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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP001942 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISION AND STATUTE CITED

Issue Presented

> Police arrested Gerald Mitchell on suspicion of operating while intoxicated. Believing that Mitchell would not be able to complete a breath test, the officers decided to take him to the hospital for an evidentiary blood draw. They never sought or contemplated seeking a warrant for this search. At some point *en route* to the hospital, Mitchell lost consciousness; at the hospital, both a warrantless, evidentiary blood draw and other medical blood draws were performed.

Did the warrantless blood draw satisfy the exigency test set out in *Mitchell v. Wisconsin*, __ U.S. __, 139 S. Ct. 2525 (2019)?

The circuit court and the court of appeals held the blood draw lawful. This Court should grant review and reverse.

CRITERIA FOR REVIEW

Mitchell is a recent decision of the Supreme Court. This Court has cited it only once, in *State v. Prado*, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869. *Prado*, however, was a decision about the state's implied-consent law; it did not address the exigency test laid out in *Mitchell*.

Mitchell required a driver to show that his or her blood "would not have been drawn if police had not been seeking BAC information" in order to satisfy an exception to the exigency rule it created. 139 S. Ct. at 2539. It did not, however, explain how lower courts were to determine what "would have" happened absent police efforts to draw blood for evidentiary purposes. In this case, Mitchell was not unconscious until after the police had determined to draw his blood and were taking him to the hospital; it thus raises questions about what the test requires. These are novel and important questions about the Fourth Amendment. See Wis. Stat. Rule 809.62(1r)(a) & (c).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In May of 2013 in Sheboygan, Gerald Mitchell's neighbor called the police. He said Mitchell's sister had called him and said Mitchell was planning to take his own life. (150:105-06). The neighbor found Mitchell in the stairwell of his apartment building. (150:94). Mitchell seemed agitated and the neighbor thought he was intoxicated; the neighbor watched Mitchell get into a van and drive off. (150:95,100-01). At his trial, Mitchell would testify that on that day he was depressed and had decided to kill himself. (150:244-45). To that end he'd mixed a half-liter of vodka with Mountain Dew in a large cup, and brought that and 40 pills to the shore of Lake Michigan. He took the pills and drank the drink. (150:247-48,254).

Police quickly located Mitchell walking near the lake; his van was found parked nearby. (150:220). He was belligerent and was having trouble staying upright. (150:197,210). The officers had Mitchell take a preliminary breath test and it revealed a BAC of .24. (147:16). The police loaded Mitchell into a squad car and took him to the police department "for further processing." (147:17). There, he was placed in a holding cell, where at some point he "began to close his eyes and sort of fall asleep or perhaps pass out," though he "would wake up with stimulation." (147:16-17). Police then decided to take him to the hospital for a blood draw. (150:13-14). By the time they arrived at the hospital he was unresponsive and could not be roused. (147:18).

An officer read the "Informing the Accused" form aloud in Mitchell's presence, though Mitchell remained unconscious. The officer then directed hospital personnel to take Mitchell's blood for testing. (147:19-23). The blood was drawn about an hour and a half after Mitchell's arrest. (150:177). Testing showed a .222 BAC.

Mitchell was charged with operating while intoxicated and with a prohibited blood alcohol concentration. (17). He moved to suppress the blood test results on the ground that his blood was taken without a warrant or exigent circumstances. (25). The state agreed there was no exigency, but argued that, per the statute, Mitchell had consented to the test by driving, and had not withdrawn his consent. (147:45; 32). The trial court upheld the

search, relying on the implied-consent statute. (147:50-51). The state introduced the test results at Mitchell's jury trial, and he was convicted of both counts. (150:178,315).

Mitchell appealed the suppression decision, and the court of appeals certified the case to this Court, noting a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." 2015AP304-CR, Certification of May 17, 2017. (App. 135)

This Court accepted certification. It ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale. *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151. Mitchell petitioned the Supreme Court of the United States for certiorari, which was granted. That Court vacated the state supreme court decision and remanded for further proceedings. *Mitchell v. Wisconsin*, __ U.S. __, 139 S. Ct. 2525 (2019).

Those further proceedings were ordered so that the state courts could apply the new rule the Supreme Court announced regarding exigent circumstances: that they would typically be present in the case of an unconscious motorist, unless "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties" and the defendant's "blood would not have been drawn if police had not been seeking BAC

information." *Id.* at 2359. The circuit court held a second evidentiary hearing to address these questions.

The arresting officer was the sole witness. He testified that he'd made the arrest at 4:26 p.m. (152:4; App. 6). He then drove to the police station, a journey of about five minutes. (152:5; App. 7). There, Mitchell was placed in a holding cell. (152:6; App. 8). However, police decided to take Mitchell to the hospital with the purpose of performing an evidentiary blood draw. (152:6,8; App. 8,10). The reason for this decision, the officer testified, was that Mitchell was incapable of standing safely, and the breath-testing machine at the police station required the subject to stand during the test. (152:10; App. 12).

The officer had earlier testified that he "wasn't so concerned of medical concerns" until the ride over to the hospital, when Mitchell's "condition increasingly became worse." (142:18). He did not know, at the time, that there was reason to believe Mitchell had attempted suicide. (142:18-19). At the new hearing he added that he thought Mitchell was drunk because of his condition and symptoms and the PBT result; he had no information about Mitchell having ingested any other substances. (152:8; App. 10). He also testified that he was concerned that the jail would not hold Mitchell until he had been medically cleared. (152:22-23; App. 122-23).

To that end the officer placed Mitchell in his squad and began the eight-minute drive to the hospital. (152:6; App. 8). During the drive, Mitchell's

condition declined, such that by the time they arrived the officer could not wake him, and needed the assistance of another officer to place him in a wheelchair and wheel him inside. (152:14,19-20; App. 16-22).

At the hospital, the officer testified, medical staff "monitored" and "assessed" Mitchell. (152:8; App. 10). In response to the state and the court's examination, he claimed he had seen medical staff take blood from Mitchell independent of the evidentiary blood draw, though he'd previously testified that he could recall only an attempt to collect urine, and had no recollection of other procedures. (152:21-22,26; App. 23-24,28). He testified that Mitchell didn't get out of the hospital that day, and stayed for more than one day in the ICU. (152:22; App. 24).

The officer testified that he never considered getting a warrant for the blood draw, and never asked any other officer about getting one, even though he and Mitchell were at the police station during business hours on a weekday, and other officers were around. (152:12-13; App. 14-15). He agreed that at present he "maybe" could get a warrant within 20 minutes. (152:13; App. 15)

The circuit court denied suppression, saying

> [N]ormally when someone gets to the hospital, the officer would go over the Informing the Accused form with the defendant and get the defendant's consent. And in 2013, that would certainly be -- and now -- sufficient for the officer to get a

warrantless blood draw. A warrant wouldn't have been required.

But the officers were denied that opportunity because your client was unconscious by the time they got to the hospital. So I don't think it's that they decided to get a warrantless blood draw. I think that once they got there, his condition had deteriorated so drastically they weren't able to get his consent. And by that time I think a blood draw was necessary for medical reasons. Particularly in light of the information that he was suicidal, I think quick action would have been necessary.

So the United States Supreme Court in the *Mitchell* decision used some pretty strong language saying that the warrant requirement, the Fourth Amendment, the exigent circumstances exception to the Fourth Amendment warrant requirement almost always permits a blood test without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test.

So they seem to acknowledge that it would be a very rare situation where a warrantless blood draw in that situation would not be permissible. And they did set out this two-prong test. The first prong is whether the blood would not have been drawn if police hadn't been seeking BAC information.

And I think it's clearly established that it would have because his condition was so dire by the time he arrived at the hospital.

I do want to touch on the second prong for a couple reasons. The second prong is the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. I think that that other pressing

> needs clause is very relevant in this particular situation because of Mr. Mitchell's very dire medical situation.
>
> Time would have been of the essence to treat him, especially, again, with that information that he was potentially suicidal and may have done something to harm himself. And I think under those circumstances, it would have been unconscionable for the police to delay the proceedings to get a warrant when lifesaving measures may have been needed and apparently were since he ended up in the Intensive Care Unit.
>
> The other thing I wanted to touch on -- and it could have been elicited through testimony by me, and I simply didn't do it because of that pressing health need which necessitated a blood draw. And that is that in 2013, the district attorney at that time was Joe DeCecco. And he was very, very vocal and got quite a bit of local press about the fact that his office was understaffed. And that is something that would have been well known to police and to the community.
>
> And it may be unique to our county and is still a problem in our county as a matter of fact. And so that certainly would have informed the police's decision to get a warrant if there had been time if there hadn't been a medical crisis. I didn't think it was necessary to get into that because there was a medical crisis in this situation, and Mr. Mitchell needed to be assessed quickly to hopefully preserve his life.

(152:30-33; App. 32-35).

Mitchell appealed. Because at the time of the appeal, there had still been no determination as to whether the state's implied-consent statute could supply constitutional consent for a blood draw,

Mitchell addressed this issue first, arguing the statute did not comport with the Constitution. This Court would later reach the same conclusion in *State v. Prado*, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869.

Mitchell also argued that his situation did not present exigent circumstances under the newly-announced *Mitchell* test. Specifically, he argued that at the time police decided to take him to the hospital for a blood draw, they could not have "reasonably anticipate[d]" that his blood would be "drawn anyway" for medical purposes regardless of any police-directed search.

The court of appeals disagreed with Mitchell's interpretation in a decision recommended for publication. *State v. Gerald P. Mitchell*, 2019AP1942, slip op. (June 15, 2022). (App. 3-13). It said that "whether or not a particular officer does in fact anticipate that a draw will occur for [medical] reasons in a particular case is completely irrelevant to the legality of the blood draw." *Id.*, ¶12. (App. 10). It thus rejected Mitchell's argument that the facts known to the police at the time they act—rather than facts that develop later—determine whether a given search is reasonable under the Fourth Amendment.

ARGUMENT

This court should accept review and hold that the warrantless taking of Mitchell's blood was not justified by the exigency doctrine.

The *Mitchell* Court said that an unconscious driver suspected of OWI presents an exigency 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." 139 S. Ct. at 2539.

The court of appeals did not address the second prong of the test, but it's clear that the police here could not reasonably have judged that getting a warrant would interfere with "other pressing needs or duties." On remand, the officer testified that Mitchell arrived at the police station during business hours on a Thursday. (152:13; App. 15). Other on-duty officers were present. (152:13; App. 15). The officer agreed that 20 minutes might be a reasonable amount of time for the procurement of a warrant. (152:13; App. 15). The reason no warrant was sought was not because there was any obstacle to getting one; it was that the officer simply did not consider doing so. (152:12,14; App. 14,16). What's more, the arrest happened at 4:26 p.m., and the test did not occur until 5:59 p.m. (152:5; 150:177; App. 7). During much of this time, Mitchell was sitting in a holding cell at the police station;

nothing prevented the officer from initiating a warrant request during this delay.

Instead of considering whether police could have gotten a warrant, the court of appeals decided Mitchell could not meet the other prong of the *Mitchell* test: a showing that his "blood would not have been drawn if police had not been seeking BAC information." *Mitchell*, 139 S. Ct. at 2539. Mitchell had contended that, as with other questions of Fourth Amendment reasonableness, the reasonableness of a warrantless blood draw could only be assessed by reference to what officers knew at the time. Not so, said the court of appeals:

> The Court did express that police can reasonably anticipate or expect that medical personnel "may" draw such a motorist's blood for medical reasons, *id.* at 2538, but whether or not a particular officer does in fact anticipate that a draw will occur for such reasons in a particular case is completely irrelevant to the legality of the blood draw.

Mitchell, 2019AP1942, ¶12. (App. 10).

Thus, per the court of appeals, because Mitchell's blood ultimately *was* drawn for medical purposes, the police search of his body was lawful. *Id.*, ¶16. (App. 13).

The court of appeals' view does not comport with the words of 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. Elsewhere in the opinion, the Court noted as a justification for this rule that in the case of an unconscious driver, police can "*reasonably anticipate* that [a driver's] blood may be drawn anyway, for diagnostic purposes, immediately on arrival." *Id.* at 2537-38 (emphasis added).

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?

The answer matters here. As the officer noted, Mitchell did end up staying in the hospital for more than a day: he had swallowed a large number of pills as part of a suicide attempt. (152:22-23; App. 24-25). But as the officer testified, he did not know about the pills—not when Mitchell was arrested and not when he was at the police station. (152:8; App. 10). It was only on the way to the hospital—*after* the officer had decided to obtain Mitchell's blood without a warrant—that Mitchell lost consciousness and the officer began to develop concerns about his medical condition. (152:15; App. 17). His decision to seek Mitchell's blood was not founded in medical emergency; it was motivated by criminal investigation.

This Court should accept review and hold that in deciding whether a suspect's blood "would have been drawn" for medical purposes, a court should assess the facts available to the police at the time they decide to perform a warrantless blood draw.

This is true for several reasons. First, 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 *Mitchell* required an officer to know what happened *after* he or she ordered a warrantless blood test?

Second, Fourth Amendment questions are objective ones. See, e.g., *State v. Larson*, 2003 WI App 150, ¶17, 266 Wis. 2d 236, 668 N.W.2d 338. 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.

Finally, under the doctrine of "police-created exigency," "police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." *Kentucky v. King*, 563 U.S. 452, 461 (2011). "[T]he government cannot justify a search on the basis of exigent circumstances that are of the law enforcement officers' own making." *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997).

Here, there was at least some delay at the police station, while Mitchell sat conscious in a holding cell. A delay "caused by police inaction ... may not be used as justification for a warrantless" search. *Com. v. Sergienko*, 503 N.E.2d 1282, 1286 (Mass. 1987). *See also State v. Dunlap*, 395 A.2d 821, 825 (Me. 1978) ("an exigency that will justify a warrantless search cannot be one which was created by unreasonable delay on the part of the law enforcement authorities"). This delay represented time during which police did not expeditiously pursue either actual consent or a warrant to take his blood. If the courts read *Mitchell* to sanction warrantless blood draws because of events occurring *after* the search, then such delays will be excused based on happenstance that could not possibly have informed the reasonableness (or unreasonableness) of police actions. The application of the Fourth Amendment should not turn on such whims of chance.

CONCLUSION

Gerald Mitchell respectfully requests that this Court grant review and reverse the court of appeals, and that it order that the evidence derived from his blood draw be suppressed.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in S. 809.19(8g)(a) for a petition. The length of this petition is 2,983 words.

CERTIFICATION AS TO APPENDIX

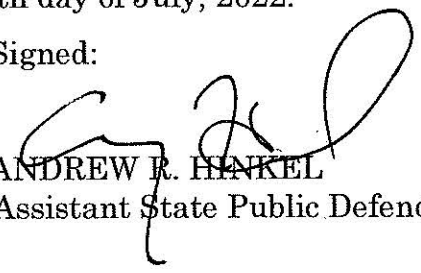
I hereby certify that filed with this petition is an appendix that complies with s. 809.19(8g)(b) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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.

Dated this 15th day of July, 2022.

Signed:



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