STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAWN M. PRADO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DAVID T. FLANAGAN III, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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I. Wisconsin Stat. § 343.305(3)(ar) and (b) authorize the taking of a sample from a person who is unconscious or otherwise incapable of withdrawing his or her implied consent when an officer requires a sample.

In its opening brief, the State explained that under Wisconsin's implied consent law, all drivers in Wisconsin are deemed to have impliedly consented to give a sample of their blood, breath, or urine, when a law enforcement officer required one. The unconscious driver provision in the implied consent law creates a presumption that a person who has impliedly consented to give a sample, and who is then unconscious or otherwise incapable of withdrawing that consent when an officer requires a sample, is presumed not to have withdrawn consent. The State explained that the circuit court's view of the law as not authorizing the taking of a blood sample from a person who impliedly consented, and then did not withdraw that consent, was plainly wrong. (State's Br. 10.)

In her brief, Prado does not appear to disagree with the State's analysis of how the unconscious driver provisions work or dispute that the circuit court's view of the law was wrong. Prado instead argues that the unconscious driver provisions are unconstitutional. (Prado's Br. 2.)

II. The unconscious driver provisions in Wisconsin's implied consent law are constitutional.

As the State explained in its opening brief, the unconscious provision in Wisconsin's implied consent law has been part of the law for decades and has never been held unconstitutional by any appellate court. And nothing in *Missouri v. McNeely*, 569 U.S. 141 (2013), or *Birchfield v.*

North Dakota, 136 S. Ct. 2160, renders the law unconstitutional.

Prado does not dispute that no Wisconsin appellate court has found the unconscious driver provisions unconstitutional. But she argues that the provisions are unconstitutional under *Birchfield*. She bases this argument on the following statement in *Birchfield*:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

(Prado's Br. 2 (quoting *Birchfield*, 136 S. Ct. at 2184–85).)

Prado's reliance on this language in *Birchfield* is misplaced. When it discussed unconscious drivers, the Supreme Court was explaining whether a nonconsensual blood draw might be administered to an unconscious person incident to arrest. As the Court stated, the issue was "how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests." *Birchfield*, 136 S. Ct. at 2174. The Court spent the next twelve pages discussing blood and breath tests incident to arrest. *Id.* at 2174–85.

After its discussion of searches incident to arrest, the Court considered consensual blood and breath tests: "Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them." *Id.* at 2185. The Court observed, "It is well established that a search is reasonable when the subject consents . . . and that sometimes consent to a search need not

be express but may be fairly inferred from context." *Id.* (citations omitted.)

The Court noted, "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* (citing *McNeely*, 133 S. Ct., at 1565–66 (plurality opinion); *South Dakota v. Neville*, 103 S. Ct. 916, 560 (1983)). It added, "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.*

The Court then said that while a State can "insist upon an intrusive blood test," it cannot impose a criminal offense for refusal to submit to a blood draw for chemical testing. *Id.* It concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

The conclusion in *Birchfield* regarding the validity of nonconsensual blood draws from unconscious persons incident to arrest has no bearing on this case because Prado's blood was not drawn incident to arrest.

And the conclusion in *Birchfield* regarding the validity of consensual blood draws under an implied consent law has no bearing on this case because the Supreme Court said only that a State cannot validly impose a criminal penalty for refusing a blood draw under an implied consent law. Wisconsin does not impose a criminal penalty for refusal. *Birchfield* says nothing about the validity of a blood draw from a person—conscious or unconscious—under an implied consent law when the penalty for refusal is not criminal.

In her brief, Prado asks why an unconscious person should have less constitutional protection than a conscious person. (Prado's Br. 6–7.) But under her view of the law, an unconscious person has greater protection than a conscious person. Under Prado's view, the State can validly request a

sample from a person who is conscious, and the person can either agree, and affirm the consent he or she gave by driving on Wisconsin highway, or refuse and face penalties including the revocation of his or her driving privilege. The person's blood could be drawn if the State obtained a warrant. But a person would benefit by being unconscious because the State would still have to obtain a warrant to get a blood sample, but the person would not be subject to a refusal penalty. In contrast, under the State's view of the law a person is treated the same whether he is conscious or unconscious—he or she impliedly consents by driving, and that consent authorizes a blood draw when an officer requests one unless he or she withdraws consent.

Prado argues, "The State persists in arguing that *McNeely* actually sanctions implied consent laws used in this context, when the *Birchfield* Court expressly rejected that rationale as used by the North Dakota Supreme Court." (Prado's Br. 8.) She asserts that the issue in *Birchfield* "was exactly whether 'implied consent' laws violate the Fourth Amendment's prohibition against unreasonable searches." (Prado's Br. 7–8.)

But Prado relies on pages 2166–67 of the *Birchfield* opinion—the syllabus—which "constitutes no part of the opinion." *Birchfield*, 136 S. Ct. at n. *. The part of the opinion that the syllabus refers to rejected only implied consent laws that criminalize refusal to submit to a blood test. And as Prado acknowledges, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." (Prado's Br. 9 (quoting *Birchfield*, 136 S. Ct. at 2186).)

Prado asserts that in *Birchfield*, the Supreme Court recognized that implied consent is not actual consent, and actual consent is required to authorize a blood draw. (Prado's Br. 9.) He says that this recognition is "implicit in the Court's language that 'implied consent' is not 'actual consent,' so

apparent that it's implicit without the need for articulation." (Prado's Br. 9.)

Prado seems to acknowledge that in *Birchfield*, the Supreme Court never actually used the term "actual consent," or actually said that "actual consent" rather than "implied consent" is necessary to authorize a blood draw under an implied consent law. What he does not acknowledge is that the Court never even impliedly said anything of the sort.

Prado points to nothing in *Birchfield* distinguishing between implied consent and actual consent. And the lead opinion in *State v. Brar* rejected any distinction as "incorrect as a matter of law." *State v. Brar*, 2017 WI 73, ¶¶ 19–20, 376 Wis. 2d 685, 898 N.W.2d 499. Every opinion of the Supreme Court of Wisconsin that has touched upon the issue has concluded that implied consent that is not withdrawn is sufficient to authorize a blood draw without violating the Fourth Amendment. And the supreme court has concluded that when a person is unconscious or otherwise incapable of withdrawing their implied consent, an officer may administer a blood test without even reading the Informing the Accused form to the person. *State v. Disch*, 129 Wis. 2d 225, 233–34, 385 N.W.2d 140 (1986), "obviates the necessity of an officer's request for a test or a blood sample."

Prado argues about differences between implied consent and actual consent. (Prado's Br. 10–15.) But the supreme court has concluded that implied consent that is not withdrawn authorizes a blood draw. *Disch*, 129 Wis. 2d at 233–34. No Wisconsin or United States Supreme Court case has overruled *Disch*, and it remains good law that binds this Court. *See State v. Howes*, 2017 WI 18, ¶ 75, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring).

In summary, the unconscious driver provisions in Wisconsin's implied consent law authorize a blood draw unless a person has withdrawn his or her implied consent.

Prado has not shown that any opinion of the United States Supreme Court or the Supreme Court of Wisconsin has rendered the provisions unconstitutional or invalidated it. The circuit court therefore erred by concluding that the blood draw in this case violated the Fourth Amendment and in suppressing the results of a test of Prado's blood.

III. Even if the unconscious driver provisions in Wisconsin's implied consent law were to be found unconstitutional, the good faith exception should apply in this case, and the results of Prado's blood test should not be suppressed.

In its initial brief, the State explained that even if the unconscious driver provisions in Wisconsin's implied consent law were to be found unconstitutional by this Court in this case or another case, or by the Supreme Court of Wisconsin in *State v. Mitchell*, 2015AP304-CR[1], the good faith exception to the exclusionary rule should apply to the blood test results in this case. As the supreme court has affirmed, the good faith exception applies in Wisconsin when officers reasonably rely on clear and settled precedent, because "[a]pplication of the exclusionary rule would have absolutely no deterrent effect on officer misconduct, while at the same time coming with the cost of allowing evidence of wrongdoing to be excluded." *State v. Dearborn*, 2010 WI 84, ¶ 44, 327 Wis. 2d 252, 786 N.W.2d 97.

The State explained in its initial brief that the officer here relied on clear and settled precedent—the unconscious driver provision that has been part of the implied consent law since 1969. The law has been used by officers since 1969, and

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[1] The unconscious driver issue was certified in *State v. Gerald P. Mitchell*, 2015AP304-CR. The case has been argued and a decision is pending.

no Wisconsin appellate court has found the law unconstitutional or invalid.

In her brief, Prado argues that the good faith exception should not apply because the blood draw in this case was unconstitutional when it occurred. She states that "[p]olice are constitutionally required to get a warrant to extract the blood of an unconscious person." (Prado's Br. 16.)

Prado does not point to any Wisconsin case that has found the unconscious driver provisions unconstitutional or invalid. And although she argues that the Supreme Court in *Birchfield* concluded that blood draws from unconscious drivers violate the Fourth Amendment, she does not rely on *Birchfield* as the reason that the officer could not properly rely on the unconscious driver provisions.

Prado cannot properly rely on *Birchfield* for two reasons. First, *Birchfield* did not invalidate implied consent laws that do not criminalize the refusal to submit to a blood test, or that presume that a driver who is unconscious or otherwise incapable of withdrawing consent has not withdrawn that consent. Second, even if *Birchfield* had invalidated any part of Wisconsin's implied consent law, the opinion was not issued until June 23, 2016. The officers administered the blood draw from Prado on December 12, 2014. The officers obviously cannot be required to comply with an opinion which had not been issued.

Because she cannot rely on *Birchfield*, Prado instead relies on *McNeely*, arguing that *McNeely* somehow must be read as invalidating the unconscious driver provisions in Wisconsin's implied consent law. Notably, Prado does not point to any language in *McNeely* that supposedly invalidates the unconscious driver provisions, or cite to a single page in *McNeely*. (Prado's Br. 15–17.) Prado cannot point to anything in *McNeely* invalidating the unconscious driver provisions in Wisconsin's implied consent law, or any part of any implied

consent law, because *McNeely* had nothing to do with implied consent laws.

As the Supreme Court of Wisconsin has recognized, *McNeely* did not even address an implied consent law, much less invalidate any part of one. "*McNeely* addressed only the exigent circumstances exception to the warrant requirement, which is not at issue here." *State v. Lemberger*, 2017 WI 39, ¶ 33 n.11, 374 Wis. 2d 617, 893 N.W.2d 232. The *Lemberger* court also recognized that in *Birchfield*, the Supreme Court rejected the notion that it had addressed implied consent laws in *McNeely*, explaining that "the *McNeely* Court 'pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception 'at issue in th[e] case,' namely, the exception for exigent circumstances." *Id.* (quoting *Birchfield*, 136 S. Ct. at 2174 (in turn quoting *McNeely*, 133 S. Ct. at 1558)).

Although Prado argues that the Supreme Court somehow invalidated the unconscious driver provisions in implied consent laws in a case that involved only the exigent circumstances exception to the warrant requirement, she tacitly acknowledges that the unconscious driver provisions have not been invalidated. She asks this court to publish its opinion because "[i]t is likely that any resolution of this case will resolve conflict between prior decisions or modify or clarify existing rules." (Prado's Br. iii.) If *McNeely* or *Birchfield* had invalidated the unconscious driver provisions in implied consent laws like Wisconsin's, there would be no need to publish this Court's opinion, because there would be no conflict.

Prado argues that the circuit court was correct in declining to apply the good faith exception because "there is no well-established precedent permitting this blood draw to be made without a warrant after *McNeely*." (Prado's Br. 16.) She argues that "the question is whether reliance on the

statute can be taken to be acting in good faith." (Prado's Br. 16.)

But Prado does not dispute that under the statute, and decades of Wisconsin cases, a warrantless blood draw from a person who did not withdraw the consent they impliedly gave by operating a motor vehicle on a Wisconsin highway was valid. And she does not point to any part of *McNeely* that invalidated the unconscious driver provisions in Wisconsin's implied consent law.

Prado also relies on the circuit court's findings of fact, specifically that Dane County had created a telephone warrant application procedure after *McNeely* was issued, and that the officer in this case knew about the procedure and had used it before the blood draw in this case. (Prado's Br. 15–16.)

But Dane County had a procedure for applying for warrants by telephone when a person *had withdrawn* the consent he or she impliedly gave by driving. The officer had no reason to believe that he needed to follow that procedure when the person *had not withdrawn* consent. *McNeely* said nothing about that situation. Again, as the supreme court recognized, "*McNeely* addressed only the exigent circumstances exception to the warrant requirement," not implied consent. *Lemberger*, 374 Wis. 2d 617, ¶ 33 n.11.

Prado takes issue with the State's assertion that applying the good faith exception in this case—if either this Court in this case or the Supreme Court in *Mitchell* determines that the unconscious driver provisions are invalid—would not deter police misconduct. She argues that the State's assertion "is belied by the four cases presently pending regarding this issue." (Prado's Br. 16.)

But four cases are pending because officers have relied on the existing law that has not been invalidated. And four defendants, including Prado, have asked courts to invalidate the law.

For the exclusionary rule to apply, "[t]he benefits of deterrence must outweigh the costs." *Herring v. United States*, 555 U.S. 135, 141 (2009), citing *United States v. Leon*, 468 U.S. 897, 910 (1984)). "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987)).

Here, excluding evidence would have no deterrent effect. The officers relied on a statute that even now has not been overruled or invalidated, and that authorized the blood draw in this case. An opinion invalidating the law would deter police from relying on the law in the future. But excluding evidence gathered before the law was invalidated will have no possible deterrent effect.

In contrast, the costs are, as Prado acknowledges, enormous—"throwing out some very important evidence for the State in a motor vehicle homicide case." (Prado's Br. 3.) Not applying the good faith exception if the law were to be invalidated would result in suppression of crucial evidence demonstrating that Prado's blood alcohol concentration was more than four times the limit at which she could legally drive, and contained a detectable amount of a restricted controlled substance. This would greatly affect the State's prosecution. Suppression is therefore unwarranted and inappropriate.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the circuit court's order granting Prado's motion to suppress evidence.

Dated this 15th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,958 words.

Dated this 15th day of June, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of June, 2018.

_____
MICHAEL C. SANDERS
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