STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 20 AP 2006 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHRISTINA MARIE WIEDERIN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

DOAR, DRILL & SKOW, S.C.
Katie J. Bosworth (#1099686)
103 N. Knowles Ave.
P.O. Box 388
New Richmond, WI 54017-0388
(715) 246-2211

Attorney for Defendant-Appellant
Christina Marie Wiederin

On appeal from the Circuit Court
for St. Croix County,
Case No. 19CF44
Honorable R. Michael Waterman,
presiding.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant does not request oral argument on this appeal for the reason set forth in Wis. Stat. § 809.22(2)(b), but does request publication for the reasons set forth in § 809.23(a)(1).

STATEMENT OF THE ISSUES

1. Did the circuit court err in finding that the warrantless search of Defendant-Appellant's blood was justified based on the exigency exception to the warrant requirement?

2. If not exigency, was the warrantless search of Defendant-Appellant's blood justified by the good-faith exception to the warrant requirement?

STATEMENT OF THE CASE

The Accident.

At 11:10 P.M. on December 21, 2018, St. Croix County dispatch center received a report of a wrong way driver travelling westbound in the eastbound lane of traffic on Highway 35/64 in Somerset, Wisconsin. (R. 227 at 5:25 – 6:4.) Highway 35/64 is a divided highway with a concrete median separating the eastbound and westbound lanes. (R. 227 at 6:5-8.) At 11:17 P.M., dispatch received a report of a motor vehicle accident involving the wrong way driver on Highway 35/64. (R. 227 at 6:13-18.)

Within one minute of the accident, at 11:18 P.M., St. Croix County Sheriff's Deputy Jeff Hillstead arrived at the scene. (R. 227 at 12:16-21.) Hillstead was the first law enforcement officer to arrive. (R. 227 at 6:21-23.)

When Hillstead arrived, he went to speak to the driver of the black car involved in the accident, which was the car that was reportedly driving the wrong way on the highway. (R. 227 at 8:22-25.) The driver was pinned in the driver's seat of her vehicle. (R. 227 at 19:17-19.) There was no other person in her car. (R. 227 at 19:20-21.) It was clear immediately who was driving the black car, because she was still trapped in it from the moment officers arrived on scene. (R. 227 at 19:22 – 20:5.) In addition, witnesses on scene reported seeing the black vehicle travelling westbound in the eastbound lane collide head-on with another vehicle. (R. 227 at 8:10-23; 39:6-8.)

Almost immediately upon arriving on scene, officers realized that the driver of the other vehicle involved in the accident was deceased. (R. 227 at 38:6-22.)

Evidence of Impairment.

Within 5 minutes of Hillstead arriving on scene, or roughly at 11:23 P.M., he had a conversation with the driver of the black car. (R. 227 at 15:17-23.) The driver was conscious and advised Hillstead that she had consumed alcohol prior to driving, but she did not know how much she consumed. (R. 227 at 10:1-11, 15:24 – 16:2.) While speaking with her, Hillstead noticed she had slow and wavering speech. (R. 227 at 15:24 – 16:7.)

Hillstead identified the driver as Christina Marie Wiederin. (R. 227 at 9:1-3.) He identified her by looking in her vehicle for an identification card of some kind. (R. 227 at 10:23-25.) While doing so, he discovered a black and silver drawstring bag on the floor. (R. 227 at 10:25.) At that time, he did not inspect the

bag further or take it out of the vehicle to examine it, but he did see there was a bottle sticking out of the top of the bag. (R. 227 at 17:4-24.)

Ms. Wiederin was conscious the entire time she was at the scene of the accident and had multiple conversations with officers on scene. (R. 227 at 10:1-4; 20:6-15; 20:25 – 21:2; 23:23-25.) At 12:16 A.M. on December 22, 2018, Ms. Wiederin was extricated from her vehicle and transported by ambulance to Regions Hospital in St. Paul, Minnesota. (R. 227 at 42:25 – 43:2; 55:24 – 56:1.) Sgt. Thomas Williams left the scene at that time to follow Ms. Wiederin to the hospital. (R. 227 at 44:22 – 45:4.) He did so with the intent to obtain a sample of her blood for evidentiary purposes. (R. 227 at 44:7-10.) On the way to the hospital, Williams stopped at the St. Croix County Sheriff's Office to obtain a Wisconsin blood draw kit. (R. 227 at 44:22 – 45:2.)

After Ms. Wiederin was extricated from her vehicle, Deputy Hillstead inspected the drawstring bag he had noticed earlier. (R. 227 at 17:4-24.) The bag contained a bottle of Captain Morgan rum, which was half full, and a two liter bottle of diet coke. (R. 227 at 11:1-3.) At this time, Hillstead also discovered in Wiederin's center console a plastic sandwich baggy with the odor of marijuana, and a metal one-hitter pipe suspected to be used for marijuana. (R. 227 at 11:4-7.) After discovering these items, Hillstead called Sgt. Williams on the phone to advise him of these discoveries. (R. 227 at 18:7-20.) Sgt. Williams was on his way to Regions when he took the call from Hillstead. (R. 227 at 18:16-20.) Hillstead made the phone call informing Williams of the foregoing items discovered in the Wiederin vehicle at approximately 12:20 or 12:30 A.M. (R. 227 at 18:12-15.)

Other than discovery of the items in her vehicle and observing and speaking with Wiederin on scene, officers did not discover any additional evidence indicating impairment. (R. 227 at 27:21 – 28:22.) In other words, all evidence gathering efforts were completed by approximately 12:30 A.M., before Sgt. Williams arrived at the hospital.

The Blood Draw.

At approximately 1:05 A.M., Sgt. Williams arrived at Regions Hospital. (R. 227 at 45:5-6.) Upon arrival at the hospital, Williams was told that Ms. Wiederin was in the hospital imaging department, and that he could not obtain a blood sample from her during this process. (R. 227 at 45:8-12.) He proceeded to wait at the hospital for almost an hour. (R. 227 at 57:9-15.) He had the technological capability to apply for a warrant while waiting at Regions, but made no effort to. (R. 227 at 54:12-14; 58:20-23.)

By the time he spoke to a nurse again who allowed him to speak with Ms. Wiederin to conduct a blood draw, Wiederin had been administered drugs that were causing her to lose consciousness. (R. 227 at 47:5-10.) Sgt. Williams began reading Ms. Wiederin the Wisconsin Implied Consent form just before 2:00 A.M. (R. 227 at 56:21 – 57:8.) However, by the time he finished reading the form, Ms. Wiederin's eyes were closed and she appeared to be unconscious. (R. 227 at 50:22 – 51:7.) Wiederin did not verbalize consent to the blood draw. (*Id.*) Nonetheless, the officer directed the Regions Nurse to take a sample of Ms. Wiederin's blood and said sample was taken at 2:00 A.M. (R. 227 at 51:8-11, 18-20.)

The Failure to Obtain a Warrant.

Prior to responding to the accident, Sgt. Williams researched procedures for obtaining warrants for blood draws in Minnesota. (R. 227 at 52:16-25.) Knowing that Ms. Wiederin would be transported to Regions Hospital in St. Paul, Minnesota, during the 59 minutes between the time of the initial accident report and Wiederin's extraction from her motor vehicle, Sgt. Williams again researched the procedures to apply for and obtain a warrant in Minnesota. (R. 227 at 55:2-23.) He discovered that the first step was to draft a warrant. (R. 227 at 59:1-6.) A warrant application is drafted electronically from his squad vehicle. (R. 227 at 22:17 – 23:7; 58:20 – 59:11.) After that, he was to contact the St. Paul Police Department Watch Commander, who would walk him through the next steps and assist with submitting and obtaining a warrant electronically. (*Id.*) Despite having taken time before responding to the scene and while at the scene to research the procedure, and despite sitting and waiting at the hospital for nearly an hour, he made no effort to undertake any step in the process. (R. 227 at 52:1-3.)

Sgt. Williams explained that the reason he never tried to apply for a warrant was because the preferred procedure was to first ask Ms. Wiederin for consent, and then if she refused consent to apply for a warrant. (R. 227 at 52:1-12.) However, he also testified that in applying for a Wisconsin warrant, he could have included an explanation in the warrant affidavit that he had not had an opportunity to speak with the suspect to ask for consent, but he was applying for a warrant now based on all the information he had (because there was a risk the suspect would lose consciousness.) (R. 227 at 59:23 – 60:6.) He offered no reason why he could not include the same explanation in a Minnesota warrant application. (R. 227 at 60:7-14.)

Sgt. Williams also had no knowledge as to how long it would have taken to obtain a search warrant for Ms. Wiederin's blood using the Minnesota warrant procedures for out of state officers. (R. 227 at 59:18-20.)

The Lack of Emergent Circumstances.

Ultimately, six law enforcement officers arrived on scene in total: four St. Croix County Sheriff's Deputies (Dep. Hillstead, Sgt. Coleman, Sgt. Kennett, and Sgt. Williams) and two Somerset Police Officers (Officers Olson and Trepczyk). (R. 227 at 6:24 – 7:2, 13:3-16, 14:2-4.)

After Ms. Wiederin was extricated from her vehicle at approximately 12:16 A.M., the chaos and emergent situation had dissipated significantly. (R. 227 at 22:3-13.) Things had "slowed down" according to Hillstead. (R. 227 at 11:19-25, 12:1-8.)

None of the officers that were on scene that night made any effort to obtain a search warrant for Ms. Wiederin's blood. (R. 227 at 22:14-16, 37:8-23.)

The Appeal.

On September 13, 2019, Wiederin made a motion to suppress the unlawful search of her blood without a warrant. (R. 51.) On October 29, 2019, a hearing was held on said motion. (*See* R. 227.) On December 27, 2019, the Circuit Judge issued a written decision denying the Motion to Suppress, finding that exigent circumstances justified the warrantless blood draw. (R. 82; App. at 9.)

On May 15, 2020, Ms. Wiederin pled No Contest to First Degree Recklessly Endangering Safety, a Class F felony, and Homicide by Vehicle, Use of Controlled Substance (THC), a Class D Felony, pursuant to a plea agreement whereby the State was bound to not seek more than 9 years' incarceration at sentencing. (*See* R. 229 at 8:2-7.) At the sentencing hearing on June 24, 2020, the State asked the Judge to sentence Ms. Wiederin to 9 years of initial confinement. (R. 230 at 27:6-9.) The State's sentencing expert recommended in its pre-sentence investigation report that the Judge sentence Ms. Wiederin to somewhere between 7-10 years of initial confinement. (R. 174 at 37.) The defense and the defense's sentencing expert advocated for a sentence of 1-3 years of initial confinement with the maximum extended supervision period of 15 years. (R. 230 at 112:17-24.) The Circuit Judge ignored the parties' recommendations for sentencing and sentenced Ms. Wiederin to the maximum term in prison of 15 years, with no eligibility for treatment programming or early release. (R. 230 at 135:6-20; 136:23-24); (R. 213; App. 1-4.)

Wiederin appealed the circuit court's denial of her motion to suppress. (R. 221.) Wiederin submits this brief in support of her request for appellate relief, as the circuit court erred in finding that exigency justified the warrantless search of her blood. Wiederin asks this Court to overturn the circuit court's denial of her suppression motion.

ARGUMENT

I. STANDARD OF REVIEW

The Appellate Court applies a two-step standard of review when reviewing a motion to suppress evidence. *See State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, the circuit court's findings of fact are upheld unless clearly erroneous. *See id.* Next, the circuit court's application of constitutional principles is reviewed *de novo*. *See id.* In this appeal, Defendant-Appellant challenges the circuit court's application of constitutional principles to the facts.[1]

II. GOVERNING CONSTITUTIONAL PRINCIPLES.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. *State v. Phillips*, 577 N.W.2d 794, 218 Wis. 2d 180, 195 (1998). The U.S. Supreme Court has explained the reason for the proscription against unreasonable searches and seizures is that "[t]he integrity of an individual's person is a cherished value of our society." *United States v. Schmerber*, 384 U.S. 757, 772 (1966). "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* at 772. As such, a blood draw for evidentiary purposes is a Fourth Amendment search that necessitates a warrant, unless the particular facts of the case provide some acknowledged exception to the warrant requirement. *Id.* at 770.

"The State bears the burden of proving that the warrantless search falls within one of these narrowly drawn exceptions." *See e.g. State v. Rome*, 2000 WI App 243, ¶ 11, 239 Wis.2d 491, 620 N.W.2d 225.

Under the exigent circumstances exception, a warrantless search is allowed only when "there is compelling need for official action and ***no time*** to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (emphasis added.)

The mere dissipation of alcohol is not a sufficient basis alone to permit a warrantless blood draw on grounds of the exigency exception to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013). "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152.

[1] The only quasi-factual finding that Defendant-Appellant takes issue with is the circuit court's finding that some practical circumstance prevented Sgt. Williams from applying for a warrant while he was waiting at Region's Hospital. *See infra*, pages 15-16.

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id.

Moreover, the fact that the suspected impaired driver is unconscious in and of itself does not justify a warrantless blood draw, though it is often a factor. In order to justify a warrantless blood draw, even of an unconscious person, the proper analysis centers on whether exigency justified the search. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

"Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. 141 at 156.

III. THE CIRCUIT COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS ON GROUNDS OF EXIGENCY.

A. No Practical Problems Existed So As To Prevent Officers From Obtaining A Warrant Within A Timeframe That Afforded Officers The Opportunity To Gather Reliable Evidence.

It is important to note that just because there is an accident or an emergent and chaotic situation that officers are dealing with in a drunk driving investigation does not automatically mean there is exigency for purposes of the Fourth Amendment. Exigency in the Fourth Amendment context means that there was some practical and specific reason that officers could not obtain a warrant within a timeframe that ensured they could still gather reliable evidence (i.e. obtain blood whose alcohol contents had not dissipated significantly). *McNeely*, 569 U.S. 141 at 152.

i. All information relevant to probable cause of impairment was obtained within moments of police arrival on scene.

This is not a case where the circumstances required additional time to investigate to gather probable cause.[2] *Compare State v. Tullberg*, 2014 WI 134, ¶

[2] Defendant-Appellant is not conceding that there was sufficient probable cause for a warrant for the blood draw. That is not something that can be conceded, as it is a Judge's function to decide such issues. Whether a Judge would have granted such a warrant upon proper application

44, 359 Wis. 2d 421, 447, 857 N.W.2d 120, 133 (finding exigency existed where the investigating officer did not have probable cause to believe the suspected drunk driver operated a motor vehicle until almost three hours after the accident, because it was not until that point that the officer knew that defendant that operated the vehicle). In *Tullberg*, the officer came upon a motor vehicle accident and the defendant was not present at the scene. *Id.* at ¶¶ 45-46. No witnesses were available to be interviewed about who was operating the vehicles involved in the accident. *Id.* at ¶ 45. The defendant had apparently left the scene of the accident, went to his mother's house, then went to a hospital in another county, causing significant delay for the officer in terms of locating and interviewing the defendant about who was driving. *Id.* at ¶ 46. Once the officer finally tracked the defendant down, the defendant lied to the officer about driving, and the officer had to spend additional time locating and interviewing other witnesses before he could determine the driver of the vehicle involved was in fact the defendant. *Id.* at ¶ 47. By the time the officer had probable cause to believe the defendant operated a vehicle while impaired, almost three hours had passed from the time of the accident. *Id.* In that situation, the Wisconsin Supreme Court found exigency justified the warrantless blood draw, because the officer was in a situation where he could not obtain reliable evidence[3] if he put off a blood draw any further by applying for a warrant. *Id.* at ¶¶ 50-51. Importantly, the Court specifically noted that, unlike this case, the investigating officer did not improperly delay in obtaining a warrant. *Id.* at ¶ 44. Rather, through no fault of his own, he merely did not obtain the necessary probable cause to indicate drunk driving had occurred until nearly three hours after the accident.

In the case at hand, there was no question upon Hillstead's arrival at the scene that Ms. Wiederin was operating a motor vehicle involved in the accident, as she was still pinned in the driver's seat of her vehicle. Her vehicle also matched the description of the wrong way driver reported moments earlier. Witnesses at the scene, spoken to within moments of officers' arrival, pointed out Ms. Wiederin's vehicle and explained that that was the vehicle they saw drive at high speeds the wrong way down the highway and collide with the decedent's vehicle. Within minutes of arriving at the scene, Hillstead spoke with Ms. Wiederin and obtained an

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is irrelevant. The issue here is whether the State can prove an exception to the warrant requirement justified the otherwise illegal blood draw. In conducting such an analysis, it is not proper to make an argument that the warrant would have been granted anyhow, so the warrantless blood draw was therefore permissible. Such an argument, if engaged in by the Courts, would erode Fourth Amendment protections altogether.

All efforts to gather probable cause were concluded by 12:30 A.M. at the very latest. (R. 227 at 18:7-20; 27:21 – 28:22.) No additional evidence relevant to impairment was gathered after this point and therefore it cannot be said that additional time was needed to investigate probable cause.

[3] Because of the dissipation of alcohol in the bloodstream over time.

admission that she had consumed alcohol prior to driving. He also observed her behavior to be indicative of drinking (the slow and wavering speech). Finally, he observed what he believed could be an open container of alcohol in the vehicle. Officers had all the information needed to apply for a warrant within five minutes of the accident. There was no circumstance here, as in *Tullberg*, that required additional time to investigate.

ii. Multiple officers were on scene and available to apply for a warrant.

This is not a case where only one officer was available to investigate, secure the scene, gather evidence, and provide emergency medical assistance. *Compare State v. Howes*, 2017 WI 18, ¶¶ 5, 45, 373 Wis. 2d 468, 497, 893 N.W.2d 812, 826, *cert. denied*, 138 S. Ct. 138, 199 L. Ed. 2d 82 (2017). There were six officers on scene at the crash.

By 12:30 A.M., after officers confirmed an open container of alcohol and suspected marijuana were in the vehicle, all evidence-gathering activities, including obtaining witness statements and searching the various vehicles, had ceased. But for obtaining Wiederin's blood alcohol concentration, the investigation had essentially concluded.

Also by 12:30 A.M., Ms. Wiederin had left the scene by ambulance, with Sgt. Williams following behind. Because the victim was deceased, after Wiederin began transport all emergency medical personnel left the scene.

Thus, by 12:30 A.M. at the latest, when Ms. Wiederin and Sgt. Williams were on route to the hospital, the chaos and emergent situation had subsided. Any exigency that once existed was extinguished, freeing up officers from the various initial duties that are required of them at an accident scene, and making them available to apply for a warrant.

B. Sgt. Williams in Particular Had The Time, Knowledge, And Capability To Apply For A Warrant But Failed To.

Perhaps the strongest evidence of officer availability and time to apply for a warrant without compromising the reliability of the blood result is the fact that Sgt. Williams literally sat at the hospital doing nothing but waiting for almost an hour.

By 1:05 A.M., Sgt. Williams had arrived at the hospital, armed with a Wisconsin blood kit and knowledge of Minnesota warrant procedure. He had the technological capability of applying for a warrant from the hospital as well. Instead of starting the warrant application process, he chose to sit at the hospital for almost an hour, doing nothing but waiting for the chance to speak to Ms. Wiederin.

Essentially, Sgt. Williams found himself in the exact situation described in *McNeely*:

> a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

McNeely, 569 U.S. 141 at 152.

i. There was no requirement that Sgt. Williams request Ms. Wiederin's consent before applying for a warrant.

The above facts notwithstanding, the circuit court found that Williams was not able to initiate the warrant process during the hour he was sitting at the hospital because it would have diverted him from Ms. Wiederin at the expense of missing an opportunity to see her before she went into surgery (and presumably ask her if she consented to a blood draw). (R. 82 at 4.; App. at 8.) The circuit court's reasoning is flawed for several reasons. First, it presumes that Williams was required to first attempt to obtain consent from Ms. Wiederin for the search of her blood before he applied for a warrant. There is no such requirement in Wisconsin law. This exact argument was addressed and rejected in *State v. Hay*, wherein the Court found that the exigency analysis is not limited to the time period and circumstances following a suspect's refusal to submit to a blood draw. 2020 WI App 35, ¶¶ 14, 15, 392 Wis. 2d 845, 855, 946 N.W.2d 190, 195. In other words, if there is time to apply for and obtain a warrant at any point in time during a drunk driving investigation, including the time before the reading of an implied consent form, the officer must do so. *Id.*

There is no reason Williams could not have gone ahead and applied for a warrant without first attempting to obtain consent, and explained in the warrant application that the driver had suffered severe injuries and was transported to the hospital, that medical personnel thus far were not allowing a blood draw, that the driver may have to undergo surgery and lose consciousness at the hospital, and therefore that the officer was applying for a warrant before attempting to obtain consent because there may not be a chance to obtain consent. (R. 227 at 59:23 – 60:14.) To be sure, this is the proper procedure according to the case law. *Id.*

ii. Even if Williams was required to request consent before he applied for a warrant, there was no practical circumstance preventing him from doing so.

Preliminarily, even if Sgt. Williams was required to first obtain Wiederin's consent before applying for a warrant (which he was not), the State presented no evidence whatsoever as to how long obtaining a warrant in Minnesota would have taken. Though Sgt. Williams researched the process, he had no idea how long it would take. Maybe it would have taken him an entire hour (in which case he still would have had time to obtain it by the time he talked to Ms. Wiederin again at 2:00 A.M.), maybe it would have taken him five minutes. He did not know, and without any evidence of how long the Minnesota warrant process takes, the circuit court's finding that Williams had no time to do it is unsupported by the record. *Compare Dieter*, 2020 WI App 49, ¶¶ 2, 6, 393 Wis.2d 796, 948 N.W.2d 431 (finding there was no time to apply for a warrant where the accident was reported several hours after it occurred and the evidence showed the warrant process would take 40 minutes).

Second, there were multiple occasions throughout the hour Ms. Wiederin was conscious and conversant on scene that the officers could have read her the Implied Consent form to attempt to get her consent. At least two officers had at least three different conversations with her while on scene before she was transported to the hospital, so there is no reason to believe the Implied Consent form could not have been read at that time.

The circuit court's reasoning conflates the reading of the form and actually performing the blood draw, which are two different things. Even if medical personnel would not allow the blood draw to occur on scene due to Ms. Wiederin's medical condition, that does not mean the officers could not have read Ms. Wiederin the Implied Consent form and obtained an answer one way or another; if she refused they could start the warrant process and if she consented they could draw her blood as soon as medical personnel would allow. The inability to have her blood drawn on scene did not prevent the reading of the Implied Consent form/request for a blood draw on scene.

Finally, the Court's reasoning is illogical. The process to obtain a warrant in Minnesota for an out of state officer/accident started with Williams drafting a warrant and then calling various Minnesota police officers. Williams could have started the warrant process by initiating phone calls while on route to Region's. He could have started it while sitting and waiting at Region's. He could have delegated another officer to start it at either of those times. He made no attempt to make those calls in the time he sat waiting at Region's, despite having the time and technological capability to do so. To find that making a phone call from his cellular

phone while he was just sitting there waiting would have somehow diverted Sgt. Williams' attention from Ms. Wiederin is baseless. Neither the State nor the circuit court's Order offered a reason why these phone calls to apply for a warrant could not have been conducted (either by Williams himself or another officer) while Sgt. Williams was sitting at Region's for an hour, essentially doing nothing.

Just as in *Hay*, the officer here provided "scant reason why he could not have . . .prepar[ed] a warrant application," in the time he was on route to Region's or sitting and waiting at Region's. *Hay*, 2020 WI App 35 at ¶ 18. In time periods marked by "the lack of complication and absence of chaos," as was the time after Wiederin was extricated from her vehicle and the scene was cleared, there is nothing that takes priority over a warrant application process. *Id.* at ¶ 19.

C. The Fact That Ms. Wiederin Became Unconscious By Way Of Medication Administered To Her At The Hospital Almost Three Hours After The Car Accident Does Not Change The Exigency Analysis.

Contrary to the circuit court's reasoning, the fact that nearly three hours after the accident Ms. Wiederin became unconscious at the hospital is not a reason to deem the situation exigent and excuse the warrant requirement.

Many of the Wisconsin cases that deal with the exigency exception in the context of a drunk driving suspect involve an unconscious person in need of immediate medical attention. Admittedly, Wisconsin Courts have frequently found the unconsciousness of a driver suspected of operating while impaired to be a factor in determining exigency. *See e.g State v. Dalton*, 2018 WI 85 at ¶ 44, 383 Wis. 2d 147, 168, 914 N.W.2d 120, 130; *Howes*, 2017 WI 18 at ¶ 45. Indeed, the U.S. Supreme Court recently said almost every situation involving a police officer encountering an unconscious driver suspected of drunk driving would be an exigent circumstance such that a warrantless blood draw is permissible. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) ("When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital," there will almost always be exigent circumstances).[4]

[4] Prior to *Mitchell v. Wisconsin*, Wisconsin Courts were split as to whether it was constitutionally permissible to conduct a warrantless blood draw of an unconscious person incapable of giving actual consent to search, on grounds that the Implied Consent Law (Wis. Stat. § 343.305) justified such a search. *See e.g. State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867; *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745. In 2018, the Wisconsin Supreme Court overruled *Padley* and held that warrantless blood draws of unconscious persons per Section 343.305 were constitutionally acceptable. *State. v. Mitchell*, 2018 WI 84, ¶ 66, *vacated and remanded*, 139 S. Ct. 2525 (2019). The issue was appealed to the U.S.

But it is imperative to note that the ***police did not come upon an unconscious driver here, nor did Ms. Wiederin lose consciousness due to consumption of alcohol.*** In that way, this case is distinguishable from *Mitchell*, which dealt with a very drunk and uncooperative suspect who wandered off from the scene and began losing consciousness shortly after police arrival due to his extreme state of intoxication. *Id.* at 2532. The court reasoned that such a situation makes it difficult, if not impossible, for officers to obtain information and evidence from the suspect and therefore heightens the exigency. *Id.* at 2537, 2539.

In the case at hand, Ms. Wiederin was fully conscious and coherent at the scene, during which time she had multiple conversations with multiple police officers, cooperated with all questioning, and admitted to consuming alcohol. She remained conscious until almost three hours after the accident, when she was administered drugs at the hospital that caused her to be unconscious.

To be sure, unlike in *Mitchell*, the only reason Sgt. Williams found himself dealing with an unconscious person in the first place was that he waited until she was in the hospital and became unconscious from medication before he ever attempted to obtain consent/get a warrant. Wiederin was not unconscious during the overwhelming majority of the time after the accident and before the blood draw. Her medication-induced unconsciousness at 2:00 A.M. did nothing to delay or otherwise impede the officers' investigation in the preceding 2 hours and 43 minutes before she became unconscious. As such, Ms. Wiederin's subsequent unconsciousness at the hospital cannot be used as a justification for the officer's failure to apply for a warrant.

Indeed, "the fact that a suspect fell unconscious at some point before the blood draw does not mean that there was insufficient time to get a warrant. And if the police have time to secure a warrant before the blood draw, the Fourth Amendment mandates that they do so." *Mitchell*, 139 S. Ct. at 2547 (Sotomayor, J., dissenting) (citing *McNeely*, 569 U.S. at 152).

Supreme Court, which granted *certiorari* in *Mitchell v. Wisconsin*, but declined to answer the question certified to it (whether warrantless blood draws on unconscious persons pursuant to Wis. Stat. § 343.305 were constitutionally acceptable) and instead held that there must be exigent circumstances to conduct a warrantless blood draw. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 204 (2019). Importantly, not one Supreme Court justice accepted the position of the Wisconsin Department of Justice that a statute can deem an unconscious person to have consented to a Fourth Amendment Search. *Id.* The Wisconsin Court of Appeals has since held that the unconscious driver provision in Wis. Stat. § 343.305 is unconstitutional and does not satisfy any exception to the Fourth Amendment's warrant requirement. *State v. Prado*, 2020 WI App 42, ¶ 3, 393 Wis. 2d 526, 531, 947 N.W.2d 182, 184. Accordingly, unconsciousness is addressed here only in the larger context of exigency.

IV. PLAINTIFF-RESPONDENT MAY NOT RELY ON THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT.

The good-faith exception to the exclusionary rule applies when "the officers conducting an illegal search acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *United States v. Leon*, 468 U.S. 897, 918 (1984)). It is anticipated that the State of Wisconsin will argue that Sgt. Williams was justified in conducting the warrantless blood draw here, because he was relying in good faith on the Implied Consent Statute, which has since been invalidated. *See State v. Prado*, 2020 WI App 42, ¶ 3, 393 Wis. 2d 526, 531, 947 N.W.2d 182, 184.[5]

Preliminarily, the State has waived the right to argue the good faith exception justified the warrantless search, because it was never argued or raised in circuit court. *See e.g. Apex Elecs. Corp. v. Gee*, 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998).

Indeed, in this case Sgt. Williams testified that he believed he could conduct the warrantless search on grounds of the exigency exception. (R. 227 at 51:6-17.) He did not testify that he ever relied on the Implied Consent Statute, nor did the State ever so argue. *Compare State v. Prado*, 2020 WI App 42, ¶ 5, 393 Wis. 2d 526, 532, 947 N.W.2d 182, 185.

Moreover, this case was argued and briefed after *Mitchell* was decided. The blood draw occurred while *Mitchell* was pending before the Supreme Court, so the same considerations about good faith reliance that were at play in *Prado*, which dealt with a stop that occurred in December 2014, simply did not exist here given the state of the law in December 2018 when the motor vehicle accident happened.

CONCLUSION

For all of the foregoing reasons, the Court must reverse the circuit court's December 27, 2019, Order denying Wiederin's motion to suppress.

[5] *See also supra*, footnote 4.

Dated: February 23, 2021.

electronically signed by Katie J. Bosworth

DOAR, DRILL & SKOW, S.C.
By: Katie J. Bosworth (#1099686)
Attorneys for Defendant/Appellant
103 North Knowles Avenue
PO Box 388
New Richmond, WI 54017-0388
kbosworth@doardrill.com

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Time New Roman proportional serif font, printed at a resolution of at least 200 dots per inch, 13 point body text and 11 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 6,756 words.

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

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 s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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electronically signed by Katie J. Bosworth
DOAR, DRILL & SKOW, S.C.
By: Katie J. Bosworth (#1099686)
Attorneys for Defendant/Appellant
103 North Knowles Avenue
PO Box 388
New Richmond, WI 54017-0388
kbosworth@doardrill.com

APPENDIX OF DEFENDANT-APPELLANT

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