STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP002474 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BENJAMIN SCHNELLER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
AUGUST 24, 2016, IN THE CIRCUIT COURT
FOR COLUMBIA COUNTY, BRANCH 2,
THE HONORABLE W. ANDREW VOIGT, PRESIDING

Respectfully submitted,

BENJAMIN SCHNELLER,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES

I. DID THE ANALYSIS OF SCHNELLER'S BLOOD EXCEED THE SCOPE OF THE SEARCH WARRANT?

TRIAL COURT ANSWERED: NO

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Schneller's motion to suppress – for exceeding the scope of the search warrant. R. 29.

Benjamin Schneller, the defendant herein, was charged with operating while intoxicated on December 24, 2014, in Columbia County, Wisconsin. R. 1. Schneller filed a Motion to Suppress Blood Test Result for exceeding the particularity of authorization in the search warrant and subsequently filed an amended version of that motion. R. 9, R. 14. The parties agreed there was probable cause to arrest Schneller for operating while intoxicated, that he was read the Informing the Accused form, and that he did not consent to a blood draw. R. 28:2-3. The State filed a brief in response to Schneller's motion and argument, attaching the search warrant and affidavit used in this case. R. 33. Schneller filed a responsive brief and the trial court then issued an oral decision. R. 15, R. 29.

The search warrant in this matter specifically states:

> NOW, THEREFORE, IT IS ORDERED, in the name of the state of Wisconsin:
> 1. That a search warrant for the taking of a blood sample from the body of the above named driver is hereby issued by the court;
> 2. That the arresting officer, or other law enforcement officers, shall secure the assistance of trained medical personnel to obtain a blood specimen from the person of the above named driver, which shall be done using medically acceptable means, and shall be done under the supervision of a law enforcement officer.

3. That the law enforcement officers executing this search warrant are hereby authorized to use reasonable force to accomplish the execution of this search warrant.
4. That the arresting officer above named, or other law enforcement officers are commanded to secure the recording of this search warrant application and bring the same to my court by the next business day following this order.

   FURTHER, you are commanded to execute this search warrant within 5 days, and return this warrant within 48 hours after its execution, along with an inventory of any property taken, to the Clerk of Court for Columbia County, Wisconsin.

R. 33:11.

The trial court ruled against Schneller, finding that ***Riley v. California,*** 134 S. Ct. 2473 (2014) was distinguishable and that, "there is absolutely no evidentiary value to a vial of blood in this case without an ethanol or other test." R. 29:4. The trial court ruled that because a cell phone, the object searched in ***Riley***, can contain evidence of criminal conduct without further testing but also may need to have further examination to be of evidentiary value, then there is a need to be specific about what search is necessary under those circumstances. R. 29:5. The trial court further held that "[i]f there had been testing for something other than an intoxicant in the defendant's blood, or if the defendant had been arrested for some offense that didn't involve impairment and there was testing done for impairment, then maybe that's a great argument." ***Id.*** However, in this case only testing for alcohol was performed. Ultimately the trial court ruled, "[g]iven all those circumstances, the defense motion to

suppress has to be denied." R. 29:9. Schneller then entered a plea and was sentenced. R. 30. The sentence was placed on hold, and Schneller appeals to this Court. R. 20, 23.

ARGUMENT

I. THE BLOOD TEST RESULTS MUST BE SUPPRESSED BECAUSE THE SEARCH WARRANT DID NOT AUTHORIZE ANY ANALYSIS OF SCHNELLER'S BLOOD.

A. Standard of Review

In this matter, the facts were agreed upon in the lower court and only issues of law remain. This Court owes no deference to the lower court's legal conclusions and reviews *de novo* the issue of how the facts apply to the law. ***State v. Padley***, 2014 WI App 65, ¶ 65, 354 Wis. 2d 545, 849 N.W.2d 867.

B. Society recognizes a legitimate privacy interest in the information contained in a sample of blood.

The Fourth Amendment protects incursions by the government into an individual's "reasonable expectation of privacy." ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." ***Schmerber v. California***, 384 U.S. 757, 767 (1966). A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol, drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and

genetic profiles suitable for identification purposes. For these reasons, the Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy. ***Skinner v. Railway Labor Executive's Association***, 489 U.S. 602, 616 (1989).

More recently, the Supreme Court further commented on the information contained in a blood sample, as distinct from a breath sample: "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2178 (2016). Thus, citizens have a legitimate and recognized privacy interest in the information contained in their own blood. Therefore, Schneller has an interest in the privacy of his blood in this matter.

C. The mere possession of a blood sample by the police cannot authorize the analysis of the sample.

The Supreme Court has recently addressed the applicability of the warrant requirement to the examination of cell phones. ***Riley v. California***, 134 S. Ct. 2473 (2014). While there are differences

between blood analysis and the search of a cell phone, there are also striking similarities—both a cell phone and a blood sample are items that, unexamined, are innocuous but that have the capacity to reveal a wealth of personal information if analyzed.

The question in ***Riley v. California*** was whether the police, having lawfully seized a cell phone in a search incident to arrest, were permitted under the Fourth Amendment to conduct a warrantless analysis of the contents of the phone. 134 S. Ct. 2473, 2480 (2014). The Court recognized that the data stored on a cell phone could not only be vast, but could include information implicating significant privacy concerns, such as information about a medical diagnosis. ***Id.*** at 2490. The Court ultimately decided:

> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest…Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Id. at 2493, 2495.

One of the overarching principles of the ***Riley*** decision is that law enforcement's conduct *can* be broken into multiple constitutionally significant events, each requiring separate justification under the Fourth Amendment. Removing a cell phone from a citizen's pocket is an invasion of his privacy that must be

legally justified; taking that cell phone and analyzing it is another invasion of privacy which must be independently justified. Thus, while the seizure may be authorized under an exception to the warrant requirement, the analysis of the phone's contents is a separate search requiring either a warrant or an exception to the warrant requirement of the Constitution.

Here, the trial court held that because the blood itself is useless without analysis, there is no need to indicate in the search warrant that analysis is authorized. However, that is not consistent with the holding in ***Riley*****.** One can also argue that the only purpose of seizing a cell phone is to examine what is stored on it. Yet the Supreme Court saw fit to do precisely what the State is arguing cannot be done—to separate the seizure of the item and its analysis into separate constitutional events, each requiring its own justification. In this case, the seizure of the blood is lawful because it is taken pursuant to a warrant. However, that warrant does not authorize any analysis of the blood. Consequently, there is no legal justification for the analysis.

D. The *Riedel* and *VanLaarhoven* cases do not dictate the result in this case.

In the trial court, the State cited to ***State v. Riedel*** and ***State v. VanLaarhoven*** for its argument that no legal justification is

necessary for the analysis of a lawfully obtained blood sample. 259 Wis. 2d 921, 656 N.W.2d 789, 2003 WI App 18; 248 Wis. 2d 881, 637 N.W. 2d 411, 2001 WI App 275. That argument does not dictate the result in this matter for several reasons. First, ***Riedel*** was published in 2003 and ***VanLaarhoven*** in 2001. Those cases have not been reexamined in any published decision since the publication of ***Riley v. California*** in 2014. ***Riedel*** holds, broadly, 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." ***Id.***, 2003 WI App 18, ¶16 (internal citations and punctuation omitted). That general holding is in direct conflict with the holding in ***Riley***, which held that the examination of evidence seized pursuant to an exception to the warrant requirement *did* require a judicially authorized warrant. The future validity of ***Riedel*** is thus in question because decisions of the United States Supreme Court are binding on our courts.

In addition, both ***Riedel*** and ***VanLaarhoven*** are distinguishable from the factual scenario in Schneller's case. The collection of the blood sample in ***Riedel*** was justified by "exigent circumstances." ***Id.*** ¶6. The search in ***VanLaarhoven*** was justified by

the consent of the driver. ***VanLaarhoven***, 248 Wis. 2d 881, 887. Wisconsin courts had long held that the Fourth Amendment was satisfied without a search warrant in cases where there was probable cause to believe drunk driving had occurred and alcohol was dissipating from the blood of the suspect. ***State v. Bohling***, 494 N.W.2d 399, 173 Wis. 2d 529 (1993). Therefore, there was no search warrant to examine and determine whether it permitted the analyses subsequently performed in either ***Reidel*** or ***VanLaarhoven***. Importantly, ***Bohling*** was subsequently abrogated by ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) and ***State v. Foster***, 360 Wis. 2d 12, 856 N.W.2d 847 (2014). Since ***Foster***, Wisconsin law has recognized dissipation of alcohol alone is not sufficient exigency to form the basis for a warrantless search.

Schneller's blood draw was itself justified by a warrant. While "exigent circumstances" is a well-recognized exception to the warrant requirement, there is a vital distinction between a search pursuant to an exception to the warrant requirement and a search pursuant to a warrant. A search pursuant to a warrant must be strictly limited by the constitutional requirement of particularity of the warrant, whereas a search pursuant to an exception to the warrant requirement is not so limited. ***Morales v. State***, 44 Wis. 2d 96, 104-

5, 170 N.W.2d 684 (1969). Where there is a search authorized by an exception to the warrant requirement, the search is reasonable if properly limited to the exception in play. For example, if a search is authorized by consent (as in ***VanLaarhoven***), then the scope of the consent determines the reasonableness of the search. ***Maryland v. Garrison***, 480 U.S. 79 (1987); ***Brinegar v. United States***, 338 U.S. 160 (1949). However, if the search is authorized by exigent circumstances (as in ***Riedel***), then probable cause limits the scope of the search. ***State v. Smith***, 131 Wis. 2d 220, 388 N.W. 2d (1986). There is no published case extending the holdings in ***Riedel*** and ***VanLaarhoven*** to searches initially authorized by warrant where the warrant does not authorize the analysis of the sample. That would be an incorrect application of law, as it would apply a standard based on exigent circumstances or consent to a case where a search warrant had been issued.

E. The scope of a search warrant must be explicit, not implicit.

While the trial court did not specifically state that the scope of the search warrant was implied by the type of law enforcement investigation, that does seem to be the basis for the ruling. As set forth below, this cannot be the case. The scope of a search warrant must be explicit.

The Fourth Amendment specifically requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*." (Emphasis added.) The particularity requirement is intended to prevent "general searches" where law enforcement is left to its own discretion as to what to search. ***Boyd v. United States***, 116 U.S. 616, 624 (1886), abrogated on other grounds ***Marron v. United States***, 275 U.S. 192, 195 (1927). While such descriptions do not have to be technical, they must be sufficient to delineate what an officer is allowed to search and seize without leaving it up to the officer to make that determination. ***Morales v. State***, 44 Wis. 2d 96, 104-5, 170 N.W.2d 684 (1969).

The search warrant in this case explicitly authorizes "the taking of a blood sample from the body" of Schneller. The warrant authorizes the means for the execution of the warrant. It does not authorize any analysis or examination of the blood sample. The warrant is facially devoid of any authorization for the analysis of the blood. There are then only two possible interpretations of law enforcement's execution of this warrant—either (1) law enforcement exceeded the scope of the warrant; or (2) there is "implicit"

authorization contained in the warrant for the analysis of the blood. If the first is correct, then the evidence must be suppressed. If there is "implicit" authorization, then the Court must consider the ramifications of a warrant that grants such broad implied authority.

As noted above, the Supreme Court has recognized that a blood sample contains a significant amount of personal information, far beyond a simple blood alcohol reading. ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2178 (2016). If implicit authorization to analyze the blood sample can be read into the warrant, then additional authorizations can presumably be read in as well. For example, in this case, Schneller and another person were both outside of the vehicle when the police arrived. R. 1:2. If identity of the driver had become an issue at trial, would the State have been implicitly authorized to use the blood sample obtained from Schneller for identification purposes? The blood obtained from him could certainly be used to develop a genetic profile and test that against evidence obtained from a steering wheel or driver's seat of a vehicle. Could the warrant be read to authorize the testing of the blood for medical conditions? Suppose the driver claimed to suffer from a medical condition which mimicked the symptoms of alcohol intoxication under the circumstances – such as diabetes. Could the

blood then be tested to determine whether the driver had diabetes? The very purpose of a warrant, the purpose of the Fourth Amendment, is to appropriately limit the authority of the government.

If authority for blood analysis can be implied from the face of the warrant, then the warrant is a constitutionally overbroad "general warrant," which is invalid under the Fourth Amendment. The historical purpose of the particularity requirement was to prohibit a "general warrant" authorizing the "general, exploratory rummaging through a person's papers and effects." ***State v. Starke***, 81 Wis. 2d 399, 412-13, 260 N.W.2d 739 (1978) (internal citations omitted). The founders of this country did not trust law enforcement officers to receive a general warrant and then abide by some ephemeral "implicit" limitations. The warrant must be explicit; "nothing is left to the discretion of the officer executing the warrant." ***Stanford v. Texas***, 379 U.S. 476, 485 (1965) (*quoting* ***Marron v. United States***, 275 U.S. 192, 196 (1927)).

CONCLUSION

When a search warrant is issued, it must state with particularity the things to be searched to be valid under the Fourth Amendment. When a search warrant for blood is issued, it must state with particularity those things for which police are permitted to look. As with a cell phone, there is significant personal data available, including genetic and medical information. A search warrant issued without limitation is illegal, and the fruits of any search based on such a warrant must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 481 n.9 (1963) (holding that the Warrant Clause's particularity "requirement applies both to arrest *and* search warrants" and applying the exclusionary rule to violations). The warrant issued for the collection of Schneller's blood did not authorize any analysis of any kind. Therefore, either the police exceeded the scope of the warrant; or the warrant was an overbroad, general warrant. Under either theory, all evidence derived from the analysis of the blood must be suppressed.

For all the reasons stated, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellant's motion to suppress. Had the suppression motion been granted, there would

have been insufficient evidence to convict Schneller, and he would not have entered a guilty plea.

Dated at Madison, Wisconsin, April 24, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,995 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: April 24, 2017.

Signed,

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: April 24, 2017.

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TABLE OF CONTENTS