STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No.: 15 AP 2675 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LAUREN A. ERSTAD,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
SEPTEMBER 17, 2015 IN THE CIRCUIT COURT
FOR ROCK COUNTY, BRANCH I,
THE HONORABLE JAMES P. DALEY PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

I. Whether the warrant establishes probable cause without the false information contained within it.

II. Whether the blood test result must be suppressed because the search warrant authorized only drawing the blood and not testing the blood.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Lauren Erstad was involved in an accident at about 3:50 a.m. on August 24, 2014. R 34, p 3. Janesville Police Officer Welte arrived shortly thereafter and saw her vehicle upside down with Ms. Erstad trapped inside. Id. p. 3-4. After she was extracted from the vehicle, Ms. Erstad was treated by emergency personnel and transported to the hospital. Id. p. 5. Officer Welte spoke briefly with Ms. Erstad prior to her transport and reported that he smelled an odor of an intoxicants when speaking with her. Id. He also reported she was very upset and crying, her eyes were bloodshot and droopy, and she complained that her foot hurt. Id.

Officer Welte testified that Ms. Erstad told him at the hospital she had had 3-4 beers. Id. p. 6. The officer did not ask when she had been drinking. Id. p. 23. The officer performed the horizontal gaze nystagmus (HGN) test on Ms. Erstad and reported seeing nystagmus. Id. He also admitted that nystagmus can be caused by factors other than alcohol. He learned through his training that HGN can be caused by a serious head injury and by other factors. Id. p. 24. He further testified he cannot distinguish between nystagmus caused by alcohol and nystagmus caused by any other factor. Id. p. 25. The officer testified he did not perform any other field sobriety testing or

any further investigation because Erstad was at the hospital. Id. p. 6. The officer arrested Ms. Erstad and read the informing the accused form, asking if she would to submit to an evidentiary test of her blood. Id. p. 6-7. The officer testified that Ms. Erstad was argumentative and, at first, did not give permission for her blood to be drawn. Id. p. 8. The officer informed her he would get a warrant to obtain her blood. Id. Ms. Erstad then indicated she would agree to the test. The officer asked if she was freely and voluntarily submitting to the test, and Ms. Erstad responded that she wanted a lawyer. Id. The officer did not tell Ms. Erstad she did not have the right to an attorney before making the decision about whether to agree to testing. Id. p. 28.

Officer Welte then filled out an application for a search warrant and took it to a court commissioner to be signed. R. 22, exhibit 1, p. 21-24. The officer testified he personally filled out the form. R. 34. p. 9. The affidavit and search warrant consist of a form on his computer where he can fill in the blanks and add additional information. Id. The officer testified that he asserted in the search warrant that he personally observed her driving. However, contrary to what he swore to in the warrant application, while Erstad was still the lone occupant in the vehicle with the doors locked and the keys

in the ignition, the car was not running. Thus, the officer did not observe Erstad operate the vehicle. Id. p. 4. The trial court ruled the officer provided incorrect information on the search warrant affidavit when he swore he saw Ms. Erstad driving. R. 34, p. 37-38.

The officer further testified he swore in the affidavit that Ms. Erstad had refused to consent to an evidentiary test. Id. p. 10. At the motion hearing in this matter, the officer testified that he took what she said as a "no" and did a search warrant to be on the safe side. Id. The officer testified she equivocated, and she did agree to the test but then asked for an attorney upon further questioning. Id. p. 8. The trial court did not find the averment that Ms. Erstad had refused to be a misstatement of the officer in the affidavit. However, the court also declined to make a finding that she had refused under the statute. Id. p. 37-38; 45-46.

The officer further swore in the affidavit that he was dispatched to a report of a drunken driver. Id. p. 10. However, he testified at the hearing that he was dispatched to a traffic accident. Id. No mention of a drunken driver was made. Id. The officer testified he checked that box on the warrant application because there was no spot on the warrant to indicate dispatch to a traffic accident. Id. However, he admitted he could choose to check boxes,

but he could also add details as needed. Id. p. 28-29. He did add appropriate details in other places on the affidavit but left the box checked, which indicated that he was dispatched to the report of a drunk driver, even though that was false information. Id. The trial court also ruled that this was incorrect information in the affidavit for the search warrant. Id. p. 38.

The officer then swore under penalty of perjury the information on the affidavit was true before a court commissioner; and the warrant was signed by the commissioner. Id. p. 11. The officer returned to the hospital and directed staff to draw Ms. Erstad's blood pursuant to the warrant. The officer then took the blood in the Blood Draw Kit, put it in evidence at the Janesville Police Department, and waited for the testing to be completed. Id. p. 31. In November, the officer was informed of the test result and, because the result was over .08, he wrote Ms. Erstad an additional ticket for having a prohibited alcohol concentration. Id.

Ms. Erstad was charged with operating while intoxicated as a second offense and operating with a prohibited alcohol concentration as a second offense. R. 2. Motions were filed challenging the search warrant, the testing of the blood, and destruction of evidence, which led to the motion hearing and the oral ruling of the trial court. R. 34.

Ms. Erstad now appeals the decision of the trial court on the motions challenging the search warrant and the testing of the blood[1]. R. 35.

In addressing the motion challenging the search warrant as insufficient because it only authorized drawing the blood and not testing the blood, the trial court held that it is settled law in Wisconsin that there is no need for a second search warrant. The court held that once the police have seized the blood, it is the department's blood, and the testing is then done pursuant to implied consent. R. 34, p. 37.

As to the motion challenging the search warrant affidavit due to the misstatements and false information provided by the officer, the trial court ruled that it could excise those statements and look to whether probable cause still existed within the affidavit and without the statements. Id. p. 38. The trial court then found without those statements, the search warrant was still sufficient and denied the motion. Id.

Ms. Erstad entered a plea. R. 23. The court sentenced Ms. Erstad, stayed all penalties pending appeal, and she filed a Notice of

[1] Ms. Erstad does not appeal the ruling on destruction of evidence. That motion raised the issue of whether the officer had destroyed the videotape of his interaction with Ms. Erstad. The trial court ruled, "You're going to have a right to ask about the tape (at trial). And, they're going to have to show that, in fact, there weren't shenanigans here…" R. 34, p. 41. The trial court later observed, "Should make an interesting trial." Id. p. 42.

Intent to Pursue Postconviction Relief. R. 23 and 28. She then filed a Notice of Appeal to this Court. R. 35.

ARGUMENT

I. Standard of Review

This Court reviews the circuit court's findings of fact under the clearly erroneous standard. ***State v. Padley***, 2014 WI App 65, ¶ 65, 354 Wis. 2d 545, 849 N.W.2d 867. Thus, this Court will generally defer to the lower court's fact and credibility determinations. ***Padley***, 2014 WI App 65 at ¶ 65. However, this Court owes no deference to the lower court's legal conclusions. ***Id.*** Thus, this Court reviews *de novo* the issue of how the facts apply to the law. ***Id.*** Whether a search is valid is a question of law to be reviewed *de novo* by this Court. ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992). A reviewing court is confined to the record that was before the warrant-issuing magistrate to determine whether there was probable cause to issue the search warrant. ***State v. DeSmidt***, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). The reviewing court has a duty to ensure that the magistrate had a substantial basis to conclude there was probable cause on those facts before the issuing magistrate. ***State v. Jackson***, 313 Wis. 2d 162, 169, 756 N.W.2d 623 (Ct. App. 2008).

II. Does the search warrant survive the false information contained on it?

"When the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a *truthful* showing." ***Franks v. Delaware***, 438 U.S. 154, 154–65 (1978) (Blackmun, J.) (emphasis in original). Probable cause may be based on hearsay and information from informants. ***Franks***, 438 U.S. at 165. But the affiant must actually believe the facts set forth in the affidavit. ***Id.***

Officer Welte made several material misrepresentations of fact, constituting at least a reckless disregard for the truth, in his affidavit in support of the OMVWI search warrant in this case. First, he averred he personally saw Ms. Erstad driving, but he later testified he did not see her driving and was actually dispatched after the accident had already occurred. Second, he swore in the affidavit that he was dispatched to a report of a drunken driver, but he testified unequivocally that the dispatch was for a motor vehicle accident with no mention of drunken driving. Third, he swore that Ms. Erstad refused a chemical test. The officer did not correctly report the facts, because Ms. Erstad had indicated she would take a chemical test. She was first argumentative; however, upon the officer's good faith representation that he would get a warrant, she

indicated she would take the test. This is generally held to be voluntary consent. *See, e.g.,* ***People v. Magby***, 37 Il. 2d 197, 226 N.E.2d 33 (1967) (consent valid where officer told defendant "If you don't care to let us search, we'll get a warrant."); ***United States v. Culp***, 472 F.2d 459, 461 n.1 (8th Cir. 1973), *cert. denied*, 411 U.S. 970 (1973). ***United States ex rel. Gockley v. Meyers***, 450 F.2d 232 (3d Cir. 1967) (consent valid where police told defendant that they were going to get a search warrant). Because Ms. Erstad agreed to the test after being told the officer would obtain a warrant, she did not refuse and, in fact, consented. After the officer further questioned Erstad's decision, asking if she would freely and voluntarily submit to the test, Ms. Erstad said she wanted to talk with a lawyer. The officer did not inform her that she needed to make the decision on her own without a lawyer, as required by ***State v. Baratka*** and instead simply proceeded to obtain the warrant at that time. 258 Wis. 2d 342, 349-50, 654 N.W.2d 875 (WI App 2002) *citing* ***State v. Reitter***, 227 Wis. 2d 213, 235, 595 N.W.2d 646 (1999). Therefore, the bald statement that Ms. Erstad had refused chemical testing omitted important information known to the officer. At a bare minimum, the officer omitted crucial facts that should have

been shared with the issuing magistrate. ***State v. Mann***, 123 Wis. 2d 375, 388, 367 N.W.2d 209 (1985).

The trial court made no finding one way or the other directly to the point of whether the officer made sworn statements in reckless disregard of the truth, but did indicate, "[i]t is troubling." R. 34, p. 38. The trial court found there were statements which were false in the affidavit, and the court was concerned about those statements. The trial court addressed the false statements saying, "Yeah, I see two. I was dispatched to the location because of a report of a drunk driving, and I observed the person driving." R. 34, p. 38. Further, it is clear the officer admitted he entered false information into the affidavit deliberately, even though he had the ability to enter the correct information. R. 34, p. 28-29. That constitutes at least reckless disregard for the truth, and no other excuse or explanation was proposed.

The trial court did not exclude the officer's contention in the warrant that Ms. Erstad had refused to submit to a test when reviewing the warrant for probable cause. Whether a person has refused to submit to a chemical test is a legal finding, not a factual finding. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999) (Application of the implied consent statute to an undisputed

set of facts, like any statutory construction, is a question of law.) While the officer marked that box, he did not provide any further information about the facts and circumstances surrounding the alleged refusal. No finding of refusal was made by the trial court. R. 34, p. 45. The bald statement that Ms. Erstad refused was at best misleading and omitted important and necessary information from the affidavit. ***State v. McMurtrey***, 704 F.3d 502, 509 (7th Cir. 2013). In this case, the testimony was that Ms. Erstad, in fact, agreed to provide a chemical test of her blood. While she originally argued after being read the informing the accused form, when the officer told her he was going to get a warrant to take her blood, she agreed to the blood draw. Where there is a genuine intent to obtain a warrant, such a statement does not negate consent. ***State v. Kiekhefer***, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997). Consequently, a simple box checked indicating she refused to consent to the blood draw omitted important information from the affidavit and was also false. Furthermore, the warrant would not have been sought in the absence of the refusal allegation under Wisconsin law. Thus, whether the officer either falsely said Erstad refused or left out crucial information that she actually agreed to the

test after negotiation is important information that the magistrate relied upon.

When, as here, an affidavit is the only evidence presented to a magistrate in support of a search warrant, the validity of the warrant rests solely on the strength of the affidavit. ***United States v. Peck***, 317 F. 3d 754, 755-56, (7th Cir. 2003). While the trial court ruled the affidavit was sufficient with the false statements, it did not rule on whether the additional information about Ms. Erstad's alleged refusal should have been considered, nor on whether it was actually considered by the trial court in its ruling. Instead the trial court simply excised the two offending statements and ruled:

> Let's remove those two comments. Is there sufficient information on that where an independent magistrate could issue a search warrant? I think, yes, from the observations. It is troubling, but there is sufficient other information in here, such as she indicated she – to the officer she had been consuming alcohol. He was there because of an accident. And the physical observation made of the defendant at the time, I think they're sufficient. Your motion is denied.

R. 34, p. 38.

However, looking at the false information provided and also taking into consideration the information omitted, there are not sufficient facts for probable cause in the affidavit. The trial court summarized the information provided in the affidavit – the officer was dispatched to an accident, Ms. Erstad admitted she had

consumed alcohol, and the officer made physical findings. The affidavit itself reflects those physical findings: bloodshot and glassy eyes, slurred speech, and difficulty keeping balance. R. 22, exhibit 1, p. 23. However, Ms. Erstad was also being treated at the hospital due to the seriousness of the accident. Her vehicle was on its roof, and she was having a hard time getting out of the vehicle when rescue personnel arrived. Ms. Erstad's vehicle was totaled with extremely serious damage. R. 22, exhibit 2. Ms. Erstad complained of injuries, and the ambulance took her to the hospital. These were all facts the officer was aware of that would establish Ms. Erstad was injured, not drunk. There was no information as to the cause of the accident at all. Ms. Erstad complained of a foot injury and was treated for that, in the officer's presence. Notably, he did not put that in the affidavit for the warrant. To do so would have shown her balance problems were due to a foot injury, not intoxication. To then state she had difficulty keeping balance does not further a finding of probable cause for impairment by alcohol. Similarly, the officer testified that Ms. Erstad was upset and crying after the accident and injuries she suffered, so any bloodshot eyes were an obvious result from crying. Again, a statement that she had glassy and bloodshot eyes would not

further a finding of probable cause for alcohol impairment after that observation.

The main information which the trial court relied upon for probable cause is then Erstad's admission to drinking and the odor of intoxicants. The officer did not ask what she drank or over what time period she drank alcohol. A mere odor of alcohol and admission to drinking do not indicate, of themselves, impairment. It is not unlawful in Wisconsin to drink alcohol and drive. What is unlawful is that a person drink enough alcohol that he or she is less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. Wis JI-Crim 2663.

An affidavit for a warrant must set out particular facts and circumstances going to the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. ***Franks v. Delaware***, 438 U.S. 154, 165, 98 S. Ct. 2674 (1978). In reviewing a warrant to determine whether it states probable cause, the reviewing court is limited to the record before the warrant-issuing magistrate. ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). There must be a sufficient factual showing that a reasonable person would believe that the object sought by the warrant is linked with the commission of the crime and will be found

in the place to be searched. ***DeSmidt***, 155 Wis.2d 119, 131-32, 454 N.W.2d 780 (1990), quoting ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). The duty of the reviewing court is to ensure that the magistrate had a substantial basis to conclude that probable cause existed. ***DeSmidt***, 155 Wis. 2d at 133, 454 N.W.2d 780 (1990). Without the offending false information and with the omitted correct information, which should have been provided to the magistrate, that burden is not met here.

Because of these misrepresentations with the incorrect information sworn to by the officer in reckless disregard of the truth and the failure to include crucial relevant facts in the affidavit for the search warrant, there is no showing of probable cause in the affidavit for the warrant. Therefore, the Fourth Amendment is violated, and the results of the search must be suppressed. ***Mapp v. Ohio***, 367 U.S. 643, 670, 81 S. Ct. 1684 (1961), quoting ***Wolf v. Colorado***, 338 U.S. 25, 42, 69 S. Ct. 1359 (1949).

III. The blood test result must be suppressed because the search warrant authorized only drawing the blood and not testing the blood.

The prosecutor argued, and the trial court agreed that ***State v. Riedel*** controls this issue. 259 Wis. 2d 921, 656 N.W.2d 789 (Wis. App. 2003). The trial court ruled:

> -- the Revel (phonetic)[2] case covers that, and I believe it's good law in Wisconsin that you don't need a second search warrant. Once the police have seized the blood, it's their blood put it into evidence, and from that point in time the purpose of it was to – under implied consent she consents – impliedly consents to the testing of her blood and even if you – You have a right to refuse. But, in this case because of McNeely we get search warrants authorizing the draw. The testing can be done under implied consent. Revel (phonetic) is also good. I mean, you don't need a second search warrant.

R. 43, p. 37.

In ***Riedel***, the decision first notes the defendant's blood was drawn pursuant to the then-recognized exception to the warrant requirement of the Fourth Amendment and was a warrantless and nonconsensual blood draw based on probable cause with exigent circumstances due to dissipation of alcohol from blood. ***Id***. at 925. That exception, as laid out in ***State v. Bohling,*** 73 Wis. 2d 529, 494 N.W.2d 399 (1993), has since been abrogated by ***Missouri v. McNeely,*** 133 S.Ct. 1552 (2013). The ***Riedel*** court also drew a distinction between the facts in ***VanLaarhoven***, where there was consent to the test after the implied consent warnings were given, and a case where there was no consent. ***Riedel*** at 927. ***State v. VanLaarhoven***, 248 Wis. 2d 881, 637 N.W.2d 411. The Court then concluded that the analysis of the blood was "simply the examination of evidence obtained pursuant to a valid search." ***Riedel*** at 930-31.

[2] The prosecutor had previously mentioned ***State v. Riedel*** as 2003 Wisconsin Appellate Court case. R. 43, p. 35.

Riedel did not involve a search warrant but a then-recognized exception to the requirement to obtain a warrant. The Court in ***Riedel*** had no warrant to scrutinize and, further, did not examine the issue of whether a second search was even performed. That Court analogized to seizure of film and subsequent development of the film. ***Id***. at 929, citing ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991). ***Riedel*** also relied on the analysis in another circuit in ***United States v. Snyder***, holding that no warrant was required to authorize a search when a blood sample was taken without consent after an arrest for operating while intoxicated offense. 852 F.2d 471 (9th Cir. 1988).

Contrary to the trial court ruling in this matter, no case holds that the implied consent law authorizes search and analysis of blood seized after a refusal. The decision in ***Riedel***, relied upon by the trial court in its decision, is called into question, as the exigency found to be the basis for the exception to the warrant clause has since been found to be unconstitutional. ***State v. Foster***, 360 Wis. 2d 12, 856 N.W.2d. 847 (2014). Further, Riedel did not recognize or discuss the holding from the United States Supreme Court in ***Skinner v. Railway Labor Executives' Ass'n*** that not only is the initial intrusion into the body a search, the ensuing analysis of the sample to obtain data is a

further invasion of the privacy interest. 489 U.S. 602, 616, 109 S.Ct. 1402 (1989). Finally, if implied consent is implicated, that is a developing area of law in Wisconsin. Following the decision in ***McNeely***, the Wisconsin Court of Appeals has issued the decision in ***State v. Padley***, discussing the limits of implied consent. (354 Wis. 2d 545, 849 N.W.2d 867 (2014). That decision requires actual consent after being given the warnings on the informing the accused form prior to use of the law against a person. The Wisconsin Supreme Court has also recently accepted certification in ***State v. Howes***. 2014AP1870-CR. The certification request included that the Wisconsin Supreme Court determine whether the implied consent statute is a *per se* exception to the warrant requirement or whether a normal totality-of-the-circumstances test should be applied. One aspect of that analysis is the issue of whether ***Missouri v. McNeely,*** 133 S.Ct. 1552 (2013) permits categorical exceptions to the warrant requirement. Furthermore, the Court of Appeals requested the Supreme Court holding explain how any such *per se* exception for the implied consent law could be consistent with Fourth Amendment jurisprudence should the Supreme Court find such an exception. The certification notes that ***Padley*** would need to be deemed void or

overruled if a *per se* exception to the warrant requirement exists for the implied consent law.

Instead of attempting to shoe-horn this factual scenario into case law which is not directly on point, has been abrogated by the United States Supreme Court, and does not take into consideration important precedent, this Court should conduct the analysis set forth by the United States Supreme Court almost 50 years ago, which remains the dominant test in Fourth Amendment jurisprudence:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, [1] that a person have exhibited an actual (subjective) expectation of privacy and, [2] that the expectation be one that society is prepared to recognize as reasonable. Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited.

Katz v. U.S., 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (numeration provided); *see also* Wayne R. LaFave, 1 *Search & Seizure* § 2.1(b) (5th ed.) ("[I]t is no overstatement to say, as the commentators have asserted, that ***Katz*** marks a watershed in Fourth Amendment jurisprudence."). Fair and honest consideration under the ***Katz*** framework reveals that chemical analysis of a person's blood is exactly the type of invasion the Fourth Amendment governs.

This case satisfies both ***Katz*** prongs. First, Ms. Erstad exhibited a subjective expectation of privacy by not providing actual

consent to chemical testing before consulting an attorney. The second prong is whether society recognizes as reasonable a citizen's expectation of privacy regarding the information contained in blood. However, the Supreme Court explicitly answered the question in the affirmative. ***Skinner***, 489 U.S. at 617–18 (stating that it "is not disputed [that the] chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic" and holding that the "*testing of [blood or urine] intrudes upon expectations of privacy that society has long recognized as reasonable*.") (emphasis added). Our nation's highest court has specifically told us that the "testing of [blood or urine] intrudes upon expectations of privacy that society has long recognized as reasonable." ***Id.*** Ms. Erstad's case plainly satisfies both ***Katz*** prongs; therefore, the subsequent chemical testing of her blood without consent and without authorization pursuant to the search warrant constitutes a search for which there was no constitutional justification.

Of course, the Fourth Amendment does not protect what a person knowingly exposes to the public. ***Katz***, 389 U.S. at 351. In the present case, however, the medical data in drawn blood is not exposed to the public. And certainly, testing for that data involves

more than merely turning one's gaze upon the blood – in contrast to, for example, looking at the tread pattern on the sole of sneakers properly taken from an arrested person, which would not be a Fourth Amendment search. Similarly, while film must be developed in order to produce a picture, it has no information other than images on the film. Put another way, one cannot do anything other than look at the pictures when film is analyzed. However, the physiological data that is contained in a person's blood contains much more information than simply alcohol concentration. Once the blood is seized pursuant to a warrant, any further analysis of that blood must be limited to that authorized by a magistrate upon a finding of probable cause. If the blood, once seized, is subject to unfettered police agency discretion that permits any uses law enforcement desires, as held by the trial court in this case, then the warrant would be considered an illegal general warrant. ***State v. Starke***, 81 Wis. 2d 399, 412-13, 260 N.W.2d 739 (1978).

Blood contains an enormous amount of personal information. It can be analyzed and reported to include the gender of the subject, whether that person is pregnant; whether that person suffers from a myriad of diseases; whether there is alcohol in the blood; whether there are various drugs in the blood; whether the person is

genetically Asian, Hispanic, African, European or some combination thereof; whether a person is related to and how closely related to another individual; and whether that person has been placed in the system as a suspect in an open case.

For all of these reasons, it is clear that the subsequent chemical analysis is a separate search for Fourth Amendment purposes, under the ***Katz*** analysis. The search warrant issued in this case only authorized the taking of a blood sample from the body of the driver. R. 16, p. 3. Warrants cannot authorize that which they do not mention. Further, the return on warrant indicates the officer drew the blood based on the warrant. R. 22, exhibit 1, p. 25. There is no mention of any testing or analysis in the return on warrant. Indeed, the warrant requires the search to be executed within 5 days and a return filed within 48 hours after execution, so the search would have to be completed no later than August 29, 2014. Id. p. 21. Still, the Wisconsin State Laboratory of Hygiene performed an analysis of the blood alcohol concentration on September 3, 2014 (outside of the 5 days given in the warrant), absent constitutional justification.

Further, the warrant as it is written is fatally overbroad. Even if there was authorization for analysis of the blood, which there is not, there is no limit on what can be done with the blood once drawn. The

trial court highlighted this flaw when it ruled, "[o]nce the police seize the blood, it's their blood." R. 34, p. 37. There is no limit on what can be done. The Fourth Amendment mandates that warrants describe with particularity the things to be searched or seized. This requirement "makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant*." ***Stanford v. Texas***, 379 U.S. 476, 485 (1965) (quoting ***Marron v. United States***, 275 U.S. 192, 196 (1927) (emphasis added)).

The two main purposes of the particularity requirement are: (1) preventing "general searches," in which law enforcement searches for and seizes whatever it wishes without regard to the scope of authority granted and (2) preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization. 2 Wayne R. LaFave, *Search and Seizure* § 4.6(a) (2d ed. 1987) (citing ***Marron v. United States***, 275 U.S. 192, 195 (1927)). Both concerns are present in the search in this case. The ***Marron*** court reiterated:

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the

> controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in this discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' since they placed 'the liberty of every man in the hands of every petty officer.'

275 U.S. at 195 (citing ***Boyd v. United States***, 116 U.S. 616, 624 (1886) (Bradley, J.)). The warrant in this case allows law enforcement agents the discretion to do with Ms. Erstad's blood what they please – that is, "in the hands of every petty officer." ***Id.*** Neither the Wisconsin nor the United States Constitution tolerate this. Officer Welte might be the most benevolent law enforcement officer, and may have intended only to search Ms. Erstad's blood alcohol content, and nothing more. His benevolence is not relevant to constitutional analysis. The Constitution does not grant *any* officer such discretion.

Thus, assuming *arguendo* that the warrant *effectively* authorizes drawing the blood for testing, then it is overbroad because it does not *facially* authorize anything other than the blood draw itself. The warrant says nothing of any sort of scientific analysis, nor places limits on what the government may do with the sensitive biological specimen. The State's arguments in the trial court appear to be that (1) the police *did not make some more private intrusion*,

rather than that (2) the police *had the authorization to make those other sorts of intrusions*. The purpose of a search warrant is to strip the police of the discretion to be selective. Lawful warrants are specific. Lawful warrants place *limits* on the police's discretion, rather than placing *trust* in their discretion. Warrants must be narrowly tailored to their objectives. The State never claimed below that the warrant facially authorized the chemical analysis.

Indeed, the warrant only authorized the seizure of the blood. R. 22, exhibit 1, p. 21. The subsequent testing was neither requested nor ordered by the court. The Wisconsin Court of Appeals suppressed evidence under analogous circumstances in ***State v. King***, 313 Wis. 2d 673, 690–91, 758 N.W.2d 131 (Ct. App. 2008). The ***King*** case involved a search warrant that "afforded law enforcement the sole discretion to search any one of the three addresses specified." 313 Wis. 2d at 690. The warrant referenced three different addresses – 8811, 8813, and 8815. ***Id.*** The police were to determine, prior to the warrant's execution, where the suspect resided. ***Id.*** The court found that this gave the police unlawful discretion and invalidated the warrant. ***Id.***

Likewise, in this case, the warrant authorized the police to draw the blood and do with it what they desired. Anything seized

pursuant to such a warrant is inadmissible in court. Blood contains far more information than ethanol content. Blood contains far more sensitive biological, private, and medical information. If this Court adopts the State's view that the warrant authorized anything more than the blood draw itself, the warrant authorized too broad a range of activities. For example, nothing would prevent the police from developing a DNA profile and storing it in a database. The warrant grants the police that discretion, and that is a result that courts consistently refuse to tolerate. ***Id.*** ("We agree with King that the search warrant afforded law enforcement the sole discretion to search [where they pleased,] in violation of the particularity requirement."). ***Id.***

The situation here is most analogous to cases where police legitimately search a location initially, but then return without warrant or other legal authorization for an additional search. It has been held in those cases that the second search is unconstitutional even though the first search was legal. *See:* ***State v. Piers***, 55 Wis. 2d 597, 201 N.W.2d 153 (1972) and ***State v. Sanders***, 311 Wis. 2d 257, 752 N.W.2d 713 (2008). Here, the authorization obtained was to draw blood. Once the blood was legally drawn, there was no legal authority to do anything with it. Similary, the Wisconsin Supreme

Court has held that when there is justification to enter an area for a protective sweep, that does not justify seizure and testing of evidence in that area. ***Sanders***, 311 Wis. 2d at 262.

The requirement that a warrantless search be strictly circumscribed by the exigencies that justify the search is clear. ***Arizona v. Hicks***, 480 U.S. 321, 324 (1987). Where exigent circumstances allowed a warrantless search of a dwelling, that alone did not allow an officer to move stereo equipment and record serial numbers while he was in the dwelling. ***Id.*** An additional justification was required because the exigent circumstances did not justify the additional intrusion of moving the belongings within the dwelling. ***Id.*** In that case, the "plain view" doctrine was rejected as justification where the officer had to move the belongings instead of just observing. ***Id.*** Without moving those objects, the officer did not have legal justification for his actions and should have obtained a warrant to further search the dwelling. ***Id***. at 327.

Here, the drawing of the blood initially was based on the warrant and what it authorized. No other legal justification has been suggested for either the blood draw or the analysis of the blood. Certainly, once the blood was drawn there was no exigency, given that the amount and quality of the evidence supposed to be in the

blood would not dissipate any further. There was no hurry to take any particular action, and no justification for a warrantless search. It is not enough to have probable cause to believe there is evidence of a crime without some further legal justification, unless there is an exception to the warrant requirement of the Fourth Amendment. Even where there is legal justification, such searches deemed necessary should be as limited as possible. ***Coolidge v. New Hampshire***, 403 U.S. 443, 467, 91 S.Ct. 2022 (1971). The warrant that was obtained did not authorize analysis or testing of Ms. Erstad's blood. No exception to the Fourth Amendment is present that could give legal justification to the second search.

The warrant issued in this case authorized only the drawing of Ms. Erstad's blood. The warrant did not put any limitation on what could be done with that blood – either to allow or prohibit actions after the blood was drawn. The police exceeded the authority of the warrant and tested the blood. That is prohibited by the Fourth Amendment. Thus, the results must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

CONCLUSION

This Court should reverse the lower court's orders denying Ms. Erstad's motions to suppress for two different reasons. First, the affidavit for the warrant contained false information and omitted relevant information known to the officer. Taking the correct information known by the officer into account, the affidavit does not then state probable cause, and no warrant should have issued.

Second, the warrant that did issue allowed only for the blood draw and not for analysis. The blood was analyzed without any legal authority to do so. Both of these are violations of the Fourth Amendment and suppression is the remedy for the violations.

Thus, Ms. Erstad respectfully requests this Court reverse the decision of the trial court and order that court to grant the suppression motions.

Dated at Madison, Wisconsin, April 29, 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) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7591 words.

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Dated: April 29, 2016.

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CERTIFICATION

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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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