STATE OF WISCONSIN

COURT OF APPEALS — DISTRICT II

Case No. 2019AP1942 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

Appeal of a judgment entered in the Sheboygan County Circuit Court, the Honorable Terence T. Bourke, presiding, and from an order entered in the Sheboygan County Circuit Court, the Honorable Rebecca L. Persick, presiding

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REPLY BRIEF

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Statutes

ARGUMENT

I. The warrantless taking of Gerald Mitchell's blood was not justified by the exigency doctrine.

This case has been on hold since the state filed its respondent's brief. The hold was to await the supreme court's decision in *State v. Prado*, 2021 WI 64, __ Wis. 2d. __, 960 N.W.2d 869. *Prado* held that Wis. Stat. § 343.305(3)(b), a part of the implied-consent statute, is unconstitutional, and cannot supply consent for blood draws. *Id.*, ¶54. After *Prado*, it is clear that that the blood draw in this case wasn't consensual. Thus, though he discussed it in his initial brief, Mitchell will not address consent here. *See* App. Br. 10-19. Also—unlike in *Prado*—in this case the state has never sought to justify the admission of the blood evidence under the good-faith doctrine. So the sole question for the Court is whether the blood draw satisfied the exigent-circumstances exception.

As Mitchell noted in his opening brief, the Supreme Court, in *Mitchell v. Wisconsin*, established a new exigency rule for blood draws from unconscious motorists. "When police have probable cause" for OWI "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" then the exigent-circumstances doctrine applies unless two conditions are met. Those conditions are, first, that the defendant's "blood would not have been drawn if police

had not been seeking BAC information" and second, that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell v. Wisconsin*, __ U.S. __, 139 S. Ct. 2525, 2539 (2019).

This is a fairly straightforward rule to state, though as with many such rules, particular facts may present questions about how to apply it. But it's not true, as the state spends some of its brief arguing, that Mitchell is advocating for or arguing under a *different* rule. *See* Resp. Br. 11-14, 19-20. He's arguing that the two conditions noted above are met here, and so the blood draw was unlawful.

A. The officer could not reasonably have judged that getting a warrant would have interfered with other pressing needs or duties.

Mitchell noted in his opening brief that he and the officers arrived at the police station during business hours on a Thursday, that other officers were thus at work, and that the arresting officer believed it might have taken 20 minutes to get a warrant. App. Br. 21-22. Nevertheless, in the more than 90 minutes between Mitchell's arrest and the blood draw, the officer did not seek a warrant; he testified that he simply did not consider doing so. *Id.* Given these facts there was no basis on which a reasonable officer could judge that applying for a warrant "would have interfered with other pressing needs or duties."

To this, the state offers several responses, none of which hold water. It first says the officers had no reason to get a warrant because "they intended to conduct a breath test." Resp. Br. 20. But the arresting officer testified that he concluded Mitchell could not take a breath test while still at the police station, long before the blood draw. App. Br. 5.

The state then points to the circuit court's statements about Mitchell's "very dire medical situation." Resp. Br. 20. But this "situation" did not become apparent until after Mitchell had sat at the police station for some unknown time; it arose during the eight-minute drive to the hospital. The officer testified that the reason he decided to take Mitchell there was not any medical emergency, but his desire for an evidentiary blood draw. App. Br. 5. And once Mitchell was *at* the hospital, of course, the officer was not providing medical care; the medical professionals who work there were. Other than the need to drive a few minutes to the hospital and get Mr. Mitchell inside, the officer had no "pressing duty" to address any medical issues, and thus seeking a warrant could not have interfered with any such duties.

The state next suggests that the officer "reasonably did not try to obtain a warrant after arriving at the hospital" because he intended to get consent. Resp. Br. 20. This is nonsensical. Mitchell was unconscious at the hospital and thus could not consent, and the officer knew this. It's also legally wrong; this Court has already rejected the state's claim that the presence of absence of exigency "should

be analyzed only from the moment a defendant refuses to submit to a blood draw and not before." *State v. Hay*, 2020 WI App 35, ¶14, 392 Wis. 2d 845, 946 N.W.2d 190. The Court observed that such a rule would allow "exigency" in cases where the lack of time to seek a warrant is attributable only to the officer's decision not to seek one promptly. This would "create exigent circumstances that would not have existed had the process been started earlier," violating the maxim that "the government cannot justify a search on the basis of exigent circumstances that are of the law enforcement officers' own making." *Id.* (citation omitted).

The state next says a medical blood draw justified the officer's failure to seek a warrant. Resp. Br. 21. Medical blood draws are relevant to the *other* prong of the Supreme Court's test, but they have nothing to do with whether seeking a warrant would have interfered with an officer's "pressing needs or duties."

The state finally argues that the police officers could not have conducted a proper breath test during their time at the police station. Resp. Br. 17-18, 21-22. This is what the officer testified to, but it is irrelevant to whether "other pressing needs or duties" prevented the officer from seeking a warrant. They plainly did not, and so this condition is met.

B. The officer could not reasonably anticipate that Mitchell's blood would be drawn anyway.

The state takes issue with Mitchell's phrasing of this prong of the test. The *Mitchell* opinion notes that when officers arrest an unconscious OWI suspect and head to a hospital, they "can reasonably anticipate… that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival." 139 S. Ct. at 2537-38. But the state insists that the only thing that matters is whether, after the fact, a court can say that the defendant's blood *was* drawn for medical purposes. Resp. Br. 16-19.

The state's position does not find support in the *Mitchell* decision. The opinion directs lower courts to decide whether the motorist's blood "*would not have been* drawn *if* police had not been seeking BAC information." 139 S. Ct. at 2539. The question is a hypothetical one: it's about what would have occurred if the facts were different and the police had not sought and obtained a warrantless, evidentiary blood draw. This question is not answered by noting that, when police *did* take Mitchell to the hospital for an evidentiary blood draw, he also ended up having his blood drawn medically.

The *Mitchell* Court's terse statement of its test leaves questions unanswered. Among these questions: what is the relevant time for the assessment of whether a medical blood draw *would have been* performed? For the reasons Mitchell gave in his

opening brief, it makes the most sense to make the call at the time police elect to conduct a warrantless search. App. Br. 21-24. The *Mitchell* court stated its intent to "offer guidance" to police on how they "should handle cases like the one before us." 139 S. Ct. at 2535 fn.3. What "guidance" would be provided if the test required an officer to know what happened *after* he or she ordered a warrantless blood test? Fourth Amendment questions are objective ones. A search is reasonable or unreasonable at the time police initiate it; subsequent events can't change what the officers knew or should have known. And contrary to what the circuit court found, the officer did not know, at the time he opted for a warrantless blood draw, that Mitchell had taken pills that would lead to his hospitalization, and the associated medical blood testing. App. Br. 23-24. He had no reason to think Mitchell's blood would be taken if he did not take Mitchell to the hospital for his own purposes. His decision to seek Mitchell's blood was not founded in medical emergency; it was motivated by criminal investigation. The courts should not sanction this decision to forego a warrant simply because Mitchell eventually ended up needing to be admitted to the hospital.

CONCLUSION

Because the warrantless taking of Gerald Mitchell's blood did not fall into any Fourth Amendment exception, he respectfully requests that this Court reverse his conviction and remand with directions that the blood be excluded.

Dated this 10th day of August, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 1,459 words.

Dated this 10th day of August, 2021.

Electronically signed by Andrew R. Hinkel
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