STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTINA MARIE WIEDERIN,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE R. MICHAEL WATERMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Christina Wiederin drove her car the wrong way on a divided highway and crashed it into an oncoming car, killing the other driver and seriously injuring herself. After emergency personnel extricated Wiederin from her car, she was taken by ambulance to a hospital in Minnesota. A law enforcement officer who had probable cause that Wiederin had driven while under the influence of an intoxicant went to the hospital seeking to obtain a blood sample. However, medical personnel would not conduct a blood draw while Wiederin was in the imaging department, or in surgery. The officer was given only a brief window of time in which to request a blood sample, but while he was reading Wiederin the Informing the Accused form, she fell unconscious and could not agree to or refuse a blood test. Hospital personnel drew Wiederin's blood at the officer's direction, nearly three hours after her crash.

1. Was the warrantless blood draw justified by exigent circumstances?

The circuit court answered "yes." It concluded that the circumstances officers faced at the crash scene and at the hospital were "the epitome of exigent circumstances that justify a warrantless blood draw," so it denied Wiederen's motion to suppress the blood test results.

This Court should answer "yes," and affirm.

2. Would suppression of the blood test results be unwarranted because the blood draw was justified under the unconscious driver provision in the implied consent law, or because of the good faith exception to the exclusionary rule?

The circuit court did not answer.

This Court should answer "yes," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and this case can be decided by application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

On December 21, 2018 at around 11:10 p.m., police were dispatched to a report of a car driving the wrong way on a divided highway near New Richmond. (R. 227:5–6.) At around 11:17 p.m., another call reported a head-on collision. (R. 227:6.) Deputy Jeff Hillstead arrived at the scene of the crash at 11:18 p.m. (R. 227:6, 12.) He observed a white car on the road and a black car on the median. (R. 227:7.) He observed that the driver of the white car showed no signs of life. (R. 227:7.)

Deputy Hillstead spoke to witnesses on the scene who reported seeing the black car traveling the wrong way on the highway. (R. 227:8.) He then spoke to the driver of the black car, whom he later identified as Wiederin. (R. 227:8–9.) Deputy Hillstead observed that Wiederin spoke softly and "obviously looked like she was in serious condition." (R. 227:9.) The deputy asked Wiederin if she had anything to drink, and she said she had consumed alcohol but did not know how much. (R. 227:10.) Wiederin denied taking any illegal or prescription drugs. (R. 227:10.) Deputy Hillstead saw a drawstring bag with a bottle sticking out, but he could not see if it was an alcohol bottle. (R. 227:17, 27.)

Fire department personnel arrived at 11:32 p.m., and after about 30 minutes of work were able to extricate Wiederin from her car at 12:03 a.m. (R. 227:35.) Once Wiederin was out of her car and in an ambulance, Sergeant Charles Coleman asked emergency personnel if they would

conduct a legal blood draw while Wiederin was in the ambulance if she consented to it. (R. 227:35–36.) However, a medic told the sergeant that he would not delay medical treatment for a blood draw. (R. 227:36.) Medical personnel did not want to delay transporting Wiederin because of the severity of her injuries. (R. 227:44.) Sergeant Coleman testified that the officers stayed out of the way because medical treatment was the top priority. (R. 227:37.)

The ambulance left for a hospital in St. Paul, Minnesota at 12:16 a.m. (R. 227:37.) Sergeant Williams went to the sheriff's department and obtained a blood test kit, and then drove to the hospital. (R. 227:44–45.) Deputy Hillstead remained at the scene and continued investigating. (R. 227:10–12, 17–18.) He saw that the drawstring bag contained a bottle of rum "that was over half gone" and a bottle of Diet Coke on the floor of the car. (R. 227:10–11.) And he found a plastic sandwich baggy with a trace amount of suspected marijuana and "one-hitter pipe commonly used to smoke marijuana." (R. 227:11.) Deputy Hillstead found the baggie and learned the contents of the bottle at 12:20 or 12:30 a.m., shortly after Wiederin was transported from the scene. (R. 227:11, 17.) He phoned Sergeant Williams to give him that information. (R. 227:11.)

Sergeant Williams arrived at the hospital around 1:05 a.m., and he was informed that Wiederin was in the imaging department. (R. 227:45.) He asked about a blood draw and was told that a blood draw could be conducted while Wiederin was in imaging, but could not be conducted once she got out of imaging. (R. 227:45.) At 12:55 a.m., a nurse went to check on Wiederin's status. (R. 227:46.) When the nurse returned, she told Sergeant Williams that Wiederin would be brought to surgery right after imaging, so a blood draw would not be conducted. (R. 227:46, 56–57.) When Sergeant Williams told the nurse about the severity of the crash and the importance

of the blood draw, the nurse contacted another nurse in imaging who said that Sergeant Williams could see Wiederin before she went into surgery. (R. 227:46–47.) However, Sergeant Williams was told that Wiederin had been administered drugs that were causing her to go into and out of consciousness. (R. 227:47.) When Sergeant Williams got to imaging, he observed that her eyes were open. (R. 227:47.) He said Wiederin's name, and Wiederin said "hi." (R. 227:47.) He read her the Informing the Accused form and requested a blood sample. (R. 227:47.) However, Wiederin had become unconscious and did not respond. (R. 227:47.)

Sergeant Williams believed that there were exigent circumstances because Wiederin was about to be taken into surgery where there would be no opportunity for a blood draw. (R. 227:51.) He therefore asked that a nurse conduct a blood draw. (R. 227:51.) Wiederen's blood was drawn at approximately 2:00 a.m. (R. 227:51.) A test of Wiederin's blood sample revealed an alcohol concentration of 0.222, and the presence of Delta-9 THC, a restricted controlled substance. (R. 29; 41:1.)

Sergeant Williams testified that he did not get a search warrant because when a suspect is conscious, like Wiederin was at the scene, the sheriff's department policy was to ask for consent prior to obtaining a search warrant. (R. 227:52, 57.) He said that no other officers were available to apply for a warrant. (R. 227:57–58.) He said that when he went to the hospital in Minnesota, he planned to ask Wiederin to give a blood sample, and then if she refused, he would apply for a search warrant. (R. 227:62–63.) Sergeant Williams said that to the best of his knowledge, a Wisconsin officer who wanted to get a search warrant in Minnesota would have to draft a warrant, contact the St. Paul Watch Commander who would get the officer in touch with an officer to help with an electronic warrant application, and then find a Ramsey

County judge to sign a warrant. (R. 227:59.) Sergeant Williams had never applied for a Minnesota warrant, and he did not know how long it would take to obtain a warrant. (R. 227:59.)

The State charged Wiederin with eight crimes: homicide by intoxicated use of a vehicle while having a prior OWI-related conviction, homicide by use of a vehicle with a prohibited alcohol concentration while having a prior OWI-related conviction, homicide by use of a vehicle with a detectable amount of a restricted controlled substance in her blood, possession of drug paraphernalia, and four counts of first degree recklessly endangering safety.[1] (R. 109.)

Wiederin moved to suppress her blood test results, asserting that the warrantless blood draw violated the Fourth Amendment. (R. 51.) The circuit court denied Wiederin's motion because it concluded that the blood draw was justified by exigent circumstances. (R. 82.) It concluded that "this is not a typical drunk driving case. This case is the epitome of exigent circumstances that justify a warrantless blood draw." (R. 82:2.)

The circuit court noted that Wiederin "was seriously injured and trapped in her car for nearly an hour," and "inaccessible to law enforcement" officers. (R. 82:3.) The court concluded that, at the scene, "At no point, did the officers have available staff or sufficient time to apply for a warrant, much less have access to Ms. Wiederin to execute it while she was in Wisconsin." (R. 82:3.)

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[1] The recklessly endangering safety charges related to four juveniles in a vehicle whose driver had to take evasive action to avoid Wiederen's car hitting the juvenile's car head on while driving the wrong way on the highway. (R. 14:2, 5.)

The court concluded that "[t]he exigency went unabated in Minnesota." (R. 82:3.) It noted that at the hospital, Wiederin was inaccessible to law enforcement for nearly an hour while she was being examined in the imaging room. (R. 82:3.) The court recognized that Sergeant Williams "needed to wait until [Wiederin] became available, and he had no way of knowing when that would happen." (R. 82:4.) The court concluded that had Sergeant Williams left to attempt to obtain a warrant, he "easily could have missed this opportunity to see Ms. Wiederin." (R. 82:4.) And it concluded that "had it not been for [Sergeant] Williams persuading the right nurse at the right time, Ms. Wiederin would have been moved to surgery and beyond the reach of the law, presumably for hours." (R. 82:4.) The court also concluded that the officers who remained at the scene of the crash "were all fully occupied with high-priority, time sensitive tasks that could not be responsibly postponed for a warrant application." (R. 82:5.)

Wiederin plead no contest to two crimes, first degree recklessly endangering safety and homicide by use of a motor vehicle with a detectable presence of a controlled substance in her blood, as part of a plea agreement in which the remaining charges were dismissed but read in at sentencing. (R. 229:7–9, 19.) The circuit court imposed 12 years and 6 months of imprisonment for the recklessly endangering safety, including 7 years and 6 months of initial confinement. (R. 230:135.) It imposed 25 years of imprisonment for the homicide, including 15 years of initial confinement. (R. 230:135.) The court made the sentences concurrent. (R. 230:135.)

Wiederin now appeals. (R. 221.)[2]

STANDARD OF REVIEW

An appellate court reviews an order granting or denying a suppression motion as a question of constitutional fact that it decides in a two-step inquiry. *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120. First, the court applies a deferential standard when it reviews the circuit court's findings of historical fact, "upholding them unless they are clearly erroneous." *Id.* Second, it independently applies the constitutional principles to the historical facts. *Id.*

A reviewing court determines whether exigent circumstances justify a warrantless blood draw under the same two-step inquiry. *State v. Howes*, 2017 WI 18, ¶ 17, 373 Wis. 2d 468, 893 N.W.2d 812 (plurality opinion).

ARGUMENT

I. The warrantless blood draw from Wiederin was justified by exigent circumstances.

A. A warrantless blood draw may be justified by exigent circumstances when it is necessary to avoid the imminent destruction of evidence.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protects against unreasonable searches and seizures. *State v. Dalton*, 2018 WI 85, ¶ 38, 383 Wis. 2d 147,

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[2] Wiederin is appealing the circuit court's order denying her motion to suppress evidence. (R. 221.) Wiederin is not appealing her judgement of conviction, and she does not assert that if her appeal were successful, she would be entitled to withdraw her no contest pleas.

914 N.W.2d 120. Warrantless searches are presumptively unreasonable unless an exception to the warrant requirement applies. *Tullberg*, 359 Wis. 2d 421, ¶ 30. One exception is exigent circumstances, which "allows warrantless searches 'to prevent the imminent destruction of evidence.'" *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533 (2019) (quoting *Missouri v. McNeely*, 569 U.S. 141, 149 (2013)).

Generally, "[w]hether 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. at 156. The dissipation of alcohol in the blood does not create a per se exigency. *Id.* at 145. But "the natural dissipation of alcohol in the bloodstream may present a risk that evidence will be destroyed and may therefore support a finding of exigency in a specific case." *Dalton*, 383 Wis. 2d 147, ¶ 40 (citing *McNeely*, 569 U.S. at 156).

Whether exigent circumstances justify a blood draw is determined objectively, based on what the officer knew at the time: "The police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction," so "we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances." *McNeely*, 569 U.S. at 158 n.7. "Reviewing courts in turn should assess those judgments 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Id.* (citation omitted). A reviewing court is "not in the business of second-guessing law enforcement's reasonable allocation of resources in a complex and evolving situation." *Dalton*, 383 Wis. 2d 147, ¶ 49 (citing *United States v. Sokolow*, 490 U.S. 1, 11 (1989)). "When presented with multifaceted and chaotic circumstances . . . law enforcement needs flexibility to determine its priorities." *Id.* Exigent circumstances depend on the reasonableness of an officer's belief that "the delay

necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Mitchell*, 139 S. Ct. at 2537 (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)).

Two factors that heighten the exigency for a warrantless blood draw are a car crash or unconsciousness. In *Schmerber*, the Supreme Court concluded that a blood draw was justified by exigent circumstances because "a car accident heightened [the] urgency" that is "common to all drunk-driving cases." *Mitchell*, 139 S. Ct. at 2533. And in *Mitchell*, the Supreme Court concluded that a driver's unconsciousness almost always heightens the urgency and constitutes an exigency. *Id*

In *Mitchell*, the Supreme Court established a "general rule" for the "category of cases" where "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531. When a person suspected of impaired driving is unconscious, "a warrant is not needed" to administer a blood draw. *Id.* Instead, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539. The Court's holding applies to cases in which "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 or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." *Id.* Under those circumstances, police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.*

B. As the circuit court recognized, the blood draw from Wiederin was justified by exigent circumstances.

The circuit court rejected Wiederin's motion to suppress evidence because it correctly concluded that the warrantless blood draw was justified by exigent circumstances. The court recognized that this "is not a typical drunk driving case," but instead, "[t]his case is the epitome of exigent circumstances that justify a warrantless blood draw." (R. 82:2.)

The circuit court was correct. The moment that Wiederin's blood was drawn—at 2:00 a.m.—was both the first and last opportunity for a blood draw. At the crash scene, medical personnel would not have conducted a blood draw even if Wiederin had agreed to one. (R. 227:35–36.) And once Wiederin arrived at the hospital in St. Paul, she was in imaging, and hospital personnel would not conduct a blood draw while she was in imaging or in surgery. (R. 227:45–46, 56–57.)[3] The first opportunity for a blood draw was in the short period of time between Wiederin being treated in imaging, and her going into surgery. And that is precisely when her blood was drawn. At that point, approximately 2 hours and 43 minutes had passed since Wiederin crashed her car into another car, killing the other driver. When Sergeant Williams read the Informing the Accused form to Wiederin and she became unconscious before she could either agree to give a sample or refuse to give one, he knew that Wiederin was about to go into surgery, and that medical personnel would not draw her blood while she was in surgery. (R. 227:46, 56.) As the circuit court recognized, "A nurse gave [Sergeant

[3] Nothing in the record indicates that medical personnel would have drawn Wiederin's blood in imaging or surgery if they had been resented with a warrant authorizing a blood draw.

Williams] his one and only opportunity to collect blood." (R. 82:4.)

Since nearly three hours had passed since Wiederin's crash and she was about to go into surgery where medical personnel would not draw her blood for police purposes, the circuit court was obviously correct in concluding that exigent circumstances justified a warrantless blood draw. This truly was a "now or never" moment that was "the epitome of an exigent circumstance." *Tullberg*, 359 Wis. 2d 421, ¶ 50 (citations omitted). After all, the need to administer a blood draw within three hours of driving contributes to the exigency. As the supreme court noted in *Dalton*, 383 Wis. 2d 147, ¶ 52, "Given the surrounding circumstances, the dissipation of alcohol in Dalton's blood and the rapidly closing three-hour window to accomplish a presumptively admissible and accurate blood draw, Deputy Stolz was presented with an exigent circumstance. Wis. Stat. § 885.235(1g)." As the court recognized in *Dalton*, "[s]uch events gave rise to a reasonable belief that a delay in procuring a warrant would risk the destruction of evidence." *Id.* Just as in *Dalton*, "[g]iven the surrounding circumstances, the dissipation of alcohol in [Wiederin's] blood and the rapidly closing three-hour window to accomplish a presumptively admissible and accurate blood draw, [Sergeant Williams] was presented with an exigent circumstance." *Id.*

C. Wiederin has not shown that it was unreasonable for officers not to have obtained a search warrant before her blood was drawn.

On appeal, Wiederin does not argue that at the time her blood was drawn, officers did not face an emergency. She instead argues that officers should have obtained a warrant before her blood was drawn. (Wiederin's Br. 15–18) She claims that officers could have read her the Informing the

Accused form at the crash scene, that officers at the scene had time to apply for a warrant, and that Officer Williams had time to apply for a warrant while on the way to the hospital or after he arrived at the hospital. (Wiederin's Br. 15–18.) The circuit court correctly rejected each of these arguments.

It was entirely reasonable that officers did not read the Informing the Accused form to Wiederin and ask her to submit to a blood draw when she was trapped in her car. As the circuit court found, Wiederin "was seriously injured and trapped in her car for nearly an hour," and "inaccessible to law enforcement while EMT's held her cervical spine steady and firefighters cut away her car." (R. 82:3.)

Wiederin points out that when officers arrived, there was no question that she was driving the car in which she was trapped in the driver's seat. (Wiederin's Br. 14.) She suggests that officers had probable cause "within five minutes of the accident" and therefore they did not require "additional time to investigate." (Wiederin's Br. 15.) She points to her admission that she had consumed alcohol and Deputy Hillstead's observation of her slow and wavering speech and "what he believed could be an open container of alcohol in the vehicle." (Wiederin's Br. 15.)

However, while Wiederin did admit to drinking, she did not admit that she had consumed a great deal of alcohol (her blood test revealed an alcohol concentration of 0.22), and she denied using drugs (her blood test revealed the presence of THC and other drugs). (R. 227:10; 29; 41:1.) Deputy Hillstead testified that when he spoke to Wiederin, she "was talking softly. She obviously looked like she was in serious condition." (R. 227:9.) Wiederin points to nothing in the record even suggesting that Deputy Hillstead believed her speech was "indicative of drinking" rather than of having crashed her car into another car, leaving her in serious condition and trapped in her car. (Wiederin's Br. 15.) And Wiederin points to nothing

in the record suggesting that Deputy Hillstead believed that the bottle he observed in the car "could be an open container of alcohol." (Wiederin's Br. 15.) He testified that he saw a drawstring bag with a bottle sticking out, but he could not tell whether it was an alcohol bottle. (R. 227:17, 27.)

Wiederin seems to be arguing that the officers had no need to investigate further because they should have understood that they had probable cause even *before* they found that the bottle was an open container of alcohol, and that there was marijuana and a pipe in the center console. After all, if there was no probable cause the officers could not have requested a blood sample from her even if she weren't seriously injured and trapped in her car. But she does not concede that the officers had probable cause for a warrant for blood draw at any point, even *after* they found the open bottle, the marijuana, and the pipe. (Wiederen's Br. 13 n.2.)[4]

In any event, Wiederin points to no authority indicating that when officers have a bare minimum of probable cause, they should simply stop investigating and obtain a warrant, hoping that the information they have is sufficient for the warrant. Officers obviously needed to continue to investigate the scene, including investigating Wiederen's car once she was extricated from it and they had access to it. And the more information officers can include in a warrant application tending to show driving while under the influence, with a prohibited alcohol concentration, or after using drugs, the greater the chances that they cross the probable cause threshold.

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[4] It seems inevitable that had the officers arrested Wiederin while she was trapped in her car, and read her the Informing the Accused form, she would be claiming that the arrest was unlawful for a lack of probable cause, and that the officer improperly requested a blood sample.

It was also entirely reasonable that officers did not read the Informing the Accused form to Wiederin and ask her to submit to a blood draw at the scene after she was extricated from her car and put into an ambulance. Officers did inquire about asking her for a blood sample. (R. 227:35–36.) Sergeant Charles Coleman asked emergency personnel if they would conduct a legal blood draw while Wiederin was in the ambulance if she consented to it. (R. 227:36.) However, medical personnel refused, indicating that they did not want to delay transporting Wiederin because of the severity of her injuries. (R. 227:44.) A medic specifically told the sergeant that he would not delay medical treatment for a blood draw. (R. 227:36.) Sergeant Coleman testified that there were "about five or six" medics and first responders inside the ambulance with Wiederin, so the officers stayed out of the way because Wiederin's medical treatment was the top priority. (R. 227:36–37.) As the circuit court recognized, the decision by emergency personnel not to allow officers access to Wiederin while she was in the ambulance "demonstrates the seriousness of Ms. Wiederin's condition and the exigent need to move her to a trauma hospital in Minnesota." (R. 82:3.)

Wiederin argues that once the ambulance left to take her to the hospital for urgent medical care, the officers at the scene had time to apply for a search warrant. (Wiederin's Br. 15.) She claims that once she was transported by ambulance 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." (Wiederin's Br. 15.) And she argues that once officers at the scene found the open container of alcohol and the marijuana in her car, at around 12:30 a.m., "all evidence-gathering activities, including obtaining witness statements and searching the various vehicles, had ceased." (Wiederin's Br. 15.)

Nothing in the record supports Wiederin's assertions. This was not simply a traffic stop for drunk driving. This was not a case in which all officers had to do was gather evidence that Wiederin drove after drinking or using drugs. This was a two-car crash that left Wiederin seriously injured and trapped in her car and left the woman—whose car she struck—dead. As the circuit court recognized, officers had pressing duties involving gathering evidence of all of Wiederin's crimes—including multiple counts of homicide and reckless endangerment.

As the circuit court concluded, "[e]xigent circumstances existed throughout the night." (R. 82:3.) As the court found as fact, the crash occurred "on a busy, divided highway," multiple law enforcement agencies were involved, and the crash scene was "chaotic." (R. 82:3.) The court found that two Village of Somerset police officers "diverted and monitored traffic to protect the scene and the public," while "firefighters and EMTs were busy attending to vehicle occupants." (R. 82:3.) The court found that Deputy Coleman collected evidence to reconstruct the scene, and he called in Deputy Kennett, who was off duty, to come to the since to assist him. The court found that Deputy Coleman "worked continuously for 3 1/2 to 4 hours." (R. 82:3.) The court found that "Deputies Williams and Hillstead collected and preserved evidence before it was tainted or lost due to the passage of time or contamination of the scene. Deputy Williams also supervised the investigation, fielded other emergency calls throughout the county, and sought assistance from other agencies." (R. 82:3.) And at some point, Deputy Williams went to the hospital in St. Paul to which Wiederin was transported. (R. 82:1–2.) The court concluded that "[a]lthough six officers were on scene at different points in time, they were all consumed with necessary, time-sensitive tasks that could not be abandoned in favor of applying for a search warrant." (R. 82:3.)

The circuit court was obviously correct. Nothing in the record demonstrates that the officers' duties—diverting and monitoring traffic to protect the scene and the public, collecting evidence and reconstructing the crash, and preserving evidence before it was tainted or lost due to the passage of time or contamination of the scene—ended when the ambulance left the scene to rush Wiederin to the hospital. Deputy Hillstead acknowledged that the scene was less chaotic after Wiederin was rushed to the hospital, but he did not agree that the chaos had dissipated. (R. 227:22.)

Wiederin has not shown that the officers acted unreasonably, or that an officer should have stopped doing what he was doing so that he could apply for a warrant. And a reviewing court is "not in the business of second-guessing law enforcement's reasonable allocation of resources in a complex and evolving situation." *Dalton*, 383 Wis. 2d 147, ¶ 49 (citing *Sokolow*, 490 U.S. at 11). "When presented with multifaceted and chaotic circumstances . . . law enforcement needs flexibility to determine its priorities." *Id.*

Wiederin essentially makes the same argument that the supreme court rejected in *Dalton*, that "officers should have prioritized arresting [her] over [her] medical needs and the safety of the scene, not to mention the additional happenings in the county." *Dalton*, 383 Wis. 2d 147, ¶ 50. As the supreme court recognized in *Dalton*, "Police serve a dual purpose at an accident scene. They are present to investigate the cause of the accident and gather evidence of wrongdoing, but they are also there as first responders to injuries." *Id.* Just like in *Dalton*, the officers at the scene acted reasonably in prioritizing their pressing needs and duties over applying for a search warrant.

Wiederin next claims that Sergeant Williams should have applied for a warrant while he was on the way to the hospital in St. Paul and after he arrived at the hospital. (Wiederin's Br. 15–18.) She argues that Sergeant Williams was "in the exact situation described in *McNeely*," where the Supreme Court noted that "an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." (Wiederin's Br. 16.)

However, the situation here was not at all the same as the one contemplated in *McNeely*, which imagined an officer who was *not* driving to the hospital having an opportunity to draft a warrant application while *another* officer drives to the hospital. *McNeely*, 569 U.S. at 152. In contrast, here, Sergeant Williams was himself driving to the hospital. Sergeant Williams testified that to the best of his knowledge, a Wisconsin officer who wanted to get a search warrant in Minnesota would have to draft a warrant, contact the St. Paul Watch Commander who would get the officer in touch with an officer to help with an electronic warrant application, and then finding a Ramsey County judge to sign a warrant. (R. 227:59.) Sergeant Williams had never applied for a Minnesota warrant, and he did not know how long it would take to obtain one. (R. 227:59.) Sergeant Williams cannot reasonably be required to apply for a warrant while driving to the hospital by *McNeely*, which contemplated an officer who was *not* driving to a hospital applying for a warrant while *another* officer drove to the hospital.

Wiederin next claims that Sergeant Williams should have applied for a warrant once he arrived at the hospital. (Wiederin's Br. 16–18.) She argues that there is no requirement that an officer must attempt to get a person's consent for a blood draw before applying for a warrant. (Wiederin's Br. 16.) That is true. But that does not mean that an officer is required to apply for a warrant before seeking

consent. The question is whether the officer acted reasonably in not applying for a warrant before asking for consent.

Sergeant Williams acted reasonably. He testified that he did not get a search warrant because when a suspect is conscious, like Wiederin was at the scene, the sheriff's departmental policy was to ask for consent prior to obtaining a search warrant. (R. 227:52, 57.) He said that when he went to the hospital in Minnesota, he planned to ask Wiederin to give a blood sample, and then if she refused, he would apply for a search warrant. (R. 227:62.)

Wiederin argues that Wiederin was required to apply for a warrant before seeking consent. She relies on *State v. Hay*, 2020 WI App 35, ¶¶ 14–15, 392 Wis. 2d 845, 946 N.W.2d 190, which she claims says that "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." (Wiederin's Br. 16.)

But while *Hay* says that exigency analysis is not always limited to the time after a drunk driving suspect refuses a blood draw, it *does not* say that "if there is time to apply for and obtain a warrant at any point in time during a drunk driving investigation . . . the officer must do so." (Wiederin's Br. 16.) The court of appeals said, "It is important to point out the limited nature of our holding in this case." *Hay*, 392 Wis. 2d 845, ¶ 26. The court explained that "based upon the unique facts of this case, a reasonable officer would have known right at the time of Hay's arrest that time was of the essence and there likely would not be sufficient time to procure a warrant after a refusal at the hospital." *Id.* But if the facts of the case had been different, "it would have been reasonable for [the officer] to wait until after he requested a blood sample from Hay at the hospital before considering applying for a warrant in the event Hay refused, because with

a significantly higher PBT reading, a reasonable officer would know he would still have sufficient time if Hay refused to then seek a warrant." *Id.*

Here, Sergeant Williams had no reason to believe at the crash scene that if officers did not obtain a blood sample before Wiederin was transported—i.e., when she was trapped in the vehicle—that they would be unable to obtain a sample. Therefore, once medical personnel at the scene said they would not draw blood in the ambulance, Sergeant Williams went to the hospital to which Wiederin was transported.

When Sergeant Williams arrived at the hospital, he reasonably intended to give the then-conscious Wiederin an opportunity to either agree to give a blood sample and confirm the consent she had impliedly given by driving in Wisconsin or refuse and withdraw that consent. If she agreed to a blood test, there would be no need for a warrant. If she refused, there would be a need for a warrant. And unlike in *Hay*, there likely would be time to obtain a warrant.

However, once Sergeant Williams arrived at the hospital, the circumstances changed. As the circuit court recognized, Sergeant Williams learned after he arrived at the hospital that medical personnel would not draw Wiederen's blood while she was in imaging but could do so once she was out of imaging. (R. 227:45.) But he was later told that once Wiederin was out of imaging, she would be taken to surgery, and medical personnel would not draw her blood for police purposes while she was in surgery. (R. 227:46, 56–57.) Sergeant Williams told a nurse about the seriousness of the case and the need for a blood draw, so the nurse called another nurse who was with Wiederin in imaging and arranged for Sergeant Williams to go to imaging and speak to Wiederin before she went into surgery, and for a blood draw if Wiederin agreed to give a sample. (R. 227:46–47.)

As the circuit court recognized, had Sergeant Williams not been there while Wiederin was in imaging, spoken to the nurse at exactly the right time, and then been there immediately before Wiederin was about to go into surgery, he would not have been able to obtain a blood sample. Indeed, Wiederin's entire argument seems to assume (incorrectly) that her blood could have been drawn at any point once she was admitted to the hospital. But that was not the case. Sergeant Williams faced a dynamic and changing situation and he had no way of knowing, in advance, that there would be such a limited window of time in which to complete a blood draw.

The circuit court recognized the situation Sergeant Williams faced. It concluded that "[o]nly with the benefit of hindsight can one see that Deputy Williams waited an hour." (R. 82:4.) The court recognized that Deputy Williams did not know he would be waiting for an hour. He only knew that medical staff would not let him speak to Wiederin while she was in imaging, so he needed to wait until she was out of imaging. (R. 82:4.)

The circuit court noted that "[u]nder normal circumstances in Wisconsin, a deputy needs 30 minutes just to complete a warrant application; that does not include the time it takes to contact a judge and have him or her review it." (R. 82:4.) And the court noted "[i]t is unclear how long the process takes in Minnesota or whether Deputy Williams could have done it all from the hospital. In any event, after the paperwork was ready, Deputy Williams needed to contact the St. Paul Police Watch Commander who would connect him to an officer who would help find a Ramsey County judge." (R. 82:4.) The court recognized that taking time to apply for a warrant could have had "terrible collateral costs," because "[a]ny of these tasks easily would have diverted Deputy Williams' attention away from Ms. Wiederin at the expense of

missing the brief opportunity to see her before she went into surgery," leaving her "beyond the reach of the law, presumably for hours." (R. 82:4.)

The timing of events left Sergeant Williams in a very difficult position. He could either attempt to get a warrant that in all likelihood he would not have been able to obtain in time to get a blood sample or wait to ask Wiederin for consent. As the circuit court recognized, in all likelihood, had Sergeant Williams not waited to see Wiederin but instead had diverted his attention to apply for a warrant, he would not have been present when Wiederin was done in imaging and about to go into surgery. And if he had not been present at that moment, he would not have been able to get a blood sample. Had he returned with a warrant, it likely would have been too late. After all, nearly three hours had passed since Wiederin's crash, and she was about to go into surgery. There is no way to know, even now, with the benefit of hindsight, how long it would have taken to get a blood sample had Sergeant Williams not been present, and how much the alcohol in Wiederin's system would have dissipated. And Sergeant Williams could not reasonably have asked the nurse to have medical personnel draw Wiederin's blood before he asked for her consent or had a warrant, because unless she either refused or was unconscious there would not have been exigent circumstances.

Wiederin seems to suggest that if there was time to apply for a warrant for a blood sample before her blood was actually drawn, an officer was required to apply for one even if doing so meant that there may not have been an opportunity to obtain the blood sample. (Wiederin's Br. 17–18.) But an officer is not required to obtain a warrant when doing so would threaten the destruction of the evidence. *McNeely*, 569 U.S. at 150; *Schmerber*, 384 U.S. at 770.

Here, as the circuit court recognized, taking to time to apply for a warrant would have threatened the destruction of evidence because Sergeant Williams may not have been at the right place at the only time the evidence could be gathered. Sergeant Williams acted reasonably in seeking Wiederin's consent for a blood sample. And when Wiederin was unconscious or otherwise incapable of either agreeing to give a sample or refusing, Sergeant Williams acted reasonably in directing that Wiederin's blood be drawn because of exigent circumstances.

II. Even if exigent circumstances did not justify the blood draw, the blood test results were properly not suppressed because an officer could have relied in good faith on the implied consent law as justifying the blood draw.

As the circuit court correctly concluded, the results of Wiederin's blood test were admissible because the blood draw was justified by exigent circumstances. This court should affirm on that ground. If it does, it has no need to address whether the officer could have relied in good faith on the implied consent law in obtaining a blood sample. The good faith exception "becomes germane" only when a warrant exception does not apply. *State v. Richards*, 2020 WI App 48, ¶ 49 n.8, 393 Wis. 2d 772, 948 N.W.2d 359. But if this Court were to conclude that the blood draw was not justified by exigent circumstances, it should still affirm, because the implied consent law justified the warrantless blood draw.

A. The good faith exception to the exclusionary rule applies when evidence is obtained pursuant to a statute that has not been found unconstitutional.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). However, "[t]he exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135, 700 (2009); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)). The exclusionary rule does not apply to all constitutional violations. *Id.* Instead, "exclusion is the last resort." *Id.*

The good faith exception provides that the exclusionary rule should not apply when officers act in good faith. *Id.* ¶36. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 702). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (quoting *Herring*, 555 U.S. at 702).

In *Krull*, the United States Supreme Court held that the good faith exception applies when an officer acts in good faith reliance on a statute that is later determined to be unconstitutional. The Court reasoned that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in

objectively reasonable reliance on a warrant." *Krull*, 480 U.S. at 349. "If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350.

B. The unconscious driver provision in Wisconsin's implied consent law justified the blood draw in this case.

Under Wisconsin's implied consent law, a person who drives on a Wisconsin highway is deemed to have consented to an officer's lawful request for a blood sample. Wis. Stat. § 343.305(2). Under the unconscious driver provision in the statute, a person who is unconscious or otherwise incapable of withdrawing their consent is presumed not to have done so, and a sample may lawfully be drawn. The statute reads, in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated [an OWI-related statute] . . . one or more samples specified in par. (a) or (am) may be administered to the person.

Wis. Stat. § 343.305(3)(b).

The blood draw from Wiederin was authorized by Wis. Stat. § 343.305(3)(b). There is no dispute that Wiederin operated a motor vehicle on a public highway. There is no serious dispute that there was probable cause that she did so while she was under the influence of an intoxicant, while she had a prohibited alcohol concentration, or while she had a detectable presence of a restricted controlled substance in her blood. And there is no dispute that Wiederin was unconscious

or otherwise incapable of giving or withdrawing her consent to a blood draw when Sergeant Williams lawfully requested a sample. (R.82:2). Therefore, a blood draw could be administered under section 343.305(3)(b).

This Court found the unconscious driver provision on in Wisconsin's implied consent law unconstitutional June 25, 2020 in *State v. Prado*, 2020 WI App 42, 393 Wis. 2d 526, 947 N.W.2d 182. But when Wiederin's blood was drawn early in the morning of December 22, 2018 (R. 14:4), no appellate court had found the statute constitutional.[5] The blood draw from Wiederin in 2018 was justified by the unconscious driver provision in Wisconsin's implied consent law, and Sergeant Williams could have relied in good faith on the statute in directing that Wiederin's blood be drawn. And since the statute has been found unconstitutional, suppressing the blood test results in this case would have no possible deterrent effect on officers. There is no need to resort to exclusion, which is the "last resort." *Evans*, 514 U.S. at 10–11. Instead, the good faith exception should be applied, and the circuit court's decision denying Wiederin's suppression motion should be affirmed.

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[5] In *Prado*, this Court concluded that the officer in that case could have relied in good faith on the statute because the United States Supreme Court had not yet silently overruled *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *State v. Prado*, 2020 WI App 42, ¶ 71, 393 Wis. 2d 526, 947 N.W2d 182. The Wisconsin Supreme Court granted review, and one of the issues was the proper application of the good faith exception. The State pointed out that under *Illinois v. Krull*, 480 U.S. 340, 347 (1987), an officer can rely in good faith on a statute until the statute is overruled by an appellate court. The State is raising the good faith issue in this case to preserve it in the event the Wisconsin Supreme Court agrees with the State.

C. Wiederin's arguments that the good faith exception does not apply are incorrect.

In her brief on appeal, Wiederin asserts that the good faith exception to the exclusionary rule does not apply because the State did not raise the issue in the circuit court, Sergeant Williams did not rely on the unconscious driver provision when he directed that Wiederin's blood be drawn, and this case was argued and brief after *Mitchell v. Wisconsin* was decided. (Wiederin's Br. 20.) None of Wiederin's arguments demonstrate that the good fatih exeption cannot or should not be applied.

Wiederin argues that the State waived the right to argue that the good faith exception applies by not raising the argument in the circuit court, and because Sergeant Williams did not rely on the unconscious driver provision when he directed that Wiederin's blood be drawn. (Wiederin's Br. 20.) Wiederin is correct that Sergeant Williams did not rely on the statute and that the State did not argue in the circuit court that the blood draw was justified by the implied consent law, or that the good faith exception should be applied. But when defending a circuit court decision on appeal, the State is permitted to argue for affirmance under any theory that supports the circuit court's decision. *State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 ("On appeal, we may affirm on different grounds than those relied on by the trial court.").

Additionally, as the Wisconsin Supreme Court recognized in *State v. Howes*, and the United States Supreme Court recognized in *Mitchell v. Wisconsin*, the issue in a case in which a search is challenged is whether the search was lawful—not whether it is lawful under a particular theory. In *Howes*, the Wisconsin Supreme Court concluded that a warrantless blood draw was justified by exigent circumstances, even though the State had argued that the

unconscious driver provision, not exigency, justified the blood draw. *Howes*, 373 Wis. 2d 468, ¶¶ 1, 3 & n.4. And in *Mitchell*, the United States' Supreme Court reached the same conclusion. *Mitchell*, 139 S. Ct. at 2534 n.2. As the Supreme Court recognized, the issue is whether the search was justified, so the Court reached an issue that would otherwise have been waived. *Id.*

The same result is warranted here. Wiederin moved to suppress her blood test results on the ground that the blood draw was an unlawul search. (R. 51.) The circuit court concluded that the search was lawful because it was justified by exigent circumstances. (R. 82.) As explained above, the court was correct. The search was also justified under the unconscious driver provision in the implied consent law, a provision that had not been found unconstitutional when Wiederin's blood was drawn. Just like in *Howes* and *Mitchell*, this court can conclude that the evidence need not be suppressed on a ground that the State did not raise in the circuit court and that the officer did not rely upon.

Wiederin also argues that the good faith exception cannot apply because this case was briefed and argued after *Mitchell* was decided. (Wiederin's Br. 20.) However, the pertinent question is whether an officer could rely in good faith on a statute, *Krull*, 480 U.S. at 349, not when the issue was briefed and argued. And in any event, in *Mitchell*, the Supreme Court "did not resolve the issue" of the "constitutionality of the incapacitated driver provision." *Prado*, 393 Wis. 2d 526, ¶ 7. If it had, this Court would have had no need to strike down the statute in *Prado*. And when Wiederin's blood was drawn, *Prado* had not yet been decided.

Thus, the good faith exception applies because at the time Wiederin's blood was drawn, no court had declared the unconscious motorist provision of the implied consent law unconstitutional.

CONCLUSION

This Court should affirm the circuit court's order denying Wiederin's motion to suppress her blood test results.

Dated this 2nd day of June 2021.

Respectfully submitted,

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CERTIFICATION

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 7973 words.

Dated this 2nd day of June 2021.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

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.

Dated this 2nd day of June 2021.

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