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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 15AP2675-CR

LAUREN ANN ERSTAD,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE FINAL ORDER ENTERED ON SEPTEMEBR 10, 2015 IN ROCK COUNTY CIRCUIT COURT BRANCH 1, THE HONORABLE JAMES P. DALEY PRESIDING.

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent State of Wisconsin agrees with the Defendant-Appellant Lauren Erstad that this case is not appropriate for publication as it is a one judge appeal. Further, oral argument is not warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal. This case can be decided by applying well-established legal principles to the facts of the case.

STATEMENT OF THE ISSUES

I. Whether the warrant contains sufficient facts to establish probable cause?

Trial Court answered: yes.

II. Whether the blood sample, once obtained by warrant, can be analyzed for evidentiary purposes without specific authorization?

Trail Court answered: yes.

SUPPLEMENTAL STATEMENT OF FACTS

Lauren Erstad, the defendant, was involved in a single car accident on August 24, 2014 at approximately 3:40 am. Janesville Officer Shawn Welte was dispatched to the scene. Upon arrival, he located the defendant's vehicle upside down with the defendant still inside of it. The keys for the vehicle were in the ignition, but the vehicle was not running. The defendant was unable to figure out how to unlock the car door to get out of the vehicle, so eventually a second officer who was also dispatched to the scene was able to convince her to crawl out a back window on her own. She was not extricated from the vehicle. R 34 p.4. Officer Welte did speak with the defendant once she was out of the vehicle. He testified that she had a very strong odor of intoxicants on her and that her speech was slurred to the point that the officer could barely understand her. Her eyes were described a droopy and blood shot. The defendant admitted to driving the vehicle to that location, and she stated she had been drinking a lot prior to driving. Id. p. 5.

The defendant was transported to the hospital, and Officer Welte spoke with her there. The defendant had difficulty recalling the detail of the crash. At this point, she told the officer she had 3 or 4 beers. The only field sobriety test the officer was able to perform on the defendant was the Horizontal Gaze Nystagmus. He observed 6 of 6 clues.

The officer testified that he did read the informing the accused form to the defendant while at the hospital. He indicated that when he asked the defendant if she was willing to submit to a chemical test of her blood that her response was ultimately no. He described the defendant as argumentative and yelling at the officers that were present. When Officer Welte explained that he would then need to get a warrant, she equivocated stating that she would provide a sample but only because the officer was making her provide the sample. The officer asked her to clarify her statement; she responded that she wanted a lawyer. The officer took that as a no, and he obtained a search warrant for her blood. Id. p. 6-8.

Officer Welte filled out the search warrant form. On the form he indicated that he personally witness the driver

driving or operating the vehicle. The officer testified he checked that box because the defendant as still in the vehicle with the keys in the ignition and no one else was present. The vehicle had clearly been in a crash. Id. p.9.

The officer also indicated in the warrant that he was dispatched to a drunken driver; however, the dispatch was actually to a traffic accident. He testified that by the time he filled out the warrant he had sufficient evidence to believe that the defendant was under the influence of an intoxicant. He also indicated that in the section of the warrant form (section 12) there is no place to check "dispatched to a report of a traffic accident." Id. p. 10-11. And ultimately the officer was dispatched to investigate what was a drunken driver.

Blood was drawn from the defendant and forwarded to the Wisconsin State Lab of Hygiene for testing. Test results showed the defendant had a blood alcohol concentration of .226 grams per 100 milliliters of blood.

ARGUMENT

I. Standard of Review and Relevant Legal Principles

The defendant, who correctly states the standard of review (Appellant's Brief p. 13), argues that the search warrant lacked probable cause thereby warranting suppression of the fruits of the search. For the reasons set forth below, the defendant's arguments have no merit and must fail.

Probable cause for a search warrant is not a hyper technical or legalistic concept, but rather, is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior. ***State v. Herrmann***, 2000 WI App 38, ¶ 22, 233 Wis. 2d 135, 608 N.W.2d 406; ***State v. Lindgren***, 2004 WI App 159, ¶ 20, 275 Wis. 2d 851, 687 N.W.2d 60. Moreover, the quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for conviction or for bind over following a preliminary examination. ***State v. Sloan***,

2007 WI App 146, ¶ 23, 303 Wis. 2d 438, 736 N.W.2d 189. See also ***Maryland v. Garrison***, 480 U.S. 79, 87 (1987) (sufficient probability, not certainty, is touchtone of reasonableness under Fourth Amendment).

Thus, the objective facts before the police officer must only lead to the conclusion that guilt is more than a possibility; but the evidence need not reach the level of proof beyond a reasonable doubt, or even that guilt is more likely than not. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Further, officers executing the search warrant are entitled to the support of the usual inferences which reasonable people draw from facts. ***State v. Schaefer***, 2003 WI App 164, ¶ 23, 266 Wis. 2d 719, 668 N.W.2d 760.

The defendant—as the challenger of the search warrant—bears the burden of establishing insufficient probable cause; the State does not need to prove probable cause existed. ***State v. Gralinski***, 2007 WI App 233, ¶ 14, 306 Wis. 2d 101, 743 N.W.2d 448.

II. The Search Warrant Affidavit Gave Rise to Sufficient Probable Cause to Support the Warrant's Issuance.

The defendant alleges that Officer Welte misrepresented facts and had a reckless disregard for the truth. However, the Officer did no such thing, and he did believe the facts as set forth in the affidavit. First, the officer did see the Defendant operating her vehicle upon arrival at the crash scene. The defendant fails to mention that the officer indicated on the warrant form he personally saw the vehicle being either driven **or** operated. The keys were in the ignition and the defendant was the lone occupant of the vehicle. She was the only person who could have operated the vehicle. Even an absent a running motor, circumstantial evidence supported that the defendant was the one operating the vehicle upon the officer's arrival. ***State v. Mertes***, 315 Wis.2d. 756, 762 N.W.2d. 813 (Ct. App 2008).

Second, the defendant also takes issue with the fact the officer indicated on the warrant that he was dispatched to investigate a drunken driver. The State admits that the actual dispatch was for a vehicle crash and did not include the information that the driver may be intoxicated. But as the officer testified, upon arriving at the scene he discovered that the driver was intoxicated. By the time he filled out the

search warrant form, he was in fact investigating a drunken driver. The officer explained that in section 12 of the form there is nowhere to indicate that he was dispatched to an accident and since he was truthfully sent to investigate an accident as a result of a drunken driver he correctly checked that box.

Third, the defendant alleges that the officer incorrectly marked on the search warrant that the defendant refused to provide a blood sample to the officer. However, the totalities of the situation lead the officer to mark the request as a refusal. The defendant was obstructionist. She was yelling and arguing with the officers. Her behavior indicted that she would not cooperate with the blood draw. A verbal refusal is not required to a find a refusal. Conduct may serve as a basis for finding a refusal. ***State v. Rydeski***, 214 Wis.2d. 101, 571 N.W.2d. 417 (Ct. App. 1997) Only after being told about the warrant, did she somewhat acquiesce to the blood draw. But she made sure the officer was aware she would only agree to provide a blood sample because she was being force to do so by the officer. The defendant then asked for a lawyer. There is no constitutional duty to inform a suspected drunk driver

that the right to counsel does not attach to the implied consent law. ***State v. Reitter***, 227 Wis. 2d. 213, 595 N.W.2d. 646 (1999) The officer has no choice but to consider it a refusal and obtain the warrant. Had he not done that, the defendant would now be arguing the exact opposite that she did not consent to the blood draw and the officer should have obtained a warrant. And in fact, if this Court agrees with the defendant that she did consent to the blood draw, and therefore warrant was not needed, then the entire issue of the validity of the warrant becomes moot.

The trial court found that the officer didn't intentionally misrepresent the facts as set forth in the warrant and as a result should have considered them in determining the validity of the warrant. R. 34 p.37-38. However, even after the court excised those facts, the court was correct in finding there was sufficient probable cause to issue the warrant.

The warrant sets forth all of the following. The defendant admitted she was the driver of the vehicle that had been in a rollover accident. Indicating that the defendant's ability to safely operate a motor vehicle was impaired. She

admitted to drinking a lot prior to driving, and she smelled strongly of alcohol. She was emotional, had blood shot eyes and extremely slurred speech. She had difficulty maintaining her balance. All of those are indictors of intoxication. Further the defendant failed the Horizontal Gaze Nystagmus. The defendant points out that all of these indicators when taken separately have other causes then just intoxication. However, the officer does not have to rule out those other causes and when taken in their totality, there was probable cause to believe the defendant was a operating motor vehicle while under the influence of an intoxicant. The trial court's ruling should be upheld.

III. Law Enforcement Can Chemically Analyze Blood Lawfully Seized During an OWI Investigation.

The defendant, who correctly states the de novo standard of review (Appellant's Brief p. 13), argues that a second search warrant was necessary to give law enforce authority to chemically analyze her blood. The State understands that the defendant to be arguing that she consented to the blood draw after being read the informing the accused form and being told that the officer would need

to get a warrant if she refused. R. 34 p. 7. Consent is an exception to the warrant requirement.

The State argues that the defendant refused to provide a blood sample, so the officer had to draft a search warrant. The warrant was reviewed and signed by a court commissioner. That warrant was upheld by the circuit court. Id. p. 37-38. Once the blood was lawfully seized, law enforcement was authorized to test the blood. They did not need a second warrant for that authorization.

Under either the State's or defendant's view of the facts and legal analysis, the examination of lawfully seized evidence by warrant or consent of the defendant is part of the seizure. Law enforcement does not need judicial authorization to analyze the blood.

In the case of ***State v. VanLaarhoven***, 248 Wis.2d 881, 637 N.W.2d 411 (Ct. App. 2001), VanLaarhoven consented to submit to the chemical test of his blood after being read the Informing the Accused form, like the defendant claims she did in the instant case. Van Larrhoven's blood was sent to the Wisconsin State Lab of Hygiene for analysis. VanLaarhoven filed numerous motions including

one challenging the examination of his blood without a second search warrant. The court of appeals ultimately disagreed with VanLaarhoven and concluded that a second warrant was not necessary prior to submitting the blood for analysis. The court relied partly on the implied consent law which states that drivers on public highways have consented to one or more tests of their blood breath or urine. Wis. Stats. 343.305(2). However, the court also realized that the consent can be revoked. The court clearly held that analysis of the lawfully seized blood is not a separate incident requiring specific authorization. The right to seize the blood includes the right to test the blood for alcohol content at a later time. The court of appeals relied on ***U.S. v. Snyder***, 852 F.2d. 471(9th Cir. 1988). The ***Snyder*** court said:

> The flaw in Snyder's argument is his attempt to divide his arrest and subsequent extraction and testing of his blood into too many separate incidents, each to be given independent significance for fourth amendment purpose….
>
> ***VanLaarhoven*** at 889.

The court of appeals also relied on ***State v. Petrone***, 161 Wis.2d. 530, 468 N.W.2d. 676 (1991), which held that law enforcement, after lawfully seizing undeveloped film, can develop the film and view the film without a second warrant

authorizing it. The examination of evidence lawfully seized is an essential part of the seizure. The court held that there is no need for a second warrant or judicial authority to examine the evidence.

The Court of Appeals came to the same conclusion using the same rational in ***State v. Riedel***, 2003 WI App 18, 259 Wis.2d. 921, 656 N.W.2d. 789. ***Riedel*** is the case the trial court used in in reaching its decision that a second search warrant was not necessary to be able to analyze the defendant's blood. Riedel revoked his implied consent, but he did not challenge the warrantless blood draw, but rather he argued that testing of the blood was a second separate search that required a search warrant. The Court citing ***VanLaarhoven*** concluded:

> …..that ***Snyder*** and ***Petrone*** stand for the proposition that the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the law seizure of blood sample into multiple components."

Riedel at 929.

The defendant Erstad's blood was lawfully seized by Office Welte. The defendant argues she consented to the blood draw, and the State argues that it was collected

pursuant to a warrant after a refusal. In either case, based on ***VanLaarhoven***, her blood was lawfully analyzed by the Wisconsin State Lab of Hygiene, and there was no need for a second warrant. Therefore, the Court should uphold the trial court's ruling.

The defendant also argues that this Court should apply the standards set forth in ***Katz v. U.S.***, 389 U.S. 347 (1967) to the facts of this case. ***Katz*** set forth a two pronged analysis. First, there must be an actual expectation of privacy and second that the expectation be one that society is prepared to recognize as reasonable. In ***Katz***, the defendant was making a call from a public phone booth. Unbeknownst to him, the FBI was recording his conversation via electronic eavesdropping device attached to the exterior of the phone booth without first obtaining a search warrant. These recordings were then used to convict Katz. The recordings were ultimately held to be an unconstitutional search. Katz was inside of a phone booth with the door closed carrying on a private conversation and it was reasonable for him to expect that the conversations would not be recorded by the FBI. The U.S. Supreme Court did note that a magistrate could have constitutionally

authorized the wiretap, but since no search warrant was obtained by the FBI the recording of Katz's conversations was unconstitutional.

The facts in the instant case are completely different. Officer Welte arrested the defendant, explained to her what she was being arrest for and read her the Informing the Accused form as required by law before asking for a sample of her blood. The Informing the Accused form includes the following language. "The law enforcement agency now wants to test one or more samples of your blood, breath or urine to determine the concentration of alcohol or drugs in your system." See: Appendix 1. Officer Welte testified that the defendant understood the Informing the Accused form, and she asked no questions about the form. R. 34 p.7-8. The defendant was fully aware of the fact that her blood was being both collected and tested.

Under these facts, the defendant cannot satisfy even the first prong of Katz. The defendant, who claims she consented to the blood draw, cannot now argue an actual expectation of privacy considering she was told about the intent by law enforcement to analyze her blood, and she was

provided that same information about the analysis in writing. The defendant was well aware of the fact that her blood would be tested to determine the concentration of alcohol. Further, the State argues that a commissioner did sign the search warrant that included a request to analyze the blood. In the affidavit for that search warrant, it clearly stated that law enforcement was requesting to search the defendant for blood to obtain sample of the blood for chemical analysis. See: Defense Brief A-10.

The defendant cannot satisfy the second prong, either. The defendant had a Wisconsin driver's license, went out and got highly intoxicated, drove on a public highway at 3:40 AM, endangered the public and had an serious accident. Then she argues that her blood should be not be tested because she expects to keep the level of her intoxication private, even though she claims she consent to the blood draw. Society is not prepared, nor should they ever be prepared to recognize the defendant's expectation as being reasonable. The defendant continues the argument for her expectation of privacy by creating a fictitious situation where a law enforcement officer might somehow get the defendant's

blood back from the Lab of Hygiene, then with no authorization somehow transfer it to the Crime Lab. Then convince the Crime Lab to complete an DNA analysis on a misdemeanor Operating While Intoxicated case, so the "petty" police officer can somehow get it into the DNA bank. And for that reason, the defendant argues there should be a second warrant to specifically authorizing the testing of the blood. There is no logic or reason to that argument, and it should not be considered by this court.

CONCLUSION

This Court should uphold the lower court's order denying the defendant's motions to suppress. The defendant refused to submit her blood for chemical analysis. As a result, the officer drafted a search that was signed by a court commissioner. The search warrant affidavit did contain facts sufficient to establish probable cause to collect and test the defendant's blood.

Furthermore, a second search warrant was not needed to give law enforcement the authority to analyze the

defendant's blood. The testing of the defendant's blood was an essential part of the seizure.

Therefore, the State of Wisconsin respectfully requests that this Court uphold the decision of the trial court and order the that defendant be returned to the court for sentencing.

Dated this ____ day of May, 2016.

Respectfully submitted,

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CERTIFICATION

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 3460 words.

____

Mary E. Bricco
Assistant District Attorney

CERTIFICATE OF
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WITH WIS. STAT. § (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 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 this _____ day of May, 2016.

____
Mary E. Bricco
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