

Wisconsin Supreme Court
Wednesday, April 11, 2018
9:45 a.m.

2015AP304-CR

State v. Gerald P. Mitchell

Supreme Court case type: Certification

Court of Appeals: District II

Circuit Court: Sheboygan County, Judge Terence T. Bourke

Long caption: State of Wisconsin, Plaintiff-Respondent, v. Gerald P. Mitchell, Defendant-Appellant.

Issue(s) presented: This case examines the constitutionality of the implied consent law and revisits an issue raised, but not clearly decided, in State v. Howes, 2014AP1870-CR. The Court of Appeals certifies the issue here: “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.”

In Howes, the issue was whether the “implied consent,” deemed to have occurred before a defendant is a suspect, is voluntary consent for purposes of the consent exception to the Fourth Amendment’s warrant requirement.

Some background: After a jury trial, Mitchell was convicted of operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC). Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. See Wis. Stat. § 346.65(2)(am)6. (2015-16). He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently.

At around 3:15 p.m. on a May afternoon in 2013, police received a call from a man who knew Gerald Mitchell. The caller reported that Mitchell was drunk and driving his minivan. About a half hour later, an officer located Mitchell walking down a street. His van was parked nearby. Mitchell was shirtless, wet, and covered in sand. He was slurring his words, had great difficulty maintaining balance, and nearly fell over several times, requiring the officer to help him keep upright.

Initially, Mitchell stated that he had been drinking in his apartment. He later altered his story and told the officer that he was drinking down at the beach, and had parked his vehicle because he felt he was too drunk to drive. Due to Mitchell’s condition, the officer deemed it unsafe to administer the standard field sobriety tests. The officer administered a preliminary breath test, which indicated an alcohol concentration of 0.24 percent. Based on his observations, the officer arrested Mitchell for OWI at approximately 4:26 p.m.

Mitchell eventually became completely incapacitated and had to be taken to the hospital. The officer read the “Informing the Accused” form verbatim to the inert Mitchell. Mitchell did not respond, and the officer concluded that it would be impossible to get affirmative verbal consent due to Mitchell’s high level of intoxication. The officer admitted on cross-examination that he could have applied for a warrant, but he did not do so. Accordingly, at 5:59 p.m., a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.

Mitchell moved the trial court to suppress the results of the blood test taken while he was unconscious.

The State said that Mitchell had consented to the blood draw via the “implied consent” provided for in Wis. Stat. § 343.305, and under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent. Therefore, the unconscious Mitchell impliedly consented to the warrantless blood draw. 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 trial court sided with the State and 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.”

Mitchell appealed, resulting in this certification to the Supreme Court.