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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP153-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOHN W. LANE,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE IN THE CIRCUIT COURT OF PORTAGE COUNTY, BRANCH 3, THE HON. THOMAS FLUGAUR PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Whether the trial court erred when it suppressed a blood ethanol result reported by the state lab of hygiene, in an operating while impaired (OWI) case when the defendant consented to seizure of the blood at the time of his arrest, but then later sent a letter to the state lab withdrawing consent to test the blood.

The issue raised in this petition is identical to the issue currently pending before the Wisconsin Supreme Court in ***State v. Jessica M. Randall***, 2017AP1518-CR. Oral arguments are completed in this case, but the decision is pending.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication. The State does not request publication, as the *Randall* case will likely establish precedent for courts to follow in this situation.

STATEMENT OF THE CASE AND FACTS

The State of Wisconsin filed a criminal complaint against the defendant, John W. Lane, on September 14, 2017. (4; A-AP 1-3) The complaint alleged that on or about Monday, August 21, 2017, in the City of Stevens Point, Portage County, Wisconsin, Lane drove a motor vehicle while under the influence of an intoxicant, as a third offense, contrary to sec. 346.63(1)(a), 346.65(2)(am)3 Wis. Stats., and drove a motor vehicle with a prohibited alcohol concentration of 0.08 or more, to-wit: did have a blood alcohol level of .130, as a third offense, contrary to sec. 346.63(1)(b), 346.65(2)(am)3 Wis. Stats. (4; A-AP 1).

According to the complaint, on August 21, 2017, at 2:10 A.M., Officer Klein of the Stevens Point Police

Department was travelling North on I-39, a four-lane highway, when he saw a motorcycle go from the right lane over the white dotted line into the left lane, then travel quickly back to the right lane, without signaling any lane changes. Klein stopped the motorcycle and identified the driver as the defendant, John W. Lane. Officer Klein immediately smelled a strong odor of alcohol and saw that Lane's eyes were bloodshot and glassy. Officer Klein conducted field sobriety tests, and based on observations during those tests, arrested Lane for OWI. (4; A-AP 2).

The complaint also states that Officer Klein transported Lane to St. Michael's Hospital where Lane consented to a blood draw upon the officer's request. Hospital staff member Tricia Wierzba drew two samples of Lane's blood and placed them into the legal blood kit. Once the kit was sealed she handed it back to Officer Klein, who later sent the kit to the state lab of hygiene for testing. (4; A-AP 2).

Lane was the transported to the Portage County Jail where he was booked in for OWI 3rd, and at that time he submitted to a preliminary breath test which showed a result of .130%. (4; A-AP 2)

Lane's attorney filed motions on November 22, 2017, and also on February 7, 2018. The motions addressed a number of issues relating to Officer Klein's stop and arrest of Lane. The motion at issue in this appeal, titled Motion to Suppress – Blood Test Result, was filed on February 7, 2018. (24; A-AP 5-7). This motion had two attachments. The first attachment is a letter from Lane's attorney to the State Lab of Hygiene, dated August 28, 2017, indicating that Lane wished to revoke "any previous consent he may have provided to the collection and analysis of his blood." (24:4; A-AP 4). The second attachment to the motion is a copy of Lane's blood results from the State Lab of Hygiene dated September 7, 2017, showing a blood alcohol concentration of .152 g/100 mL. (24:5; A-AP 5).

The Motion to Suppress – Blood Test Result asserts that though Lane consented to have his blood drawn on the night of his arrest, he subsequently revoked his consent, which rendered the lab's testing of his blood improper under the Fourth Amendment to the United States Constitution. (24:2; A-AP 6).

The circuit court held a motion hearing regarding all motions on April 27, 2018. During that hearing Officer Klein testified as the only witness. The testimony did not address the issues raised in this appeal. The parties then made arguments regarding all of the motions. The circuit court informed the parties that it would either issue a written bench decision or schedule a further hearing to provide a decision on all motions. A transcript of this hearing is not attached, as there is nothing critical to this appeal in that transcript.

On July 24, 2018, the circuit court held a hearing to provide the parties an oral decision regarding Lane's motions. (45; A-AP 9-28). The court made findings of fact and decisions regarding all three motions. Lane's motions regarding the stop and an alleged request for an alternate test were denied. The court granted Lane's motion to suppress the blood test result obtained at the state lab. (45:15-18; A-AP 23-26). The court recognized that there are currently unpublished Court of Appeals holdings contradicting one another on this issue, and interestingly noted that it expects the Wisconsin Supreme Court to side with the State and the rationale of the ***State v. Sumnicht*** decision. ***State v. Sumnicht***, 2017AP280-CR. Nonetheless, the circuit court ruled that the unpublished Court of Appeals decision issued in ***State v. Randall*** is the correct statement of the law, and requires suppression of Lane's blood test result. ***State v. Randall***, 2017AP1518-CR. The circuit court suppressed the blood test result reported by the State Lab of Hygiene in a written order Signed January 7, 2019. (30; A-AP 30).

ARGUMENT

The state recognizes that this issue has been argued extensively in the court of appeals and the supreme court in the ***Sumnicht*** and ***Randall*** cases. Those cases present the identical issue as the issue in this case. The State does not intend to extensively recreate the arguments made in those cases, as the Wisconsin Supreme Court's decision in ***Randall*** will dictate the result in this case.

To simplify the issue, the question is whether a driver who is arrested for OWI and consents to an officer taking the defendant's blood for alcohol testing, can later revoke consent to test the defendant's blood at a state lab.

The State notes that the issue is interpretation of the application of constitutional principles to undisputed facts, and as such, the standard of review is de novo.

A. The Fourth Amendment.

The analysis of the consent issue starts with the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Consent is an exception to the warrant requirement. The Fourth Amendment prohibits only "unreasonable searches." ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2173 (2016). But "a search conducted pursuant to a valid consent is constitutionally permissible." ***State v. Wantland***, 355 Wis. 2d 135, ¶ 20 (quoting ***Schneckloth v. Bustamonte***, 412 U.S. 218, 22 (1973)).

"[T]he taking of a blood sample or the administration of a breath test is a search." ***Birchfield v. North Dakota***,

136 S.Ct. 2160, at 2173 (*citing* ***Skinner v. Railway Labor Executives' Assn.***, 489 U.S. 602, 616–617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); ***Schmerber v. California***, 384 U.S. 757, 767–768, 86 S.Ct.1826, 16 L.Ed.2d 908.

Though consent to draw a driver's blood may have been given, the question this case presents is whether a driver can later revoke that consent.

B. Wisconsin's Implied Consent Procedure.

Wisconsin has an implied consent procedure outlined in Wis. Stat. §343.305. Pursuant to that statute, a driver arrested for OWI must be informed of his right to refuse a law enforcement request to provide a blood or breath sample, depending on the agency's choice of primary test. A driver's refusal to permit testing may result in the driver's operating privileges being revoked. Under Wisconsin's implied consent law, a person who submits to a request for a sample for testing has consented to the implied consent procedure. ***State v. VanLaarhoven***, 248 Wis. 2d 881, ¶ 8.

The implied consent law, and the informing the accused form, speak of the testing of samples, and advise drivers that any sample given will be tested. Wis. Stat. § 343.305(4), and the implied consent form used by law enforcement officers, advise drivers, in part:

> ***This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system.*** If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court. (emphasis added)

As this Court recognized in ***State v VanLaarhoven***, 2001 WI App 275, ¶ 8, 248 Wis. 2d 881, 637 N.W.2d 411, this is a "testing procedure" that includes the giving of a sample and the testing and analysis required for a determination of the concentration of alcohol or drugs in the person's system. As this Court put it, "by operation of law and by submitting to the tests, VanLaarhoven consented to a taking of a sample of his blood and the chemical analysis of that sample." Id.

When an officer reads the form to the person, the person has a statutory opportunity to withdraw the consent he or she impliedly gave to provide a sample when he or she drove on a Wisconsin highway. The person has no constitutional right to withdraw that consent and refuse to take a requested test. ***State v. Reitter***, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). A subject's right to refuse a blood test is simply an opportunity bestowed by the Legislature and not a constitutional right. ***South Dakota v. Neville***, 459 U.S. 553, 565 (1983).

By submitting to a blood draw under the implied consent law a person affirms his or consent to the implied consent procedure, including testing or analysis of the blood drawn. The statute authorizes withdrawal of consent before submission to a request for a sample, but not after.

On the other side of the argument, the defense will point out that there are factual circumstances that allow for a person to withdraw consent given for a search. The defense relies on those cases for the proposition that a driver suspected of OWI who consents to have blood drawn may later revoke his or her consent to the testing of the sample. This rationale is supported by the Court of Appeals in the ***State v. Randall*** decision. 2017AP1518-CR

C. ***Sumnicht*** and ***Randall***

Without completely restating the opinions given in these two cases, it is important to note the most significant statements from each decision. While the Supreme Court is

not bound by the reasoning presented in either, it is helpful to understand the reasoning from each decision. Those decisions take positions which can be characterized as the single constitutional event analysis (***Sumnicht***), and the constitutional right to revoke ongoing consent analysis (***Randall***).

In ***State v. Sumnicht***, 17AP280-CR, Judge Neubauer issued a single judge opinion on December 20, 2017. In that case, the circuit court denied the defense motion to suppress the blood test result in circumstances almost identical to those presented in this case. Sumnicht attempted to revoke her consent to have her blood tested by sending a letter to the State Lab of Hygiene. The ***Sumnicht*** Court, in footnote 5, pointed out that Sumnicht conceded that her initial consent was not just for the taking of her blood, but also any subsequent analysis. That being said, Sumnicht argued that she could withdraw that consent with the letter she sent to the lab.

The Court rejected Sumnicht's argument, asserting that the search is not ongoing or continuous, but is completed at the time of the seizure of the blood. ***Sumnicht***, ¶ 21-22. The Court ruled that the search was complete once the blood was seized, and that the letter revoking consent was too late:

> The lawful extraction of blood and subsequent testing of the blood are a single event for fourth amendment purposes. See *Riedel*, 259 Wis. 2d 921, ¶16 (the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant ." (citation omitted)); *State v. VanLaarhoven*, 2001 WI App 275, ¶¶13, 16, 248 Wis. 2d 881, 637 N.W.2d 411 ("'[T]he right to seize the blood ... encompass[ed] the right to conduct a blood - alcohol test at some later time,'" precluding a "defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance.")(citation omitted)).

In a different district, the Court reached a very different result. Judge Kloppenburg issued a single-judge decision in ***State v. Randall***, 2017AP1518-CR, on June 14, 2018. The defendant in that case, Randall, similarly consented to the initial seizure of blood by law enforcement officers, and later sent a letter to the state lab of hygiene revoking her consent.

The ***Randall*** Court viewed the constitutional event very differently than the ***Sumnicht*** Court. The *Randall* Court characterized the taking and testing of Randall's blood as one continuous and ongoing event. ***Randall***, ¶ 11. The distinction with the ***Sumnicht*** Court is the Randall's Court characterization of the search as an ongoing event.

Because the search is ongoing, the Randall Court concludes, Randall had the right to withdraw her consent. The Randall Court reviewed Wisconsin precedent in ***State v. Wantland***, 2014 WI 58, and determined that citizens have the right to revoke consent after it is given. The ***Wantland*** decision rejected Wantland's argument that he revoked his consent in that case, but explained that consent could be revoked in other circumstances. According to the ***Randall*** Court:

> The court contrasted Wantland's ambiguous question to the officer with the following "[u]nequivocal acts or statements sufficient to constitute withdrawal" of consent: "slamming shut the trunk of a car during a search, grabbing back the item to be searched from the officer, and shouting 'No wait' before a search could be completed ."Id., ¶34 (emphasis added)(*citing* ***United States v. Flores***, 48 F.3d 467, 468 (10th Cir. 1995); ***United States v. Ho***, 94 F.3d 932, 934 (5th Cir. 1996); ***United States v. Fuentes***, 105 F.3d 487, 489 (9th Cir. 1997). Thus, *Wantland* teaches us that so long as a search has not yet been completed, an individual has the right to withdraw consent to continuation of the search through unequivocal actions or statements. ***Randall***, ¶ 12.

Thus, the ***Randall*** Court concludes, because Randall revoked her consent prior to the testing of the blood, the

search had not been completed and the blood was improperly searched without her consent and should be suppressed. The ***Randall*** case is currently pending in the Wisconsin Supreme Court, with briefing and oral arguments complete. The Wisconsin Supreme Court has not yet issued a decision.

D. Resolution of the Disagreement: Possessory Interest

It appears that the Wisconsin Supreme Court will resolve the issue in the near future. The resolution must rectify Wisconsin precedent which both allows for and rejects the revocation of consent during an ongoing search. One solution is find that a citizen no longer has the right to revoke consent when the State has possession of an item pursuant to the citizen's consent, and then simply wishes to analyze the item.

Cases which have addressed this issue in the context of the search of an apartment or car, and those which have applied the law to a search of an item, have addressed a similar issue. In ***State v. Wantland***, relied on by Judge Kloppenburg in the ***Randall*** case for the proposition that consent to an ongoing search can be revoked, the ongoing search was the search of the defendant's vehicle. The ***Wantland*** Court very clearly ruled that consent could be revoked in that kind of situation. See ***Wantland*** 2014 WI 58, ¶ 33.

By contrast, in ***State v. Petrone***, 161 Wis.2d 530, the issue was related to the lawful extent of a search based on seizure of an item seized pursuant to a warrant. Petrone allegedly took nude photographs of underage girls, and officers obtained a warrant to search his home. Officers seized photos, clothing, and film during the search. Officers later developed the film and found images which were used to convict the defendant at trial. Petrone argued that the warrant only allowed for the search and seizure of items, not the subsequent analysis.

The Court in ***Petrone*** did not decide that the warrant implicitly authorized analysis of the film, but rather said "[d]eveloping the film is simply a method of examining a lawfully seized object." ***Petrone***, Id., at 545.

This reasoning would apply equally well to a consent situation. The idea is that once a defendant's possessory interest is abandoned or extinguished by lawful means, there is no longer a right of privacy and no right to object to analysis. In ***State v. Wantland***, the Court explained:

> The driver of a vehicle has "obvious possessory authority over the vehicle and therefore the capacity to consent to its search." ***Wantland***, ¶ 28. (citation omitted)

A person cannot consent to a search of an area in which he or she does not have a possessory interest. Once a film canister, or a computer, phone, or blood sample is lawfully seized, then the person who consented or was subject to a warrant no longer has a possessory interest.

A possessory interest is necessary for both consent and the revocation of consent. Once the item is in the exclusive possession of the State, a person can no longer object to analysis of the item. *See* ***State v. Whitrock***, 452 N.W.2d 156, 153 Wis.2d 707 (Wis. App. 1989).

Similarly, abandoned property can be searched without a warrant and without consent. *See* ***State v. Roberts***, 538 N.W.2d 825, 196 Wis.2d 445 (Wis. App. 1995). Abandoned property can be searched because there is no expectation of privacy in an abandoned item, as the person has relinquished the expectation of privacy through giving up a possessory interest. ***Roberts***, 538 N.W.2d at 829.

A driver who has consented to the seizure of his or her blood has given up the possessory interest he or she had in the blood. That driver has given up the possessory interest and attendant expectation of privacy which previously

existed, and no longer has the right to revoke consent to analze the item.

CONCLUSION

Again, the State recognizes that the ***Randall*** case will likely establish new precedent to be applied in this case. The State moves the Court of Appeals to reverse the circuit court's suppression of critical evidence for the reasons supplied.

Dated this ___day of _____, 2019.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGHTH

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 3688 words.

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

APPENDIX CERTIFICATION

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 the content requirements of Wis. Stat. § 809.19(2)(b); which contains at a minimum, a table of contents, the findings or opinion of the circuit court, a copy of any unpublished opinion cited under § 809.23, and 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.

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Dated this ____day of_____, 2019.

_____

Michael D. Zell
Assistant District Attorney