STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP000043-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONNIE GENE RICHARDS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Waushara County Circuit Court,
the Honorable Guy D. Dutcher, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the results of the warrantless blood draw must be suppressed under the exclusionary rule because no exigent circumstances existed and, as such, the blood draw violated Richards' Fourth Amendment right to be free from unreasonable searches?

The circuit court answered: No, exigent circumstances justified the warrantless blood draw.

2. Whether the circuit court's implicit finding that Mr. Richards was unconscious or otherwise unable to withdraw consent, as contemplated by Wisconsin's implied consent statute, Wis. Stat. §§ 343.305(3)(ar)-(b), was clearly erroneous?

The circuit court answered: The "exceptions" to the implied consent requirements, including that the individual was unconscious, under Wis. Stat. 343.305(3)(ar) and (b) apply as "a subcategory" of the exigent circumstances analysis.

3. If the circuit court's implicit finding that Richards was unconscious or otherwise not capable of withdrawing consent is upheld, whether the provisions found in Wis. Stat. §§ 343.305(3)(ar) and (b) authorizing warrantless blood draws from unconscious individuals suspected of intoxicated driving are facial violations of the Fourth Amendment?

The circuit court implicitly answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Briefing should adequately address the issues presented by this case; however, Richards would welcome oral argument should the court deem it desirable. Publication will likely be warranted because this case presents the court an opportunity to determine the constitutionality and operation of Wisconsin's implied consent law as it applies to individuals who are unconscious or otherwise not able to withdraw consent.

STATEMENT OF THE CASE AND FACTS

On July 30, 2014, Officers Ryan McElroy and Wesley Bowser responded to a report of a vehicle in the ditch off of State Highway 73. (4:4; 46:4-5, 24). Officer McElroy arrived first on scene shortly after receiving the call from dispatch at 11:30 p.m. (4:4; 46:6). Officer McElroy observed the vehicle in the ditch, with the engine still running, and immediately made contact with the individual in the driver's seat, Richards, who was seriously injured. (4:4; 46:6-8). Upon contact with Richards, Officer McElroy smelled the odor of intoxicants. (46:8). Shortly thereafter, he observed empty beer cans in the vehicle. (4:4; 46:22-23). Officer McElroy believed that Richards had driven while intoxicated. (46:24).

During the initial contact, Richards identified himself and indicated that his arm was broken. (4:4; 46:7-8). Officer McElroy testified that Richards was able to answer his questions at times, but that he appeared to be fading in and out of consciousness. (46:9). Officer McElroy immediately called for emergency medical services (EMS) to attend to Richards. (*Id.*).

Officer Bowser arrived on scene sometime after Officer McElroy, but before EMS arrived, and began taking photographs of the scene. (4:4).

When EMS arrived they determined that the seriousness of Richards' injuries would require him to be transported from a local hospital to a larger medical facility by helicopter. (*See* 46:9-10). EMS attended to Richards on scene for approximately 15 to 20 minutes during which time Officers Bowser and McElroy remained with Richards and reviewed the accident scene to determine where Richards' vehicle went off the road. (46:26). Officer McElroy also testified that he was available "if EMS needed any assistance." (46:26). EMS took Richards in an ambulance to Wild Rose Hospital to await a helicopter transport to Theda Clark Medical Center. (46:10-11). Officer McElroy testified that the hospital was 6 to 7 miles away, which he estimated to be a 10 to 15 minute drive. (46:27).

After Richards left in the ambulance, Officer McElroy "finished processing the scene" and prepared the paperwork for a blood draw as he had already contacted dispatch to arrange for Richards' blood to be drawn at Wild Rose Hospital. (46:11). He did not ask Richards for his consent to obtain the blood draw, and testified that this was because he believed Richards' injuries would prevent him from consenting. (46:28). Officer McElroy did not attempt to obtain a warrant for Richards' blood and did not discuss obtaining a warrant with Officer Bowser. (46:27-28). Before departing for the hospital, Officer McElroy learned from EMS that Richards had lost consciousness while in the ambulance. (46:13).

Officer McElroy estimated that he left the scene at approximately 12:20 a.m. and arrived at Wild Rose Hospital between 12:45 a.m. and 12:50 a.m. (46:11, 27). In total, he had spent roughly one hour at the scene of the accident. (46:27).

At approximately 12:55 a.m., after Officer McElroy arrived at the hospital, Richards' blood was drawn. (46:14-15). Richards was in the ambulance awaiting the helicopter transport at the time of the blood draw. (46:14-15, 27). Richards was transported by helicopter to Theda Clark Medical Center at 1:15 a.m.[1] (46:10, 15).

Officer McElroy also testified to the general procedures used when an individual is suspected of driving while intoxicated. (46:18). Generally, if an individual is suspected of intoxicated driving and refuses to consent to blood testing or is unresponsive, Officer McElroy would contact Judge Dutcher by phone to obtain a warrant for a blood draw. (46:18, 20). Officer McElroy would communicate his observations of intoxication over the phone, and the Judge would make a determination regarding the warrant. (46:19).

Officer McElroy testified that the warrant procedure is conducted entirely by phone, requires no travel, can be done from the scene of an accident, and takes a total of 20 to 30 minutes to complete. (46:18, 20-22).

* * *

[1] The record reflects that Richards was not placed under arrest; rather, a summons and complaint were filed with the circuit court on August 13, 2014. (1).

The State initially charged Richards with operating while intoxicated (OWI), 12th offense, and operating a vehicle while revoked, 1st offense. (1:2-3). The State subsequently filed an amended complaint adding an additional charge of operating with a prohibited alcohol concentration (PAC), 12th offense. (4:2). The information charged all three counts. (18:1-3).

Richards filed a motion to suppress the results of the warrantless blood draw. (15). After holding an evidentiary hearing, the circuit court denied the suppression motion for the reasons discussed below. (46:45-46; App. 148-49). On August 3, 2016, Richards pled guilty to OWI (12th) with the PAC (12th) dismissed and the operating while revoked (1st) dismissed, but read in at sentencing. (50:2, 14). The circuit court, the Honorable Guy D. Dutcher, presiding, sentenced Richards to 10 years in prison, comprised of 6 years' initial confinement and 4 years' extended supervision. (50:17; 42; App. 101-03). Richards filed a timely notice of appeal. (52).

ARGUMENT

I. The Results of Richards' Warrantless Blood Draw Must be Suppressed Under the Exclusionary Rule Because No Exigent Circumstances Existed; Therefore, the Blood Draw Violated Richards' Fourth Amendment Right to be Free from Unreasonable Searches.

A. Introduction and standard of review.

The Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable

searches.[2] The Fourth Amendment, in pertinent part, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .". U.S. Const. amend. IV.

A basic and long held principle under the Fourth Amendment is that warrantless searches are per se unreasonable absent the application of a well-recognized exception to the warrant requirement. ***State v. Foster***, 2014 WI 131, ¶32, 360 Wis. 2d 12, 856 N.W.2d 847. "[T]he doctrine of exigent circumstances is one of the well-recognized exceptions to the warrant requirement." ***State v. Robinson***, 2010 WI 80, ¶24, 327 Wis. 2d 302, 786 N.W.2d 463. This exception, generally speaking, recognizes that special circumstances may present both an urgent need for a search and insufficient time for officers to obtain a warrant. ***Id.*** The State bears the burden of proving that an exception to the warrant requirement exists. ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548.

Appellate review of a circuit court's order on a motion to suppress evidence presents a question of constitutional fact necessitating a two-step review process. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this court upholds the circuit court's factual findings unless clearly erroneous. ***Id.*** Second, this court independently applies constitutional principles to the facts. ***Id.***

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[2] Wisconsin courts "have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court." ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97.

B. A warrantless blood draw is an unconstitutional search under the Fourth Amendment unless an exception to the warrant requirement applies.

There is no question that a blood draw constitutes a search under the Fourth Amendment. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966); *see also* ***State v. Howes***, 2017 WI 18, ¶20, __ Wis. 2d __, __ N.W.2d __. This particular type of search can not only be compelled, but involves a physical intrusion into veins beneath an individual's skin. *See* ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552, 1558 (2013). Warrantless searches such as this are presumptively unconstitutional. *See* ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994).

The presence of "exigent circumstances" may qualify as an exception to the warrant requirement. ***Howes***, __ Wis. 2d __, ¶23. "A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if: (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw." ***Tullberg***, 359 Wis. 2d 421, ¶31.

Exigent circumstances exist when a reasonable officer would believe that there is a threat that evidence will be destroyed if time is taken to obtain a warrant. ***State v. Faust***, 2004 WI 99, ¶¶11-12, 274 Wis. 2d 183, 682 N.W.2d 371. As a result, the test to determine whether exigent circumstances exist is an objective test that asks whether an officer, under the circumstances, would reasonably believe that a delay in obtaining a warrant would risk the destruction of evidence. ***Id.*** at ¶12.

Whether exigent circumstances exist to permit a warrantless blood draw of a suspected drunk driver requires a careful case-by-case analysis considering the totality of the circumstances. ***McNeely***, 133 S. Ct. at 1561. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so." ***Id.*** (citing ***McDonald v. United States***, 335 U.S. 451, 456 (1948)) (emphasis added).

In 1966, the United States Supreme Court first addressed the constitutionality of warrantless searches to obtain blood samples from suspected intoxicated drivers. ***Schmerber***, 384 U.S. at 766-72. It held that under the "special facts" presented by the case, the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threated 'the destruction of evidence'" ***Id.*** at 770-71 (quoting ***Preston v. United States***, 376 U.W. 364, 367 (1964)). In so holding, the Court recognized "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." ***Id.*** at 770.

In 2013, the Court clarified that ***Schmerber*** did not create a per se rule of exigent circumstances in drunk driving cases based on the natural dissipation of alcohol from the bloodstream. ***McNeely***, 133 S. Ct. at 1561. Rather, the Court held that the natural dissipation of alcohol from the bloodstream may constitute exigent circumstances, but that a determination of exigent circumstances requires a case-by-case evaluation under the totality of the circumstances. ***Id.*** at 1563. In rejecting a categorical per se rule of exigency

in drunken driving cases, the Court recognized the technological advances since ***Schmerber*** that have greatly expedited the warrant process and stated:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

McNeely, 133 S. Ct. at 1561. The Court also indicated that "some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." ***Id.*** at 1561.

C. The State failed to prove that exigent circumstances justified the warrantless blood draw in this case.

The State has the burden to prove that an exception to the warrant requirement applies. ***Payano-Roman***, 290 Wis. 2d 380, ¶30. Here, the State failed to prove that the circumstances in this case amounted to an exigency permitting the warrantless blood draw.

Relying on ***Schmerber***, 384 U.S. 757 (1966), the State asserted that the exigent circumstances exception applied because of Richards' serious injuries requiring helicopter transport to another medical facility and because officers had to spend some time at the scene of the accident. (46:33).

In denying Richards' suppression motion, the circuit court framed the issue surrounding the warrantless blood draw by stating: "The question becomes whether or not the decision to draw Mr. Richards' blood without either his

informed consent or without judicial authorization of a search warrant fits into . . . the category of exigent circumstances, as now required under ***McNeely***." (46:41; App. 144). The court then found that exigent circumstances permitted the warrantless blood draw considering the severity of Richards' injuries and the officers' need to focus on Richards' medical needs rather than investigate the accident. (46:41-43; App. 144-46). The court also found that although the warrant process would have taken 20 to 30 minutes to complete, the medical needs of Richards' and the need for the helicopter transport court have resulted in Richards' being transported prior to the issuance of a warrant. (46:44-45; App. 147-48).

The court's ruling was erroneous because the facts in this case do not establish exigent circumstances. The question is whether the 20 to 30 minutes necessary to obtain a warrant would have risked the destruction of evidence. The answer is no. Here, the officers had time to obtain a warrant for the blood draw and made no attempts to do so.

First, there was no indication that a significant amount of time had passed between the accident and Officer McElroy's arrival on scene. Rather, dispatch notified Officer McElroy of the accident at 11:30 p.m. and he testified that he arrived shortly thereafter. (46:6).

Second, Officer McElroy observed signs of intoxication immediately upon arrival at the scene. (46:22). He smelled the odor of intoxicants coming from Richards and observed open beer cans in the vehicle. (46:22-23). Richards was the sole occupant of the vehicle and was seated in the driver's seat. (46:6-7). Officer McElroy testified that these facts established probable cause of intoxicated driving, that his probable cause determination developed before he left the scene to go to the hospital, and that the blood draw occurred

after he arrived at the hospital at 12:55 a.m. (46:27-29). Specifically, Officer McElroy testified that he had the necessary probable cause to obtain a warrant based on Richards' involvement in the accident, the odor of intoxicants, and the open intoxicants in the vehicle. (46:31). Probable cause is all that is necessary to obtain a warrant.

That Officer McElroy almost immediately suspected Richards of drunk driving and determined probable cause existed to support the blood draw without the need for further investigation is a critical distinction between this case and the circumstances presented in two recent Wisconsin Supreme Court cases holding that exigent circumstances justified warrantless blood draws. *See* ***Tullberg***, 359 Wis. 2d 421; *see also* ***Howes***, __ Wis. 2d __. In both cases, officers did not have probable cause of intoxication until arriving at the hospital after considerable time had passed in investigating whether intoxicated driving had occurred.

In ***Tullberg***, the court found that the state had met its burden to show exigent circumstances permitted the warrantless blood draw. ***Id.***, 359 Wis. 2d 421, ¶5. The court pointed to the fact that the investigating officer did not have probable cause to believe that Tullberg, who left the accident scene, was operating while intoxicated until two and a half hours after first responding to the scene of a fatal accident. ***Id.***, ¶¶2, 47. In addition, by the time the officer had probable cause of intoxicated driving, the officer knew that Tullberg was about to undergo a CT scan, which would have further delayed the blood draw. ***Id.***, ¶48.

Similarly, in ***Howes***, the court determined that exigent circumstances existed to allow an officer to obtain a sample of the defendant's blood without a warrant. ***Id.***, __ Wis. 2d __, ¶3. The court reasoned that exigent circumstances existed

because of the delays presented by the defendant's medical condition, which required a CT scan, the officer's need to direct traffic and investigate the accident scene, and the fact that the officer did not have probable cause that the defendant was intoxicated until after speaking with medical professionals at the hospital. ***Id.***, ¶¶46-49. The timing of the officer's probable cause determination that the defendant was driving under the influence was a critical component of the decision as the court stated "the present case is not one in which the officer could have obtained a warrant on the way to the hospital because he did not have probable cause to obtain a warrant then." ***Id.***, ¶49.

Here, unlike the circumstances presented in ***Tullberg*** and ***Howes***, the State did not prove that the police lacked the time necessary to obtain a warrant because of the need to investigate the accident to determine whether alcohol was involved or due to a need to attend to injuries. Officer McElroy arrived at the scene shortly after 11:30 p.m. and remained at the scene for approximately one hour. (46:27). Another officer and EMS were present at the scene during much of this time. (46:26). With a single injured person, two officers, and EMS personnel all at the scene, it does not follow that an officer could not have made a phone call to the judge to obtain a warrant.

Officer McElroy testified that it would have taken a total of 20 to 30 minutes to obtain a warrant. (46:22). The entire process could have been completed over the phone, and Officer McElroy had his department issued phone with him at the scene. (46:21-22). However, no attempts to secure a warrant were made. Officer McElroy testified that he did not even discuss requesting a warrant with the other officer on scene. (46:27-28). As a result, the State did not prove that both officers were so occupied the entire time such that at

least one of the officers could not have called the judge to obtain a warrant.

Even assuming for the sake of argument that the officers were occupied and unable to start the warrant process until approximately 12:20 a.m. when Officer McElroy left the scene for the hospital, he or the other officer could have requested a warrant at that time.

This is exactly the situation contemplated in ***McNeely*** where obtaining a warrant would not have "significantly increase[d] the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." ***Id.***, 133 S. Ct. at 1561. Here, there was nothing to prevent either Officer McElroy or Officer Bowser from obtaining a warrant while Richards was being transported to the hospital by EMS. "[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***Id.***

In sum, considering that: (1) two officers were at the scene, (2) Officer McElroy had the probable cause necessary for a warrant almost immediately after arriving at the scene, and (3) the warrant process in its entirety takes 20 to 30 minutes and can be done by phone, the State cannot meet its burden that exigent circumstances permitted the warrantless blood draw.

II. The Circuit Court's Implicit Ruling That the Warrantless Blood Draw was Permissible Under Wisconsin's Implied Consent Law was Clearly Erroneous.

A. Introduction and standard of review.

At the suppression hearing, the parties focused on whether or not exigent circumstances permitted the warrantless blood draw. However, the State also referenced subsections in Wisconsin's implied consent statute, which permit warrantless blood draws from individuals who are either unconscious or otherwise unable to withdraw consent under specific circumstances. *See* Wis. Stat. §§ 343.305(3)(ar)-(b). (46:32).

Although the court found that exigent circumstances permitted the warrantless search, the court stated that it "also recognizes that the existence of the series of implied consent exceptions that have been articulated under '343.305(ar)1,2,' and then '(3b)', all of which are present in this situation." (46:45; App. 148).

This court will uphold a circuit court's factual findings uncles clearly erroneous. ***State v. Novy***, 2013 WI 23, ¶22, 346 Wis. 2d 289, 827 N.W.2d 610. However, "[c]onstruction of a statute, or its application to a particular set of facts, is a question of law, which we review without deference to the trial court decision." ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773, 778 (1989). As referenced above, the State has the burden to prove that an exception to the warrant requirement applies. *See* ***Payano-Roman***, 290 Wis. 2d 380, ¶30.

To the extent that the circuit court relied on the unconscious driver provisions found in Wisconsin's implied consent statute as an alternative justification for its decision to deny Richards' suppression motion, Richards asserts that the circuit court erred. Specifically, Richards contends that the State failed to meet its burden that Richards was unconscious or otherwise unable to withdraw consent at the time of the blood draw. As a result, the circuit court's implicit finding that Richards was unconscious or otherwise unable to withdraw consent was clearly erroneous.

B. Wisconsin's implied consent statute permits warrantless blood draws from individuals who are unconscious or otherwise unable to withdraw consent under certain circumstances.

Wisconsin's implied consent statute provides, generally speaking, that by driving on public roadways in Wisconsin, motorists have given "implied consent" to various forms of testing for the presence of alcohol or drugs. Wis. Stat. § 343.305(2); ***State v. Padley***, 2014 WI App 65, ¶26, 354 Wis. 2d 545, 849 N.W.2d 867. A driver who refuses to submit to testing under Wis. Stat. § 343.305(3) is confronted with possible revocation of his or her operating privileges. *See* Wis. Stat. § 343.305(9)-(10).

Under § 343.305(3)(ar)1., if a motorist is involved in an accident that causes substantial bodily harm and an officer detects the presence of alcohol or drugs, the officer may ask the motorist for a sample of breath, blood, or urine. Similarly, under § 343.305(3)(ar)2., if a motorist is involved in an accident that causes death or great bodily harm and the officer has reason to believe that the motorist has violated a traffic law, the officer may ask for a sample of breath, blood, or urine. Both of these statutory subsections also state: "A

person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. §§ 343.305(3)(ar)1.-2.

In addition, § 343.305(3)(b) states that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection" and if an officer has probable cause to believe that an individual has committed an OWI-related offense or detects the presence of alcohol or illegal drugs the officer can obtain a sample of breath, blood, or urine.

C. The circuit court's implicit finding that Richards consented to the blood draw under §§ 343.305(3)(ar)-(b) because he was unconscious or otherwise unable to withdraw consent was clearly erroneous.

In its ruling, the circuit court found that as a "subcategory" of its exigent circumstances analysis:

> [T]he exceptions to the implied consent requirements under [§] 343.305 have all been met as it relates to a catastrophic motor-vehicle incident, serious or great bodily harm, an individual unconscious, and, further, under circumstances where – where the individual was believed to have consumed – there was reason to believe alcohol had been consumed.

(46:45-46; App. 148-49).

The court's ruling was erroneous because the State failed to meet its burden to show that Richards was unconscious or otherwise "not capable" under Wis. Stat. §§ 343.305(3)(ar)-(b). The Wisconsin Supreme Court has

explained the phrase "otherwise not capable of withdrawing consent" "describes a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge of perception of her acts or surroundings." ***State v. Disch***, 129 Wis. 2d 225, 235, 385 N.W.2d 140 (1986). The court also stated that "[t]he phrase 'not capable of withdrawing consent' must be construed narrowly and applied infrequently" to avoid sidestepping the protections of the implied consent statute in any situation involving disoriented or confused drivers. ***Id.***

Here, Officer McElroy's testified that upon arriving at the scene he spoke with Richards who correctly identified himself and spoke about his injuries. (46:7-8). Officer McElroy stated that Richards was able to answer questions at times, but that he appeared to fade in and out of consciousness. (46:9). Officer McElroy also testified that he was advised that Richards had lost consciousness in the ambulance on the way to Wild Rose Hospital. (46:13).

Officer McElroy also testified that standard procedure would be to read the "Informing the Accused"[3] form to an individual and if the individual did not respond, he would obtain a warrant.[4] (46:20). Here, however, Officer McElroy did not follow this procedure and did not read the "Informing the Accused" form to Richards stating he "believe[d] his injuries prevented him from consenting." (46:28).

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[3] *See* Wis. Stat. § 343.305(4).

[4] This procedure is not legally required by the implied consent statute. *See* ***State v. Disch***, 129 Wis. 2d 225, 233, 385 N.W.2d 140 (1986) (holding it would be "useless" for an officer to ask an unconscious individual to submit to testing).

There is no dispute that Richards was seriously injured in the accident. In addition, the record indicates that Richards was not conscious at all times following the accident. However, the record does not support the circuit court's finding that Richards was unconscious or otherwise unable to withdraw consent to the blood draw under the meaning of these terms in the applicable implied consent subsections.

First, the record demonstrates that Richards was conscious and lucid during periods following the accident. This is demonstrated by Officer McElroy's testimony that Richards was able to identify himself and describe his injuries. Although Officer McElroy testified that he did not think Richards was capable of withdrawing consent due to his injuries, the specific interaction the officer described having with Richards failed to establish Richards "lack[ed] present knowledge or perception of his or her acts or surroundings." *See* ***Disch***, 129 Wis. 2d at 235. Furthermore, Officer McElroy made no attempt to read the "Informing the Accused" form to Richards.

Second, the record is silent as to Richards' condition at the time of the blood draw. Officer McElroy testified that he was aware that Richards lost consciousness in the ambulance on the way to the hospital; however, Richards' blood was drawn after both he and Officer McElroy arrived to the hospital. There was no testimony as to Richards' condition at that time. Finally, applying the "otherwise not capable of withdrawing consent" provisions from Wis. Stat. §§ 343.305(3)(ar)-(b) based on the fact that an individual is seriously injured rather than on observations of whether the individual understands his or her surroundings would not be keeping with the Wisconsin Supreme Court's instruction that "[l]aw enforcement officers and courts should be very

reluctant to declare a person 'not capable of withdrawing consent'" because construing this phrase broadly to apply to "all persons who are confused or disoriented" would defeat the purpose of the implied consent statute. *See* ***Disch***, 129 Wis. 2d at 235-36.

In sum, Richards was conscious and responsive to questions at the scene and the State presented no evidence that Richards was unconscious at the time of the blood draw. The State did not meet its burden to show an exception to the warrant requirement applied because all the State proved was that Richards was unconscious at some point during the ambulance ride. Therefore, the circuit court's implicit finding of unconsciousness as it relates to Wis. Stat. §§ 343.305(3)(ar)-(b) was clearly erroneous.

III. If the Circuit Court's Implicit Finding That Richards was Unconscious or Otherwise Not Capable of Withdrawing Consent is Upheld, the Provisions Found in Wis. Stat. §§ 343.305(3)(ar) and (b) Authorizing Warrantless Blood Draws from Unconscious Individuals Suspected of Intoxicated Driving Are Facial Violations of the Fourth Amendment.[5]

A. Introduction and standard of review.

If this court agrees that the circuit court's implicit finding of unconsciousness was clearly erroneous, then it need not decide whether §§ 343.305(3)(ar)-(b) is

[5] The court of appeals previously certified the question of whether the unconscious driver provisions in Wisconsin's implied consent statute are constitutional under the Fourth Amendment; however, the Wisconsin Supreme Court did not reach the certified question holding instead that exigent circumstances justified the search at issue. *See* ***Howes***, 2017 WI 18, ¶¶1, 3 n.4, __ Wis. 2d __, __ N.W.2d. __.

constitutional because the unconscious driver provisions would not apply to Richards. However, if this court affirms the circuit court's implicit finding of unconsciousness, Richards additionally asserts that the unconscious driver provisions in §§ 343.305(3)(ar)-(b) are unconstitutional.

Although warrantless searches are per se unreasonable, "searches conducted pursuant to voluntarily given consent" fall within a well-established exception to the Fourth Amendment's warrant requirement. ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834. Whether the consent exception applies to a warrantless search requires a determination of (1) whether actual consent was given and (2) whether consent was voluntarily given. ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

Wisconsin Statute § 343.305(2) governs implied consent and provides, in pertinent part:

> **(2)** IMPLIED CONSENT. Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

The implied consent provisions in Wis. Stat. § 343.305(3)(ar) and (b) apply to drivers involved in accidents involving serious injury or death. Specifically, when an accident causes substantial bodily harm and an

officer detects the presence of alcohol, § 343.305(3)(ar)1., or involves death or great bodily harm and an officer has reason to believe a traffic violation has occurred, § 343.305(3)(ar)2., the officer may request the driver to submit to blood, breath, or urine testing. Both provisions state: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. §§ 343.305(3)(ar)1.-2. Section 343.305(3)(b) similarly provides:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person.

In sum, under §§ 343.305(3)(ar)-(b) police may obtain a sample of an unconscious[6] individual's blood, breath, or urine without a warrant. These provisions, however, are unconstitutional under the Fourth Amendment because they presume that an individual who is unable to withdraw consent has given actual and voluntary consent to testing. This

[6] The use of "unconscious" throughout this section refers to both the term itself as well as the phrase "otherwise not capable of withdrawing consent."

presumption is not only unreasonable, it is foreclosed by ***State v. Padley***, and contrary to recent United States Supreme Court decisions rejecting per se exceptions to the warrant requirement in OWI cases.

Whether the unconscious driver provisions found in Wis. Stat. §§ 343.305(3)(ar)-(b) are constitutional requires this court to engage in statutory interpretation. Statutory interpretation begins with the plain language of the statute. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Words or phrases are generally given their "common, ordinary, and accepted meaning." ***Id.*** In addition, a reviewing court works to avoid absurd or unreasonable results. ***Id.***, ¶46.

In addition, the constitutionality of a statute is a question of law subject to de novo review. ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Reviewing courts, generally speaking, presume that a statute is constitutional. ***League of Women Voters of Wisconsin Educ. Network Inc. v. Walker***, 2014 WI 97, ¶16, 357 Wis. 2d 360, 851 N.W.2d 302. This presumption of constitutionality requires Richards to prove the statute unconstitutional beyond a reasonable doubt. *See* ***In the Interest of Hezzie R.***, 219 Wis. 2d 848, 862-63, 580 N.W.2d 660 (1998). In addition, a facial challenge to the constitutionality of a statute requires the challenging party to show that the statute cannot be enforced under any circumstance. ***League of Women Voters***, 357 Wis. 2d 520, ¶15. However, "[i]n reviewing the constitutionality of a statute, a court may find only a portion of a particular statute unconstitutional, allowing the remaining valid portions of that statute to continue in effect." ***In the Interest of Hezzie R.***, 219 Wis. 2d at 863.

B. The provisions found in Wis. Stat. §§ 343.305(3)(ar) and (b) authorizing warrantless blood draws from unconscious individuals suspected of intoxicated driving are unconstitutional under the Fourth Amendment.

1. The unconscious driver provisions in Wis. Stat. §§ 343.305(3)(ar)-(b) are unconstitutional under the plain language of Wisconsin's implied consent statute, as correctly interpreted by ***State v. Padley***, because "implied consent" does not constitute the actual and voluntary consent required by the Fourth Amendment.

The implied consent statute states: "Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine . . . when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub, (3)(ar) or (b). Wis. Stat. § 343.305(2). The purpose of the implied consent statute is to facilitate law enforcement officials' ability to combat impaired driving by "persuading drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***Padley***, 354 Wis. 2d 545, ¶24 (citing ***State v. Zielke***, 137 Wis. 2d 39, 46, 403 N.W.2d 427 (1987)). This purpose is reflected in the penalties for refusal. *See* Wis. Stat. § 343.305(9)-(10).

As a result, the plain language and purpose of the implied consent statute demonstrates that it is not the decision to drive on Wisconsin's roads that constitutes the actual and voluntary consent to testing. Instead, actual and voluntary

consent, required by the Fourth Amendment, occurs when an individual decides to submit to testing rather than refuse testing and suffer the associated consequences. This is exactly how the court of appeals interpreted Wisconsin's implied consent statute in ***Padley***.

Padley involved a fatal accident in which the investigating officer had reason to believe that the driver, Megan Padley, had committed a traffic violation. ***Padley***, 354 Wis. 2d 545, ¶¶1-2. As a result, the officer, operating under Wis. Stat. § 343.305(3)(ar)2., read Padley the "Informing the Accused" form, which informed her that her refusal to submit to testing would result certain consequences. ***Id.***, ¶10. Padley consented to the testing, but later argued that her consent was not valid for a number of reasons including that § 343.305(3)(ar)2. was unconstitutional under the Fourth Amendment. ***Id.***, ¶¶11, 18-21, 32.

In addressing the constitutionality of § 343.305(3)(ar)2., this court focused on how the implied consent statute functions. ***Id.***, ¶¶25-28. The court explained, in regard to conscious drivers, that "actual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law." ***Id.***, ¶25. The court further explained:

> The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized.

Id., ¶26. In sum, in rejecting Padley's constitutional challenge, the court made clear that the meaning of "implied consent" under the statute and actual consent are distinct

concepts. ***Id.***, ¶37. As a result, if a driver, such as Padley, gives consent after being read the "Informing the Accused" form "consent is actual consent, not implied consent. If the driver refuses to consent, he or she thereby withdraws 'implied consent' and accepts the consequences of that choice" ***Id.***, ¶38.

Under ***Padley***, the unconscious driver provisions are unconstitutional. *See* ***id.***, ¶39 n.10. This is because the analysis in ***Padley*** hinged on the fact that Padley gave actual consent and the court repeatedly explained that implied consent is not synonymous with actual or voluntary consent under the Fourth Amendment. *See* ***id.***, ¶¶32-33, 37-39 & n.10. The court also focused on the fact that for conscious drivers the implied consent statute allows the driver, not the police officer, to make a decision regarding actual consent to a blood draw when faced with the sanctions for refusal. ***Id.***, ¶¶33, 39-40, 42.

The ***Padley*** decision correctly interpreted Wisconsin's implied consent statute and properly outlined the difference between "implied consent" and "actual consent." Under ***Padley***, the unconscious driver provisions in §§ 343.305(3)(ar)-(b) are unconstitutional because "implied consent" is not actual consent. An individual who has decided to drive on Wisconsin roads gives implied consent; however, the Fourth Amendment requires actual consent. It should go without saying that it is impossible for an unconscious person to give actual consent. In fact, under the unconscious driver provisions, it is the officer, not the individual, who grants consent to the search based on the officer's belief that the person is unconscious.

In addition, the unconscious driver provisions do not constitute voluntary consent under the Fourth Amendment.

The determination of voluntariness is typically a mixed question of fact and law that involves consideration of the totality of the circumstances. *See* ***Artic***, 327 Wis. 2d 392, ¶32. Our supreme court has stated that "when a suspect is asked to make a statement or consent to a search, the suspect's response must be 'an essentially free and unconstrained choice,' not 'the product of duress or coercion, express or implied.'" ***Id.***, ¶32 (quoting ***Schneckloth v. Bustamonte***, 412 U.S. 218, 225, 227 (1973)) (internal citations omitted).

An individual who is unconscious is not able to make any decision at all, let alone one that is free and unconstrained. In fact, the unconscious driver provisions create a per se rule of consent, discussed below, that negates any consideration of the voluntariness of consent under the totality of the circumstances. Furthermore, the fact that an individual has made the voluntary decision to drive on Wisconsin roads before becoming incapacitated does not constitute voluntary consent to a search of their blood. This is because, as ***Padley*** described, the decision to drive constitutes "implied consent" not actual consent under the Fourth Amendment.

Finally, other jurisdictions have agreed that the actual consent required by the Fourth Amendment is not supplied by reliance on implied consent statutes permitting warrantless blood draws of unconscious drivers. *See* ***People v. Arredondo***, 199 Cal. Rptr. 3d 563, 578 (Cal. Ct. App. 2016), *review granted* 371 P.3d 240 (Cal. 2016) ("The mere operation of a motor vehicle is not a manifestation of actual consent to a later search of the driver's person."); ***Bailey v. State***, 790 S.E.2d 98, 104-05 (Ga. App. 2016) ("Bailey's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual

consent to the search and seizure of his blood and urine, as he was unconscious.").

2. The unconscious driver provisions in Wis. Stat. §§ 343.305(3)(ar)-(b) are unconstitutional because they constitute per se exceptions to the Fourth Amendment's warrant requirement.

In addition to being unconstitutional under plain language analysis and ***Padley***, the unconscious driver provisions in §§ 343.305(3)(ar)-(b) create a per se rule of consent, which runs afoul of ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013), and ***Birchfield v. North Dakota***, 579 U.S. __, 136 S. Ct. 2160 (2016).

As described above, ***McNeely*** rejected a proposed per se rule of exigency based on the natural dissipation of alcohol from the blood stream. ***Id.***, 133 S. Ct. at 1556. Although ***McNeely*** dealt with the exigent circumstances exception to the Fourth Amendment's warrant requirement, its rejection of per se rules in general, is instructive here. Both the exigent circumstances exception and the voluntariness required by the consent exception require consideration of the totality of the circumstances. *See* ***id.*** at 1559; *see also* ***Artic***, 327 Wis. 2d 392, ¶32. The unconscious driver provisions create a per se consent exception, which removes the need to consider the totality of the circumstances. This per se exception is akin to the per se exigent circumstances exception rejected by the Court in ***McNeely***.

In fact, other jurisdictions have relied on ***McNeely*** to suppress warrantless blood draws of unconscious individuals authorized under implied consent statutes similar to Wisconsin's statute. *See e.g.* ***Bailey***, 790 S.E.2d at 104 (holding that under ***McNeely*** implied consent was insufficient to satisfy the Fourth Amendment); ***State v. Romano***, 785 S.E.2d 168, 174-75 (N.C. Ct. App. 2016), *review granted* 794 S.E.2d 317 (N.C. 2016) (relying on ***McNeely*** to hold that despite the unconscious driver provision in North Carolina's implied consent statute, the warrantless blood draw of the unconscious defendant was unreasonable).

McNeely did recognize that a limited number of per se exceptions to the Fourth Amendment's warrant requirement are constitutional including, generally, the search incident to a lawful arrest exception. ***Id.***, 133 S. Ct. at 1559 n.3. However, the search incident to lawful arrest exception does not permit the warrantless blood draw from an unconscious person under §§ 343.305(3)(ar)-(b) for two reasons. First the blood testing permitted in §§ 343.305(3)(ar)-(b) is not premised on a lawful arrest and Richards was not under arrest at the time of the blood draw.

Second, and more importantly, the United Supreme Court has recently held that warrantless *breath tests* incident to a lawful arrest are permitted under the Fourth Amendment, but warrantless *blood tests* incident to a lawful arrest do not pass constitutional muster. ***Birchfield***, 136 S. Ct. at 2185 (emphasis added). The Court in ***Birchfield*** reasoned that blood tests are "significantly more intrusive" than breath testing and "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances . . . ." ***Id.*** at 2184.

Under ***Birchfield***, a warrantless blood draw cannot be based on the established search incident to a lawful arrest exception. It follows that a warrantless blood draw based on the unconscious driver provisions, which do not even require arrest, in Wisconsin's implied consent statute are unconstitutional as well. Under both ***McNeely*** and ***Birchfield***, the unconscious driver provisions in Wisconsin's implied consent statute are unconstitutional per se exceptions to the Fourth Amendment's warrant requirement.

In addition, the Court's holding in ***Birchfield***—that warrantless blood tests based on the search incident to arrest exception violate the Fourth Amendment—significantly undermines interpretations of Wisconsin's implied consent statute that predate ***Padley***, which suggest or state that a driver consents to testing of his or her blood by either driving on Wisconsin roads or by obtaining a driver's license. *See e.g.* ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980) (holding a driver has no right to consult with an attorney before determining whether to take or refuse an intoxication test under § 343.305); ***State v. Wintlend***, 2002 WI App 314, ¶12, 258 Wis. 2d 875, 655 N.W.2d 745 (holding the penalties for refusal do not constitute coercion to invalidate consent under the Fourth Amendment).

Specifically, in holding that a driver has no right to an attorney before deciding to submit to testing or refuse testing under the implied consent statute, the Wisconsin Supreme Court indicated that an "accused intoxicated driver has no choice in respect to granting his consent." ***Neitzel***, 95 Wis. 2d at 201. The court reasoned that under the implied consent statute the driver gave consent at the time he or she applied for a driver's license. ***Id.***

However, the court's explanation of the implied consent statute in ***Neitzel*** creates a per se rule of consent based on an individual's decision to apply for a driver's license. If the well-established search incident to arrest exception does not permit warrantless blood testing for OWI arrests, then the unconscious driver provisions in Wisconsin's implied consent statute, which constitute a statutorily created per se consent exception, do not pass constitutional muster either.

In sum, the unconscious driver provisions in §§ 343.305(3)(ar)-(b) are unconstitutional under the Fourth Amendment and ***Padley*** because they unreasonably presume that an individual who is unable to withdraw consent has given actual and voluntary consent to testing. Furthermore, the unconscious driver provisions create a statutory per se rule of consent contrary to ***McNeely*** and ***Birchfield***.

CONCLUSION

For the reasons set forth above, Richards respectfully requests that this Court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence derived from warrantless blood draw.

Dated this 6th day of April, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 7,587 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of April, 2017.

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CERTIFICATION AS TO APPENDIX

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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

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