STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2018AP2269 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

YANCY KEVIN DIETER,

Defendant-Respondent.

Appeal of an order entered in the
Monroe County Circuit Court,
the Honorable Richard A. Radcliffe, presiding

BRIEF OF DEFENDANT-RESPONDENT

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CASES CITED

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ISSUE PRESENTED

Yancy Kevin Dieter was the suspected driver in a fatal accident. Did exigent circumstances justify forgoing a warrant for a blood-alcohol test when more than five hours had passed since the accident, the officer had probable cause more than an hour before the draw, and the circuit court found that a warrant could have been obtained "much earlier" than the 40 minutes the officer claimed?

The circuit court held that no exigency existed; this Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Dieter does not request oral argument. He does not believe publication of the opinion is likely to be merited, as this case requires only the application of established law to a particular set of facts.

STATEMENT OF THE CASE

The state's recitation of the case is largely accurate, but it omits an important fact and presents only a small portion of the circuit court's reasoning.

First, the state says the sheriff's deputy "told an officer from Tomah that he could not get a warrant because there wasn't time to get one before Dieter was transported to La Crosse for medical treatment." App's Br. 5. It repeats this claim in its

argument, in support of the assertion that the deputy faced a "now or never" moment. App's Br. 12-13. It's true that this is what the deputy testified to. (66:71-72; App. 178-79) But this testimony was directly contradicted by two different video recordings of the conversation. (66:107-08; A:-App. 214-15; 42:1:16-2:07; 40:17:00-20:55). The circuit court cited this discrepancy in its decision. (67:60-61). In fact, the videos show that the deputy spoke only of the length of time that had passed since the accident and that Mr. Dieter had "killed a guy."

The state also presents an oversimplified version of the circuit court's reasoning: that because the draw was going to be well outside the three-hour window for automatic admissibility, "it therefore made no difference whether the blood was drawn after five and one-half hours or an hour later." App's Br. 6-7.

In fact the court recited the facts the deputy encountered and concluded that he "had probable cause to draw the blood either at the scene or certainly by the time that he arrived at the hospital." (67:53-56,66; App. 288-91,300).

It played one of the videos of the conversation between the deputy and the Tomah officer, noting it was "reflective of the officer's contemporaneous thoughts at the time as to why he was seeking a blood draw; and generally speaking, contemporaneous evidence is more persuasive than

… evidence provided later." (67:59-60; App. 294-95). It noted that on the recording

> there was no… discussion about whether or not the blood may be tainted by the defendant receiving some medication from … medical personnel. There was no discussion about ambulance transfer. There was no discussion about the time it may take to transfer to a different hospital.
>
> There was no effort to contact either the District Attorney or a magistrate to obtain a warrant, no discussion with other officers or supervisors about what resources might be available to obtain a warrant.

(67:61-62; App. 296-97).

Regarding the three-hour window for automatic admissibility, the court noted that in both *State v. Dalton* and *State v. Tullberg*, the fact that the officers were coming up against that time limit was a significant factor leading to a finding of exigency. (67:47-49; App. 282-84). 2018 WI 85, ¶52, 383 Wis. 2d 147, 914 N.W.2d 120; 2014 WI 134, ¶48, 359 Wis. 2d 421, 857 N.W.2d 120. It went on that

> if you can obtain a sample within three hours, it's presumptively admissible, you don't have to have an expert, but if it's beyond that three hours, then it's less valuable, it's less probative.
>
> It is harder to prove with an older sample what the alcohol concentration of an individual was at a particular time, and I have not found any cases where the Court has found exigent circumstances based solely on the dissipation of alcohol after the presumptive three-hour window.

> In other words, I've not found any case where the Court has said it's okay to take a person's blood without their consent and without a warrant when, by doing that, you are going to have to in order for it to be admissible, you're going to have to have an expert and you're going to have to have that expert prove that the alcohol sample in the blood which was taken more than three hours after the incident is sufficient proof of what the alcohol level was at the time of the incident.

(67:50-51; App 285-86).

Regarding the circumstances in this case, the court said the

> blood draw was taken at 7:25 a.m., that is five hours and thirty minutes after the accident. Even the evidence that was obtained without a warrant is already outside the presumptive three-hour window for the admissibility of that evidence.
>
> In addition, it is evidence that … since the delay occurred not by reason of any law enforcement action or the defendant, it is evidence that has less probative value, meaning a blood sample taken at 7:30 in the morning is less compelling than a blood sample that's taken immediately after a person's observed to drive or arrested for driving under the influence.

(67:62-63; App. 297-98).

Though at one point the court said it was going to use the officer's asserted 40-minute time frame for getting a warrant, (67:61-62; App. 296-97), it later noted that because he hadn't called a judge or attorney,

> we're left to speculate actually how much time may have been necessary. It's possible actually to get a warrant without filling out all the paperwork by having a telephonic search warrant where the officer provides the probable cause testimony, sworn testimony over the phone. So it's possible that the warrant could have been obtained much earlier than 40 minutes.

(67:66-67; App 301-02).

The court ultimately concluded that suppression was required. (67:67-68; App. 302-03).

ARGUMENT

I. Because the circuit court properly found first, that the dissipation of blood alcohol was of diminished importance here, and second, that there was ample time to seek a warrant, this Court must affirm.

A. Contrary to the state's argument, the circuit court's reasoning about the diminished evidentiary value of a blood draw was apt.

The state relies heavily on an argument that, because several hours had passed since the accident, there was a possibility that Mr. Dieter's blood alcohol

content would go to 0.00 before it could be tested. App's Br. 11-15.[1]

It's certainly true that a delay in drawing Mr. Dieter's blood could lead to a 0.00 result. But this is also true in many cases: an officer often has no reliable way to know a person's blood alcohol content before it is tested, and never has any way to know how quickly the alcohol is dissipating. There's always a good chance a person's BAC will drop below a legal threshold, or even to zero, based on a delay in testing. So the state's argument about Mr. Dieter is really an argument that the natural dissipation of alcohol in the blood stream is a *per se* exigency—a proposition which is of course foreclosed by *Missouri v. McNeely*, 569 U.S. 141 (2013).

It may be that, as the state claims, the fact of a five-plus hour delay makes the possibility of a 0.00 result more likely. But this cuts both ways. Based on the state's calculations, App's Br. at 11-12, Mr. Dieter could easily have been above the legal limit at the time of the crash and already at 0.00 by the time the sheriff's deputy arrived on scene. So there was ample reason to doubt that any evidence was being destroyed; there was a good chance it was already gone. The destruction of evidence is the exigency that

[1] The state notes in a footnote that medical personnel were also about to administer painkillers to Mr. Dieter, and that such medication could have affected testing for other drugs. But the state does not claim there was probable cause to believe that Mr. Dieter was operating under the influence of other drugs, and indeed there is no indication that he was.

(sometimes) permits warrantless blood draws; logically, the fact of a long delay between drinking and arrest is at least as likely to diminish this exigency as to augment it. The state's claim to the contrary would produce the odd result that motorists whose blood is least likely to contain evidence of a crime—including those who simply don't seem especially intoxicated—would be most likely to be subjected to a warrantless blood draw.

This was the thrust of the circuit court's discussion of the difference between the time that had already elapsed and the time it would take to get a warrant: five hours and thirty minutes versus up to six hours and thirty minutes. (67:63; App. 298). And it also quite reasonably observed that an additional delay would not affect the admissibility of the evidence under Wisconsin's statutory scheme, saying that "even if there had to be a one-hour delay, there [are] certainly significant questions … about how that delay would significantly undermine the efficacy of the blood information because if they would have obtained a warrant, they would still need an expert." (67:67, App. 302).

In sum, the circuit court's discussion of the state's need for an immediate search of Mr. Dieter's blood properly assessed the chances that evidence would be destroyed or diminished substantially in value.

B. The circuit court correctly found that there was time to get a warrant.

Perhaps more importantly, the circuit court also found as fact that there was time to get a warrant without delaying the blood draw. This finding was not clearly erroneous and must be affirmed. *See State v. Walli*, 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898.

1. More than an hour elapsed between the development of probable cause and the blood draw.

First, the court observed that the deputy had probable cause, such that he could seek a warrant, "either at the scene or certainly by the time that he arrived at the hospital." (67:53-56,66; App. 288-91, 300). Though the court was ambiguous on the point, it's clear that the deputy had probable cause on-scene. Within a minute of arriving at the crash site at 6:16 a.m., he knew that

- Mr. Dieter had told dispatch he had been drinking at a bar before driving
- Mr. Dieter had personally told the deputy he was driving

- Mr. Dieter had crashed his car in an accident involving yaw marks on the highway, at least three large trees being snapped, and his car being bent nearly into a "V" shape, all of which indicated very high speeds

- The crash happened at 1:55 a.m.

- Mr. Dieter had red and watery eyes

App's Br. 3; (38:12:25 (showing officer arriving at scene and Mr. Dieter's immediate admission to driving)).

An early-morning high-speed single-car crash, the driver's admission that he was drinking, and watery red eyes easily meet the standard of a "common-sense decision [that] there is a fair probability that … evidence of a crime" would be found in Mr. Dieter's blood. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). The deputy had probable cause to apply for a warrant within a minute of arriving at the crash site at 6:16 a.m., more than an hour before the blood draw between 7:20 and 7:25 a.m.

2. The court properly found there was no reason to think the officer couldn't have obtained a warrant in that time.

The deputy testified that it would have taken 40 minutes to get a warrant. (66:72; App. 179). The circuit court, though, didn't accept this testimony. Having already noted that the video recording contradicted the deputy's claims about his conversations, it noted that it would have been possible for the officer to "get a warrant without filling out all the paperwork" telephonically, and that it could have been done "much earlier than 40 minutes." (67:59-62; App. 294-97; 67:66; App. 301-02).

There's no basis to challenge the court's factual finding on this point. Though the officer testified that he would have had to complete a citation, this is not a requirement of the statute (or of the Constitution). *See* Wis. Stat. § 968.12(3). And the court, as the entity that issues warrants in Monroe County, had ample basis to discredit the officer's testimony about how long the actual telephone call would take.

But even if the warrant process would have taken 40 minutes, the court reasonably concluded the officer could have completed it in time. He had at least two other law enforcement officers as well as at least two rescue workers on scene at the crash, and several at the hospital. (66:31, 56; 67:21; App. 138, 163,256). The court correctly noted this distinguished

the situation from *Dalton*, where the officer was alone "stuck on an island." (67:52; App. 207). It may be, as the officer testified, that asking *another* officer to seek a warrant would have lengthened the process. (66:73; App. 180). But that doesn't answer the question of why *he* could not do so, given the presence of ample personnel to accomplish the other necessary tasks. He could have, for example, radioed dispatch from the scene to begin the process of contacting a judge; or while he was in his squad on the way to the hospital.

In sum, the circuit court correctly found that there was ample time to get a warrant, and that the reason the deputy was unable to do so is that he simply never tried. (67:61-62; App. 296-97). This is the opposite of what *McNeely* requires: "When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." 569 U.S. at 152.

CONCLUSION

Because the circuit court correctly found the warrantless taking of Mr. Dieter's blood unreasonable, this court should affirm and remand the case for further proceedings.

Dated this 19th day of June, 2019.

Respectfully submitted,

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CERTIFICATIONS

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 2,220 words.

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.

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.

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 19th day of June, 2019.

Signed:

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Assistant State Public Defender