Appeal No. 2015AP304-CR **Cir. Ct. No. 2013CF365**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD P. MITCHELL,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This cases raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

BACKGROUND

Gerald P. Mitchell was charged with operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC).[1] He moved to suppress the results of a blood test taken while he was unconscious. The parties do not contest the basic facts on appeal.

Officer Alexander Jaeger was the sole witness at the suppression hearing. He testified that around 3:17 p.m. on May 30, 2013, he received a dispatch call to check on the welfare of a male subject in Sheboygan County. When he arrived, he spoke with the complainant, Alvin Swenson, who informed Jaeger that he knew Mitchell and "received a telephone call from … Mitchell's mother concerned about his safety." Swenson told Jaeger that he went to his window shortly after the call and observed Mitchell in a discombobulated state. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away."

Jaeger was able to locate Mitchell walking down St. Clair Avenue about one-half hour after speaking with Swenson. A gray van was also found nearby on Michigan Avenue. Mitchell's state was consistent with what Swenson described. Mitchell was not wearing a shirt, and was wet and covered in sand "similar to if you had gone swimming in the lake." Jaeger explained that Mitchell

[1] Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. *See* WIS. STAT. § 346.65(2)(am)6. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," necessitating Jaeger and another officer to help him "to ensure he wouldn't fall."

Initially, Mitchell stated that he had been drinking "in his apartment." However, he later altered his story and informed Jaeger "that he was drinking down at the beach" and parked his vehicle "because he felt he was too drunk to drive." Jaeger further explained that Mitchell's current condition made administration of the standard field sobriety tests unsafe, so he declined to administer them. Jaeger did administer a preliminary breath test, which indicated an alcohol concentration of .24. Based on his observations, Jaeger arrested Mitchell for OWI at approximately 4:26 p.m.

On the way to the police station, Mitchell's condition began to decline, and he became more lethargic. Upon arriving at the station, Mitchell had to be helped out of the squad car. Jaeger concluded that a breath test would not be appropriate, and he took Mitchell from the station to the hospital for a blood test. The drive took approximately eight minutes. During the drive, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair." Jaeger then read the "Informing the Accused form verbatim" to the inert Mitchell. Mitchell did not respond. Because of Mitchell's "unusual" level of incapacitation, obtaining affirmative verbal "consent" at that time was not possible. Jaeger admitted on cross-examination that he could have applied for a warrant; he did not.

Accordingly, at 5:59 p.m. a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.[2]

Mitchell argued that the blood test should be suppressed because it was taken without a warrant or his consent. The State responded that Mitchell had consented to the blood draw via the "implied consent" provided for in WIS. STAT. § 343.305. The State explained that under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent, and therefore—because Mitchell was unconscious—the warrantless blood draw was pursuant to this (implied) consent.

The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency." The circuit court denied Mitchell's motion, reasoning that WIS. STAT. § 343.305(3)(b) "makes clear that an unconscious operator … cannot withdraw their consent to a blood sample." The only remaining question, the court reasoned, was whether probable cause supported the blood draw, which it clearly did.

After a jury trial, Mitchell was convicted on both the OWI count and the PAC count. He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently. Mitchell appeals from his convictions.

[2] Although the specific results were not mentioned during the suppression hearing, Mitchell entered into a stipulation at trial that the results were .222g/100mL.

DISCUSSION

This case squarely asks whether the "implied consent" outlined in WIS. STAT. § 343.305(3)(b) constitutes consent to a search under the Fourth Amendment. Although no case has explicitly decided the precise issue of whether a warrantless blood draw on an unconscious motorist may be justified solely by "implied consent," our precedents do address whether statutory implied consent is actual consent. These cases offer differing answers to that question, and accordingly, we must certify. *See* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶¶78-79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict).

We certified this precise issue previously in ***State v. Howes***, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). Although certification was granted, the lead opinion decided the case on the basis that exigent circumstances justified the search. ***State v. Howes***, 2017 WI 18, ¶3, 373 Wis. 2d 468, ___ N.W.2d ___. Justice Gableman, joined by Justice Ziegler, authored a concurrence explaining his view that implied consent constitutes actual consent. ***Id.***, ¶¶52, 84 (Gableman, J., concurring). Justice Abrahamson authored a dissent that explained her view that implied consent did not constitute actual consent for Fourth Amendment purposes. ***Id.***, ¶¶89, 136 (Abrahamson, J., dissenting). She was joined in this reasoning by Justice Ann Walsh Bradley and Justice Kelly. ***Id.***, ¶154. With no controlling majority view, this question remains unanswered.

This case presents the opportunity to clarify the law head-on. While consent is not the only circumstance in which a warrantless search is permissible, none of the other "few" and "well-delineated" exceptions were argued, briefed, or

otherwise addressed. *See* ***State v. Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371 ("Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment."). In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. Jaeger expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us. The sole question, then, is whether Mitchell consented to the blood draw.

A. Legal Overview

The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Under these provisions, "[w]arrantless searches are per se unreasonable, subject to several clearly delineated exceptions." ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent is one of these "clearly delineated exceptions." ***Id.*** Although consent may be given by "words, gestures, or conduct," it must be actual consent, which is a question of historical fact. ***Id.***, ¶30. It is the State's burden to establish and prove by clear and convincing evidence that consent was voluntary. ***Id.***, ¶32.

The United States Supreme Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." ***Birchfield v.***

North Dakota, 136 S. Ct. 2160, 2185 (2016). But it has yet to decide whether the "implied consent" that flows from a statutory scheme constitutes actual Fourth Amendment consent. *See* ***id***. at 2185. Some state courts have concluded that statutory implied consent satisfies the Fourth Amendment. *See, e.g.*, ***Bobeck v. Idaho Transp. Dep't***, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015), *review denied* (Idaho Dec. 23, 2015). Others have reasoned that such implied consent is a legal fiction that does "not take into account the totality of the circumstances" as required by the United States Supreme Court, and therefore implied consent alone cannot justify a warrantless search. *See, e.g.*, ***Aviles v. State***, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation omitted).

Wisconsin's implied consent law is contained in WIS. STAT. § 343.305. It provides as follows:

> Any person who … drives or operates a motor vehicle upon the public highways of this state … is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Sec. 343.305(2). Because Mitchell was unconscious, it is the "implied consent" to submit to a blood test "when required to do so" under para. (3)(b) that concerns us here.

Addressing unconscious motorists, WIS. STAT. § 343.305(3)(b) operates in a simple, straightforward manner. It provides the following:

> 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 [WIS. STAT. §] 346.63(1) … one or more samples specified in par. (a) or (am) may be administered to the person.

Id. Thus, by choosing to drive on public roads prior to losing consciousness, an unconscious person is "deemed to have given consent" to his or her blood being tested. That consent is "presumed" not to have been withdrawn. Accordingly, an officer may act on this "implied consent" and conduct a warrantless blood draw provided that the officer "has probable cause to believe" the unconscious person has violated WIS. STAT. § 346.63(1)—as Jaeger concededly did here.

B. The Parties' Positions

The parties agree that WIS. STAT. § 343.305(3)(b) is the applicable provision at issue. Neither party contests that Jaeger had probable cause to believe Mitchell was guilty of OWI at the time of the blood draw. The parties disagree, however, about whether the blood draw was reasonable under the Fourth Amendment.

The State relies exclusively on Mitchell's "implied consent" to justify the warrantless blood draw. The State's position is simple: Mitchell consented to have his blood drawn when he drove on Wisconsin highways and never withdrew that consent. In the State's view, this "consent" passes constitutional muster.

Mitchell takes the position that statutory implied consent cannot operate as Fourth Amendment consent because he had "no opportunity to consent or to refuse consent." In his view, consent occurs when an officer reads the Informing the Accused, not when a person drives on Wisconsin roads. Because he was incapable of giving affirmative consent to the blood draw, he concludes that

the blood draw cannot be justified under the consent exception.[3] Thus, though he does not quite frame it as such, his argument is in effect that the implied consent applying to unconscious individuals as described in WIS. STAT. § 343.305(3)(b) is unconstitutional—i.e., it cannot justify a warrantless blood draw.

C. Our Precedents Offer Conflicting Answers

Our certification in ***Howes*** explained in much greater detail the case law and constitutional background to this question. Having just considered ***Howes***, the members of the court are well aware of the important questions and various arguments pro and con. Rather than retread and repeat the same ground, we briefly explain why we believe we are compelled to certify this question again. Namely, two of our own cases—***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745—specifically addressed how the implied consent statute operates and whether it satisfies the consent exception, and both came to incompatible answers.

In ***Padley***, it was undisputed that the defendant actually consented to having her blood drawn. ***Padley***, 354 Wis. 2d 545, ¶11. At issue, was whether Padley's consent was voluntary. ***Id***, ¶12. We rejected her argument that her

[3] Mitchell additionally urges that WIS. STAT. § 343.305(3)(b) should not apply where police have time to obtain a warrant. Because "the warrant process would not have significantly increased the delay before the blood test could be conducted," he maintains Jaeger was required to obtain a warrant. He grounds his argument in "public policy" and the Supreme Court's exigent circumstances analysis in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013). However, because the State has conceded that the blood draw was not justified by exigent circumstances, this argument need not be addressed. The real issue is whether Mitchell consented to the blood draw. If he did, the practicality of obtaining a warrant is immaterial; the search would be justified under the consent exception.

consent was coerced, concluding that the implied consent statute offered Padley a choice between consenting to the blood draw or withdrawing her "implied consent" and facing the statutory penalties. ***Id.***, ¶27. Although this choice was difficult, we concluded that it passed constitutional muster. ***Id.*** In our discussion, we explained the meaning of "implied consent" in a manner that affects this case.

> On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.
>
> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized….

Id., ¶¶25-26. In other words, implied consent (at least in that scenario) was not actual consent, but a choice between two alternatives: consent or face statutory penalties.

We also took the time to "address some confusion in the arguments of the parties regarding the implied consent law." ***Id.***, ¶37. Of particular note, we explicitly rejected the State's argument that "implied consent … is still consent." ***Id.*** The contention that "'implied consent' alone can 'serve as a valid exception to the warrant requirement'" was, we stated, "incorrect." ***Id.*** We explained, "It is incorrect to say that a driver who consents to a blood draw … has given 'implied

consent.'" ***Id.***, ¶38. Rather, in that circumstance "consent is *actual* consent, not *implied* consent." ***Id.*** (emphasis added). We further reasoned that "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether" to give consent. ***Id***, ¶39. Said another way, implied consent is not really consent; it "does not authorize searches." ***Id***, ¶40. Rather, it is a legal trigger that authorizes law enforcement to require a choice: actually consent or face sanctions. ***Id***, ¶40. We acknowledged tension between this view of implied consent and the statute's clear statement that "implied consent is deemed the functional equivalent of actual consent" for unconscious drivers under certain circumstances. ***Id.***, ¶39 n.10. However, we left resolution of that "tension" for another day. ***Id.*** Though the discussion in ***Padley*** was based on it's statutory application to conscious drivers, the case still sets forth two broad propositions of law: (1) consent is given (or "withdrawn") at the time the officer reads the Informing the Accused form, and (2) "implied consent" does not by itself satisfy the consent exception.

Several years prior to ***Padley***, we addressed the implied consent statute in ***Wintlend***. In that case, we were faced with the same scenario as ***Padley***: a motorist was stopped for OWI, was read the Informing the Accused warnings, and consented to a blood draw. ***Wintlend***, 258 Wis. 2d 875, ¶2. As in ***Padley***, Wintlend argued that although he consented to the blood draw, his consent was not voluntary.

Critical to whether Wintlend's consent was coerced was the question of the precise time "coercion rears its head." ***Wintlend***, 258 Wis. 2d 875, ¶14. In other words, when did Wintlend consent for Fourth Amendment purposes? Wintlend maintained (like our later decision in ***Padley***) that he consented at the time the officer read him the Informing the Accused warnings. ***Id.*** He further

argued that his consent was coerced because he was forced to choose to either consent to a blood draw or face suspension of his license. ***Id.*** We rejected his arguments. Relying on ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)—a case not addressing the consent exception or the Fourth Amendment—we reasoned that WIS. STAT. § 343.305 provides that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." ***Wintlend***, 258 Wis. 2d 875, ¶12.[4] Thus, for Fourth Amendment purposes, "the time of consent is when a license is obtained," not when confronted with the Informing the Accused warnings. ***Id.***, ¶¶12-14.

We further concluded that the implied consent given when a license is obtained is actual, Fourth Amendment consent, and that such consent is voluntary. ***Id.***, ¶¶13-14. We explained:

> [I]t stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license.

Id., ¶13. Because there was no unconstitutional coercion, we concluded that Wintlend's implied consent—which he gave as a condition of receiving a license—satisfied the consent exception. ***Id.***, ¶¶1, 19. Again, two critical points

[4] Here too we conceded some tension. The conclusion that implied consent takes place when a person obtains his or her license does not sit comfortably with the plain language of WIS. STAT. § 343.305(2) that any person "who drives or operates a motor vehicle upon the public highways … is deemed to have given consent." ***State v. Wintlend***, 2002 WI App 314, ¶15, 258 Wis. 2d 875, 655 N.W.2d 745. But we concluded that we were bound by our interpretation of ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). ***Wintlend***, 258 Wis. 2d 875, ¶14.

of reasoning emerge, both contrary to ***Padley***'s reasoning. First, the consent that matters for Fourth Amendment purposes takes place when a motorist obtains his or her license, and second, this statutory "implied consent" is sufficient to satisfy the consent exception to the Fourth Amendment.

Like ***Wintlend*** and ***Padley***, the issue here is whether the "implied consent" that is statutorily deemed to have occurred when a driver chooses to drive on a public road supplies voluntary consent to a blood draw for Fourth Amendment purposes under the conditions set forth in the law. Because Mitchell was unconscious at the time of the blood draw, the only possible way to conclude he consented is to hold that "implied consent" under WIS. STAT. § 343.305 is actual, Fourth Amendment consent. On this question, ***Wintlend*** and ***Padley*** offer, or at least strongly suggest, two different answers. ***Wintlend*** implies that the "implied consent" provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. ***Padley***, on the other hand, explicitly rejected that position when it was offered by the State. The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in ***Padley*** and ***Wintlend***.

Wintlend predates ***Padley*** and might arguably govern. *See* ***Marks***, 369 Wis. 2d 547, ¶78. But as we are unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question. ***Id.***, ¶79 (holding that the court of appeals may not "overrule, modify, or withdraw language from a previously published decision" and a court of appeals decision "that a case impermissibly modified an earlier case and is thus not binding is effectively the

same as overruling that case"). We ask the Wisconsin Supreme Court to accept certification and provide clear guidance to the bench, the bar, and the public.