SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V. Appeal No. 2016AP308-CR

DAWN M. PRADO,

DEFENDANT-RESPONDENT.

PETITION FOR REVIEW

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INTRODUCTION

Dawn M. Prado petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District IV, in State of Wisconsin v. Dawn M. Prado, appeal no. 16AP308-CR, filed on June 25, 2020 (motion for reconsideration denied July 17, 2020).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the "good faith" exception to the warrant requirement should be extended to an officer's reliance on law which is not "well established."

The circuit court found that the officer's reliance was not in good faith because it was well established that warrantless blood draws were not permissible and the officer had been trained in the warrant system but not used it.

The Court of Appeals, apparently employing a *de novo* standard of review without articulating as much or referencing the circuit court's findings, decided that the officer had acted in "good faith" reliance on *some* of the law at the time.

2. Whether the "good faith" exception to the warrant requirement should be extended to officers who are not "well trained" in the matter they supposedly exercised "good faith" in.

The circuit court found that the officer did not act in good faith because he was trained in the warrant system but did not use it.

The Court of Appeals did not characterize the officer's training, but found apparently *de novo* that what it imputed was the officer's subjective understanding of some of the law was sufficient to satisfy the "good faith" standard. The Court of Appeals denied a motion for reconsideration squarely presenting the issue.

3. Whether a circuit court's determination that an officer did not act in good faith is a question of fact, law, or both, and what standard of review ought to apply to

such determinations, is an issue of first impression requiring a decision from this court.

The circuit court did not have occasion to answer this question.

The Court of Appeals apparently employed without announcing a *de novo* standard of review, and denied a motion for reconsideration squarely presenting the issue.

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

The Court of Appeals' decision is in conflict with controlling opinions of this Court: Binding precedent has established the "good faith" exception to the exclusionary rule only when a reasonably well trained officer acts in reasonable reliance on well settled law. The Court of Appeals decision in this case applies the good faith exception to a poorly trained officer's unreasonable reliance on unsettled law.

Because of this, a decision by this Court will help develop, clarify, and harmonize the law. Because the Court of Appeals decision is published, not accepting review to correct the application of good faith in these circumstances will leave bad precedent to infect circuit courts' prospective application in such instances. I.e., it is a question of law that is likely to recur.

Further, because the standard of review is unrefined (evident from the Court of Appeals' failure to articulate the standard of review) a decision by this court will help clarify the law.

STATEMENT OF THE CASE

Dawn Prado was found injured and unconscious at the scene of a motor vehicle crash. Criminal Complaint, R. 1; A-App 101. She had been thrown from a vehicle registered to her, and the other occupant of Dawn's vehicle wandered about the scene, insisting unbidden that he had not been driving. *Id.* The driver of the other vehicle was dead. *Id.* Dawn was transported to a hospital, and her blood was drawn at the instruction of an officer to test for intoxication. *Id.* A warrant was not sought. Order Granting Motion To Suppress, R. 33, A-App. 122-125.

Dawn sought suppression of the warrantless blood draw. Motion Hearing, December 3, 2015, R. 41, 9-13, A-App. 134-138. Briefs were submitted, an evidentiary hearing conducted, and more briefing was ordered. *Id.* The circuit court decided that the evidence was obtained in violation of the Fourth Amendment, that Wis. Stat. § 343.305 does not authorize drawing blood from an unconscious person, and that to the extent the statute does it is unconstitutional beyond a reasonable doubt. Order Granting Motion To Suppress, R. 33, A-App. 122-125. The court also considered the State's "good faith" argument, rejecting it on the basis that the officer admittedly knew of the warrant requirement, had been trained to use it over a year before, had used the warrant system before, and there was no reason to not use it. *Id.*

The State appealed. The Court of Appeals decided that the blood draw was unconstitutional beyond a reasonable doubt, but that the officer acted in good faith. Dawn petitions this Court for review solely on the good faith determination.

ARGUMENT

The good faith exception to the warrant requirement is applicable only when an officer who is 1) reasonably well trained, 2) acts in objectively reasonable reliance, 3) on well established law. *State v. Dearborn*, 2010 WI 84, ¶36, 327 Wis. 2d 252, 786 N.W.2d 97. If the officer was not reasonably well trained, if the officer's reliance was not objectively reasonable, or if the law was not well settled, the good faith exception thus cannot apply. In this case, there are a number of permutations of these factors in which the officer's actions cannot fall under the good faith exception: Since the law was unsettled, his reliance cannot have been objectively reasonable. If he was unaware the law was unsettled, he cannot have been reasonably well trained. An unreasonable reliance on unsettled law cannot be characterized as "good faith."

Further, the characterization of this issue and the standard of review which ought to apply, implicating what level of deference is due to the circuit court, are unrefined and mitigate in favor of this Court granting review.

I. The "good faith" exception to the warrant requirement should not be extended to an officer's reliance on law which is not "well established."

The law the officer purported to rely on could by no means be characterized as "well-established" or "clear and settled." Quite the opposite. While a statute purporting to authorize unconscious blood draws was on the books, that statute was called into question

by *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, which conflicted with *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, and was informed by *Missouri v. McNeely*, 569 U.S. 141 (2013). As the circuit court found through the officer's own testimony, a telephonic warrant system had been put in place shortly after *McNeely*, and the officer admitted he was trained in it soon after (well ahead of the instant circumstances). The officer did not recall whether he'd been trained in *Padley*.

The indisputable fact of the matter is that the law was in flux. The existence of a statute does not mitigate that fact. An officer would be no more reasonable in drawing blood from an unconscious person without a warrant than they would in arresting someone for performing an abortion: A statute currently on Wisconsin's books (Wis. Stat. § 940.15) that is nonetheless unenforceable by virtue of binding or superseding authority. One can disagree about whether abortion should be criminal, but what is not in dispute is that the statutes prohibiting it are unenforceable by virtue of governing authority such as *Roe v. Wade* and its progeny.

So the mere existence of a statute authorizing something cannot, on its own, make that thing "well established." When there is binding precedent against such a statute, the statute is nonetheless illegal. Even in the absence of binding precedent declaring it illegal, the fact that the Court of Appeals and Wisconsin and U.S. Supreme Courts had all been presented with the issue and either come to different conclusions or avoided deciding whether the statute was constitutional means that it was, by definition, not well-

established.

Aside from the statute, *Wintlend* and *Padley* informed this issue to opposite results. The Court of Appeals understates it when it assesses "*Padley* may have been in conflict with the earlier *Wintlend*…" As they thoroughly delineated in the decision, *Padley* was in conflict with *Wintlend*. Decision at ¶¶ 34 to 49. And that tension is necessarily the opposite of "well-established law." If *Wintlend* could somehow preempt *Padley*, or if *Padley* could overrule *Wintlend*, either of those would result in "well-established" or "clear and settled" law. But neither could, which is the definition of *not* well-established, of unclear, and unsettled. The cases were clearly in conflict, making the law unsettled. Thus, the officer's reliance could not have been on well established law, and the good faith exception cannot apply.

II. The "good faith" exception to the warrant requirement should not be extended to officers who are not "well trained" in the matter they supposedly exercised "good faith" in.

In order for the good faith exception to apply, an officer must be "reasonably well trained" in the matter they're supposed to be exercising "good faith" in. *Dearborn* at ¶36. In this case, the officer admitted that he had been trained in a telephonic warrant system after *McNeely*, and did not recall whether he had been trained in *Padley*. The Court of Appeals noted that *Padley* could not overrule *Wintland*. Even upon a motion for reconsideration, though, the Court of Appeals did not address that neither could *Wintland* invalidate *Padley*. The Court of Appeals further imputed to the officer a subjective

understanding of just *some* of the law in existence at the time. Obviously, an officer's subjective, erroneous understanding of some law is not the correct standard to employ.

The summation of the Court of Appeals decision on this issue was:

> Despite these concerns, we are persuaded that in this case, the State has met its burden to show that the officer who directed the warrantless blood draw acted in objective good-faith reliance on the incapacitated driver provision. At the time that Prado's blood was drawn, the incapacitated driver provision had been on the books for decades, and its constitutionality had not been challenged in any published appellate decision.[ ] *Wintlend* was the law in Wisconsin and had not yet been overruled by *Birchfield*. The officer testified that he was familiar with *McNeely*, that he had been trained to use the Dane County telephone warrant system developed in *McNeely's* wake, and that he had used the system approximately a dozen times, all in situations involving conscious drivers who refused to consent to chemical testing. However, the officer also testified that he had never attempted to obtain a search warrant for a blood draw from a person who was unconscious, and that based on the incapacitated driver provision, it did not occur to him that he might have to do so. As we understand it, the implication of this testimony is that the officer did not read *McNeely* to prohibit officers from relying on the implied consent of incapacitated drivers, which, as discussed above, the statute presumes has not been withdrawn.

Decision at ¶71. The Court of Appeals observes in a footnote:

> We recognize that *Padley* had been decided six months before Prado's blood draw, and that, for the reasons explained above, a careful reader of *Padley* might have drawn conclusions about the constitutionality of the incapacitated driver provision. *See supra* ¶¶34-35. However, and also as explained above, we cannot overrule our own precedent. *Padley* may have been in conflict with the earlier *Wintlend*, but it could not and did not overrule it. Accordingly, we cannot conclude that at the time Prado's blood was drawn, an objectively reasonable officer would have read *Padley* to mean that the incapacitated driver provision was unconstitutional.

There are several problems with this analysis which are fatal to its conclusion. First, the Court of Appeals purports to understand that the "implication of this testimony is that the officer did not read *McNeely* to prohibit officers from relying on the implied consent…" To be clear, the Court of Appeals is imputing a subjective understanding of

the officer. Who cares what the officer understood *McNeely* to mean? The officer's subjective, erroneous understanding is not the standard. It is the opposite of the "objectively reasonable reliance on settled law" standard. Second, imputing a subjective understanding, the Court of Appeals cites only portions of the officer's testimony, ignoring his lack of recollection regarding whether he'd been trained in *Padley*. The Court of Appeals thus avoids any discussion (even after the issues were squarely presented in a motion for reconsideration) of the factors—including whether the officer was reasonably well-trained—that must be present for a finding of good faith.

While the Court of Appeals notes that *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) had not yet overruled *Wintlend*, *Padley* (consistent with what *Birchfield* later established) had thrown *Wintlend* into doubt.

Third, his subjective understanding is irrelevant whether he was trained in *Padley* or not: The "objectively reasonable reliance" necessitates a "reasonably well trained officer." A reasonably well trained officer would be trained in *Padley* within six months after it was decided. If not half a year, how long a span of time is appropriate before this Court believes police officers should have to start to pay attention to this Court's dictates? How long can the police conveniently ignore the dictates of the courts? While the Court of Appeals is entirely correct that *Padley* could not overrule *Wintlend*, neither could *Wintlend* invalidate *Padley*: A necessarily true inverse that the Court of Appeals must ignore (and did, on a motion for reconsideration) in order to reach a conclusion of "good faith."

An officer's subjective understanding of conflicting, binding authorities is not the standard. The fact that the law was indisputably unsettled in light of the conflict between two cases decided well before the circumstances at hand means that the law was as a matter of fact not settled, and if the officer did not know that, he was not reasonably well trained. Therefore, the good faith exception cannot apply.

III. Characterizing a circuit court's determination of no good faith as a matter of fact, law, or both (and its implications on what standard of review is to be applied), is an issue of first impression and requires a decision by this court.

Which standard of review applies to the issue of good faith in this factual context is not clear. Most frequently suppression issues are regarded as a mixed question of fact and law. *See e.g. State v. Hess*, 2010 WI 82, ¶19. We maintain, as with constitutional questions like competency, that the facts are inextricably tied to the constitutional determination, and therefore the circuit court is owed clearly erroneous deference. *See State v. Garfoot*, 207 Wis. 2d 214 (1997). Whereas previous cases have applied a standard of review when considering an officer's reliance on statute, on pronunciations of the court, on a warrant, etc. (*See State v. Blackman*, 2017 WI 77, ¶70), here it is the officer's supposed reliance on a statute at odds with case law the officer admits he was trained in and other case law he either was or should have been trained in. Regardless, Courts have characterized the application of the "good faith" exclusion as a balancing test. *See* Decision at ¶69; *State v. Dearborn*, 2010 WI 84, (dissent at footnote 21). To the extent the circuit court engaged in such a balancing test, it is owed deference unless clearly erroneous, and a reviewing Court should search the record for grounds in support.

See State v. LaCount, 2008 WI 59, ¶15. Which standard of review to apply therefore affects most particularly reviewing courts' treatment of the circuit court's findings of fact.

This Court should accept review to articulate the appropriate characterization of the issue and standard of review when a circuit court makes a finding of good faith (or lack of it) and a reviewing court's obligation of deference.

CONCLUSION

For the foregoing reasons, Dawn M. Prado respectfully requests that the court grant this petition for review.

Dated: August 17, 2020

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CERTIFICATION

I certify that this petition for review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4)(a) for a petition produced using a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this petition from introduction to conclusion is 2,653 words.

Dated: August 17, 2020

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:
This electronic petition for review 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 petition for review filed with the court and served on all opposing parties.

Signed

Signature

APPENDIX

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