COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2292 **Cir. Ct. No. 2012TR9285**

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

COUNTY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

DUSHYANT N. PATEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Dushyant Patel appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), first offense.

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

He contends the circuit court erred in failing to suppress evidence related to a sample of his blood because the blood draw was unconstitutional in light of ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013), a United States Supreme Court decision handed down after the draw was performed but while the case was still pending. He argues that the exclusionary rule should preclude use of the evidence and that the good faith exception to the rule does not apply. We conclude that because the arresting deputy was acting in conformity with clear, well-settled law in effect at the time, which permitted such a blood draw, the circuit court did not err in determining that the deputy acted in good faith and denying Patel's motion to suppress. We affirm.

Background

¶2 The Waukesha county sheriff's deputy who arrested Patel was the only witness to testify at the hearing related to the motion to suppress. The facts relevant to this appeal are derived from his testimony, undisputed, and as follows.

¶3 On November 2, 2012, Patel was arrested for OWI. Because the arresting deputy was informed at the time that Patel had a prior OWI offense, which the deputy understood to be a conviction, the deputy placed Patel under arrest for OWI-second offense, a criminal offense. The deputy transported Patel to the hospital to procure a sample of his blood. When Patel refused to provide a sample, a blood draw was nonetheless performed because, as the deputy testified, "[t]hat was our policy at that time."

¶4 The charge ultimately proceeded as an OWI-first offense. Patel brought a motion to suppress the evidence from the warrantless blood draw on the ground that it violated his constitutional rights as set forth in ***McNeely***. After a hearing, the circuit court denied the motion. Patel appeals.

Discussion

¶5 Appeal of a circuit court's denial of a motion to suppress requires that we review the application of constitutional principles to a set of facts, which is a question of constitutional fact. ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. We will accept the circuit court's findings of fact unless they are clearly erroneous, but application of those facts and undisputed facts to constitutional principles is a question of law we review de novo. ***Id.***; ***State v. Verhagen***, 2013 WI App 16, ¶17, 346 Wis. 2d 196, 827 N.W.2d 891.[2]

¶6 Patel argues that evidence related to the blood draw should be suppressed because, while his case was pending, the United States Supreme Court decided ***McNeely*** which held that "[i]n 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." ***McNeely***, 133 S. Ct. at 1561. Patel contends that the deputy in this case had sufficient time to seek a warrant prior to the blood draw (which Waukesha County does not dispute) but did not do so. He asserts that the evidence from the blood draw must be suppressed pursuant to the exclusionary rule and that the good faith exception to the rule should not apply because the deputy only stated at the suppression hearing that he procured a sample of Patel's blood despite Patel's refusal because doing so was "our policy at

[2] In an order dated December 26, 2013, this court requested the parties brief whether Patel had waived his right to appeal the denial of his suppression motion by pleading to this civil traffic violation. We choose not to employ the waiver rule in this case and instead, as Patel requests, directly address the merits. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 493-94, 588 N.W.2d 285 (Ct. App. 1998) (waiver is a rule of judicial administration; this court has discretion to make exceptions and address the merits).

that time." Patel argues that for the good faith exception to apply, the deputy needed to articulate that when he procured Patel's blood sample he was relying on clear, settled law and identify the specific law on which he was relying at the time. Patel is mistaken.

¶7 We recently decided a case similar to this one. In ***State v. Reese***, 2014 WI App 27, 353 Wis. 2d 266, 844 N.W.2d 396, Reese sought suppression related to a warrantless blood draw because although the blood sample was obtained consistent with our supreme court's long-standing holding in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *cert. denied*, ***Bohling v. Wisconsin***, 510 U.S. 836 (1993), that the natural dissipation of alcohol alone constitutes an exigent circumstance justifying a warrantless blood draw, Reese's case was still pending when the United States Supreme Court decided ***McNeely*** wherein the Court held that such natural dissipation does not by itself constitute a per se exigency justifying a warrantless blood draw. ***Reese***, 353 Wis. 2d 266, ¶¶1, 18-19. We held in ***Reese*** that evidence related to the blood sample should not be excluded because "[a]t the time of the blood draw the officer was following clear, well-settled precedent established by the Wisconsin Supreme Court, which [as the supreme court stated in ***Dearborn***] 'is exactly what officers should do.'" ***Reese***, 353 Wis. 2d 266, ¶22 (quoting ***Dearborn***, 327 Wis. 2d 252, ¶44). We concluded that any 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, as in ***Dearborn***, be nonexistent in this case because the officer did not and could not have known at the time that he was violating the Fourth Amendment." ***Reese***, 353 Wis. 2d 266, ¶22 (quoting ***Dearborn***, 327 Wis. 2d 252, ¶49).

¶8 Patel argues that ***Reese*** is not dispositive because at the suppression hearing in this case the deputy did not identify any specific Wisconsin case law (such as ***Bohling***) upon which he was relying when he procured Patel's blood sample, but only testified that he procured the sample after the refusal because he was following "our policy at that time." Patel would set a much lower bar for the exclusion of evidence than the law does.

¶9 In ***Dearborn***, the Wisconsin Supreme Court thoroughly discussed the exclusionary rule, emphasizing that it is "a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." ***Dearborn***, 327 Wis. 2d 252, ¶35 (citing ***Herring v. United States***, 555 U.S. 135, 141 (2009)). "That means that just because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies. Rather, exclusion is the last resort. The application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations." ***Id.*** (citing ***Herring***, 555 U.S. at 141). The court further observed that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." ***Id.***, ¶36 (quoting ***Herring***, 555 U.S. at 144). The ***Dearborn*** court then noted that the test for determining whether an officer's reliance on current precedent 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.'" ***Id.*** (quoting ***Herring***, 555 U.S. at 145) (emphasis added). As the United States Supreme Court stated in ***Herring***, a case relied upon by the ***Dearborn*** court, "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was *unconstitutional* under the Fourth Amendment.'" ***Herring***, 555 U.S. at 143 (emphasis added). The

Dearborn court concluded that "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." ***Dearborn***, 327 Wis. 2d 252, ¶38.

¶10 In this case, the arresting deputy testified that he procured a sample of Patel's blood despite Patel's refusal because "[t]hat was our policy at that time." As our decision in ***Reese*** confirms, procuring the blood sample without a warrant was consistent with the "clear, well-settled precedent established by the Wisconsin Supreme Court," which was "the law" in Wisconsin at the time. As in ***Reese***, applying the exclusionary rule in this case would have no deterrent effect on officer misconduct because no misconduct actually occurs where an officer acts consistent with clear, settled law and "did not and could not have known at the time that he was violating the Fourth Amendment." ***Reese***, 353 Wis. 2d 266, ¶22 (citing ***Dearborn***, 327 Wis. 2d 252, ¶49). In a case such as this, suppressing evidence from the blood draw would simply come at the cost of "the truth-seeking and law enforcement objectives of the criminal justice system." *See* ***Dearborn***, 327 Wis. 2d 252, ¶38.

¶11 Patel has directed us to no law demonstrating that the particular officer directing that blood be drawn must know the specific case or statute upon which a policy he or she is following is based. Nor has he identified any law stating it is insufficient that a law enforcement officer's actions were in fact consistent with "clear and settled Wisconsin precedent" as it existed at the time, whether or not the officer knew the specific law (statute or case law) that supported his acts.

¶12 While the deputy in this case did not articulate at the suppression hearing the specific case law supporting his procurement of the blood sample, he acted in conformity with clear, settled Wisconsin Supreme Court precedent in effect at the time. In a case such as this, where "[a]pplication of the exclusionary rule would have absolutely no deterrent effect on officer misconduct, while at the same time coming with the cost of allowing evidence of wrongdoing to be excluded," the good faith exception to the exclusionary rule applies. ***Id.***, ¶¶44, 49. The circuit court did not err in denying Patel's motion to suppress.

By the Court.—Judgment affirmed.

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