OFFICE OF THE CLERK
**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT IV**

August 20, 2020

*To*:

Hon. Nicholas J. Brazeau Jr.
Circuit Court Judge
400 Market St., P.O. Box 8095
Wisconsin Rapids, WI 54494

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Cindy Joosten
Clerk of Circuit Court
Wood County Courthouse
P.O. Box 8095
Wisconsin Rapids, WI 54494

Sandra J. Zenor
Sandra Zenor Law Office, LLC
420 3rd Street South
P.O. Box 1267
Wisconsin Rapids, WI 54495-1267

Craig S. Lambert
District Attorney
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095

You are hereby notified that the Court has entered the following opinion and order:

---

2016AP486-CR State of Wisconsin v. Alan L. Brown (L.C. # 2014CF259)

Before Blanchard, Kloppenburg, and Nashold, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

In May 2014, Alan L. Brown was found lying on the road after he was involved in a motor scooter-deer collision, and he was airlifted to a hospital. At the hospital, Brown's blood was drawn without a warrant at the responding officer's direction while Brown was unconscious, as was then

authorized under WIS. STAT. § 343.305(3)(ar)1., (3)(ar) 2 & (3)(b) (2017-18).[1] On appeal, Brown challenges the circuit court's denial of his motion to suppress the evidence obtained from the warrantless blood draw based on the good faith exception to the exclusionary rule. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm, based on this court's recent decision in ***State v. Prado***, 2020 WI App 42, __ Wis. 2d__, __ N.W.2d __.

After receiving the results of the blood test, the State charged Brown with operating a vehicle while intoxicated and operating a vehicle with a prohibited alcohol concentration. Brown moved to suppress the evidence obtained from the warrantless blood draw, arguing that the blood draw was an unreasonable search and seizure under the Fourth Amendment to the United States Constitution. The circuit court denied Brown's motion based on the good faith exception to the exclusionary rule. A jury found Brown guilty as charged. Brown's appeal hinges on whether the circuit court erred in denying his motion to suppress the evidence obtained from the warrantless blood draw based on the good faith exception to the exclusionary rule.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …." U.S. CONST. amend. IV.[2] "A blood draw conducted at the direction of the police is a search subject to the Fourth Amendment requirement that all searches must be reasonable." ***State v.***

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. We discern no changes to pertinent statutes since the 2014 accident that matter to the issues on appeal.

[2] "Because the language of the Fourth Amendment and article I section II of the Wisconsin Constitution is substantially similar, Wisconsin courts follow the United States Supreme Court's interpretation of the Fourth Amendment when construing article I section II of the state constitution." ***State v. Padley***, 2014 WI App 65, ¶23 n.6, 354 Wis. 2d 545, 849 N.W.2d 867.

***Padley***, 2014 WI App 65, ¶23, 354 Wis. 2d 545, 562, 849 N.W.2d 867. Warrantless searches are per se unreasonable and therefore unlawful, subject to certain recognized exceptions to the warrant requirement, ***Prado***, __ Wis. 2d__, ¶¶10-11, none of which we need address here given our conclusion that the good faith exception to the exclusionary rule applies, under the reasoning in ***Prado***.

"Ordinarily, evidence obtained through an unconstitutional search should be excluded at trial…. However, courts deviate from the exclusionary rule under certain circumstances, including when law enforcement acted in objective good-faith reliance 'on settled law (whether statute or binding judicial precedent) that was subsequently overruled ….'" ***Id.***, ¶67 (second alteration in original) (quoted source omitted).

We stayed this appeal for more than three years pending resolution of other Wisconsin appeals that also involved challenges to the constitutionality of WIS. STAT. § 343.305(3)(ar)1., (3)(ar) 2 & (3)(b), which includes the incapacitated driver provision on which the officer here relied in directing the warrantless blood draw. At the State's request, we ordered the parties to file supplemental briefs addressing the United States Supreme Court's decision in ***Mitchell v. Wisconsin***, 139 S. Ct. 2525 (2019), and this court's decision in ***State v. Paull***, No. 2017AP1210-CR, unpublished slip op. (WI App Aug. 15, 2019). After those briefs were filed, this court issued its decision in ***Prado***.

In ***Prado***, we determined that the incapacitated driver provision is unconstitutional. ***Prado***, __ Wis. 2d__, ¶74. However, we further concluded that the evidence obtained from the blood draw in ***Prado***, which was administered before the United States Supreme Court issued ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016), should not have been suppressed because the officer

who directed the blood draw acted in objective good-faith reliance on the constitutionality of the incapacitated driver provision. ***Prado***, __ Wis. 2d__, ¶3.

In ***Prado***, we explained that, at the time of the blood draw in that case, in December 2014, "the incapacitated driver provision had been on the books for decades, and its constitutionality had not been challenged in any published appellate decision." ***Id.***, ¶¶ 71. We clarified that ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, which held that the implied consent that drivers give when they apply for a Wisconsin license authorizes warrantless searches that satisfy the Fourth Amendment was still "the law in Wisconsin." ***Prado***, __ Wis. 2d__, ¶¶34, 71.

It was only after the decision by the Supreme Court in ***Birchfield*** effectively overruled ***Wintlend*** that it became clear that the incapacitated driver provision violates the Fourth Amendment, as we explained in ***Prado***, __ Wis. 2d__, ¶¶44-49.

It is the same here. The blood draw occurred in May 2014, and the officer acted in objective good-faith reliance on the constitutionality of the incapacitated driver provision. Relying on the reasoning in ***Prado***, we reject the only arguments on this topic advanced by Brown.

Like the defendant in ***Prado***, Brown argues that this court's decision in ***Padley***, decided before the blood draw in this case, should have informed the officer that the incapacitated driver provision authorizing a warrantless blood draw from an unconscious driver was unconstitutional because it stated that the "implied consent" given by every driver on Wisconsin's roads does not establish the "actual consent" that satisfied the Fourth Amendment. However, we explained in ***Prado*** that ***Padley*** could not overrule our prior decision in ***Wintlend*** and, therefore, "we cannot conclude that at the time Prado's blood was drawn, an objectively reasonable officer would have

read ***Padley*** to mean that the incapacitated driver provision was unconstitutional." ***Prado***, __ Wis. 2d__, ¶71 n.26.

Also like the defendant in ***Prado***, Brown also relies on ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), and ***Birchfield***. But we explained in ***Prado*** that ***McNeely*** was limited to the exigent circumstances exception to the warrant requirement and did not "clearly address whether or how the 'consent' implied by implied consent law can satisfy a warrant exception." ***Prado***, __ Wis. 2d__, ¶72. As to the decision in ***Birchfield***, this cannot preclude application of the good faith exception because it was issued after the blood draw occurred in this case.

Accordingly, we affirm the circuit court's denial of Brown's motion to suppress the evidence obtained from the blood draw based on the good faith exception to the exclusionary rule.

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

---

*Sheila T. Reiff*
*Clerk of Court of Appeals*