STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP2269-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

YANCY KEVIN DIETER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD A. RADCLIFFE, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

The circuit court erred in granting a motion to suppress the results of a test which revealed that the defendant-respondent Yancy Kevin Dieter's blood alcohol concentration (BAC) was .164 g/100 ml when his blood was drawn about five and one-half hours after he crashed his car. Dieter refused a request for a blood sample under Wisconsin's implied consent law more than five hours after he crashed his car. Sergeant Ryan Oswald testified that it would typically take about 40 minutes to obtain a warrant, and that he had learned that Dieter was about to be transported from a hospital in Tomah to one in La Crosse, about 45 minutes away. Dieter's BAC was naturally dissipating. So much time had passed that there was a chance that Dieter's BAC was nearing 0.00, at which point it would be impossible to even estimate his BAC at the time he drove. Sergeant Oswald therefore administered a warrantless blood draw. The blood draw was justified by exigent circumstances because a reasonable officer would have feared that taking the time to obtain a warrant after Dieter refused a request for a blood draw would have risked the destruction of evidence.

In his brief, Dieter argues that the circuit court correctly suppressed the blood test results because the evidentiary value of his blood was diminished after so much time had passed after he drove, and because there was time to obtain a warrant between the moment the officer had probable cause that he drove drunk and the time his blood was drawn.

But a reasonable officer would not have sought a warrant until Dieter refused to give a blood sample consensually. And there was probable cause that his blood contained evidence of intoxication when the sample was drawn. Dieter does not dispute that his BAC was dissipating, that he was about to be transported to a different hospital,

and that there was no time to obtain a warrant after he refused and before he was transported. Exigent circumstances therefore justified the blood draw.

ARGUMENT

The circuit court erred in granting Dieter's motion to suppress his blood test results.

A. Exigent circumstances justified drawing Dieter's blood because waiting to obtain a warrant risked the destruction of evidence.

"[E]xigent circumstances justify a warrantless blood draw if delaying the blood draw would 'significantly undermin[e] [its] efficacy." *State v. Tullberg*, 2014 WI 134, ¶ 50, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Missouri v. McNeely*, 569 U.S. 141, 152 (2013)).

In *Mitchell v. Wisconsin*, the Supreme Court confirmed 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)). Specifically, "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.* A suspect's hospitalization before police can administer a breathalyzer almost always creates exigent circumstances. As the Court explained,

> [w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may *almost always* order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment.

Id. at 2539.[1] Dieter argues that the State is asserting that "the natural dissipation of alcohol in the blood stream is a *per se* exigency." (Dieter's Br. 6.)

But the State's argument is that under the totality of the circumstances here—which include that more than five hours had passed since Dieter crashed his car, and that he was about to be transported to another hospital—there was insufficient time to get a warrant without "significantly undermining the efficacy" of a blood test. Waiting to obtain a warrant would have risked the destruction of the evidence.

There is no dispute that Dieter's BAC was dissipating. It is a "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 Dieter does not dispute that when he refused the officer's request for a blood sample more than five hours had passed since he drove, and he was about to be transported to

[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.

another hospital.[2] As the circuit court noted, Sergeant Oswald "did testify at the hearing that he was aware that an ambulance was on its way, he believed that it would arrive within a 10-minute window; . . . and that there was discussion about him being - - the defendant being transferred to a hospital in La Crosse." (R. 67:61, A-App. 296.) And right after Dieter's blood was drawn sometime between 7:20 and 7:25, an ambulance arrived and transported him to a hospital in La Crosse. (R. 66:85–87, A-App. 192–93.)

In addition, as the State pointed out in its initial brief, because so much time had passed between Dieter's crash and officers arriving to the scene, there was a chance that his BAC was nearing 0.00, at which point the evidence would have been destroyed. (State's Br. 11–13.)

Dieter acknowledges that taking additional time to obtain a warrant after he refused a request for a blood draw posed a risk that his BAC would dissipate to 0.00. (Dieter's Br. 6.) And he does not dispute that if his BAC had dissipated to 0.00, the evidence would be destroyed, and an expert could not testify about what Dieter's BAC was when he drove. But he asserts that the fact that his BAC could have dissipated to 0.00 did not make the situation exigent because his BAC

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[2] Dieter notes that in its initial brief the State asserted that Sergeant Oswald told another officer that there was not time to get a warrant before Dieter was transported to the hospital in La Crosse but did not mention that the circuit court concluded that two video recordings did not show Sergeant Oswald telling another officer about Dieter being transported. (Dieter's Br. 1–2.)

The State apologizes for its oversight in not mentioning that the circuit court concluded that on the video recordings, "there was no discussion about ambulance transfer," or "about the time it may take to transfer to a different hospital." (R. 67:60–61, A-App. 295–96.) However, it is undisputed that Sergeant Oswald knew that an ambulance was arriving soon to take Dieter to another hospital about 40 minutes away. It makes no difference whether he relayed that information to another officer.

might already have dissipated to 0.00. He argues that he "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 department 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." (Dieter's Br. 6.)

Dieter's argument is essentially that because so much time had passed since he drove, and his BAC may already have dissipated to 0.00, the officer should have waited even longer and obtained a warrant to draw his blood.

Of course, waiting to obtain a warrant would have made it even more likely that Dieter's BAC would dissipate to 0.00 by the time his blood was drawn. It obviously would have risked the destruction of evidence. And while it was possible that Dieter's BAC had already dissipated to 0.00, the circuit court concluded that at the time the officer decided to administer a warrantless blood draw, there was probable cause that Dieter's blood contained evidence of a crime. (R. 67:66, A-App. 301.) Dieter does not dispute that the circuit court was correct on this point.

The State is not arguing that a blood draw days or weeks after Dieter drove would be justified by exigent circumstances. But there is no dispute that in this case, when Sergeant Oswald arrested Dieter and requested a blood sample, there was a clear indication that a blood draw would produce evidence of intoxication.

Dieter argues that the circuit court "quite reasonably observed that an additional delay would not affect the admissibility of the evidence under Wisconsin's statutory scheme," because the State would have needed expert testimony to admit the test results of a sample drawn more than three hours after driving. (Dieter's Br. 7.)

It is true that since more than five hours passed between Dieter's crash and his refusal, the admission of test

results on blood drawn after his refusal would have required expert testimony. Wisconsin Stat. § 885.235(3), which provides that the results of BAC tests conducted within three hours of driving are admissible without expert testimony, would not apply. But as the State explained in its initial brief, the issue is not the admissibility of the evidence. It is the existence and the quality of the evidence that is to be admitted. (State's Br. 15.) Additional delay risked Dieter's BAC dissipating to 0.00, resulting in the destruction of the BAC evidence. And even if Dieter's BAC did not dissipate to 0.00, additional delay results in additional dissipation and "may raise questions about the accuracy of the calculation" an expert would conduct to estimate Dieter's BAC when he drove. *See McNeely*, 569 U.S. at 156. Additional delay posed further risk of "significantly undermining the efficacy of the search." *Id.* at 152. Exigent circumstances therefore justified a warrantless blood draw. *Tullberg*, 359 Wis. 2d 421, ¶ 50.

B. After Dieter refused a request for a consensual blood draw there was no time to obtain a warrant without risking the destruction of evidence.

Dieter asserts that the circuit court found as fact that Sergeant Oswald had time to obtain a warrant without delaying the blood draw. (Dieter's Br. 8–11.) He does not cite any part of the record supporting that assertion, likely because the court did not make such a finding. Had the court concluded that obtaining a warrant would not have resulted in additional delay, it would have had no reason to consider whether the officer should have delayed Dieter's transport to the hospital in La Crosse or attempted to have a sample drawn in the ambulance on the way to La Crosse, or after the ambulance got to La Crosse. But that is exactly what the court did.

The circuit court noted that Sergeant Oswald testified that it would have taken 30 to 40 minutes to obtain a warrant,

and it said it would "use that time frame" in its analysis. (R. 67:62, A-App. 297.) The court later suggested that "it's possible that the warrant could have been obtained much earlier than 40 minutes." (R. 67:66–67, A-App. 301–02.) But the court compared the "delay that actually happened without a warrant, five hours and thirty minutes, to the potential delay that might have occurred if the officers would have sought a warrant." (R. 67:63, A-App. 298.) It concluded that the delay to obtain a warrant if Dieter had been transported to La Crosse would have been "at the most" an additional hour. (R. 67:63, A-App. 298.) The court concluded that that the officer "could have certainly obtained a warrant during that one-hour time period while the defendant was transported, so that's a fact that I need to consider." (R. 67:64, A-App. 299.)

Dieter seems to be arguing that the circuit court found that there was probable cause at the scene, and that the 30 to 40 minutes that the officer testified that it would take to get a warrant is measured from that point in time. But "[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). Further, Dieter seemingly overlooks that this is an implied consent case, and that the officer reasonably attempted to get Dieter's consent for a blood draw before proceeding with a nonconsensual blood draw.

In OWI cases, officers generally do not immediately seek a warrant as soon as there is probable cause that a person has committed an OWI-related offense. Among other things, officers typically administer issue a citation, arrest the person, read the person the Informing the Accused form to the person, and request a sample. *Tullberg*, 359 Wis. 2d 421, ¶ 18. This is "standard protocol" in an OWI case. *Id.* If the person refuses, an officer who wants a blood sample must obtain a

warrant unless another exception to the warrant requirement applies.

It is entirely reasonable for an officer to attempt to get blood from a suspect in a consensual manner. The Fourth Amendment requires that searches be reasonable. "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.

In *McNeely*, the Supreme Court at least implicitly recognized that officers will generally attempt to obtain a blood sample in consensual manner. That is why the issue in *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." *McNeely*, 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 142. 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 recognized that Sergeant Oswald proceeded under the implied consent law. Therefore, in determining whether exigent circumstances justified the blood draw, the court considered when Sergeant Oswald read the Informing the Accused form to Dieter and when Dieter refused. (R. 67:56, 59, A-App. 291, 294.) The court did not conclude that exigent circumstances did not justify the blood draw because the officer could have obtained a warrant before seeking a consensual blood draw. It concluded that exigent circumstances did not exist because the delay after Dieter refused would not have made a difference. (R. 67:63–64, 67–68, A-App. 298–99, 302–03.)

While the court correctly considered Dieter's refusal in determining whether exigent circumstances justified the warrantless blood draw, it erred in concluding that exigent circumstances did not justify the blood draw.

Sergeant Oswald reasonably attempted to administer a consensual blood draw under Wisconsin's implied consent law. On his way to the Tomah hospital, Sergeant Oswald learned that Dieter had multiple prior OWI convictions and that his operating privilege was revoked. Upon arrival, Sergeant Oswald learned that an odor or intoxicants was coming from Dieter. (R. 66:58–60, A-App. 165–67.) Sergeant Oswald printed the Informing the Accused form in his squad car, found Dieter in the emergency room, read the form to him, and requested a blood sample. (R. 66:64–65, A-App. 171–72.) Dieter refused at 7:07 a.m. (R. 66:66, A-App. 173.)

At that point, Sergeant Oswald had to decide whether to obtain a warrant. He concluded that there wasn't enough time, so he administered a warrantless blood draw. Dieter's blood was drawn between 7:20 and 7:25 a.m. Contrary to Dieter's assertion, the circuit court did not find "that there

was ample time to get a warrant." (Dieter's Br. 11.) It concluded that the additional delay to get a warrant simply would not have mattered because more than three hours had passed since the crash.

As explained above, the circuit court was incorrect. More than five hours had passed after Dieter drove, and he was about to be transported to another hospital. Additional delay would have significantly undermined the efficacy of a blood and posed a very real risk of the evidence being completely destroyed. There was simply no time to get a warrant after Dieter refused. Exigent circumstances therefore justified the warrantless blood draw.

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 22nd day of July 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this 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 brief is 2994 words.

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MICHAEL C. SANDERS
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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 22nd day of July 2019.

_____
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