APPENDIX A

2022 WI 16

SUPREME COURT OF WISCONSIN

CASE NO.:	2019AP1317-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Daniel J. Van Linn, Defendant-Appellant-Petitioner.
	REVIEW OF DECISION OF THE COURT OF APPEALS Reported at 395 Wis. 2d 294, 953 N.W.2d 116 (2020 – unpublished)
OPINION FILED:	March 24, 2022
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	October 27, 2021

SOURCE OF APPEAL:

COURT: Circuit

COUNTY: Oconto

JUDGE: Michael T. Judge

JUSTICES:

DALLET, J., delivered the majority opinion of the Court, in which ZIEGLER, C.J., ROGGENSACK, REBECCA GRASSL BRADLEY, HAGEDORN, and KAROFSKY, JJ., joined. ANN WALSH BRADLEY, J., filed a dissenting opinion.

NOT PARTICIPATING:

ATTORNEYS:

For the defendant-appellant-petitioner, there were briefs filed by *Andrew R. Hinkel*, assistant state public defender. There was an oral argument by *Andrew R. Hinkel*.

For the plaintiff-respondent, there was a brief filed by *John W. Kellis*, assistant attorney general; with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *John W. Kellis*.

2022 WI 16

NOTICE

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No. 2019AP1317-CR

(L.C. No. 2017CF44)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Daniel J. Van Linn,

Defendant-Appellant-Petitioner.

FILED

MAR 24, 2022

Sheila T. Reiff
Clerk of Supreme Court

DALLET, J., delivered the majority opinion of the Court, in which ZIEGLER, C.J., ROGGENSACK, REBECCA GRASSL BRADLEY, HAGEDORN, and KAROFSKY, JJ., joined. ANN WALSH BRADLEY, J., filed a dissenting opinion.

REVIEW of a court of appeals' decision. *Affirmed.*

¶1 REBECCA FRANK DALLET, J. After crashing his car, Daniel Van Linn was taken to the hospital, where two blood tests were performed: the first one by the hospital for diagnostic and treatment purposes; a later one at the direction of a sheriff's deputy for investigative purposes. Both blood tests revealed that Van Linn's blood-alcohol concentration (BAC) was over the legal limit. The circuit court suppressed the results of the deputy's blood test, concluding that the deputy's blood draw violated the Fourth Amendment because the deputy did not have a warrant. The State then subpoenaed the hospital for Van Linn's medical records, which included the hospital's diagnostic blood-test results. Van Linn argues that those results should be suppressed under the Fourth Amendment's exclusionary rule because the State subpoenaed the hospital only after it learned from the deputy's unlawful blood draw that Van Linn's BAC was over the legal limit. The issue is whether hospital's blood-test results are nevertheless admissible under the independent-source doctrine, an exception to the exclusionary rule. We hold that they are, and therefore affirm the court of appeals.

I

¶2 Around 2:00 a.m. one Sunday morning, the Oconto County Sheriff's Office responded to a call about a car accident on a rural road in the Town of Mountain. When a deputy arrived, he found Van Linn's car crashed into the back of a cabin. The subsequent investigation revealed that Van Linn was driving to his cabin when he thought he saw an oncoming car in his lane and swerved to avoid it. He veered off the road and into a ditch, where he hit a tree. He then drove back onto the road, crossing both lanes of traffic before continuing into a ditch on the other

side of the road, over a hill, and through a field, eventually crashing into the back of someone's cabin.

¶3 Ambulance personnel found Van Linn lying on the ground across the street. He had a bump and some blood on his forehead and his hands were bleeding. Van Linn claimed to know nothing about the accident and denied that he was driving. The deputy noted a "moderate odor of alcohol" coming from Van Linn, and Van Linn told the deputy that he had drank "two beers" earlier that evening. The deputy learned that because Van Linn had four prior OWI (operating while intoxicated) convictions, he was subject to a BAC limit of 0.02 and his driving privileges were revoked.[1]

¶4 Van Linn was taken to the hospital. At 3:55 a.m., hospital personnel performed a "diagnostic workup," which included drawing Van Linn's blood. The results of that blood test revealed that Van Linn's BAC was 0.226. Not long after, the deputy arrived at the hospital and, based on his investigation at the accident scene, arrested Van Linn for his fifth OWI. At the time of Van Linn's arrest, the deputy was unaware of the hospital's blood draw and its results.

¶5 Following his arrest, Van Linn admitted that he had in fact been driving and that he was the one who called the police to report the crash. The deputy asked Van Linn to consent to a blood draw, which Van Linn refused. Nevertheless, at his lieutenant's direction and without a warrant, the deputy had Van Linn's blood drawn at

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[1] The legal BAC limit in Wisconsin is typically 0.08. Wis. Stat. § 340.01(46m)(a) (2019–20). Persons with at least three OWI convictions are subject to a BAC restriction of 0.02. See § 340.01(46m)(c). The conditions under which a person's driving privileges can be revoked are laid out in § 343.31. All statutory references are to the 2019–20 version.

approximately 4:15 a.m., about twenty minutes after the hospital had taken Van Linn's blood. A test of this second sample showed that Van Linn's BAC was 0.205.

¶6 In the circuit court,[2] Van Linn moved to suppress the results of the deputy's blood draw because the deputy did not have a warrant and no exceptions to the warrant requirement applied. The State argued that the deputy did not need a warrant because the natural dissipation of alcohol in Van Linn's bloodstream was an exigent circumstance. The circuit court granted Van Linn's motion, suppressing the results of the deputy's warrantless blood draw on the grounds that no exigent circumstances justified the deputy's failure to get a warrant.[3]

¶7 Three months later, the State asked the circuit court to issue a subpoena to the hospital for Van Linn's medical records, which included the results of the hospital's diagnostic blood test.[4] The State submitted an accompanying affidavit asserting there was probable cause for the subpoena because the deputy smelled alcohol on Van Linn at the scene, Van Linn had a reduced BAC restriction, and Van Linn admitted he had been drinking before the accident. The affidavit referenced the deputy's blood draw and noted that testing of the sample showed that Van Linn's BAC was over the legal limit. Van Linn moved to quash the subpoena, arguing that the State's subpoena request violated the circuit court's

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[2] The Honorable Michael T. Judge of the Oconto County Circuit Court presided.

[3] The State does not contest the circuit court's conclusion that the deputy's warrantless blood draw violated the Fourth Amendment.

[4] Wisconsin Stat. § 968.135 authorizes the circuit court to issue a subpoena at the State's request and upon a showing of probable cause.

suppression decision because it sought evidence that was "necessarily related to the previously suppressed blood draw." But the subpoena was issued and executed before the court held a hearing on Van Linn's motion to quash. The hospital turned over Van Linn's treatment records, including the results of the hospital's diagnostic blood test.[5]

¶8 Van Linn then filed a motion to suppress the hospital's blood-test results. He argued that the State was attempting to circumvent the circuit court's prior suppression decision by obtaining the "same information"—his BAC—that it learned from the deputy's unlawful blood draw. Van Linn urged that suppressing the hospital's blood test was necessary to "give[] proper purpose and effect" to the court's prior decision. The circuit court denied Van Linn's motion on statutory grounds without addressing whether its prior suppression of the deputy's unlawful blood draw precluded the State from acquiring the results of the hospital's blood test.[6]

¶9 On appeal, Van Linn argued that the United States Supreme Court's precedent—namely, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and Murray v. United States, 487 U.S. 533 (1988)—required

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[5] The circuit court eventually held a hearing, concluding that the motion was moot since the hospital had already released the records.

[6] Van Linn also argued that he had an absolute privilege under Wis. Stat. §§ 146.82 and 905.04(2) to keep his medical records confidential. The circuit court determined, however, that the exceptions to that privilege in §§ 148.82(2)(a)4. and 905.05(4)(f) applied. The former allows for the release of privileged medical records "under a lawful order of a court," and the latter states that "[t]here is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or alcohol concentration." Van Linn has not challenged this part of the circuit court's decision.

the circuit court to suppress the hospital's blood-test results because the State was "prompted" by the suppression of the deputy's unlawful blood draw to subpoena the hospital for his medical records. He further claimed that the State subpoenaed the hospital only because it knew from the deputy's unlawful blood draw that his BAC was over the legal limit. Van Linn explained that Silverthorne Lumber and Murray prevented the State from using that knowledge as the reason for its subsequent subpoena request. The court of appeals rejected those arguments, holding that the independent-source doctrine, as described in Silverthorne Lumber and Murray, applied. State v. Van Linn, No. 2019AP1317-CR, unpublished op. (Wis. Ct. App. Nov. 17, 2020). It reasoned that, based on the deputy's investigation at the accident scene, the State had probable cause to believe that Van Linn was operating his car while intoxicated before it had "any inkling of what a blood test would reveal." Id., ¶24. Although the State obtained the hospital's blood-test results only after it knew the results of the deputy's blood test, the hospital's blood test was an independent source of Van Linn's BAC because it was "created completely independently" of the deputy's unlawful blood draw. Id., ¶20. The court of appeals held that "the purpose of the exclusionary rule would not be effectuated" by suppressing the hospital's blood test "merely because it was of the same nature" as the unlawfully obtained evidence, because suppressing it would put the State in a worse position than it was in absent the deputy's unlawful conduct. Id.

II

¶10 Whether the exclusionary rule applies to the hospital's blood test is a question of "constitutional fact," which we review under a mixed standard of review. See State v. Jackson, 2016 WI 56, ¶45, 369 Wis. 2d 673, 882

N.W.2d 422. We accept the circuit court's factual findings unless they are clearly erroneous. State v. Carroll, 2010 WI 8, ¶17, 322 Wis. 2d 299, 778 N.W.2d 1. Determining whether those facts amount to a Fourth Amendment violation is a question of law that we review de novo. Id. (adding that we nevertheless benefit from the lower courts' constitutional analyses).

III

¶11 The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. When the State obtains evidence in violation of the Fourth Amendment, that evidence typically must be suppressed under the exclusionary rule. See State v. Prado, 2021 WI 64, ¶56, 397 Wis. 2d 719, 960 N.W.2d 869. The exclusionary rule can apply to both evidence discovered during an unlawful search or seizure and evidence discovered only because of what the police learned from the unlawful activity, also referred to as "fruit of the poisonous tree." State v. Knapp, 2005 WI 127, ¶24, 285 Wis. 2d 86, 700 N.W.2d 899. Not all Fourth Amendment violations, however, justify applying the exclusionary rule. Rather, the rule applies when excluding the unlawfully obtained evidence will "meaningfully deter" police misconduct such that interfering with the criminal justice system's truth-seeking objective is justified. Prado, 397 Wis. 2d 719, ¶¶57-58 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)). Whenever the exclusionary rule applies, the scope of the remedy is limited to preventing the State from "profit[ing] from its illegal activity" without placing the State "in a worse position than it would otherwise have occupied" absent its illegal conduct. Murray, 487 U.S. at 542; Carroll, 322 Wis. 2d 299, ¶44. It follows that excluding illegally obtained evidence "does not mean that the facts thus obtained become sacred and inaccessible," provided

the State's knowledge of them is gained from a source unrelated to the State's illegal conduct. Silverthorne Lumber, 251 U.S. at 392.

¶12 That idea is the foundation of the independent-source doctrine. E.g., Murray, 487 U.S. at 537. The doctrine is an exception to the exclusionary rule in that it allows for the admissibility of evidence or information tainted by an illegal evidence-gathering activity when the State otherwise acquires the same information—or "rediscover[s]" it—by lawful means "in a fashion untainted" by that illegal activity. See id. at 537-38, 541-42; Silverthorne Lumber, 251 U.S. at 392. Subsequent lawful means, such as a subpoena, are "untainted" when the State can show that the illegal conduct neither "affected" the circuit court's decision to approve its subpoena request nor "prompted" the State's decision to seek a subpoena in the first place. See, e.g., United States v. Markling, 7 F.3d 1309, 1315-16 (7th Cir. 1993). The former question turns on "whether the [subpoena's supporting affidavit] contain[s] sufficient evidence of probable cause without the references to the tainted evidence." See United States v. Huskisson, 926 F.3d 369, 375-76 (7th Cir. 2019); Carroll, 322 Wis. 2d 299, ¶44. Van Linn concedes that although the supporting affidavit referenced his BAC as discovered by the deputy's unlawful blood draw, the affidavit establishes probable cause for the subpoena without that reference. Our analysis therefore focuses on the latter question of whether the State's decision to seek the subpoena was prompted by what it learned from the deputy's unlawful blood draw. See United States v. Johnson, 994 F.2d 980, 987 (2d Cir. 1993) ("What is key is that [law enforcement's unlawful conduct] did not result in the government obtaining evidence it would not have otherwise obtained.").

¶13 Van Linn argues that the State's decision to subpoena his medical records was "motivated specifically" by the knowledge it gained from the deputy's unlawful blood draw—that his BAC was over the legal limit. According to Van Linn, if the deputy had not unlawfully drawn Van Linn's blood, the State would not have known that the hospital's blood test would show he had a prohibited BAC and, therefore, "would have had no reason to seek a subpoena" for his medical records.

¶14 Murray, however, demonstrates that the independent-source doctrine can apply even though the State knew the hospital's blood test would show an unlawful BAC. In Murray, federal agents found marijuana during a warrantless search of a warehouse that they suspected housed a drug-trafficking operation. The agents then applied for a search warrant, but included in the warrant application only information they knew prior to their warrantless entry. A magistrate approved the warrant, and when the agents executed it, they "rediscovered" the marijuana. 487 U.S. at 535-36. The Court held that the marijuana evidence was admissible because, although the agents first discovered the marijuana during an unlawful search, they rediscovered it while executing a valid warrant. And the agents had probable cause for the warrant based on what they knew prior to the unlawful search. Id. at 541-42. In other words, neither the agents' decision to seek the warrant nor the magistrate's issuance of the warrant was "prompted by what [the agents] had seen during the [unlawful] entry"—even though the unlawful entry gave the agents a preview of what they would find when executing the warrant. Id. (adding that, under such circumstances, "there [was] no reason why the independent source doctrine should not apply"). Thus, Murray teaches that the independent-source doctrine

applies when the State has a separate reason to seek the challenged evidence apart from the knowledge it gains from an unlawful search. See id.

¶15 Here, the State had ample reasons to subpoena Van Linn's medical records for evidence of OWI, apart from what it learned from the deputy's unlawful blood draw. At the accident scene, the deputy found Van Linn's car crashed into the back of a cabin. His investigation revealed that Van Linn had veered off the road and into a ditch, where he hit a tree. The deputy smelled an "intoxicant" on Van Linn, and Van Linn admitted to having had "a couple of beers." While Van Linn was en route to the hospital, the deputy also learned that Van Linn had a reduced BAC restriction of 0.02. Moreover, the deputy arrested Van Linn for OWI prior to conducting the unlawful blood draw. Similar to the agents' unlawful entry in Murray, the testing results of the deputy's unlawful blood draw "only served to confirm [the State's] prior suspicions": that Van Linn's BAC was over the legal limit. See United State v. Pike, 523 F.2d 734, 736 (5th Cir. 1975) (declining to exclude evidence the FBI lawfully rediscovered because, prior to an earlier, illegal search that revealed identical information, the FBI's investigation had "already focused" on the defendant for the same crime); Murray, 487 U.S. at 535-36, 541. Stated differently, the State's decision to subpoena Van Linn's medical records was not prompted by what it learned from the deputy's unlawful blood draw. See Murray, 487 U.S. at 541.[7]

[7] This conclusion is consistent with how other courts have applied Murray. See, e.g., United States v. Moody, 664 F.3d 164, 167-68 (7th Cir. 2011) ("no indication" that illegal search in 2007 of defendant's cell phone records had "any bearing" on 2009 subpoena for the same records); Johnson, 994 F.2d at 987 (agents' decision to get warrant

¶16 Granted, the State did not subpoena Van Linn's medical records until after the circuit court suppressed the deputy's unlawful blood draw. Van Linn argues that the State's subpoena is therefore the "direct result" of the deputy's unlawful conduct because, but for that conduct, there would have been nothing for the circuit court to suppress. And but for the circuit court's suppression decision, the State would not have subpoenaed the hospital. We hold that, despite the timing of the State's subpoena request, suppression is not justified for two reasons.

¶17 First, in the exclusionary-rule context, the U.S. Supreme Court has rejected the strict but-for causality Van Linn presses here. See Wong Sun, 371 U.S. at 487-88 (evidence should not be excluded "simply because it would not have come to light but for the illegal actions of the police"); United States v. Carter, 573 F.3d 418, 423 (7th Cir. 2009). The "more apt question" for whether the exclusionary rule applies is: did the State "exploit[]" the deputy's unlawful conduct? See Wong Sun, 371 U.S. at 487-88. In this case, the State did not exploit the deputy's illegal conduct because, as explained above, the State had reasonable grounds to suspect Van Linn of OWI prior to anyone drawing his blood. See also State v. Dasen, 155 P.3d 1282, 1286 (Mont. 2007) (explaining that although "the invalidity of the first search necessitated a second [search], the State nevertheless possessed sufficient independent information to 'purge the taint' of the first search"). Additionally, the blood-test evidence contained

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was prompted by the "obvious relevance" of what might be on audiotape recordings, not by the agents' unlawfully listening to the recordings before getting a warrant); United States v. Herrold, 962 F.2d 1131, 1140–41 (3d Cir. 1992) (police had evidence, prior to the unlawful search, that made it "inconceivable" they would not have lawfully discovered the same evidence).

in Van Linn's medical records is "untainted" by the deputy's unlawful conduct because the hospital drew Van Linn's blood for its own diagnostic and treatment purposes, not at the direction of law enforcement. See Segura v. United States, 468 U.S. 796, 813-14 (1984); cf. State v. Ravotto, 777 A.2d 301, 311 (N.J. 2001) (rejecting the State's independent-source argument because the hospital drew the defendant's blood only at a police officer's request).

¶18 Second, suppressing the hospital's blood-test results would not further the purpose of the exclusionary rule, which is to deter police misconduct. The circuit court's suppression of the deputy's warrantless blood draw remedied the police misconduct in this case. Suppressing the hospital's diagnostic blood test, however, would have no further deterrent effect because it involved no police conduct at all, let alone misconduct. See Prado, 397 Wis. 2d 719, ¶57; Davis v. United States, 564 U.S. 229, 237 (2011) ("Real deterrent value is a 'necessary condition for exclusion' . . . .") (quoted source omitted). Moreover, suppressing the hospital's blood test runs counter to the exclusionary rule because it would put the State in a worse position than it occupied absent the deputy's unlawful conduct.[8] See Murray, 487 U.S. at 537-38.

¶19 Accordingly, we conclude that the results of the hospital's blood test are admissible under the

[8] The dissent oversimplifies the issue in asserting that the independent-source doctrine allows law enforcement to "circumvent a suppression decision by simply looking for the same information in a different place." See dissent, ¶33. The doctrine requires law enforcement to have had a reason to look elsewhere for the same information independent of the unlawful conduct that led to the suppression decision. That requirement ensures the police do not get a "do-over" simply because "evidence gained through an unconstitutional search is suppressed." See id., ¶7.

independent-source doctrine. The State's decision to subpoena the hospital for Van Linn's medical records was not prompted by the deputy's unlawful conduct, because the State had reasonable grounds to suspect Van Linn of OWI prior to the deputy's warrantless blood draw. The fact that the State subpoenaed those records only after the circuit court suppressed the deputy's unlawful blood draw does not change the independent nature of the State's suspicions that Van Linn's BAC was over the legal limit. Furthermore, the evidence discovered through the State's subpoena—the hospital's diagnostic blood test—is untainted by the deputy's unlawful conduct, thus suppressing it would not serve the exclusionary rule's purpose.

By the Court.—The court of appeals' decision is affirmed.

¶20 ANN WALSH BRADLEY, J. *(dissenting).* Law enforcement drew Daniel Van Linn's blood without a warrant. He refused to give consent for the blood draw, but an officer nevertheless proceeded to extract his blood.

¶21 No exception to the warrant requirement permitted such a search. After the circuit court suppressed the fruits of the State's unconstitutional foray, the State waited three months to try an end run around the Fourth Amendment and the circuit court's suppression ruling. It subpoenaed hospital records containing the information that the circuit court had earlier suppressed—Van Linn's blood alcohol content.

¶22 Providing the State with an insurance policy in the event of an unconstitutional search, the majority tells law enforcement not to worry. The majority's message is: "If you violate a person's Fourth Amendment rights and the resulting evidence is suppressed, there will be no consequences because you can still gain the information through other means."

¶23 In contrast, my message is: "Get a warrant." This entire appeal would not exist if law enforcement had simply sought a warrant in the first place.

¶24 This court should not promote a search first and warrant later approach. And it certainly should not be condoning an approach that undermines the essence of the exclusionary rule, which is to prevent—not to repair.

¶25 In giving its imprimatur to the State's tactic, the majority justifies its determination by invoking the independent source doctrine. Its rationale rests on two assertions: (1) that the State did not "exploit" the illegal search because it had "reasonable grounds" to suspect Van Linn of OWI before either law enforcement or

medical personnel drew his blood; and (2) that disallowing the subpoena would have no effect on police misconduct.

¶26 The first of these rationales answers the wrong question, obscuring the true inquiry of whether the unconstitutional search "prompted" the subpoena. And the second insulates law enforcement from the consequences of its unconstitutional actions. In doing so, the majority ignores that the consequence of its decision is to give a do-over to law enforcement in the event evidence gained through an unconstitutional search is suppressed.

¶27 Because the majority obscures the constitutional inquiry, erroneously concludes that suppression of the hospital sample would have no effect on police misconduct, and turns the exclusionary rule on its head by creating a perverse incentive for law enforcement to conduct warrantless searches, I respectfully dissent.

I

¶28 Van Linn was suspected of OWI and taken to a hospital. Majority op., ¶¶3-4. While at the hospital, he refused a warrantless blood draw.[1] Id., ¶5. Law enforcement directed a blood draw anyway, believing that exigent circumstances justified the warrantless search. Id.

¶29 The circuit court later determined that exigent circumstances were not present and suppressed the results of the blood draw. Id., ¶6. After this setback, and almost ten months after the arrest and three months after the State's first attempt to admit the blood evidence was

[1] As is his right. State v. Prado, 2021 WI 64, ¶47, 397 Wis. 2d 719, 960 N.W.2d 869 (explaining that "a person has a constitutional right to refuse a search absent a warrant or an applicable exception to the warrant requirement").

rebuffed, the State pursued a different strategy. It subpoenaed the results of a separate blood test the hospital took for purposes of Van Linn's medical treatment. Id., ¶7.

¶30 In support of its application for the subpoena, the State articulated grounds for its issuance, including the results of the unconstitutionally obtained blood draw indicating that Van Linn's blood alcohol content was above the legal limit—.205. The State's second try was met with success. The subpoena for the hospital records issued and the circuit court ultimately denied Van Linn's motion to suppress the results of the hospital sample. Id., ¶8.

¶31 Van Linn appealed, and the court of appeals affirmed the circuit court's denial of this second suppression motion. State v. Van Linn, No. 2019AP1317-CR, unpublished slip op. (Wis. Ct. App. Nov. 17, 2020). The majority now affirms the court of appeals, concluding that the hospital sample is admissible under the independent source doctrine. In the majority's view, "the State did not exploit the deputy's illegal conduct because . . . the State had reasonable grounds to suspect Van Linn of OWI prior to anyone drawing his blood." Majority op., ¶17. Further, the majority concludes that "suppressing the hospital's blood-test results would not further the purpose of the exclusionary rule, which is to deter police misconduct." Id., ¶18.

II

¶32 The majority rests its conclusions on its application of the independent source doctrine. This doctrine "derives from the principle that when the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or

violation." State v. Carroll, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1 (internal quotation and quoted source omitted). The "ultimate question" is whether the search conducted pursuant to the subpoena was "in fact a genuinely independent source of the information and tangible evidence at issue." Murray v. United States, 487 U.S. 533, 542 (1988).

¶33 In determining whether the independent source doctrine applies, we utilize a two-pronged analysis. First, we must determine whether, absent the illegal search, the officer would have sought the search warrant or subpoena. Carroll, 322 Wis. 2d 299, ¶45. Second, we ask if information illegally acquired influenced the magistrate's decision to authorize the warrant or subpoena. Id. (citing State v. Lange, 158 Wis. 2d 609, 626, 463 N.W.2d 390 (Ct. App. 1990)). The burden is on the State to convince the court on each of these prongs. Id. (citing Murray, 487 U.S. at 540).

¶34 Van Linn focuses his argument on the first prong of the analysis, but I pause at the preface of the discussion to briefly observe that a concession by the defense to the existence of probable cause may not be tantamount to answering the question posed in the second prong.[2]

[2] I acknowledge the Carroll court's statement that "[a]s applied to circumstances where an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant." State v. Carroll, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1. However, Carroll cites to Murray in support of that premise, but Murray represents a very different circumstance. Although in Murray, law enforcement had both tainted and untainted evidence sufficient to support probable cause, only the untainted evidence was presented in the application for the search warrant. See Murray v. United States, 487 U.S. 533, 535-36 (1988). Additionally, the Supreme Court voiced concern about the effect that the illegally

Indeed, the State included in the subpoena application the results of the suppressed blood test. Why would the State include the fruits of the unconstitutional search other than in an attempt to influence the circuit court to grant the subpoena? The .205 test result in and of itself would generally be sufficient to establish probable cause. Once a circuit court sees that, "game over."

¶35 The State's mention of the results of the suppressed test stands in stark contrast to the warrant application the United States Supreme Court upheld in Murray. There, "In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry." Murray, 487 U.S. at 535-36. Thus, in addressing the question posed by the second prong—whether information illegally acquired influenced the magistrate's decision to authorize the warrant—the only tenable answer is: Who knows? The record does not reveal the answer. As a result, I think it unlikely that the State met its burden.

A

¶36 With this background in hand, I move next to address the majority opinion's errors. First, the majority rests its holding on the assertion that "the State had

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obtained information might have on the magistrate IF it had been presented in the search warrant application. See id. at 542.

Moreover, the Carroll court's proclamation tells us nothing about the influence the tainted evidence had on a magistrate's decision to issue a subpoena. The circuit court here made no explicit factual findings that law enforcement would have applied for the subpoena absent the tainted evidence. "Murray simply does not contemplate that, in the absence of any relevant fact-finding by a trial court, an appellate court can reach its own 'inference' about whether the law enforcement officers sought the [subpoena] on the basis of evidence that is genuinely independent of the unlawfully obtained evidence." Carroll, 322 Wis. 2d 299, ¶75 (Abrahamson, C.J., dissenting).

reasonable grounds to suspect Van Linn of OWI prior to anyone drawing his blood." Majority op., ¶17. Herein lies the majority's first error.

¶37 At the outset of its analysis, the majority correctly frames the question, focusing on "whether the State's decision to seek the subpoena was prompted by what it learned from the deputy's unlawful blood draw." Id., ¶12. Such a framing stems from the United States Supreme Court's decision in Murray, where, as indicated above, the Court wrote: "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." Murray, 487 U.S. at 542. Further refining the test, the Murray court explained that evidence does not derive from a genuinely independent source "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Id. (emphasis added).

¶38 But the majority's analysis quickly strays from this inquiry. It focuses not on whether any information gleaned from the illegal search prompted the subpoena application, but on whether law enforcement "exploited" the fruits of the illegal search. In answering this question, the majority highlights its conclusion that there was enough information to seek a subpoena of the hospital sample before either blood draw was conducted. See majority op., ¶17. This is not the question that Murray poses.

¶39 With our focus properly on the decision to seek a subpoena, we must ask whether the information learned from the first unconstitutional search "prompted" the second. Common sense says yes. After all, the illegal

search gave the State a sneak-peek of what it was going to find in the "lawful" search: that Van Linn's blood alcohol level was above the legal limit. In other words, when law enforcement filed for the subpoena of the hospital's test results, they already knew what they were going to find due to the illegal search. Would officers really have sought the subpoena if the illegally obtained sample had shown that Van Linn's BAC was below the legal limit?

¶40 Undoubtedly, the subpoena here was also prompted by the suppression of the law enforcement sample. Without that suppression, there would have been no need to subpoena the hospital sample. Accordingly, the independent source doctrine should not apply here to give the State a do-over after it collected evidence in an unconstitutional manner.

B

¶41 Second, the majority concludes that "suppressing the hospital's blood-test results would not further the purpose of the exclusionary rule, which is to deter police misconduct." Majority op., ¶18. The majority says that "[s]uppressing the hospital's diagnostic blood test . . . would have no further deterrent effect because it involved no police conduct at all, let alone misconduct." Id. Herein lies the majority's second error.

¶42 Far from having "no further deterrent effect," allowing law enforcement a second chance to "discover" the same information after it violates a person's rights in conducting a search encourages police misconduct. Instead of taking the time to apply for a warrant, why wouldn't law enforcement give a warrantless search a try if it knew that it could get the same information admitted from another source in the event the fruits of the first search are suppressed?

¶43 Justice Thurgood Marshall observed just this concern in his dissent in Murray: "Under the circumstances of these cases, the admission of the evidence 'reseized' during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches." Murray, 487 U.S. at 546 (Marshall, J., dissenting).

¶44 If the majority really wanted to discourage police misconduct, it would create a strong incentive for police to do things right the first time. Instead, it provides law enforcement with an insurance policy.

¶45 Under the majority's rule, an officer would feel free to seek evidence through unconstitutional means if the officer knew the evidence would later be available from a different source. In contrast, if the State were not given the workaround the majority sanctions in this case, an officer would be encouraged to either get a warrant for the first search or forgo the first search and subpoena the hospital record later—both options that are consistent with the Fourth Amendment's protections.

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¶46 Finally, I am concerned about the perverse incentive created by the majority opinion vis-à-vis a law enforcement officer's initial determination whether to get a warrant.

¶47 This is an OWI case, and in the OWI context, the United States Supreme Court has determined that the dissipation of alcohol in the bloodstream does not create a per se exigency that excuses the need for a warrant. Missouri v. McNeely, 569 U.S. 141, 144 (2013). Rather, "[w]hether a warrantless blood test of a drunk-driving

suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. at 156.

¶48 Warrantless searches are generally disfavored. Indeed, they are deemed presumptively unreasonable unless an exception applies. State v. Dalton, 2018 WI 85, ¶38, 383 Wis. 2d 147, 914 N.W.2d 120.

¶49 Yet the majority here rewards a warrantless search. Imagine, if you will, the future officers who find themselves in an emergency room with an OWI suspect. To get a warrant or not to get a warrant?

¶50 Under the majority opinion, there is a perverse incentive to forgo a warrant application. Just take the blood sample, and if it is thrown out, simply subpoena the hospital records. No harm, no foul. But this flips the exclusionary rule on its head and turns a subpoena into "an after the fact 'insurance policy' to 'validate' an unlawful search." United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992) (citing Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 755 (9th Cir. 1989)).

¶51 The above dilemma facing an officer will recur not only in the OWI context, but also throughout modern policing. And the incentives provided by the majority will be the same, giving rise to concerning implications. Take, for example, a hypothetical raised in Van Linn's reply brief: "Consider the illegal search of a person's phone in Riley v. California, 573 U.S. 373, 379 (2014), which turned up incriminating photographs. After suppression of a search like that, could the government simply subpoena Google or Apple for those companies' copies of the same files as an 'independent source'?"

¶52 Law enforcement should not be able to circumvent a suppression decision by simply looking for the same information in another place. Instead, it should

do things right the first time. The exclusionary rule "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

¶53 Despite the perverse incentive created by the majority opinion, the next officer to confront this situation should still just get a warrant. Indeed, the entire argument before this court would have been avoided from the get-go if law enforcement would have simply sought a warrant for the first draw of Van Linn's blood. Judicial efficiency appreciates it and the constitution demands it.

¶54 For the foregoing reasons, I respectfully dissent.

APPENDIX B

COURT OF APPEALS DECISION **DATED AND FILED** **November 17, 2020** **Sheila T. Reiff** **Clerk of Court of Appeals**	**NOTICE** **This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.** **A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**
Appeal No. 2019AP1317-CR	**Cir. Ct. No. 2017CF44**
STATE OF WISCONSIN	**IN COURT OF APPEALS DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL J. VAN LINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Daniel Van Linn appeals a judgment of conviction for fifth-offense operating a motor vehicle while intoxicated (OWI). Van Linn was injured in an automobile accident. A police officer noted that he smelled of intoxicants, and Van Linn admitted to drinking "a couple of beers." After Van Linn was transported to a hospital, a police officer took a warrantless blood sample from him, which the circuit court subsequently deemed an unlawful search and suppressed as evidence. The court later signed a subpoena from the State seeking medical records from Van Linn's treatment providers at the hospital, which revealed that those providers had taken a second blood sample from Van Linn for diagnostic purposes. The court denied Van Linn's motion to suppress the diagnostic blood evidence, and Van Linn appeals that determination.

¶2 We conclude the circuit court properly denied Van Linn's suppression motion. The diagnostic blood evidence was obtained independent of the earlier, unlawful blood draw, and we conclude the independent source doctrine applies under the circumstances here. We reject Van Linn's arguments to the contrary and affirm.

BACKGROUND

¶3 At approximately 2:00 a.m. on March 26, 2017, police, fire and ambulance first responders were dispatched following a report of an accident in the Town of Mountain in Oconto County. First responders discovered an SUV registered to Van Linn's ex-wife near the reported location of the accident. The SUV had struck the side of a cabin on private property. No one was present in the vehicle, but there was blood on the steering wheel and the driver's-side door, as well as a cell phone in the front-passenger seat. The SUV appeared to have been

damaged in another accident, and the doors were inoperable. The responding officer, deputy Nick School, determined that whoever had exited the vehicle after the accident did so through the front driver's-side window. School was able to follow the vehicle's tracks back to an area where it had also struck a tree in a ditch.

¶4 Police located Van Linn lying in a nearby yard. He was bleeding from his head and hands. When questioned, Van Linn claimed he had been out for a walk and further claimed not to have any knowledge of an accident. School noted that Van Linn smelled of alcohol, and Van Linn acknowledged he had consumed "a couple of beers." Dispatch advised School that Van Linn had four prior OWI offenses and, therefore, was subject to a .02 blood alcohol limit.

¶5 Van Linn was transported by ambulance to receive medical care; he was originally destined for a hospital in Oconto County but was diverted to ThedaCare Medical Center—Shawano. There, School met with Van Linn and medical staff, whereupon he determined that he could not perform field sobriety tests given Van Linn's injuries. School informed Van Linn he was under arrest for fifth-offense OWI and read him the "Informing the Accused" form verbatim at 3:56 a.m. Van Linn refused to consent to an evidentiary chemical test of his blood.

¶6 School, believing that exigent circumstances existed due to the delay in transporting Van Linn, decided to take a blood sample from him without obtaining a warrant. Hospital staff collected the sample and provided it to School, who secured it in his patrol vehicle; we refer to this sample as the "law enforcement blood sample." After receiving treatment and being medically cleared, Van Linn agreed to provide a statement to police before he was transported to the jail. The law enforcement blood

sample was mailed that morning to the state Forensic Toxicology Laboratory, which analyzed the sample and concluded that it contained an alcohol concentration well in excess of the .02 restriction.

¶7 Van Linn was charged with fifth-offense OWI, and he filed a motion to suppress the results from the test of the law enforcement blood sample. The circuit court granted the motion, finding that the warrantless blood draw was not justified by exigent circumstances. The court concluded that the warrantless blood draw violated Van Linn's Fourth Amendment rights and that all evidence derived from that draw must be suppressed.

¶8 Thereafter, the State requested circuit court approval of a subpoena directed to ThedaCare Medical Center—Shawano seeking Van Linn's medical records created in connection with his treatment on March 26, 2017. After the court signed the subpoena, Van Linn objected and filed a motion to quash.[1] ThedaCare provided the records before the motion to quash could be heard, and the court deemed the motion moot. The records revealed that hospital personnel, acting independently of law enforcement, had taken one or more blood samples from Van Linn and performed a blood panel for diagnostic purposes, which included his blood alcohol concentration.[2] We refer to this sample (or samples) as the "the diagnostic blood test."

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[1] The circuit court also signed a subpoena directed to Mountain Ambulance, the company that transported Van Linn after the accident. Van Linn does not raise any issue on appeal regarding that subpoena or any evidence obtained from it.

[2] As the State notes, the record is not entirely clear whether more than one additional blood sample was taken for diagnostic or treatment purposes. However, the precise number of blood samples

¶9 Van Linn then moved to suppress evidence related to the diagnostic blood test, raising numerous concerns about the evidence (including chain-of-custody issues and the availability of independent testing of the samples obtained) and arguing that the results were privileged under WIS. STAT. § 905.04(2) (2017-18)[3] (providing for physician-patient privilege). Van Linn also argued that to give the exclusionary rule its "proper purpose and effect," the circuit court was required to also suppress the results of the diagnostic blood test after having suppressed the test results of the earlier law enforcement blood sample. In response, the State asserted that the evidence obtained from the subpoena should not be suppressed because "[t]he hospital's action [in sampling and analyzing Van Linn's blood] was completely separate and independent of law enforcement's request for a blood sample under the State's implied consent law."

¶10 The circuit court denied Van Linn's motion to suppress the evidence related to the diagnostic blood test. It rejected Van Linn's assertion of privilege, but it did not address Van Linn's conclusory contention that the suppression of the diagnostic blood test evidence was necessary to effectuate the purposes of the exclusionary rule vis-à-vis the suppressed law enforcement blood sample. Following the ruling, Van Linn pled no contest to the fifth-offense OWI charge. He now appeals,

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taken from Van Linn for diagnostic or treatment purposes is immaterial to the issues presented.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

challenging the denial of his motion to suppress the diagnostic blood test evidence.[4]

DISCUSSION

¶11 On appeal, Van Linn argues that the evidence from the diagnostic blood test was inadmissible because it was the result of the prior unlawful search—invoking the well-established notion that all evidence derived from an illegal search is the "fruit of the poisonous tree" and must be suppressed. *See* ***Nardone v. United States***, 308 U.S. 338, 341 (1939). Relying on ***Murray v. United States***, 487 U.S. 533 (1988), and ***Silverthorne Lumber Co. v. United States***, 251 U.S. 385 (1920), Van Linn contends that the diagnostic blood test evidence was derived from the earlier illegal search, both because the suppression of the law enforcement blood sample was a "but-for" cause of the subpoena request and because the affidavit in support of the subpoena mentioned the blood alcohol content present in the earlier sample.[5]

¶12 As an initial matter, the State contends Van Linn has forfeited this argument. Forfeiture is a party's failure to timely assert a right. ***State v. Coffee***, 2020 WI 1, ¶19, 389 Wis. 2d 627, 937 N.W.2d 579. The general rule is that issues, even those of constitutional dimension, that are not presented to the circuit court will not be considered for the first time on appeal. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The State argues that this rule applies to Van Linn's appellate arguments because he did not specifically argue to the circuit court "that the

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[4] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding a defendant's no-contest plea. WIS. STAT. § 971.31(10).

[5] The affidavit in support of the subpoena disclosed that the law enforcement blood sample analyzed by the state Forensic Toxicology Laboratory had a blood alcohol concentration of .205.

medical records were in any way fruit of the poisonous tree." The fact that Van Linn focused on privilege arguments before the circuit court is, in the State's view, fatal to our ability to consider his appellate claim that the diagnostic blood test evidence was derived from the unlawful law enforcement blood sample. Whether a defendant has properly preserved a claim for appellate review is a question of law that this court reviews de novo. ***State v. Corey J.G.***, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

¶13 We decline to apply the forfeiture doctrine under the circumstances of this case. The forfeiture rule is a rule of judicial administration, not a mandate, and it need not be applied in every case. ***Coffee***, 389 Wis. 2d 627, ¶21. Here, although Van Linn arguably did not outline the specific argument he makes on appeal, his suppression motion clearly raised a Fourth Amendment challenge to the diagnostic blood test evidence. As such, addressing Van Linn's argument here would not blindside the circuit court with a reversal that did not originate in that forum. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Moreover, there are no disputed facts requiring resolution. And although the State contends Van Linn should not be allowed to make an argument "which the prosecutor was never given notice of or the opportunity to respond," it has not identified any prejudice to it that would arise from our consideration of the issue on appeal. We therefore proceed to the merits of Van Linn's appeal.

¶14 Whether a search comports with the Fourth Amendment is a question of constitutional fact. ***State v. Carroll***, 2010 WI 8, ¶17, 322 Wis. 2d 299, 778 N.W.2d 1. We will uphold a circuit court's findings of evidentiary or historical facts unless they are clearly erroneous. ***Id.*** We

independently determine the application of constitutional principles to those facts. ***Id.***

¶15 The parties' dispute turns on the scope of the exclusionary rule. "[T]he exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure." ***Id.***, ¶19. Under ***Murray***, the rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original unlawful search to dissipate that taint. ***Carroll***, 322 Wis. 2d 299, ¶19 (citing ***Murray***, 487 U.S. at 536-37).

¶16 Here, the State relies on the independent source doctrine, which was developed "[a]lmost simultaneously with [the Supreme Court's] development of the exclusionary rule" and was announced in ***Silverthorne Lumber Co.*** *See* ***Murray***, 487 U.S. at 537. The independent source doctrine is a function of the notion that the exclusionary rule should not "put the police in a worse position than they would have been in absent any error or violation." ***Id.*** (citing ***Nix v. Williams***, 467 U.S. 431, 443 (1984)). To determine whether law enforcement obtained evidence from a source independent of a constitutional violation, courts look to two factors: (1) whether, absent the unlawful seizure, police would still have applied for the search warrant; and (2) whether the unlawful seizure influenced the magistrate's decision to grant the search warrant. ***State v. Gant***, 2015 WI App 83, ¶16, 365 Wis. 2d 510, 872 N.W.2d 137; *see also* ***Murray***, 487 U.S. at 542.

¶17 Van Linn asserts that ***Murray*** dictates that the evidence derived from the diagnostic blood test must be suppressed. In ***Murray***, police officers, having

intercepted vehicles containing contraband during a sting operation, unlawfully entered a warehouse and observed marijuana bales, then applied for (and were granted) a warrant to search the warehouse without the application mentioning the earlier warehouse entry or their observations. ***Murray***, 487 U.S. at 535-36. In determining whether the "search pursuant to [the] warrant was in fact a genuinely independent source of the information and tangible evidence at issue," the Court observed that the doctrine would not apply "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." ***Id.*** at 542 (footnote omitted).

¶18 Van Linn asserts the State ran afoul of this prohibition against the circuit court considering otherwise unlawfully obtained evidence when issuing the subpoena here. This alleged error occurred because the State mentioned the alcohol content of the earlier blood sample in its subpoena affidavit and, as a result, "plainly used information gained from its illegal search to demonstrate the probable cause it needed" to issue the subpoena. Consequently, Van Linn argues the result in this case is dictated by ***Silverthorne Lumber Co.***, where law enforcement officers unlawfully seized books, papers and documents and then, after returning the evidence, applied for a subpoena for those same documents, relying upon the knowledge gained from the initial seizure. ***Silverthorne Lumber Co.***, 251 U.S. at 391. The Supreme Court held that such a procedure does not constitute an independent source; "the knowledge gained by the Government's own wrong cannot be used by it" to establish probable cause for an alternative method of obtaining the evidence. ***Id.*** at 392.

¶19 Van Linn and the State appear to agree that the principles articulated in ***Silverthorne*** and ***Murray*** apply equally to subpoenas and warrants, and we assume that to be the case.[6] We do not agree with Van Linn, however, that the State is attempting to take an impermissible "back door" to avoid the circuit court's earlier suppression ruling. Nor do we agree with him that merely by disclosing the impermissibly derived blood alcohol content in the subpoena application, the State automatically rendered the diagnostic blood test evidence the "fruit" of the earlier unlawful law enforcement blood sample.

¶20 We reach these conclusions because, most importantly, the diagnostic blood test evidence sought by the State was created completely independently of the impermissible law enforcement blood sample. The medical provider drew its own sample of blood for treatment purposes and conducted its own analysis. The purpose of the draw was not to obtain evidence of a crime but, rather, to diagnose and treat any injuries from which Van Linn may have been suffering. By declaring this evidence unavailable to the State merely because it was of the same nature as separate, unlawfully obtained evidence, we would be placing the police in a worse position than they would otherwise occupy. Thus, the purpose of the exclusionary rule would not be effectuated by suppressing the evidence. *See* ***Murray***, 487 U.S. at 537.

¶21 Critically, in analyzing whether the independent source rule applies, we must consider whether law enforcement would have sought out the pertinent evidence even if the unlawful seizure had not occurred. ***Gant***, 365 Wis. 2d 510, ¶16. Despite Van Linn's arguments

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[6] Both subpoenas and search warrants may issue upon a showing of probable cause. *See* WIS. STAT. §§ 968.12 and 968.135.

to the contrary, that is plainly the case here. It seems exceedingly likely the prosecutor would have sought out any evidence that could be used to establish the elements of the OWI charge for which Van Linn had already been arrested before the diagnostic blood test had even occurred. This motivation would have been particularly true regarding highly probative evidence like Van Linn's blood alcohol content.

¶22 Van Linn's argument is that the suppression of the law enforcement blood sample prompted the prosecutor to seek the diagnostic blood test evidence. But we fail to see why the sequencing of the State's subpoena request should matter, especially under the facts here. When prior case law speaks of an unlawful search "prompting" a subsequent, lawful search, it is referring to the notion that the knowledge police gained from an illegal search cannot form the basis for a later, lawful request for that evidence. *See* ***Murray***, 487 U.S. at 542; ***Silverthorne Lumber Co.***, 251 U.S. at 392. Such prompting does not occur when the police seek different, lawfully obtained evidence that is otherwise known to be available to them. Indeed, the relevant case law validates untainted attempts to obtain even the *same* evidence that was the subject of an earlier, unlawful search. *See* ***Murray***, 487 U.S. at 535-36 (involving evidence observed by police during an unlawful search of a warehouse but later lawfully seized); ***Carroll***, 322 Wis. 2d 299, ¶¶6-11 (involving incriminating pictures on a cell phone that were unlawfully viewed by police prior to obtaining a warrant).

¶23 The only aspect of Van Linn's "prompting" argument that bears further scrutiny is his contention that the subpoena affidavit was tainted by the inclusion of the blood alcohol content derived from the unlawful law enforcement blood sample. But in the context of a warrant, when the affidavit supporting the application

"contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant." ***Carroll***, 322 Wis. 2d 299, ¶44. The subpoena affidavit detailed the law enforcement investigation of the crash, including the accident scene and discovery of an injured Van Linn who smelled of intoxicants and admitted to drinking "a couple of beers." As a result, there was probable cause to believe that Van Linn's medical treatment providers would have evidence concerning the degree of Van Linn's intoxication.

¶24 Additionally, we must consider whether the unlawful search influenced the decision to issue the subpoena. *See* ***Gant***, 365 Wis. 2d 510, ¶16. Here, it plainly did not, and Van Linn's reply brief concedes as much. As set forth in the subpoena affidavit, police reasonably suspected Van Linn of—and arrested him for—OWI even before law enforcement had any inkling of what a blood test would reveal. As a result of the foregoing, the circuit court properly held that the evidence derived from the diagnostic blood test and produced as a result of the subpoena is not subject to suppression.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN	CIRCUIT COURT	OCONTO COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

DANIEL J. VAN LINN,

Defendant.

MEMORANDUM DECISION

Case No. 17 CF 44

FILED
APR 17 2018
CLERK OF COURTS
OCONTO COUNTY, WI

SUPPRESSION OF EVIDENCE

FACTS

On March 26, 2017, Deputy Sheriff Nicholas School of the Oconto County Sheriff's Department responded to a call of a crash of an automobile in the Town of Mountain, Oconto County, Wisconsin. Mountain Area Ambulance was also dispatched to the scene. Deputy School located a vehicle crashed into a cabin. The vehicle had front and passenger side damage. Mountain Area Ambulance then stated that they had located a male but the male had run into the woods. Shortly, thereafter, Mountain Area Ambulance found the male person, who was the defendant, Daniel Van Linn. The defendant's clothes were dirty and wet and he had a head injury and blood over his forehead and hands. Mountain Area Ambulance personnel then attended to defendant's injuries. Thereafter, the defendant was transported to the ThedaClark Hospital by the Mountain Area Ambulance for treatment. As a part of the defendants diagnostic

workup by hospital personnel a blood panel was obtained, which included blood alcohol concentration determination. Subsequently, diagnostic blood test results were obtained from the hospital as a result of a subpoena issued by the Circuit Court Branch I, Judge Michael T. Judge, Oconto County.

The defendant has filed a motion to suppress challenging the Court's jurisdiction to issue a subpoena in order for the State of Wisconsin to obtain the certified medical records of Daniel J. Van Linn as it concerns an automobile accident which occurred on March 26, 2017.

ARGUMENT

Judge Michael Judge was authorized to issue an order to subpoena the medical records of the defendant pursuant to Sec. 885.01 Wis. Stats, which reads:

> *(1) By any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.*

Under Sec. 885.01 a circuit judge has authority to order the production of documents in any action pending before any court.

Furthermore, pursuant to Sec. 146.82(2)(a)4 Wis. Stats. patient health records shall be released upon request WITHOUT INFORMED CONSENT UNDER A LAWFUL ORDER OF A COURT OF RECORD.

The defense also argues that the diagnostic healthcare records of the defendant cannot be used by the State of Wisconsin to show that he was operating a motor vehicle with the stated blood alcohol content in the records. Wis. Stat. 905.04(4)(f) provides that: *There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or alcohol concentration...* This statutory section is neither ambiguous nor unclear.

Wisconsin Statute Sec. 146.82 concerning confidentiality of patient health care records is a general statute when compared to the more specific section 905.04(4)(f) which concerns tests for intoxication. Therefore, this Court finds that there is no privilege concerning the results of or circumstances surrounding the chemical tests for intoxication of blood alcohol concentration of this defendant.

The State of Wisconsin is also requesting that it allow testimony from individuals of the Mountain Area Ambulance as to the demeanor and conduct of the defendant while he was being treated and transported to the hospital.

CONCLUSION

Therefore, the motion of the defendant to suppress the diagnostic blood test results obtained from ThedaClark Hospital as a result of this accident is dismissed. Further, personnel of the Mountain Area Ambulance shall be allowed to testify as to the conduct and demeanor and other observations of the defendant while being treated and transported.

Dated April 17, 2018.

BY THE COURT

/s/ Michael T. Judge
JUDGE MICHAEL T. JUDGE
CIRCUIT JUDGE-BRANCH I

APPENDIX D

STATE OF WISCONSIN	CIRCUIT COURT	OCONTO COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

DANIEL J. VAN LINN,

Defendant.

MEMORANDUM DECISION

Case No. 17 CF 44

FILED
OCT 18 2017
CLERK OF COURTS
OCONTO COUNTY, WI

A motion hearing was held on September 19, 2017, as to Defendant's Motion to Suppress Blood Draw Test Results.

FACTS

On March 26, 2017, Deputy Sheriff Nicholas School of the Oconto County Sheriff's Department was on duty. At 1:58 a.m., he received a call of a crash of an automobile near Section 4 Lane in the Town of Mountain, Oconto County, Wisconsin. It took Deputy School about twenty minutes to arrive at the scene. Deputy School does not know the specific time that the automobile accident would have occurred. School testified that it could have been an hour or even two hours before he arrived at the scene. Mountain area ambulance was also dispatched to the scene. Upon arrival at the alleged scene. Deputy School could not locate an accident involving an automobile. Deputy School began checking up and down Section 4 Lane looking for either a crash scene or people. Eventually, Deputy School located a vehicle crashed into

a cabin. The vehicle had front and passenger side damage and there was no sign of a driver. Deputy School then began a search for someone who may have been involved in this accident. Around that time, the Mountain Area Ambulance stated that they located a male but the male ran. Deputy School then began to search the area where the male who ran was last seen. Shortly, thereafter, a member of the Mountain Area Ambulance found this male person. The person was the Defendant, Daniel Van Linn, whose clothes were dirty and wet. Van Linn had a bump and blood on his forehead and his hands were also bleeding. The Mountain Area Ambulance personnel then attended to Van Linn's injuries. Deputy School arrived at the scene at 2:18 a.m., and Van Linn was located at 2:31 a.m. The Defendant stated that he wasn't driving and he didn't know anything about an accident. Van Linn stated to Deputy School that he had two beers and Deputy School could smell a moderate odor of alcohol emitting from the Van Linn.

After Deputy School briefing spoke to Van Linn, Van Linn was transported by the Mountain Area Ambulance to St. Clare Memorial Hospital in Oconto Falls. After Van Linn was placed in the ambulance Deputy School did a follow-up investigation from the crash and shortly thereafter Deputy School left to continue the investigation with Van Linn. In route to St. Clare Hospital, in Oconto Falls, Wisconsin, the ambulance was diverted to the Shawano Medical Center which is a further distance away than St. Clare Hospital in Oconto Falls. Deputy School diverted as well and went to the Shawano Medical Center to meet up with Van Linn. Deputy School asserts in his records that he arrived at the Shawano Medical Center at 4:14 a.m., however, the Informing the Accused was read and signed by School at 3:56 a.m. At that point Van Linn was asked if he would

submit to an evidentiary chemical test of his blood and he declined. The blood draw of Van Linn was then conducted without Van Linn's consent at 4:15 a.m., which was some two hours and fifteen minutes after the first call from dispatch informing Deputy School that there had been an automobile accident.

LAW

Wisconsin Statute 885.235(3) provides that if the blood sample is not taken within three hours after the event to be proved, evidence of the amount of alcohol in the person's blood could only be given prima fascia effect only if it is established by expert testimony.

Both the State and the Defense agree that the Fourth Amendment to the United States Constitution provides the right of people to be secure in their persons against unreasonable searches and seizures. Included in this right is the right to be protected from unreasonable searches of an individual's person. A warrantless search of a person, including obtaining a sample of an individual's blood in a criminal investigation, is reasonable only if it falls within a recognized exception to the Fourth Amendment. One recognized exception, one that is at issue in this particular case are situations in which the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Whether a law enforcement officer is faced with an emergency that justifies a warrantless blood draw is determined based upon the totality of the circumstances. The United States Supreme Court and the Wisconsin Supreme Court have decided that the dissipation of alcohol from the blood stream creates a per se exigency is no longer good law. Instead, the totality of circumstances must be analyzed to determine whether an exigency exists justifying a warrantless blood draw.

CONCLUSION

This Court has looked at the totality of the circumstances in determining whether exigent circumstances existed to justify drawing Van Linn's blood without a search warrant. The only exigent circumstance that Deputy School offers is that an accident had occurred approximately two hours prior to his denial of a warrantless blood draw. Deputy School believed that the lapse of time only was a sufficient exigent circumstance so as to justify a warrantless blood draw. Further, there are inconsistences in the records of Deputy School as to the timing of his arrival at the Shawano Medical Center and the timing of the Informing the Accused to Van Linn. Deputy School testified that he arrived at the Shawano Medical Center at 4:14 a.m.; however, his same records show that Deputy School read the Informing the Accused to Van Linn at 3:56 a.m. This Court can not determine which of these times are true and correct nor could Deputy School during his testimony. It further appears that Van Linn, although he was dirty and Deputy School observed blood on his forehead and his hands, there is no indication that Van Linn was incapable of communicating clearly and appropriately with Deputy School. Additionally, concerning the three hour time limit to obtain the blood draw; Deputy School was contacted at approximately 2:00 a.m., and was in the Shawano Medical Center with the Defendant at approximately 4:00 a.m. There was an additional one hour of time, not even including the transport time from the Town of Mountain to the Shawano Medical Center for Deputy School to make contact with a Judicial Official in order to obtain a search warrant for the blood draw. At no point did Deputy School request any assistance in obtaining a search warrant. The time lapse in this case by itself, - is not a

sufficient exigent circumstance to justify a warrantless blood draw.

Therefore, the blood draw which was taken from Van Linn was in violation of his Fourth Amendment rights and all evidence derived from that blood draw must be suppressed.

Dated October 18, 2017.

BY THE COURT

/s/ Michael T. Judge
JUDGE MICHAEL T. JUDGE
CIRCUIT JUDGE-BRANCH I

APPENDIX E

FILED
01-17-2018
Clerk of Courts
Oconto County Wl
2017CF000044

For Official Use

STATE OF WISCONSIN	**CIRCUIT COURT**	**OCONTO COUNTY**

STATE OF WISCONSIN,

Plaintiff,

vs.

DANIEL J. VAN LINN,

Defendant.

DA Case No.:
2017OC000199
Assigned DA/ADA:
Robert J. Mraz
Agency Case No.:
OCSD 17-003106
Court Case No.:
2017CF000044

AFFIDAVIT IN SUPPORT OF SUBPOENA FOR DOCUMENTS

STATE OF WISCONSIN)
)
COUNTY OF OCONTO)

WHEREAS, Chief Deputy Ed Janke has this day complained to this Court, under oath, that on this day in Oconto County, in and upon certain premises in the City of Shawano in Shawano County, which premises are

occupied or owned by ThedaCare Medical Center – Shawano Hospital there are now located certain things which are:

Certified Medical records of Daniel J. Van Linn, dob 11/20/1948, resulting from an automobile accident, which occurred on March 26, 2017.

which things may constitute evidence of Operating while Intoxicated - 5th or 6th Offense; Alcohol Fine Enhancer, Operating with Prohibited Alcohol Concentration - 5th or 6th Offense; Alcohol Fine Enhancer in violation of 346.63(1)(a); 346.65(2)(g)2, 346.63(1)(b); 346.65(2)(g)2.

The facts tending to establish the grounds for issuing a subpoena for documents are as follows:

Complainant states that on March 26, 2017 at 1:58 AM, Deputy Nick School was on patrol in full uniform operating a marked squad. Deputy Nick School was dispatched to the area of 14645 Section 4 Lane, in the Town of Mountain, Oconto County, Wisconsin, for a two vehicle accident, with unknown injuries and one party entrapped in the vehicle. Mountain Fire Department and Mountain Ambulance also responded to the scene.

Deputy School arrived in the area and was unable to locate any sign of an accident at the location given. Rescue personnel and Deputy School began checking up and down Section 4 Ln and in both ditches for vehicle and were unable to locate anything. Dispatch advised the caller stated his name was Daniel and the call plotted just north of 14645 Section 4 Ln. Dispatched attempted phone contact with the original caller and was unable to reach anyone. Dispatch advised this is the only call they received on the accident.

A personnel from Mountain Ambulance advised they had a male in the ditch on Section 4 Ln off of Hwy 32. Deputy

School met with personnel who advised when they turned around to go check on the male he took off running. Rescue personnel and Deputy School began checking the area for the male. While checking the area Deputy School located a white 2001 Suzuki SUV bearing Wl registration 803-***. The vehicle had struck the north side of a structure located at 14632 Section 4 Ln. Deputy School checked the vehicle and did not observe anyone inside the vehicle. Deputy School noticed a cell phone on the front passenger seat along with a hat and glasses on the passenger side floor. Deputy School observed blood on the steering wheel and on the driver's side door. The vehicle had damage to the driver's side of the vehicle that was not caused by striking the building. Deputy School was unable to open any doors on the vehicle. The driver's front window was out and whoever was driving had to exit through the window.

Dispatch advised after searching records they advised the number comes back to Daniel Van Linn. Dispatch advised Daniel Van Linn owns property located at 14645 Section 4 Ln which is the original address given for the complaint. The vehicle that struck the building is registered to Lori Van Linn. DOT records show Lori and Daniel have the same address at 232 Foote Street in Seymour, WI.

While checking the area for patients, rescue personnel advised they located a male across the road. Deputy School walked across the road to 14633 Section 4 Ln. Deputy School observed a white male later identified as Daniel Van Linn lying on the ground in the yard. Daniel was bleeding from the head and hands. Daniel's clothing was wet and dirty. Deputy School asked Daniel if he was alright. Daniel stated he was. Deputy School asked Daniel what happened and he asked what Deputy School was talking about. Deputy School asked Daniel what happened to his vehicle and Daniel replied he was not

driving any vehicle and did not know what Deputy School was talking about. Deputy School asked Daniel if he knew where he was and he stated he was at his house and he was out for a walk. Daniel denied being involved in an accident or driving a vehicle. While speaking with Daniel, Deputy School could smell a moderate odor of an intoxicant emitting from his person. Deputy School asked Daniel if he had anything to drink tonight and he replied with a couple of beers. Rescue personnel began treating Daniel for possible injuries.

Fire Department personnel advised they located an area where a vehicle hit a tree west of Deputy School's location. After investigating the crash further it was determined the white Suzuki SUV was traveling west on Section 4 Ln off of Hwy 32. The vehicle traveled left of center and into the south ditch striking a tree. Vehicle parts located near the tree were consistent with the damage observed on the driver's side of the vehicle. The vehicle then re-entered the roadway and crossed both lanes of traffic and entered the north ditch. The vehicle traveled in the north ditch for a short distance before crossing a road that connects Hwy 32 and Section 4 Ln. The vehicle then continued into a field type area behind 14632 Section 4 Ln. The vehicle drove over a hill and began traveling south down the hill. The vehicle then struck the north side of a structure located at 14632 Section 4 Ln. Deputy School was able to determine the path of traveling of the vehicle by following the tire tracks in the wet grass.

Deputy Baribeau began photographing the scene. Deputy School collected two DNA samples of the blood located on the steering wheel and on the driver's side door. Deputy School also collected the phone located on the front passenger seat as evidence. Deputy School advised dispatch to contact Wilson's to remove the vehicle. A search of the area was conducted and it was determined

there were no other vehicles involved and no other patients. Mountain Ambulance transported Daniel to St. Clare's Memorial Hospital. Dispatch advised Daniel had four prior OWI's and had restriction of no alcohol concentration greater than .02.

Wilson's Towing arrived and removed the vehicle. Deputy School was en-route to St. Clare's Memorial Hospital when dispatch advised Mountain Ambulance was diverted to Shawano Medical Center. Deputy School went to Shawano Medical Center and met with medical staff and Daniel. Standardized Field Sobriety Tests were not completed on Daniel due to possible injuries sustained from the accident, along with medical equipment on Daniel. DOT records show Daniel had four prior OWI's. Deputy School processed a citation # C836706-3 for OWI 5th. Deputy School made contact with Daniel and advised him he was under arrest for OWI 5th. Deputy School then read Daniel the Informing the Accused form verbatim at 3:56 pm. Daniel stated he understood the form and stated "no" when asked if he would submit to an evidentiary chemical test of his blood. Deputy School made contact with Lt. Thomson and advised him Daniel had refused.

It was determined that exigent circumstances exist due to the accident had occurred approximately two hours prior. Daniel was transported to a medical facility out of Oconto County. It would have taken an extended amount of time to obtain a search warrant from an Oconto County Judge. Also the officers were unable to determine Daniel's level of impairment because Standardized Field Sobriety Tests were not conducted because of possible injuries and medical equipment on Daniel.

Daniel had restriction of no alcohol concentration greater than .02 and only admitted to consuming a couple of beers.

A blood sample was collected by the hospital staff and secured in the blood kit along with the completed blood analysis form. Deputy School took possession of the blood evidence and later secured it in his patrol vehicle. Daniel was treated for his injuries by hospital staff. After being treated for his injuries Deputy School read Daniel his Miranda Warning which he stated he understood and agreed to answer questions Daniel answered the questions on the alcohol/drug influence report.

While questioning Daniel he stated he turned onto Section 4 Ln off of Hwy 32 and was heading to his cabin located at 14645 Section 4 Ln. Daniel stated he seen headlights coming in his lane so he swerved to miss them. Daniel stated he thought he hit another vehicle. Daniel stated after the collision he was not sure what was going on but does remember driving in the ditch for a distance and also striking a building. Daniel stated he thought he could hear someone yelling for help and that's when he called 911. Daniel stated he was unable to get out of his car at first but was later able to crawl out through the window. Daniel stated he forgot his phone in the vehicle. Daniel stated the vehicle he was driving belongs to his ex-wife, Lori, who he still lives with. Daniel stated he seen people up by the road and got scared and ran across the road and laid down in the yard. Daniel stated at that time he still was not sure what was going on.

Deputy School informed Daniel that there was not another vehicle involved and that he hit a tree at first and not another vehicle. Daniel seemed surprised but thankful he did not hit another vehicle. Daniel was medically cleared by hospital personnel.

Deputy School transported Daniel to Oconto County Jail where he was booked in for OWI 5th.

Daniel and his property were released to jail staff without incident. Daniel was also cited for operating left of center, and failure to keep vehicle under control. Deputy School also completed a notice of intent to revoke operating privilege. Copies of all citations, Informing the Accused, and Notice of Intent to Revoke Operating privilege were left in Daniel's property at the jail. Daniel was cooperative and polite during the incident.

Deputy School later made contact with Matthew D Reese, the owner of the property located at 14632 Section 4 Ln. Deputy School advised Reese of the damage to the structure on the property. Reese advised the building was not insured and he would contact someone to come up and look at the property if he is unable to. Deputy School informed Reese he would be mailing him a victim information form to his address in Janesville. Deputy School advised Reese if he has any further questions to contact the Sheriff's Office.

Deputy School completed Crash # 9KL05PI,4FR and attached all photos taken to the complaint.

Victim Information Form was mailed to Reese's address. The blood kit was mailed from the Suring Post Office on 03/26/17 at approximately 9:00 AM.

Complainant states that in a written report, Kimberle Glowacki stated that she is an Analyst with the Wisconsin State Laboratory of Hygiene in Madison. She further stated that she analyzed the blood sample of the defendant and determined its blood ethanol concentration to be 0.205 g/100mL.

Complainant further states that a routine computer check with the Wisconsin Department of Transportation revealed that this would be the defendant's 5th conviction,

suspension, and revocation counted under Sec. 343.307(1). Wis. Stats.

Affiant states that the medical records will show the extent of Daniel J. Van Linn's injuries.

WHEREFORE, the said Chief Deputy Ed Janke, prays that a subpoena for documents be issued requiring the production of the documents described herein, and that same be delivered as required by law.

/s/ Ed Janke
AFFIANT

Subscribed and sworn before me
this 17 day of January 2018

/s/ Robert J. Mraz
Robert J. Mraz
My commission expires: Permanent