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STATE OF WISCONSIN

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

Case No. 2019AP1317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

> After Daniel Van Linn was arrested on suspicion of drunk driving, a sheriff's deputy ordered his blood drawn for testing. This draw was illegal, and the circuit court excluded its fruit. After the suppression decision, the prosecutor applied for a subpoena to the hospital where Mr. Van Linn had been treated; the application included the results of the first, suppressed blood test. The court issued the subpoena and the hospital turned over evidence including the results of the blood alcohol test it had conducted. Was the state's decision to seek this subpoena the fruit of its earlier, unlawful search, such that its results should have been suppressed?

The circuit court and the court of appeals refused to suppress the hospital blood test results. This Court should grant review and reverse.

CRITERIA FOR REVIEW

The question in this case is whether, after an unlawful blood test has revealed incriminating information, the state may use a subpoena to a hospital to obtain that same information from a different blood sample. This is a question about the scope of the exclusionary rule of the Fourth Amendment. *See* Wis. Stat. Rule 809.62(1r)(a). No

binding case has addressed this question, so the question is a novel one of statewide impact. *See* Rule 809.62(1r)(c)2. If the state's tactic in this case was legal, it would also obviate the warrant requirement in many drunk-driving cases; as such the issue is likely to recur unless this Court addresses it. *See* 809.62(1r)(c)3.

STATEMENT OF FACTS

Mr. Van Linn was in a car crash and was transported to a hospital. (23:1-3; App. 115-17). Suspecting that Mr. Van Linn was intoxicated, a deputy sheriff informed him that he was under arrest and asked him to consent to a blood draw. Mr. Van Linn refused. (23:3; App. 117). The deputy, believing the circumstances presented an exigency, directed that Mr. Van Linn's blood be drawn anyway without seeking a warrant. (23:3; App. 117).

The state charged Mr. Van Linn with operating while intoxicated and operating with a prohibited alcohol concentration. (11:1-2). Mr. Van Linn moved to suppress the results of the testing of this blood. (12). The state argued the search was justified by exigent circumstances, but the circuit court disagreed, holding that the fact that around two hours had elapsed since that accident did not excuse the deputy's failure even to attempt to obtain a warrant. It accordingly suppressed the results of this blood draw. (18).

About three months later, the state moved the court under Wis. Stat. § 968.135 to issue a subpoena to the hospital that had treated Mr. Van Linn. (21). In support, the state provided an affidavit which was a recitation of the facts from the amended criminal complaint—with the included fact that the (suppressed) blood test had shown a prohibited blood alcohol content. (23:4; 6; App. 118). The court signed the subpoena the following day; Mr. Van Linn's counsel sent an email to the judge and assistant district attorney on the same afternoon opposing the subpoena and saying he would file a motion to quash. (26:1). He did later file such a motion, but in the interim the hospital had provided the requested documents. Because the parties had the documents, the court determined that the question of the validity of the subpoena was moot, but reserved the question of whether the documents were admissible. (78:9-10).

The parties briefed the issue. Mr. Van Linn argued that the result of the hospital's blood draw was privileged under Wis. Stat. § 905.04, and also that the court's prior suppression of the same information should prevent the state from accessing it via different means. (32:2-4). After briefing, the court issued a written decision finding the hospital's blood test results admissible. (32; 33; 37; App. 113-14). Mr. Van Linn pleaded no contest. (51:1-2). He appealed the suppression decision. (54; 65); *see* Wis. Stat. § 971.31(10).

The court of appeals affirmed. In an unpublished decision, it held that the subpoena to the hospital satisfied the independent source exception to the exclusionary rule. *State v. Van Linn,* No. 2019AP1317-CR, unpublished slip op. at ¶¶19-24 (WI App. Nov. 17, 2020); App. 109-112.

ARGUMENT

This Court should grant review and hold that the subpoena here, sought after suppression of the police draw and with knowledge of its result, was the fruit of the illegality and not an independent source.

Unless a recognized exception applies, the Fourth Amendment prohibits the taking of a drunk-driving suspect's blood without a warrant. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). Here, the circuit court held that the only warrant exception offered by the state—exigent circumstances—was not satisfied, and so it suppressed the results of the blood test ordered by the deputy. This ruling was correct; the simple fact of the passage of two hours between the report of the accident and the officer's request for Mr. Back's blood does not constitute an exigency, particularly when there was no attempt, at any time, to get a warrant, and no explanation of why one could not have been sought. *See id.* at 163. In any case, the state did not appeal this ruling, *see* Wis. Stat. § 808.04(4). Not having appealed the trial court's

suppression decision, it properly did not argue to the court of appeals that that decision was wrong. *See* Brief of Respondent. Like Mr. Van Linn, the state's arguments focused on the subsequent subpoena.[1] *Id.*, pp. 15-17.

Mr. Van Linn had contended in the circuit court that the state should not be permitted to take advantage of its wrongdoing by way of a "back door around the Court's prior ruling" excluding the blood draw evidence. (32:3-4). In the court of appeals, he noted that the subpoena the court issued, while not denominated a "warrant," was subject to the same legal requirements: it could be issued by a judge only on a showing of probable cause. Wis. Stat. § 968.135.[2]

Moreover, Mr. Van Linn observed that state had plainly used information gained from its illegal search to demonstrate the probable cause it needed: it listed the BAC discovered by the warrantless blood draw in its affidavit for the subpoena to the hospital. (23:4; App. 118). The facts in this case are thus in line

[1] The state also asked the court of appeals to hold Van Linn's challenge forfeited; that court declined.

[2] This fact distinguishes this case from *City of Muskego v. Godec*, 167 Wis. 2d 536, 541, 482 N.W.2d 79 (1992), which was a civil matter and involved a subpoena under a different statute not requiring probable cause, and *State v. Jenkins*, 80 Wis. 2d 426, 433, 259 N.W.2d 109 (2019), which involved a physician's testimony and no subpoena at all—and thus no search.

with those of the seminal fruit-of-the-poisonous-tree case, *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

In *Silverthorne*, federal agents without a warrant "made a clean sweep" of all the documents in the company office of two men it had indicted. 251 U.S. at 390. The men challenged the seizure and the court ordered the documents returned to them. *Id.* at 390-91. The documents were returned, but the government then sought a subpoena for the same documents, in part relying on the knowledge gained by the illegal seizure. The targets of the subpoena refused to comply, and then they were held in contempt. *Id.* at 391. In the Court's words, the government's position was that although the "seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them." *Id.*

The Court rejected the government's argument, saying it "reduces the Fourth Amendment to a form of words." *Id.* at 392. It went on:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id.

In this case, just as in *Silverthorne*, the government violated the Fourth Amendment in taking Mr. Van Linn's blood without a warrant. In this case, as in *Silverthorne*, the court refused to let the government use the illegally-seized evidence directly. And, in this case and that one, the government responded by presenting the court with a subpoena containing information—here the blood-alcohol content—that it had gained in the illegal seizure.

The state contended, though, that the subpoena was nevertheless an "independent source" of blood alcohol evidence. Evidence may be admissible, even if it has been uncovered by an illegal search, where it is obtained by an independent lawful means. A warrant is not an independent source, however, if either the decision to seek a warrant, or the issuing magistrate's decision to issue it, was affected by

information gathered by illegal conduct. *Murray v. United States*, 487 U.S. 533, 542 (1988).

In the court of appeals Mr. Van Linn contended that the state could not meet the first prong: it cannot show the decision to seek the subpoena was not affected by the information it gathered in the illegal search, for two reasons.

First, this is not a typical independent-source case, in which evidence becomes available soon after or contemporaneously with the illegal search—and not because of it. Here, the prosecution obtained the results of the unlawful blood draw and took no further action to investigate. It was only after several months—and specifically after the circuit court had ordered the illegal blood draw suppressed—that the state sought the subpoena. Obviously, it would have had no reason to seek a subpoena had the earlier search not been illegal. In this sense, the fact of the earlier illegality "prompted" the later subpoena.

The court of appeals rejected this argument, saying that "[w]hen prior case law speaks of an unlawful search 'prompting' a subsequent, lawful search, it is referring to the notion that the knowledge police gained from an illegal search cannot form the basis for a later, lawful request for that evidence." *Van Linn*, No. 2019AP1317-CR, ¶22, citing *Murray*, 487 U.S. at 542 and *Silverthorne*, 251 U.S. at 392; App. 110-11. But this doesn't settle matters: the

reason those cases did not consider the effect of a suppression decision on a later search is because those cases did not *involve* a suppression decision followed by a search. Whether a court's exclusion of evidence may be said to "prompt" a later search thus remains an open question.

Mr. Van Linn also argued that the decision to seek the subpoena was motivated specifically by the "information obtained" via the unlawful blood draw. *Murray*, 487 U.S. at 542. If the unlawful search had shown that Van Linn's blood contained little or no alcohol, the state would have had no incentive to seek out another means of proving this fact. It was only because the state *knew* what the result would be—because it had learned from the illegal search—that it had any reason at all to obtain the same information from another source. This is precisely the position of the government agents in *Silverthorne*, 251 U.S. at 391—the state sought to "use the knowledge that it [had] gained" to obtain the same knowledge in a "more regular form."

To this argument, the court of appeals responded that it was

> exceedingly likely the prosecutor would have sought out any evidence that could be used to establish the elements of the OWI charge for which Van Linn had already been arrested before the diagnostic blood test had even occurred. This motivation would have been particularly true regarding highly probative evidence like Van Linn's blood alcohol content.

Van Linn, No. 2019AP1317-CR, ¶21; App. 110 But that is exactly what did *not* happen here. The prosecutor *didn't* seek out the hospital's test results—not until months later, after he'd seen the results of the illegal blood draw, and after those results had been suppressed. Speculation about what a hypothetical prosecutor might have done doesn't change the fact that *this* prosecutor took no action to obtain the hospital records until after he knew what they'd contain—and he knew because of the illegal search. The state therefore cannot show that the illegal search, and the suppression that rightly followed, did not prompt the subpoena. Its results should therefore have been suppressed.

CONCLUSION

Mr. Van Linn respectfully requests that this Court grant review and reverse the decision of the court of appeals, and that it remand to the circuit court with directions that the evidence obtained by subpoena be suppressed.

Dated this 16th day of December, 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 2,157 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 16th day of December, 2020.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender

APPENDIX

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