STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP001573-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY A. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL FROM THE JUDGMENT OF
CONVICTION ENTERED ON AUGUST 27, 2015,
IN THE CIRCUIT COURT OF LA CROSSE COUNTY,
THE HONORABLE ELLIOT M. LEVINE, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Cases

Statutes

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BRIEF OF THE PLAINTIFF-RESPONDENT

ADDITIONAL ISSUE PRESENTED

The State accepts the issues Anderson presents as warranting review but believes another issue raised before the circuit court may require deciding by this court:

Should this court find Anderson initially offered but subsequently withdrew consent to the evidentiary blood draw, did exigent circumstances permit law enforcement to proceed with a warrantless, nonconsensual blood draw?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED ANDERSON'S MOTION TO SUPPRESS EVIDENCE.

A. Introduction

The circuit court denied Anderson's motion to suppress evidence, concluding that his initial agreement to submit to an evidentiary blood draw following his OWI arrest was voluntary and his subsequent actions during the administration of the blood draw did not constitute withdrawal of that consent (29:5-8, R-Ap. 153-156).

Anderson advances two arguments on appeal, both concerning the circuit court's decision denying his suppression motion. Anderson first argues that the circuit court erred by ruling that his initial agreement to supply a sample of blood for testing was consensual (Anderson's Br. at 12-20). Anderson also argues that the circuit court erred by ruling that he did not withdraw consent to the blood draw (Anderson's Br. at 20-24).

The State will explain that the circuit court correctly denied Anderson's motion to suppress evidence for two reasons. Anderson's first argument fails as an officer's recitation of the statutorily-mandated advisory set forth in Wis. Stat. § 343.305(4) paired with an explanation of the events which would transpire if he were to refuse the test does not render his subsequent consent to a blood draw involuntary. Anderson's second argument fails as he did not withdraw his consent to a blood draw but rather expressed disapproval of the manner in which his blood sample would be drawn.

However, even if this court were to disagree and find that Anderson withdrew consent before a sample was drawn, Anderson's own actions created exigent circumstances requiring the blood draw to proceed without law enforcement first securing a search warrant.

As a result, the circuit court properly denied Anderson's motion to suppress evidence, properly imposed judgment of conviction, and this court should affirm that judgment of conviction.

B. Standard of review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* (citation omitted). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of

constitutional principles to those historical facts is reviewed de novo. *Id.*

C. Anderson voluntarily offered initial consent to an evidentiary blood draw.

Anderson first argues that the combination of the statutorily-mandated advisory set forth in Wis. Stat. § 343.305(4), hereinafter referred to as the Informing the Accused, paired with Officer Miller's explanation of the events that would follow if Anderson were to refuse the blood draw rendered Anderson's initial consent involuntary (Anderson's Br. at 12-20).

In *State v. Wintlend*, this court addressed whether an officer's recitation of the Informing the Accused pursuant to Wis. Stat. § 343.305(4) constitutes coercion capable of negating a defendant's consent to an evidentiary chemical test. 2002 WI App 314, ¶ 1, 258 Wis.2d 875, 655 N.W.2d 745. Despite the fact that the implied consent advisory warns an individual that failing to consent will result in driver's license revocation and other unidentified penalties, this court rejected Wintlend's argument, concluding:

> At whatever point a motorist is coerced into making a decision to submit to chemical testing, be it at the time the person applies for and obtains a license, or when the person begins operating the vehicle on each particular occasion, or after arrest, the informed consent statute's coerciveness is not unreasonable, given compelling need to get intoxicated drivers off the highways and keep them off until they have, hopefully, learned their lesson.

Id., ¶ 18. While the circuit court did not reference *Wintlend* by name, it recognized that an officer's recitation of the Informing the Accused "is not a coercive process" (29:5; R-Ap. 153).

The circuit court then examined whether additional communication between Officer Miller and Anderson concerning law enforcement's intent to secure a search warrant to retrieve a blood sample was coercive in nature and capable of negating the voluntariness of Anderson's consent:

> But then there's this question, well, what if I refuse and then the search warrant process is explained, you know, sort of, well, I can go to a Judge and get a search warrant. That was determined not to be a coercive part. So I don't think the informing – or even the informing of that extra information is coercive in nature.

(29:5; R-Ap. 153)

Anderson argues on appeal that the circuit court erred in its decision and his consent was rendered involuntary because Officer Miller read the Informing the Accused and explained to him that she would obtain a search warrant in the event of his refusal and get authorization to take a sample of his blood with the reasonable amount of force necessary (Anderson's Br. at 16-19).

In support, Anderson does not offer to this court any authority for the proposition that as a prerequisite to obtaining voluntary consent, law enforcement must explain to an individual the warrant application process or educate an individual as to intricacies of probable cause determinations (Anderson's Br. at 19).

Nor does Anderson argue that law enforcement did not possess sufficient evidence to secure a search warrant for his blood, that law enforcement would have encountered any evidentiary hurdles obtaining a search warrant, or that Officer Miller's stated intentions to secure a search warrant were anything but genuine (Anderson's Br. at 19).

To the contrary, Anderson encouraged the circuit court to find Officer Miller should have secured a search warrant prior to proceeding with the blood draw, directing the circuit court's attention to the substantial preliminary breath test result following his arrest and effectively yielding that a search warrant would have been available, if sought (15:4, R-Ap. 162).

This concession is extremely important, because Anderson's central criticism of the Officer Miller's statements which purportedly forced his consent to a blood draw surrounds the assertion that she would "obtain" rather than "apply for" or "seek" a search warrant (Anderson's Br. at 14, 19).

Anderson maintains Officer Miller's word choice improperly implied that obtaining a search warrant would be automatic, and as a result, Anderson's choice to submit to a blood draw constitutes submission to legal authority rather than voluntary consent (Anderson's Br. at 14, 19).

Anderson offers no binding authority supporting his argument, instead referencing foreign appellate authority in support of the holding that "the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant" (Anderson's Br. at 19).

Nor does Anderson acknowledge the Supreme Court of Wisconsin's holding that "threatening to obtain a search warrant does not vitiate consent if 'the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission.'" *State v. Artic*, 2010 WI 83, ¶ 41, 327 Wis.2d 392, 417, 786 N.W.2d 430, 442 (*citing United States v. White*, 979 F.2d 539, 542 (7th Cir.1992), *State v. Kiekhefer*, 212 Wis.2d 460, 473, 569 N.W.2d 316 (Ct.App.1997)).

Notably, that law enforcement in *Artic* purportedly stated an intention to *obtain* rather than *apply for* or *seek* a search warrant was of no consequence to the court's decision decided forty-two years after the case which Anderson rests much of his argument: the United States Supreme Court's decision in *Bumper v. North Carolina*, 391 U.S. 543 (1968). *Artic*, ¶ 42,

Finally, Anderson advances no argument now nor before the circuit court that Officer Miller's stated intentions of obtaining a search warrant were anything but genuine.

Consequently, in accordance with *Wintlend* and *Artic*, the State asks this court to affirm the circuit court's decision that Andersons' initial consent to a blood draw was voluntarily offered notwithstanding Officer Miller's recitation of the Informing the Accused advisory and her stated intentions to secure a search warrant in the event Anderson were to refuse a blood draw.

D. Anderson's objection to the manner medical personnel conducted his blood draw does not constitute a refusal to submit to a blood draw.

In denying Anderson's motion to suppress, the circuit court found that Anderson did not refuse to submit to a blood draw but rather expressed dissatisfaction concerning the manner in which the blood draw was conducted (29:7-8, R-Ap. 155-56). The circuit court explained:

> 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 to me. 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 bout, 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 about the process, and that doesn't raise to the level of refusal to the testing, and so the Court is going to deny the motion.

(29:7-8, R-Ap. 155-56).

Absent from either of Anderson's circuit court briefs or his Brief-in-Chief filed with this court is any authority supporting the proposition that an individual who consents to an evidentiary chemical test of his blood then gains the authority to dictate the precise manner in which the blood draw shall occur, especially when that demand involves the removal of restraints, potentially endangering the safety of law enforcement or medical staff.

This court should accept the circuit court's findings as properly supported by the evidence offered at the hearing on Anderson's motion unless clearly erroneous. *State v. Johnson*, 2007 WI 32, ¶ 13. That Anderson demanded to watch as the blood draw needle pierced his skin or yell, "I refuse," once the blood draw was already being conducted should not, absent authority to the contrary, prevent this court from finding that Anderson had not withdrawn consent to search he previously offered.

E. Even had Anderson withdrawn consent to a blood draw, his own actions created exigent circumstances permitting a warrantless, nonconsensual blood draw.

Should this court deem the circuit court's determination concerning whether Anderson withdrew consent before the blood draw occurred as clearly erroneous, this court should nevertheless affirm the circuit court's holding as correct even if its reasoning in reaching its

decision was incorrect. *See Liberty Trucking Co. v. DILHR*, 57 Wis.2d 331, 342, 204 N.W.2d 457 (1973) (an appellate court is concerned with whether the circuit court decision being reviewed is correct, rather than with the reasoning employed by the court. If the holding is correct, it should be sustained.)

Anderson correctly notes that in *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552, 1556, 185 L.Ed.2d 696 (2013), the Supreme Court rejected a categorical exception to the warrant requirement in OWI cases (Anderson's Br. at 12). The Wisconsin Supreme Court has since also recognized, "[T]he dissipation of alcohol in the bloodstream by itself does not create a per se exigency so as to justify a warrantless investigatory blood draw of an OWI suspect." *State v. Kennedy*, 2014 WI 132 ¶ 14, 359 Wis. 2d 454, 856 N.W.2d 834 (citing *McNeely*, 133 S. Ct. at 1563).

While *McNeely* and its progeny rejected a per se exigency rule for the natural dissipation of alcohol in one's bloodstream in impaired driving cases, the Supreme Court of Wisconsin recently affirmed that exigent circumstances arise in relation to impaired driving cases. *See e.g. State v. Tullberg*, 2014 WI 134, 359 Wis.2d 421, 857 N.W.2d 120 (finding exigent circumstances justified warrantless blood draw from driver that left scene of fatal motor vehicle accident and made dishonest statements to law enforcement).

The State maintains that if this court were to find that Anderson withdrew consent to the requested blood draw, the same reasoning underlying *Tullburg* should guide this court in

finding Anderson's own conduct created exigent circumstances meriting a nonconsensual warrantless blood draw.

Anderson advanced two arguments to the circuit court opposing this State's position. First, Anderson argued that exigent circumstances to conduct a warrantless blood draw did not exist because Officer Miller may have been able to secure a search warrant by more expedient means (15:2-3, R-Ap. 159-60). Second, Anderson argued that because Officer Miller had not considered getting a warrant before the blood draw, that the State's argument is misplaced, and apparently, should be summarily disregarded (15:3, R-Ap. 160).

Addressing Anderson's first point, during the hearing on Anderson's motion, Officer Miller provided a summary describing the amount of time that would elapse during a routine consensual blood draw as compared with those necessitating the application for a search warrant (28:12-18, R-Ap. 112-118).

Specifically, Officer Miller estimated that approximately twenty to twenty-five minutes had elapsed from the time of the initial traffic stop of Anderson's vehicle to the time he was placed under arrest (28:12, R-Ap. 112). Officer Miller stated she remained on scene of the traffic stop for some time to make arrangements for Anderson's vehicle and read the Informing the Accused to Anderson (28:13, R-Ap. 113).

Based on Anderson's consent to a blood draw at the scene of the traffic stop, Officer Miller then transported Anderson from the scene of the traffic

stop to Mayo Clinic in Onalaska, Wisconsin, a task that took approximately another twenty minutes (28:13, R-Ap. 113). From there, Officer Miller believed approximately twenty to twenty-five minutes elapsed before a phlebotomist arrived at the room and another five to ten minutes elapsed before a blood sample was drawn from Anderson (28:14, R-Ap. 114).

Officer Miller confirmed that the general process would take approximately an hour and fifteen minutes to an hour and twenty minutes from the time of an initial traffic stop until the blood draw was completed for a routine consensual blood draw (28:14, R-Ap. 114). Anderson did not contest before the circuit court, nor does he appear to now contest Officer Miller's estimates as to the time which would elapse in a routine, consensual blood draw.

Officer Miller then went on to describe the general process by which area law enforcement would secure a search warrant in the event of a blood draw refusal (28:14-18, R-Ap. 114-18). In addition to the ninety-five to one-hundred minute timeframe described above, Officer Miller explained the twenty to twenty-five minute period to travel from the hospital to the Onalaska Police Department, the unpredictable time allotted to ensuring another officer would be available to observe an arrested driver in a conference room, a minimum of thirty minutes dedicated to completing a sworn affidavit to be forwarded on to an on-call circuit court judge (28:14-18, R-Ap. 114-18).

Then, assuming the on-call judge was immediately available and additional time was not

expended to locate another judge, the judge would authorize a search warrant and the defendant would then be transported back to the hospital – another twenty to twenty-five minutes later (28:16-18, R-Ap. 116-18).

Faced with cross-examination that implied law enforcement could have sought a search warrant through more expedient means – particularly by utilizing in-vehicle technology to prepare and send search warrant materials to the on-call judge – Officer Miller further described technological difficulties previously encountered when attempting to secure a search warrant using technology found within her squad vehicle that caused an additional delay of thirty-five to forty-five minutes (28:39, R-Ap. 139).

Undoubtedly, had Anderson refused to submit to a blood draw at the scene of the traffic stop, the time expended before a search warrant was obtained would have been extremely reasonable.

However, because Anderson elected to express consent at the scene of the traffic stop, cause Officer Miller to expend over an hour to transport him and make accommodations for the blood draw, waiting until the last conceivable moment to express opposition to the manner in which the draw would be completed, the State maintains Anderson's own actions created exigent circumstances. The State respectfully requests that this court not disregard this conclusion just because Anderson now wishes to fault an officer for not utilizing technology which failed her in the past.

Addressing Anderson's second point, that Officer Miller may not have considered obtaining a warrant should not end this court's determination of whether exigent circumstances permitted a nonconsensual blood draw. As the Supreme Court of Wisconsin recognized in *Tulburg*, "[T]he test for determining the existence of exigent circumstances is an objective one." 2014 WI 134, ¶ 41, 359 Wis.2d 421, 445, 837 N.W.2d 120, 132.

Consequently, should this court determine that Anderson withdrew his consent at the time of the blood draw, the dispositive inquiry concerns whether facts known to Officer Miller at the time – particularly her knowledge that nearly one and one-half hours had already elapsed since the traffic stop and securing a search warrant would inhibit an evidentiary blood draw for a minimum of another one and one-half hours – necessitated a warrantless blood draw.

The State argues Officer Miller's knowledge and experience mandated just that, for to determine that exigent circumstances did not exist in the instant case is to encourage drunk drivers throughout the state to remain in compliance with Wisconsin's implied consent law to the last conceivable moment before withdrawing consent, thereby requiring law enforcement to secure a warrant and undoubtedly delay the gathering of evidence of the driver's intoxication or proceed with a warrantless blood draw as occurred in this case.

Had Anderson expressed a desire not to permit a blood draw at the scene of the traffic stop, Officer Miller could have taken the necessary steps to secure a search warrant in a manner that

permitted the blood draw to occur well within three hours of the traffic stop. *See* Wis. Stat. § 885.235(1g).

Instead, Anderson elected to consent several times at the scene of the traffic stop, gave no indication that he would withdraw his consent at the hospital, and only at the last possible moment did he grow confrontational concerning the manner his blood would be drawn, further delaying the gathering of evidence against him had Officer Miller sought a search warrant.

The State asks that this court not reward Anderson's decision and properly find that even if his conduct at the hospital constituted a withdrawal of consent, exigent circumstances caused by his own conduct required law enforcement to proceed with the blood draw without first securing a search warrant.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment convicting Bradley A. Anderson of operating a motor vehicle with a prohibited alcohol concentration.

Dated this 16th day of November, 2015.

Respectfully submitted,

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,177 words.

John W. Kellis
Assistant District 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 at La Crosse, Wisconsin, this 16th day of November, 2015.

John W. Kellis
Assistant District Attorney

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of November, 2015.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on November 16, 2015, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 16th day of November, 2015.

_____

John W. Kellis
Assistant District Attorney