STATE OF WISCONSIN

C O U R T OF A P P E A L S

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 A MOTION FOR RECONSIDERATION, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. APRAHAMIAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

The circuit court erred in granting a motion to suppress the results of a test which showed the presence of cocaine in the defendant-respondent David M. Hay's blood. Law enforcement officers stopped Hay's vehicle, learned that he could not legally drive with a blood alcohol concentration (BAC) above 0.02, and administered a preliminary breath test (PBT) which yielded a result of 0.032. The officers arrested Hay for operating a motor vehicle with a prohibited alcohol concentration and requested a blood sample under the implied consent law. He refused and withdrew his implied consent. The officers feared that waiting to obtain a warrant authorizing a blood draw risked Hay's alcohol concentration dissipating to zero, destroying the evidence, so they administered a warrantless blood draw. Exigent circumstances therefore justified the blood draw.

Hay does not dispute that there was insufficient time to obtain a warrant after he refused, but he asserts that the circumstances were not exigent because the officers could have obtained a warrant when they had probable cause to arrest him. He asserts that the moment that there is probable cause is dispositive on whether there is time to get a warrant.

However, a reasonable officer would not seek a warrant authorizing a nonconsensual forcible blood draw until determining that the suspect is not consenting to give a blood sample. And the point at which the suspect refuses and withdraws consent is part of the totality of circumstances determining whether a warrantless blood draw is justified.

ARGUMENT

Exigent circumstances justified drawing Hay's blood without a warrant.

A. The warrantless blood draw was justified by exigent circumstances because evidence of Hay's blood alcohol concentration was dissipating, and police had a pressing need to obtain evidence of his alcohol concentration before it dissipated to 0.00.

In *Mitchell v. Wisconsin*, the Supreme Court concluded that that even if "the constant dissipation of BAC evidence alone does not create an exigency," "it does so when combined with other pressing needs." 139 S. Ct. 2525, 2537 (2019) (plurality opinion) (citing *Schmerber v. California*, 384 U.S. 757, 770–71 (1966)). The Court explained that "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Id.* [1]

[1] This holding is binding even though it comes from a four-justice plurality opinion. "When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *State v. Griep*, 2015 WI 40, ¶ 36, 361 Wis. 2d 657, 863 N.W.2d 567 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

Justice Thomas' concurrence sets forth a rule broader than the plurality opinion's rule. Justice Thomas believes that exigent circumstances justify a warrantless blood draw whenever police have probable cause that a driver is drunk. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (Thomas, J., concurring). The narrower plurality opinion is therefore the Court's holding on this issue.

In this case, there is no dispute that Hay's blood alcohol concentration was dissipating. It is "biological certainty" that alcohol in the bloodstream "is literally disappearing by the minute." *Missouri v. McNeely*, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring). And the officers had a pressing law enforcement need for the evidence after Hay refused to provide a sample consensually. The officers knew that Hay was subject to the 0.02 BAC limit (R. 68:14, A-App. 122), that a preliminary breath test had indicated a BAC of .032 (R. 68:68:7, A-App. 115), and that a person's BAC dissipates at a rate of .015 to .02 percent per hour. (R. 68:12, A-App. 120). The officers had a pressing need for the evidence and reason to believe that Hay's BAC would soon dissipate to 0.00, destroying the evidence, and there was no time to obtain a warrant. Under the totality of the circumstances, exigent circumstances justified the warrantless blood draw.

B. The officers acted reasonably by not seeking a warrant authorizing a nonconsensual blood draw until Hay withdrew his implied consent and refused their request for a blood sample.

The Fourth Amendment requires that searches be reasonable. It does not require that they be authorized by a warrant. "It is well established that a search is reasonable when the subject consents." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). Consent is favored, and a "search authorized by consent is wholly valid." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). In "a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002). Accordingly, a warrant is not required if a person consents to a blood draw.

The officers who arrested Hay did not immediately seek a warrant authorizing a nonconsensual blood draw. They attempted to administer a consensual blood draw under

Wisconsin's implied consent law. (R. 68:8–9, A-App. 116–17.) This was "standard protocol" in an OWI case not involving a crash or an unconscious person. *State v. Tullberg*, 2014 WI 134, ¶ 18, 359 Wis. 2d 421, 857 N.W.2d 120. In such a case, officers do not immediately seek a warrant. They administer field sobriety tests, issue a citation, arrest the person, and read the person the Informing the Accused form to request a sample. *Id.*

Hay argues that "warrants are the rule rather than the exception." (Hay's Br. 9.) He relies on *McNeely*, in which the Supreme Court said that, "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." (Hay's Br. 9 (quoting *McNeely*, 569 U.S. at 152)) (emphasis added by Hay).

But *McNeely* concerned only warrantless *nonconsensual* blood draws: "the question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 569 U.S. at 145. A *nonconsensual* blood draw may not be justified by exigent circumstances when an officer can obtain a warrant "without significantly undermining the efficacy of the search." *Id.* at 152. But a warrant is not required when the suspect consents to the search.

It makes sense to determine whether an OWI suspect consents to a blood draw before seeking a warrant. A blood draw authorized by a warrant is a forcible search. It is "a compelled physical intrusion beneath [a suspect's] skin and into his veins to obtain a sample of his blood." *McNeely*, 569 U.S. at 148. In contrast, consensual blood draws are not compelled or forced. Implied consent laws are designed "to

induce motorists to submit to BAC testing." *Birchfield*, 136 S. Ct. at 2179. They "provide an incentive to cooperate." *Id.*

The circuit court seemingly recognized that the officers acted reasonably by requesting a blood sample from Hay before seeking a warrant. The court said that the officers "could have taken steps to shorten the time it would [have] take[n] to obtain a warrant." (R. 46:11–12, A-App. 168–69.) But it did not say that the officers should have started the warrant process as soon as there was probable cause. The court said that the officers could have "promptly read Mr. Hay the Informing the Accused Form" at the scene of the traffic stop. (R. 46:12, A-App. 169.) And it said that, "Once Mr. Hay refused to provide a sample, at no time did Officer Hanson start the process of obtaining a warrant while Officer Stommes proceeded in parallel the process of obtaining blood." (R. 46:12, A-App. 169.) The court therefore recognized that it was reasonable for the officers to do exactly what they did here—determine how to obtain a nonconsensual blood draw only after the suspect refuses a request for a consensual blood draw.

In its initial brief the State asserted that after arresting Hay, "the officers had no reason to believe that he would not submit to that request" because under Wis. Stat. § 343.305(2) and (3)(a), "Hay, like all drivers, impliedly consented to an officer's request for a blood sample when the officer had probable cause that he had operated with a prohibited alcohol concentration . . . in his blood." (State's Br. 16.)

Hay takes issue with this argument, asserting that it conflates implied consent with actual consent and contradicts the language of Wisconsin's implied consent statute. (Hay's Br. 23–24.) He claims that "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." (Hay's Br. 24.)

This Court need not address the workings of the implied consent law in this case. Whether Hay impliedly consented to a blood draw by driving on a Wisconsin highway or impliedly consented that he would be subject to penalties if he did not consent when the officer requested a sample, a reasonable officer would have no reason to think that Hay would refuse the officer's request for a blood sample until the officer requested the sample and Hay refused. After all, Wisconsin's implied consent law "incentivize[s] prompt BAC testing." *Mitchell*, 139 S. Ct. at 2536. By refusing, Hay faced revocation of his operating privilege and evidentiary consequences. *Id.* at 2531. A reasonable officer would not seek a warrant before determining whether the suspect will expressly consent to a blood draw as required by the implied consent statute.

C. Once Hay withdrew his consent to a blood draw, there was no time to get a warrant authorizing a nonconsensual blood draw without risking the destruction of evidence.

In its initial brief, the State explained that once Hay withdrew his implied consent to a blood draw and refused the officer's request for a blood sample, the officers reasonably feared that there was no time to obtain a warrant without risking the destruction of evidence. (State's Br. 7–10.) Hay does not dispute that there was no time to obtain a warrant after he refused. And he acknowledges that "[w]hether the driver refuses is one of the circumstances to consider in a totality of the circumstances analysis." (Hay's Br. 22.)

But Hay argues that even though there was no time to obtain a warrant after he refused, exigent circumstances did not justify a warrantless blood draw because "the point in which an officer obtains probable cause is 'dispositive' for a Fourth-Amendment exigent circumstances analysis." (Hay's Br. 20).

Hay relies on *State v. Vongvay*, No. 2015AP1827-CR, 2016 WL 1761982 (Wis. Ct. App. May 4, 2016) (unpublished).[2] (R-App. 101–107.) But *Vongvay* does not establish that whether exigent circumstances exist depends only on when the officer had probable cause to arrest a suspect, and not also on when the suspect withdrew his implied consent to a blood draw.

In *Vongvay*, a defendant stopped for OWI told police he had no prior offenses, so the officer took him to the police station and requested a breath sample. *Id.* ¶ 2–4, (R-App. 102–03). The defendant refused. *Id.* ¶ 4, (R-App. 103). The officer apparently decided to proceed with the refusal rather than attempt to obtain a blood sample, but he later learned that the defendant had a prior offense. *Id.* (R-App. 103). The officer read the Informing the Accused form to the defendant and requested a blood sample. *Id.* (R-App. 103). The defendant refused. *Id.* (R-App. 103). The defendant's blood was drawn without a warrant or consent "just minutes shy of three hours from the . . . traffic stop." *Id.* (R-App. 103).

This Court concluded that exigent circumstances justified the blood draw. *Id.* ¶ 9, (R-App. 105). It noted that the officer did not have probable cause that the defendant had committed a criminal offense until more than two hours after the stop, and that the officer "reasonably concluded that if he completed the warrant application process he would have risked the destruction and admissibility of the evidence." *Id.* ¶ 11, (R-App. 106). This Court had no need to consider how much time elapsed after the defendant refused, because by the time the officer had probable cause, it was too late to

[2] The State regrets that it failed to append the *Vongvay* decision to its initial brief. Hay provided this Court with a copy of the unpublished opinion in his filed appendix (R-App. 101–107). Rather than provide another copy of the same unpublished opinion in a supplemental appendix, the State will cite to the copy in Hay's appendix.

obtain a warrant. It didn't matter that it was still too late a few minutes later, when the defendant refused.

Hay relies on *Tullberg*, arguing that in that case, "the warrantless blood draw was justified by exigent circumstances because" the officer "did not have probable cause to believe that Tullberg operated the vehicle until nearly three hours after the incident." (Hay's Br. 19 (quoting *Tullberg*, 359 Wis. 2d 421, ¶ 44).)

But *Tullberg* was not a consent case. Tullberg crashed his truck and an officer had probable cause to arrest him and seek a blood sample more than two and a half hours later. *Tullberg*, 359 Wis. 2d 421, ¶ 19. "Tullberg's medical condition was unknown, Tullberg was hospitalized after a serious car accident, and medical personnel needed to perform a Computerized Tomography scan ('CT scan') on Tullberg with some immediacy." *Id.* ¶ 18. The officer therefore "did not follow standard protocol for an operating under the influence arrest. He did not administer field tests, issue a citation, arrest Tullberg, or read the Informing the Accused form to Tullberg." *Id.* In concluding that exigent circumstances justified a blood draw, the supreme court did not consider when the defendant withdrew his implied consent because the officer did not proceed under the implied consent law.

Hay also relies on *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812 (lead opinion), asserting that when the officer had probable cause "was critical to the court finding exigent circumstances." (Hay's Br. 20.) He notes that the Supreme Court of Wisconsin concluded that "an officer who obtains probable cause at the scene of the crash can reasonably obtain a warrant on the way to the hospital." (Hay's Br. 21.)

But in *Howes*, the defendant did not refuse and withdraw his implied consent. He couldn't do so because he was unconscious. *Howes*, 373 Wis. 2d 468, ¶ 4. In determining whether exigent circumstances justified a warrantless blood draw, it would have made no sense to consider how much time elapsed between the refusal and the blood draw because there was no refusal. And the court's comment about starting a warrant application on the way to the hospital presupposed both probable cause at the scene and an unconscious person could not withdraw his implied consent.

Hay's argument about the timing of probable cause conflicts with United States Supreme Court precedent. In an exigent-circumstances case, the Supreme Court explained that "[f]aulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Kentucky v. King*, 563 U.S. 452, 467 (2011).

The court in *Howes* and *Tullberg* did not hold otherwise. Rather, the court in both cases simply held that the late discovery of probable cause was one factor why the police officers reasonably did not pursue a warrant earlier. *Howes*, 373 Wis. 2d 468, ¶¶ 45–50; *Tullberg*, 359 Wis. 2d 421, ¶¶ 44–50. Although the officers here had probable cause earlier than in *Howes* and *Tullberg*, the officers here did not pursue a warrant because they reasonably thought that Hay would consent to a blood draw after being read the Informing the Accused form.

Whether exigent circumstances justify a warrantless nonconsensual blood draw cannot depend only on when the officer had probable cause to arrest the suspect. If that were the case, a suspect could prevent a blood draw by initially consenting, and then when it is too late to obtain a warrant, withdrawing that consent. For instance, a suspect stopped at 1:00 a.m., and arrested at 1:15, could agree to a blood draw at 1:30, then after being transported to the hospital and

medically treated, withdraw his consent immediately before his blood is drawn, at 3:30. Under Hay's view of the law, exigent circumstances would not justify a warrantless blood draw if at 1:15, when there was probable cause, there was time to get a warrant. But once the officers had reason to obtain a warrant, it would be too late to do so without risking destruction of evidence. Exigent circumstances would therefore justify a warrantless blood draw. *McNeely*, 569 U.S. at 165; *Howes*, 373 Wis. 2d 468, ¶ 37.

Hay argues that the State asserts that a PBT close to zero when a suspect is subject to the 0.02 BAC limit is a categorical exigency justifying a nonconsensual warrantless blood draw. (Hay's Br. 27.) But the State asserts only that under the totality of circumstances, the warrantless blood draw in this case was justified. Those circumstances include Hay's 0.02 BAC limit; the PBT result that showed a BAC that was prohibited but close to 0.00; the short time that passed between the arrest and Hay's refusal; the short time that passed after Hay withdrew his consent; and the time necessary to obtain a warrant. Under the circumstances, a reasonable officer would have feared that taking additional time to obtain a warrant would have risked the destruction of evidence. The blood draw was therefore justified by exigent circumstances.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the decision and order granting a motion to suppress evidence.

Dated this 12th day of July 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant

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 reply 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 reply brief is 2995 words.

_____
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 12th day of July 2019.

_____
MICHAEL C. SANDERS
Assistant Attorney General