STATE OF WISCONSIN

C O U R T O F A P P E A L S

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, PRESIDING

SUPPLEMENTAL BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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INTRODUCTION

The circuit court granted the defendant-respondent Dawn M. Prado's motion to suppress her blood test results. (R. 33.) It concluded that the warrantless blood draw after Prado crashed her car, was transported to the hospital, and was unconscious, was unreasonable and in violation of the Fourth Amendment. (R. 33:3–4.) It concluded that Wisconsin's implied consent law did not authorize the blood draw. (R. 33:3–4.) And it concluded that the good faith exception to the exclusionary rule did not apply, so the test results must be suppressed. (R. 33:3.) The State did not assert that the warrantless blood draw was justified by exigent circumstances, so the court did not address whether that exception to the warrant requirement applied.

In its brief on appeal, the State argued that the unconscious driver provisions in Wisconsin's implied consent law, Wis. Stat. § 343.305(3)(ar) and (b), authorized the blood draw from Prado. It also argued that even if those provisions were to be found unconstitutional, the officer who administered the blood draw relied in good faith on those provisions, which had not been found unconstitutional at the time of the blood draw. Therefore, the test results should not have been suppressed. The State did not argue in its brief that exigent circumstances justified the blood draw.

This Court placed this appeal on hold pending resolution of *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, by the Wisconsin Supreme Court. It then placed the appeal on hold pending resolution of *State v. Hawley*, 2015AP1113-CR. The Wisconsin Supreme Court denied certification in that case on September 3, 2019.

The State then requested that the parties be allowed to file supplemental briefs addressing the United States Supreme Court's decision in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), and this Court's decision in *State v. Paull*, No.

2017AP1210-CR, 2019 WL 3820298 (Wis. Ct. App. Aug. 15, 2019) (unpublished). On October 4, 2019, this Court ordered the parties to file briefs addressing those two cases. The State now submits this brief pursuant to the Court's order.

ARGUMENT

I. The warrantless blood draw from Prado was justified by exigent circumstances.

A. Under *Mitchell v. Wisconsin*, warrantless blood draws from drivers who are taken to a hospital before a breath test can be administered and are unconscious are almost always justified by exigent circumstances.

In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the United States Supreme Court set forth a rule for the category of cases in which police have probable cause that a person has committed a drunk-driving offense, the person is unconscious and must be taken to a hospital, and there is no opportunity to obtain a breath test. In such a case a blood test is almost always justified by exigent circumstances. *Id.* at 2531 (plurality opinion).[1]

[1] The plurality opinion in *Mitchell* is binding on the existence of exigent circumstances when officers have probable cause that a person has committed an OWI offense and the person is taken to the hospital before an evidentiary breath test can be administered. Wisconsin courts apply the *Marks* rule to interpret fractured opinions of the Supreme Court. *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567. Under that rule, "When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). Justice Thomas's concurrence sets forth a rule broader than the plurality opinion's rule, concluding that exigent circumstances justify a warrantless blood draw whenever police have probable cause that a

The *Mitchell* Court "d[id] not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539. But unless a defendant makes both showings, "when a driver is unconscious, the general rule is that a warrant is not needed." *Id.* at 2531.

B. This Court should apply *Mitchell* and conclude that exigent circumstances justified the warrantless blood draw in this case.

This case falls squarely within the category of cases to which the *Mitchell* rule applies. The circuit court found that City of Fitchburg Police Officer Jonathan Parker had probable cause that Prado was the operator of a motor vehicle involved in a crash in which another person was killed. (R. 33:2.) When officers arrived, Prado was lying in a ditch, moaning. (R. 1:1–5.) Prado was taken to the hospital by Emergency Medical Services (EMS). (R. 1:5.) The parties stipulated that Officer Parker had probable cause to read the Informing the Accused form to Prado and request a blood sample from her. (R. 41:5.) And the court found that at the hospital Prado "was unconscious and incapable of giving or withdrawing conscious consent to a blood draw." (R. 33:2). The circuit court did not address whether the officers had an opportunity to obtain a breath sample from Prado before she was taken to the hospital. But the officers plainly did not have such an opportunity. Prado was seriously injured and was transported to the hospital by EMS. She was unconscious

driver is drunk. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (Thomas, J., concurring). The plurality opinion, which is narrower than the concurrence, is therefore the Court's holding on this issue.

when officers encountered her in the hospital and when her blood was drawn. There obviously was no opportunity to take Prado to the police station for an evidentiary breath test.

This case therefore satisfies the criteria that the Supreme Court set forth in *Mitchell*. There was probable cause; Prado was unconscious; she was taken to a hospital; and there was no opportunity to obtain an evidentiary breath test. Under these circumstances, a law enforcement officer "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Mitchell*, 139 S. Ct. at 2539.

This Court should apply the *Mitchell* rule in this case. The State acknowledges that it did not argue in the circuit court and its initial briefs to this Court that the blood draw was justified by exigent circumstances. But it did not waive or forfeit that argument: "A litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced." *State v. Rodriguez*, 2007 WI App 252, ¶ 11, 306 Wis. 2d 129, 743 N.W.2d 460. The State did not argue that exigent circumstances justified the blood draw in this case because *Mitchell* had not yet established the rule that exigent circumstances justify blood draws in this category of cases.

By holding this appeal for a decision in *State v. Howes* and *State v. Hawley*, this Court indicated that it sought definitive guidance on the issue of the validity of warrantless blood draws from unconscious drivers. In *Mitchell*, the United States Supreme Court provided that definitive guidance. The Court set forth a rule that applies to the category of cases "in which the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531. In cases in which officers have probable cause that the person has driven while under the influence of an intoxicant, and the person is unconscious and taken to the hospital before police can obtain

a breath sample, "the exigent-circumstances rule almost always permits a blood test without a warrant." *Id.*

The Court established this rule in *Mitchell* even though the State did not argue that exigent circumstances justified the blood draw and the Wisconsin Supreme Court did not decide the case on that ground. The Court explained that the issue before the Wisconsin Supreme Court was "whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment," and it concluded that the question presented "easily encompasses the rationale that we adopt today." *Id.* at 2534 n.2. Notably, the Court adopted a rule for an entire category of cases—those "in which the driver is unconscious and therefore cannot be given a breath test." *Id.* at 2531.

As explained above, this case falls squarely within the category of cases to which *Mitchell* applies. The "general rule" that the Supreme Court set forth, that when a driver is unconscious a warrant is not needed, should therefore apply. *Mitchell*, 139 S. Ct. at 2531. The Supreme Court "d[id] not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539. But it is doubtful that Prado can satisfy her burden of showing that this is the "unusual case" in which *Mitchell*'s rule does not apply.

In particular, it is unlikely that Prado can satisfy her burden of showing that her "blood would not have been drawn if police had not been seeking BAC information." *Mitchell*, 139 S. Ct. at 2539. The *Mitchell* Court recognized that hospitalized "unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes." *Id.* at 2538 n.8. That observation applies here. Prado was involved in a serious crash in which another person was killed. (R. 33:2.)

When officers arrived at the scene, she was lying in the ditch, moaning. (R. 1:1–5.) Prado was taken to the hospital by EMS and was unconscious when an officer arrived. (R. 1:5; 33:2.) Officer Parker testified that Prado was on a hospital bed, that she had been intubated, and that doctors and hospital staff informed him that she was unconscious. (R. 41:7–8.) Under the circumstances, it seems extremely unlikely that Prado's blood would not have been drawn even if officers had not wanted a sample to test her alcohol concentration.

In the circuit court, Prado did not attempt to show both that her blood would not have been drawn at the hospital had officers not wanted evidence about the presence and quantity of drugs and alcohol in her blood, and that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S. Ct. at 2539.

If Prado does not meaningfully assert that she can meet that burden, this Court should reverse the circuit court's decision granting her motion to suppress her blood test results. If Prado does meaningfully allege that she can meet her burden, fact finding might be necessary. Because this Court cannot find facts, *Phelps v. Physicians Ins. Co. of Wisconsin*, 2005 WI 85, ¶ 4 n.4, 282 Wis. 2d 69, 698 N.W.2d 643; *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980), remand to the circuit court to make that determination would likely be appropriate.

II. *State v. Paull* supports the State's argument that the officer acted in good faith reliance on the unconscious driver provision in the implied consent law, so the circuit court should not have suppressed Prado's blood test results.

The State argued in the circuit court that even if the unconscious driver provisions in Wisconsin's implied consent law were to be found unconstitutional, the officer who ordered

the blood draw relied in good faith on the law, which had not yet been invalidated. Therefore, the good faith exception to the exclusionary rule applies, and suppression of the blood test results is unnecessary and inappropriate. (R. 31.) The circuit court rejected the State's argument and suppressed the blood test results. (R. 33:3–4.) It relied on *Missouri v. McNeely*, 569 U.S. 141 (2013), concluding that "a more limited remedy might be appropriate if the legal impact of the *McNeely* decision was not so clear or had not been in place for so long or had not been so widely recognized." (R. 33:3.)

On appeal, the State again argued that even if the unconscious driver provision were to be found unconstitutional, it had not yet been invalidated when the officer in this case ordered the blood draw, and he relied on it in good faith. Therefore, the good faith exception to the exclusionary rule applies and the blood test results should not be suppressed. (State's Br. 30–36.)

This Court recently issued an opinion in *State v. Paull*, 2019 WL 3820298, which applied the good faith exception in a case much like this one. In *Paull*, the officer administered a warrantless blood draw while the suspected drunk driver was unconscious. *Id.* ¶ 5. The defendant moved to suppress the blood test results on the ground that the unconscious driver provision, Wis. Stat. § 343.305(3)(b), is unconstitutional. *Id.* ¶¶ 2, 6. The State argued that the provisions are constitutional, but that even if they were to be found unconstitutional, the test results should not be suppressed because the officer relied in good faith on the statute. *Id.* ¶ 6. The circuit court agreed. *Id.* ¶ 7. It assumed that the statute is unconstitutional, but it concluded that the test results need not be suppressed because the officer relied in good faith on the statute. *Id.*

This Court affirmed. It assumed without deciding that the unconscious driver provision is unconstitutional. *Id.* ¶¶ 2, 11. And it concluded that the officer relied in good faith on the statute. *Id.* ¶¶ 18, 20–21.

This Court rejected the argument that the unconscious driver provision was invalidated by *McNeely*. This Court noted that *McNeely* did not "address the constitutionality of blood tests absent a warrant in an unconscious driver situation." *Id.* ¶ 18. Therefore, "it is not objectively reasonable to expect an officer in 2015 to have drawn from" *McNeely* "inferences against the constitutionality of Wisconsin laws permitting blood tests from unconscious drivers." *Id.*

This Court recognized that "in September 2015, at least one appeal from a conviction in a case concerning the constitutionality of the unconscious driver provisions was pending in the Wisconsin courts, and those provisions had yet to be invalidated." *Id.* ¶ 20 (citing *State v. Mitchell*, 2018 WI 84, ¶ 15, 383 Wis. 2d 192, 914 N.W.2d 151, *vacated and remanded by Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). This Court therefore concluded that because "no court had deemed Wisconsin's unconscious driver provisions unconstitutional" at the time of the blood draw from the defendant, "it was objectively reasonable for [the officer] to rely on those provisions, and, therefore, that the good faith exception to the exclusionary rule applied." *Id.* ¶ 18 (citing *Illinois v. Krull*, 480 U.S. 340, 349 (1987)).

This Court should apply the same reasoning in this case. Here, the officer ordered the blood draw on December 12, 2014, even before the blood draw in *Paull*. (R. 33:2.) And the officer relied on the unconscious driver provisions in Wisconsin's implied consent law. (R. 41:8–9, 14–15.)

Prado asks this Court to find the unconscious driver provisions unconstitutional. (Prado's Br. 2–15.) And she

argues that the good faith exception to the exclusionary rule does not apply because of *McNeely*. (Prado's Br. 15–17.) But just like in *Paull*, even if this Court were to find the unconscious driver provision unconstitutional (or assume without deciding that it is unconstitutional), it should conclude that the circuit court properly denied the suppression motion because the officer relied in good faith on the statute. As this Court concluded in *Paull*, a reasonable officer would not have believed that the unconscious driver was invalidated by *McNeely*. Instead, the officer could reasonably rely on the statute because the statute had yet to be invalidated.

CONCLUSION

This Court should apply *Mitchell* and *Paull* and reverse the circuit court's order granting the motion to suppress evidence.

Dated this 24th day of October, 2019.

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 2,667 words.

Dated this 24th day of October, 2019.

_____
MICHAEL C. SANDERS
Assistant Attorney General

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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.

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Dated this 24th day of October, 2019.

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MICHAEL C. SANDERS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Dawn M. Prado
Case No. 2016AP308-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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MICHAEL C. SANDERS
Assistant Attorney General

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