STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

State of Wisconsin,

Plaintiff-Respondent,

v.

Bradley A. Anderson,

Defendant-Appellant.

Appeal No.: 2015AP001573 CR

Circuit Court Case No. 2014CT000357

Appeal from the Judgment of Conviction and Order in Case No. 2014-CT-357, entered , in the circuit court for La Crosse County, the Honorable Elliot M. Levine presiding.

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

1. **Whether the defendant-appellant's initial consent to supply a sample of blood for testing was voluntary.**
   Answered by the circuit court: Yes.

2. **Whether the defendant-appellant withdrew consent to the drawing of his blood after initially agreeing to supply a sample for evidentiary testing.**
   Answered by the circuit court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the complexity of facts and legal arguments at issue do not lend justification for further development during oral argument.

A decision in this appeal does not meet the criteria for publication enumerated in Wis. Stat. Sec. 809.23, because the decision is to be decided by a single judge.

STATEMENT OF THE CASE

On September 21, 2014, Bradley A. Anderson was arrested for suspicion of Operating a Motor Vehicle While Impaired. The arresting officer read him the implied consent "Informing the Accused" information, and Mr. Anderson eventually said "yes" when asked if he would supply a sample of blood for evidentiary testing.

While the phlebotomist was preparing to draw his blood at the hospital, Mr. Anderson insisted on being allowed to watch the procedure of the blood being drawn. The officer refused to uncuff his arms from behind his back to permit this. Mr. Anderson vociferously protested the drawing of his blood, stating, among other things, that this was "against [his] rights as a U.S. citizen", and saying out loud, "I refuse--I refuse." Despite his protests, blood was drawn from his arm with a needle and collection vial, with the arresting officer holding his arms and standing upon his feet. The blood sample was eventually tested at the Wisconsin Lab of Hygiene, reportedly with illegal results.

Mr. Anderson filed a motion to suppress the blood test results, alleging, among other things, that the results were the product of a warrantless and non-consensual search. An evidentiary hearing was held on January 23, 2015, the Honorable Elliot M. Levine presiding. After additional briefing, an oral ruling took place on March 17, 2015.

The circuit court denied Mr. Anderson's Motion to Suppress. The circuit court did not rule that Mr. Anderson consented to the blood draw. Instead, the circuit court ruled that "the refusal was not a refusal of the testing", only a refusal to "the manner that the blood is being drawn".

As a result of the ruling, Mr. Anderson pleaded guilty to PAC 2nd, contrary to Wis. Stat. § 346.63(1)(b). He now appeals from the Judgment of Conviction and the denial of his Motion to Suppress.

STATEMENT OF FACTS

On September 21, 2014, at approximately 7:56 p.m., the Defendant-Appellant, Bradley A. Olson, was arrested for suspicion of OWI by Officer Nicole Miller of the Onalaska, Wisconsin, Police Department. (R.28 at 7, 25; P-App. at 16, 34.)

While inside the squad car at the scene of the arrest in the City of Onalaska, Officer Miller read Mr. Anderson the information in the implied consent "Informing the Accused" document". (R.28 at 9, 27; P-App. at 18, 36.) The entire conversation was captured on Officer Miller's squad video camera. (R. 14; R. 28 at 22, 27; P-App. at 31, 36.) After reading the information, the following conversation occurred:

> **Officer:** Mr. Anderson: Will you submit to an evidentiary chemical test of your blood? Yes or No?
>
> **Anderson:** I . . . [Inaudible].
>
> **Officer:** You have to say answer 'yes' or 'no'.
>
> **Anderson:** [inaudible].
>
> **Officer:** Mr. Anderson, If you tell me 'no', what's gonna happen is I'm gonna go back to the police department, I'm gonna fill out a search warrant, I'm gonna contact the judge, and I will get permission to take your blood with the reasonable amount of force necessary to do so. If you say yes, we'll go down to the hospital and they will draw your blood, and we'll continue the process.
>
> **Anderson:** And if I say 'no'?
>
> **Officer:** I just told you what's gonna happen if you say 'no'. I will go back to the police department, fill out officer's warrant paperwork, contact the judge, and get the authorization from the judge to take it with the reasonable amount of force necessary. So the question is . . .
>
> **Anderson:** Yes.
>
> **Officer:** Will you submit to an evidentiary chemical test of your blood? Yes or No?

Anderson: I already did.

Officer: You did not. You . . .

Anderson: Yes, I did. I said 'yes'.

Officer: Okay. It's a yes. Thank you.

(R.14: 27:10 - 28:10.)

Mr. Anderson was driven to Mayo Clinic in nearby La Crosse, and he was escorted into the hospital by Officer Miller for a blood draw. (R. 28 at 9; P-App. at 18.) He was handcuffed. (R. 28 at 10; P-App. at 19.) The Officer later claimed that Mr. Anderson was verbally loud and generally uncooperative with her throughout her contact with him. (R. 28 at 6-11; P-App. at 15-20.) Mr. Anderson contends that the objective recording of their discussions throughout his contact with her demonstrates otherwise. (See R.14.)

After a short wait, a phlebotomist arrived to draw Mr. Anderson's blood. (See R. 14.) Just prior to and during the blood draw by the phlebotomist, the following exchange occurred:

Anderson: I have the right to see a needle being pushed in my arm. I have the right to watch her poke a needle in my arm. . . . I have rights also, and I want to see what she's doing to me. I have rights. I have rights, just like you and her. I want to see what you're doing. I'm not against you. I'm in the medical field too. I want to see what you're doing. And because my arms are behind me, I cannot see this. I am not going to hurt nobody. I refuse-- I refuse--

Officer: Stop moving.

Anderson: This is against my rights. This is against my rights as a U.S. citizen. [unintelligible]

Officer: Stop moving.

Phleb.: Okay, so, big poke.

Anderson.: I don't know what she's doing. I can't [unintelligible]. Don't stand on my feet.

Phleb.: Please don't move, I have a needle in your arm.

(R. 14 at 56:30 - 1:03:00.)

Mr. Anderson's blood was drawn by the phlebotomist despite his very vocal protests. (R.14: at 56:30 - 1:03:00.) As Mr. Anderson later described in an Affidavit, at the time of the blood draw, he was being physically restrained by Officer Miller. (R. 9; P-App. at 82-83.) Officer Miller was literally standing on his feet, and she was holding his arms to facilitate the blood draw. (R. 9; P-App. at 82-83.) On the recording, he could be heard saying, "Don't stand on my feet." He also clearly stated, "I refuse-- I refuse". (R. 14 at 56:30-1:03:00.)

Mr. Anderson's blood was eventually tested by the Wisconsin Lab of Hygiene, reportedly with illegal results. Mr. Anderson filed a Motion to Suppress Evidence, asserting, among other things, that his initial agreement to supply a sample of blood was made involuntary by the statements made to him by Officer Miller, and alternatively, on the grounds that he had withdrawn his consent to the blood draw, thus necessitating a warrant, which was never obtained by Officer Miller. (R.11 & 12.; P-App. at 69-85.)

At the hearing Officer Miller initially testified that she did not recall Mr. Anderson objecting to the procedure of the blood draw. (R.28 at 32; P-App. at 41.) In fact, despite Mr. Anderson's protests that continuation of the blood draw "violated his rights, and his statement, "I refuse--I refuse", Officer Miller proceeded with the

blood draw as though it were a consensual situation. (R. 28 at 35; P-App. at 44.) She never even considered getting a warrant. (R. 28 at 35-36; P-App. at 44-55.)

After receiving additional briefing and reviewing the audio-video of the events in question, the Honorable Elliot M. Levine issued an oral ruling March 17, 2015. (R. 29; P-App.1-8.) Judge Levine denied Mr. Anderson's motion. (R. 29 at 8; P-App. at 8.) He first ruled that Mr. Anderson's initial agreement to submit to a blood draw was not coerced. (R. 29 at 5; P-App. at 5.)

Judge Levine then focused on whether Mr. Anderson had withdrawn consent inside the hospital. However, Judge Levine couched his analysis in terms of whether Mr. Anderson had "refused" testing. Judge Levine essentially ruled that while Mr. Anderson had refused, the refusal was to the manner of the blood draw--i.e., with his arms behind his back and not being able to watch the process. As the Judge stated, "The refusal is not a refusal of the testing. What it really is, is he doesn't like the process and that's very clear." (R. 29 at 7; P-App. at 7.) Because the circuit court reasoned that Mr. Anderson's refusal was to the manner of the blood draw, and not a refusal to the search or testing, it was not deemed a "refusal". (R. 29 at .7-8; P-App. at 7-8.) Mr. Anderson now appeals.

STANDARD OF REVIEW

"[V]oluntariness of consent . . . [is a] question[] of constitutional fact. *State v. Phillips*, 218 Wis. 2d 180, 195, 204, 577 N.W.2d 794 (1998). We review questions of constitutional fact as mixed questions of fact and law and apply a two-step

standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634, *citing State v. Martwick*, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552). We review the circuit court's findings of historical fact to determine if they are clearly erroneous, and we independently apply those facts to constitutional principles." *State v. Artic*, 2010 WI 83, 786 N.W.2d 430.

ARGUMENT

I.
THE SEARCH AND SEIZURE OF MR. ANDERSON'S BLOOD WAS *PER SE* UNREASONABLE UNLESS THE STATE DEMONSTRATES THAT IT/THEY FELL WITHIN ONE OF THE "WELL-DELINIATED EXCEPTIONS" TO THE WARRARNT CLAUSE.

The Fourth Amendment to the United States Constitution ensures "[t]he right of the people to be secure in their person…against unreasonable searches and seizures." The United States Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

The United States Supreme Court has recognized that alcohol concentration tests of blood, breath and urine are searches protected by the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In *Missouri v. McNeely*, 569 U.S. ___ (April 17, 2013), the United States Supreme Court reiterated that there is no single-factor exigency

exception to the Fourth Amendment warrant requirement in OWI cases. This holding overruled Wisconsin State law to the contrary, specifically, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).

In *McNeely*, the Court wrote that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.*, slip op. at 9, *citing McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the warrantless search] imperative").

The practical holding of *McNeely* is that the warrantless methods used by law enforcement officers to investigate OWI offenses in Wisconsin are unconstitutional under the Fourth Amendment. Here, the defendant's test result should have been suppressed because it was obtained without a warrant, without valid consent, and in the absence of any exigent circumstances.

II.
THE CIRCUIUIT COURT ERRED BY RULING THAT MR. ANDERSON'S INITIAL AGREEMENT TO SUPPLY A SAMPLE OF BLOOD FOR TESTING WAS CONSENSUAL.

As set forth above, the State has the burden of demonstrating some exception to the warrant requirement existed. Here, it must prove that consent was given voluntarily and without coercion. *United States v. Dennis*, 625 F.2d 782 (8th

Cir. 1980). The question of voluntariness is a question of fact to be determined from the totality of the circumstances present at the time such consent was allegedly given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973).

Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 222. Consent is **not** voluntary if it results from circumstances that overbear the consenting party's will and impairs his or her capacity for self-determination. *Id.* at 233. The State cannot prove consent simply by showing an individual acquiesced to a claim of lawful authority or submitted to a show of force. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Consent must be "received, not extracted." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

Fourth Amendment consent does not lie where the police claim to have a right to the result. *Bumper*, 391 U.S. at 550 (1968). In *Bumper*, the police showed up at the defendant's home with a search warrant, and upon showing it to the defendant's grandmother, she consented to allow them to search the defendant's home. The Court in *Bumper* said:

> One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant rather than an invitation to search.
>
> One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law …. The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve

> it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law. (Citations omitted).

Bumper at 549, fn. 14.

Consent is not present if it is based on the belief that withholding consent would be futile. *See Commonwealth v. Mack,* 796 A.2d 967, 973 (Pa. 2002) (Saylor, J., concurring); see also *United States v. Larson*, 978 F.2d 1021, 1024 (8th Cir. 1992); *Dotson v. Somers*, 402 A.2d 790, 794 (Conn. 1978) ("the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant"). Stating that refusal to consent will result in an officer "seeking" a warrant or "applying for a warrant is acceptable. However, making it seem routine and automatic (i.e., "I will get a warrant"), and threatening is not. *See id.*

Under these rules, the State has the burden in this case to prove that the Mr. Anderson freely and voluntarily consented to submit a sample of his blood. *See Bumper*, 391 U.S. at 548. To do so, the State must prove that Mr. Anderson's agreement to provide a sample was not just the product of submission to the officer's legal authority. *Id.* To make that determination, the court must examine the totality of circumstances that led to the agreement to supply a sample. *Schneckloth*, 412 U.S. at 224-27. A court must first determine if "consent was given in fact by words, gestures, or conduct; and second, whether the consent was

voluntary." *Artic*, 2010 WI at ¶ 29, 786 N.W.2d 430, *citing Phillips*, 218 Wis. 2d at 196-97, 577 N.W.2d 794.

The record includes the actual audio recording made contemporaneous with Mr. Anderson's arrest and Implied Consent processing. (R. 14.) After his arrest, Mr. Anderson was read the "Informing the Accused" statement prior to being asked if he would provide a sample of his blood. That form, states, in pertinent part,

> 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 you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties.*** . . . Will you submit to an evidentiary chemical test of your _____?"

Wisconsin DOT form SP4197l; (R. 14 at 25:30.)

Upon reading Mr. Anderson the Informing the Accused, the following discussion occurred:

Officer: Mr. Anderson: Will you submit to an evidentiary chemical test of your blood? Yes or No?

Anderson: I . . . [Inaudible].

Officer: You have to say answer 'yes' or 'no'.

Anderson: [inaudible].

Officer: Mr. Anderson, If you tell me 'no", what's gonna happen is I'm gonna go back to the police department, I'm gonna fill out a search warrant, I'm gonna contact the judge, and I will get permission to take your blood with the reasonable amount of force necessary to do so.

If you say yes, we'll go down to the hospital and they will draw your blood, and we'll continue the process."

Anderson: And if I say 'no'?

Officer: I just told you what's gonna happen if you say 'no'. I will go back to the police department, fill out officer's warrant paperwork, contact the judge,

and get the authorization from the judge to take it with the reasonable amount of force necessary. So the question is . . .

Anderson: Yes.

Officer: Will you submit to an evidentiary chemical test of your blood? Yes or No?

Anderson: I already did.

Officer: You did not. You . . .

Anderson: Yes, I did. I said 'yes'.

Officer: Okay. It's a yes. Thank you.

(R. 14 at 27:10 - 28:10.)

First, Mr. Anderson was told, "***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.*** . . ." Wisconsin DOT form SP4197 (emphasis added). Mr. Anderson was told he would be punished by revocation of his driving privileges and/or "other penalties" if he refused the deputy's request.

More importantly, Mr. Anderson was clearly led to believe that declining Officer Miller's request for blood would be futile. He was twice told that if he did not agree to it, she "will get permission to take [his] blood", and would use "force", if necessary, to do so.

Officer Miller omitted the fact that she would have to locate a judge and demonstrate probable cause to obtain a warrant. Her voice was authoritative and very matter of fact. She made it seem that getting a warrant was just a matter of filling out paperwork, and that issuance of a warrant would be automatic. (R. 14 at 27:10 - 28:10.) This is why Mr. Anderson agreed to the test after asking what

would happen if he did not. (R. 9; P-App. at 82-83.) He was led to believe that refusal would be futile and, perhaps, lead to the use of force. (R. 9; P-App. at 82-83.) He believed that he had no other choice. (R. 9; P-App. at 82-83.)

Consent is not present if it is based on the belief that withholding consent would be futile. *See Mack*, 796 A.2d at 973; *see also Larson*, 978 F.2d at 1024; *Dotson*, 402 A.2d 790, 794 (Conn. 1978) ("the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant").

Here, the circuit court reasoned that the Implied Consent advisory is not a "coercive process", citing to cases "Artic" (cited *infra.)* and "Kiekhefer", presumably, *State v. Kiekhefer*, 569 N.W.2d 316 (Wis. Ct. App. 1997). While these cases do explore the issue of voluntary consent, they do not deal with consent to a search in the context of the reading of the Implied Consent advisory or the impaired driving context.

There is precedent in Wisconsin that the reading of the Implied Consent to a suspect, and the threat of revocation and "other penalties", does not invalidate a suspect's consent. *State v. Wintlend*, 258 Wis. 2d 875, 2002 WI App 314, 655 N.W.2d 745; *Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891. These decisions were limited to the assertion that Wisconsin's Implied Consent advisory, in and of itself, did not override valid consent. *See id.* The facts of this case clearly go well beyond the reading of the Implied Consent advisory. Here, a conversation about what happens if one does

not consent was undertaken. Officer Miller's explanation was clearly designed to quash any attempt by Mr. Anderson choice to refuse a blood draw. The point she ultimately conveyed was that refusal would be futile.

The State bears the burden of proving, by clear and convincing evidence, that Mr. Anderson's consent was voluntary, and not the product of coercion. *Dennis*, 625 F.2d 782; *Phillips*, 218 Wis. 2d at 197, 577 N.W.2d 794. It must prove that that his consent was the product of "free and unconstrained will, reflecting deliberateness of choice." *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987).

Prior to *McNeely*, there was no "right" to insist upon a warrant, because **all** OWI blood tests presented the arresting officer with exigent circumstances. However, *McNeely* reiterated once and for all that, absent **actual** exigent circumstances, drivers arrested for routine OWI arrest have the right to insist upon a warrant issued by a neutral and detached magistrate. They have the right to refuse the warrantless seizure and search of their blood. In order for consent to be freely given, a driver must be free to withhold that consent.

The State did not meet its burden of proving that Mr. Anderson's agreement to provide a sample of blood was consensual in the Fourth Amendment context. He had been arrested, handcuffed, and driven to the hospital. He was told if he refused to take any test requested, his driving privileges would be revoked and that he would be subject to "other penalties."

In her testimony at hearing on the Motion, Officer Miller attempted to portray the warrant application process as cumbersome, time-consuming, and doubtful, implying several times that she might not even be able to "get a hold of a judge". (R. 28 at 14-16; P-App. at 23-25.) However, when she was speaking to Mr. Anderson, she was resolute, telling him twice what was "gonna happen" if he did not consent: She (1) would contact a judge, (2) would "get authorization to take it", and (3) would be authorized to use reasonable force to do so. (R. 14 at 27:10 - 28:10.)

"[T]he intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant" *Dotson*, 402 A.2d at 794. Stating that refusal to consent will result in an officer seeking a warrant or applying for a warrant is acceptable. However, making it seem routine and automatic (i.e., "I will get a warrant"), and threatening is not. *See id.*

Unlike the case involving only the reading of the Implied Consent advisory, which merely tells a person what will happen if they refuse, this situation had variables. Mr. Anderson was led to believe that withholding consent was futile and could result in the use of force to take the blood. Officer Miller did not explain that she would have to locate a judge, apply for a warrant, and show probable cause in order to obtain a warrant. She clearly wanted to avoid that process by quashing Mr. Anderson's will to say "no", and it worked. (R. at 9; P-App. at 82-83.) That is not consent. *See Dotson*, 402 A.2d at 794.

This Court should reverse Judge Levine's ruling, and it should order that the blood sample must be suppressed. The sample was taken without the defendant's actual consent.

III.
THE CIRCUIT COURT ERRED BY RULING THAT MR. ANDERSON DID NOT WITHDRAW CONSENT TO THE BLOOD DRAW.

Even if this Court affirms the circuit court's ruling that Mr. Anderson's initial agreement to supply blood was consensual, it should reverse, because any initial consent was clearly withdrawn. Many courts have acknowledged that even general consent, once given, "may be withdrawn or limited at any time prior to the completion of the search." 34 Wayne R. LaFave, Search and Seizure § 8.1(c), at 45-46 (4th ed. 2004). See, e.g., *Painter v. Robertson*, 185 F.3d 557, 567 (6th Cir. 1999); *United States v. Ho*, 94 F.3d 932, 934 (5th Cir. 1996); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994); *Baxter v. State*, 77 P.3d 19, 25 (Alaska Ct. App. 2003); *Burton v. United States*, 657 A.2d 741, 746 (D.C. 1994). *United States v. Miner*, 484 F.2d 1075, 1076 (9th Cir. 1973) (withdrawal of implied consent where prospective airline passenger balked at search of luggage by saying, "'No, it's personal'"); *United States v. Dichiarinte*, 445 F.2d 126, 128-30 (7th Cir. 1971) (suggesting withdrawal of consent occurred when defendant exclaimed, "'The search is over. I am calling off the search'"); *United States v. Bily*, 406 F. Supp. 726, 728-29 (E.D. Pa. 1975) (concluding consent was withdrawn when defendant stated, "That's enough. I want you to stop"). Courts have required that "conduct withdrawing consent must be an act clearly

inconsistent with the apparent consent to a search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both." *Burton*, 657 A.2d at 746-47 (footnotes omitted); *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir. 2004) ("Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement."); *United States v. Alfaro*, 935 F.2d 64, 65-67 (5th Cir. 1991); *United States v. Cadieux*, 324 F. Supp. 2d 168, 170 (D. Me. 2004) ("Although consent to search, once given, may be withdrawn, the law generally requires that the withdrawal of consent amount to an 'unequivocal act or statement of withdrawal.'") (citations omitted).

In this case, withdrawal of any consent could not be more clear and unequivocal, and a warrant was, therefore, necessary. Just prior to and during the blood draw by the phlebotomist, the following exchange occurred:

> **Anderson:** I have the right to see a needle being pushed in my arm. I have the right to watch her poke a needle in my arm. . . . I have rights also, and I want to see what she's doing to me. I have rights. I have rights, just like you and her. I want to see what you're doing. I'm not against you. I'm in the medical field too. I want to see what you're doing. And because my arms are behind me, I cannot see this. I am not going to hurt nobody. I refuse-- I refuse--
>
> **Officer:** Stop moving.
>
> **Anderson:** This is against my rights. This is against my rights as a U.S. citizen. [unintelligible]
>
> **Officer:** Stop moving.
>
> **Phleb.:** Okay, so, big poke.
>
> **Anderson.:** I don't know what she's doing. I can't [unintelligible]. Don't stand on my feet.

Phleb.: Please don't move, I have a needle in your arm.

(R. 14 at 56:30 - 1:03:00.)

It should be noted that the State's arguments below admitted that Mr. Anderson had withdrawn consent to the blood draw. (R. 13 at 5-6; P-App at 67-68.) The State's assertion was that the warrantless search and seizure was justified by exigent circumstances. (*Id.*) That argument was entirely misplaced, however, because Officer Miller never even considered getting a warrant. (R. 28 at 41-42; P-App. at 50-51.) The circuit court never reached that issue in its ruling. (R. 29 at 3-8; P-App. at 12-17.)

In its ruling, the circuit court pointed out that Mr. Anderson told Officer Miller, "I refuse, I refuse, against my rights . . . ." (R. 29 at 7; P-App. at 7.) However, the circuit court went beyond just determining whether Mr. Anderson withdrew his consent, or as it put it, "refused". The circuit court agreed that there was a refusal by Mr. Anderson. However, this is where the circuit court should have stopped, because it erred by undertaking an inquiry as to **why** he refused:

> The refusal is not a refusal of the testing. What it really is, is he doesn't like this idea that his arm is behind his back when they're taking the blood. I don't think that this is a refusal to taking the test, he just didn't like that the hands are secured, he can't see the needle going into his arm, and that's very clear. He's talking about the manner in which the blood is being drawn, and I listened to that a couple different times, trying to see if there's a distinction about, does he assert, well, no, I'm refusing this because, you know, I refuse for the search, but he doesn't really say that, he just doesn't like the process. Because of that, I don't see it as a refusal at all. I see it as just basically complaint [sic] about the process, and that doesn't raise [sic] to the level of refusal to the testing, and so the Court is going to deny the motion.

(R. 29 at 7-8; P-App. at 7-8.)

The issue before the circuit court was not **why** Mr. Anderson withdrew consent or "refused" the blood draw. The issue was whether the warrantless search was conducted within one of the "clearly-delineated exceptions" to the requirement of a warrant, i.e., consent. *See Artic*, 201 WI 83 at ¶ 29-33, *citing State v. Faust*, 2004 WI 99, ¶ 11, 274 Wis. 2d 183, 682 N.W.2d 371. For purposes of determining whether consent is withdrawn, 'No means no', whatever the reasons.

"Once given, consent may be withdrawn." *U.S. v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005). "Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement." *Gray*, 369 F.3d at 1026. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S.248, 251 (1991). "In a consensual search, an officer has no authority to command the person being search to stop interfering with the search." *Lowery v. State* 894 So. 2d 1032, 1034, (Fla. Dist. Ct. App. 2005.)

Here, Mr. Anderson protested both vocally and physically. He stated that the blood draw was "against [his] rights as a U.S. citizen. He said, "I refuse--I refuse". He also apparently physically resisted the blood draw, because Officer Miller repeatedly told him, "Stop moving", and the nurse can be heard telling him, "Hold still".

As Mr. Anderson later explained, Officer Miller was holding his arms, which were handcuffed behind his back, and standing on his feet. (R. 9; P-App. at 82-83.) This is corroborated by the fact that Mr. Anderson can be heard on the recording saying, "Don't stand on my feet." (R. 14 at 56:30 - 1:03:00.)

Nowhere does the law require, or allow, a court to explore suspects' **reasons** for declining to consent to, or withdrawing consent to, a search or seizure. The law only requires an objective showing that consent was withdrawn. *Jimeno*, 500 U.S. at 251. Here, Mr. Anderson's consent to continue with a blood draw was clearly withdrawn. It would be astonishing to find a voluntary blood draw under such circumstances, where a person being commanded to "Stop moving" and "Hold still".

For all these reasons, the circuit court's ruling that Mr. Anderson never withdrew his consent should be reversed, and all evidence from the blood test should be suppressed.

CONCLUSION

The oral ruling of the circuit court, denying the defendant-appellant's Motion to Suppress Evidence: Nonconsensual and Warrantless Blood Draw, should be reversed, and all evidence stemming from the blood draw should be suppressed. Further the Judgment of Conviction should be vacated, and this matter should be remanded back to the circuit court for further proceedings consistent with the orders of this Court. The defendant-appellant's consent to supply a sample of blood for evidentiary testing was not voluntary. Even if the

court determines that the original consent to supply blood was voluntary, such consent was subsequently withdrawn. Because the arresting officer did not obtain a warrant, and was not operating under any other exception to the Warrant Clause, the test evidence must be suppressed.

Dated this _____ day of October, 2015.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,260 words.

Dated this _____ day of October, 2015.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 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 our paper copies of this brief filed with the court and served on all opposing parties.

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