IN THE SUPREME COURT OF THE STATE OF FLORIDA

BYRON MCGRAW,

Petitioner,

v. Case No. SC18-792

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S MOTION FOR REHEARING AND CLARIFICATION

Respondent, by and through undersigned counsel, pursuant to Rule 9.330 Florida Rules of Appellate Procedure, respectfully moves this Honorable Court for rehearing and clarification, and as grounds therefore states:

Clarification

1. The Court recently issued its slip opinion in McGraw v. State, 2019 WL 6333909 (Fla. Nov. 27, 2019). The Court's slip opinion vacated the Fourth District's decision in this case and remanded it "to the Circuit Court of the Fifteenth Judicial Circuit so that McGraw can be given an opportunity to demonstrate that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Id. at *3.

2. The State believes the slip opinion may contain a scrivener's error because it remands the case to the Circuit Court to provide petitioner with an opportunity to resolve certain factual issues. Id. The trial court in this case, however, was the County Court. (R. 31, 67-75, 85-88).

3. Petitioner pled to an enhanced misdemeanor DUI charge in this case. Id. The Circuit Court lacks jurisdiction over such a misdemeanor charge. § 26.012(d), Fla. Stat.; § 34.01(1)(a), Fla. Stat.; Wesley v. State, 375 So. 2d 1903, 1904 (Fla. 3d DCA 1979). Thus, it appears the slip opinion in McGraw needs clarification regarding whether the case is remanded to the County Court (the trial court) or the Circuit Court.

Rehearing

4. The slip opinion cited the recent opinion in Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019), vacated the Fourth District's opinion below, and remanded the case with directions that petitioner be afforded the opportunity "to demonstrate that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." McGraw, 2019 WL 6333909 at *3. The Court's remedy in this case mirrored the one issued by the United States Supreme Court in Mitchell.

5. The State respectfully submits that the Court's slip opinion overlooked or misapprehended a point of law and fact.

6. The State contends the Court misapprehended the Mitchell decision and the facts of the instant case when it fashioned a remedy in this case. Although the Court correctly concluded this case "falls squarely within the rule announced in *Mitchell*," it overlooked certain factual and legal distinctions between the cases. For example, in Mitchell a police officer drove the defendant to a hospital in order to obtain a blood test under Wisconsin's implied consent statute because he became too lethargic for a breath test at the police station. Mitchell, 139 S.Ct. at 2532. Petitioner, in contrast, was taken to the hospital via ambulance for treatment of his unknown injuries. (R. 35). Petitioner was unconscious and unresponsive at the hospital, so Officer DeSantis had petitioner's blood drawn pursuant to Florida law.

7. The trial court in Mitchell denied the defendant's motion to suppress his blood draw based solely on the consent provided by Wisconsin's implied consent statute. Mitchell, 139 S.Ct. at 2532. The trial court in this case, in contrast, specifically found that petitioner did not consent to the blood draw. (R. 71). Nevertheless, the trial court denied petitioner's motion to suppress based upon the good faith exception. Id. at 72-73. The Fourth District unanimously

agreed that the results of petitioner's blood draw were admissible under the good faith exception. McGraw v. State, 245 So. 3d 760, 770, 777 (Fla. 4th DCA 2018).

8. The remedy the United States Supreme Court afforded the defendant in Mitchell was reasonable because of (1) the circumstances involved in that case, i.e., the defendant was transported to the hospital by a police officer (not an ambulance) for the purpose of obtaining a blood draw (not medical treatment), and (2) the legal basis for the trial court's ruling (the defendant gave consent for the blood draw under Wisconsin's implied consent statute). Such a remedy is inapplicable in this case because the trial court's ruling was based upon the good faith exception, not the validity of consent provided by Florida's implied consent statute. Remanding this case to the trial court for further proceedings will have no impact on its ultimate disposition because petitioner's blood draw will remain valid under the good faith exception. State v. Liles, 191 So. 3d 484 (Fla. 5th DCA 2016)(exclusionary rule did not deprive the State of the benefit of blood draw evidence obtained from police officers' good-faith reliance on binding precedent that allowed for such draws in all DUI cases); State v. Hoerle, 901 N.W.2d 327, 334 (Neb. 2017)(blood draw taken prior to Birchfield v. North Dakota, 136 S.Ct. 2160 (2016); good faith exception applied where officer acted in objectively reasonable reliance on a statute that had not been found unconstitutional at that time).

WHEREFORE, the State respectfully requests this Honorable Court GRANT the motion for rehearing and affirm the trial court's denial of petitioner's motion to suppress under the good faith exception.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email (appeals@pd15.state.fl.us) to Benjamin Eisenberg, Assistant Public Defender, 421 Third Street, West Palm Beach, FL 33401 on this 9th day of December, 2019.

/s/ Richard Valuntas
Assistant Attorney General