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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

State of Wisconsin,

Plaintiff-Respondent,

Appeal No.: 2015AP001573 CR

v.

Circuit Court Case No. 2014CT000357

Bradley A. Anderson,

Defendant-Appellant.

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.
OFFICER MILLER'S STATEMENTS TO MR. ANDERSON WERE INTEDED TO INDUCE--AND ACTUALLY DID INDUCE--HIM TO CONSENT.

Voluntariness is determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973). However, the State argues a single issue: Whether the defendant has proven that the officer's threat to obtain a warrant was "genuine". (*See* R. Brief at 7.) This impermissibly shifts the burden away from the State and replaces the "totality of the circumstances" test with a test that hinges on a defendant somehow being able to prove the officer's actual intentions. In arguing for this approach, the State highlights a single quote in *State v. Artic*, 2010 WI 83, ¶ 41 (*quoting*, *United States v. White*, 979 F.2d 460, 473 (7th Cir. 1992)): "[T]hreatening 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.'" The *Artic* court actually emphasized six "non-exclusive" factors:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, nonthreatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

Id. (*citing*, *State v. Phillips*, 218 Wis. 2d 180, 195, 204, 577 N.W.2d 794 (1998)). The *Artic* court stated that "[d]iscussion regarding either the absence of a search warrant or the possibility of getting one bears on several of these factors." *Id.* at ¶ 33.

Regarding the first factor, when the State attempted to make a record for exigent circumstances, Officer Miller made the warrant process sound doubtful and time-consuming, even raising the possibility that a judge may not be located. (R .at 28: 14-16, 36-41; A. App at 23-25, 45-50.) However, the statements she made to Mr. Anderson made the process sound deceptively simple, and the result automatic. (R.14: 27:10 - 28:10.) Which is true?

When he hesitated, Mr. Anderson was told, "I will get permission to take your blood with the reasonable amount of force necessary to do so." (R.14: 27:10 - 28:10.) She thought Mr. Anderson might not consent, and she wanted to convince him that would be futile. *Id.* Afterwards, Mr. Anderson quickly consented. (R.14: 27:10 - 28:10.)

Mr. Anderson had just been arrested. He was handcuffed in the backseat of Officer Miller's squad car. He 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 SP4197l; (R. 14 at 25:30.) When he hesitated, he was told the officer would simply contact a judge and get

"permission" to use "force" to obtain his blood. (R.14: 27:10 - 28:10.) Therefore, the second and third factors, "whether the police threatened . . . the defendant . . .", and "whether the conditions attending the request to search were congenial, nonthreatening, and cooperative, or the opposite", also favor finding involuntary his original consent to the blood draw. *See Artic*, 2010 WI 83, ¶ 41.

The fourth factor, "how the defendant responded to the request to search", also favors finding consent involuntary. Mr. Anderson hesitated when asked if he would supply a sample of blood. (R.14: 27:10 - 28:10.) He asked, "And if I say no?" *Id.* He was told again that a warrant would be obtained and that force could be used to draw his blood, and he quickly consented. *Id.*

The sixth factor, "whether the police informed the defendant that he could refuse consent", also favors finding consent involuntary. He was told that if he refused consent, he would be punished with revocation, would be "subject to other penalties. . . . ", and that force could be used against him. Wisconsin DOT form SP4197l; (R. 14 at 25:30; R.14: 27:10 - 28:10.) Rather than being told he could refuse consent, Mr. Anderson was told he would be punished and/or forcibly dealt with if he refused.

The State must prove that Mr. Anderson's agreement to provide a sample was not just submission to the officer's legal authority. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Consent is not present if based on a 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"). These cases deal directly with the issue of consent in the context of statements made by police about getting a warrant. This Court should not ignore them, as the State suggests, on the grounds that they are "foreign appellate authority". (State's Brief at 6.) The State

has not proven that consent was voluntary, and this Court should reverse the circuit court ruling and order the blood sample suppressed.

II.
MR. ANDERSON CLEARLY WITHDREW CONSENT TO THE BLOOD DRAW.

The State argues for the first time that Mr. Anderson's protests did not amount to a "refusal". (State's Brief at 8.) However, this is not about whether an Implied Consent refusal took place. The issue is whether consent--assuming it was initially validly given--was withdrawn.

"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." *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir. 2004). "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.)

The State argues that the circuit court was allowed to go beyond determining whether consent was withdrawn, and to examine the **reason** it was withdrawn. If it was for the wrong reason, consent was still present. The State even asserts that this exercise is a mere finding of fact, subject to the clearly erroneous standard. (State's Brief at 8-9.)

This is a novel and unworkable theory. Under this theory, if a person unequivocally told police officers to stop searching his/her residence because they were damaging the house, that would not be a withdrawal of consent because it merely an objection to the "manner in which the [search] was conducted ". A

person who agrees to allow police to search him/her for drugs, but later refuses to allow them to pump his/her stomach because it would hurt, would also be consenting, because the refusal would be to the "manner in which the [search] was conducted ", and/or an aversion to pain, and not an objection to the search or seizure itself. (*See* State's Brief at 8-9.)

There is no authority for this novel approach. Nothing allowed the circuit court to go beyond the issue of **whether** consent was withdrawn. If consent was withdrawn, the reason(s) it was withdrawn are irrelevant.

However, even if this Court did entertain this approach, withdrawing consent because the person objects to a medical procedure-- i.e., the preservation of one's bodily integrity-- has to be the **best** reason. As the Supreme Court stated in *Missouri v. McNeely,* 569 U.S. ___ (April 17, 2013)(slip op. at 4-5.), "the type of search at issue in this case . . . involved a compelled physical intrusion beneath [Mr. Anderson's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." (*citing, Winston v. Lee*, 470 U. S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Assn.*, 489 U. S. 602, 616 (1989)). Therefore, even if this Court does believe that Mr. Anderson's reason for objecting is relevant, that reason was quite valid.

The State also attempts to rearrange the sequence in which Mr. Anderson's statements of protest were made. Contrary to its assertion that he yelled "'I refuse,' once the blood draw was already being conducted", (State's Brief at 9.), the objective evidence shows that he said, "I refuse, I refuse", **and** "This is against my rights as a U.S. citizen", **prior** to the phlebotomist stating, "Okay, so, big poke." (R. 14 at 56:30 - 1:03:00.) There can be no question that Mr. Anderson withdrew consent before being stuck with the needle. (R. 14 at 56:30 - 1:03:00.)

The circuit court agreed that Mr. Anderson refused. (R. 29 at 7; A.-App. at 7.) This is where the circuit court should have stopped, and it erred by

undertaking an inquiry as to why he refused. The issue before the circuit court was not **why** Mr. Anderson withdrew consent to 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). Here, consent was clearly withdrawn. Therefore, this Court should reverse the circuit court's order denying Mr. Anderson's motion and order the test results suppressed from evidence.

III.
THE SEARCH AND SEIZURE OF MR. ANDERSON'S BLOOD CANNOT BE EXCUSED ON THE GROUNDS OF "EXIGENT CIRCUMSTANCES".

The State attempts to excuse the warrantless search and/or seizure under the exigent circumstances exception. The circuit court never reached the issue of exigent circumstances. (R. 29: 1-9; A-App.at 1-9.) As pointed out above, it found that Mr. Anderson's original consent to Officer Miller request for a blood draw had not been withdrawn because his "refusal" was to the manner of the procedure, and not the test. *Id.* Findings of fact were not made with regard to exigent circumstances. *Id.* Therefore, this case should be remanded for further proceedings on this issue. However, should this Court proceed to the issues of exigent circumstances, that exception clearly has no bearing on this case.

Officer Miller never once considered getting a warrant, because despite Mr. Anderson's vociferous objections, and despite having to physically restrain him, she did not believe he had withdrawn consent to the blood draw. She testified as follows:

> Q. Does your--did you maintain that he refused at any time to supply you with a sample of blood?
>
> A. I don't recall Mr. Anderson refusing during that time frame, no.
>
> Q. And so you never proceeded with him as a refusal at any time; correct?
>
> A. No, I did not, because he didn't refuse to me.
>
> . . .

Q. So, you proceeded with him through this process as if he were a consent case; is that right?

A. That is correct.

Q. And so you didn't even consider at any time getting a warrant, did you?

A. No, sir.

(R. 28: 26-27; A-App. at 35-36.)

"Exigent circumstances" never even occurred to Officer Miller. Nonetheless, the State continues to argues to argue for it application. That effort is misplaced.

The State asserts that the exigent circumstances exception can still apply because the test is "and objective one". (State's Brief at 14.) True, but this doesn't ends the inquiry. The caselaw makes clear that the police have to actually **be** faced with exigent circumstances.

The State cites to *State v. Tullberg*, 2014 WI 134, in support of its position. *Tullberg* demonstrates that the exigent circumstances exception requires an actual reasonable belief that evidence may be lost due to the exigency presented:

> Like our analysis of probable cause, the test for determining the existence of exigent circumstances is an objective one." Robinson, 327 Wis. 2d 302, ¶30 (citing Brigham City, Utah v. Stuart, 547 U.S. 398, 403-04 (2006); State v. Smith, 131 Wis. 2d 220, 230, 388 N.W.2d 601 (1986)). To determine if exigent circumstances justified a search, a reviewing court determines "**whether the police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would . . . risk the destruction of evidence.**"

Id. (emphasis added)

This authoritative case states that while the test is an objective one, there is a subjective component: the police must actually be operating under exigent circumstances and be conscious of an unreasonable risk to destruction of evidence if the warrant process is undertaken or completed. The *McNeely* Court likewise focused on an officer who is making "factual determinations" while operating under an exception to the Fourth Amendment warrant requirement. *McNeely,* 569 U.S. ___ (April 17, 2013)(slip op. at pp. 8-9.)

The State's argument is based on what might have happened if Officer Miller actually thought she needed a warrant and actually tried getting one. Her squad computer might not work, because it did not work **once** before, forcing her to take other, time-consuming steps, despite her department's policy that the warrants be obtained electronically. (R. 28: 14-17, 36-41;A-App. at 23-27, 45-50.) She would have to drive all the way back to her station in Onalaska, where she might not find someone to watch Mr. Anderson, might not find a judge, and would, at any rate, be faced with a time crunch getting a blood sample. *See id.*

There is no basis for applying exigent circumstances to the hypothetical scenario the State has created. The law requires that the police actually be facing exigent circumstances, forcing them to resort warrantless means. *See Tullberg*, 2014 WI 134, ¶ 41. Therefore, this court should rule that exigent circumstances cannot justify the non-consensual warrantless blood draw in this case. *See id.*

Nonetheless, it is clear that exigent circumstances were not present. The State begins with the premise that Mr. Anderson's withdrawal of consent took place "nearly one and one-half hours" from the traffic stop. (State's Brief at 12, 14.) The counter on the video shows it was actually between 56:30 minutes and 1:03 minutes. (R. 14 at 56:30-1:03; R. at 28-29; A. App. 37-38.) Officer Miller's testimony about the amount of time it **could** take for a blood draw is irrelevant. It actually took around one hour. S*ee id.*

Officer Miller testified that she could get a warrant using her squad computer in as little as 20-30 minutes. (R. 28: 40-41; A. App. at 49-50.) The rest of the State's exigency argument stems from a purely hypothetical scenario wherein she forgoes the squad computer because one time before the server was down, which the State describes as "technological difficulties." (State's Brief at 13.; R. 28: 39-40; A-App. at 48-49.) If that is justified, then there is no stopping point. The "exception" would swallow the rule. As the *McNeely* Court stated, there is a "'reasonableness' requirement of the Fourth Amendment". *McNeely,*

569 U.S. ___ (April 17, 2013)(slip op. at pp. 8-9.) The State's hypothetical exigency does satisfy that requirement.

An officer should not be able to show exigent circumstances by insisting they "would have" used a far more time-consuming method of obtaining a warrant **if** they had even thought to do it in the first place. Officer Miller had not even considered getting a warrant that night. There were no, and could not be, exigent circumstances in this case.

Compare this case to the facts of *Tullberg*, 2014 WI 134. Tullberg was involved in a fatal car accident. The deputy who ordered the warrantless blood draw was not dispatched to the accident scene until approximately 30 minutes after the accident. *Id.* ¶¶ 6-9. He spent considerable time at the scene investigating the accident, speaking to witnesses, and consoling a victim's father. *Id.* at ¶¶ 9-11. He had to drive 20 miles to the hospital. *Id.* at ¶ 11. There, he spent considerable time interviewing the defendant and another witness. *Id.* ¶¶ 12-17. Only then did the deputy conclude he had probable cause to arrest. *Id.* ¶ 17. At that point, due to no fault of his own, it was more than 2.5 hours since the driving. Furthermore, the defendant needed to undergo a CT-Scan. *Id.* at 18-19. The deputy actually believed that time was of the essence, and he ordered the blood draw. *Id.*

This case strongly contrasts with *Tullberg*. Here, matters progressed quickly. There was no accident, no time consuming-investigation or drive. The officer knew BAC was nearly .20 through a PBT. (R.28 at 25; A. App. at 34.) The need for a warrant arose around an hour from the driving event. (R. 14 at 56:30 - 1:03:00.) There was plenty of time to obtain a warrant before BAC evidence would be compromised. There were two hours remaining in the three hour window affecting automatic admissibility of the test. Wis. Stat. § 885.235(1g).

"If there is time to secure a warrant before blood can be drawn, the police must seek one." *McNeely,* 569 U.S. ___ (April 17, 2013)(slip op. at

pp. 8-9.) Here, there was a quick and accessible way of obtaining a warrant, it just never occurred to Officer Miller that she had to get one.

Because Mr. Anderson's blood draw was not consensual, and because there were no exigent circumstances, this Court should reverse the circuit court and suppress the blood test results from use at trial.

Dated this 3 day of December, 2015.

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I certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12).

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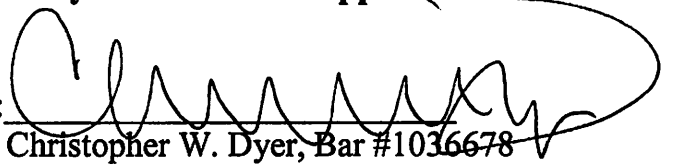
By: 
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