STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP1210 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JUSTIN W PAULL,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE William E. Hanrahan, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication.

ARGUMENT

I. Statement of the Case and Facts

This case presents an odd appeal, in that both the State and the Defense agree on nearly every relevant fact. The State does not quarrel with the manner by which the facts were presented by opposing counsel. To provide a bit more clarity, I provide the following timeline (citing the defendant appellant exhibit of the Motion hearing transcript)

A hearing was held on September 23, 2016 at which time Officer Ryhan Smith testified. The relevant facts elicited at that hearing are as follows:

1. The defendant, Justin Paull crashed his motorcycle in the City of Sun Prairie, Dane County, Wisconsin on September 7, 2015 at approximately 7:36 PM. (R. Smith trans., 22:24-23:24).
2. Officer Ryhan Smith responded to the crash. (Id).
3. Officer Smith spoke to the defendant as he was being attended to by good Samaritans. The defendant was "in and out of consciousness," and "spoke with slurred speech and smelled of intoxicants." (Smith 24:3-10).

4. Due to the location of the crash on a slow speed road, the location of the motorcycle, and the slurred speech, Officer Smith believed the defendant to be intoxicated. (Smith 24:21-24).
5. Officer Smith decided to place the defendant under arrest at this time for operating a motor vehicle while under the influence of intoxicants. (Smith 25:15-17).
6. Officer Smith went to the University of Wisconsin Hospital in Madison, Wisconsin to wait for Mr. Paull to finish receiving medical treatment. Officer Smith planned to read the defendant the informing the accused form prior to obtaining a blood draw. (Smith 26:24-27:3).
7. Officer Smith was finally able to read the defendant the informing the accused form and draw blood approximately three hours after the crash. (Smith 27:9-27:16).
8. The defendant was unconscious at the time the informing the accused form was read to him and his blood was drawn. (Smith 27:17-27:25).
9. At the time of this incident, Officer Smith says it was the policy of the Sun Prairie Police, when

obtaining a blood draw on an unconscious driver, to read the informing the accused form and then obtain a blood sample without a warrant. (Smith 35:12-14).

10. Three days after the incident at hand, on September 10, 2015, a memorandum was sent to Sun Prairie Police officers indicating that they should begin obtaining warrants for unconscious drivers. (See Exhibit 1 or Smith testimony).

As the appellant points out, Judge Hanrahan heard the defense motion, considered briefs, and denied the motion to suppress the blood draw. Mr. Paull entered a plea of guilty.

The defense is asking the court to embark on a nationwide search for jurisdictions that have prohibited warrantless blood draw's from unconscious drivers. Next, the Defendant-Appellant asks the Court declare that Wis. Stat. 343.305, a law that nearly every court in Wisconsin, including our Supreme Court, has struggled with, must have been known to be unconstitutional[1] by the patrol officer on the scene. The defense makes this request knowing full well that Wis. Stat. 343.305 remains constitutional in Wisconsin

[1] Referencing Defendant-Appellant's brief at pp. 14.

today. Lastly, the Defense completely ignores the ruling of the Circuit Court that Officer Smith's seizure of blood from the Defendant-Appellant was an "objectively reasonable belief" of fourth amendment parameters and, thus, the Court denied the defense motion.[2]

II. The unconscious driver provisions of Wisconsin's implied consent law are constitutional.

The unconscious driver provisions in Wisconsin's implied consent law at Wis. Stat. 343.305 have been part of the law for decades and have never been held unconstitutional by any appellate court. Nothing in State v. Mitchell, 1018 WI 84, 383 Wis. 2D 192, Missouri v. McNeely, 569 U.S. 141 (2013), or Birchfield v. North Dakota, 136 S. Ct. 2160, renders the law unconstitutional. Neither does the law in Arizona, California, Texas, Kansas, Georgia, or North Carolina. Wis. Stat. 343.305 remains constitutional in Wisconsin.

Paull does not dispute that no Wisconsin appellate court has found the unconscious driver provisions unconstitutional. But argues that the provisions are

[2] See Record 26 (Order) pp.2

unconstitutional under a collective reading of the laws in California, Texas, and Georgia[3] along with McNeely. This Court should not participate in such a skewed reasoning to declare a lawfully enacted statute unconstitutional.

In interpreting the constitutionality of a statute, a Court begins with the plain language of the statute. State v. Dinkins, 2012 WI 24, ¶ 29, 339 Wis. 2d 78 (citing State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis. 2d 633.). Statutes that are lawfully enacted in Wisconsin are presumed constitutional and anyone challenging a statute's constitutionality has the burden of demonstrating that a statute is unconstitutional beyond a reasonable doubt. Wisconsin Med. Soc'y, Inc. v. Morgan, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22.

A facial challenge to the constitutionality of a statute cannot prevail unless "the law cannot be enforced under any circumstances." State v. Wood, 2010 WI 17 ¶ 13, 323 Wis.2d 321.

The defendant errored in the trial court in asserting that State v. Padley changed Wisconsin's implied consent law as it relates to unconscious drivers. In Padley, 2014 WI App. 65, the appeals court affirmed the

[3] See Paull's brief at pp. 7-8

constitutionality of the implied consent law ("For the foregoing reasons, we conclude that Padley fails to demonstrate that her consent to the blood draw was invalid because Wis. Stat. § 343.305(3)(ar)2. is facially unconstitutional or because her consent was involuntary. . . we affirm the decision of the circuit court denying Padley's motion to suppress.") State v. Padley, 2014 WI App 65, ¶ 81, 354 Wis. 2d 545, 590, 849 N.W.2d 867, 888, review denied, 2014 WI 122, ¶ 81, 855 N.W.2d 695.

The defense position was that "implied consent" is not "actual consent." This phrasing is pulled from the decision in Padley, yet, ignores the holding. The State asserts, however, that the "actual consent" provided by the Defendant (and all licensed drivers) is the voluntary consent given at the time of driving on a Wisconsin highway.

The State asks the Court to refer to Wis. Stats. § 343.305(2), which states that "[a]ny person . . . who drives or operates a motor vehicle upon the 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 . . . of

alcohol, controlled substances, controlled substance analogs or other drugs . . . when requested to do so by a law enforcement officer [upon arrest for an OWI related offense] or when required to do so under sub. (3)(ar) or (b)." A strict reading of this statute shows that the "consent" is provided at the time of driving on the highways of our State. The Constitution does not demand a second occurrence of consent at the time of a crash or an OWI arrest (although a conscious driver has the ability to withdraw consent and suffer the consequences of that decision).

The defendant's Padley argument has now been abandoned for a McNeely argument. The analysis, however, remains the same.

Paull argues about differences between implied consent and actual consent. (Paull's Br. 5-6.) But the supreme court has concluded that implied consent that is not withdrawn authorizes a blood draw. Disch, 129 Wis. 2d 225 at 233–34 (1986). No Wisconsin or United States Supreme Court case has overruled Disch, and it remains good law that binds this Court. See State v. Howes, 2017 WI 18, ¶ 75, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring).

III. The Officer acted in good faith when obtaining a sample of Paull's blood without a warrant and, therefore, suppression is not a remedy

The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. State v. Sykes, 2005 WI 48, ¶ 13, 279 Wis. 2d 742, 695 N.W.2d 277. The Wisconsin Supreme Court has 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. Kramer, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598.

When there has been an unlawful search, a common judicial remedy for the constitutional error is exclusion. State v. Eason, 2001 WI 98, ¶¶ 39-45, 245 Wis. 2d 206, 629 N.W.2d 625. That is, illegally obtained evidence will be suppressed as a consequence of the law enforcement officers' misconduct. *Id.* "The [exclusionary] rule is calculated to prevent, not repair." State v. Ward, 2000 WI 3, ¶ 47, 231 Wis.2d 723, 604 N.W.2d 517, citing Elkins v. United States, 364 U.S. 206, 217 (1960).

The circuit court is allowed to complete its own analysis and make its own decisions regarding the application of this rule. The United States Supreme Court wrote that "while courts must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." Stone v. Powell, 428 U.S. 465, 488 (1976). In the case at hand, judicial integrity is not sullied by the admission of the defendant's blood test results, nor will its suppression serve any remedial objective. Both the United States Supreme Court and the Wisconsin Supreme Court "have determined that the retroactivity rule does not bar application of the good faith exception in situations where police act in objectively reasonable reliance on settled (albeit subsequently overruled) law." State v. Dearborn, 2010 WI 84, ¶ 44, 313 Wis. 2d 767, 758 N.W.2d 463.

In Herring v. United States, 555 U.S. 135 (2009), the Court held that the exclusionary rule did not apply to evidence seized incident to an invalid arrest. The defendant had been arrested by one jurisdiction upon receiving information from another jurisdiction that there was a warrant for his arrest, which in fact had been

withdrawn months before, but not noted because of faulty police record keeping. Id. at 137-38. The Court affirmed the holding of both lower courts that the exclusionary rule did not apply in these circumstances:

> Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

Id. at 137.

Two facts of importance to the Court were that: 1) the arresting officers did nothing wrong; and 2) the error of the other jurisdiction was mere negligence, rather than recklessness or deliberate misconduct. Id. at 138-39. In the course of its analysis the Court stated:

> Indeed, exclusion "**has always been our last resort, not our first impulse,**" *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). First, **the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'"** We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.

Herring, 555 U.S. at 140-41 (citations omitted) (emphasis added).

> In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." **The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free – something that "offends basic concepts of the criminal justice system."**

Herring, 555 U.S. at 141-42 (citations omitted) (emphasis added).

The Court clarified that the "good faith" exception would be better referred to as "objectively reasonable reliance." Id. at 142. The Court then traced the extension of the good faith exception from reliance upon an invalid search warrant to reliance upon a statute later declared unconstitutional to reliance upon mistaken information in a court's database. Id.

The Court made clear that the exclusionary rule should be invoked only if the police conduct was flagrant and the police can be charged with knowledge of the unconstitutionality:

> The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in Leon, "an assessment of

> the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. 468 U.S. 897, 911 (1984). Similarly, in Krull we elaborated that "**evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'**"

Herring, 555 U.S. at 143 (citations omitted) (emphasis added).

The Court concluded by holding that:

> To trigger the exclusionary rule, police conduct **must** be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144 (emphasis added).

The Court also raised two other points important to the analysis. The first is that the Court acknowledged that suppression would have some deterrent effect on sloppy police record keeping, but that it was not worth the "substantial social costs." Id.

The second point was raised when the Court drew an analogy to Franks v. Delaware, 438 U.S. 154 (1978), wherein the Court held that mere "police negligence in obtaining a warrant did not even rise to the level of a Fourth

Amendment violation, let alone meet the more stringent test for triggering the exclusionary rule." Herring at 145. Therefore, it would make no sense to suppress evidence in Herring's case, absent recklessness or deliberate misconduct. Id.

In Arizona v. Gant, 556 U.S. 332 (2009), the United States Supreme Court held that previous Supreme Court cases on the issue of search incident to arrest had been "misinterpreted" for close to thirty years. In that case, the Court acknowledged its own role in misleading lower courts in their interpretations of prevailing case law. "[The State's] reading of Belton has been widely taught in police academies and . . . law enforcement officers have relied upon the rule in conducting vehicle searches during the past 28 years." Gant, 556 U.S. at 349 (footnote omitted).

In the case of Gant, it was only the interpretation of case law that was at issue; there was no actual statute that stated specifically what officers should do. In this case, there was such a statute, which the officer has been taught to rely upon.

The Wisconsin Supreme Court has addressed this exact issue in State v. Dearborn, 2010 WI 84, 313 Wis. 2d 767, 758 N.W.2d 463. In that case:

> The main question [was] whether the exclusionary rule should be applied to remedy the constitutional violation, or alternatively, whether the good faith exception should preclude application of the exclusionary rule and the evidence's consequent suppression.

Id. ¶ 2. This case dealt with a search incident to arrest that occurred before the United States Supreme Court found that such searches were unconstitutional, in Gant. The Court ultimately found that the evidence should **not** be suppressed, stating:

> We hold that the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court.

Dearborn, 2010 WI 84, ¶ 4.

The Wisconsin Supreme Court also addressed a similar issue in State v. Ward, 2000 WI 3, 231 Wis.2d 723, 604 N.W.2d 517. In that case, Ward claimed that evidence seized pursuant to a search of his home should be suppressed because officers executed an unlawful no-knock warrant. Id. ¶ 3. At the time the warrant was executed,

it was done according to then-existing law, which was later changed by the United States Supreme Court. Id. The Court found that the exclusionary rule did **not** apply because officers acted in good faith reliance upon the law as it existed at the time. Id.

The exact same analogy as in Herring can be drawn with the instant case. If the court finds that the statute allowing the officer to draw blood from an unconscious driver is not constitutional, because the blood draw occurred prior to the determination of unconstitutionality, it would not even rise to the level of a Fourth Amendment violation, let alone meet the more stringent test for triggering the exclusionary rule.

There can be no serious dispute that under the Herring analysis the good faith – or objectively reasonable reliance – exception should be applied in this case. This is because:

1) There was no police misconduct in this case, not even negligence, because the officer was following the statute. Wis. Stat. § 343.305(3)(b) clearly states that unconscious persons are deemed to have consented to chemical testing of their blood, breath, or urine by not withdrawing

their implied consent. While the defendant and others have recently challenged the constitutionality of this statute, the statute is still good law.

2) The exception to the exclusionary rule is not limited to certain circumstances such as invalid search warrants, but also includes situations where a statute is later declared unconstitutional. In this case, Wis. Stat. 343.305(3)(b) has not been declared unconstitutional by any appellate court. Even if the statute is declared unconstitutional, the good faith exception would still apply.

3) If this evidence were to be suppressed, there would be no deterrence of police misconduct whatsoever. The officer conducted a legal blood draw in compliance with long standing state statute. There is no evidence whatsoever that the Officer acted in a manner outside of his training and understanding of the law. If the officer has any question on how to conform his behavior to the law, there was a statute stating that the officer should do exactly what he did do. Given

> the officer's belief he was acting within the law, suppression of the blood test would unequivocally have no deterrent effect.

In the case at hand, the defendant's blood was drawn pursuant to statute, as well as pursuant to the officer's training; therefore, it was clearly lawful at the time it was drawn. There was clearly no foul play, maliciousness, negligence, or bad faith on the part of the officer. Therefore, suppression would have no deterrent effect and is not the remedy.

CONCLUSION

The State requests the Court deny the defendant-appellant's appeal and remand to the Circuit Court for a lift of the Stay of Sentence in this matter.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 18 pages.

Dated: _____.

Signed,

_____
Attorney

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this day of November, 2018.

_____
William L. Brown
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