STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2017AP1210-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUSTIN W. PAULL,

Defendant-Appellant.

On notice of appeal from a judgment
entered in the Dane County Circuit Court,
the Honorable William E. Hanrahan, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Legislature's enactment of a policy of taking blood from unconscious motorists suspected of intoxication does not establish that those motorists have given Fourth Amendment consent; *State v. Mitchell* did not set binding precedent to the contrary.

As Mr. Paull observed in his opening brief, whether a legislature can defeat the Fourth Amendment warrant requirement by "deeming" a class of people to have consented to a search is a question that has arisen all over the country. Quite a few state courts have addressed it, and a solid majority have concluded that, no, a legislature cannot simply declare constitutional consent. Opening Brief at 4-10. As Mr. Paull also pointed out, even after *State v. Mitchell*, the question is an open one in Wisconsin. Opening Brief at 3-4; 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151.

Mr. Paull also argued that this court should adopt the view aligning with the majority of courts nationwide, for several reasons: "implied consent" is not really consent at all, Opening Brief at 6-7; it doesn't consider, as the Constitution requires, voluntariness under all the circumstances, Opening Brief at 7-9; and it's a *per se* warrant exception of the sort the Supreme Court rejected in *Missouri v. McNeely*. Opening Brief at 9; 569 U.S. 141 (2013).

In its response the state speaks generally of constitutional principles, and notes that the statute "deems" consent to exist by the act of driving. Respondent's Brief at 4-7. But it offers no argument that this "deemed consent" satisfies the Fourth Amendment: it does not argue that Mr. Paull actually consented, or that he consented voluntarily under all the circumstances, or that the statute does not create a *per se* exception to the Fourth Amendment contrary to *McNeely*. Respondent's Brief at 4-7. It suggests only that the question has already been settled, back in 1986, in *State v. Disch*, 129 Wis. 2d 225, 385 N.W.2d 140 (1986). Respondent's Brief at 7. This is wrong; *Disch* was a statutory interpretation case and did not even mention the Fourth Amendment. The state's failure to provide any substantive argument should be deemed a concession, and this court should hold (as did four of the justices in *Mitchell*) that the implied-consent law does not satisfy the voluntary consent exception to the warrant requirement.

II. The good faith doctrine is not satisfied here because, after *McNeely*, a reasonable officer could not conclude a statute's blanket authorization of warrantless searches was constitutional.

Mr. Paull argued in his opening brief that a reasonable officer could not, in 2015, believe that Wis. Stat. § 343.305(3)(ar) & (b) satisfy the rule announced in *McNeely*: that a warrantless blood test of an OWI suspect can be legal only "case by case

based on the totality of the circumstances." Opening Brief at 14-16. The statutes clearly don't contain such an inquiry: they just give blanket authorization for blood draws any time three circumstances are present. Such a plainly unconstitutional statute cannot sustain a good-faith claim. *Illinois v. Krull*, 480 U.S. 240, 355 (1987).

Once again, the state responds with a summary of good-faith case law and then simply asserts that the existence of the statute rules out suppression. Respondent's Brief at 8-15. The state then claims that this court should not apply the exclusionary rule because the officer engaged in "no foul play, maliciousness, negligence, or bad faith." Respondent's Brief at 17.

That is not the standard. Mr. Paull need not show "foul play." He need only show that the statutes here are plainly just what *McNeely* forbids—a *per se* exception to the warrant requirement.

This was the argument of his opening brief, and the state apparently agrees—its good-faith section doesn't even mention *McNeely*. In the absence of any argument that the implied-consent statute doesn't plainly violate the rule of that case—which, again, was decided more than two years before the arrest here—this court should decline to apply the good faith doctrine and should order the evidence suppressed.

CONCLUSION

Mr. Paull respectfully requests that this court vacate his conviction and sentence and remand to the circuit court with instructions that all evidence derived from the taking of his blood be suppressed

Dated this 14th day of December, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 704 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 14th day of December, 2018.

Signed:

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