STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN

DISTRICT IV

APPEAL CASE NO. 2017AP001403-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

VS.

COLLIN M. GALLAGHER,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

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

JENNA GILL
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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent, State of Wisconsin, agrees with Defendant-Appellant that oral argument is not warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal. Further, this case is not appropriate for publication because the Plaintiff-Respondent believes that the issue of law to be decided in this case has already been well decided.

ARGUMENT

I. A SECOND SEARCH IS NOT REQUIRED TO CHEMICALLY ANALYZE BLOOD LAWFULLY SEIZED BY A WARRANT DURING AN OWI INVESTIGATION.

The ultimate argument made by Gallagher is that the search warrant obtained did not authorize any analysis of defendant's blood requiring that the results be suppressed. An order granting a motion to suppress evidence is reviewed as question of constitutional fact. State v. Wantland, 2014 WI 58, ¶ 18, 355 Wis. 2d 135, 848 N.W.2d 810 (citations omitted). A reviewing court upholds a circuit court's findings of historical fact unless they are clearly erroneous. It independently applies constitutional principles to those facts. Id. ¶ 19 (citations omitted). In this case, the Gallagher's blood was lawfully seized by a search warrant after he was read the Informing the Accused form and refused. Once the blood was lawfully seized, law enforcement was authorized to test the blood. Law enforcement

did not need a second warrant for that authorization. This argument has been denied by well-established precedent.

In State v. Erstad, this Court indicated that the concept of a "separate search" argument was put to rest in State v. Riedel, 259 Wis. 2d 921, 656 N.W.2d 789 (Ct. App. 2003), which adopted holdings in three other cases. State v. Erstad, No. 2015AP2675, unpublished slip op. (July 28, 2016). Riedel makes clear that, once police lawfully obtain a blood sample in the course of a drunk driving investigation, they need not obtain further authorization to test the blood for the presence of alcohol. Id. at ¶22. In Riedel, the court explained:

> This court has concluded that Snyder and Petrone stand for the proposition that the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components." VanLaarhoven, 2001 WI App 2275 at ¶16. We find the reasoning of Snyder, Petrone, and VanLaarhoven persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis.

Riedel at ¶ 16. This Court indicated again in State v. Schneller, that Riedel determined that no further authorization is necessary to test the blood for the presence of alcohol once the blood sample has been lawfully obtained. State v. Schneller, No. 2016AP2474, unpublished slip op. (June 22, 2017).

Gallagher additionally argues that Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) and Ferguson v. City of Charleston, 532 U.S. 67 (2001) indisputably confirm that the subsequent

analysis of a blood sample is a separate search and thus, subject to the warrant requirement of the Fourth Amendment. This Court rejected this argument, as well, in Erstad, and stated that "the court in Riedel acknowledged the pertinent Skinner language, and concluded that that language does not address whether the testing of lawfully obtained blood is a separate search." Erstad at ¶25 (citing Riedel, 259 Wis. 2d 921, ¶16 n.6). Thus, this argument by Gallagher does not advance his position.

Gallagher further goes on to rely on Riley v. California to argue that a warrant authorizing seizure of a blood sample does not authorize the analysis of that sample by comparing cell phone searches incident to arrest. 134 S. Ct. 2473 (2014). Gallagher is incorrect that Riedel conflicts with Riley. This Court addressed this exact argument in Schneller and was not persuaded by the argument. In doing so, the opinion indicated "Riley addressed the narrow issue of whether a warrant is required to search a cell phone that is seized incident to arrest…Riley did not address the taking or testing of blood, nor did it address whether a separate warrant would be required to search a cell phone if the cell phone was taken not incident to an arrest, but instead pursuant to a warrant." Schneller at ¶8-9. In so finding, there was a conclusion that Riley does not directly conflict with Riedel. Id. The Riley Court concluded that if police officers want to search a cell phone incident to arrest they must "get a warrant." Riley at 2495. The circumstances in this case are entirely different from those in Riley for the

reasons stated. A person has no reasonable privacy interest in the blood that has been obtained under the implied consent laws after reading the Informing the Accused form and through a valid warrant.

Here, just as in Erstad and Schneller, the Gallagher also argues that Missouri v. McNeely, 133 S. Ct. 1552 (2013) calls Riedel into question. Both opinions agreed that neither exigency nor the Implied Consent Law played a role in the court's analysis in Riedel of what police may do with a blood sample once they have lawfully obtained it. Erstad at ¶23-24 and Schneller at ¶10 (citing Riedel at ¶7-17). Similarly, this case does not implicate either of those issues and instead, Gallagher's blood was lawfully obtained based on a warrant, not exigent circumstances or the Implied Consent Law.

Gallagher's last argument fails in its entirety. Gallagher suggests that the search warrant in this case, that authorized the taking of a blood sample from the body of the Gallagher based upon an affidavit, is devoid of any authorization for the analysis or examination of the blood sample. Gallagher then suggests that because of that, there are only two interpretations-either (1) law enforcement exceeded the scope of the warrant; or (2) there is "implicit" authorization contained in the warrant for the blood analysis. In essence, the Gallagher is first arguing that the search warrant lacks the authorization necessary for the analysis of the blood, but then also argues that the search warrant is overbroad, which would certainly

encompass such authorization. The court in Erstad commented on a similar argument and indicated it was difficult to reconcile the two arguments. Erstad at pg. 9, note 2. It is the State's position that these two arguments are irreconcilable, but nonetheless, Riedel controls. The search warrant is not devoid of authorization for the analysis. Rather, Riedel, Snyder, Petrone, VanLaarhoven, Erstad, and Schneller all confirm that "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." The implied consent law and the Informing the Accused form, speak of the testing of samples and any sample obtained after reading the Informing the Accused form may be analyzed by virtue of those laws. This is not an issue of a warrant containing implicit terms that make a warrant overbroad and therefore, a general warrant. For those reasons, this argument fails.

There is a legitimate governmental interest in analyzing blood that has been lawfully drawn, which courts have long recognized-that of preserving the safety of public highways. A requirement of a warrant to analyze blood for alcohol and drugs after a person's blood has been lawfully drawn would serve no real, legitimate purpose. In this case, a judge found probable cause to issue a warrant for the withdrawal of Gallagher's blood. The withdrawal would serve no purpose if the blood wasn't analyzed and the judge would have signed the warrant for no reason

and to only have to sign a second warrant later authorizing the analysis. The suppression of the results of the blood test is unnecessary and unwarranted.

CONCLUSION

This Court should uphold the trial court's order denying the defendant's motion to suppress. A second search warrant was not needed to give law enforcement the authority to analyze the defendant's blood. The testing of the defendant's blood was an essential part of the seizure.

Therefore, the State of Wisconsin respectfully requests that this Court uphold the decision of the trial court and order that the defendant be returned to the court to serve his sentence that was imposed on June 27, 2017.

Dated this 9th day of January, 2018.

Respectfully submitted,

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CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 1,430 words.

Dated this 9th day of January, 2018.

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Jenna Gill
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Attorney for Plaintiff-Respondent

CERTIFICATE OF ELECTRONIC FILING

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wisconsin Statutes sections 809.19(12)(f) and 809.19(13)(f) and that the content of the electronic copy of the Respondent's brief is identical to the content of the paper copy of the Respondent's brief.

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

Dated this 9th day of January, 2018.

_____

Jenna Gill
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CERTIFICATION OF MAILING

I certify that this brief and accompanying documents was mailed via the United States Postal Service to the Wisconsin Court of Appeals, District IV and to all parties associated with this action on January 9, 2018.

Dated this 9th day of January, 2018.

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Jenna Gill
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified.

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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of January, 2018.

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APPENDIX

State v. Erstad, No. 2015AP2675, unpublished slip op. (July 28, 2016)

State v. Schneller, No. 2016AP2474, unpublished slip op. (June 22, 2017)