STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1518-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JESSICA M. RANDALL,

Defendant-Respondent.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

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ARGUMENT

A. Randall does not meaningfully respond to the State's argument that the court of appeals' decision is contrary to established law.

The court of appeals concluded that Randall, who voluntarily submitted to a request for a blood sample under Wisconsin's implied consent law, could later revoke her consent and prevent the State from analyzing the blood for the presence and quantity of alcohol and drugs. *State v. Randall*, Cast No. 2017AP1518-CR, 2018 WL 3006260 (Wis. Ct. App. June 14, 2018) (unpublished). The court's decision was based primarily on *State v. VanLaarhoven*, which it termed the "controlling case." *Id.* ¶ 16 (citing *State v. VanLaarhoven*, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411). The court concluded that *VanLaarhoven* established that "the taking and testing of blood comprised one continuous search under the Fourth Amendment." *Id.* ¶ 11.

As the State explained in its initial brief, the court of appeals in *Randall* misinterpreted and misapplied *VanLaarhoven* and *State v. Riedel*, 2003 WI App, ¶ 16, 259 Wis. 2d 921, 656 N.W.2d 789, both of which concluded that under *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), and *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988), "the examination of evidence" that is lawfully seized "is an essential part of the seizure and does not require a judicially authorized warrant." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16; *Riedel*, 259 Wis. 2d. 921, ¶ 16; (State's Br. 6–10, 15–22).

The court of appeals addressed the same issue presented in this case in *State v. Sumnicht*, and concluded

that a person whose blood is lawfully seized under Wisconsin's implied consent law cannot withdraw consent and prevent the analysis of the blood for the presence and quantity of alcohol and drugs. *State v. Sumnicht*, Case No. 2017AP280-CR, ¶¶ 21–22, 2017 WL 6520961 (Wis. Ct. App. Dec. 20, 2017) (unpublished); (State's Br. 12–14). In *Sumnicht*, the court recognized that *VanLaarhoven* and *Riedel* made clear that "the search and seizure of the blood was completed at the time of the lawful blood draw," and "squarely rejected arguments challenging the examination of lawfully seized evidence, including subsequent testing of blood drawn pursuant to a warrant, consent, or exigent circumstances." *Id.* ¶¶ 21–22. (citing *VanLaarhoven*, 248 Wis. 2d 881, ¶¶ 13, 16; *Riedel*, 259 Wis. 2d 921, ¶ 16).

In her brief, Randall does not mention *Sumnicht*. She barely addresses the court of appeals' reasoning in this case, only quoting the court's statement that "*VanLaarhoven* teaches us that there is one continuous search that begins with the taking of blood and continues through the testing of that blood." (Randall's Br. 27–28 (quoting *Randall*, 2018 WL 3006260, ¶ 11).) She argues that *VanLaarhoven* and *Riedel* "can therefore reasonably be read, as the court of appeals did here, to stand for the proposition that the analysis of a blood sample is part of one continuous search that begins with the collection of the blood." (Randall's Br. 29–30.)

However, *Randall's* interpretation of *VanLaarhoven's* holding is plainly wrong. *VanLaarhoven* recognized that the search ended when the blood was drawn, and the analysis of the blood was part of the seizure. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16; *Riedel*, 259 Wis. 2d 921, ¶ 16; *Sumnicht*, 2017 WL 6520961, ¶¶ 21–22; (State's Br. 15–22).

Randall does not ask this Court to overrule *VanLaarhoven*, *Riedel*, or *Sumnicht*. But she does not explain how, if the court of appeals' decision in this case is correct, those cases are not wrong.

Randall also does not mention *People v. Woodard*, a case directly on point, that the court of appeals relied on in *Sumnicht*, 2017 WL 6520961, ¶ 22 n.6, but termed "unpersuasive" in *Randall*, 2018 WL 3006260, ¶ 21. The Michigan Court of Appeals concluded that a person cannot withdraw consent after a blood draw and prevent analysis of the blood sample. *People v. Woodard*, 909 N.W.2d 299, 305–307 (Mich. Ct. App. 2017); (State's Br. 10–11). The court noted that "the testing of blood evidence 'is an essential part of the seizure.'" *Id.* at 306 (quoting *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16). It concluded that "once the blood was lawfully procured by the police pursuant to defendant's consent, the subsequent analysis of the blood did not constitute a separate search, and defendant simply had no Fourth Amendment basis on which to object to the analysis of the blood for the purpose for which it was drawn." *Id.* at 310.

Randall also does not address *Snyder*, 852 F.2d at 474, a case that the court of appeals relied upon in *VanLaarhoven*, *Riedel* and *Sumnicht*, which concluded that when blood is extracted after an OWI arrest, "the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes."

The State cited numerous other cases which have concluded that the analysis of a blood sample under these circumstances does not require Fourth Amendment justification. (State's Br. 11–12, 27–28.) Randall addresses only two of these cases. She notes that the Minnesota Supreme Court said that the court of appeals' conclusion in *State v. Fawcett*—that a person has no expectation of privacy

in blood once it is removed from her body—was too broad, and that the defendant did not lose all "expectation of privacy." *State v. Fawcett*, 877 N.W.2d 555, 559 (Minn. Ct. App. 2016) (Randall's Br. 32.) But while the Minnesota Supreme court concluded that a person has some privacy interest in a blood sample, it did not conclude that the privacy interest was reasonable when the State wanted to analyze the blood for the presence and quantity of alcohol and drugs.

Randall argues that in *State v. Loveland*, 696 N.W.2d 164, 166 n.1 (S.D. 2005), the court did not conclude that the defendant had no privacy interest in a urine sample after it had been provided, noting that "such samples may contain vast amounts of sensitive personal information about the person they were taken from." (Randall's Br. 31–32.)

But *Loveland* concluded that "[o]nce a urine sample is properly seized, the individual that provided it has no legitimate or reasonable expectation that the presence of illegal substances in that sample will remain private." *Loveland*, 696 N.W.2d at 166; (State's Br. 11–12). *Loveland* supports the State's argument that Randall had no reasonable expectation of privacy in the blood that was lawfully seized after her OWI arrest, to prevent the State from testing it for the presence and quantity of alcohol and drugs.

B. Randall had no reasonable expectation of privacy in the blood that had been lawfully seized when the State wanted to analyze it for the presence and quantity of alcohol and drugs. Therefore, the analysis did not require a Fourth Amendment justification.

Randall asserts that her consent to a blood draw did not forever waive her expectation of privacy in the data in her blood, and she was entitled to limit, modify, or revoke

her consent at any time. (Randall's Br. 15–21.) She likens the blood draw and subsequent analysis of her blood to a search of a home, arguing that a person who consents to a search of her home can revoke her consent, and the police must then leave. (Randall's Br. 16.)

After Randall consented to a blood draw she could have revoked and withdrawn her consent to the search before the blood was drawn. But the search ended when the blood was drawn. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16, *Riedel*, 259 Wis. 2d 921, ¶ 16; *Sumnicht*, 2017 WL 6520961, ¶ 22. Randall could not revoke her consent after the blood draw because the State did not need her consent to analyze the blood sample for the presence and quantity of alcohol and drugs. Randall points to no case holding that a person may limit, modify, or revoke consent to a search after the police have found evidence—for instance, after an officer searching a home with consent finds a baggie containing a substance that he believes is cocaine.

Randall argues that *State v. Petrone*, a case that the court of appeals relied on in *VanLaarhoven*, *Riedel*, and *Sumnicht*, does not establish that the State may always analyze lawfully seized evidence. (Randall's Br. 21–27.) But the State is not arguing that it can always analyze lawfully seized evidence. It is not arguing that it could analyze the blood lawfully seized from Randall for any purpose other than determining the presence and quantity of alcohol and drugs. The implied consent law under which the State lawfully seized the blood explicitly limits the use of the blood to analysis for that purpose. Wis. Stat. § 343.305(2), (3)(a), and (5).

Randall argues that *Petrone* is distinguishable because the defendant in *Petrone* (1) did not have a privacy interest in the testing separate from the privacy interest in collection

of the sample, and (2) did not attempt to assert a privacy interest in the testing. (Randall's Br. 23.) But as the State explained in its opening brief, society would not recognize as reasonable a privacy interest in the analysis of the blood sample for the presence and quantity of alcohol and drugs. (State's Br. 22–32.) The analysis was not a search requiring Fourth Amendment justification.

Randall asserts that "persuasive authorities" say that "the analysis of a biological specimen is a search." (Randall's Br. 30.) But in *State v. Martinez*, the court said that a person's expectation of privacy "might be implicated" by the "exercise of control over and the testing of the blood sample." *State v. Martinez*, 534 S.W.3d 97, 100 (Tex. Crim. App. 2017) (citing *State v. Hardy*, 963 S.W.2d 516, 526 (Tex. Crim. App. 1997). In *Diaz v. Van Wie*, 426 P.3d 1214, 1216 (Ariz. Ct. App. 2018) the court said that the Fourth Amendment "may be implicated" by the analysis of blood. (Randall's Br. 31). And in *Mario W. v. Kaipio*, 281 P.3d 476, 480–81 (Ariz. 2012), the court concluded that the collection of a DNA sample and the processing of the sample to extract a profile are separate searches. None of these cases holds that a person who voluntarily surrenders a blood sample after an arrest for OWI has a privacy right that society would recognize as reasonable when the State wants to analyze the blood for the presence and quantity of alcohol and drugs.

Randall asserts that binding precedent establishes that "individuals do have a legitimate expectation of privacy in the information contained within their blood, and that a Fourth Amendment justification is therefore needed to conduct an analysis of a blood sample." (Randall's Br. 33.) She relies on *Riley v. California*, 134 S.Ct. 2473 (2014), *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), and *Skinner v. Ry. Lab. Execs. Assn*, 489 U.S. 602 (1980). But none of those cases support Randall's position.

In *Riley*, the Supreme Court held that to search the digital data on a cell phone seized incident to an arrest for driving with a suspended license, police must "get a warrant." *Riley*, 134 S.Ct. at 2480, 2495. "*Riley* addressed the narrow issue of whether a warrant is required to search a cell phone that is seized incident to an arrest," and "did not address the taking or testing of blood." *State v. Schneller,* Case No. 2016AP2474-CR, 2017 WL 2704180 (Wis. Ct. App. June 22, 2017) (unpublished opinion). "[T]he Court explicitly limited [its] holding to cell phones seized during searches incident to arrest." *State v. Inman*, 409 P.3d 1138, 1146 (Wash. Ct. App. 2018) (citing *Riley*, 134 S. Ct. at 2494).

Randall claims that "[t]here is no principled reason why the examination of a lawfully-seized package or cell phone should constitute a search while the examination of a blood sample does not." (Randall's Br. 25–26.) But *Riley* found a reasonable expectation of privacy in the contents of a cell phone, concluding that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley*, 134 S.Ct. at 2488–89. It said that "[w]ith all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* at 2494–95 (citation omitted).

Randall cites no case finding a similar reasonable privacy interest in a blood sample lawfully seized following an arrest for OWI, when police want to analyze it for the presence and quantity of alcohol and drugs. Randall cites *Skinner*, in which the Supreme Court said that the "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." *Skinner*, 489 U.S. at 616; (Randall's Br. 13).

But while *Skinner* concluded that society would find a person's expectation of privacy in a blood draw reasonable, it did not say the same thing about the analysis of the blood. It said only that the analysis is "a further invasion of . . . privacy interests." *Skinner*, 489 U.S. at 616.

Randall also relies on *Birchfield*. But as she acknowledges, *Birchfield* "was focused on legal issues surrounding the collection of the sample, rather than the analysis." (Randall's Br. 13.) The Court noted that blood tests which "require piercing the skin" and extraction of a part of a person's body, are significant bodily intrusions. *Birchfield*, 136 S.Ct. at 2178. It said that a blood 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," so a person may have anxiety that law enforcement could test the blood for a purpose other than to measure BAC. *Id.*

The Supreme Court considered the anxiety that a person might feel about testing a blood sample—along with the piercing of the skin—as the reason that a blood draw is more intrusive than a breath test. *Birchfield*, 136 S.Ct. at 2178. The Court did not say that society would recognize as reasonable a privacy interest in a blood sample lawfully seized from a person arrested for OWI when the State wants to analyze it for the presence and quantity of alcohol and drugs.

Randall also asserts that because "the government needed her consent to access the information in the first place," it is reasonable to conclude "that she should have been able to keep the information private by revoking her

permission for the government to access it." (Randall's Br. 14.)

But Randall chose not to keep her information private. She voluntarily surrendered her blood. And nothing in *Riley*, *Birchfield*, or *Skinner* provides that after voluntarily surrendering her blood, she somehow retained a reasonable privacy interest in it to prevent the State from analyzing it to determine the presence and quantity of alcohol and drugs.

Whether a search requires a warrant is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Riley*, 134 S.Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In *Birchfield*, the Court balanced the degree to which a blood draw intrudes upon an individual's privacy against "the degree to which it is needed for the promotion of legitimate governmental interests." *Birchfield*, 136 S.Ct. at 2176 (citing *Riley*, 573 U.S. at 2484).

Implied consent laws that "induce motorists to submit to BAC testing," and "are designed to provide an incentive to cooperate," serve "a very important function." *Birchfield*, 136 S.Ct. at 2179. "[T]he need for BAC testing is great," *id.* at 2184, and "the State is justifiably concerned that evidence may be lost" due to either active destruction or a natural process. *Id.* at 2182.

Any expectation of privacy that a person retains in blood he or she has voluntarily surrendered after being arrested for OWI is outweighed by the State's interest in preserving the blood and analyzing it for the presence and quantity of alcohol and drugs.

C. Even if the State needed a warrant to analyze a blood sample it lawfully seized, it would not be required to destroy or return the sample.

Randall argues that once she wrote to the lab and withdrew her consent, the State could neither analyze the blood without a warrant, nor obtain a warrant and then analyze the blood. According to Randall, the State had to destroy the blood sample or return it to her. (Randall's Br. 36–38.)

But Randall does not dispute that the State lawfully seized the blood. Even if a warrant were required to analyze the sample, the State would not be required to destroy the sample or return it to Randall.

In *Riley*, the defendants "concede[d] that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant." *Riley*, 134 S.Ct. at 2486. The Supreme Court termed the concession "sensible" under *Illinois v. McArthur*, 531 U.S. 326, 329, 332 (2001), where it concluded that the seizure of a person was warranted in order to prevent the destruction of drugs. *Riley*, 134 S.Ct. at 2486. The Court also cited *United States v. Chadwick*, 433 U.S. 1, 13 & n.8 (1977), where it concluded that the seizure and detention of evidence, "were sufficient to guard against any risk that evidence might be lost." *Id.*

The same is true here. The blood was lawfully seized, and even if a warrant were required to analyze it, the State could detain it to prevent its destruction. It would not be required to destroy or return the blood.

CONCLUSION

For the reasons explained above and in its brief-in-chief, the State respectfully requests that this Court reverse the court of appeals' decision that affirmed the circuit court's order granting Randall's motion to suppress the results of a test of her blood.

Dated this 25th day of January, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

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MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 25th day of January, 2019.

_____
MICHAEL C. SANDERS
Assistant Attorney General