STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP1261-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NAVDEEP S. BRAR,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 1, THE HONORABLE JUDGE JOHN W. MARKSON, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication. This court may decide this case by applying well-established legal principles to the facts presented.

STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

ARGUMENT

The only issue on appeal is whether the trial court properly denied Brar's motion to suppress. "Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses." *State v. Hampton,* 2010 WI App 169, ¶ 23, 330 Wis.2d 531, 793 N.W.2d 901, *rev. denied,* 2011 WI 29, 332 Wis.2d 279, 797 N.W.2d 524. But, "[a] narrowly crafted exception to this rule exists," "which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea." *See id.; see also* Wis. Stat. § 971.31(10).

I. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S FINDINGS OF FACT THAT BRAR'S RESPONSE "OF COURSE" TO LAW ENFORCEMENT WAS AN AFFIRMATIVE RESPONSE TO A REQUEST THAT BRAR SUBMIT TO A CHEMICAL TEST OF HIS BLOOD.

A. Standard of Review

The standard of review for findings of fact made by a trial court is that they will be affirmed unless clearly erroneous. Wis. Stat. § 805.17(2). A denial of a suppression motion is analyzed using a two-part standard of review. *State v. Conner*, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 821 N.W. 2d 267; *see also* Wis. Stat. § 805.17(2).

First, the trial court's findings of fact will be upheld unless they are clearly erroneous, and second, this Court independently reviews whether those facts warrant suppression. *Conner*, 2012 WI App 105, ¶ 15.

B. General Principles of Fourth Amendment Law Regarding the Legality of Warrantless Searches and Seizures

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend IV; Wis. Const. art. 1, § 11. The Fourth Amendment does not prohibit all searches and seizures; it merely prohibits those which are unreasonable – the touchstone of the Fourth Amendment is reasonableness. *See, e.g. State v. Robinson*, 2010 WI 80, ¶ 32, 327 Wis. 2d 302, 786 N.W.2d 463.

One of the basic search and seizure constitutional rules is that warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment, subject only to a few well-delineated exceptions. *State v. Pinkard*, 2010 WI 83, ¶ 13, 327 Wis. 2d 392, 785 N.W.2d 592. One of the exceptions to the warrant requirement is consent. *State v.*

Padley, 2014 WI App 65, ¶ 23, 354 Wis. 2d 545, 849 N.W.2d 867. Consent is "[a] search conducted pursuant to free and voluntary consent from the person searched." *Id.* Black's Law Dictionary defines "consent" as "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose." *Black's Law Dictionary* (10th ed. 2014). Put another way, consent is "to agree to do or allow something: to give permission for something to happen or be done." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). "Consent" is not to be confused with Wisconsin's "implied consent" statute, a law which gives law enforcement the authority to require drivers to choose between consenting to a blood draw or refusing and facing penalties enacted by the legislature. *Padley*, 2014 WI App 65, ¶¶ 27,33.

C. Brar's Response "Of Course" Was an Affirmative Response and is the Equivalent of "Yes" for the Purpose of Consenting to a Chemical Test of his Blood

At an evidentiary hearing on December 23, 2014, Middleton Police Officer Michael Wood testified about arresting Navdeep Brar on July 2, 2014 for operating while under the influence. R. 42:4. Upon arrest, Officer Wood

took Brar to the Middleton Police Department and completed the paperwork for the incident, including the Informing the Accused form. R. 42:6. The Informing the Accused form incorporates language from Wis. Stat. § 343.305(4) and the most relevant section is as follows:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

Wis. Stat. § 343.305(4).

Officer Wood testified that on the incident date, he read the Informing the Accused form to Brar in its entirety, beginning with the first sentence, "Under Wisconsin's Implied Consent Law," and ending with the last sentence, "[w]ill you submit to an evidentiary chemical test of your blood?" R. 42:6-7. When asked what Brar's response was to that question, Officer Wood testified that he said, "of course," and then a statement similar to "he didn't want to have his license revoked." R. 42:7. Officer Wood took that statement to be an affirmative

response, and recorded a “yes” on the Informing the Accused form to indicate Brar’s choice to submit to a chemical test. R. 42:8.

Officer Wood testified that Brar asked what type of test would be completed, and he was informed it would be a blood test. R. 42:9. Brar next asked whether a warrant was needed for the blood test, to which Officer Wood responded that he shook his head no. Officer Wood testified that Brar never hesitated or gave any resistance to the drawing of his blood, and Brar made any indication that he would not agree to a blood draw. R. 42:9, 16. Furthermore, the blood draw occurred about 45 minutes after the Informing the Accused form was read to Brar, which would have allowed Brar sufficient opportunity to change his mind and voice opposition to a blood draw. *See* R. 42:8.

During the evidentiary hearing, a video recording of the interaction between Officer Wood and Brar was played, which includes when Officer Wood reads the Informing the Accused form to Brar. R. 42:10. Officer Wood testified that although not every statement made by Brar was intelligible on the video, the statements that Officer Wood

referred to earlier in his testimony were intelligible. R. 42:11.

After watching and listening to the video during the hearing, Officer Wood confirms that he heard Brar say, in response to whether Brar would take the test, "of course, I don't want my license," and then acknowledges that it is hard to tell on the video what Brar says after that. R. 42:14. Officer Wood testified that he believed Brar said that he "does not want his license revoked." *Id*. Officer Wood took Brar's response "of course" to mean that Brar would take the test. R. 42:15-16. Brar asked what type of test, Officer Wood answered that it would be a blood test, entered "yes" into the Informing the Accused form, and then printed off the form. R. 42:16. On cross-examination, Officer Wood was quite clear that he heard Brar respond with "of course" when asked to take the test, and even testified that Brar's statement "of course" "is obvious." R. 42:18. Any discussion about the type of chemical test and whether a warrant was necessary for a blood test occurred after Brar gave an affirmative response to Officer Wood. R. 42:21.

Officer Wood also testified that he has experience with numerous people who have refused to take the test. R.

42:22. Also, Officer Wood had a refusal case in 2014 (after the law changed post-*McNeely*[2]) where he had to get a search warrant for the blood draw. R. 42:23. Officer Wood testified that if a person refused to take a blood test, he would have marked "no" on the Informing the Accused form, completed a Notice of Intent to Revoke form, obtained a warrant, and then obtained a blood draw pursuant to that warrant. R. 42:23.

While having video and audio recordings can be helpful for the trier of fact, ultimately the person who heard all of Brar's statements – Officer Wood – heard them in-person, first-hand, and within the context of their entire conversation that night. Officer Wood brought over a decade's worth of experience to this incident, and it is his job to interact with people from a variety of backgrounds, and make decisions based on those interactions.

In addition to Officer Wood's testimony, the State-Respondent also asserts that the plain meaning of the phrase "of course" indicates Brar's affirmative choice to take the test. The phrase "of course" is defined under the

[2] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). This case overruled the Wisconsin Supreme Court's decision in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), which allowed for warrantless blood draws in all OWI related cases.

word “course” and means “following the ordinary way or procedure” and “as might be expected.” *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003). Black’s Law Dictionary defines “of course” as “[n]aturally; obviously; clearly”. *Black's Law Dictionary* (10th ed. 2014). Taking into consideration both the dictionary definition of Brar’s words and the content of the Informing the Accused form, it is certainly reasonable to conclude that Brar said “of course” because he did not want to lose his license, and therefore agreed to take the test. This is certainly not an easy choice, as this Court recognized in *Padley*, but it is nonetheless a choice that a driver such as Brar has to make and deal with the consequences, if any, of that choice. *See Padley*, 2014 WI App 65, ¶¶ 27-28, 39, 354 Wis. 2d 545, 849 N.W.2d 867.

Brar characterizes his use of the phrase “of course” as “incidental” and as an “expression of desire when faced with a difficult choice.” Appellant Br. 14, 18. Additionally, Brar argues that he “merely thought aloud” when he responded to Officer Wood using the phrase “of course.” Appellant Br. 18. Brar further asserts that Officer Wood “manufacture[d] consent by divorcing words helpful to law enforcement goals from the totality of

surrounding circumstances." Appellant Br. 14. However, the State-Respondent believes the record demonstrates quite the opposite, given Officer Wood's consistent testimony on both direct and cross examination that Brar said "of course" and something to the effect of Brar did not want his license revoked. Furthermore, the video recording played during the evidentiary hearing also confirmed this affirmative statement made by Brar.

Brar would like this Court to think that an "expression of desire" is different than an affirmative response. Appellant Br. 18, 20. The dictionary defines "expression" as "an act, process, or means of putting something into words." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). "Desire" is defined as "to want or wish for (something)." *Id.* Brar attempts to use what essentially amounts to synonyms to describe the phrase "of course," and believes by doing so it can morph the phrase into something that has a better connotation for the defense. However, based on the dictionary definition, "an expression of desire" is, by definition, an affirmative response.

The trial court made a factual finding that Brar gave an affirmative response to the question of whether he would

submit to a chemical test. R. 42:46-47. The judge was present in the courtroom for the entire hearing, heard Officer Wood's testimony, and watched the video. *See* R. 42:46-47. The trial court found Officer Wood's testimony to be credible and noted that Officer Wood was in the best position to determine what Brar said on the night of the incident. R. 42:46. The judge heard Brar say "of course" on the video and found the video to be consistent with Officer Wood's recollection of what Brar said. R. 42:47.

Brar's response "of course" indicated an affirmative response to taking the test. The trial court found that Brar provided an affirmative response. Therefore, this Court should affirm the trial court's factual finding.

II. BRAR'S AFFIRMATIVE RESPONSE TO THE QUESTION OF WHETHER HE WOULD CONSENT TO A CHEMICAL TEST OF HIS BLOOD AMOUNTED TO VOLUNTARY CONSENT WHICH IS A VALID EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FOURTH AMENDMENT AND THEREFORE THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF BRAR'S MOTION TO SUPPRESS

The trial court concluded that Brar's affirmative response "of course" to Officer Wood's question of whether Brar would submit to a chemical test did amount to actual consent to the blood draw. R. 42:46. After Brar responded

with “of course,” and something to the effect of he did not want his license revoked, Brar asked Officer Wood a couple questions. First, he asked what type of test, to which Officer Wood responded that it would be blood. R. 42:9, 14-15. Second, Brar asked something to the effect of “do you need a warrant for that?” *Id.* Officer Wood testified that he did not verbally respond to that question, but he believed he shook his head “no.” *Id.* Considering Brar’s affirmative response to taking the test, Brar therefore consented and made the choice to take the test, Officer Wood was correct when he indicated to Brar that a warrant was not needed. As noted earlier in this brief, consent is one of the few exceptions to the warrant requirement under the Fourth Amendment. Therefore, this Court should affirm the trial court’s conclusion that there was no constitutional violation and no basis to suppress the blood test result because Brar consented to the chemical test of his blood.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Navdeep Brar's motion to suppress and the conviction should be affirmed.

Dated this 2nd day of December, 2015.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 12 pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of December, 2015.

_____

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