STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018AP2269-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

YANCY KEVIN DIETER,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

Police drew Yancy Dieter's blood without seeking a warrant. The circuit court suppressed the blood evidence, concluding the draw did not fall within the exigency exception. It noted that five and a half hours passed between Mr. Dieter's driving and his first contact with police, meaning the evidentiary value of any blood alcohol result was already degraded, and concluded that the lesser additional delay to get a warrant would not "significantly undermin[e] the efficacy of the search." *See Missouri v. McNeely*, 569 U.S. 141, 152 (2013). The court of appeals reversed in a published decision, saying "the possibility that evidence may have already been destroyed does not reduce the urgency of preserving it if it still exists." The issue presented is:

Whether the exigency analysis must consider the likelihood that sought-after evidence does not exist or is of little value.

The circuit court considered the low value of the evidence in deciding to suppress the test results. The court of appeals declined to do so in its reversal. This Court should accept review and reverse the court of appeals.

CRITERIA FOR REVIEW

The exigency exception to the warrant requirement is a question of state and federal constitutional law. What factors determine whether the exception applies is a real and significant question, as evidenced by the disagreement between the two lower courts in this case. *See* Wis. Stat. Rule 809.62(1r)(a). The court of appeals' conclusion here—that courts may not properly consider whether the sought-after evidence is actually likely to be present—is also in conflict with the Supreme Court's definition of exigency, which requires a reasonable belief that evidence is likely to be destroyed. *Schmerber v. California*, 384 U.S. 757, 770 (1966); *see* Rule 809.62(1r)(d).

STATEMENT OF FACTS

Mr. Dieter called 9-1-1 at 6:06 a.m. to report that after he had left a bar earlier that morning, he had driven his car off the road, and he was injured. (66:13–14, 27–28). A sheriff's deputy was dispatched; he was told that Mr. Dieter had come from a bar and had been drinking. (66:27). By the time the deputy arrived on scene at 6:16 a.m., he'd been informed that someone had died in the crash. (66:30).

On arrival, the deputy saw that a first responder was holding Mr. Dieter's head to keep Mr. Dieter's spine aligned. (66:31). He observed that a Ford Crown Victoria was laying on its roof, and that it was "bent almost in a V shape." (66:34–35). He

also noted that the overturned car had broken through three trees, indicating that it had been travelling at a "very high rate of speed." (66:35).

The deputy identified the deceased former occupant outside the car. (66:35–36). He observed that Mr. Dieter was behind the car, and that he had severe injuries, including what appeared to be a dislocated leg. (66:36,61). The deputy spoke to Mr. Dieter, who first said he did not know if anyone else had been in the car, but then said he had been driving home from Lizzy's Tap with the decedent. (66:44). The deputy observed that Mr. Dieter's eyes were red and watery, but he did not know if that was due to consuming a substance, crying because his friend had died, or pain. (66:44).

An ambulance arrived at 6:27 a.m., and paramedics transported Mr. Dieter to Tomah Memorial Hospital at 6:39 a.m. (66:55–56). They arrived at 6:51 a.m. (66:58). The deputy briefly investigated the scene after Mr. Dieter was taken away. Two people gave him information about the crash: one told him that he had been camping and awoke to the sound of a crash at 1:55 a.m. (66:55). Another told him Mr. Dieter had called him between 5:15 and 5:30 a.m. asking for help, but that Mr. Dieter did not know where he had crashed his car. (66:54). The deputy left the scene at 6:43 a.m. and arrived at the hospital at 6:51 a.m., just behind the ambulance. (66:53, 58).

On arrival, the deputy learned that Mr. Dieter had multiple prior OWI convictions. (66:59). He also learned from medical staff that an odor of intoxicants was coming from Mr. Dieter. (66:60). The deputy returned to his squad car and printed the Informing the Accused form. (66:60). He read the form to Mr. Dieter and requested a blood sample. (66:64–65). Mr. Dieter refused at 7:07 a.m. (66:66).

Without seeking a warrant, the deputy requested a blood draw. A nurse drew Mr. Dieter's blood between 7:20 and 7:25 a.m. (66:70, 83). Analysis of the blood sample revealed that Mr. Dieter's blood alcohol concentration at the time of the test was .164 g/100 ml. (12:1).

The State charged Mr. Dieter with five crimes related to the crash. (15). Mr. Dieter moved to suppress his statements to police and the results of the blood draw. (21). The circuit court held a hearing on the motion. (66).

At the hearing, the deputy testified about his decision not to seek a warrant. He noted he had some information suggesting that the crash had occurred at 1:55 a.m., so about five hours had passed by the time he got to the hospital. (66:55). He knew that the alcohol in Mr. Dieter's blood was dissipating. (66:70) He knew that Mr. Dieter was about to be transported to La Crosse, which is about 45 minutes away, and that it would take an ambulance about ten minutes to get to the hospital in Tomah. (66:67–68). The deputy said he did not attempt to get a warrant

because "there wasn't enough time to obtain one." (66:67). He testified that he had obtained warrants to draw blood in OWI cases in Monroe County "multiple times," and that the process usually took about 40 minutes. (66:71, 73). He said it usually took about five minutes to complete the affidavit and citations, fifteen minutes to fill out all the required information on the automated form that officers use, and then about twenty minutes to have dispatch conduct a three-way call with a judge, to get the information to the judge, and to have the judge issue the warrant. (66:71–72).

He testified that, while at the hospital, he had 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. (66:71). However, two different video recordings of the officers' conversation contradicted this claim. (66:107-08; 42:1:16-2:07; 40:17:00-20:55).

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 court played one of these videos while issuing its oral ruling, commenting that the video 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. 137-38). 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. 139-40).

The court also questioned the officer's testimony about how long it would take to get a warrant, saying 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. 144-45).

The court noted that in both *State v. Dalton* and *State v. Tullberg*, the fact that the officers were coming up against the three-hour time limit for automatic test-result admissibility was a significant

factor leading to a finding of exigency. (67:47-49; App. 125-27). 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. Observing that the draw here was well outside this window, the court said the delayed test results would necessarily be less valuable: because of the delay the evidence

> 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 … under the influence.
>
> And when I compare that delay that actually happened without a warrant, five hours and thirty minutes, to the potential delay that might have occurred if the officer would have sought a warrant as required by the Fourth Amendment, it appears … that the delay would have been an additional hour which would have meant, at the most, that the sample would have been taken six hours and thirty minutes after the accident occurred.

(67:63; App. 141).

The court held that the deputy had probable cause for the search, at the latest, when he arrived at the hospital, but despite the presence of several other officers, there was no attempt to get a warrant. (67:66; App. 144). It continued that it questioned whether any delay associated with moving Mr. Dieter to another hospital "would significantly undermine the efficacy of the search," given the long delay that

had already occurred and the state's need for an expert to secure admission of the results. (67:67; App. 145). It concluded that "there was no real emergency in the Court's mind" and ordered the evidence suppressed. (67:67-68; App. 145-46).

The state appealed. It argued, in part, that the hours between the crash and Mr. Dieter's arrival at the hospital meant there was a chance his BAC would soon drop to 0.00, eliminating any evidentiary value. Appellant's Brief at 9, 11-13, 15, 19. Mr. Dieter responded that this delay cut both ways, since there was also a good chance there was *already* no evidentiary value to the blood:

> Based on the state's calculations … 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 (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.

Respondent's Brief at 6-7.

The court of appeals reversed the circuit court in a decision recommended for publication. *State v. Dieter*, No. 2018AP2269 (slip op.) (July 16, 2020); App. 101-114. It concluded that the deputy had reasonably prioritized his on-scene activities, and

then the seeking of Mr. Dieter's consent, over initiating a warrant request. Regarding the parties' arguments on the possibility that Mr. Dieter's BAC would reach or had reached 0.00, the court of appeals found it favored only the state, saying "the possibility that evidence may have already been destroyed does not reduce the urgency of preserving it if it still exists." *Id.*, ¶28; App. 112.

ARGUMENT

I. This Court should grant review, hold that the likely absence of evidence weighs against a finding of exigency, and uphold the circuit court's ruling.

The exigent-circumstances exception applies where an officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Schmerber v. California*, 384 U.S. 757, 770 (1966).

As noted above, in the court of appeals the state relied heavily on the 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. Appellant's Brief 11-15. The state cited *State v. Howes*, 2017 WI 18, ¶45, 373 Wis. 2d 468, 893 N.W.2d 812, in which this Court noted the risk that the driver there, who had a statutory limit of

.02, might reach 0.00 in an hour despite having been over the limit while driving.

It's certainly true, given what the deputy knew at the time, that a delay in drawing Mr. Dieter's blood could have led to a 0.00 result—which might have (depending on whether Mr. Dieter had alcohol in his blood to begin with) been "destruction of evidence." But this is often true: an officer frequently 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 fair chance a person's BAC will drop below a legal threshold, or even to zero, because of a delay in testing. But the Supreme Court has already instructed that the natural metabolization of alcohol is not an exigency in every case. *McNeely*, 569 U.S. at 156. So it can't be that a mere theoretical risk of total elimination constitutes exigency.

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, Appellant's Brief 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.

Mr. Dieter made this argument to the court of appeals, but that court rejected it completely, saying,

as noted above, that "the possibility that evidence may have already been destroyed does not reduce the urgency of preserving it if it still exists." App. 112. But this cannot be correct. "Exigency," as described in *Schmerber* and *McNeely*, is an assessment of the reasonableness of a belief that evidence will be destroyed if a warrant is obtained. Logically, the possibility (or probability) that the sought-after evidence does not exist—either because it never existed, or because it has, for whatever reason, ceased to exist—has to be a factor in deciding whether it's reasonable to believe it will be lost. Evidence that isn't there can't be destroyed.

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 one additional hour. (67:63; App. 141). It 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. 145). It also noted that the probative value of a blood draw so long after driving was low to begin with, and would likely not get substantially lower in the course of an hour (or less). So, the court thought, the time needed to get a warrant didn't present a risk of destroying valuable evidence that was sufficient to meet the definition of

"exigency" under *McNeely*: it didn't "significantly undermin[e] the efficacy of the search." (67:63, 66-67; App. 141, 144-45).

The court of appeals' categorical rejection of this reasoning doesn't square with the definition of "exigency," as described above. It also leads to an odd result in OWI cases: motorists whose blood is least likely to contain evidence of a crime—including those who simply don't seem especially intoxicated—would also be the motorists whose BAC is most likely to be approaching 0.00. Thus, under the court's reasoning, the least intoxicated motorist is the one most likely to be subject to a warrantless blood draw.

If we accept that the low value—and possible nonexistence—of evidence affects whether its possible destruction constitutes exigency, the circuit court's decision here must be upheld. The circuit court 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.

The deputy testified that it would have taken 40 minutes to get a warrant. (66:72). 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. 137-40).

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). The court correctly noted this distinguished the situation from *Dalton*, where the officer was alone "stuck on an island." (67:52; App. 130). It may be, as the officer testified, that asking *another* officer to seek a warrant would have lengthened the process. (66:73). 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 failed to do so is that he simply

never tried. (67:61-62; App. 139-40). 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. The circuit court's decision should be affirmed, and the court of appeals' reversed.

CONCLUSION

For the foregoing reasons, Mr. Dieter respectfully requests that this Court grant review and reverse the decision of the court of appeals.

Dated this 17th day of August, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,900 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 17th day of August, 2020.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender

APPENDIX

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TO
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