STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 839 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LONNIE P. AYOTTE, JR.,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
DECEMBER 15, 2017, IN THE CIRCUIT COURT
FOR MARQUETTE COUNTY,
THE HONORABLE BERNARD BULT PRESIDING.

Respectfully submitted,

LONNIE P. AYOTTE, JR.,
Defendant-Appellant

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ARGUMENT

I. THE STATE LABORATORY UNLAWFULLY TESTED MR. AYOTTE'S BLOOD SAMPLE AFTER HE WITHDREW HIS CONSENT.

A. The search is ongoing after a person gives his or her blood sample, because a person retains a privacy interest in his or her blood.

In ***Birchfield v. North Dakota***,[1] the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample:

> [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.[2]

Relying upon the Supreme Court's reasoning in ***Birchfield***, the Wisconsin Supreme Court has very recently affirmed that there is a Fourth-Amendment right to refuse to submit to blood testing. In ***State v. Dalton***, the Court explicitly recognized that the defendant's decision to not consent to an evidentiary blood test was protected by the Fourth Amendment.[3]

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[1] 136 S. Ct. 2160 (2016).
[2] ***Birchfield***, 136 S. Ct. at 2178.
[3] ***State v. Dalton***, 2018 WI 85, ¶ 61, 377 Wis. 2d 730, 902 N.W.810.

In ***Ferguson v. City of Charleston***, the United States Supreme Court examined whether warrantless drug testing, conducted on lawfully-obtained urine samples, was lawful.[4] Despite the collection of the urine being lawful, the Supreme Court held that "[T]he urine tests . . . were *indisputably* searches within the meaning of the Fourth Amendment."[5] The majority opinion states that the analysis of a sample that is lawfully obtained *is* a Fourth-Amendment search.[6] The State cites to the dissenting opinion in ***Ferguson***, which is not the binding opinion, and does not impact this Court's legal analysis.[7]

The caselaw cited above and in Mr. Ayotte's brief-in-chief indicates that individuals have a legitimate and recognized privacy interest in the information contained in their own blood. 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 or her lawfully-obtained blood sample.[8] The Supreme Court recognized it is *precisely* the fact that blood contains vast amounts of personal information that triggers an arrestee's anxiety.[9]

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[4] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).
[5] ***Id.*** at 76 (emphasis added).
[6] ***Id.*** at 73.
[7] State's Br. at 8.
[8] ***Birchfield***, 136 S. Ct. at 2178.
[9] ***Id.***

It is irrelevant that the State Lab only tests for the presence of alcohol or drugs, as the State asserts.[10] 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 argues that society would not recognize as reasonable any retained privacy interest in a blood sample after a person's blood had been drawn.[11] 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.

In addition, the State repeatedly miscategorizes Mr. Ayotte's argument as an argument requiring a warrant to analyze his blood after he has consented to drawing his blood.[12] Mr. Ayotte agrees that drawing and testing his blood are one continuous search, and that the State's categorization of Mr. Ayotte's argument would violate

[10] State's Br. at 10.
[11] State's Br. at 11.
[12] State's Br. at 4–6.

VanLaarhoven.[13] But if the State intends to use results from ethanol testing of a person's blood sample after that person has withdrawn consent to testing (but before the lab tests the person's blood), the State needs another basis to test a person's blood. To do otherwise would violate the Fourth Amendment's prohibition against warrantless searches.

Under existing caselaw, a search occurs for Fourth Amendment purposes whenever the government intrudes upon an individual's "reasonable expectation of privacy."[14] Since Mr. Ayotte had a reasonable expectation of privacy in the information contained in his blood, the analysis of his blood sample was a search. Any evidentiary testing upon arrest for OWI must be justified through a warrant or an exception to the warrant requirement, as any testing is an invasion of a person's legitimate privacy interest in their blood.

B. Before the search was executed, Mr. Ayotte had the right to withdraw his consent to testing.

Federal caselaw holds that, "One who consents to a search 'may of course delimit as he chooses the scope of the search to which

[13] ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W. 2d 411.
[14] ***Katz v. United States***, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

he consents.'"[15] If a person withdraws his or her consent to a search, he or she must do so unequivocally.[16]

Consent to an evidentiary chemical blood analysis may be withdrawn, just as one may withdraw consent to any other Fourth-Amendment search. Just as with a home search, it is unlawful for the party executing the search to continue with the search after the person withdraws his or her consent.[17]

A recent Court of Appeals case directly applicable to Mr. Ayotte's is ***State v. Randall***.[18] In ***Randall***, the Court considered the issue here, *i.e.* whether a person could retract their consent to blood testing for ethanol.[19] The ***Randall*** Court concluded that the defendant withdrew consent to an ongoing search.[20] Because the search was ongoing, once the original authority for the search was revoked, the State could no longer rely on that legal authority to analyze the blood sample.[21] Moreover, the ***Randall*** Court stated that its holding

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[15] ***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)).
[16] ***State v. Wantland***, 2014 WI 58, ¶ 21, 355 Wis. 2d 135, 848 N.W.2d 810.
[17] *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 revocation of consent the search should be terminated instantly, and the officers should promptly depart the premises).
[18] ***State v. Randall***, No. 2017AP1518-CR, 2018 WL 3006260 (Wis. Ct. App. June 14, 2018) (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). The State has filed a petition for review in this matter and, therefore, this case is currently pending Supreme Court review.
[19] ***Id.*** ¶ 13.
[20] ***Id.***
[21] ***Id.***

followed the reasoning in ***VanLaarhoven***.[22] According to the ***Randall*** Court, because the ***VanLaarhoven*** Court stated that taking a defendant's blood and testing it comprised one continuous search, the defendant could withdraw his consent to ethanol testing.[23]

The State argues that that ***Randall*** Court misapplies ***VanLaarhoven***,[24] ***Petrone,*** [25] ***Snyder***,[26] and ***State v. Reidel***.[27] In support of its argument, the State cites to a passage in ***VanLaarhoven*** that declares, "***Petrone*** and ***Snyder*** teach 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 judicial authorized warrant."[28] Yet, as addressed below, neither the Court in ***VanLaarhoven*** nor the Court in ***Petrone*** would argue that once the legal basis for the search no longer exists, the State may continue to analyze the blood sample. The situation here is akin to a warrant being deemed invalid by a reviewing court. Once the legal justification for the search is no longer applicable, the State may not rely on evidence derived from that search in its case.

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[22] ***Id.***
[23] ***Id.***
[24] ***VanLaarhoven***, 2001 WI App 275, ¶ 16.
[25] ***State v. Petrone***,161 Wis. 2d 530, 468 N.W.2d 676 (1991).
[26] ***United States v. Snyder***, 852 F.2d 471 (9th Cir. 1988).
[27] State's Br. at 6. ***State v. Reidel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789.
[28] State's Br. at 5; ***VanLaarhoven***, 2001 WI App 275, ¶ 16.

As addressed in Mr. Ayotte's brief-in-chief, evidentiary testing of a blood sample typically takes days or weeks—not the minutes or hours involved in searching a home or automobile. Regardless of the particular length of time, the legal principles do not change.[29] When a person withdraws his or her consent before the search is completed, any search must immediately cease.

C. The State cannot legally justify the Lab testing Mr. Ayotte's blood sample.

The State cites to ***State v. VanLaarhoven*** to support its argument that the search ends when a person's blood has been drawn.[30] But the facts in ***VanLaarhoven*** are different. In that case, the defendant consented to a blood draw.[31] The defendant did not then withdraw his consent.[32] The state lab tested his blood, and the defendant moved to suppress, arguing that analyzing his blood was a second search, requiring a warrant.[33] In its holding, the Court of Appeals held that the defendant had "consented to a taking of a sample

[29] *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).
[30] State's Br. at 4; ***VanLaarhoven***, 2001 WI App 275, ¶ 16.
[31] ***VanLaarhoven***, 2001 WI App 275, ¶ 8.
[32] ***Id***. ¶ 3.
[33] ***Id***.

of his blood *and* the chemical analysis of that sample."[34] Given that the defendant never withdrew his consent to testing, the government did not need a warrant to test the sample.[35] In other words, this Court found that the testing was an "essential part of the seizure" to which the defendant consented.[36]

Mr. Ayotte does not dispute the Court's reasoning in ***VanLaarhoven*** that the State does not need to get a warrant for a search to which a person has voluntarily consented.[37] But when the legal justification for the search is no longer available, for example, when a person withdraws his consent to ethanol testing, the search must promptly cease.

The State concludes by arguing that permitting Mr. Ayotte to withdraw his consent to testing days or weeks after the blood draw occurred is not provided for in the statutory mechanism that is the implied consent law and would also "be contrary to the policy behind implied consent laws."[38] That is not so. To begin with, the State's assertion does not account for Wisconsin caselaw on issuing refusal paperwork.

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[34] ***Id***. ¶ 8 (emphasis added).
[35] ***Id***. ¶ 16.
[36] ***Id***.
[37] ***VanLaarhoven***, 2001 WI App 275, ¶ 16.
[38] State's Br. at 14.

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 for OWI.[39] There, the Court stated that "shall" in "shall immediately prepare a notice of intent to revoke" under Wis. Stat. § 343.305(9) was "directory, rather than mandatory."[40] The ***Moline*** case indicates that, at least occasionally, the directives that the implied consent law places upon law enforcement officers to immediately perform certain duties are not as inflexible as the State believes.

Second, the implied consent law was designed to facilitate the collection of evidence by allowing the State to penalize drivers who do not provide consent.[41] When a driver is asked to provide a blood sample, he or she absolutely has the right to say "no"—and by extension, also retract any consent before the search is executed. 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

[39] ***State v. Moline***, 170 Wis. 2d 531, 542, 489 N.W.2d 667 (Ct. App. 1992).
[40] ***Id.*** at 541.
[41] *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; ***State v. Brar***, 2017 WI 73, ¶¶ 44–86, 376 Wis. 2d 685, 898 N.W.2d 499 (Kelly, J., concurring).

requires that the police find another route to obtain a blood sample, or forgo obtaining a sample at all.[42]

In addition, there is more recent caselaw that also allows Mr. Ayotte to withdraw his consent, regardless of the existence of the implied consent law. In ***Dalton***, the Wisconsin Supreme Court explicitly recognized that the defendant's decision to refuse consent to an evidentiary blood test was protected by the Fourth Amendment.[43] In other words, the Court determined that the Fourth Amendment applies to OWI blood draws. Presumably, that includes withdrawing consent to ethanol testing—though the Court did not rule on this precise issue.

The State fails to develop its argument that a person has a narrow window to refuse consent to a search.[44] Because the State does not cite to any authority beyond the implied consent law itself for its argument that withdrawing consent would violate the implied consent law, this Court does not need to consider this argument. Further, the statutory scheme that is the implied consent law cannot overcome constitutional protections given by the Fourth Amendment.

[42] *Cf.* ***State v. Blackman***, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.
[43] ***State v. Dalton***, 2018 WI 85, ¶ 61.
[44] State's Br. at 16.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Ayotte respectfully requests that this Court reverse the lower court's ruling denying his suppression motion. Had the circuit court suppressed the blood test results in this case, Mr. Ayotte would have been acquitted of the charges against him.

Dated at Madison, Wisconsin, October 10, 2018.

Respectfully submitted,

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CERTIFICATION

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