



**THE WISCONSIN SUPREME COURT HOLDS  
THAT LAW ENFORCEMENT OFFICERS CAN  
TAKE BLOOD SAMPLES FROM  
UNCONSCIOUS DRIVERS WITHOUT A  
WARRANT UNDER CERTAIN  
CIRCUMSTANCES**



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In *Wisconsin v. Howes*, \_\_\_ N.W.2d \_\_\_, 2017 WL 785876 (Wisc. Mar. 1, 2017), the Wisconsin Supreme Court was asked to determine whether the exigent circumstances exception to the Fourth Amendment's warrant requirement permitted law enforcement officers to draw blood from an unconscious driver in order to determine whether that driver had been driving under the influence in violation of Wisconsin's driving laws. The Wisconsin Supreme Court held that, under certain circumstances, law enforcement officers could, in fact, take blood samples from an unconscious driver without first obtaining a warrant. Specifically, the Wisconsin Supreme Court determined that an officer can be justified in taking a blood sample without a warrant when delaying would lead to the destruction of evidence, i.e., the falling levels of alcohol in the suspect's bloodstream. The relevant facts are as follows.

At approximately 9:18 p.m. on July 7, 2013, Deputy Robert Schiro of the Dane County Sheriff's Office received a call from dispatch indicating that an individual had been in a motorcycle crash with a deer. Dispatch stated that the driver was unconscious. Deputy Schiro arrived at the scene of the accident and found the deceased deer and the motorcycle in the middle of the road. The driver of the motorcycle was the Defendant David Howes. Howes was positioned approximately 40 feet away from the deer and was seriously injured and unconscious. When the deputy arrived, Emergency Medical Services (EMS) was already attending to Howes.

Deputy Schiro testified at the evidentiary hearing on Howes' motion to suppress that an individual told Deputy Schiro that he had approached Howes and stated that the individual smelled an odor of intoxicants on Howes. While EMS continued to attend to Howes, Deputy Schiro had to ensure the safety of those traveling through the accident scene because a dead deer and a motorcycle were partially blocking the road. Deputy Schiro began to direct traffic lanes that ran through the scene of the accident. Deputy Schiro also ensured that no one moved the motorcycle and preserved other evidence relating to the accident. During Deputy Schiro's investigation, other officers arrived, and Howes, still unconscious, was transported to the hospital.

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Deputy Schiro, then, left to go to the hospital to follow up with Howes. During the drive to the hospital, Deputy Schiro checked Howes' driving record. As a result of this record check, Deputy Schiro discovered that Howes had three prior OWI convictions. These prior convictions signaled to the Deputy Schiro that Howes had a prohibited alcohol concentration ("PAC") threshold more restrictive than the usual 0.08 percent. Specifically, Howes violated the law if he had operated the motorcycle with a blood alcohol concentration of as little as 0.02 percent.

After he arrived at the hospital, Deputy Schiro immediately spoke with the two Emergency Medical Technicians (EMTs) who were in the ambulance with Howes as he was transported to the hospital. Deputy Schiro inquired about whether either of the EMTs had smelled alcohol on Howes' breath. The deputy testified that the EMT positioned in the ambulance near Howes' head smelled a "high odor of intox coming from" Howes. The EMT positioned in the ambulance at Howes' feet did not smell intoxicants.

Thereafter Deputy Schiro proceeded to the emergency room in which medical staff was treating Howes. Deputy Schiro testified that "numerous nurses and medical staff [were] attending to [Howes] at the time." The on-going medical treatment prevented him from approaching Howes. However, one nurse told Deputy Schiro that there was a strong odor of intoxicants in Howes' room. Deputy Schiro observed that Howes had not regained consciousness and that he was intubated to assist his breathing. Deputy Schiro spoke with a physician regarding Howes' medical condition, and the physician said that Howes was in critical condition and possibly had a brain injury. The physician stated that Howes needed a CT scan to further evaluate his injuries.

At approximately 10:15 p.m., Deputy Schiro arrested Howes for operating a motor vehicle with a prohibited alcohol concentration. Deputy Schiro testified that he arrested Howes for the following reasons: (1) three different individuals smelled an odor of intoxicants emanating from Howes; (2) Howes had a prohibited alcohol concentration threshold of 0.02 percent due to his previous drunk-driving convictions; and (3) the crash. After arresting Howes and while Howes was still unconscious, Deputy Schiro read to Howes an informed consent form. Deputy Schiro asked Howes if he would submit to an evidentiary chemical test of his blood, and Howes did not respond because he was still unconscious. Deputy Schiro then instructed hospital staff to draw a blood sample from Howes to test for alcohol concentration.

At 11:17 p.m., roughly two hours after the accident and an hour after the deputy asked hospital staff to draw Howes' blood, a phlebotomist completed the blood draw. Deputy Schiro testified that the delay occurred either because medical personnel at the hospital were too busy to draw the blood, or Howes may have had a CT scan during this period of time. The report of the blood test revealed that Howes had a 0.11 percent blood alcohol concentration. This result was well in excess of the 0.02 percent prohibited alcohol concentration threshold to which he was subjected due to his prior drunk-driving convictions.

Accordingly, Howes was charged with operating a vehicle while intoxicated and with operating a vehicle with a prohibited alcohol concentration. Howes moved to suppress the results of his blood draw. The trial court granted Howes' motion. The State appealed, and the Wisconsin Court of Appeals certified the case for review by the Wisconsin Supreme Court.

The Wisconsin Supreme Court began its analysis of the issue by noting that a blood draw is a search for purposes of the Fourth Amendment. Thereafter, the Wisconsin Supreme Court reiterated that the “touchstone” of the Fourth Amendment is reasonableness and that the presumption under the Fourth Amendment is that the Government must obtain a warrant prior to conducting a search of one’s home or person.

However, certain exceptions exist to the Fourth Amendment’s warrant requirement, one of them being the “exigent circumstances exception” that holds that a warrantless search complies with the Fourth Amendment if the need for a search is urgent and insufficient time to obtain a warrant exists. There are four well-recognized categories of exigent circumstances: (1) hot pursuit of a suspect; (2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that the suspect will flee. The test for determining the existence of exigent circumstances is an objective one. The Wisconsin Supreme Court went on to state that four additional requirements that a warrantless blood draw in a drunk driving case must satisfy to be reasonable under the Fourth Amendment: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime; (2) there is a clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to the blood draw. *State v. Kennedy*, 856 N.W.2d 834 (Wisc. 2014).

In this case, the Wisconsin Supreme Court stated that there was no doubt that the third and fourth factors existed. The Wisconsin Supreme Court further determined that Deputy Schiro had probable cause to arrest Howes after Deputy Schiro arrived at the hospital. Under the totality of the circumstances, Howes was engaged in a motorcycle accident after which at least one person told Deputy Schiro that Howes smelled of alcohol. That Howes smelled of alcohol was confirmed to Deputy Schiro by one EMT and one a nurse. Given the fact that Howes had a lower PAC than other drivers based upon his prior OWI convictions, the Wisconsin Supreme Court agreed with the trial court that Deputy Schiro had probable cause to arrest Howes.

In addition, the Wisconsin Supreme Court found that exigent circumstances existed for the blood draw. In reaching this conclusion, the Wisconsin Supreme Court reiterated that an officer is justified in conducting a warrantless search to prevent the destruction of evidence, and evidence of a crime is destroyed as alcohol is eliminated from the bloodstream of a drunken driver. Although the Wisconsin Supreme Court conceded that the natural dissipation of alcohol is not, under all circumstances, an exigent circumstance sufficient to allow an officer to conduct a warrantless blood draw, the Court found that exigent circumstances existed here because delaying the blood draw would significantly undermine its efficacy. Specifically, a significant amount of time passed because Deputy Schiro had to investigate the accident; Howes was severely injured and had to be transported to the hospital; and Howes’ prohibited alcohol concentration threshold of 0.02 percent increased the need for a prompt blood draw. Accordingly, the Wisconsin Supreme Court reversed the lower court’s decision and denied Howes’ motion to suppress.

The Wisconsin Supreme Court’s decision in this case was not, however, unanimous. One justice (in which another justice joined) filed a separate concurring opinion. In this concurring opinion, these two justices relied upon Wisconsin’s implied consent law in determining that the evidence of the results of Howes’ blood draw should not be suppressed. The justices explained that, under Wisconsin’s implied consent law, drivers implicitly consent to drug and alcohol testing when doing so would combat

intoxicated driving and protect public safety. Accordingly, these two justices would have reversed the trial court's decision on this basis.

In addition, two justices dissented from the majority's decision. In this dissenting opinion, the two justices argued that implied consent is unconstitutional because consent cannot be given by an unconscious driver. As for this specific case, the justices believed that Deputy Schiro had time to obtain a warrant. Therefore, the dissenting justices would have affirmed the trial court's suppression of the results of Howes' blood draw.

In newspaper accounts, Howes' attorneys have vowed to seek review of the case by the United States Supreme Court.

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**Note:** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*