STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2016AP002474-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BENJAMIN SCHNELLER,

Defendant-Appellant,

BRIEF OF PLAINTIFF-- RESPONDENT

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,

State of Wisconsin,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

The Appellant's only issue on appeal is whether the analysis of Schneller's blood exceeded the scope of the search warrant.

TRIAL COURT'S ANSWER

The Trial Court denied the defendant's motion to suppress (R. 29, pages 4-5). The Trial Court stated:

> So I'm not particularly shocked and would be surprised if there is any case law or significant case law on that point. I have to note that the Defendant successfully argues and very successfully in this Court's – persuasively argues in this Court's mind – there is absolutely no evidentiary value to a vial of blood in this case without an ethanol or other test.
>
> The problem, of course, is that's exactly why Riley v. California is distinguishable from this set of circumstances. My understanding is that was a cell phone case. A cell phone can be evidence of criminal conduct without any further testing of any variety whatsoever.
>
> Or it could have absolutely no evidentiary value whatsoever unless there is further testing or examination of the thing authorized. Hence, they need to be specific about what is necessary under the circumstances.
>
> In this case, everyone agrees that there is absolutely no evidentiary value to a vial of blood as it relates to the issues or outcome of this case. Without the test, it's a fruitless exercise. It was a waste of everybody's time. Someone got Judge George out of bed for absolutely no reason whatsoever.
>
> And, frankly, as to the Defendant's third point about the lack of specific testing being required, frankly, that argument might be persuasive if there was testing that had been done on this blood that

> wasn't exactly for the stated purpose that we were talking about.
>
> If there had been testing for something other than an intoxicants in the Defendant's blood, or if the Defendant had been arrested for some offense that didn't involve impairment, then maybe that's a great argument. In fact, probably a pretty good argument, but that's not what happened here. (R. 29, p. 4, lines 9-25 and p. 5, lines 1-25).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The Plaintiff-Respondent does not request that this case be published because the Plaintiff-Respondent believes that the issue of law to be decided in this case has already been well decided.

I. FACTS

The Facts in the case are contained in the Record of this case. Because the facts are all contained in the Record, there is no dispute in the facts, just a dispute in the law.

II. QUESTIONS PRESENTED

The only question in this case is whether the State needed a second search warrant in order to test the blood that was drawn from the Defendant.

III. TRIAL COURT'S FINDINGS THAT THERE WAS PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT IN QUESTION AND THAT THE LATER TESTING OF THE BLOOD AT THE LAB WAS NOT "A SECOND SEARCH" WAS NOT CLEARLY ERRONEOUS

The Respondent believes that the Standard of Review for this Court on the question presented is that it is a constitutional question of law that this Court will review *de novo*.[1] The Trial Court held that under the facts of this case, that essentially, there was not a "second search" of the blood by the lab when it was tested. (R. 29, pages 4-5). See above cite from the Trial Court, under Trial Court's Answer.

[1] II. STANDARD OF REVIEW
10 Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell,* 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams,* 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. *Id.,* ¶¶ 18–19. *State v. Popke*, 2009 WI 37, ¶¶ 9-10, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573.

IV. ARGUMENT

The Appellant argues that there was a separate, "second search" that was conducted by the lab when it tested his blood sample for indicators of impairment. He also argues that this testing that was done by the lab, needed a second search warrant for it to be justified. (*See generally,* Appellant's Brief). The Respondent disagrees with this assertion and asks that this Court agree with the ruling from the Trial Court and deny the Appellants request.

It is the Respondent's position that this issue has already been answered by the Court of Appeals in the case of *State v. Erstad*, 371 Wis.2d 566, 884 N.W.2d 535 (Wis. Ct. App. 2016). This is an unpublished opinion, which the Respondent will include a copy of the opinion with this brief, but it is citable as persuasive authority. The *Erstad* case involved almost the same challenges that were made by the same defense attorney. Because, the facts in this case are almost completely on point with the facts in the *Erstad* case, this Court should make the same ruling as the *Erstad* Court. The *Erstad* Court, on the issue of the "second search" stated:

> *B. Testing Of Blood Sample*
> *5 ¶ 20 I turn to Erstad's argument that the blood test result must be suppressed because the search warrant authorized only *drawing* her blood, not *testing* it. Erstad characterizes the testing of her blood as a "separate search for Fourth Amendment purposes" and, therefore, as requiring an additional warrant or a warrant exception.
> ¶ 21 Whether the express terms of the warrant failed to authorize testing of Erstad's blood seems

debatable, but rather than engage in that debate, I reject Erstad's testing argument for the same reason the circuit court did: This type of "separate search" argument was put to rest in *State v. Riedel,* 2003 WI App 18, 259 Wis.2d 921, 656 N.W.2d 789 (WI App 2002).[2]

¶ 22 *Riedel* makes clear that, once police lawfully obtain a blood sample in the course of a drunk driving investigation, they need not obtain further authorization to test the blood for the presence of alcohol. The court in *Riedel* explained:

> This court has concluded that *Snyder* and *Petrone* stand for the proposition 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. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components." *VanLaarhoven,* 2001 WI App 275 at ¶ 16, 248 Wis.2d 881, 637 N.W.2d 411. We find the reasoning of *Snyder, Petrone* and *VanLaarhoven* persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis.

Id., ¶ 16; *see also id.,* ¶ 17 (concluding that "analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search").

¶ 23 Erstad argues that the United States Supreme Court's decision in *Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), calls *Riedel* into question. In *McNeely,* the Court held that the natural metabolization of alcohol in the bloodstream is not a per se exigency justifying warrantless, nonconsensual blood draws. *McNeely,* 133 S.Ct. at 1560–61; *see also State v. Foster,* 2014 WI 131, ¶¶ 39–40, 360 Wis.2d 12, 856 N.W.2d 847 (discussing *McNeely*).

¶ 24 Erstad's argument as to why *McNeely* calls *Riedel* into question is not clear, but the argument appears to be based on an assertion that *Riedel* and the cases it builds upon involved blood draws that were justified by the per se exigency exception that *McNeely* rejected, or by a mixture of this per se exception and the Implied Consent Law. Taking this assertion as true, I fail to see why it matters. Neither exigency nor the Implied Consent Law played a role in the *Riedel* court's analysis of what

> police may do with a blood sample once they have lawfully obtained it. *See Riedel,* 259 Wis.2d 921, ¶¶ 7–17, 656 N.W.2d 789. And, for the reasons explained above, Erstad's blood was lawfully obtained based *not* on exigent circumstances or the Implied Consent Law but instead based on *a warrant.*
>
> ¶ 25 In another attempt to get around *Riedel,* Erstad argues that the *Riedel* court failed to address pertinent language in a different United States Supreme Court case, *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). That language in *Skinner* refers to the testing of blood as a "further invasion" of privacy interests. *See id.* at 616. Erstad is wrong about *Riedel* and *Skinner.* The court in *Riedel* acknowledged the pertinent *Skinner* language, and concluded that that language does not address whether the testing of lawfully obtained blood is a separate search. *See Riedel,* 259 Wis.2d 921, ¶ 16 n. 6, 656 N.W.2d 789.
>
> *6 ¶ 26 Erstad makes other arguments relating to *Riedel* but, as far as I can tell, these remaining arguments are tantamount to a request to modify or overrule *Riedel.* Such arguments must be directed at our supreme court. *See Cook v. Cook,* 208 Wis.2d 166, 189–90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court ... has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). *State v. Erstad*, 2016 WI App 67, ¶¶ 19-26, 371 Wis. 2d 566, 884 N.W.2d 535.

The Respondent agrees with everything that the Court stated above in the *Erstad* case.

This type of challenge was also tried by a defendant in the State of Washington, and rejected by the Supreme Court of Washington in the case of *State v. Martines*, 184 Wash.2d 83, 355 P.3d 1111 (Wash. 2015). In this case, Martines challenged the testing of his blood after it was taken by search warrant, because he alleged that the warrant only authorized the taking of

the blood and not the test. (*See case generally.*) The *Martines* Court stated:

> 19 Martines next argues that even if the warrant was supported by probable cause to suspect alcohol and drugs, it lacked particularity to authorize blood testing. The Court of Appeals accepted this argument, concluding the warrant's language authorized only the drawing of a blood sample from Martines, not the testing of that sample for drugs or alcohol. *Martines,* 182 Wash.App. at 531, 331 P.3d 105. The court reasoned that absent express authorization to test the blood, a vague warrant could potentially allow the State to "rummag[e]" the blood sample for evidence unrelated to DUI. *Id.* We disagree.
>
> 56 ¶ 20 The Fourth Amendment and article I, section 7 of our state constitution require that "warrants describe *93 with particularity the things to be seized." *State v. Riley,* 121 Wash.2d 22, 28, 846 P.2d 1365 (1993); *State v. Perrone,* 119 Wash.2d 538, 545, 834 P.2d 611 (1992). This requirement "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone,* 119 Wash.2d at 546, 834 P.2d 611. Courts examine the purpose of the "particular description" requirement to determine whether the description is valid. These purposes include (1) preventing exploratory searches, (2) protecting against "seizure of objects on the mistaken assumption that they fall within" the warrant, and (3) ensuring that probable cause is present. *Id.* at 545, 834 P.2d 611.
>
> ¶ 21 The warrant in this case authorized the "extract[ion]" of a blood sample from Martines, indicating probable cause existed to believe his blood contained evidence of DUI. CP at 100–01. The purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI. It is not sensible to read the warrant in a way that stops short of obtaining that evidence. A warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause. The only way for the State to obtain evidence of DUI from a blood sample is to test the blood sample for intoxicants. *See State v. **1116 Grenning,* 142 Wash.App. 518, 532, 174 P.3d 706 (2008) ("[I]t is generally

> understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value."), *aff'd,* 169 Wash.2d 47, 234 P.3d 169 (2010).
>
> ¶ 22 The court erred in concluding the warrant was fatally deficient. The warrant in this case was supported by probable cause to believe Martines's blood contained evidence of DUI. We apply a commonsense reading to the warrant and conclude it authorized not merely the drawing and storing of a blood sample but also the toxicology tests performed to detect the presence of drugs or alcohol. *See Perrone,* 119 Wash.2d at 549, 834 P.2d 611 ("Search warrants are to be *94 tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense.").
>
> 78 ¶ 23 Lastly, the State argues the search was executed within the scope of the warrant because it acted reasonably in testing the blood sample. Martines does not address the permissible scope of the search, resting his arguments on the warrant's lack of probable cause and particularity. We emphasize that police "must execute a search warrant strictly within the bounds set by the warrant." *State v. Kelley,* 52 Wash.App. 581, 585, 762 P.2d 20 (1988) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 394, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). The nature of the items to be seized governs the permissible degree of intensity for the search. *State v. Lair,* 95 Wash.2d 706, 717, 630 P.2d 427 (1981).
>
> ¶ 24 Here, the warrant referred to the extraction of a blood sample from Martines to obtain evidence of DUI. As discussed above, a warrant authorizing extraction of a blood sample necessarily authorizes testing of that sample for evidence of the suspected crime. The search in this case did not exceed the bounds of the search warrant when a sample of Martines's blood was extracted and tested for intoxicants. *State v. Martines*, 184 Wash. 2d 83, 92–94, 355 P.3d 1111, 1115–16 (2015).

The Respondent agrees with everything that the Court in *Martines* stated above as well.

V. CONCLUSION

Each of the above cited cases are similar to Mr. Schneller's case. The Search Warrant and Affidavit in Support of the Warrant, in this case can be found by this Court attached to the State's Brief in Response to Defendant's Motion to Suppress Blood Test Results (R. 33, pages 11-14). The search that was authorized in the warrant was for the blood for evidence in an OWI case. (R. 33, page 11). The Affidavit in Support of the OWI detailed why the officer believed that there was probable cause to believe that Mr. Schneller had in fact operated a motor vehicle while under the influence of alcohol or with a prohibited alcohol concentration. (R. 33, pages 12-14). When this Court reads these documents together, this Court should come to the same conclusion as the above Courts did in the *Erstad* and *Martines* cases and should deny the Appellant's request.

Given the facts of this case, the Trial Court was absolutely correct in its ruling that there was not a "second search" when the lab tested the blood under these circumstances. Because the Trial Court was correct in its ruling, the Respondent asks that this Court uphold the Trial Court's decision and deny the Appellant's appeal.

Dated at Portage, Wisconsin, May 17th , 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 with a Proportional Serif Font. The length of this brief is 2,958 words.

Dated this 17th day of May, 2017.

Signed,

_____
Troy D. Cross
Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2015AP1650, excluding the appendix, if any, which complies with the requirements of s. 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 17th day of May, 2017.

Signed:

_____

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