STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2018AP2240-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID M. HAY,

Defendant-Respondent.

On Appeal from an Order Granting a
Motion to Suppress Evidence and an
Order Denying Reconsideration,
Entered in Waukesha County Circuit Court, the
Honorable Michael J. Aprahamian, Presiding.

RESPONSE BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorney for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> Within nineteen minutes of stopping his vehicle, police arrested Mr. Hay for driving with a prohibited alcohol concentration. In the forty minutes that followed Mr. Hay's arrest, the three responding officers rigidly followed routine department procedures without attempting to obtain a warrant before they ultimately concluded there were exigent circumstances and ordered a warrantless blood draw. Was this conclusion reasonable?

The circuit court answered no. It concluded that truly exigent circumstances did not exist, and granted Mr. Hay's motion to suppress the results of his blood test. (46).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is not requested. Briefing should adequately present this issue for the court's decision, but Mr. Hay would welcome oral argument should the court find it desirable.

STATEMENT OF THE CASE AND FACTS

On July 6, 2017, Brookfield Officer Stommes observed a vehicle that failed to stop at a yellow light. (68:5; A-App.[1] 113). Officer Stommes activated his lights and stopped the vehicle at the Corner Market Gas Station in Brookfield at 12:50 a.m. (4:2; 68:6, 8, 13; A-App. 102, 114, 116, 121). While interacting with the driver, David Hay, Officer Stommes perceived indicia of intoxication, and Mr. Hay admitted he had been drinking earlier in the evening. (4:2; 68:14; A-App. 102, 122).

Officer Stommes returned to his squad car and checked Mr. Hay's driving record. (68:7; A-App. 115). Officer Stommes learned that Mr. Hay had prior OWI convictions and a .02 alcohol restriction. (68:7, 14; A-App. 115–22). Officer Stommes called another officer for backup, and Officer Hanson arrived shortly thereafter. (68:17; App. 125–26).

After Officer Hanson arrived, the officers conducted field sobriety testing. (68:15, 18; A-App. 123, 126). At the conclusion of field sobriety tests, Mr. Hay submitted to a preliminary breath test ("PBT"), which registered a .032 alcohol concentration. (68:7; A-App. 115).

Officer Stommes arrested Mr. Hay at 1:09 a.m.—19 minutes after the initial stop. (68:13; A-App. 121). Mr. Hay was handcuffed, searched, and then buckled into the back seat of the squad car. (68:8, 15–

[1] "A-App" refers to the state's appendix, included with its opening brief.

16, 17; A-App. 116, 123–24, 125). Officer Stommes then searched Mr. Hay's car. (68:8, 18; A-App. 116, 126). While Officer Stommes searched the car, Officer Hanson "stood by to monitor Mr. Hay." (68:19; A-App. 127).

Following Mr. Hay's arrest, the officers called for a third officer to "sit" with Mr. Hay's car until it was towed. (68:16; A-App. 124). Officer Stommes testified that it is department policy to (1) transport a defendant with two squad cars and (2) wait with the vehicle until a tow truck arrives. (68:16–17; A-App. 124–25).

Officer Turk arrived on scene and waited for the tow truck. (68:17; A-App 125). Officers Stommes and Hanson transported Mr. Hay to the hospital. (68:17; A-App. 125). The drive to the hospital took 10 to 15 minutes. (68:14; A-App. 122). While driving to the hospital, Officer Stommes contacted the hospital and requested a phlebotomist for a blood draw. (68:10; A-App. 118). None of the officers attempted to, or requested assistance with, preparing a warrant application. (46:3; A-App. 160).

Once the officers arrived at the hospital, Officer Stommes finished writing the citations. (68:20; A-App. 128). While Officer Stommes finished writing citations, Officer Hanson "was standing by monitoring." (68:20; A-App. 128). At about 1:45 a.m., the officers read Mr. Hay the "Informing the Accused" form. (68:8; A-App. 116). Mr. Hay responded that he wanted to talk to an attorney before refusing or consenting; when he was told that he would not be

allowed to speak to an attorney, Mr. Hay refused to consent to a blood draw. (68:22–23; A-App. 130–31).

At 1:51 a.m., Officer Stommes contacted the on-call Assistant District Attorney ("ADA"). (68:9; A-App. 117). While Officer Stommes was on the phone, Officer Hanson continued to "monitor[ ]" Mr. Hay, and Officer Turk was still with Mr. Hay's vehicle waiting for a tow truck. (68:23; A-App. 131).

Following the phone call with the ADA, Officers Stommes and Hanson took Mr. Hay into the hospital to proceed with a warrantless blood draw. (68:9–10; A-App. 117–118). At no point did Officer Stommes or any of the assisting officers attempt to obtain a warrant, nor and they request assistance from another officer in drafting a warrant application and seeking a warrant. (68:11, 24; A-App. 119, 132). He testified that it would take 60 to 90 minutes to get a warrant, and that he understood alcohol dissipates in the bloodstream at .01 to .02 percent per hour. (68:12; A-App. 120). Based on those beliefs, he did not prepare a warrant application prior to contacting the on-call ADA. (68:10; A-App. 118).

Mr. Hay's blood was drawn at 2:25 a.m. (68:11; A-App. 119). The results of the blood draw showed no alcohol, but revealed the presence of cocaine. (3:1; 68:12; A-App. 120). Mr. Hay was subsequently charged with operating with a restricted controlled substance in blood – fifth or sixth offense. Wis. Stat. § 346.63(1)(am); (4; 18; A-App. 101–03, 104–05).

Mr. Hay moved to suppress the results of the blood test. (30). He argued that the warrantless blood draw was unreasonable because the officers lacked exigent circumstances to justify proceeding without a warrant. (30:1, 2).

Following a hearing and subsequent briefing, the court granted Mr. Hay's suppression motion by written decision and order. (46; A-App. 158–72). The court concluded that Mr. Hay's case involved a routine OWI investigation, and the situation in which the officers proceeded was not "'complicated,' 'fluid,' [or] 'chaotic'" like other federal and state cases in which exigent circumstances existed to justify a warrantless blood draw. *See* (46:8; A-App. 165 (citing *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120)). The court concluded that, absent additional facts suggesting a true exigency, the mere fact that Mr. Hay had a .02 restriction and a PBT result close to that restriction did not create a sufficient exigency to obviate the warrant requirement. *See* (46: 8–13; A-App. 165–70).[2]

The court specifically took issue with the fact that the state did not present any evidence that law enforcement attempted to contact a magistrate for an emergency warrant. (46:13; A-App. 170). It explained

[2] The state also argued, on alternative grounds, that the results of Mr. Hay's blood test should be admitted under the inevitable discovery doctrine. (37:5–6). The court disagreed with the state in this regard, and ultimately ordered suppression. (46:13–15; A-App. 170–72). The state's appeal, however, is limited solely to the court's ruling with respect to exigent circumstances. (State's Br. at 1–22).

that "nothing prevents law enforcement from contacting the on-duty judge on a recorded line pursuant to Wis. Stat § 968.12(3) and presenting the situation to the judge without the standard affidavit, and seeking the magistrate's recorded, oral approval for the blood draw." (46:13; A-App. 170 (citing *Missouri v. McNeely*, 569 U.S. 141, 155, which recognizes that "technological developments enable officers to secure warrants more quickly"). The court noted that this procedure would "likely take no more than 10–15 minutes," and that doing so would be "infinitely more consistent with the mandates of the Fourth Amendment." (46:13; A-App. 170).

The state subsequently moved for reconsideration, (50), which the circuit court denied. (51). The state's appeal followed. (54).

ARGUMENT

I. Police Lacked the Exigent Circumstances Necessary to Justify Drawing Mr. Hay's Blood without a Warrant.

A. Constitutional principles and standard of review

An appeal of an order regarding the suppression of evidence is a question of constitutional fact, and appellate review involves a two-step inquiry. *State v. Howes*, 2017 WI 18, ¶17, 373 Wis. 2d 468, 893 N.W.2d 812. First, this court applies a deferential standard to a trial court's findings of historical fact, and upholds those findings unless they

are clearly erroneous. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. Second, this court independently applies constitutional principles to the historical facts. *Id.*

The Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution provide that citizens have the right to be free from unreasonable searches. *State v. Dalton*, 2018 WI 85, ¶38, 383 Wis. 2d 147, 914 N.W.2d 120. The ultimate measure of a government search under the Fourth Amendment is reasonableness. *Tullberg*, 359 Wis. 2d 421, ¶29. In defining the Fourth Amendment's touchstone of reasonableness, the United States and Wisconsin Supreme Courts have repeatedly held that searches conducted without a warrant are "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

For Fourth Amendment purposes, blood draws are searches. *State v. Blackman*, 2017 WI 77, ¶53, 377 Wis. 2d 339, 898 N.W.2d 774. Thus, a warrantless blood draw is per se unreasonable unless an exception to the warrant requirement applies. *Id.*

Exceptions to the warrant requirement are "jealously and carefully drawn" because "search warrants are an essential safeguard against government overreaching." *Jones v. United States*, 357 U.S. 493, 499 (1958); *State v. Dearborn*, 2010 WI 84, ¶97, 327 Wis.2d 252, 786 N.W.2d 97. The state bears the burden of proving that one of the narrowly-

drawn exceptions to the warrant requirement exists, so as to justify a warrantless search. *Blackman*, 377 Wis. 2d 339, ¶¶4–6, 53–54.

One of the few exceptions to the warrant requirement is exigent circumstances. *Dalton*, 383 Wis. 2d 147, ¶39. This exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *State v. Parisi*, 2016 WI 10, ¶29, 367 Wis. 2d 1, 875 Wis. 2d 619 (citing *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013)).

The test for determining whether exigent circumstances exist is an objective one. *Tullberg*, 359 Wis. 2d 421, ¶41. Courts conducting this analysis in the context of a warrantless blood draw consider whether "police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would risk the destruction of evidence." *Dalton*, 383 Wis. 2d 147, ¶43.

The United States and Wisconsin Supreme Courts recognize that evidence of blood alcohol content becomes less reliable with the passage of time. *See, e.g.*, *McNeely*, 569 U.S. at 145; *Dalton*, 383 Wis. 2d 147, ¶42; *see also* Wis. Stat. § 885.235(3) (providing that blood that is taken over three hours after the point of driving is no longer automatically admissible). But the natural dissipation of alcohol in a driver's bloodstream does not create a *per se*

exigency allowing police to forego the warrant requirement before drawing blood. *McNeely*, 569 U.S. at 145; *Dalton*, 383 Wis. 2d 147, ¶42. Instead, the state must prove, on a case-by-case basis, whether exigent circumstances existed to justify a warrantless blood draw. *McNeely*, 569 U.S. at 145. The state's burden to prove that exigent circumstances justified a warrantless search a heavy one. *Welsh v. Wisconsin*, 466 U.S. 740, 749– 50 (1984).

Notably, in *McNeely*, the Supreme Court re-affirmed that warrants are the rule rather than the exception: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so." *McNeely*, 569 U.S. at 152. (emphasis added).

The Court in *McNeely* stressed that advancing technology allows law enforcement to obtain warrants remotely via telephone, radio, email, and video conference—thereby reducing the time and effort needed to get a warrant. *Id.* at 154–55. *Id.* The Court illustrated the manner in which these advancements can expedite the warrant-seeking process:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In

> such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id. at 153–54. The Supreme Court of Wisconsin similarly recognized the role advancing technology plays in expediting the warrant-procurement process. *See State v. Kennedy*, 2014 WI 132, ¶30, 359 Wis. 2d 454, 856 N.W.2d 834.

In accordance with *McNeely*, it should only occur in rare and unique circumstances that police need to "undermin[e] the neutral magistrate judge's essential role as a check on police discretion" by forcing an individual's blood without first obtaining a warrant. *McNeely*, 569 U.S. at 155. The facts of this case do not present such circumstances, and it was proper for the circuit court to order suppression.

B. The officers in this case were not forced to make split-second decisions in uncertain or rapidly-evolving circumstances, and the state therefore failed to prove that a genuine exigency justified the warrantless blood draw.

The police in this case arrested Mr. Hay nineteen minutes after they stopped him. At that time, there were two officers on the scene, and a third officer arrived thereafter. At no point did any of the three officers attempt to obtain a warrant; instead, they merely adhered to routine policies for OWI investigations—which strongly suggests that an actual exigency did not exist.

Exigent circumstances "may arise in the regular course of law enforcement," *McNeely*, 569 U.S. at 156, but any warrantless search based on exigent circumstances "must, of course, be supported by a genuine exigency." *Kentucky v. King*, 563 U.S. 452, 470 (2016). When objectively analyzing the circumstances in a particular case, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 466.

Since *McNeely* was decided, several Wisconsin cases have engaged in totality-of-the-circumstances analyses to illustrate the circumstances in which genuine exigencies necessitated conducting a blood draw without a warrant. Common throughout these cases are situations which are fluid, oftentimes tense or uncertain, and rapidly evolving.

In *Tullberg*, the court analyzed a warrantless blood draw following a fatal car crash. 359 Wis. 2d 421. Police arrived at the scene approximately thirty minutes after the crash, and neither any witnesses nor the defendant were at the scene. *Id.*, ¶¶. 9, 45. Mr. Tullberg's father arrived a few minutes after the first responding officer and appeared frantic. *Id.*, ¶¶10, 45. Police spent approximately thirty minutes investigating the scene, during which they found a deceased man under the crashed vehicle. *Id.*, ¶9. Police then travelled to a hospital, which was thirty minutes away, to interview Mr. Tullberg. *Id.*, ¶¶ 11, 46. At the hospital, Mr. Tullberg appeared intoxicated and mislead the officer by claiming that

the deceased man drove the car. *Id.*, ¶¶ 12, 14 & 47. After further investigation, the interviewing officer subsequently learned that Mr. Tullberg's account was incredible, and ultimately determined that Mr. Tullberg operated the vehicle while intoxicated. *Id.*, ¶17.

Due to the additional investigation required, it was not until "more than two and a half hours after the accident" that police had sufficient probable cause to believe that Mr. Tullberg had been driving under the influence. *Id.*, ¶¶19, 47. At that point, hospital staff were about to perform a CT scan on Mr. Tullberg. *Id.*, ¶¶18, 48. The officer then instructed medical staff to conduct a warrantless draw of Mr. Tullberg's blood.

The court in *Tullberg* concluded that the officer did not improperly delay obtaining a warrant because he "did not have probable cause to believe Tullberg operated the motor vehicle while under the influence . . . until nearly three hours after the accident." *Id.*, ¶44. Furthermore, the court noted that the officer was presented with a rapidly evolving situation, during which he had to respond to the accident, secure the scene, and investigate the matter, which "ultimately left [him] with a very narrow time frame" in which to draw Mr. Tullberg's blood. *Id.*, ¶50.

The court in *Howes* placed similar emphasis on the volatility of the situation presented to the officer, which ultimately delayed his ability to determine probable cause for an arrest or a warrant. *Howes*, 373 Wis. 2d 468. The court found exigent circumstances

existed because of (1) delays due to Mr. Howes's medical condition, which required a CT scan, (2) the officer's need to direct traffic and investigate the scene of the crash, and (3) the fact that Mr. Howes was unconscious, and the officer did not have probable cause to believe Mr. Howes was intoxicated until *after* he spoke with medical professionals at the hospital. *Id.*, ¶¶46–49. The timing of the officer's ability to determine probable cause again proved critical to this Court's finding of exigent circumstances: "the present case is not one in which the officer could have obtained a warrant on the way to the hospital because he did not have probable cause to obtain a warrant then." *Id.*, ¶49.

The court in *Howes* further recognized that Mr. Howes had a .02 driving restriction, which "increased the need for a prompt blood draw." *Id.*, ¶45. The court did not, however, hold that this fact, on its own, would support a finding of exigent circumstances. *Id.* Instead, the court noted that this fact was relevant "in addition" to Mr. Howes's medical condition, the officer's countervailing law enforcement duties, and the fact that Mr. Howes was unconscious. *Id.*

Dalton similarly involved a car crash with a "complicated," "fluid," and "chaotic" sequence of events. *Dalton*, 383 Wis. 2d 147, ¶44, 49. Mr. Dalton was unconscious, smelled of alcohol, and had to be airlifted to a hospital via helicopter. *Id.*, ¶7. The car's passenger told police that Mr. Dalton was drinking and drove the car. *Id.* One officer accompanied Mr. Dalton to wait for the helicopter, subsequently

drove to a different hospital to interview the passenger, and then drove to the hospital Mr. Dalton was airlifted to. *Id.*, ¶9, 10. Four other officers remained on the scene to investigate the crash, interview witnesses, and ensure the safety of travelers. *Id.*, ¶8. Nearly two hours after the crash, Mr. Dalton, who had regained consciousness after receiving emergency medical treatment, was arrested and refused a blood draw. *Id.*, ¶13. The officer believed there were exigent circumstances and ordered a warrantless blood draw shortly thereafter. *Id.*, ¶14.

The court in *Dalton* emphasized that it was "not in the business of second-guessing" police actions in "a complex and evolving situation." *Id.*, ¶49 (citing *United States v. Sokolow*, 490 U.S. 1, 11 (1989), which explained "that courts do not 'indulge in unrealistic second-guessing' of police's 'swift, on-the-spot decisions"). It explained that the officers' decisions to tend to Mr. Dalton's and the passengers' medical needs, examine and secure the scene, obtain evidence, and ensure the safety of other passengers, were all reasonable choices made at the expense of getting a warrant. *Id.*, ¶¶45–47. The court also noted that more than half of the on-duty officers were attending to the crash, and because other officers were busy responding to other incidents and patrolling the county, there were no available officers to prioritize getting a warrant. *Id.*, ¶48.

Mr. Hay's case did not entail the on-the-spot decision making or rapidly evolving facts presented in *Tullberg*, *Howes*, and *Dalton*. Officers Stommes,

Hanson, or Turk were neither forced to make swift or split-second decisions, nor prioritize pressing and countervailing law enforcement obligations over obtaining a warrant. *See Dalton*, 383 Wis. 2d 147, ¶50 (“‘The police have complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses,’ including “aid[ing] individuals who are in danger of physical harm” and “provid[ing] other services on an emergency basis.’” (citing Wayne R. LaFave, *Search & Seizure*, § 6.6 (5th ed.)). There were no witnesses to interview or substantial evidence to gather. Mr. Hay was alert and responsive throughout, did not require medical attention, and his immediate availability for testing was not in question. He did not attempt to mislead the officers in a manner that stifled their investigation. Mr. Hay’s vehicle was safely parked at a gas station, and there was no need to direct traffic around it. In contrast to the fluid situations in *Tullberg*, *Dalton*, and *Howes*, the facts of this case were relatively static.

The circuit court correctly acknowledged that this case involved a “run-of-the-mill” OWI investigation. (46:8). Police in this case had probable cause to believe that Mr. Hay violated his PAC no later than nineteen minutes after he was stopped, and they promptly arrested him. At that time, Mr. Hay’s PBT revealed the presence of alcohol, and the result of that PBT was relatively close to Mr. Hay’s .02 restriction. A reasonable officer—who would be aware that blood dissipates at a rate of .015 to .2 percent per hour—would have believed he had

between one and two hours to obtain a blood sample before Mr. Hay metabolized all of the alcohol in his body. (State's Br. at 9). At this point, when the driver is responsive, uninjured, and securely contained in the squad car, police could have reasonably begun, or requested assistance with, obtaining a warrant.

Although there were two officers on scene at the time of Mr. Hay's arrest, neither of them prioritized getting a warrant. Officer Stommes adhered to departmental policy by calling for a third officer to wait for a tow truck and searching Mr. Hay's vehicle. Officer Hanson merely stood by to "monitor" Mr. Hay, who was responsive, securely handcuffed, and buckled into the back seat of the squad car. (68:8, 15–16, 17, 19; A-App. 116, 123–24, 125, 127). Furthermore, both officers had to wait at the scene for Officer Turk, who arrived to "sit" with Mr. Hay's vehicle and wait for a tow truck. (68:8; A-App. 116). Officer Stommes never asked Officer Hanson or Turk to begin processing a warrant, or to search the vehicle or call for backup while he began the process of obtaining a warrant. (68:10; A-App. 118). Unlike the situations in *Tullberg*, *Dalton*, and *Howes*, the three responding officers in this case were not overwhelmed by competing and pressing obligations that took priority over obtaining a warrant.

While the court in *McNeely* acknowledged that the "routine"-ness of a stop is not dispositive for a Fourth Amendment reasonableness inquiry, it explained that "other factors present in an ordinary traffic stop, such as the procedures in place for

obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way." 569 U.S. at 164. Despite the fact that a reasonable officer would have believed he had one to two hours to obtain a valid blood sample, the officers in this case did not even attempt to obtain a warrant or inquire as to the availability of a magistrate judge.

Furthermore, there was no indication that the officers ever attempted to contact the on-duty judge in accordance with Wis. Stat. § 968.12(3) to expedite the warrant procurement process.[3] *See McNeely*, 569 U.S. at 154–55 (recognizing that "technological developments" exist which enable officers to "secure warrants more quickly"). The state ultimately failed to meet its heavy burden in this case to show that procedures for obtaining a warrant or unavailability of a magistrate frustrated the officers' ability to obtain a warrant expeditiously.

In *McNeely*, the Supreme Court explained there would be "no plausible justification" for not obtaining a warrant when "an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." 569 U.S. at 153-

[3] The state argues it was impermissible for the court to "speculate" about the expedited warrant procedures under Wis. Stat. § 968.12(3) because neither party presented evidence about that procedure at the hearing. (State's Br. at 18). But it was not speculation for Judge Aprahamian, a Waukesha County Circuit Court Judge, to take notice of the procedures on-duty judges use to complete warrants under Wis. Stat. § 968.12(3).

154. Here, there was time to request a warrant, and two additional officers on scene who could have assisted Officer Stommes in attempting to make that request. The only arguable exigency in this case was the passage of time, and the fact that police could have attempted to obtain a warrant during that time and failed to do so demonstrates that the warrantless search of Mr. Hay's blood was unreasonable.

While courts conducting a Fourth-Amendment reasonableness inquiry should refrain from second-guessing a police officer's swift, on-the-spot decisions in complex and fluid situations, *Dalton* 338 Wis. 2d 147, ¶49, that does not mean that they should simply rubber stamp all police conduct. *See State v. Reed*, 2018 WI 109, ¶53, 384 Wis. 2d 469, 920 N.W.2d 56 ("It is the duty of the courts to be watchful of the constitutional rights of the citizen, and against any stealthy encroachments thereon" (citing *Boyd v. United States*, 116 U.S. 616 (1886)). The circuit court did not impermissibly second-guess the police's conduct in this case when it concluded that truly exigent circumstances did not exist, and the warrantless search of Mr. Hay's blood was therefore unreasonable.

C. The "totality of the circumstances" considered were not limited to the time between Mr. Hay's refusal and moment his blood was drawn.

The test for determining whether truly exigent circumstances existed to justify a warrantless search is an objective one which considers the totality of the

circumstances. *McNeely*, 569 U.S. at 156; *Dalton*, 383 Wis. 2d 147, ¶42. The state argues, without citation to any authority, that the totality of the circumstances that should be considered were limited to the time between Mr. Hay's refusal to submit to a blood test and the time his blood was drawn. The state further argues that, by virtue of the implied consent statute, it was reasonable for the officer to believe Mr. Hay had consented to a blood draw up to the point he refused. These arguments are plainly contradicted by case law and the implied consent statute.

i. The dispositive questions for assessing the totality of the circumstances is when the police had probable cause.

Several post-*McNeely* cases in Wisconsin emphasized that the time in which an officer obtains probable cause is highly relevant to a exigent circumstances analysis. In *Tullberg*, due to complex accident investigation and an uncooperative defendant, police did not have sufficient probable cause to believe the defendant was driving while intoxicated until "two and a half hours after the accident." 359 Wis. 2d 421, ¶47. The court in *Tullberg* found that the officer "conducted himself reasonably," and the warrantless blood draw was justified by exigent circumstances because he "did not have probable cause to believe that Tullberg operated the vehicle until nearly three hours after the incident." *Id.*, ¶44.

Similarly, the court in *Howes* found exigent circumstances because of the officer's countervailing obligations—namely, directing traffic, investigating the accident scene, and allowing an unconscious defendant to receive medical attention—created exigent circumstances justifying a warrantless blood draw. 373 Wis. 2d 468, ¶46–49. The timing of the officer's ability to determine probable cause was critical to the court finding exigent circumstances: "the present case is not one in which the officer could have obtained a warrant on the way to the hospital because he did not have probable cause to obtain a warrant then." *Id.*, ¶49.

In *State v. Vongvay*, The Wisconsin Court of Appeals similarly found that the point in which an officer obtains probable cause is dispositive for a Fourth-Amendment exigent circumstances analysis. *State v. Vongvay*, Appeal No. 2015AP1827-CR, unpublished slip opinion (May 4, 2016)[4] (App. 101–07). After he was arrested on suspicion of OWI, Mr. Vongvay told officers that he did not have any prior OWI convictions, and later refused a blood test. *Id.*, ¶¶2, 3 (App. 102–03). The police department's system for checking criminal records was not working, so the officer proceeded with an arrest for a non-criminal offense. *Id.*, ¶3, 4. Over two hours after the traffic stop, the officer learned from dispatch that Mr. Vongvay had a prior OWI, and he then had probable cause to believe that Mr. Vongvay

[4] Authored, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. *See* Wis. Stat. § 809.23(3)(b).

committed a criminal OWI offense. *Id.*, ¶4. Mr. Vongvay again refused to submit to a blood test, and the officer proceeded with a warrantless blood draw, which was performed just under three hours from the time of Mr. Vongvay's traffic stop. *Id.*, ¶4.

The court of appeals determined that the officer did not improperly delay obtaining a warrant because, due to technological issues and Mr. Vongvay misleading him, the officer did not have probable cause to believe that Mr. Vongvay committed a criminal offense until over two hours after the traffic stop. *Id.*, ¶11 (App. 106). If not for those delays, the officer would have had probable cause much sooner and could have "easily begun the process for obtaining a warrant." *Id.*, ¶11. (App. 106) The court therefore determined that officer reasonably concluded that attempting to obtain a warrant with less than hour left in the three-hour window under Wis. Stat. § 885.235(1g) would risk the destruction of evidence. *Id.* (App. 106).

These analyses contradict the state's assertion that "the period of time necessary to obtain a warrant mattered only after Hay refused the officer's request for a blood draw." (State's Br. at 19). If that were true, then the court's considerations in the afore-mentioned cases concerning the delays in the officer's ability to determine probable cause would be irrelevant. The court in *Howes* expressly emphasized that an officer who obtains probable cause at the scene of the crash can reasonably obtain a warrant on the way to the hospital. *See Howes*, 373 Wis. 2d 468, ¶49. Similarly, the court in *Vongvay* recognized that

an officer can begin the warrant application "easily" once he has probable cause that a criminal offense was committed. *Vongvay*, 2015AP1827-CR, unpublished slip opinion (May 4, 2016), ¶11 (App. 106). Whether the driver refuses is one of the circumstances to consider in a totality of the circumstances analysis, but it is not the starting point.

Unlike any of the afore-mentioned cases, police in this case had probable cause to arrest Mr. Hay and seek a warrant no later than nineteen minutes after they stopped him. Instead of doing so, they rigidly adhered to department policies—which included an officer standing by and "monitoring" Mr. Hay, and another officer waiting near Mr. Hay's vehicle for a tow truck. (68:8, 10; A-App.116, 118). These actions stand in stark contrast to the mandate in *McNeely* that obtaining a warrant—and thereby complying with the Fourth Amendment—must be the priority when it can be done reasonably.

ii. It is unreasonable for an officer to assume that a driver consents to a blood test based solely on the language of the implied consent statute.

In further support of its argument that the court should only have considered the time between Mr. Hay's refusal and the blood draw, the state asserts that a reasonable officer would have "no reason to believe" that a driver would refuse a request for a blood sample because "[Mr.] Hay, like

all drivers, impliedly consented to an officer's request for a blood draw when the officer had probable cause [to arrest him for operating with a PAC]" under Wis. Stat. § 343.305. This argument is without merit, as it appears to conflate "implied consent" with actual and voluntary Fourth Amendment consent.

Like exigent circumstances, consent is a "jealously and carefully drawn" exception to the warrant requirement. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). "Consent in any meaningful context cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing." Wayne R. LaFave, *Criminal Procedure*, § 8.2 (4th ed.). Furthermore, voluntary consent may be limited or withdrawn at will. *See Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

"Implied consent," on the other hand, does not establish actual, Fourth-Amendment consent. In *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184–84 (2016), the United States Supreme Court recognized that "implied consent" statues provide that "cooperation with BAC testing [is] a condition of the privilege of driving and that privilege will be rescinded if the suspected driver refuses to honor that condition." Wisconsin's implied consent statute seeks to discourage refusals by imposing consequences for doing so, but it nonetheless provides a driver the opportunity, upon his arrest, to refuse to submit to a requested blood test. *See* Wis. Stat. § 343.305; *see also Birchfield*, 136 S. Ct. at 2186 (holding that North Dakota's implied consent law,

which criminalized refusal, was so severe that it risked coercing a driver to submit to testing). Therefore, an officer cannot reasonably assume, as the state appears to argue, that a driver has given voluntary consent under the implied consent statute unless or until he refuses. *See* (State's Br. at 16).

Because Wisconsin's implied consent statute imposes penalties for refusal, the legislature contemplated the very real possibility that a driver might refuse to submit to a blood test upon request. *See* Wis. Stat. § 343.305(9). An officer who has "no reason to believe" that a driver would refuse a blood test, (State's Br. at 16), both (1) conflates implied consent with actual, voluntary consent, and (2) contradicts the language and of Wisconsin's implied consent statute—which contemplates the reasonable likelihood that a driver might refuse to consent to a blood draw and imposes consequences. Such a belief would therefore be an unreasonable one, and the state's argument in this regard is without merit.

If it is reasonable for police, following an arrest, to assume that the driver will ultimately consent to a blood draw and thereby prioritize waiting with a defendant while other officers search the vehicle and/or wait for a tow truck over getting a warrant, then it is hard to fathom circumstances that would be unreasonable. Police will always have other tasks to attend to during drunk driving investigations, but strict adherence to those tasks, rather than obtaining a warrant, cannot create the exigency upon which police later rely.

The circuit court correctly recognized that in uncomplicated situations like this case, obtaining a warrant should have been the priority, but none of the officers' conduct suggests as much. (46:8, A-App. 165). Police had probable cause to arrest Mr. Hay less than twenty minutes after they stopped him, yet they never even tried to get a warrant. Instead, they prioritized routine tasks, which included standing by and "monitoring" Mr. Hay, over a warrant—and that very conduct belies any reasonable conclusion that the police truly believed they had exigent circumstances necessitating a warrantless search. Such conduct does not pass constitutional muster under *McNeely*.

D. The results of Mr. Hay's blood test are not relevant to an exigent circumstances analysis.

A court analyzing whether a warrantless blood draw was justified by exigent circumstances considers "whether police officers *under the circumstances known to them at the time* reasonably believed that a delay in procuring a warrant would risk the destruction of evidence." *Dalton*, 383 Wis. 2d 147, ¶43 (emphasis added). Accordingly, justifying a warrantless blood draw on the basis of information that was learned *after* the blood draw would be impermissible. *See id.*

Nonetheless, the state makes numerous references to "the fact that [Mr.] Hay's alcohol concentration reached 0.00 in no more than 76 minutes after his arrest," and argues that fact

demonstrates that exigent circumstances were present. (State's Br. 9, 10, 13, 18, 19). This line of argument plainly contradicts the standard under which a court determines whether exigent circumstances justified a warrantless blood draw, and is therefore without merit.

The circumstances known to the officers at the time were well documented in the circuit court's decision. *See* (46:1–3; A-App. 158–60). Mr. Hay had a .02 driving restriction, and officers had probable cause to arrest him for violating that restriction no later than 19 minutes after the traffic stop. (46: 1–2; A-App. 158–59). Prior to his arrest, Mr. Hay had submitted to a PBT which indicated an alcohol concentration of .032. (46:2; A-App. 159). The officers knew that an individual metabolizes alcohol at a rate of .015 to .02 percent per hour. (46:2; A-App. 159).

As the state acknowledges, a reasonable officer in these circumstances would believe he had between one and two hours before all of the alcohol in Mr. Hay's blood dissipated. (State's Br. at 9). That is a reasonable amount of time in which to comply with *McNeely* and attempt to procure a warrant. The officer did not know, and could not have known, that Mr. Hay's blood alcohol concentration would dissipate within 76 minutes or less until *after* the warrantless blood draw was performed. If officers could rely on the ends-justifying-the-means approach for which the state argues, it would wholly and unconstitutionally obviate the requirements of the Fourth Amendment.

Finally, the state appears to argue that an individual with a .02 restriction whose PBT gives a result that is relatively close to zero creates a categorical exigency. *See* (State's Br. at 11–13). In recent years, the United States Supreme Court has twice declined to create categorical exceptions to the warrant requirement in the context of drunk-driving arrests. *See McNeely*, 569 U.S. 141 (holding that the natural dissipation of alcohol in the blood stream does not constitute per se exigent circumstances); *Birchfield*, 136 S. Ct 2160 (holding that a blood draw is not a reasonable search incident to arrest). The categorical exception for which the state appears to argue is, at its core, the same one that was rejected in *McNeely*. The mere passage of time and natural dissipation of alcohol does not, and should not, create an exigency which obviates the requirement for a warrant under the Fourth Amendment.

McNeely and *Birchfield* instead affirmed the bedrock principle that a blood draw is a search, which requires a warrant unless the state can meet its heavy burden to prove that a warrantless search was reasonable. The state did not meet its heavy burden here, and the circuit court did not err in concluding as much.

CONCLUSION

For the foregoing reasons, David M. Hay respectfully requests that this court affirm the circuit court's decision and order granting Mr. Hay's motion to suppress evidence.

Dated this 7th day of June, 2019.

Respectfully submitted,

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,296 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 June, 2019.

Signed:

_____

MARK R. THOMPSON
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of June, 2019.

Signed:

_____

MARK R. THOMPSON
Assistant State Public Defender

A P P E N D I X

INDE X
TO
APPENDIX

Page