STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2017AP43-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

SUPPLEMENTAL BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The circuit court denied the defendant-appellant Donnie Gene Richards's motion to suppress his blood test results because it concluded that the warrantless blood draw after he crashed his car and he was at the hospital and unconscious, was justified by exigent circumstances and the unconscious driver provision in Wisconsin's implied consent law. (R. 46:45–46.) Two recent cases underscore the correctness of the circuit court's decision denying the suppression motion in this case.

In *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality opinion), the United States Supreme Court set forth a new rule for the category of cases in which police have probable cause that a person has committed a drunk-driving offense, the person is unconscious and must be taken to a hospital, and there is no opportunity to obtain a breath test. In such a case a blood test is almost always justified by exigent circumstances. This case falls squarely within the category of cases to which the *Mitchell* rule applies.

In *State v. Paull*, 2017AP1210-CR, 2019 WL 3820298 (Wis. Ct. App. August 15, 2019) (unpublished) (R-App. 101–04), this Court concluded that even assuming that the unconscious driver provision in Wisconsin's implied consent law is unconstitutional, test results of blood drawn in good faith reliance on that statute when it not yet been invalidated should not be suppressed. The same reasoning should apply here.

ARGUMENT

I. *Mitchell v. Wisconsin* confirms that the circuit court's conclusion that exigent circumstances justified the warrantless blood draw in this case was correct.

A. The circuit court was correct in concluding that exigent circumstances justified the warrantless blood draw in this case.

In its initial brief, the State explained that the circuit court was correct in concluding that the warrantless blood draw from Richards after he crashed his car was justified by exigent circumstances. (State's Br. 8–16.) The court found that Deputy Ryan McElroy had probable cause that Richards had driven while under the influence of an intoxicant, and he knew that Richards was badly injured and in need of medical care. (R. 46:40–42.) The court found that after Richards was extracted from his car, and while he was being transported to the hospital in an ambulance (R. 46:10), Deputy McElroy learned that Richards lost consciousness. (R. 46:43.) When Deputy McElroy arrived at the hospital, Richards was about to be transported by MedFlight to another hospital. (R. 46:44.) The court found that because Richards was unconscious, "the implied consent issues under '343.305' are, essentially a nullity." (R. 46:44.) The court found that "The warrant process takes 20 to 30 minutes," and it concluded that Richards probably would have been transported by MedFlight before a judge could have authorized a warrant for a blood draw. (R. 46:44–45.) The court concluded that "in this case-specific, fact-driven situation, I find that has been established clearly and convincingly that there were exigent circumstances necessitating the warrantless blood-draw that was taken of Mr. Richards." (R. 46:45.)

The Supreme Court's decision in *Mitchell v. Wisconsin* underscores the correctness of the circuit court's decision. In *Mitchell*, the Supreme Court established a rule concerning blood tests for the category of impaired driving cases in which "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531 (plurality opinion).[1] When there is probable cause that a person has driven while under the influence of an intoxicant, and the person is unconscious and has been taken to a hospital before the officers could obtain a breath sample, a law enforcement officer "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.* at 2539.

This case falls squarely within the category of cases to which *Mitchell* applies. There is no dispute that a police officer had probable cause that Richards had driven while under the influence of an intoxicant. (R. 46:27–29, 41); (Richards's Br. 10.) The circuit court found that Richards "lost consciousness." (R. 46:43.) It concluded that officers recognized that "the implied consent issues under '343.305'

[1] The plurality opinion in *Mitchell* is binding on the existence of exigent circumstances when officers have probable cause that a person has committed an OWI offense and the person is taken to the hospital before an evidentiary breath test can be administered. Wisconsin courts apply the *Marks* rule to interpret fractured opinions of the Supreme Court. *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567. Under that rule, "When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). Justice Thomas's concurrence sets forth a rule broader than the plurality opinion's rule, concluding that exigent circumstances justify a warrantless blood draw whenever police have probable cause that a driver is drunk. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (Thomas, J., concurring). The plurality opinion, which is narrower than the concurrence, is therefore the Court's holding on this issue.

are, essentially, a nullity because the individual is unconscious, incapable of even being addressed." (R. 46:44.) At the suppression hearing, Richards defense counsel acknowledged that Richards "wasn't able to go through fields. He wasn't able to do a PBT." (R. 46:35.) And Richards "wasn't able to offer consent, due to his injuries." (R. 46:35.) Richards was taken to a hospital because of his injuries, and then transported by MedFlight to another hospital. (R. 46:43–44.)

This case therefore satisfies the criteria that the Supreme Court set forth in *Mitchell*. There was probable cause; Richards was unconscious; he was taken to a hospital; and there was no opportunity to obtain an evidentiary breath test. Under these circumstances, a law enforcement officer "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Mitchell*, 139 S. Ct. at 2539.

B. This Court should apply *Mitchell* and conclude that exigent circumstances justified the warrantless blood draw in this case.

This Court should apply the *Mitchell* rule in this case. The circuit court concluded that exigent circumstances justified the blood draw, and the parties briefed the issue on appeal. And by holding this appeal for a decision in *State v. Philip J. Hawley*, 2015AP1113-CR (Dist. IV), this Court indicated that it sought definitive guidance on the issue of the validity of warrantless blood draws from unconscious drivers. In *Mitchell*, the United States Supreme Court offered that definitive guidance. The Court set forth a rule that applies to the category of cases "in which the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531. In cases in which officers have probable cause that the person has driven while under the influence of an intoxicant, and the person is unconscious and taken to the

hospital before police can obtain a breath sample, "the exigent-circumstances rule almost always permits a blood test without a warrant." *Id.*

The Court established this rule in *Mitchell* even though the State did not argue that exigent circumstances justified the blood draw and the Wisconsin Supreme Court did not decide the case on that ground. The Court explained that the issue before the Wisconsin Supreme Court was "whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment," and it concluded that the question presented "easily encompasses the rationale that we adopt today." *Id.* at 2534 n.2. Notably, the Court adopt[ed] a rule for an entire category of cases—those "in which the driver is unconscious and therefore cannot be given a breath test." *Id.* at 2531.

Here, the circuit court concluded that the blood draw from Richards was justified by exigent circumstances, and the State explained why this Court should affirm on that ground. This case falls squarely within the category of cases for which the Supreme Court intended its rule to apply. This Court should therefore apply the *Mitchell* rule in this case.

Under *Mitchell*, the blood draw in this case was justified by exigent circumstances. As explained above, the blood draw in this case satisfies each criterion that the Supreme Court set forth in *Mitchell*. There was probable cause; Richards was unconscious; he was taken to a hospital; and there was no opportunity to obtain an evidentiary breath test. Under these circumstances, a law enforcement officer "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Mitchell*, 139 S. Ct. at 2539.

The *Mitchell* Court "d[id] not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not

been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.*

It is doubtful that Richards can satisfy his burden of showing that this is the "unusual case" in which *Mitchell*'s rule does not apply.

Richards likely cannot show that police "could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* The circuit court concluded that the officers' focus at the scene of the crash "was in caring for this individual," "not on investigating an impaired-driving incident." (R. 46:42.) The officers focused on "getting an individual who is in a life-threatening situation the requisite level of medical treatment, extract him safely from the vehicle," and transporting him "to a locale where he could receive medical treatment and ultimately be transported to an appropriate medical facility." (R. 46:42.) The court observed: "Frankly, I think that the public that Deputy McElroy serves would be aghast if they were to learn that in this situation, with an individual facing life-threatening conditions, his focus was on investigating an impaired-driving event rather than getting the individual medical treatment." (R. 46:42–43.)

The circuit court noted that after Richards was extracted from his car and while he was being transported to the hospital, the officer learned that Richards had lost consciousness. (R. 46:43.) And when the officer arrived at the hospital, the scene was "[h]ectic"—Richards was in an "acute medical condition and a transport that is about to take place." (R. 46:44.) The court found that the warrant process takes 20 to 30 minutes. (R. 46:44.) And it concluded that even if "Officer McElroy was doing nothing in this whole process but trying to obtain a warrant at the time of his arrival at the hospital," the "series of events and the time it would have taken could very well and probably would have resulted in

Mr. Richards being transported from the scene of the hospital by ThedaStar prior to the time that the Court would have even authorized the issuance of the warrant." (R. 46:45.)

It is even more unlikely that Richards can satisfy his burden of showing that "his blood would not have been drawn if police had not been seeking BAC information." *Mitchell*, 139 S. Ct. at 2539. Deputy McElroy observed "a large laceration on [Richards's] head, a large laceration of his arm, disorientation." (R. 46:41.) After Richards was extracted from his car, he was transported to the hospital by ambulance and he lost consciousness. (R. 46:10, 43.) And shortly after he arrived at the hospital, he was transported by MedFlight to another hospital. (R.46:42.)

In the circuit court, Richards did not attempt to show both that his blood would not have been drawn at the hospital had officers not wanted evidence about the presence and quantity of drugs and alcohol in his blood, and that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S. Ct. at 2539.

If Richards does not meaningfully assert that he can meet that burden, this Court should affirm the circuit court's decision denying his motion to suppress his blood test results. If Richards does meaningfully allege that he can meet his burden, fact finding might be necessary. Because this Court cannot find facts, *Phelps v. Physicians Ins. Co. of Wisconsin*, 2005 WI 85, ¶ 4 n.4, 282 Wis. 2d 69, 698 N.W.2d 643; *Wurtz v. Fleischman*, 97 Wis. 2d 100, 159 n.3, 293 N.W.2d 155 (1980), remand to the circuit court to make that determination would likely be appropriate.

II. *State v. Paull* supports the State's argument that the circuit court was correct to deny Richards's motion to suppress the blood test results.

The circuit court concluded that the blood draw in this case was justified under the implied consent law, because Richards impliedly consented to a blood draw, did not withdraw that consent, and was unconscious when officers wanted a blood sample. (R. 46:45–46.) In its initial brief to this Court, the State argued that the unconscious driver provision, Wis. Stat. § 343.305(3)(b) is constitutional. (State's Br. 19–32.) The State also argued that even if this Court were to find section 343.305(3)(b) unconstitutional, it should apply the good faith exception to the exclusionary rule and conclude that the circuit court properly denied Richards's motion to suppress his blood test results. (State's Br. 32–34.) The State pointed out that when the officer administered the warrantless blood draw in this case, unconscious driver provision in Wisconsin's implied consent law had not been found unconstitutional. (State's Br. 33.) Under *Illinois v. Krull*, 480 U.S. 340, 349 (1987), the exclusionary rule should not apply to require the exclusion of evidence gathered in objectively reliable reliance on the statute. Instead, the good faith exception should apply. (State's Br. 33.)

In his reply brief, Richards argued that the good faith exception cannot apply to the blood draw in this case because *Missouri v. McNeely*, 569 U.S. 141 (2013), represented a "sea change in the law," and that "after *McNeely*, officers were placed on notice that they must secure a warrant if at all possible." (Richards's Reply Br. 10.) He argued that *Krull* does not apply because "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." (Richards's Reply Br. 10) (quoting *Krull*, 480 U. S. at 355).

This Court recently issued an opinion in *State v. Paull*, 2019 WL 3820298, (R-App. 101–04), which applied the good faith exception in a case much like this one. In *Paull*, the officer administered a warrantless blood draw while the suspected drunk driver was unconscious. Id. ¶ 5. The defendant moved to suppress the blood test results on the ground that the unconscious driver provision, Wis. Stat. § 343.305(3)(b) is unconstitutional. *Id.* ¶¶ 2, 6. The State argued that the provisions are constitutional, but that even if they were to be found unconstitutional, the test results should not be suppressed because the officer relied in good faith on the statute. *Id.* ¶ 6. The circuit court agreed. *Id.* ¶ 7. It assumed that the statute is unconstitutional, but it concluded that the test results need not be suppressed because the officer relied in good faith on the statute. *Id.*

This Court affirmed. It assumed without deciding that the unconscious driver provision is unconstitutional. *Id.* ¶¶ 2, 11. And it concluded that the officer relied in good faith on the statute. *Id.* ¶¶ 18, 20–21.

This Court rejected the argument that the unconscious driver provision was invalidated by *McNeely*. This Court noted that *McNeely* did not "address the constitutionality of blood tests absent a warrant in an unconscious driver situation." *Id.* ¶ 18. Therefore, "it is not objectively reasonable to expect an officer in 2015 to have drawn from" *McNeely* "inferences against the constitutionality of Wisconsin laws permitting blood tests from unconscious drivers." *Id.*

This Court recognized that "in September 2015, at least one appeal from a conviction in a case concerning the constitutionality of the unconscious driver provisions was pending in the Wisconsin courts, and those provisions had yet to be invalidated." *Id.* ¶ 20 (citing *State v. Mitchell*, 2018 WI 84, ¶ 15, 383 Wis. 2d 192, 914 N.W.2d 151 (vacated and remanded by *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019)). This Court therefore concluded that because "no court had

deemed Wisconsin's unconscious driver provisions unconstitutional" at the time of the blood draw from the defendant, "it was objectively reasonable for [the officer] to rely on those provisions, and, therefore, that the good faith exception to the exclusionary rule applied." *Id.* ¶ 18 (citing *Krull*, 480 U.S. at 349).

This Court should apply the same reasoning in this case. Here, the officer administered the blood draw on July 31, 2014. (R. 46:4, 6, 15.) And the officer relied on the unconscious driver provisions in Wisconsin's implied consent law. (R. 46:45.)

The circuit court did not address the good faith exception in this case because Richards did not challenge the constitutionality of the unconscious driver provisions in the circuit court. (R.15.) Richards asks this court to find the unconscious driver provisions unconstitutional. (Richards's Br. 19–30.) But just like in *Paull*, even if this Court were to find the unconscious driver provision unconstitutional (or assume without deciding that it is unconstitutional), it should conclude that the circuit court properly denied the suppression motion because the officer relied in good faith on the statute. As this Court concluded in *Paull*, a reasonable officer would not have believed that the unconscious driver was invalidated by *McNeely*. Instead, the officer could reasonably rely on the statute because the statute had yet to be invalidated.

CONCLUSION

This Court should apply *Mitchell* and *Paull*, conclude that the circuit court properly denied the motion to suppress evidence, and affirm the judgment of conviction.

Dated this 14th day of October 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2982 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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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 14th day of October 2019.

_____
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