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 REPLY BRIEF

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

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I. EXIGENT CIRCUMSTANCES DID NOT JUSTIFY THE WARRANTLESS SEARCH.

A. After Ms. Wiederin was transported from the scene to the hospital, multiple officers had time to apply for a warrant.

The circuit court found that after the chaos of the scene subsided when Ms. Wiederin was medically transported, all five remaining officers on scene were "fully occupied with high-priority, time sensitive tasks that could not be reasonably postponed for a warrant application." (R. 82; App. at 9.) This finding is not supported by the record.

After 12:30 A.M., Sgt. Coleman remained on scene **taking photographs, looking at the crash scene, and looking at the interior of the vehicles.** (R. 227 at 37:6-23.)

Deputy Kennett arrived on scene later to **assist Coleman** with his reconstruction efforts. (*Id.* at 33:10-20.)

Sgt. Williams also **took photographs** on scene. (R. 227 at 43:5-13.)

Deputy Hillstead's testified that all that was left to do after 12:30 A.M. was to **secure the scene**. (*Id.* at 12:1-8, 21:22 – 22:2.) He also testified that that both Somerset police officers were **diverting traffic** at the time Wiederin was transported. (R. 227 at 16:19-25.) However, he also testified that traffic had stopped by then and wasn't an issue. (*Id.* at 21:22 – 22:2.)

Choosing to take photos of debris that would certainly still be there for 5, 10, or even 60 minutes[1] while the warrant was drafted, or to hold an evidence bag rather than apply for a warrant, was unreasonable.[2] This is especially so given that there

[1] No evidence whatsoever was entered into the record as to how long it would have taken Williams, or any other officer, to apply for a warrant in Minnesota. The Court relied on the fact that it would have taken 30 minutes to apply for and complete the Wisconsin warrant process. (App. 8.) The Court had no basis to believe it would have also taken 30 minutes in Minnesota. Maybe it only would have taken five minutes. Without any information about how long it would have taken to complete the Minnesota warrant application process, the Court cannot find that there would have been no time do so.

[2] The State in its brief frames the issue as whether the Defendant has shown that it was unreasonable for officers not to obtain a search warrant. (State's Brief, p. 11). "Reasonableness" is not the standard. Though *Mitchell* mentioned in dicta at the conclusion of the opinion that to be entitled to suppression a defendant can show "police could not have reasonably judged that a

were multiple officers on scene engaged in duplicative tasks. The question is not whether the officers had anything at all to do other than apply for a warrant, the question is whether they had other duties that were so important that they simply could not apply for a warrant. *See McNeely*, 569 U.S. 141 at 152; *see also State v. Hay*, 2020 WI App 35, ¶ 19, 392 Wis. 2d 845, 855, 946 N.W.2d 190, 195 (finding that where the relevant time period is marked by lack of complication and the absence of chaos, there is no exigency).

Despite the State's contention, *State v. Dalton* is not applicable. In *Dalton* all deputies had left the scene by the time the defendant was transported therefrom, either finishing their shift or travelling to other calls, such that there were no available officers to assist with a warrant. 2018 WI 85, ¶¶ 16-18, 383 Wis. 2d 147, 171, 914 N.W.2d 120, 131. Moreover, unlike here, the time period at issue in *Dalton* was characterized by a "complicated and fluid situation," and was "chaotic." *Id.* at ¶ 44.

B. No practical circumstance prevented Williams from applying for a warrant.

The State argues the first opportunity Williams had to secure blood evidence was during the five-minute conversation with Wiederin just before 2:00 A.M. (State's Brief, p. 24.) The State's argument is essentially that had Williams applied for and obtained a warrant, he may not have been given access to Ms. Wiederin to conduct the blood draw at the time he was, and maybe not at all. First of all, the State is misapplying the standard of review and attempting to shift the burden to the defense. It is the State's burden to establish that there was no time to get a warrant. Whether hospital staff would have allowed a blood draw at a different time based on a warrant is irrelevant to the question of whether there was time to procure one.

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warrant application would interfere with other pressing needs or duties" of the officers in the context of an investigation of an unconscious suspected drunk driver, that sentence did not transform the standard of review. *See Mitchell*, 139 S. Ct. at 2539. Indeed, *Mitchell* was a plurality opinion, and Justice Thomas' concurrence in *Mitchell* specifically disclaimed the adoption of any new rule proposed by the plurality. *Mitchell*, 139 S. Ct. at 2539-2541, (Thomas, J., concurring). *Mitchell* therefore did not announce a new rule that operates to shift the burden in a Fourth Amendment issue from the State (to establish an exception to the warrant requirement applies) to a criminal defendant to establish that an officer's actions were not reasonable, because no majority of justices were in agreement as to the adoption of any such rule. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977).

Nonetheless, the touchstone of the Fourth Amendment is reasonableness, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and therefore the State's arguments as to the officers' reasonableness are addressed herein.

At any rate, Williams needed only to explain the seriousness of the situation and the importance of obtaining Ms. Wiederin's blood to a nurse – which he for some inexplicable reason waited to do until almost three hours had lapsed, and after he'd sat at the hospital doing nothing for nearly an hour – and he was immediately given the opportunity to talk to her. (R. 227 at 56:24 – 57:8.) There is nothing in the record to indicate that he would not have been given the same deference and immediate access to Ms. Wiederin upon producing a warrant.

The State's argument that Williams was required to first attempt to obtain consent before drafting a warrant was addressed and rejected in *State v. Hay*, 2020 WI App 35, ¶¶ 14, 15, 392 Wis. 2d 845, 855, 946 N.W.2d 190, 195. But even if Williams did need to try to obtain consent first, to assume he would see Wiederin again and assume she would consent within the requisite time[3] was unreasonable, and this became increasingly so the longer he waited at the hospital with no sight of Wiederin. Thus, any exigency Williams found himself facing at 2:00 A.M. was a result of his own decisions in the preceding hours. *See State v. Guard*, 2012 WI App 8 at ¶ 30, 338 Wis.2d 385, 808 N.W.2d 718 (finding that exigency cannot exist for Fourth Amendment purposes if it is merely a result of the police officer's own making).

II. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IS NOT APPLICABLE.

Generally, evidence obtained through an illegal search is excluded at trial. *State v. Blackman*, 2017 WI 77, ¶ 68, 377 Wis. 2d 339, 898 N.W.2d 774. However, where law enforcement officers have acted in objective good faith reliance on well-settled law, in limited circumstances the evidence obtained from an illegal search can be admitted, despite the exclusionary rule. *Id.* at ¶ 70; *see also United States v. Leon*, 468 U.S. 897, 907-908.

A. Williams did not rely on the implied consent law in choosing not to obtain a warrant.

The State attempts to convince this Court that the good faith exception applies here, such that Williams was acting in good faith reliance on the incapacitated driver provision of Wis. Stat. § 343.305(2) when he directed a nurse to draw Ms. Wiederin's blood as she was starting to lose consciousness. The problem with the State's argument is that Williams did not at all rely on the unconscious driver provision of Wisconsin's Implied Consent statute. (R. 227 at

[3] Blood tests conducted within three hours of motor vehicle operation enjoy the presumption of accuracy. *See* Wis. J.I. CRIM – 2663 and Wis. Stat. § 885.235(1g).

51:6-17, 52:1-12.) Instead, Williams testified that in deciding to draw the blood without a warrant, he relied on the exigent circumstances exception. (*Id*.)

In this way, this case is distinguishable from virtually all jurisprudence on the good faith exception, because here we have an officer who did not actually rely on a law that was subsequently deemed unconstitutional. *Compare State v. Prado*, 2020 WI App 42, ¶¶ 5, 64, 71, 393 Wis. 2d 526, 532, 947 N.W.2d 182, 185 (applying the good faith exception where the investigating officer testified he relied on it in conducting a blood draw absent a warrant).

B. Applying the good faith exception to a case where the officer did not actually rely on the law that was subsequently invalidated would pervert the intention of the exception and destroy the warrant requirement altogether.

The intention of the good faith exception is to ensure that the exclusion of otherwise admissible evidence does not hinder law enforcement's objectives or interfere with the system's truth finding functions where law enforcement has reasonably relied on settled law that was subsequently overturned, and where that overturning was isolated from any police negligence. *Blackman*, 2017 WI 77 at ¶ 70. Excluding the fruits of the illegal search here will not hinder law enforcement's reasonable reliance on well settled law because there was no such reliance. Similarly, the negligence here (the failure to get a warrant) had nothing at all to do with the subsequently invalidated statute; it was a result of an unreasonable reliance on/interpretation of a warrant exception that has not been invalidated. The entire rationale behind the good faith exception is just inapplicable here.

Moreover, the exception is only to be applied where exclusion of the evidence would not serve the "prime purpose" of the exclusionary rule, which is "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Prado*, 2020 WI App 42 at ¶ 69 (internal citations omitted). Excluding the wrongfully obtained blood evidence here ***would*** deter future unlawful conduct on the part of the police; it would ensure that next time officers have time to obtain a warrant they do so. Conversely, not excluding the evidence would only foster further police misconduct. *See Prado*, 2020 WI App 42 at ¶ 70 (expressing concern about over-application of the good faith exception, as it would (1) induce courts to decide that issue first and fail to properly analyze the legality of underlying conduct, which would run afoul of courts' obligations to decide what the law is and be watchful against Fourth Amendment violations and (2) de-incentivize defendants from litigating unconstitutional intrusions, knowing courts would side against them and allow the admission of illegally obtained evidence even if their rights were violated) (internal citations omitted).

C. Even if Williams had relied on the implied consent law, which he did not, it would not have been reasonable for him to do so.

i. It would not have been reasonable for Williams to rely on the implied consent statute as the basis for a warrantless blood draw given the state of the law in December 2018.

The warrantless blood draw in this case was conducted in December 2018. By that time, both *McNeely* and *Birchfield v. North Dakota* had been decided. 569 U.S. at 152, 156; 136 S. Ct. 2160, 2186 (2016). In addition, *Mitchell v. Wisconsin*, which was set to decide the issue of the constitutionality of Wisconsin's implied consent statute, was on appeal. *Mitchell v. Wisconsin*, 139 S. Ct. 915, (2019) *granting certiorari State v. Mitchell*, 2018 WI 84, 383 Wis.2d 192, 914 N.W.2d 151.[4]

In this way, this case is distinguishable from *Prado*, which dealt with a stop that occurred in December 2014, before *Birchfield or Mitchell* were decided. In fact, the *Prado* Court went out of its way to mention that the investigating officer did not have the benefit of *Birchfield* or of any published appellate decision challenging its constitutionality when he relied on the implied consent statute, thus making his reliance reasonable. *Prado*, 2020 WI App 42 at ¶ 68, 71.

Moreover, by the time this case was argued and briefed in the circuit court, *Mitchell* was decided. The parties and the circuit court therefore had the benefit of the *Mitchell* ruling at the time the case was briefed. And while it is true that *Mitchell* did not resolve the constitutionality of the implied consent law, it also did not strike down the law. The State therefore had every opportunity to argue that the unconscious driver provision of Wis. Stat. § 343.305(2) applied, but chose not to.

In other words, this is not a case where the law suddenly changed after the officer handled the stop. This is a case where there was good reason the State didn't argue the implied consent law justified the search: the law was in flux and pending appeal. Thus, it was not reasonable for the officer to rely on it.

ii. It would not have been reasonable for Williams to rely on the unconscious driver provision of the implied consent statute to justify the search because Ms. Wiederin was not unconscious until after he started reading her the form.

[4] *State v. Mitchell*, the most recent case dealing with the implied consent statute at the time of the stop, was decided in July 2018 and certiorari was granted by the U.S. Supreme Court in January 2019.

The unconsciousness here did not come to be until almost three hours post-accident. In fact, Wiederin did not start to lose consciousness until after Williams started reading her the implied consent advisory.[5] To rely on the incapacitated driver provision of the statute under these circumstances rather than making any effort to obtain a warrant in the nearly three hours Ms. Wiederin was conscious and cooperative with officers – of which time included one hour of mere sitting and waiting at the hospital with absolutely no other task –was unreasonable.

D. The State has waived any argument that the good faith exception applies to allow admission of the evidence, and there is no compelling reason for this Court to address the waived argument.

Though a court may exercise its discretion to address an issue that has been waived, there are strong public policy reasons why the Court need not do so here: applying the waiver rule gives the higher courts the benefit of a more developed record, ensures that courts are resolving actual disputes among the parties, and affords greater fairness to litigants who cannot anticipate what issues or arguments are of import to the justices. *Yee v. Escondido*, 503 U.S. 519, 535-536, 538 (1992); *Carducci v. Regan*, 714 F.2d 171, 177 (8th Cir. 1983).

III. SHOULD DEFENDANT-APPELLANT PREVAIL ON APPEAL, THE JUDGMENT OF CONVICTION WOULD BE VACATED.

In a footnote in the State's brief, the State implies that even if Ms. Wiederin's appeal is successful, she would not be entitled to withdraw her no contest pleas. (State's Brief, p. 7, f.n. 2.) While it is true that Ms. Wiederin has not made a formal motion to withdraw her no contest pleas, should the appeal be successful the practical effect is that the judgment of conviction that resulted from said pleas would be vacated. *See e.g. State v. VanBeek*, 2021 WI 51, ¶ 2, 397 Wis. 2d 311, 318, 960 N.W.2d 32, 35 (holding where a motion to suppress should have been granted for a Fourth Amendment violation, the judgment of conviction is vacated, the trial court's decision denying the motion is reversed, and the case is remanded for further proceedings).

[5] The incapacitated driver provision of the implied consent law allowed police to take blood samples from unconscious persons suspected of driving drunk after reading them the implied consent advisory, on grounds that all Wisconsin drivers impliedly consent to blood draws, and unless said consent is expressly revoked, it is deemed continuing. *See* Wis. Stat. § 343.305(2),(3)(b). The practical effect of the statute, before it was deemed unconstitutional, is that police officers would read the form to an unconscious person and then, hearing no response, deem them to have consented to a chemical evidentiary search of their blood.

If the State wished to raise an argument that the denial of the motion to suppress was harmless error, and therefore the defendant's no contest pleas and the judgment of conviction should stand even if the appeal is successful, it certainly has not met its burden in so establishing. "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau,* 2000 WI App 54, ¶ 22, 233 Wis.2d 508, 608 N.W.2d 376. The State presents no argument whatsoever that the denial of the suppression motion did not lead to a conviction. Indeed, Ms. Wiederin pled No Contest to Homicide by Use of a Vehicle with a Restricted Controlled Substance. (R. 213, App. 1-4.) An element of that charge that the State was required to prove is that the defendant had a detectable amount of restricted controlled substance in her blood at the time she operated her motor vehicle. Wis. Stat. § 940.09(1)(am); Wis. J.I. – CRIM 1187. It is absurd to say that Ms. Wiederin would have pled to a charge the State did not have any admissible evidence to prove. *See Semrau,* 2000 WI App 54 at ¶ 22 (finding that but for the trial court's failure to suppress the disputed evidence, there was reasonable probability that the defendant would have refused to plead.)

CONCLUSION

For all of the foregoing reasons, the Court must reverse the circuit court's December 27, 2019, Order, vacate the judgment of conviction, and remand the case to the trial court.

Dated: July 26, 2021.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief.

The length of this brief is 12 pages, 2,999 words.

Dated: July 26, 2021.

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