COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP962-CR **Cir. Ct. No. 2012CF22**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL L. SHEPARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: BERNARD BULT, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Randall Shepard appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), fourth offense. Shepard contends the circuit court erred in failing to suppress the

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

result of his blood test because the result was obtained without a warrant and in the absence of exigent circumstances. I conclude that even though the facts of this case do not establish exigent circumstances justifying a warrantless blood draw, the blood draw result should not be suppressed because at the time of the blood draw, it was done in accordance with established Wisconsin Supreme Court precedent.

BACKGROUND

¶2 The following facts are undisputed. Shepard was placed under arrest for operating a motor vehicle under the influence of an intoxicant (OWI) and PAC, fifth or sixth offenses.[2] Shepard was read the Informing the Accused form, after which Shepard refused an evidentiary chemical test of his blood. Shepard was then transported to the local hospital where the blood draw was taken.

¶3 Shepard moved the circuit court to suppress the result of his blood draw on the basis that the blood draw was taken without a warrant and without exigent circumstances. In lieu of taking evidence at the suppression motion, the parties stipulated to the arresting officer's police report as a factual basis. The circuit court denied Shepard's motion, after which Shepard entered a plea to PAC, fourth offense. Shepard appeals.

DISCUSSION

¶4 Shepard contends the circuit court erred in denying his motion to suppress the result of his blood draw.

[2] The charges were later reduced to fourth offense.

¶5 The Fourth Amendment to the United States Constitution protects individuals from "unreasonable searches and seizures," including unreasonable searches of the individual's person. U.S. CONST. amend. IV; ***Missouri v. McNeely***, ___ U.S. ___, 133 S.Ct. 1552 (2013). A blood sample obtained in a criminal investigation without a warrant is reasonable only if it falls within an exception to the Fourth Amendment. ***McNeely***, ___ U.S. ___, 133 S.Ct. 1552, 1558; ***State v. Reese***, 2014 WI App 27, ¶15, 353 Wis. 2d 266, 844 N.W.2d 396. One such exception 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.'" ***McNeely***, ___ U.S. ___,, 133 S.Ct. 1552, 1558 (quoted source omitted).

¶6 In ***Reese***, we explained that prior to the United States Supreme Court's ***McNeely*** decision, jurisdictions were split on whether the natural dissipation of alcohol in an individual's bloodstream, alone, established a per se exigency justifying an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. ***Reese***, 353 Wis. 2d 266, ¶17. We explained that in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), our supreme court adopted the view that the natural dissipation of blood-alcohol evidence did constitute a per se exigency and that following ***Bohling***, "the law in Wisconsin was clear that the dissipation of alcohol in a defendant's bloodstream, alone, constituted an exigent circumstance justifying a warrantless blood draw." ***Reese***, 353 Wis. 2d 266, ¶17. ***Bohling*** remained the law for approximately twenty years, until the United States Supreme Court held in ***McNeely*** that the natural dissipation of alcohol in blood does not constitute a per se exigency. *See* ***id.***, ¶18; ***McNeely***, ___ U.S. ___, 133 S.Ct. 1552, 1563.

¶7 Both Shepard and the State agree in this case that there were no exigent circumstances at the time of the blood draw as the law stands now. The State argues, however, that because the blood draw occurred prior to the Supreme Court's decision in ***McNeely***, this court should uphold the validity of the blood draw under the "good faith exception" articulated in ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, and ***Reese***.

¶8 In ***Dearborn***, the defendant sought to suppress evidence obtained during the search of his vehicle after his arrest. ***Id.***, ¶1. Under a 2009 United States Supreme Court decision, the search of the defendant's vehicle in ***Dearborn*** was unconstitutional. ***Id.***, ¶2. However, our supreme court held that the evidence should not be suppressed because at the time the search took place, the law was "clear and settled" that the type of search conducted on the defendant's vehicle was lawful, the officer "'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment,'" and excluding the evidence "would have absolutely no deterrent effect on officer misconduct." ***Id.***, ¶¶30, 33, 44 (quoted source omitted).

¶9 In ***Reese***, as in the present case, an officer obtained a blood draw of the defendant without a warrant and the defendant later sought to suppress the result of that blood draw on the basis that exigent circumstances did not exist. *See* ***Reese***, 353 Wis. 2d 266, ¶14. In ***Reese***, the only possible exigent circumstance was the natural dissipation of alcohol from the defendant's system. *See* ***id.***, ¶19. We acknowledged that ***McNeely*** establishes that the natural dissipation of alcohol from a defendant's system is not a per se exigent circumstance justifying a warrantless blood draw. ***Id.***, ¶18. However, we concluded that the good faith exception should be applied and the blood draw evidence should not be suppressed. ***Id.***, ¶22. We explained that at the time the blood draw was obtained

without a warrant, the officer was following the "clear and settled precedent" of ***Bohling***. ***Id.*** We further explained that "[t]he deterrent effect on officer misconduct, which our supreme court characterized as 'the most important factor' in determining whether to apply the good faith exception, would … be nonexistent … because the officer did not and could not have known at the time that he was violating the Fourth Amendment." ***Id.*** (quoting ***Dearborn***, 327 Wis. 2d 252, ¶49).

¶10 The parties in this case agree that under ***McNeely***, exigent circumstances did not exist to justify Shepard's warrantless blood draw. The State argues, however, that this case is similar to ***Reese*** and that this court should conclude, as it did in ***Reese***, that the good faith exception applies and the results of the blood draw should not be suppressed. Shepard argues that the good faith exception should not apply in this case because "the officer did not allege he was following ***Bohling*** []. He merely said he was doing a forced blood draw due to the Implied Consent Law."[3] Shepard does not cite this court to any legal authority requiring an officer to specify to a defendant the legal authority—statutory, case law, or some other rule or regulation—upon which the officer is acting. Unsupported legal assertions need not be considered. *See* ***State v. Lindell***, 2001 WI 108, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500.

¶11 This court agrees with the State that this case closely resembles that factual and legal situation presented in ***Reese***, and as in ***Reese***, I conclude that the good faith exception applies. As was the case in ***Reese***, and in ***Dearborn***, the

[3] The police report provides in relevant part: "I placed [Shepard] under arrest for [OWI] …. I went en route to Divine Savior Hospital with [Shepard] …. I arrived at the hospital.… I read verbatim the informing the accused.… [Shepard] stated he was refusing an evidentiary chemical test of his blood."

officer was following clear and established precedent when he obtained a blood draw without a warrant, and, as in those cases, exclusion of the blood draw result would have no deterrent effect. Accordingly, this court concludes that the blood draw evidence should not be suppressed.[4]

CONCLUSION

¶12 For the reasons discussed above, the judgment is affirmed.

By the Court.—Judgment affirmed.

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

[4] Shepard also argues that even if the blood draw could be construed as having taken place under ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), this case should be separately reviewed to determine whether application of the ***Bohling*** exception at that time was reasonable. However, Shepard has not developed an argument that it was not. Shepard also argues that "[no] case has permitted the good faith [exception] to excuse an unreasonable warrantless bodily intrusion," and argues that the exception should not be applied to situations involving blood draws. However, Shepard acknowledges that this court applied the exception to a blood draw situation in ***State v. Reese***, 2014 WI App 27, ¶15, 353 Wis. 2d 266, 844 N.W.2d 396. This court is bound by our prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).