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 II

November 9, 2022

To:

Hon. Teresa S. Basiliere
Circuit Court Judge
Electronic Notice

Amy Thoma
Clerk of Circuit Court
Green Lake County Courthouse
Electronic Notice

Gerise M. LaSpisa
571 County Rd. A
Green Lake, WI 54941

Michael C. Sanders
Electronic Notice

Todd A. Snow
Electronic Notice

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

2021AP241-CR State of Wisconsin v. Denny L. Peterson (L.C. #2019CF98)

Before Gundrum, P.J., Neubauer and Grogan, 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).

The State appeals from an order granting Denny L. Peterson's motion to suppress evidence. 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 (2019-20).[1] We conclude that the good faith exception to the exclusionary rule applies and precludes suppression of the evidence at issue. Accordingly, we reverse the order to suppress and remand the matter for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On June 19, 2019, law enforcement was dispatched to a single car crash in Green Lake County. Green Lake County Deputy Sheriff Matthew Vande Kolk was the first to respond. He found Peterson trapped underneath his overturned car with serious injuries. Deputy Vande Kolk requested a helicopter for medical transport and a tow truck to help extricate Peterson.

Prior to the arrival of the helicopter and tow truck, Deputy Vande Kolk learned that Peterson had seven prior convictions for operating while intoxicated (OWI) and was prohibited from driving with an alcohol concentration above 0.02. Deputy Vande Kolk directed another deputy to go to a nearby tavern and ask whether Peterson had been drinking there before the crash.

Peterson was eventually freed from the wreckage and placed in a helicopter for transportation to a hospital in the city of Neenah. Just as the helicopter was leaving, Deputy Vande Kolk learned that Peterson had been drinking at the nearby tavern. He asked another deputy to contact the city of Neenah police department to request assistance with obtaining a blood sample from Peterson.

City of Neenah Police Officer Paige Collins was dispatched to the hospital in an attempt to obtain a blood sample from Peterson. There, she found him unconscious in the emergency room. When Peterson got out of the emergency room, Officer Collins read him the Informing the Accused form and requested a blood sample. Peterson, who was still unconscious,

did not respond.[2] Officer Collins subsequently directed hospital personnel to draw Peterson's blood. A test of the blood revealed an alcohol concentration of 0.132.

The State charged Peterson with OWI and operating with a prohibited alcohol concentration, both as an eighth offense. Peterson moved to suppress his blood test results, arguing that the warrantless blood draw violated the Fourth Amendment of the United States Constitution. After a hearing on the matter, the circuit court granted Peterson's motion. This appeal follows.

A circuit court's ruling on a motion to suppress presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. The court's findings of fact will not be overturned unless they are clearly erroneous. ***Id.*** However, the application of constitutional and statutory principles to those findings of fact presents a matter for independent appellate review. ***Id.***

When police collect a blood sample for chemical testing, they have conducted a "search" governed by the Fourth Amendment of the United States Constitution. ***Schmerber v. California***, 384 U.S. 757, 767 (1966). The Fourth Amendment protects against unreasonable searches and seizures. ***State v. Dalton***, 2018 WI 85, ¶38, 383 Wis. 2d 147, 914 N.W.2d 120. A warrantless search is presumptively unreasonable unless an exception to the warrant requirement applies. ***Id.***

Evidence obtained without a warrant, in the absence of a warrant exception, is generally inadmissible in court proceedings under the exclusionary rule. ***Mapp v. Ohio***, 367 U.S. 643

[2] When asked what point there was in reading the form to someone who was unconscious, Officer Collins replied, "It's State law." Earlier, she explained how it was her practice to read the form, and "if they consent or they are unconscious, then we do the blood draw."

(1961); ***State v. Scull***, 2015 WI 22, ¶23, 361 Wis. 2d 288, 862 N.W.2d 562. An exception to this rule exists, however, when police act in good faith. *See* ***State v. Blackman***, 2017 WI 77, ¶70, 377 Wis. 2d 339, 898 N.W.2d 774. The good faith exception has generally been applied when police have reasonably and objectively relied on settled law that is subsequently changed. ***Id.***

At the time Officer Collins encountered Peterson in this case, she was authorized to obtain a blood sample from him pursuant to the incapacitated-driver provision of Wisconsin's implied consent law.[3] *See* WIS. STAT. § 343.305(3)(b). That is because police had probable cause to believe Peterson committed an intoxicated-driver-related offense, and Peterson, who was unconscious, was presumed not to have withdrawn his statutorily implied consent to a blood test. ***Id.***

Since that encounter, both this court and the Wisconsin Supreme Court have declared the incapacitated-driver provision unconstitutional. *See* ***State v. Prado***, 2020 WI App 42, ¶¶3, 74, 393 Wis. 2d 526, 947 N.W.2d 182; ***State v. Prado***, 2021 WI 64, ¶¶3, 70, 397 Wis. 2d 719, 960 N.W.2d 869. Neither court applied the exclusionary rule in the case, however, as both cited the police's good faith reliance on the provision in gathering the evidence at issue. *See* ***Prado***, 393 Wis. 2d 526, ¶¶3, 74; ***Prado***, 397 Wis. 2d 719, ¶¶4, 71.

Given the state of the law at the time of Peterson's blood draw, as well as the precedent of ***Prado***, we believe this case is best resolved via the good faith exception. We conclude that

[3] The State did not assert in the circuit court that Peterson's blood draw was justified under this provision. Despite this omission, we choose to address the issue anyway. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶23, 338 Wis. 2d 114, 808 N.W.2d 155 (the forfeiture rule is one of judicial administration, which appellate courts may overlook). Officer Collins was certainly familiar with Wisconsin's implied consent law, as evidenced by her testimony regarding the Informing the Accused form. *See* WIS. STAT. § 343.305(4).

the exception applies as Officer Collins could have reasonably and objectively relied on the incapacitated-driver provision in justifying her action. Accordingly, we reverse the order to suppress and remand the matter for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for further proceedings.

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

Sheila T. Reiff
Clerk of Court of Appeals