COURT OF APPEALS DECISION DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1193-CR

Cir. Ct. No. 2012CT15

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLER M. PASCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed.*

¶1 STARK, J.[1] Tyler Pasch appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (PAC), as a

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 versions unless otherwise noted.

second offense. Pasch argues the circuit court erred by denying his suppression motion and motion for reconsideration. Pasch's case is directly controlled by the recent Wisconsin Supreme Court decision in ***State v. Foster***, 2014 WI 131, __ Wis. 2d __, 856 N.W.2d 847. For the reasons explained below, we affirm.

BACKGROUND

¶2 On January 14, 2012, at approximately 2:12 a.m., Pasch was arrested for operating a motor vehicle while intoxicated (OWI) and was ultimately charged with that offense and PAC, both as second offenses. According to the criminal complaint, Pierce County sheriff's deputies Mitchell Rhiel and Adam Olson observed erratic driving and upon stopping Pasch's vehicle, Rhiel observed a strong odor of intoxicants, Pasch's slurred speech, and a clear plastic cup with ice on the passenger floor of the vehicle. After Pasch resisted performing standardized field sobriety tests, Rhiel arrested Pasch, read him the "Informing the Accused" form containing the warnings from WIS. STAT. § 343.305(4), and transported Pasch to the River Falls hospital. Pasch refused to consent to an evidentiary chemical blood test. A blood sample was obtained despite his refusal at approximately 3:05 a.m.

¶3 Pasch subsequently moved to dismiss a refusal citation based on noncompliance with the informed consent law.[2] The court conducted a motion hearing on August 28, 2012.

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[2] Upon Pasch's refusal to consent to the blood test, Rhiel issued a "notice of intent to suspend operating privilege" when he should have issued a "notice of intent to revoke operating privilege." *See* WIS. STAT. § 343.305(9). Rhiel realized his mistake and sent Pasch an explanation and the correct notice of intent to revoke two days later.

¶4 Before the circuit court ruled on the motion to dismiss the refusal charge, Pasch also moved to suppress the results of his blood test. Pasch argued suppression was warranted because his blood test result was the product of an unconstitutional search and seizure. Pasch asserted the Wisconsin Supreme Court incorrectly and unconstitutionally interpreted the United States Supreme Court's decision in ***Schmerber v. California***, 384 U.S. 757 (1966), when it decided ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). Pasch argued ***Schmerber*** required courts to apply a totality of the circumstances analysis when determining if exigent circumstances justified a nonconsensual, warrantless blood draw. *See* ***Schmerber***, 384 U.S. at 770-72. In contrast, ***Bohling*** held the loss of evidence through the natural dissipation of alcohol in the bloodstream constituted a per se exigency in drunk-driving cases and justified nonconsensual, warrantless blood draws. *See* ***Bohling***, 173 Wis. 2d at 539, 547-48. Pasch notified the circuit court that the United States Supreme Court had accepted review of ***Missouri v. McNeely***, 358 S.W.3d 65 (Mo. 2012), which presented the question of whether the dissipation of alcohol in the bloodstream over time created a per se exigency justifying an exception to the warrant requirement of the Fourth Amendment.

¶5 The circuit court denied both of Pasch's motions on November 16, 2012. As to the suppression motion, the court explained, "Forced blood draws under the facts of this case are permitted under existing law as set forth in … ***Bohling*** …. Because … ***Bohling*** is still the law in Wisconsin, Defendant's motion to suppress evidence based on the forced blood draw is hereby DENIED."

¶6 Following the United States Supreme Court's decision in ***McNeely*** on April 17, 2013, Pasch moved for reconsideration. *See* ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013). Pasch argued ***McNeely*** abrogated ***Bohling*** when it held that dissipation was not a per se exigency for nonconsensual blood testing in

drunk-driving cases, but rather, exigent circumstances needed to be determined on a case-by-case basis considering the totality of the circumstances. *See* ***McNeely***, 133 S. Ct. at 1556. The court conducted a hearing on Pasch's motion for reconsideration on May 8, 2013. Pasch requested an evidentiary hearing, "at the very least," for the court to make a factual determination of whether the warrantless blood draw was justified by exigent circumstances. In response, the State directed the court to ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, which articulated a good faith exception to the exclusionary rule when a police officer followed "clear and settled precedent." It argued Rhiel acted in accordance with the law at the time, so the good faith exception should apply.

¶7 On November 12, 2013, the court denied Pasch's motion for reconsideration, concluding the good faith exception applied and declining to retroactively apply ***McNeely***. Pasch pleaded guilty to second-offense PAC; the remaining charges were dismissed. Pasch now appeals the denial of his motion to suppress and motion for reconsideration.

STANDARD OF REVIEW

¶8 The issue on appeal is whether the circuit court erred when it applied the good faith exception to the exclusionary rule and denied Pasch's suppression motion and motion for reconsideration. When reviewing a ruling on a motion to suppress, we apply the clearly erroneous standard to the circuit court's findings of fact. ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010). However, we independently apply constitutional principles to those findings of fact. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385.

DISCUSSION

¶9 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect against "unreasonable searches and seizures." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). In ***Schmerber***, the United States Supreme Court established that a nonconsensual blood draw constituted a search subject to the Fourth Amendment's requirements. ***Schmerber***, 384 U.S. at 767-68. "The touchstone of the Fourth Amendment is reasonableness," ***Florida v. Jimeno***, 500 U.S. 248, 250 (1991) (citing ***Katz v. United States***, 389 U.S. 347, 360 (1967)), and a warrantless search of a person is per se unreasonable unless it falls within a recognized exception to the Fourth Amendment, ***Coolidge v. New Hampshire***, 403 U.S. 443, 454-55 (1971); ***Phillips***, 218 Wis. 2d at 196.

¶10 Warrantless searches incident to a lawful arrest are one recognized exception to the warrant requirement; however, "[b]lood constitutes a limited exception to the foregoing rule." ***Bohling***, 173 Wis. 2d at 537. The ***Schmerber*** Court observed, "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." ***Schmerber***, 384 U.S. at 770.

¶11 Accordingly, the ***Schmerber*** Court held a warrantless, nonconsensual blood draw performed incident to a lawful arrest was constitutional where three conditions were met. ***Id.*** at 770-71. The Court required, first, a "clear indication" that evidence of intoxication would be found in the blood; second, the existence of exigent circumstances; and third, that the blood draw be done by a reasonable method performed in a reasonable manner. ***Id.***

¶12 With respect to the ***Schmerber*** Court's second prong, the exigent circumstances doctrine applies when a situation presents an emergency that overcomes an "individual's right to be free from governmental interference." ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621 (citing ***Payton v. New York***, 445 U.S. 573, 575, 583-88 (1980)). Such an emergency exists when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." ***Kentucky v. King***, 131 S. Ct. 1849, 1856 (2011). One such example is when a delay in obtaining a warrant could result in the loss of evidence. *See* ***Hughes***, 233 Wis. 2d 280, ¶17. Where police conduct warrantless searches, they bear a heavy burden of proving that the circumstances were indeed exigent, and that they did not have time to obtain a warrant. ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984).

¶13 In ***Schmerber***, the Court found exigent circumstances justified the warrantless blood draw when, among other factors, it considered the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." ***Schmerber***, 384 U.S. at 770. The ***Schmerber*** Court concluded,

> Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 771.

¶14 When the Wisconsin Supreme Court decided ***Bohling***, it determined the natural dissipation of alcohol in the bloodstream constituted a per se exigency

to justify warrantless, nonconsensual blood tests in drunk driving investigations. ***Bohling***, 173 Wis. 2d at 547-48. Specifically, ***Bohling*** provided that a warrantless, nonconsensual blood draw was constitutional when:

> (1) the blood draw [was] taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there [was] a clear indication that the blood draw [would] produce evidence of intoxication, (3) the method used to take the blood sample [was] a reasonable one and performed in a reasonable manner, and (4) the arrestee present[ed] no reasonable objection to the blood draw.

Id. at 534. The court "believe[d] that the more reasonable interpretation of ***Schmerber*** [wa]s … exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream." ***Id.*** at 539.

¶15 In 2013, the United States Supreme Court clarified its holding from ***Schmerber*** when it decided ***McNeely***. ***McNeely***, 133 S. Ct. at 1556. The Court intended "to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." ***Id.*** at 1558. Ultimately, it declined to "depart from careful case-by-case assessment of exigency and adopt [a] categorical rule." ***Id.*** at 1561. The Court noted the metabolization of alcohol in the blood over time was a factor courts could properly consider, but instructed, "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 1561, 1563.

¶16 In the wake of ***McNeely***'s abrogation of ***Bohling***, the Wisconsin Supreme Court decided three cases addressing ***McNeely***. *See* ***Foster***, 2014 WI 131; ***State v. Kennedy***, 2014 WI 132, __ Wis. 2d __, 856 N.W.2d 834; ***State v. Tullberg***, 2014 WI 134, __ Wis. 2d __, 857 N.W.2d 120. Most relevant to this appeal is ***Foster***, which directly controls the issues raised by Pasch.[3] In ***Foster***, the supreme court resolved

> whether the warrantless nonconsensual blood draw performed on Foster [was] constitutional in light of the United States Supreme Court's decision in ***McNeely***, and if not, whether suppression of the evidence derived from Foster's blood [was] the appropriate remedy for that constitutional violation, or alternatively, whether the good faith exception to the exclusionary rules applie[d].

Foster, 2014 WI 131, ¶17.

¶17 The exclusion of evidence obtained through an unlawful search is "a common judicial remedy for the constitutional error." ***Dearborn***, 327 Wis. 2d 252, ¶15. A "good faith exception," to the exclusionary rule has been recognized by our supreme court, ***State v. Eason***, 2001 WI 98, ¶¶73-74, 245 Wis. 2d 206, 629 N.W.2d 625, and "precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court," ***Dearborn***, 327 Wis. 2d 252, ¶51.

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[3] ***Foster*** is also factually similar to Pasch's case. *See* ***State v. Foster***, 2014 WI 131, ¶¶11-13, __ Wis. 2d __, 856 N.W.2d 847. Foster was stopped for speeding; Pasch for erratic driving. Both defendants showed signs of intoxication, were arrested, and refused blood draws. Further, in both cases the warrantless blood draws were ordered within an hour of the initial traffic stop.

¶18 The ***Foster*** court held that ***McNeely*** applied retroactively and rendered the warrantless, nonconsensual blood draw in that case unconstitutional. ***Foster***, 2014 WI 131, ¶8. Nevertheless, the court declined to apply the exclusionary rule to suppress the evidence resulting from the blood draw. ***Id.*** The court held Foster's blood was searched and seized by police acting in "objectively reasonable reliance on the clear and settled precedent of ***Bohling***." ***Id.***, ¶56.

¶19 ***Foster*** resolves the arguments Pasch raised before the circuit court and on appeal. Like the defendant in ***Foster***, Pasch argues the warrantless, nonconsensual blood draw was always unconstitutional under ***Schmerber***, and he therefore urges against the application of the good faith exception. Pasch contends the State has "unclean hands" and should not be permitted to benefit from the application of the good faith exception.[4] As ***Foster*** makes clear, however, ***Bohling*** was a reasonable interpretation of ***Schmerber*** until the time the United States Supreme Court spoke definitively on the issue of a per se exigency in drunk-driving cases. ***Foster***, 2014 WI 131, ¶37. The ***Foster*** court specifically rejected the defendant's contention, like Pasch's, that "***Bohling*** was void ab initio." ***Id.***, ¶57. While the supreme court found Foster's warrantless, nonconsensual blood draw violated his right to be free from unreasonable searches

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[4] Pasch argues the State "induced the ***Bohling*** court into making a decision that violated the Fourth Amendment (and Art. 1, sec. 11, Wis. Const.) and the State has subsequently been violating the citizens' [sic] of Wisconsin rights for years." *See* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). Further, Pasch asserts the State was aware that "jurisdictions were split on whether the natural dissipation of alcohol in [a person's] blood stream establishes a per se exigency" and, therefore, "bore the risk that ***Bohling*** would be declared wrong." As the State argues in response, it neither induced the supreme court to violate the Fourth Amendment, nor "bore the risk" that ***Bohling*** would be reversed due to the existence of the jurisdictional split. Moreover, the ***Foster*** court explicitly rejected the argument that the supreme court "failed to follow the controlling precedent of ***Schmerber*** when [it] decided ***Bohling***." ***Foster***, 2014 WI 131, ¶56; *see* ***Schmerber v. California***, 384 U.S. 757 (1966).

and seizures, the court nevertheless declined to apply the exclusionary rule. Rather, it held the good faith exception applied to preclude suppression of the evidence.

¶20 So, too, in light of ***McNeely***'s abrogation of ***Bohling***, Pasch's warrantless, nonconsensual blood draw violated his right to be free from unreasonable searches and seizures. *See* ***Foster***, 2014 WI 131, ¶¶8, 46. Indeed, the State does not contend any exigent circumstances existed other than the natural dissipation of alcohol from Pasch's blood. However, because the police acted in objectively reasonable reliance upon the clear and settled precedent from ***Bohling***, which was the law in Wisconsin at the time, the good faith exception applies to the exclusionary rule.

¶21 Pasch asserts the circuit court could not properly determine whether the good faith exception applied because it never conducted an evidentiary hearing to determine whether the arresting officer was aware of and relied on ***Bohling***. Pasch argues, "Rhiel was a very new officer. Accordingly, perhaps he was taught regarding the conflicting case law regarding warrantless forced blood draws …." We reject Pasch's argument. As the State points out, "[t]he test of whether the officers' reliance was reasonable is an objective one, querying 'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" ***Dearborn***, 327 Wis. 2d 252, ¶36 (quoting ***Herring v. United States***, 555 U.S. 135, 145 (2009)).

¶22 The law in Wisconsin at the time of Pasch's arrest was ***Bohling***. A reasonably well-trained officer would have relied on ***Bohling***, and such reliance would not be rendered unreasonable by his or her familiarity, or lack thereof, with the conflicting case law regarding warrantless forced blood draws. Likewise,

contrary to Pasch's assertion, Rhiel's mistaken issuance of an "intent to suspend operating privilege" instead of an "intent to revoke operating privilege" is of no consequence to an analysis of his objective, reasonable reliance on the law of searches and seizures.[5] Whether a hearing was requested by Pasch, forfeited as argued here by the State, or denied by the trial court, no evidentiary hearing was necessary for the circuit court to determine the good faith exception applied to the exclusionary rule here.[6]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[5] Pasch argues because Rhiel issued a "notice of intent to suspend" instead of a "notice of intent to revoke operating privilege" after Pasch's refusal to consent to a blood draw, Rhiel was "uncontrovertibly poorly trained." We note Rhiel corrected his mistake and the circuit court rejected Pasch's argument that the error constituted noncompliance with informed consent law. Further, we do not agree that the incorrectly issued form bears on Rhiel's training or conformance with the procedure for warrantless blood draws under ***Bohling***.

[6] Because we have decided that an evidentiary hearing was unnecessary, we need not reach the parties' arguments as to whether Pasch properly requested an evidentiary hearing. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (If a decision on one point is dispositive, we need not address other issues raised.).