STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2017 AP002367-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH A. WALL,

Defendant-Appellant,

BRIEF OF PLAINTIFF-- RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT FOR COLUMBIA COUNTY CASE NO. 2013CT000125, THE HONORABLE TODD J. HEPLER PRESIDING

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE
Page

STATEMENT OF THE ISSUES

The Appellant presented two issues on appeal: Whether the blood results in this case should have been suppressed due to the holding in *Missouri v. McNeely*, 569 U.S. 14; 133 S. Ct. 1552 (2013), even though the officers acted in good faith reliance upon prior case law; and whether the blood evidence that was obtained in this case should have been suppressed because of the use of force that was used in order to obtain the blood evidence.

TRIAL COURT'S ANSWER

The Trial Court denied the defendant's motions to suppress in an oral ruling on December 13, 2013 (R. 75). The Court ruled that on the issue of whether the blood evidence should be suppressed because the blood draw that was conducted in this case, violated the *McNeely* decision, would not be suppressed and that the Court was not going to use the exclusionary rule because the police had been relying in good faith upon the *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) case, which allowed the police to perform blood draws in this fashion. (R. 75). The Trial Court stated:

> With regard, first, to the issues raised by the ***McNeely*** decision, as everyone, I'm sure, is well aware, the US Supreme Court came down with its determination in the ***McNeely*** case. That was rendered April 17th, 2013, and that determination was that the dissipation of alcohol in an individual's bloodstream through the metabolism process does not, in and of itself, constitute exigent

> circumstances which would thereby obviate the need for a search warrant.
>
> The State of Wisconsin had previously had a longstanding decision, rendered by our Supreme Court in ***State v. Bohling***, that essentially created a rule that said just to the contrary of the ***McNeely*** decision: That the dissipation of alcohol through metabolism does constitute exigent circumstances and, accordingly a search warrant wasn't required. That's no longer the law.
>
> We do, however, get to the next step in terms of what we do about the fact that no search warrant was secured in order to draw the blood of Mr. Wall in this particular case.
>
> As I indicated, Mr. Wall was – or the ***McNeely*** decision came down April 17th, 2013. Mr. Wall was arrested March 22nd, 2013, and there is, as set out in ***State v. Dearborn*** and also a US Supreme Court decision in ***Davis v. US***, found at 131 S. Ct. 2419, a 2011 decision. Each of those stand for the proposition that the exclusionary rule, which is a court-made rule to prevent abuses by law enforcement in the securing of evidence, the Court established a good faith exception to the application of the exclusionary rule, that good faith essentially being the reliance upon well-established precedent.
>
> That did, in fact, exist, as I outlined, in the ***Bohling*** case, and as such law enforcement was, up until ***McNeely*** came out, justified in relying upon the status of the law laid out in ***Bohling***. Accordingly, the Court is not going to suppress evidence with regard to issues raised by ***McNeely***, that being the failure to secure a search warrant in order to effectuate the blood draw. (R. 75; pages 2-4; lines 22-25 (p.2), 1-25 (p.3) and 1-6 (p.4)).

The Trial Court also denied the defendant's motion to suppress on the issue of excessive use of force (R. 75). The Trial Court stated:

> As to the issue of the reasonableness of the force utilized in drawing Mr. Wall's blood, the Court has been cited to the ***Krause*** case, ***State v. Krause***, found at 168 Wis.2d 578, and the factors laid out in

> that case are virtually on point with the facts as found in our case here.
>
> The defendant in our case did not demonstrate the same level or degree of violence as was initially found in the ***Krause*** case, but the defendant was very clear in indicating that he was not going to agree to a blood draw, thus making the use of the restraint chair and the application of force necessary to prevent a significant risk of harm to the defendant, the officers who were involved, and potentially any hospital staff that may be assisting, as well.
>
> Then, ultimately, during the process of the uncuffing of the defendant and in attempting to secure his arm and control it so that the blood draw could be accomplished, the defendant began to actively resist, requiring as many as, I believe, three officers at one time to attempt to access his arm for the purpose of the blood draw. It was ultimately after his arm was secured – well, in the process of securing his arm, actually, the – the application of that mandibular pressure point type tactic did occur and it is primarily that, as well as the use of the restraint chair and the holding of the defendant, that is being complained of as being excessive.
>
> Consistent with the ruling in ***Krause*** the Court considers the factors in this case are substantially similar and accordingly, the Court will likewise find that the use of force in this case was reasonable under the circumstances and the motion to suppress will be denied. (R. 75; pages 4-5; lines 7-25 (p. 4) and 1-10 (p. 5)).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The Plaintiff-Respondent does not request that this case be published because the Plaintiff-Respondent believes that there are already sufficient published cases on these points of law that are already controlling of the issues. In addition, it does not appear that this case is currently eligible to be published due to the fact that it has only been scheduled as a one Judge case.

I. FACTS

The Facts in the case are contained in the varying transcripts of the motion hearings and oral ruling in this case which are in the record (R. 73-75). Because the facts are all contained in the transcripts of the above hearing, there is no dispute in the facts, just a dispute in the interpretation of them and a dispute in the law.

II. QUESTIONS PRESENTED

The questions presented are whether the blood results in this case should have been suppressed due to the holding in *Missouri v. McNeely*, 569 U.S. 14; 133 S. Ct. 1552 (2013), even though the officers acted in good faith reliance upon prior case law; and whether the blood evidence that was obtained in this case should have been suppressed because of the use of

force that was used in order to obtain the blood evidence.

III. TRIAL COURT'S FINDINGS THAT THE EXCLUSIONARY RULE SHOULD NOT BE USED IN THIS CASE AND THAT THE OFFICERS DID NOT USE EXCESSIVE FORCE IN THIS CASE, WERE NOT CLEARLY ERRONEOUS AND SHOULD NOT BE OVERTURNED BY THIS COURT

The Respondent believes that the Standard of Review for this Court on the questions presented is that it is a clearly erroneous standard.[1] The facts in this case are essentially undisputed. The defendant, Keith Wall was stopped on a roadway in Columbia County at about 10:30 p.m. on March 22, 2013, and then arrest for operating a motor vehicle while under the influence of an intoxicant, by Deputy Miller of the Columbia County Sheriff's Office. (R. 74; p. 5-6). Mr. Wall was then taken to the Divine Savior Hospital where they arrived at about 11:00 p.m. (R. 74; p. 7). Mr. Wall was read the Informing the Accused form and he refused to consent to the blood draw. (R. 74; p. 7-8).

[1] **II. STANDARD OF REVIEW**
123 ¶ 13 The application of constitutional principles to a particular case is a question of constitutional fact. *State v. Pallone,* 2000 WI 77, ¶ 26, 236 Wis. 2d 162, 613 N.W.2d 568. We accept the circuit court's findings of fact unless they are clearly erroneous. *Id.,* ¶ 27. The application of constitutional principles to those facts is a question of law that we review *de novo*. *Id. State v. Dearborn*, 2010 WI 84, ¶¶ 12-13, 327 Wis. 2d 252, 261, 786 N.W.2d 97, 102.

After Mr. Wall refused, and made some other comments, Deputy Miller requested assistance from the Portage Police Department. (R. 74; p. 9). Officers Bagnall and Stumpf arrived to assist within about five minutes. (R. 74; p. 9-10). Deputy Miller retrieved the restraint chair so that the forced blood draw could occur. (R. 74; p. 10). Mr. Wall was placed into the restraint chair while he was still in handcuffs and strapped into it. (R. 74; p. 12). Mr. Wall had his hands cuffed behind his back, so one of the cuffs was removed so that his arm could be moved to his front so that the blood draw could take place. (R. 74; p. 12-13). Mr. Wall would not allow the officers to move his arm from his back to his front. (R. 74; p. 13-15).

Officer Bagnall testified that he noticed that Mr. Wall was not complying with the request to move his arm from behind his back so that the blood could be taken. (R. 74; p. 31). Officer Bagnall stated that Mr. Wall was told to stop resisting and when he didn't stop, Officer Bagnall used a mandibular compliance hold in order to get Mr. Wall to comply. (R. 74; p. 31-32). Officer Bagnall continued with the hold until Mr. Wall complied and his arm was taken from his back to his front. (R. 74; p. 32-33).

The Trial Court denied the defendant's motions, after it heard the testimony in this case, in an oral ruling on December 3, 2013. (R. 75). Because the Trial Court's findings in this case are not clearly erroneous, this Court should not overturn them. The

Plaintiff-Respondent asks that this Court deny the Defendant-Appellant's motions based upon the facts of this case and the existing case law in the state of Wisconsin.

IV. ARGUMENT

The Appellant argues that the Trial Court's reliance on the *Bohling* is somehow flawed in asserting that the police officers in this case were reasonably relying on it when they performed this blood draw. (Defendant-Appellant's brief, filed 2/16/18, at pages 6-7). The Appellant seems to argue that the holding in the *Bohling* case was modified by the *Faust* case. (*Id.).* The Respondent disagrees with this assertion. The Wisconsin Supreme Court in this case held that:

> ¶ 34 In sum, we reaffirm that the rapid dissipation of alcohol in the bloodstream of **384 an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless nonconsensual test of that individual's blood, breath, or urine, so long as the test satisfies the four factors enumerated in *Bohling.* The presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. The nature of the evidence sought-that is, the rapid dissipation of alcohol from the bloodstream-not the existence of other evidence, determines the exigency. Because exigent circumstances were present in this case and the blood test satisfied the test we set forth in *Bohling,* we reverse the decision of the court of appeals. *State v. Faust*, 2004 WI 99, ¶¶ 33-34, 274 Wis. 2d 183, 208, 682 N.W.2d 371, 383–84.

It is the Respondent's position that the holding in *Faust* simply reaffirmed the holding in *Bohling*. This reaffirmation by the Wisconsin Supreme Court only bolsters the Respondent's argument that the officers in this case were reasonably relying upon the state of the law as it was at the time of this incident, as it was spelled out over multiple cases by the Wisconsin Supreme Court.

The Appellant also seems to argue that the *Faust* Court somehow ruled that further testing, after certain evidence was obtained, was unreasonable. (Defendant-Appellant's brief, filed 2/16/18, p. 7).

> The facts of this case show that the forced blood draw was unreasonable under *Faust*. Prior to forcibly taking Wall's blood, Deputy Miller had obtained evidence of Wall's alleged impairment through various field sobriety tests and a breath test. (*Id.*, 18:13-24.); see *Faust*, 2004 WI 99. Para. 32 (further testing may be unreasonable);.

This assertion by the Appellant, appears to be contrary to the actual holding by the State Supreme Court in the *Faust* case. In addition, even if the *Faust* Court had held as the Appellant seems to suggest that it did, the facts in that case are completely different from the facts in Mr. Wall's case. In the *Faust* case, the police had actually obtained a breath sample that could have been used in the defendant's trial.[2] In Mr. Wall's

[2] Officer Olsen placed Faust under arrest and transported him to police headquarters. Upon arriving, Faust consented to provide a sample of his breath for chemical analysis. The results of the breathalyzer indicated that Faust possessed an alcohol concentration of 0.09 grams of alcohol per 210 liters of breath

case, there was not any breath test sample that could have been used at a trial. The Appellant argued that Deputy Miller had obtained "evidence of Wall's alleged impairment through various field sobriety tests and a breath test." (Defendant-Appellant's brief, p. 7).

The Respondent will agree that there was some evidence of Mr. Wall's impairment that Deputy Miller had observed through the field sobriety tests, however, there was no evidence obtained by Deputy Miller of any breath test. In fact, Mr. Wall would not provide a sufficient sample for the PBT to register. "A PBT was requested, but Mr. Wall would not provide a sufficient breath sample for a reading." (R. 1; p.3 from the criminal complaint).

It is clear that the *McNeely* decision changed the law in the State of Wisconsin when it comes to blood draws in operating a motor vehicle while under the influence of an intoxicant cases. It is equally clear that the *McNeely* decision had not come down at the time of this incident. The Trial Court made the correct decision when it declined to use the exclusionary rule in this case because the officers were acting in good faith regarding the established law at the time. (R. 75). The Trial Court correctly applied the *Dearborn* case in this situation.

> However, we decline to apply the remedy of exclusion for the constitutional violation. We hold that the good faith exception precludes application

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State v. Faust, 2004 WI 99, ¶ 5, 274 Wis. 2d 183, 189, 682 N.W.2d 371, 374.

> of the exclusionary rule where officers conduct a search in *278 objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court. Accordingly, we affirm the court of appeals and uphold Dearborn's conviction. *State v. Dearborn*, 2010 WI 84, ¶ 51, 327 Wis. 2d 252, 277–78, 786 N.W.2d 97, 110.

The Appellant next argues that this Court should still exclude the blood evidence in this case because it was obtained under a violent police encounter. (Defendant-Appellant's brief; p. 1). The Appellant has tried to analogize this case with that of that of the *Rochin v. California*[3] case. The facts of these cases are completely different.

It is the Respondent's position that the case that the Trial Court relied upon for this issue,

[3] Having 'some information that (the petitioner here) was selling narcotics,' three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a 'night stand' beside the bed the deputies spied two capsules. When asked 'Whose stuff is this?' Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine. *Rochin v. California*, 342 U.S. 165, 166, 72 S. Ct. 205, 206, 96 L. Ed. 183 (1952).

State v. Krause[4], is much more on point in its facts than that of the *Rochin* case. The Wisconsin Court of

[4] Officer Dornfeld arrested Krause for OAR and OWI, placed him in the back of **349 the police car, and began to transport him to the sheriff's department where a breathalyzer test would be done. En route, Krause became unruly and began spitting at the officer through the wire "cage" behind the front seat and kicking at the doors and windows. The officer stopped the car twice to try to put a seat belt on Krause but was unsuccessful, despite the aid of a back-up officer. After a third attempt, the officers "hog-tied" Krause and put him on the rear floor of the car. The trial court found, consistent with Krause's testimony, that the officer put a burlap bag over Krause's head because Krause continued to spit at him.

Officer Dornfeld then decided to take Krause to the hospital instead of the station because he believed a blood test would yield a more accurate measurement of Krause's BAC than would a breath test. The officer's decision also was based on (1) his belief that Krause's BAC was likely above 0.20% and the jail had a policy requiring arrestees with BACs over 0.20% to receive medical clearance before being jailed; and (2) his learning that Krause had at least three prior OWI convictions and there was a memo from the district attorney's office instructing officers making an arrest for a third or subsequent alcohol offense to obtain a blood sample from the arrestee. Officer Dornfeld did not seek a warrant because he believed it would take several hours to get a warrant *585 which would render the blood test meaningless.[2]

When Krause learned that a blood test was to be drawn, he became even more upset, stating that he "d[id]n't believe in needles" and that he did not want to get AIDS. At the hospital, Officer Dornfeld read Krause the "Informing the Accused" form. Krause adamantly refused to submit to a blood test, shouted vulgarities, and continued to spit and be unruly. Officer Dornfeld and at least two other officers placed a pillowcase over Krause's head, tied his feet down and held his arms while a medical technician drew blood from Krause. Krause struggled throughout the procedure. He testified: "I was fighting, moving my arm back and forth so she [the technician] couldn't do it [draw the blood]." His struggling and the officers' attempts to restrain him caused the needle to injure his arm. Krause also testified that an officer twisted his head so he could not see what was going on, causing him to break a tooth and bite his lip or tongue. He continued to spit and at that point was spitting blood at the officers and medical personnel. After the blood was drawn, Krause was taken to the jail where he submitted to a breathalyzer test. Ultimately, the blood test showed a BAC of 0.26%. *State v. Krause*, 168 Wis. 2d 578, 584–85, 484 N.W.2d 347, 348–49 (Ct. App. 1992).

Appeals, in a decision that was filed on April 1, 1992, upheld the warrantless blood draw that took place in the *Krause* case. This opinion has not been overruled by any court at this time. It is clear that the police had to use more force against Mr. Krause, than was used in Mr. Wall's case. Therefore, it is equally clear that the Trial Court made the correct decision when it chose to deny the Appellant's motion to suppress the blood test results in this case.

V. CONCLUSION

It is the Plaintiff-Respondent's position that, under the facts of this case, the Trial Court ruled correctly that because of the *McNeely* decision, the officers should have obtained a search warrant prior to having Mr. Wall's blood taken. The Trial Court also correctly held that the exclusionary rule should not be applied in this case because the officers were relying on the well-established case law that was in place at the time of the incident. And, the Trial Court was correct in that the method that the officers used in this case to obtain Mr. Wall's blood sample, did not "shock the conscience"[5] as was the case in the *Rochin* case. But,

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[5] This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents **210 of government to obtain evidence is bound to offend even hardened

the officer's actions in this case were in line with the officers in the *Krause* case and therefore, the evidence should not be suppressed.

Given the facts of this case, the Trial Court was absolutely correct in its ruling denying each of the Appellant's motions. Because the Trial Court was correct in its ruling, the Plaintiff-Respondent asks that this Court uphold the Trial Court's decision and deny the Appellant's appeal.

Dated at Portage, Wisconsin, March 7th, 2018

Respectfully submitted,

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sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209–10, 96 L. Ed. 183 (1952).

CERTIFICATION
I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a Proportional Serif Font. The length of this brief is 3,150 words.

Dated this 7th day of March, 2018.

Signed,

_____

Troy D. Cross
Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2017AP2367-CR, excluding the appendix, if any, which complies with the requirements of s. 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 7th day of March, 2018.

Signed:

_____

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