STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001403 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

COLLIN GALLAGHER,

Defendant-Appellant.

REPLY BRIEF 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

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant-Appellant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: ADAM WELCH
State Bar No. 1064835

BY: TRACEY A. WOOD
State Bar No. 1020766

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

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

A. Federal caselaw is clear that the analysis of lawfully-seized biological sample is a search subject to the requirements of the Fourth Amendment.

The State begins its argument by declaring: "Once the blood was lawfully seized, law enforcement was authorized to test the blood."[1] The State then justifies this position by referring to "well-established precedent."[2] But the cases cited by the State do not adequately address the issues at hand.

As stated in Gallagher's brief-in-chief, ***Riedel*** does not control here.[3] While Gallagher does not challenge the lawfulness of the blood draw based on exigent circumstances, he brings up ***McNeely*** and ***Riley*** because these cases changed the constitutional considerations a court must make when considering a blood draw upon OWI arrest.[4] ***McNeely*** is important to this analysis because it was the first time the United States Supreme Court expressed the idea that blood tests must be more carefully scrutinized for reasonableness.[5] ***Riedel***, as a pre-

[1] State Br. 3.
[2] ***Id.*** at 4.
[3] ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789. For a more extensive discussion of this topic, *see* Brief of Defendant-Appellant, 13.
[4] ***Missouri v. McNeely***, 569 U.S. 141 (2013), ***Riley v. California,*** 134 S. Ct. 2473 (2014).
[5] ***McNeely***, 569 U.S. at 156.

McNeely case, was decided on the basis of exigent circumstances at a time when the natural dissipation of alcohol was considered a per se exception to the warrant requirement for blood draws. ***Riedel*** did not address whether the government could analyze a blood sample obtained through a warrant which only authorized its collection. And ***Riley*** is important because the United States Supreme Court recognized police conduct may be broken into constitutionally significant events—each step of which must be constitutionally justified due to a further invasion of privacy.

The State cites numerous times to ***State v. Erstad*** and ***State v. Schneller***, two unpublished Court of Appeals decisions that relied upon ***State v. Riedel*** to conclude police do not need to obtain a warrant to submit a blood sample for alcohol analysis.[6] In these unpublished cases, defense counsel argued, among other things, that the warrant used to collect the defendant's blood did not authorize its analysis. The ***Erstad*** and ***Schneller*** Courts concluded that ***Riedel*** controlled and denied the defendant's claim.[7] The Court of Appeals also held

[6] ***State v. Erstad***, 2016 WI App 67, 371 Wis. 2d 566, 884 N.W.2d 535, (unpublished but citable under Wis. Stat. (Rule) 809.23(3)); ***State v. Schneller***, No. 2016AP2474, unpublished slip op. (June 22, 2017); ***State v. Riedel***, 2003 WI App 18, 259 Wis. 3d 921, 656 N.W.2d 789.

[7] ***Erstad,*** 2016 WI App 67, 371 Wis. 2d 566, 884 N.W.2d 535, (unpublished but citable under Wis. Stat. (Rule) 809.23(3)); ***State v. Schneller***, No. 2016AP2474, unpublished slip op. (June 22, 2017).

that ***Skinner*** did not address whether the analysis of blood was a separate search.[8]

As a preliminary matter, neither of these cases are citable as precedent. Although the State appears to treat these cases as dispositive, no published appellate decision has addressed the second search issue. These unpublished decisions are citable only for their persuasive value, but the State's brief fails to set forth a developed argument based on these opinions. The State's undeveloped argument need not be considered by this Court.[9]

Nor may the State rely upon ***Erstad*** and ***Schneller*** to argue ***Skinner v. Railway Labor Executives' Ass'n*** and ***Ferguson v. City of Charleston*** do not apply to the analysis of blood samples.[10] This Court may not ignore the plain language of United States Supreme Court precedent in favor of an unpublished Wisconsin Court of Appeals decision. In ***Skinner***, the Court stated the privacy interest inherent in a blood draw is "obvious."[11] In ***Ferguson***, the Court stated the testing of an already-seized urine sample was "indisputably" a search.[12] Other

[8] ***Erstad***, 2016 WI App 67, 371 Wis. 2d 566, 884 N.W.2d 535, (unpublished but citable under Wis. Stat. (Rule) 809.23(3));
[9] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).
[10] ***Skinner v. Railway Labor Executives Ass'n***, 489 U.S. 602 (1989); ***Ferguson v. City of Charleston***, 532 U.S. 67 (2001).
[11] ***Skinner***, 489 U.S. at 616.
[12] ***Ferguson***, 532 U.S. at 76.

states also recognize that the analysis of blood samples constitutes an invasion of privacy that is distinct from the initial collection of the blood.[13]

Based on this caselaw, the analysis of Gallagher's blood was a search—a search that was legally distinct from the initial collection of his blood. And because the analysis was a search, it was subject to the requirements of the Fourth Amendment.[14]

B. The legal principles behind *Riley* and *Birchfield* require police to have a warrant or an exception to the warrant requirement to analyze a person's blood.

No published Wisconsin decision has addressed the "second search" issue post-***Riley***.[15] ***Riley*** stands for the proposition that a search may be analyzed as a series of discrete, constitutionally-significant events. This rationale is in direct conflict with the broad holding of ***Riedel***, which explicitly prohibits the "pars[ing] of a lawful seizure of a blood sample into multiple components."[16] Wisconsin courts must reexamine ***Riedel*** in light of ***Riley*** but have not yet done so.

---

[13] *See, e.g.*, ***State v. Huse***, 491 S.W.3d 833 (Tex. Crim. App. 2016), holding that "when the State itself extracts blood from a DWI suspect, and when it is the State that conducts the subsequent blood alcohol analysis, two discrete 'searches' have occurred for Fourth Amendment purposes"; *citing* ***State v. Hardy***, 963 S.W.2d 516, 523–24 (Tex. Crim. App. 1997).
[14] *See also* Brief of Defendant-Appellant, 8.
[15] ***Riley v. California***, 134 S. Ct. 2473 (2014).
[16] ***Riedel***, ¶ 16 (internal citation and punctuation omitted).

Nor has a Wisconsin court reexamined ***Riedel*** in light of ***Birchfield v. North Dakota,***[17] which held that blood tests implicate a significant privacy interest. If a person has a reasonable expectation of privacy in his or her blood, any analysis the government orders performed on that blood constitutes a search.

The State's brief does not address ***Birchfield***. Instead, it declares: "[a] person has no reasonable privacy interest in the blood that has been obtained under the implied consent laws . . . and through a valid warrant."[18] This proposition is flawed for several reasons.

First, as stated above, federal caselaw is clear that a person maintains a privacy interest in his or her drawn blood. This privacy interest does not disappear once the blood is drawn.[19] The fact that vast amounts of information can be found in a person's blood sample contributes to the heightened privacy interest.[20]

Second, whether a blood sample is obtained through the implied consent law, through express consent, or pursuant to a warrant, the analysis of a person's blood is still a search under the Fourth Amendment. The mode through which the police get the sample does not change the legal principles.

---

[17] 136 S.Ct. 2160 (2016)
[18] State Br. 6.
[19] ***Ferguson***, 532 U.S. at 76.
[20] ***Birchfield***, 136 S. Ct. at 2178.

As noted above, the State disagrees that a privacy interest exists in a collected blood sample but fails to address ***Birchfield***. In ***Birchfield***, the United States Supreme Court recognized a heightened privacy interest in a blood sample (as compared to a breath sample) based in part on the fact that blood contains vast amounts of personal information that triggers an arrestee's anxiety.[21] The Court's commentary on a suspect's *ongoing* anxiety after the blood has been drawn reflects an understanding that a person also retains his or her privacy interest in the blood sample after it has been extracted from his or her body. That privacy interest must continue to exist indefinitely—as long as the sample is in the possession of the government, the potential for the extraction of personal information from the sample remains. The State's argument that a person does not retain a privacy interest in his or her drawn blood cannot be reconciled with United States Supreme Court caselaw.

C. The warrant at issue was deficient in scope.

To justify a search, a warrant must state with particularity the parameters of the authorized search.[22] The warrant here did not authorize any analysis of Gallagher's blood sample. It simply

[21] ***Id.***
[22] ***State v. Starke***, 81 Wis. 2d 399, 412-13, 260 N.W.2d 739 (1978) (internal citations omitted).

authorized seizing Gallagher's blood. The police, having this warrant, chose to submit Gallagher's blood sample for testing anyway. The clear implication of this testing is that the police exceeded the scope of the search warrant, thus rendering the search invalid.

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.[23]

As shown through ***Coolidge***, a warrant must be as particular and limited as possible. If the warrant in this case is found to be legally sufficient to authorize the analysis of Gallagher's blood, this Court would have to grapple with the ramifications of permitting a general warrant, a result the Founding Fathers took care to ensure would never happen by ratifying the Bill of Rights.

The State then argues that requiring a warrant to analyze blood seized upon OWI arrest would serve no real or legitimate purpose.[24]

---

[23] ***Coolidge v. New Hampshire***, 403 U.S. 443, 467 (1971) (internal citations omitted; emphasis in original).
[24] State Br. 7.

While it may be tedious for police to ensure their warrants state with particularity the parameters of the search, the Fourth Amendment requires such precision. Furthermore, there are other interests to consider beyond the government's here. Just as the government has an interest in keeping public highways safe, citizens also possess a right to be free from unreasonable searches. There is no need for these rights to conflict with one another. While the State recognizes the government's interest, it fails to recognize Gallagher's.

CONCLUSION

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, _____, 2018.

Respectfully submitted,

COLLIN GALLAGHER, Defendant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: _____
ADAM WELCH
State Bar No. 1064835

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

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:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,427 words.

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.

Dated: _____, 2018.

Signed,

_____
ADAM WELCH
State Bar No. 1064835

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: _____, 2018.

Signed,

_____
ADAM WELCH
State Bar No. 1064835

TABLE OF CONTENTS