been lost if Officer Goetsch waited to obtain a warrant. Based on the totality of the circumstances, the blood draw met the constitutional requirements. The circuit court concluded that exigent circumstance justified the warrantless blood draw (R27:40-42). This court should affirm that conclusion.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the circuit court's order denying Vongvay’s motion to suppress.

Dated this _____ day of February, 2016.

Respectfully submitted,

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is ____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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: _____

Signed,

_____
Attorney