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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No. 16AP308-CR
Dane County Case No.15CF859

DAWN M. PRADO,

Defendant-Respondent.

STATE'S INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE DAVID T. FLANNAGAN PRESIDING

SUPPLEMENTAL BRIEF OF THE DEFENDANT-RESPONDENT

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Introduction

The Defendant-Respondent stands by the issues presented, statement of the case, position on oral argument and publication, and arguments iterated in our brief-in-chief.

Argument

The previously submitted briefs are of more benefit than these supplements, and the defense stands by its arguments in the wake of the recently decided cases these supplements address—*Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) and *State v. Paull*, 2019 WL 3820298—which are respectively unhelpful and inapplicable.

I. *Mitchell* is Unhelpful in this Case

The U.S. Supreme Court's decision in *Mitchell* is not very helpful in disposing of this case. The U.S. Supreme Court granted cert in that case to determine the issue presented here—whether Wisconsin's implied consent statute trumps the Fourth Amendment—but ultimately decided that case without a clear majority, on other grounds that are not applicable here. To the extent that the U.S. Supreme Court's decision in *Mitchell* can be of benefit to us, it is in recognizing that the statute in question does not trump the Constitution and that if an exception to the warrant requirement is to be found, it must be found in one of the few recognized exceptions to the warrant requirement.

The State contends that it can now assert exigent circumstances despite its failure to argue as much in the circuit court because "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's Supplemental Brief at 4, citing *State v. Rodriguez*, 2007 WI App 252, ¶11, 306 Wis.2d 129, 743 N.W.2d 460. But *Mitchell* did not announce a new rule. It applied an old rule—exigent circumstances—to the facts of the case before it. Exigent circumstances have been used as a justification for warrantless blood draws for over 25 years. *See e.g. State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399 (1993). If the Supreme Court had announced a brand-new exception to the warrant requirement, the State might be correct in its assertion that its failure to advance that argument in the circuit court didn't constitute forfeiture or waiver of those grounds. But as it is, the "exigent circumstances" doctrine existed at the time of the suppression hearing, and was tangentially considered and dismissed as inapplicable by the circuit court despite the State's failure to advance those grounds. The circuit court was right in its analysis. The sound principal remains that an issue not raised before the circuit court is waived and/or forfeited. *See State v. Caban*, 210 Wis.2d 597, 563 N.W.2d 501 (1997); *State v. Ndina*, 2009 WI 21, 761 N.W.2d 612.

What *Mitchell* does not do, and should not be construed as doing, is provide a roadmap for avoiding difficult decisions. As the dissent noted in *Mitchell*, "the plurality ventures forth to provide guidance entirely of its own accord. One wonders why the Court asked for briefing and oral argument at all." *Mitchell*, dissent of Justice Sotomayor, footnote 5. Both our state's and our nation's Supreme Courts have been unfortunately unable to reach a majority opinion on this matter, despite

that—at the state level, at least—it has been clearly presented several times. While the lack of a majority is unfortunate, it is merely unfortunate. What is disappointing beyond that is the damage the Courts have done to the institution of the judiciary in avoiding the clearly presented issue. Their handling of it leaves the distinct impression that the Courts will break their own rules to avoid protecting the constitutional rights of citizens, in favor of making the executive branch's job more convenient. To the extent that there are controlling decisions by higher courts, this Court must follow them. What this Court is not obligated to do is follow the example of higher courts in avoiding issues that both the State and its citizens urgently need clarified.

In light of this Court's conflicting precedents, outlined in its certifications of this issue in previous cases, how can this Court proceed in this case? By recognizing that the helpful and instructive decisions of the U.S. Supreme Court as outlined in our previous briefing have resolved those conflicts, even though the Wisconsin Supreme Court has not yet specifically incorporated those resolutions in a decision of its own to reach the same result. In brief, while this Court's decisions in *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 867 and *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745 were in conflict, this Court was unable to resolve that conflict on its own. However, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) have resolved that conflict clearly in favor of the *Padley* analysis, notwithstanding that the Wisconsin Supreme Court remains ambiguous about it.

To sum: *Mitchell's* tangential relevance to this case is to be found in its failure to endorse statutory negation of the Fourth Amendment, favoring instead reliance on one of the few, well-delineated, very old exceptions to it. The exception the Court considered ex nihilo in *Mitchell* is not relevant to this case, and has in fact been waived and/or forfeited by the State at the circuit court level in this case. It cannot properly be raised now.

II. *Paull* is Inapplicable

The most relevant part of *State v. Paull*, 2019 WL 3820298, as it relates to this case, are its final words in footnote 6: "This opinion is of course confined to the record before the court and does not address what may constitute good faith reliance regarding the same provisions in different circumstances at different times." The facts at issue in *Paull* took place before *Birchfield*, and with an officer vaguely trained after *McNeely* (in contrast to the officer in this case). Clearly, these are different circumstances, at different times.

Good faith is fully addressed in our previous brief. The State's contentions that the unpublished and non-binding *Paull* are applicable ignores that in this case the circuit court judge's determination was based particularly on the officer's own testimony—not some legal ambiance the officer may or may not have been aware of—in order to determine that he did not act in good faith. In *Paull*, the reverse was true: Both the circuit court and the Court of Appeals found that the officer's admitted ignorance of the law worked to absolve him of his constitutional ineptitude. Nothing in the unpublished *Paull* rebuts the binding precedent and analysis laid out

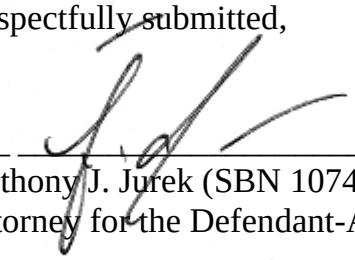
in our brief-in-chief or changes the facts of the officer's testimony and the circuit court's findings of fact in this case.

Conclusion

For the reasons stated herein and in our primary brief, this Court should affirm the circuit court.

Dated this 12th day of November, 2018.

Respectfully submitted,



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CERTIFICATIONS

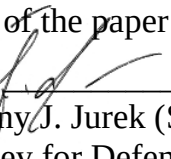
I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,465 words.

Further

I hereby certify that consistent with Wis. Stat. §809.19(3)(b), a supplemental appendix is unnecessary, as all documentation required of the appeal and essential to its understanding is included in the appendix to the State's Brief.

Further

I certify that consistent with Wis. Stat. § 809.19(12)(f) the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.



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