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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT: THE RECENTLY DECIDED RANDALL DECISION REQUIRES REVERSAL OF THE CIRCUIT COURT'S SUPPRESSION ORDER

In his brief, the defendant points that the Wisconsin Supreme Court recently decided the ***Randall***[1] case, which confronts the same issue raised in this case: whether a person who consents to a blood draw pursuant to an OWI arrest can revoke that consent prior to state lab ethanol testing. The State asserts that ***Randall*** established precent which this Court must apply to reverse the circuit court's suppression decision. The ***Randall*** decision ultimately holds that a defendant does not have a privacy interest in his or her blood once seizure of the blood occurs. This is contradictory to the ruling of the circuit court.

The defendant disagrees, arguing that the Randall decision is "fractured" and fails to establish precedent, and that factual differences warrant different treatment in this case.

A. WAS THERE A "FRACTURED" DECISION WHICH FAILS TO PROVIDE PRECEDENTIAL VALUE.

The defendant first argues that the "rationale of the Supreme Court … is unclear as there was no majority that agreed on the exact basis…" Defendant's Brief, 10. As such, according to the defendant, there was "no agreement on the legal basis." Id. The defendant points out that "when a decision is fractured, its precedential value is curtailed." Defendant's brief, 11 (*citing* ***State v. Elam***, 195 Wis.2d 683, 538 N.W.2d 249 (1995)). The State disagrees that

[1] ***State v. Jessica Randall***, 2018 WI 107, 384 Wis. 2d 772, 921 N.W.2d 509.

Randall is a "fractured" decision which fails to establish precedent.

A majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court. ***State v. Elam***, 195 Wis.2d 683, at 685 (*citing* ***State v. Dowe***, 120 Wis.2d 192, 194-95, 352 N.W.2d 660 (1984)). In ***Dowe***, the Wisconsin Supreme Court addressed the overlap of concurring and lead opinions, much as occurred in the ***Randall*** decision. The ***Dowe*** Court noted that "numerous cases have held that a concurring opinion becomes the opinion of the court when joined in by a majority." 120 Wis.2d at 194.

The ***Dowe*** court addressed a different issue: the proper standard to apply when evaluating whether to release the identity of a confidential informer. The ***Dowe*** Court reviewed the controlling decision of the Wisconsin Supreme Court on this issue, ***State v. Outlaw***, 108 Wis.2d 112, 321 N.W.2d 145 (1982). In ***Outlaw***, there was a lead opinion and a concurring opinion just as in ***Randall***. Also similarl to ***Randall***, the concurring opinion in ***Outlaw*** rejected portions of the lead opinion. However, the ***Dowe*** court accepted the concurring opinion from ***Outlaw*** as the legal standard, as it was the majority opinion on the issue presented.

The ***Dowe*** court pointed out that the concurring opinion rejected a portion of the lead opinion:

> I specifically reject that language in the majority opinion stating the proper test for disclosure of an informer's identity to be whether the informer's testimony was relevant and admissible to a material issue. I conclude that an essential condition precedent to disclosure is that the informer's testimony be necessary to the defense. ***Dowe*** at 194, *citing* ***Outlaw*** 108 Wis.2d 112, 141.

The ***Dowe*** Court resolved the tension between the lead opinion and concurring opinion by finding the majority rule from the decision:

> In ***Outlaw***, the lead opinion represents the majority and is controlling on the issues of the state's burden and the existend of abuse of discretion by that circuit court. However, the concurring opinions represent the majority on the issue of the test to be applied and therefore control on this point.

The ***Randall*** decision has a similar tension between the lead opinion and the concurring opinion. In ***Randall***, there was a lead opinion, a concurring opinion from Justice Roggensack which collected two supporting votes, two single-justice dissents, and one abstention. Justice Kelly, who wrote the lead opinion, concluded that a defendant does not have a privacy interest in her blood after it is seized, and thus does not have a right to revoke previously given consent:

> This, then, is the nature of the privacy interest she claims today: She says that, notwithstanding a constitutionally—compliant search (the blood draw), she nonetheless had a legitimate privacy interest in shielding from the State the very evidence for which it was authorized to search. This has never been the law, and her argument fails to account for the age-old principle that an arrest reduces the suspect's privacy interest. Randall, ¶20.

Justice Kelly concludes: "… a defendant arrested for intoxicated driving has no privacy interest in the amount of alcohol in that sample." ***Randall***, ¶ 39.

Justice Roggensack, writing the concurring opinion, which also gathered two votes in support, rejects some of the rationale of the lead opinion, but also concludes that a defendant who was arrested for driving while under the influence "has no reasonable expectation of privacy in the alcohol concentration of the blood sample that has been lawfully seized." ***Randall***, ¶ 42.

Justice Roggensack is clear that she does not agree with Justice Kelly's analysis of the constitutional issues, but states that it does not matter to the ultimate opinion:

> While I agree with parts of the lead opinion, I do not join it. In my view, the opinion loses its constitutional thread in its concern for whether the drawing and testing of the blood sample should be analyzed as one search or two. In actuality, it does not matter. What matters is whether there is a legally protectable privacy interest in the alcohol concentration of a blood sample constitutionally obtained from the operator of a vehicle after arrest for driving while intoxicated. ***Randall***, ¶ 64.

Four of the six justices participating in the matter agree that there is no privacy interest in a suspect's blood after the blood is lawfully seized. This does not present a "fractured" opinion, even though there may be disagreement about the constitiutional substratum. The majority ruling is that there is no privacy interest in a suspect's blood once it is lawfully taken, and therefore no right to revoke consent as Randall argued.

B. ARE THERE SIGNIFICANT FACTUAL DIFFERENCES BETWEEN ***LANE*** AND ***RANDALL***.

Lane also argues that there are significant factual differences between his case and Randall's case which warrant different treatment. The record does not support that assertion. The most significant problem with Lane's argument on this point is that he fails to make any showing that the law supports his argument.

According to Lane, "even if this Court were to find that the Randall decision was a cohesive decision, the facts here are distinguishable." Accoding to Lane's brief,

> Mr. Lane first stated he would prefer a breath test. Then he mumbeled something that the officer stated he did not hear. These facts indicate Mr. Lane did not wish to submit to the evidentiary test. This was in contrast to the clear, unequivocal original consent as in the ***Randall*** case. (Respondent's brief, 12 (citations to record omitted)).

Lane's brief fails to state any argument or legal citation which would explain how this allegedly significant distinction would change the Court's decision in his case. Appellate courts are not required to consider any issue that is not fully briefed. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). The State asks the Court to apply the ***Pettit*** principle here, as Lane provides no basis on which the Court could determine that a clear unequivocal consent would make a difference regarding the ***Randall*** analysis regarding the withdrawal of consent already given.

If the Court believes this issue should be addressed further, the State asserts that it is best addressed in the circuit court. It seems that this argument is really a new challenge regarding the initial consent to the blood draw. This is not an issue which was argued by the parties nor addressed by the circuit court during the suppression hearing. The circuit court made only conclusory statements about the issue as it had not been raised by Lane before the circuit court.

In the circuit court, Lane filed three motions: a motion to suppress and dismiss (R19), a motion to suppress – unlawful detention and arrest (R21), and a motion to suppress blood test result (R24).

None of Lane's circuit court motions asserted that he did not consent to the initial blood draw, nor did he make this argument at any point during the proceedings. In the

motion to suppress blood test result, Lane states "Mr. Lane submitted to an evidentiary chemical test of his blood." (R24, ¶ 3). Lane then points out that "On August 28, 2017, Mr. Lane withdrew his consent to the analysis of his blood." (R24, ¶ 4). The motion to suppress and dismiss argued that Lane requested an alternative test during his exchange with the officer after the officer read the informing the accused. (R19, ¶¶ 3-5). Lanes motion to suppress for unlawful detention and arrest addressed the reason for the initial stop of Lane's motorcycle. (R21).

Lane did not argue that he did not consent to the blood test during the circuit court's motion hearing on April 27, 2018. (R44). The absence of any argument about the voluntariness of his consent before the circuit court seem to represent a concession that this issue does not have any merit. If this Court determines that Lane's new argument regarding his consent to give blood is worthy of consideration, it is one that should be first raised in the circuit court. ***See State v. Gove***, 148 Wis.2d 936-940-41, 437 N.W.2d 218 (1989). If the Court decides that this issue should be addressed, it should be addressed in the circuit court on remand.

The only issue being addressed in this appeal is whether Lane can withdraw his consent to analyze his blood after lawful consent. On that issue, ***Randall*** definitively answer's the question in the negative.

CONCLUSION

Randall established binding precedent which mandates overturning the circuit court's suppression order in this case. The State moves the Court of Appeals to reverse the circuit court's suppression order for the reasons supplied.

Dated this 10th day of September, 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 2136 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.

I further certifiy that if the record is required by law to be confidential, the portions of the record included in this appendix are reproduced using first names and last initials 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 10th day of September, 2019.

_____

Michael D. Zell
Assistant District Attorney