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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State Failed to Prove that Exigent Circumstances Justified the Warrantless Blood Draw; therefore, the Blood Draw Violated Richards' Fourth Amendment Rights and the Result of the Blood Draw Must be Suppressed.

A warrantless search is per se unreasonable and in violation of the Fourth Amendment unless it falls within an exception to the warrant requirement. ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120. "The government bears the burden of proving that a warrantless search falls within one of the narrowly drawn exceptions." ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548.

The state seeks to prove the exigent circumstances exception to the warrant requirement. Whether this exception applies depends on whether the need for the search is urgent and whether there is sufficient time to obtain a warrant, considering the totality of the circumstances. *See* ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552, 1559 (2013). Because "[t]he touchstone of the Fourth Amendment is reasonableness[,]"at the heart of this question is whether it was reasonable for two law enforcement officers to make no attempt to obtain a warrant considering: Richards' injuries and treatment needs, officers investigative responsibilities, and the efficient process to obtain a warrant in Waushara County.

The state places much reliance on the extent of Richards' injuries and his need to be transported by ambulance and then by helicopter to support the existence of

exigent circumstances. (State's Resp. at 11, 13, 14-15, 16). This argument compartmentalizes the deputies' varied responsibilities into either rendering aid or investigating an OWI, which suggest that McElroy and Bowser were not able to perform more than one task at a time.

In fact, the record indicates that McElroy, the first officer on scene, had 12 years of law enforcement experience, routinely dealt with intoxicated driving, and had training and experience to identify impaired driving. (46:3-4). McElroy applied that training and experience as he arrived on scene shortly after 11:30p.m. when he "immediately" made contact with Richards, observed his injuries, and "immediately" called for emergency medical personnel to respond. (46:6, 8). The initial contact with Richards also revealed the odor of intoxicants and numerous beer cans strewn throughout the vehicle. (46:8-9). At the same time that McElroy was observing Richards' injuries, the smell of intoxicants, the numerous beer cans, it was also apparent that Richards, the sole occupant, was the driver of the vehicle based on the damage to the windshield. (46:8). McElroy agreed with defense counsel's assessment: "It's a pretty clear scene. It doesn't take a lot of imagination . . .". (46:24).

Despite the immediate indicators of intoxication, the state asserts that probable cause to obtain a search warrant did not develop until approximately 12:20am when McElroy learned of Richards' prior OWI record.[1] (State's Br. 12, 15).

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[1] The state does not explain how Richards' prior record and .02 limit supports exigent circumstances in this case. (*See* State's Resp. at 11). Undeveloped arguments need not be addressed by this court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

Under Wis. Stat. § 968.12(1) a search warrant shall issue "if probable cause is shown." Probable cause exists if "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). The amount of evidence necessary to establish probable cause for a search warrant is less than what is required for bind over following a preliminary examination. ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). "'Probable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" ***Id.*** at 989 (quoting ***State v. Petrone***, 161 Wis. 2d 530, 548-49, 468 N.W.2d 676 (1991)).

Based on the information gathered from the straight-forward accident scene and the initial contact with Richards, a reasonable officer would readily conclude that evidence of intoxicated driving would be obtained through a test of Richards' blood. This information was apparent without the need to perform additional investigation and was known at the same time that McElroy was focused on addressing Richards' serious injuries. There was no probable cause puzzle to solve. (*See* State's Resp. at 15).[2]

Richards does not suggest that officers should ignore medical needs to focus on investigation. However, once EMS arrived there is no indication that either McElroy or Bowser provided medical care or assisted EMS. McElroy testified that he was available "*if* EMS needed any assistance."

[2] The state later asserts that there was "ample probable cause of impairment." (State's Resp. at 17 n.4). This assertion conflicts with its argument that the probable cause puzzle could not be complete until Richards' prior OWIs were known. (*Id.* at 15).

(46:26) (emphasis added). There was no evidence that his assistance was ever requested. And even if McElroy was needed to assist EMS, another deputy was on site. Moreover, EMS was on site for 15-20 minutes before leaving at 12:05a.m. (*See* 46:26). At that time neither McElroy nor Bowser's attention would have been on Richards' injuries.

The state points to McElroy's other investigative duties. (State's Resp. at 11). The state's argument does not account for Bowser's presence on scene or his availability to obtain a warrant. Nor does it recognize that obtaining a lawful blood draw should be a high priority for officers.

Finally, the state fails to adequately acknowledge Waushara County's efficient, technologically-advanced process for remotely obtaining search warrants. McElroy testified that the entire warrant process, including the phone call to the judge, would take 20 to 30 minutes. (46:22). These facts present the exact same example contemplated by ***McNeely***:

> 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.

There is no plausible reason why either Bowser or McElroy did not start the 20-30 minute process to obtain a warrant when probable cause developed shortly after the first officer arrived on the scene. Nor could there be any reason why the warrant process was not initiated when EMS left the scene with Richards at 12:05am or why Bowser could not

have started to obtain a warrant while McElroy made the 10 to 15 minute drive to the hospital or vice versa. (*See* 46:27). Instead, neither deputy made any attempt to obtain a warrant. This is not reasonable considering "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.***

II. The Circuit Court's Implicit Finding that Richards Consented to the Blood Draw under Wis. Stat. § 343.305 because he was Unconscious or Otherwise Unable to Withdraw Consent was Clearly Erroneous.

The circuit court's implicit finding that Richards was unconscious or otherwise not capable of withdrawing consent at the time of the blood draw is not supported by the record. (46:45-46; App. 148-49).

Richards' suffered serious injuries and was not conscious at all times following the accident. However, the record indicates that Richards was able to identify himself, describe his injuries, and appropriately answer questions. (46:7-9). This does not support McElroy's testimony that he believed Richards' injuries prevented him from consenting. Moreover, McElroy made no attempt to read the Informing the Accused form ("the form") to Richards, but assumed Richards would not be able to respond. (46:28).

The state posits that reading this form to conscious drivers plays an important role by enforcing the reasonableness of the search. (State Resp. 26). It follows that a court should be especially reluctant to rely on an officer's determination that a person is unable to consent when no attempt to read the form has been made.

In addition, the record provides no indication of Richards' condition at the time of the blood draw. McElroy testified that Richards lost consciousness while on the way to the hospital; however, McElroy gave no indication of Richards' condition at the time of the blood draw. As a result, the state failed to meet its burden to show that an exception to the warrant requirement applied.

Finally, this court need not defer to the circuit court's implicit finding of unconsciousness or inability to withdraw consent at the time of the blood draw. "Whether the facts fulfill a statutory standard is ordinarily a determination of law and an appellate court need not defer to the circuit court." ***State v. Disch***, 129 Wis. 2d 225, 234, 385 N.W.2d 140 (1986).

III. The Provisions Found in Wis. Stat. §§ 343.305(3)(ar) and (b) Authorizing Warrantless Blood Draws from Unconscious Individuals are Facially Unconstitutional as they do not Require Actual or Voluntary Consent and because they Establish a Per Se Exception to the Fourth Amendment's Warrant Requirement.

As ***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 380, 714 N.W.2d 548, correctly explained, the implied consent authorized by the plain language of the statute is not the same as the actual and voluntary consent required by the Fourth Amendment. This court is bound by ***Padley***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Nor should this court question the reasoning in ***Padley*** based on broad statements praising the usefulness of implied consent statutes to combat impaired driving. The question is not whether the implied consent statute benefits drivers and

law enforcement, but whether its unconscious driver provisions are constitutional.

The state supports its expansive view of the implied consent statute by pointing to prior case law suggesting that consent is given when an individual operates a vehicle on a Wisconsin highway or when an individual applies for a driver's license in Wisconsin. (State's Resp. at 21-22). These general and varied statements describing the structure of the implied consent statute, however, were all made pre-***McNeely*** and in regard to law enforcement officers requesting a conscious driver to submit to a test or face the applicable consequences. *See e.g.* ***Washburn Cty. v. Smith***, 2008 WI 23, ¶40 n.36, 308 Wis. 2d 65, 746 N.W.2d 243 (indicating a driver is deemed to have consented "when requested to do so . . ."); ***State v. Krajewski***, 2002 WI 97, ¶36 n.15, 255 Wis. 2d 98, 648 N.W.2d 385 ("In Wisconsin, a driver impliedly consents to take the test requested by a law enforcement officer.").

The state's reliance on ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, is similarly misplaced. (*See* State's Resp. at 22). ***Piddington*** involved an officer's varied attempts to communicate with a deaf driver and to convey the implied consent warnings. ***Id.***, ¶¶1-6. The court held an officer must use reasonable methods of communication under the circumstances presented that "would reasonably convey the implied consent warnings." ***Id.***, ¶1. It does not follow that because this inquiry must focus on the officer's objective conduct rather than the driver's subjective comprehension of the form that actual consent is not obtained at the time the form is read.

If the actual and voluntary consent required by the Fourth Amendment is given by driving or obtaining a license,

there would be no need for the court to carefully analyze the officer's actions in communicating the form to the deaf driver.

The same could be said about numerous cases that carefully analyze the totality of the circumstances when evaluating the application of implied consent statutes to a given case. If implied consent is the same as actual consent, the Supreme Court would have no reason to hold in ***McNeely*** that a blood draw's constitutionality must be determined on a case-by-case basis under a totality of the circumstances. Nor would the Court have vacated a Texas judgment upholding a warrantless blood draw based solely on implied consent and remanded it for further proceedings in light of ***McNeely. Aviles v. Texas***, 134 S. Ct. 902 (2014); ***Aviles v. State***, 443 S.W.3d 291 (Tex. App. 2014) (holding on remand that the implied consent statute created an impermissible per se exception to the warrant requirement). In ***Birchfield v. North Dakota***, 579 U.S. __, 136 S. Ct. 2160, 2186 (2016), the Court again did not rely on implied consent to uphold a warrantless blood draw, but remanded to the state court to determine whether consent was voluntary under the totality of the circumstances. The unconscious driver provisions create a per se exception to the warrant requirement contrary to both ***McNeely*** and ***Birchfield***. (Brief-in-Chief at 27-30).

Justice Kelly's concurrence in ***State v. Brar***, 2017 WI 73, ¶¶61-65, further explains that a totality of the circumstances analysis is not required under the state's interpretation because under this interpretation the only question is "whether the driver drove his car."

He continues: "It is a metaphysical impossibility for a diver to freely and voluntarily give 'consent' implied by law." Rather, the plain language of § 343.305(4) makes clear that

an officer must request permission to draw blood. ***Id.***, ¶52 (Kelly, J., concurring); ***Id.***, ¶113 (Abrahamson, J., dissenting).

Justice Kelly goes further: "When the court says 'consent' implied by law is just as constitutionally effective as express consent, it is saying something terribly chilling. It is saying the legislature may decide when the people of Wisconsin must surrender their constitutional rights." ***Id.***, ¶81 (Kelly, J., concurring). He then asks what limits are placed on the legislature's ability to consent on behalf of Wisconsin residents?

> [The legislature] could . . . adopt an "implied consent" statute in which recording a property deed comprises consent to a search of one's property when the police have probable cause to believe the owner has been involved in a crime. It takes very little imagination to see how this new doctrine could eat its way through all of our constitutional rights.

Id., ¶83.

Equally chilling is the state's suggestion that unconscious individuals have lessened privacy rights. (State's Resp. at 27). The argument that an unconscious person would not feel the pain or experience the embarrassment of an intrusion into his or her body raises troubling questions in the context of sexual assault perpetrated against unconscious individuals.

The unconscious driver provisions are unconstitutional under the Fourth Amendment and ***Padley*** because they fail to require actual or voluntary consent and because they establish a per se exception to the warrant requirement.

IV. Officers Could Not Have Relied on Wis. Stat. § 343.305(3)(ar) and (b) in Good Faith because the Provisions Authorizing Warrantless Blood Draws of Unconscious Individuals Conflict with Controlling Precedent.

The good faith exception is to be applied in cases where an officer "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." ***United States v. Leon***, 468 U.S. 897, 918 (1984). The good faith exception will not apply to unconstitutional statutes that were drafted by a "legislature [that] wholly abandoned its responsibility to enact constitutional laws." ***Illinois v. Krull***, 480 U.S. 340, 355 (1987). There can be no good faith reliance on a statute "if its provisions are such that a reasonable officer should have known that the statute was unconstitutional." ***Id***.

McNeely represented a sea change in the law that no reasonably trained officer could overlook. Before ***McNeely***, Wisconsin officers were never required to obtain a blood-draw warrant in a suspected drunk driving case, pursuant to the per se rule of exigency based on the natural dissipation of alcohol adopted by ***State v. Bohling***, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993). ***McNeely*** overturned the presumption that no warrant was required under ***Bohling*** in favor of requiring a warrant. Thus, after ***McNeely***, officers were placed on notice that they must secure a warrant if at all possible. Here, officers made no attempt to obtain a warrant.

It is more important for the exclusionary rule to apply in cases involving unconstitutional statutes than in cases involving invalid warrants. For example, a judge's error in issuing a warrant not supported by probable cause threatens the Fourth Amendment rights of one individual whereas a

statute violating the Fourth Amendment affects a much larger class. In fact, the adoption of the Fourth Amendment was meant to combat statutes authorizing unreasonable searches. *See* ***Stanford v. Texas***, 379 U.S. 476, 481-82 (1965). The Supreme Court has thus applied the exclusionary rule to evidence gathered pursuant to statutes authorizing unreasonable searches. *See, e.g.*, ***Ybarra v. Illinois***, 444 U.S. 85, 95 (1979) (statute authorizing search of any person at a location being searched pursuant to warrant); ***Torres v. Puerto Rico***, 442 U.S. 465, 465 (1979) (statute authorized search of luggage of anyone entering Puerto Rico from the United States).

Applying the exclusionary rule rather than the good faith exception discourages the legislature from passing unconstitutional laws. The "legislature's objective in passing a law authorizing unreasonable searches . . . is explicitly to facilitate law enforcement" and "legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers." ***Krull***, 480 U.S. at 365-66 (O'Connor, J., dissenting).

Finally, the exclusionary rule plays an important function in preserving the integrity of the judiciary. ***Terry v. Ohio***, 392 U.S. 1, 12 (1968). "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." ***Id.*** at 13.

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 22nd day of September, 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 2,988 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 22nd day of September, 2017.

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