STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001403 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

COLLIN GALLAGHER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JUNE 27, 2017, IN THE CIRCUIT COURT
FOR LAFAYETTE COUNTY,
THE HONORABLE DUANE JORGENSON, PRESIDING

Respectfully submitted,

COLLIN GALLAGHER,
Defendant-Appellant

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STATEMENT OF THE ISSUES

I. SHOULD GALLAGHER'S BLOOD TEST RESULTS HAVE BEEN SUPPRESSED WHEN THE SEARCH WARRANT DID NOT AUTHORIZE ANY ANALYSIS OF HIS BLOOD?

TRIAL COURT ANSWERED: NO

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Collin Gallagher's motion to suppress the results of an evidentiary chemical analysis of his blood after an arrest for operating while under the influence of an intoxicant.[1]

On May 18, 2016, a Lafayette County Sheriff's Deputy arrested Mr. Gallagher for operating while under the influence of an intoxicant ("OWI").[2] After the deputy read Gallagher the Informing the Accused form, Gallagher refused a blood test.[3] The deputy then obtained a warrant, which authorized him to collect "a blood sample from the body of the above named driver."[4] The blood sample was collected by a technician in the hospital, and Gallagher's blood came back at a 0.17.[5]

On August 11, 2016, the Lafayette County District Attorney's Office charged Gallagher with operating while under the influence of an intoxicant.[6] Gallagher filed a motion to suppress because the warrant authorizing the collection of his blood did not authorize its chemical analysis.[7]

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[1] R. 16.
[2] R. 3.
[3] *Id.*
[4] R. 20.
[5] R. 3:15.
[6] R. 3.
[7] R. 16.

The trial court ruled against Gallagher, finding that it was unclear how an expectation of privacy existed in drawn blood.[8] The trial court acknowledged the holding in ***Birchfield v. United States***[9] that blood tests implicate significant privacy concerns.[10] The court noted there was a potentially valid privacy interest claim, but stated, "perhaps this is an issue that has potential for development . . . by appellate courts[.]"[11] Ultimately the trial court ruled against Gallagher, stating that the collected blood was lawfully obtained evidence and could be analyzed for blood alcohol content.[12]

On June 27, 2017, Gallagher entered a guilty plea to operating while under the influence of an intoxicant as a third offense.[13] Gallagher now appeals the trial court's denial of his suppression motion.[14]

[8] R. 41:20.
[9] ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016)
[10] R. 41:11.
[11] R.41:17.
[12] R. 41:20.
[13] R. 32.
[14] R. 36.

ARGUMENT

I. BECAUSE THE SEARCH WARRANT DID NOT AUTHORIZE ANY ANALYSIS OF GALLAGHER'S BLOOD, THE BLOOD TEST RESULTS MUST BE SUPPRESSED.

A. Standard of Review

Whether a search is valid is a question of constitutional law reviewed *de novo*.[15]

B. A person has a legitimate privacy interest in the information contained in a sample of his blood.

A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol, drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and genetic profiles suitable for identification purposes. For these reasons, the United States Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy.[16]

The United States Supreme Court has consistently recognized an expectation of privacy in the information contained within biological samples—a privacy interest distinct from the collection of

[15] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[16] ***Skinner v. Railway Labor Executive's Association***, 489 U.S. 602, 616 (1989).

the samples in the first place. In the 1989 case ***Skinner v. Railway Labor Executive's Association***, the Court explained:

> [I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of … privacy interests.[17]

In 2001, the United States Supreme Court decided the case of ***Ferguson v. City of Charleston***, where warrantless drug testing was conducted on lawfully-obtained urine samples.[18] Despite the collection of the urine itself being lawful, the Court, citing to ***Skinner***, held that "the urine tests … were *indisputably* searches within the meaning of the Fourth Amendment."[19]

In ***Birchfield v. North Dakota***, the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample: "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested."[20] Thus,

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[17] ***Skinner v. Railway Labor Executive's Association***, 489 U.S. 602, 616 (1989).
[18] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).
[19] ***Id***., at 76 (emphasis supplied),
[20] ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2178 (2016).

citizens like Gallagher have a legitimate and recognized privacy interest in the information contained in their own blood.

A search occurs for Fourth Amendment purposes whenever the government intrudes upon an individual's "reasonable expectation of privacy."[21] Since Gallagher had a reasonable expectation of privacy in the information contained in his blood, the analysis of his blood sample was a search, and therefore subject to the warrant requirement of the Fourth Amendment.

C. A warrant to seize a blood sample does not authorize the analysis of the sample.

Because analysis of Gallagher's blood by the government was a search, it must therefore be justified by a warrant or by an exception to the warrant requirement. Although the warrant here authorized the collection of a blood sample from Gallagher, it did not contain any authorization for the analysis of that blood. The analysis of evidence in police custody cannot be justified by the simple fact that it was lawfully seized.

In ***Riley v. California***, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches.[22] While a blood sample analysis and a cell phone search are

[21] ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
[22] ***Riley v. California***, 134 S. Ct. 2473 (2014).

not exactly alike, both a cell phone and a blood sample have vast amounts of unanalyzed personal information contained within.

The question in ***Riley*** was whether police could analyze the contents of a lawfully-seized cell phone under the Fourth Amendment.[23] The Court recognized that a huge amount of personal information could be stored on or accessed through a cell phone, including information implicating significant privacy concerns, such as medical records.[24] The Court ultimately decided:

> [A] warrant is generally required before such a search, even when a cell phone is seized incident to arrest … Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[25]

The ***Riley*** court explicitly distinguished the search of a cell phone's contents from searching a person incident to arrest.[26] While concerns about officer safety and the destruction of evidence are minimal with a cell phone search, the privacy interest is much greater than with a pat-down incident to arrest.[27] Moreover, the Court stated that searching a cell phone revealed more private information than any home search would.[28] Here, the trial court failed to recognize the similarities between Gallagher's blood sample and a cell phone in terms of the heightened privacy interests involved. Seizing a blood

[23] ***Id***., 134 S. Ct. at 2480.
[24] ***Id***., at 2490.
[25] ***Id.*** at 2493, 2495.
[26] ***Id***., at 2485.
[27] ***Id.*** at 2478, 2479.
[28] ***Id.*** at 2491.

sample, like seizing a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant to seize these items. However, analyzing a blood sample, like searching a cell phone, implicates a greater privacy interest. Because there is a greater privacy interest in the analysis of the blood sample, the reasonableness of the search must be more carefully scrutinized.

One of the overarching principles of the ***Riley*** decision is that law enforcement's conduct must sometimes be broken into multiple constitutionally significant events, each requiring separate justification under the Fourth Amendment. Removing a cell phone from a citizen's pocket is an invasion of his privacy that the State must legally justify; taking that cell phone and analyzing it is another invasion of privacy which the State must independently justify. Thus, while the seizure may be authorized under an exception to the warrant requirement, the analysis of the phone's contents is a separate search requiring either a warrant or an exception to the warrant requirement.

Here, the trial court held that the purpose of seizing the blood is to analyze it, and that this process cannot be broken into separate events.[29] This view is inconsistent with ***Riley*****.** One could argue that the only purpose of seizing a cell phone is to examine what is stored on it. Yet the Supreme Court saw fit to do precisely what the State is

[29] R. 41:20

arguing cannot be done—to separate the seizure of the item and its analysis into separate constitutional events, each requiring justification. While seizing and preserving Gallagher's blood was lawful, the warrant did not authorize any analysis of the blood. Because the government had no legal justification for the blood analysis, it was an unlawful search; and the test results should have been suppressed.

D. The *Riedel* and *VanLaarhoven* cases do not dictate the result in this case.

In the trial court, the State cited to ***State v. Riedel*** and ***State v. VanLaarhoven*** to argue that no legal justification was necessary to analyze the blood sample.[30] Neither ***Riedel*** nor ***VanLaarhoven*** control here. These cases were respectively published in 2003 and 2001, meaning no appellate court has reexamined either case in a published decision since the U.S. Supreme Court issued the ***Riley*** and ***Birchfield*** decisions. Wisconsin courts are bound to follow those decisions.

In ***VanLaarhoven***, the Wisconsin Court of Appeals held that no second warrant was necessary to analyze the defendant's blood.[31]

[30] R. 18; ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789; ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W. 2d 411.
[31] ***VanLaarhoven***, 2001 WI App 27, ¶ 17.

The Court of Appeals relied upon ***State v. Petrone***, which held that the seizure of undeveloped film through a warrant could not be distinguished from developing the film.[32] Yet ***VanLaarhoven***'s holding (and ***Petrone***'s, by extension) is in conflict with ***Riley***, which requires a warrant to analyze otherwise lawfully obtained evidence.[33] Because ***VanLaarhoven*** likely directly contradicts ***Riley***, the case must be reexamined by an appellate court.

Riedel broadly holds that analyzing a blood sample does not require a separate warrant or legal justification because analyzing the sample is legally indistinguishable from seizing it.[34] That general holding is in direct conflict with the holding in ***Riley***, which held that evidence seized pursuant to an exception to the warrant requirement did require a judicially authorized warrant to analyze the cell phone.[35] Thus, to the extent ***Riedel*** conflicts with ***Riley***, ***Riedel*** must be abrogated.

In addition, both ***Riedel*** and ***VanLaarhoven*** are distinguishable from the factual scenario in Gallagher's case. The ***Riedel*** court held the collection of the blood sample was justified by exigent circumstances.[36] The search in ***VanLaarhoven*** was justified

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[32] ***State v. Petrone***, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991).
[33] ***Riley***, 134 S. Ct. at 2485.
[34] ***Riedel***, 2003 WI App 18, ¶ 16.
[35] ***Riley***, 134 S. Ct. at 2485.
[36] ***Riedel***, 2003 WI App 18, ¶ 6.

by the driver's consent.[37] Here, Gallagher refused consent to the blood test, and no exigent circumstances existed to draw the blood without a warrant. Neither case directly addressed whether blood analysis could be legally conducted on a blood sample obtained pursuant to a warrant that authorized only the collection of the sample.

At the time that both ***Riedel*** and ***VanLaarhoven*** were decided, Wisconsin courts took the position that the Fourth Amendment was satisfied whenever there was probable cause to believe drunk driving had occurred and alcohol was dissipating from the suspect's blood.[38] In other words, in Wisconsin, courts considered alcohol dissipation as exigent circumstances in virtually every case where a defendant would not give consent to a blood draw. This broad view of exigent circumstances was done away with by ***Missouri v. McNeely*** and ***State v. Foster***.[39] Since ***Foster***, Wisconsin law has recognized dissipation of alcohol alone is not sufficient exigency to form the basis for a warrantless search.

While "exigent circumstances" is a well-recognized exception to the warrant requirement, there is a vital distinction between a search pursuant to an exception to the warrant requirement and a search pursuant to a warrant. A search pursuant to a warrant must be strictly

[37] ***VanLaarhoven***, 248 Wis. 2d at 887.
[38] ***State v. Bohling***, 494 N.W.2d 399, 173 Wis. 2d 529 (1993).
[39] ***Missouri v. McNeely***, 569 U.S. 141, 156 (2013); ***State v. Foster***, 360 Wis. 2d 12, 33, 856 N.W.2d 847 (2014).

limited by the particularity of the warrant, whereas a search pursuant to an exception to the warrant requirement is not so limited.[40]

Where there is a search authorized by an exception to the warrant requirement, the search is reasonable if properly limited to the exception in play. For example, if a search is authorized by consent (as in ***VanLaarhoven***), then the scope of the consent determines the reasonableness of the search.[41] If the search is authorized by exigent circumstances (as in ***Riedel***), then probable cause limits the scope of the search.[42] But the scope of a search pursuant to a warrant is defined by the terms of the warrant itself. No published decision extends the holdings in ***Riedel*** and ***VanLaarhoven*** to searches initially authorized by warrant. That would be an incorrect application of law, as it would apply a standard based on exigent circumstances or consent to a case where a search warrant had been issued. Thus, ***Riedel*** and ***VanLaarhoven*** do not control here.

E. The scope of a search warrant must be explicit, not implicit.

The Fourth Amendment specifically requires that "no Warrants shall issue, but upon probable cause, supported by Oath or

[40] ***Morales v. State***, 44 Wis. 2d 96, 104–05, 170 N.W.2d 684 (1969).
[41] ***Maryland v. Garrison***, 480 U.S. 79 (1987); ***Brinegar v. United States***, 338 U.S. 160 (1949).
[42] *See* ***State v. Pires***, 55 Wis. 2d 597, 606, 201 N.W.2d 153 (1972).

affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*."[43] The particularity requirement exists to prevent general searches where law enforcement is left to its own discretion as to what to search.[44] In ***Coolidge v. New Hampshire***, the Supreme Court explained the "two distinct constitutional protections" protected by the Fourth Amendment:

> First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of a search or seizure is evil, so that no intrusion at all is justified without a careful prior determination of necessity. The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.[45]

As seen through the framework of ***Coolidge***, the issue here is not whether *some* intrusion was proper but whether the warrant was sufficiently particular and as limited as possible.

While the description of what the police are allowed to search does not have to be technical, it must sufficiently delineate what an officer can search and seize without leaving it up to the individual executing the warrant to make that determination.[46] The search warrant in this case explicitly authorizes "the taking of a blood sample

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[43] (Emphasis added.)
[44] ***Boyd v. United States***, 116 U.S. 616, 624 (1886), abrogated on other grounds, ***Marron v. United States***, 275 U.S. 192, 195 (1927).
[45] ***Coolidge v. New Hampshire***, 403 U.S. 443, 467 (1971) (internal citations omitted; emphasis in original).
[46] ***Morales v. State***, 44 Wis. 2d 96, 104–05, 170 N.W.2d 684 (1969).

from the body" of Gallagher. The warrant authorizes the means for the execution of the warrant. It is devoid of any authorization for the analysis or examination of the blood sample.

There are then only two possible interpretations of law enforcement's execution of this warrant—either (1) law enforcement exceeded the scope of the warrant; or (2) there is "implicit" authorization contained in the warrant for the blood analysis. If the first is correct, then the evidence must be suppressed. If there is "implicit" authorization, then the Court must consider the ramifications of such a warrant.

As noted above, the Supreme Court has recognized that a blood sample contains a significant amount of personal information, far beyond a simple blood alcohol reading.[47] If implicit authorization to analyze the blood sample can be read into the warrant, then additional authorizations could also be read in, eliminating any expectation of privacy that a citizen would possess in his or her blood. The very purpose of a warrant, the purpose of the Fourth Amendment, is to appropriately limit the authority of the government.

If authority for blood analysis can be implied from the face of the warrant, then the warrant is an overbroad "general warrant," which is invalid under the Fourth Amendment. The historical purpose of the

[47] ***Birchfield***, 136 S. Ct. at 2178.

particularity requirement was to prohibit a "general warrant" authorizing the "general, exploratory rummaging through a person's papers and effects."[48] The founders of this country did not trust law enforcement officers to receive a general warrant and then abide by some ephemeral "implicit" limitations. The warrant must be explicit; "nothing is left to the discretion of the officer executing the warrant."[49]

Neither caselaw nor the Fourth Amendment permit the police to determine for themselves the limitations of judicially authorized warrants. Nor can police exceed the scope of a warrant. Under any interpretation of the government's actions here, the search of Gallagher's blood was unlawful.

[48] ***State v. Starke***, 81 Wis. 2d 399, 412–13, 260 N.W.2d 739 (1978) (internal citations omitted).
[49] ***Stanford v. Texas***, 379 U.S. 476, 485 (1965) (*quoting* ***Marron v. United States***, 275 U.S. 192, 196 (1927)).

CONCLUSION

When a search warrant is issued, it must state with particularity the things to be searched. When a search warrant for blood is issued, no lesser standard applies. A search warrant issued without limitation is illegal, and the fruits of any search based on such a warrant must be suppressed.

For all the reasons stated, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellant's motion to suppress. Had the suppression motion been granted, there would have been insufficient evidence to convict Gallagher, and he would not have entered a guilty plea.

Dated at Madison, Wisconsin, October 2, 2017.

Respectfully submitted,

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CERTIFICATION

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

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I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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CERTIFICATION

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; and
(3) 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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