STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001518 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JESSICA M. RANDALL,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

ON APPEAL FROM A FINAL ORDER ENTERED ON JULY 13, 2017, IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

Respectfully submitted,

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STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR WHEN IT HELD THAT THE WARRANTLESS ANALYSIS OF MS. RANDALL'S BLOOD, WHICH TOOK PLACE AFTER SHE HAD WITHDRAWN HER CONSENT TO TESTING, VIOLATED HER FOURTH AMENDMENT RIGHT TO BE FREE FROM UNLAWFUL SEARCHES AND SEIZURES?

STATEMENT ON PUBLICATION

Defendant-respondent 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 granting Jessica Randall's motion to suppress the results of an evidentiary chemical analysis of her blood after an arrest for operating while under the influence of an intoxicant.[1]

On October 29, 2016, a City of Fitchburg police officer arrested Ms. Randall for operating while under the influence of an intoxicant ("OWI").[2] After the officer read Ms. Randall the Informing the Accused form, Ms. Randall submitted to a blood test.[3] The blood sample was collected by a technician in a hospital.[4]

On October 31, 2016, Ms. Randall sent a letter to the Wisconsin State Lab of Hygiene "revok[ing] any previous consent that she may have provided to the collection and analysis of her blood."[5] The lab disregarded Ms. Randall's letter and analyzed the sample on November 7, 2016. Three days later, it issued a report, showing a blood alcohol concentration above the legal limit.[6]

On November 17, 2016, the Dane County District Attorney's Office charged Ms. Randall with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited

[1] R. 1:1.
[2] *Id.* at 2.
[3] *Id.*
[4] *Id.*
[5] R. 18:4.
[6] *Id.* at 6.

alcohol concentration, both as a third offense.[7] Because the laboratory's analysis of her blood after the revocation of her consent was unlawful, Ms. Randall moved to suppress the test result.[8]

The trial court ruled for Ms. Randall, finding that because a blood test is a Fourth Amendment search, a person could withdraw his or her consent to the search of that blood.[9] The court further found that Ms. Randall withdrew her consent prior to the analysis of the blood by the Lab. The court agreed with Ms. Randall's characterization of a blood sample as being similar to a cell phone—both are items subject to seizure that, depending on the circumstances, may require further legal authorization to be searched or analyzed.[10]

The State now appeals the trial court's order granting the suppression motion.

[7] R. 1.
[8] R. 32.
[9] *Id.* at 57.
[10] *Id.* at 59; see ***Riley v. California***, 134 S. Ct. 2473 (2014).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DECIDED MS. RANDALL'S MOTION TO SUPPRESS.

A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.[11] Appellate courts uphold findings of historical facts unless they are clearly erroneous.[12]

B. A person has a legitimate privacy interest in the information contained in a sample of his or her 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.[13]

The United States Supreme Court has consistently recognized an expectation of privacy in the information contained within

[11] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[12] ***State v. Robinson***, 2010 WI 80, ¶ 22, 327 Wis.2d 302, 786 N.W.2d 463.
[13] ***Skinner v. Ry. Labor Executives' Ass'n***, 489 U.S. 602, 616 (1989).

biological samples—a privacy interest distinct from the collection of the samples in the first place. In the 1989 case ***Skinner v. Railway Labor Executives' 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.[14]

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.[15] Despite the collection of the urine itself being lawful, the Court, citing to ***Skinner***, held that "[T]he urine tests … were *indisputably* searches within the meaning of the Fourth Amendment."[16] While the State cites to ***Ferguson***, it only cites to the dissenting opinion.[17] The majority opinion, which contains the actual holding of the case, states that the analysis of a sample that is lawfully obtained *is* a Fourth-Amendment search.[18]

In ***Birchfield v. North Dakota***,[19] the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample:

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[14] ***Skinner***, 489 U.S. 602, 616 (1989).
[15] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).
[16] *Id*. at 76 (emphasis supplied).
[17] State Br. 7.
[18] ***Ferguson***, 532 U.S. at 73.
[19] 136 S.Ct. 2160 (2016)

> [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]

The caselaw is unambiguous that individuals have a legitimate and recognized privacy interest in the information contained in their own blood.

Despite this caselaw, the State argues in its brief that "A person has no reasonable privacy interest in the[ir] blood."[21] The State makes no attempt to square this position with ***Skinner***, where the United States Supreme Court specifically recognized a distinct privacy interest in the analysis of a blood sample, nor with ***Ferguson***, where the United States Supreme Court recognized a privacy interest in lawfully-collected urine samples.[22]

Instead, the State argues that the privacy interests the Supreme Court recognized in ***Birchfield*** for blood tests "apply only to the blood draw, not to the analysis of the blood by a lab."[23] While the anxiety provoked by the physical intrusion of a needle into an arrestee's arm was considered by the ***Birchfield*** Court, the Court also recognized that a person may feel anxiety about what the government may do with his

[20] ***Birchfield***, 136 S. Ct. at 2178.
[21] State Br. 10; ***Id.***
[22] ***Skinner***, 489 U.S. at 616; ***Ferguson***, 532 U.S. at 73.
[23] State Br. 10–11.

or her lawfully-obtained blood sample.[24] The State argues that a person cannot feel anxious if the sample is analyzed "for the purpose for which it was drawn," yet the Supreme Court recognized it is precisely the fact that blood contains vast amounts of personal information that triggers an arrestee's anxiety.[25] The only reasonable interpretation of ***Birchfield***'s discussion of privacy interests is that a person retains his or her privacy interest in the blood sample after it has been extracted from his or her body. Moreover, a person retains that privacy interest indefinitely—as long as the sample is in police possession, the potential for the extraction of personal information from the sample remains.

The State further argues that even if Ms. Randall possessed a privacy interest in her drawn blood, society would not recognize that interest as reasonable. While the government does possess 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. Police have many methods at their disposal for the collection of evidence in criminal cases. Each method has its potential benefits and potential drawbacks. The benefit of relying on consent is that it can save police the small amount of work that would be required to obtain a warrant prior to a blood draw. One drawback

[24] ***Birchfield***, 136 S. Ct. at 2178.
[25] State Br. 11.

from the government's point of view is that relying solely on consent brings the blood analysis process under the umbrella of Fourth-Amendment caselaw concerning voluntary consent—including the well-recognized right to modify or revoke consent at any time.[26]

Moreover, the State's arguments are inconsistent. The State first argues there is no privacy interest in drawn blood, and thus its analysis is not a search,[27] but then frames the issues as an ongoing process, as per ***VanLaarhoven***.[28] If the blood analysis is part of an ongoing search, the State cannot also argue the analysis is not a search. It is a search.

A search occurs for Fourth Amendment purposes whenever the government intrudes upon an individual's "reasonable expectation of privacy."[29] Since Ms. Randall had a reasonable expectation of privacy in the information contained in her blood, the analysis of her blood sample was a search.

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[26] ***State v. Wantland***, 355 Wis. 2d 135, 152, 848 N.W.2d 810 (2014).
[27] State Br. at 7.
[28] State Br. at 9, ("The analysis of Randall's blood . . . was simply part of the search to which Randall consented when she submitted a blood sample for testing[.]"); ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411.
[29] ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

C. Because analyzing a blood sample is a search, a person may withdraw consent to the search at any point.

"One who consents to a search 'may of course delimit as he chooses the scope of the search to which he consents.'"[30] When consent, previously given, is modified, limited, or withdrawn, this must be done by an unequivocal act or statement.[31] "Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement."[32]

There is no reason why the search of a blood sample should be treated as categorically different than the search of a cell phone, an automobile, or a dwelling. Consent to an evidentiary chemical blood analysis may be withdrawn, just as one may withdraw consent to any other Fourth-Amendment search. For example, a person might consent to the search of a house but withdraw that consent before the search is completed. It would clearly be unacceptable for law enforcement officers to ignore the withdrawal of consent and remain in the house solely because of the initial consent.[33]

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[30] ***State v. Matejka***, 2001 WI 5, ¶ 37, 241 Wis.2d 52, 621 N.W.2d 891 (*quoting* ***Florida v. Jimeno***, 500 U.S. 248, 252, 111 S. Ct. 1801 (1991)).
[31] ***Wantland***, 355 Wis. 2d 135, 152, 848 N.W.2d 810 (2014).
[32] ***United States v. Sanders***, 424 F.3d 768, 774 (8th Cir. 2005) (*quoting* ***United States v. Gray***, 369 F.3d 1024, 1026 (8th Cir. 2004)); *see also* ***United States v. Alfaro***, 935 F.2d 64, 67 (5th Cir. 1991); ***Payton v. Commonwealth***, 327 S.W.3d 468, 478 (Ky. 2010).
[33] *See e.g.* ***United States v. Buckingham***, 433 F.3d 508, 513 (6th Cir. 2006), ***Painter v. Robertson***, 185 F.3d 557, 567 (6th Cir. 1999) (holding that upon a

When the search at issue is the scientific analysis of blood, the duration of the search is typically stretched over days or weeks rather than the minutes or hours that might be involved in the search of a home or automobile. But the relevant time period being longer or shorter does not change the basic legal principles.[34] If the consent is withdrawn before the search is completed—whether that is several minutes or several days after consent is initially provided—any search must immediately cease.

The State argues in its brief that Ms. Randall and all other Wisconsin drivers have no "right to . . . refuse" chemical testing.[35] The State argues that a person may refuse testing, but this is not a constitutional right; instead, it is a "statutory opportunity" provided by the legislature.[36] It cites to several cases for support, including ***South Dakota v. Neville*** and ***State v. Lemberger***.[37]

The State's position is incorrect. The analysis must begin with ***Schmerber v. California***, a 1966 United States Supreme Court case that addressed a slew of constitutional challenges to a blood draw in

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revocation of consent the search should be terminated instantly, and the officers should promptly depart the premises).

[34] *See* ***United States v. Casellas-Toro***, 807 F.3d 380 (1st. Cir. 2015) (where, when the defendant's automobile was searched 21 days after he provided consent, it was held that the search was still justified by the defendant's initial and un-retracted consent).

[35] State's Br. at 3.

[36] ***Id.***

[37] ***South Dakota v. Neville***, 459 U.S. 553, 565 (1983); ***State v. Lemberger***, 2017 WI 39, ¶¶ 3, 29, 36, 374 Wis. 2d 617, 893 N.W.2d 232.

an operating while under the influence case.[38] The ***Schmerber*** Court found, inter alia, that the Fifth Amendment's right against self-incrimination does not preclude the police from obtaining a blood sample and that the Sixth Amendment did not afford the defendant the right to an attorney prior to the blood sample being collected.[39] But the ***Schmerber*** Court also held that a blood draw *does* fall within the protection of the Fourth Amendment:

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.[40]

The Court then went on to find that the collection of the defendant's blood was a lawful warrantless search because of the existence of exigent circumstances.[41]

Schmerber was followed in 1983 by ***South Dakota v. Neville***, which addressed the question of whether the refusal to take a test was admissible as consciousness of guilt.[42] The defendant argued that his refusal was protected by the Fifth Amendment and commentary on his refusal at trial would thus be unconstitutional.[43] The ***Neville*** Court,

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[38] ***Schmerber v. California***, 384 U.S. 757 (1966).
[39] ***Id.*** at 761, 766.
[40] ***Id***. at 767.
[41] ***Id.*** at 770–71.
[42] ***South Dakota v. Neville***, 459 U.S. 553 (1983).
[43] ***Id.*** at 556.

following ***Schmerber***, found that a refusal was not protected by the Fifth Amendment.[44] ***Neville*** also addressed, and denied, a Fifth Amendment due process claim.[45] It did not address the Fourth Amendment.

The cases cited by the State fall into a noticeable pattern—they do not address the Fourth Amendment. ***State v. Crandall***, in 1986, dealt with a due process claim under the Wisconsin Constitution.[46] ***State v. Mallick***, in 1997, dealt with a self-incrimination claim under the Wisconsin Constitution.[47] ***State v. Reitter***, in 1999, addressed issues of statutory construction, due process, and the right to counsel.[48] ***State v. Lemberger***, in 2017, was a rehashing of the issue in ***Neville***: a claim that commentary on the defendant's refusal was barred by the Fifth Amendment.[49]

The State's argument here boils down to two key assertions—first, that at the time that a person has been placed under arrest for OWI, that person has no Fourth-Amendment right to refuse to consent to a blood test, and, second, that the supposedly statutory right to refuse consent must be invoked at a specified time or lost forever. The State's brief does not develop an argument in support of either

[44] ***Id.*** at 564.
[45] ***Id.*** at 566.
[46] ***State v. Crandall***, 133 Wis. 2d 251, 252–53, 394 N.W.2d 905 (1986).
[47] ***State v. Mallick***, 210 Wis. 2d 427, 429, 565 N.W.2d 245 (1997).
[48] ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999).
[49] ***Lemberger***, 2017 WI 39, ¶ 21.

position, and, as such, the State's assertions do not need to be considered by this Court.[50] But, in addition to being undeveloped, neither of these assertions is supported by the law.

None of the cases cited by the State support a notion that the Fourth Amendment ceases to protect a citizen who has been arrested for OWI. There is no OWI exception to the Fourth Amendment. Indeed, ***Schmerber*** explicitly states that the Fourth Amendment *does* apply to OWI blood draws, and the State's exact position on this subject failed to obtain a majority in ***State v. Brar***.[51] The caselaw establishes that a person does not have the right to refuse a blood draw under Wis. Stat. § 343.305 without statutory penalties being applied, that a refusal may be used against a person in court, and that a person does not have the right to consult with an attorney before making the decision. But the Fourth Amendment cannot simply be abrogated by statute. The implied consent law creates a penalty structure to help the police obtain consent—but the existence of this law and this penalty structure only serve to highlight that the collection of the blood is still being justified by the subject's consent. Questions of consent to search fall within the scope of the Fourth Amendment.

[50] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).
[51] ***Schmerber v. California***, 384 U.S. at 767; ***State v. Brar***, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499.

The State characterizes the "right to refuse" as a creation of statute. This is not so. The police can ask for consent to search without a specific statutory scheme. Citizens can give, refuse, modify, or withdraw consent without such a statutory scheme. The implied consent law was designed to facilitate the collection of evidence by allowing the State to penalize drivers who do not provide consent.[52] It permits the State to penalize a driver who refuses to consent, but it does not directly create or compel consent.

The question of whether a constitutional "right to refuse" exists is therefore confusing and probably not a helpful way to frame the issue. The term "right" might be interpreted as connoting the unconstrained authorization to refuse *without consequences*, or it might simply be interpreted as connoting the ability to refuse *at all*. In the first sense, there is no unconstrained right to refuse—a refusal results in penalties, including the revocation of one's driving privileges and the ability of the State to use that refusal as evidence at trial. As the State correctly points out, Wisconsin caselaw has consistently upheld such penalties.[53]

But in the second sense, it should be clear that drivers have the *ability* to refuse. If drivers did not have the ability to refuse testing,

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[52] *Cf.* ***State v. Gibson***, 2001 WI App 71, ¶ 7, 242 Wis. 2d 267, 626 N.W.2d 73; ***State v. Padley***, 2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867; ***Brar***, 2017 WI 73, ¶¶ 44–86 (Kelly, J., concurring).

[53] State Br. 5–6.

then police officers would not have to ask for consent, and the legislature would not have had to design a penalty structure for refusals. When a driver is asked to provide a blood sample, he or she absolutely has the right to say "no." That answer may come with consequences, but it is an answer that the driver may provide. Because the police must ask the driver for his or her consent, and because the driver is free to say "yes" or "no," there is a Fourth Amendment encounter occurring whenever this conversation takes place, and, if the driver says "no," then the Fourth Amendment requires that the police find another route to obtain a blood sample or forgo obtaining a sample at all.[54]

The State also fails to develop its argument that a person has a narrow window to refuse consent to search. The State first makes its leap from arguing that the lack of a Sixth-Amendment right to counsel or Fifth-Amendment right against self-incrimination means that there is no Fourth-Amendment protection, and then makes a second leap to arguing that consent cannot be withdrawn because "The law authorizes withdrawal of consent before submission to a request for a sample, but not after."[55]

The State provides absolutely no authority for this claim and fails to address any of the caselaw that establishes an absolute right

[54] *Cf.* ***State v. Blackman***, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.
[55] State Br. 3.

under the Fourth Amendment to withdraw, modify, or limit the scope of consent to a search or seizure. The State apparently wishes for a "no-take-backs" rule, but such a rule does not exist in Fourth-Amendment caselaw. In any other context—the search of a home, a car, a computer, or anything else—a person retains the right to withdraw consent at any point. The State fails to advance any authority for a different rule in the context of OWI blood draws.

In summary, the Fourth Amendment protects Ms. Randall from unreasonable searches and seizures; because no warrant or other exception to the warrant requirement existed, if Ms. Randall's blood was collected legally, then it was collected pursuant to her voluntary consent; if Ms. Randall provided voluntary consent to a search, then she retained the right to modify or withdraw that consent. The State apparently does not dispute that Ms. Randall explicitly and unequivocally revoked her consent; therefore, the blood test was an unlawful search, and any results must be suppressed.

In addition, the State devotes two pages to determining whether a person like Ms. Randall, who withdraws her consent, can be subjected to refusal penalties under the law. The State did not advance this argument in the circuit court, thus forfeiting the argument on appeal.[56] In addition, because the State never attempted to subject

[56] ***In re Guardianship of Willa L.***, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

Ms. Randall to refusal penalties, this issue was neither properly before the circuit court nor is it ripe for consideration in this case.[57] Any language from the circuit court on that issue was not meant to be a formal ruling, and therefore should not affect this Court's analysis.

D. The analysis of seized evidence in which a person retains a legitimate privacy interest must still be justified under the Fourth Amendment.

In ***Riley v. California***, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches.[58] Of course, a blood sample analysis and a cell phone search are not exactly alike. But, as the trial court noted, both a cell phone and a blood sample have vast amounts of unanalyzed personal information contained within.[59]

The question in ***Riley*** was whether police could analyze the contents of a lawfully-seized cell phone under the Fourth Amendment.[60] The Court recognized that a huge amount of personal information could be stored on or accessed through a cell phone,

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[57] ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (holding that a court does not need to address a claim that depends upon hypothetical or future facts). Although the issue is not ripe for consideration on this appeal, it is worth noting that it is not so clear-cut as the State makes it out to be. For example, in ***State v. Moline***, the Court of Appeals held that a refusal notice may be prepared and served on a defendant well after his arrest. 170 Wis. 2d 531, 541, 489 N.W.2d 667 (Ct. App. 1992).

[58] ***Riley v. California***, 134 S. Ct. 2473 (2014).

[59] R. 32:59.

[60] ***Riley***, 134 S. Ct. at 2480.

including information implicating significant privacy concerns, such as medical records.[61] 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.[62]

Here, the trial court recognized the similarities between Ms. Randall's blood sample and a cell phone in terms of the heightened privacy interests involved.[63] Analyzing a blood sample, like searching a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant or a warrant exception to search these items. It is irrelevant that ***Riley*** involved a search incident to arrest and Ms. Randall initially consented to the analysis of her blood. The foundational legal principle is identical: Even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful. Because the government had no legal justification for the blood analysis after Ms. Randall withdrew her consent, it was an unlawful search, and the test results were suppressed.

In the trial court, and in this Court, the State cited to ***State v. VanLaarhoven*** to argue that analyzing the blood sample at issue did

[61] ***Id***. at 2490.
[62] ***Id.*** at 2493, 2495.
[63] R. 32:59.

not require an independent legal justification.[64] Yet ***VanLaarhoven*** does not control here. In ***VanLaarhoven***, the Wisconsin Court of Appeals held that no warrant was necessary to analyze the defendant's blood where the police relied upon the defendant's *unretracted* consent to the search.[65] The State's reliance upon ***State v. Petrone*** is also misplaced. [66] ***Petrone*** involved a question pertaining to the scope of a search warrant—whether the seizure and development of undeveloped film was lawful when a the search warrant did not explicitly authorize it.[67] Although ***Petrone***'s applicability to the facts of this case would be tenuous at best, it is also questionable whether the principal holding of ***Petrone***—which appears to give police officers a fairly broad latitude in conducting additional searches on previously-seized evidence—would be sustained today in light of ***Riley v. California***.

Neither ***VanLaarhoven*** nor ***Petrone*** apply to the facts of Ms. Randall's case. Because she initially consented to the analysis of her blood but then promptly withdrew it, Ms. Randall did not suggest to the trial court, as in ***VanLaarhoven***, that a warrant was required to analyze her blood *notwithstanding* her consent. The point is that the

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[64] State Br. 8; ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W. 2d 411.
[65] ***VanLaarhoven***, 2001 WI App 27, ¶ 17.
[66] ***State v. Petrone***, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991).
[67] ***Id.*** 161 Wis. 2d at 539–40.

original justification for the seizure *and* analysis of the blood—her consent—ceased to exist. Without the existence of valid consent, the search should have promptly ceased.

E. Ms. Randall properly withdrew her consent to her blood sample's analysis.

Before any analysis occurred, Ms. Randall sent a letter to the laboratory, the arresting law enforcement agency, and the District Attorney's office. The letter explicitly stated that she, "revokes any previous consent that she may have provided to the collection and analysis of her blood, asserts her right to privacy in her blood, and demands that no analysis be run without [a warrant]."[68]

This letter was clear and direct. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[69] Any reasonable person reading this letter would understand that Ms. Randall had withdrawn her consent to blood analysis and had asserted her right to privacy. The trial court made a

[68] R.18:4.

[69] ***Jimeno***, 500 U.S. at 251, (*citing* ***Illinois v. Rodriguez***, 497 U.S. 177, 183–89, 110 S. Ct. 2793; ***Florida v. Royer***, 460 U.S. 491, 501–02, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983)).

factual finding that Ms. Randall properly withdrew her consent to her blood sample's analysis. The State does not challenge this finding.

The Wisconsin State Laboratory of Hygiene disregarded Ms. Randall's letter and conducted an ethanol analysis of her blood sample.[70] This analysis was an unlawful search. The government's only justification for testing Ms. Randall's blood was that it was a search pursuant to voluntary consent. But Ms. Randall, through her letter to the laboratory, clearly and unequivocally withdrew that consent before the analysis took place. Therefore, the government's analysis of her blood sample was an unlawful search in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, and the results of the analysis were properly suppressed.

[70] R. 18:6.

CONCLUSION

Because of the personal information contained within it, Ms. Randall retained a privacy interest in her drawn blood. Under the Fourth Amendment of the federal Constitution and the corresponding Wisconsin constitutional provisions, Ms. Randall had a right to withdraw her consent to the analysis of her blood sample. Any analysis performed on her drawn blood was thus an unlawful search.

For all the reasons stated, the judgment of the trial court should be affirmed.

Dated at Madison, Wisconsin, _____, 2018.

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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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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.

Dated: _____, 2018.

Signed,

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