

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP002474 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BENJAMIN SCHNELLER,

Defendant-Appellant.

REPLY BRIEF 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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ARGUMENT

I. STANDARD OF REVIEW.

The State argues the trial court made a finding of fact that no second search occurred in this matter. Whether a second search occurred, however, is a question requiring the application of facts to a constitutional principle, and is to be determined by this Court without deference to the circuit court's decision. *State v. VanLaarhoven* 248 Wis. 2d 881, 885, 637 N.W.2d 411 (Ct. App. 2001). In support of its argument, the State cites to the record of the trial court's oral ruling at pages 4-5, stating that the trial court made findings of fact including that there was no "second search." However, that citation is to a passage of the transcript where the circuit court discusses *McNeely v. Missouri*, 133 S. Ct. 1552 (2013) and *Riley v. California*, 134 S. Ct. 2473 (2014) and makes its finding that Schneller's blood was not tested for anything other than alcohol. The court makes no reference to a second search.

The proper standard of review in this matter is to apply the facts in the record, unless clearly erroneous, to the constitutional question and determine *de novo* whether the trial court was correct in

its application of the facts to the constitutional question. *State v. Padley*, 2014 WI App 65, ¶ 65, 354 Wis. 2d 545, 849 N.W.2d 867.

II. THE STATE HAS ADVANCED NO ARGUMENT OR CASELAW CONTRARY TO THE DEFENDANT'S POSITION THAT THE ANALYSIS OF HIS BLOOD EXCEEDED THE SCOPE OF THE WARRANT.

The State responds to the defendant's arguments only by citing to *State v. Erstad*, 371 Wis. 2d 566, 884 N.W. 2d 535 (Ct. App. 2016) (unpublished but citable as persuasive authority pursuant to Wis. Stat. (Rule) 809.23(3)) and *State v. Martines*, 184 Wash.2d 83, 355 P.3d 1111 (Wash. 2015), a state of Washington opinion not binding on Wisconsin courts. The State essentially cites to a large portion of these two decisions and agrees with those holdings, without analyzing or applying those decisions and their holdings to the facts in this case or with the arguments made and law cited by the defendant. As an initial point, the defendant notes that any argument not responded to is conceded. The failure to respond to the defendant's arguments and caselaw should be deemed a concession that the defense argument is correct. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Furthermore, a failure to properly brief or explain an argument waives that argument on appeal. *State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

A. An individual has a legitimate privacy interest in a sample of his or her blood.

The State does not respond to the defendant's argument that society recognizes a legitimate privacy interest in the information contained in a sample of blood. Defendant's brief specifically argues that based on the United States Supreme Court decisions in *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602, 616 (1989), and in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016), there is a recognized privacy interest in the information contained in a sample of blood. Further, the trial court's findings in this case seem to recognize that interest, without making any specific finding of fact, where the trial court indicated both that the blood sample is useless without further analysis and that had the blood sample been tested for something other than ethanol, that would likely run afoul of the law. R. 29:5. The State copies a large portion of the *Erstad* decision, which does reference *Skinner*, but does not reference *Birchfield* in any way. The copied portion of *State v. Martines* cites only to Washington law and does not address either *Skinner* or *Birchfield* and further does not appear to directly address the issue of whether a person has an on-going privacy interest in his own blood sample once it is drawn.

B. Possession of an item does not, by itself, allow for testing.

The State also does not address the defendant's argument based on *Riley v. California* 134 S. Ct. 2473 (2014), that the mere possession of the blood sample does not authorize the analysis of the blood. This argument is based on an analogy to the cell phone legitimately seized in *Riley*, where the United States Supreme Court found a search warrant was needed to authorize the search for information in that lawfully seized item. The State's brief does not address this issue or even cite to *Riley*. This issue is thus conceded. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Simply because the police possess an item which contains potentially incriminating information does not mean the police have the right to do whatever they want with it. *Riley v. California* 134 S. Ct. 2473, 2492 (2014). The State does not respond as to why this Court should find the analysis of the blood is permissible here, in an analogous situation. Law enforcement lawfully seized the blood, but the question is whether law enforcement had lawful authority to analyze that blood. *Riley* indicates constitutional analysis is required, because sometimes when information is already in possession of law

enforcement, a warrant is still required to lawfully analyze that information. The State simply does not address this argument.

C. Old caselaw based on abrogated law does not dictate the decision in this case.

The State further does not address defendant's argument that both *State v. Riedel*, 259 Wis. 2d 921, 656 N.W.2d 789, 2003 WI App 18 and *State v. VanLaarhoven* are called into question because of the significant decisions in *Missouri v. McNeely* and *Riley v. California*. Further, the factual scenarios in *Riedel* and *VanLaarhoven* did not involve actual warrants, and this case does. The State further does not address the argument that the authority for the analysis in *Riedel* is limited based on the theory of exigent circumstances, and the authority for the analysis in *VanLaarhoven* is limited based on the consent provided by the defendant, as that provided the legal authority to obtain the blood. Here the only limit to police authority is that specifically stated in the warrant. Thus, in this case, neither exigent circumstances or consent limit the government's authority. The only purported authority for the analysis of the blood is the warrant. The State does not address this argument in any way.

D. The scope of a lawful search warrant is explicit and not implicit.

Finally, the State does not directly respond to the argument that the scope of the search warrant must be explicit and not implicit. There is some discussion of search warrants and their implications in the copied portion of *State v. Martines*. However, that case involves only state of Washington law, and the State's brief does not analyze that information or apply it to the facts in this case. Importantly, the State does not indicate that either Wisconsin or precedential federal cases follow Washington law in this area.

Again, the State concedes the issue by not responding or by failing to fully develop its argument. *Charolais Breeding Ranches, supra; Petit, supra*. The State advances no argument counter the fact that either this warrant is overbroad or it is implicit. This is either a general warrant, which is prohibited, or the scope of the warrant is only implied, which is also unlawful. Either way, the analysis of the blood in this case must be suppressed.

CONCLUSION

For the reasons stated in this and defendant's original Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the trial court grant the defendant-appellant's motion to suppress.

Dated at Madison, Wisconsin, June 12, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this reply 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 points 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 1913 words.

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

Dated: _____, 2017.

Signed,

SARAH M. SCHMEISER
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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: _____, 2017.

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