STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2016AP001146-CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Eric M. Doule
Defendant- Appellant,

BRIEF AND APPENDIX OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE VINCENT BISKUPIC PRESIDING

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Is physically resisting a blood draw a withdrawal of consent?

The Trial Court answered: No
The Appellant answers: Yes

Where the Methods used by the Officers in taking Doules blood "reasonable"?

The Trial Court answered: Yes
The Appellant answers: No

Was the warrantless blood draw of Doule justified by an exigent circumstance?

The Trial Court did not address
The Appellant answers: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is requested in order to give further guidance to the bench and bar as to whether or not forced dangerous blood draws of this nature shall be permitted in the State.

STATEMENT OF CASE

On November 5th, 2015, the Appellant and his counsel were present in Outagamie County County Circuit Court for a hearing on the Defendants motion to suppress the results of a warrantless blood draw, citing as grounds for suppression a warrantless, forced, blood draw. (R. 17)

On March 4th, 2016, the Defendants motion for suppression was denied.(R. 20) Subsequently, Eric Doule (herein after known as "Doule") entered a plea of No Contest and was adjudicated guilty of OWI 3rd contrary to § 346.63(1)(a). (R. 29) Having filed and argued a motion before the Circuit Court citing as an issue failure to comply with the procedures required by law when forcibly taking a suspects blood, on April 21st 2016, Doule petitioned the Circuit Court in Outagamie County for an Order Staying his sentence pending appeal. On April 25th, 2016, Doule's request to stay his Sentence was granted. (R. 20) This appeal follows.

STATEMENT OF THE FACTS:

On November 31, 2015, the Defendant, Doule was stopped by Officer Vue of the Grand Chute Police Department. (R. 35, 5-6) Officer Vue seized Doule for speeding. A short time after the stop, officers forcibly entered Doules vehicle. (R. 35, 32) Doule did not consent to any of the officer's commands (R. 35, 32). Doule resisted the officers continually. (R. 35, 32) Doule was arrested for Operating While Intoxicated (3rd offense), contrary to Wis. Stat. § 346.63(1)(a).

Following his arrest Doule was subjected to a forcible, warrantless "blood draw" for the evidentiary purposes of analyzing the blood sample to determine the alcohol concentration thereof. The blood draw in question took place in the hospital garage. (R. 35, 41) There were cars entering and leaving the garage at this time. (R. 35, 41) There was oil on

the floor directly behind the area that blood was eventually taken. (R. 35, 41) The blood draw itself took three attempts. (R. 35) For each of the three attempts Doule was handcuffed and physically restrained by 2-4 officers. (R. 35) During all attempts to pull Doules blood he physically resisted. (R. 35) During the course of the 3 attempts to draw Doules blood the Phlebotomist withdrew from the procedures as it was unsafe to continue. (R. 35, 45) After the second attempt at a blood draw Doules resistance resulted in him being stabbed with a needle that was unsuccessfully placed in his arm. (R. 32) After over an hour elapsed, consisting of 3 attempts at a blood draw that required the attention of at least four on duty officers Doule was finally held down by 3 officers, a lieutenant holding his arm for the phlebotomist to take his blood. (R. 32) Again, Doule was tense and resisted. The many attempts were eventually successful and Doules blood was taken. (R. 32)

AUTHORITY

WIS STAT. § 343.305 (4) STATES:

"INFORMATION. At the time that a chemical test specimen ***is requested*** under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

"You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

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.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test."

It is incorrect to say that a driver who consents to a blood draw after receiving the advisement contained in the "Informing the Accused" form has given "implied consent." If a driver consents under that circumstance, that consent is actual consent, not implied consent. If the driver refuses to consent, he *or she thereby withdraws "implied consent"* and accepts the consequences of that choice. *See, e.g., McNeely,* 133 S.Ct. at 1566 (Implied consent laws "impose significant consequences when a motorist withdraws consent."); *State v. Neitzel,* 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980) State v. Padley, 2014 WI App 65, ¶ 38, 354 Wis. 2d 545, 570–71, 849 N.W.2d 867, 879, review denied, 2014 WI 122, ¶ 38, 855 N.W.2d 695

In order for consent to constitute a valid exception to the warrant requirement of the Fourth Amendment, it must be freely and voluntarily given. *Bumper v. North Carolina,* 391 U.S. 543, 548–49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *State v. Phillips,* 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

Consent is voluntary if it is given in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant." *State v. Clappes,* 136 Wis.2d 222, 245, 401 N.W.2d 759 (1987).

In making a determination regarding the voluntariness of consent, this court examines the totality of the circumstances, including the circumstances surrounding consent and the characteristics of the defendant. *State v. Artic,* 2010 WI 83, ¶¶ 32–33, 327 Wis.2d 392, 786 N.W.2d 430. State v. Padley, 2014 WI App 65, ¶ 64, 354 Wis. 2d 545, 582, 849 N.W.2d 867, 884–85, review denied, 2014 WI 122, ¶ 64, 855 N.W.2d 695

The State "bears 'the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.' " **885 *State v. Johnson,* 177 Wis.2d 224, 233, 501 N.W.2d 876 (Ct.App.1993) (quoting *Gautreaux v. State,* 52 Wis.2d 489, 492, 190 N.W.2d 542 (1971)); *accord Artic,* 327 Wis.2d 392, ¶ 32, 786 N.W.2d

430. State v. Padley, 2014 WI App 65, ¶ 64, 354 Wis. 2d 545, 582, 849 N.W.2d 867, 884–85, review denied, 2014 WI 122, ¶ 64, 855 N.W.2d 695

In, *Schmerber v. California*, 384 U.S. 757, 772, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908 (1966) the Supreme Court cautioned the lower courts about misinterpreting their holding, stating:

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

In *Schmerber v. California*, the Supreme Court also stated:

Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U.S. 10, 13—14, 68 S.Ct. 367, 369, 92 L.Ed. 436; see also Aguilar v. State of Texas, 378 U.S. 108, 110—111, 84 S.Ct. 1509, 1511, 1512, 12 L.Ed.2d 723.

Many states heeded this warnings and refused to make a *per se* exception for warrantless blood draws. The Utah Supreme Court, for example, stated that:

> *Schmerber* does not stand for the proposition that the loss of evidence of a person's blood-alcohol level through the dissipation of alcohol from the body was a sufficient exigency to justify a warrantless blood draw. Rather, these three categories of "special facts" combined to create the exigency. The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself. (*State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008))

In fact, thirty states either restricted, or severely limited warrantless blood draws. *See Ala. Code §32–5–192(c) (2010); Alaska Stat. §§28.35.032(a), 28.35.035(a) (2012); Ariz. Rev. Stat. Ann. §28–1321(D)(1) (West 2012);Ark. Code Ann. §§5–65–205(a)(1), 5–65–208(a)(1) (Supp. 2011);Conn. Gen. Stat. §§14–227b(b), 14–227c(b) (2011); Fla. Stat. Ann.§316.1933(1)(a) (West 2006); Ga. Code Ann. §§40–5–67.1(d), (d.1) (2011); Haw. Rev. Stat. §291E–15 (2009 Cum. Supp.), §§291E–21(a), 291E–33 (2007), §291E–65 (2009 Cum. Supp.); Iowa Code §§321J.9(1),*

321J.10(1), 321J.10A(1) (2009); Kan. Stat. Ann. §§8–1001(b), (d) (2001); Ky. Rev. Stat. Ann. §189A.105(2) (Lexis Supp. 2012); La. Rev. Stat.Ann. §§32:666.A(1)(a)(i), (2) (Supp. 2013); Md. Transp. Code Ann. §§16–205.1(b)(i)(1), (c)(1) (Lexis 2012); Mass. Gen. Laws Ann., ch. 90, §§24(1)(e), (f)(1) (West 2012); Mich. Comp. Laws Ann. §257.625d(1)(West 2006); Miss. Code Ann. §63–11–21 (1973–2004); Mont. Code Ann.§§61–8–402(4), (5) (2011); Neb. Rev. Stat. §60–498.01(2) (2012 Cum. Supp.), §60–6,210 (2010); N. H. Rev. Stat. Ann. §§265–A:14(I), 265–A:16 (West 2012 Cum. Supp.); N. M. Stat. Ann. §66–8–111(A) (LexisNexis 2009); N. Y. Veh. & Traf. Law Ann. §§1194(2)(b)(1), 1194(3)(West 2011); N. D. Cent. Code Ann. §39–20–01.1(1) (Lexis Supp. 2011),§39–20–04(1) (Lexis 2008); Okla. Stat., Tit. 47, §753 (West Supp. 2013); Ore. Rev. Stat. §813.100(2) (2011); 75 Pa. Cons. Stat. §1547(b)(1)(2004); R. I. Gen. Laws §§31–27–2.1(b), 31–27–2.9(a) (Lexis 2010); S. C. Code Ann. §56–5–2950(B) (Supp. 2011); Tenn. Code Ann. §§55–10–406(a)(4), (f) (2012); Tex. Transp. Code Ann. §§724.012(b), 724.013 (West 2011); Vt. Stat. Ann., Tit. 23, §§1202(b), (f) (2007); Wash. Rev. Code §§46.20.308 (2)–(3), (5) (2012); W. Va. Code Ann. §17C–5–7 (Lexis Supp. 2012); Wyo. Stat. Ann. §31–6–102(d) (Lexis 2011).

Even the Wisconsin Supreme Court's own Justice Shirley Abrahamson dissented from the majority's position in *State v. Bohling*, 173 Wis. 2d 529, 548-49, 494 N.W.2d 399, 406 (1993), stating:

I agree with the holdings of the circuit court and the court of appeals: the *per se* rule urged by the state and adopted by the majority violates the Fourth Amendment. I further agree with the circuit court and the court of appeals that to justify a warrantless extraction of the operator's blood upon a lawful warrantless arrest of operating a vehicle while intoxicated, the state must prove that it could not have obtained a search warrant without destruction of the evidence.[2] This holding satisfies both the Fourth Amendment and the public interest in prosecuting drunk drivers.

I conclude, as did the other two courts, that a search warrant is required under the facts of this case.

"when offices in drunk-driving investigation can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search the fourth amendment mandates they do so. "See Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013): *McDonald v. United States,* 335 US 451, 456, 69 S. Ct. 191, 93 L.Ed 153.

"Unlike a situation where a suspect has control over easily disposable evidence, BAC evidence naturally dissipates in a gradual and relatively

predictable way." *See McNeely this time citing* Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973)

In *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. at 1835-36, the United States Supreme Court held that the Fourth Amendment permits blood to be taken incident to a lawful arrest without a warrant and over the arrestee's objection only if three requirements are met: (1) the arresting officers have a "clear indication" that the evidence they seek will be found in the arrestee's blood; (2) exigent circumstances exist; and (3) the method used to take the blood sample is "a reasonable one" and "performed in a reasonable manner." State v. Bohling, 173 Wis. 2d 529, 537, 494 N.W.2d 399, 401 (1993) abrogated by Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)

Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts, as in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect, *Richards v. Wisconsin,* 520 U.S. 385, 393, 117 S.Ct. 1416, 137 L.Ed.2d 615. Missouri v. McNeely, 133 S. Ct. 1552, 1555, 185 L. Ed. 2d 696 (2013).

"Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures."*State v. Eason,* 2001 WI 98, ¶ 16, 245 Wis.2d 206, 629 N.W.2d 625.[8] "We have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court."*Dearborn,* 327 Wis.2d 252, ¶ 14, 786 N.W.2d 97. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

Consistent with the United States Supreme Court's interpretation of the Fourth Amendment, we have adhered to the basic principle that warrantless searches are per se unreasonable unless they fall within a well-recognized exception to the warrant requirement. *State v. Mazur,* 90 Wis.2d 293, 301, 280 N.W.2d 194 (1979) (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 454–55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). We continue to apply that principle to the kind of search performed in this case, "which involved a compelled physical intrusion beneath [Foster's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." *McNeely,* 133 S.Ct. at 1558. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

Like the United States Supreme Court, we recognize an exception to the warrant requirement for a search performed incident to a lawful arrest. *Leroux v. State,* 58 Wis.2d 671, 688, 207 N.W.2d 589 (1973) (citing *Ker v. State of Cal.,* 374 U.S. 23, 41, 83 S.Ct. 1623, 10

L.Ed.2d 726 (1963)). "A lawful arrest gives rise to heightened concerns that may justify a warrantless search, including the need to discover and preserve evidence." ***30** *State v. Payano–Roman,* 2006 WI 47, ¶ 31, 290 Wis.2d 380, 714 N.W.2d 548. "Pursuant to this rule, law enforcement officers have been permitted to seize samples of an arrestee's hair, breath, and urine solely on the basis of lawful arrest."*Bohling,* 173 Wis.2d at 537, 494 N.W.2d 399.

However, "[b]lood constitutes a limited exception to the foregoing rule." *Id.* In*Schmerber v. California,* 384 U.S. 757, 770–71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that a warrantless nonconsensual blood draw performed incident to a lawful arrest is constitutional only where three conditions are met: (1) the police have a "clear indication"[9] that evidence of intoxication will be found in the blood; (2) exigent circumstances exist; and (3) the method chosen to draw the blood is a reasonable one that is performed in a reasonable manner.

Regarding the second prong of *Schmerber* 's test, we note that the exigent circumstances doctrine is an exception to the warrant requirement that exists independent of the search incident to arrest exception. *State v. Hughes,* 2000 WI 24, ¶ 17, 233 Wis.2d 280, 607 N.W.2d 621 (citing *Payton v. New York,* 445 U.S. 573, 575, 583–88, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). The exigent circumstances doctrine requires an emergency situation which "overcome[s] the individual's right to be free from governmental interference," *Id.,* because, as is relevant here, the delay in obtaining a warrant may result in the loss of evidence. *Hughes,* 233 Wis.2d 280, ¶ 25, 607 N.W.2d 621. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

The United States Supreme Court's mandate that the exigent circumstances doctrine be satisfied in the context of a blood draw incident to a lawful ***31** arrest is a strong indication that the Fourth Amendment permits only " minor intrusions into an individual's body under stringently limited conditions...." *Schmerber,* 384 U.S. at 772, 86 S.Ct. 1826. The exigency sufficient to justify the minor intrusion into Schmerber's body concerned the destruction of evidence: "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770, 86 S.Ct. 1826. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

In the wake of *Schmerber,* jurisdictions split "on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *McNeely,* 133 S.Ct. at 1558. Thus, when we answered that question affirmatively in *Bohling,* 173 Wis.2d at 539–40, 494 N.W.2d

399, we were not alone. *See, e.g., Gregg v. State*, 374 So.2d 1301, 1303–04 (Miss.1979) (reasoning that the metabolism of alcohol in the blood alone constitutes a sufficient exigency to justify a warrantless search); *State v. Baker*, 502 A.2d 489, 493 (Me.1985) (holding same); *State v. Woolery*, 116 Idaho 368, 370, 775 P.2d 1210 (1989), *overruled on other grounds by State v. Wulff*, 157 Idaho 416, 337 P.3d 575 (2014), *abrogated by McNeely*, 133 S.Ct. 1552 (holding same). State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

As a result of our decision in *Bohling*, a warrantless nonconsensual blood draw taken at the direction of a police officer was constitutional in the following circumstances:

(1) the blood draw [was] taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there [was] a clear indication that the blood draw [would] produce evidence of intoxication, (3) the method used ***32** to take the blood sample [was] a reasonable one and performed in a reasonable manner, and (4) the arrestee present[ed] no reasonable objection to the blood draw. *Bohling*, 173 Wis.2d at 534, 494 N.W.2d 399 (footnote omitted).[10] *Bohling* remained the law in Wisconsin for twenty years. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

In *McNeely*, the United States Supreme Court resolved the split among jurisdictions as to whether drunk-driving cases present a per se exigency sufficient to justify a warrantless nonconsensual search and seizure of a person's blood. The United States Supreme Court rejected a categorical rule in favor of a case-by-case, "totality of the circumstances" assessment of exigency. *McNeely*, 133 S.Ct. at 1561. Both the metabolization of alcohol in the bloodstream and the resulting loss of evidence are factors to consider in determining whether a warrant is required. *Id.* at 1568. ***However, "[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.* at 1561. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

Insofar as *McNeely* rejects a categorical rule concerning exigency in drunk-driving cases, the United States Supreme Court's decision abrogates our holding in *Bohling.Kennedy*, ___ Wis.2d ____, ¶ 32, 856 N.W.2d 834 ("In light of the Supreme Court's decision in *McNeely*, we recognize our holding in *Bohling*, that the rapid dissipation of alcohol alone constitutes an exigent circumstance sufficient for law enforcement officers to order a warrantless investigatory blood draw, is no longer an accurate interpretation of the Fourth Amendment's protection against unreasonable

searches and seizures."). *McNeely* therefore creates a new constitutional rule of law for the state of Wisconsin. State v. Foster, 2014 WI 131, ¶ 46, 360 Wis. 2d 12, 35, 856 N.W.2d 847, 858

Likewise, in this case, the State does not contend that exigent circumstances aside from the natural dissipation of alcohol in the bloodstream justified the police's search and seizure of Foster's blood. It is the State's burden to prove that exigent circumstances exist. *State v. Robinson*, 2010 WI 80, ¶ 24, 327 Wis.2d 302, 786 N.W.2d 463.

ARGUMENT

I. The blood draw of Doule was not a valid consent search.

1. Facts known to the officers at the time of the blood draw in question clearly illustrate that there is not valid consent to support a warrantless blood draw.
2. From the very beginning of this stop it was apparent that anything that was done with Doule was non-consensual. (R. 35; 31-32) From the original extension of this traffic stop until released Doule did not cooperate with the arresting officers. (R. 35; 31-32)
3. Clear exhibitions of his unwillingness to consent to any police procedure are evident from the very beginning of the stop on. (R. 35; 31-32)
4. When Officer Vue begins the traffic stop of Doule, Doule supply's his license to Officer Vue and then rolls up his window and instructs the officer that he is not going to answer any questions. (R. 35, 30)
5. Vue continually questions Doule and is continually denied answers. (R. 35, 32)
6. Eventually Doules car door is opened by the officer's use of a wedge to prop the door and unlock it. (R. 35, 33)
7. Doule is then commanded out of his vehicle under the apprehension that force will be used to get him to comply. (R. 35, 38)

8. Only under the fear of force being used against him does Doule finally get out of his vehicle. From this point on it is clear that Doule is not a cooperating suspect. (R. 35, 38)
9. There are nearly constant inquiries into the authority and procedures employed by the officers. Doule is not cooperating and there is no valid consent.
10. The moment Doule was forced out of his vehicle by the apprehension of harm to his person this encounter became non-consensual.
11. By opening his door with a wedge and unlocking the door against his will to force him out of the car, the arresting officers effectively seized Doule against his will.
12. To say that Doule did anything consensually after this point would require ignoring the fact that everything that occurred beyond Doules removal from the vehicle was the result of non-consensual police action.
13. The next large indication of the officers lack of consent can be seen in the conversations surrounding the execution of the informing the accused form itself.
14. At the time of reading the form, Officer Vue attempted to go through the individual lines. (R. 35, 15) It is clear from the video and the form that Doule did not give valid consent. (R. 32) At the time the question is presented as to whether or not he will submit to testing , Doule avoids answing the question. (R. 32) Rather than answer Doule asks about other unrelated matters, like going home and seeing his children. (R. 35, 44) Eventually Doule does state, I am not saying no. (R. 35, 44)
15. Evidence of this lack of consent and of the struggle in obtaining consent can be illustrated by Officer Vue failing to initial the final lines on the form. (R. 32) (R. 35, 15)

16. Further, at this point in the stop Doule has resisted everything the officers have instructed him to do. (R. 35, 32) To conclude that valid consent was obtained would require ignoring all of the nonconsensual actions of Doule prior to time of reading the form as well as all of the physical indications that this was not a consensual encounter. (35, 29-32)
17. Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct. *See United States v. Griffin,* 530 F.2d 739, 741 (7th Cir.1976); *see also United States v. Donlon,* 909 F.2d 650, 652 (1st Cir.1990). State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794, 802 (1998)

II. Even if Doule's compelled and ambiguous words are mistakenly taken as consenting to a blood draw his physical actions clearly indicate that he was not willing to cooperate with the search.

18. Under *Phillips* the Supreme Court of Wisconsin has indicated that words alone are not the only factor to consider in evaluating consent.
19. Rather there the Court clearly illustrates that consent can be indicated by conduct.
20. Here the conduct of Doule clearly implicates to any reasonable person that this is and never was a consensual encounter. (R. 35, 18-19)
21. Upon arrival to the hospital Doule is handcuffed behind his back and surrounded by multiple officers. (R. 35, 18-19)
22. Doule is then escorted to an area in the parking garage where he remains handcuffed and non-cooperative, with several officers. (R. 35, 18-19)
23. During this blood draw at all times relevant the conditions surrounding the procedure are not reasonable. (R. 35, 18-19)
24. There are cars coming. (R. 35, 41)

25. There are residual fluids on the ground in the vicinity. (R. 35, 41)
26. In this garage Doule there were three separate attempts made to draw Doules blood. (R. 35, 18)
27. When the first attempt is made Doule is handcuffed behind his back and held by two officers, here Doule pulls away from the needle before it punctures his skin. (R. 35, 18)
28. On the second attempt officers are again restraining Doule one on each side and again upon the attempt of the phlebotomist to puncture Doule's skin he tenses up and pulls away.(R. 35, 24)
29. During the second attempt to obtain Doule's blood a needle appears to be inserted into his arm and at that moment he flees from the nurse causing a panic. (R. 35, 24), (R. 32)
30. At this time Doule is not cooperating, has not cooperated for well over an hour and is clearly a non-consenting, uncooperative suspect. (R.32)
31. Upon the second attempt, Doule's skin is punctured and the Phlebotomist expresses her concern. (R. 32) (R. 35, 24)
32. Knowing that Doule's just pulled away with a partially inserted needle in his arm the Phlebotomist states that she cannot continue this if he will not cooperate and leaves the area with her cart. (R. 32)
33. A supervisor is then called to the scene. (R. 32)
34. For the next 10-15 minutes Doule sits surrounded by officers clearly in opposition to the officers that are holding him in custody. (R. 32)
35. A telephonic warrant could have been obtained in less time. (R. 35, 25)
36. Comments are made by Doule requesting badge numbers as well as many other statements that would indicate to a reasonable person that Doule is not consenting to the actions of the Officers but rather is in contention with what they are trying to do. (R. 32)
37. After some time the supervisor arrives and joins in the restraint of Doule. (R. 32)

38. Upon the third attempt a sample of Doules blood was obtained. (R. 32)
39. These events took in excess of an hour. (R. 35, 25)

II. The Warrantless Blood Draw of Doule was not reasonable

40. The practice of continuing an attempt at an unsafe blood draw is clearly against the holding of the Wisconsin Courts in *Tullberg* and *Foster*.
41. A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if: (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw. State v. Erickson, 2003 WI App 43, ¶ 9, 260 Wis.2d 279, 659 N.W.2d 407; Schmerber v. California, 384 U.S. 757, 769–71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). State v. Tullberg, 2014 WI 134, ¶ 31, 359 Wis. 2d 421, 438, 857 N.W.2d 120, 128 cert. denied, 135 S. Ct. 2327, 191 L. Ed. 2d 981 (2015).
42. The facts in Doules case clearly fail the test established by the Supreme Court of Wisconsin in *Tullberg* for assessing the constitutionality of a warrantless blood draw.
43. Under *Tullberg* the state has the burden of proving that the blood draw was done in a reasonable manner. In reviewing the facts of this case it is clear that the draw in question;
    1. Took place in a parking garage where cars with coming and going. (R. 32)
    2. The garage where the draw took place had oil spills on the floor. (R. 32)
    3. It took four officers three attempts to successfully draw Doules blood. (R. 32)

4. The three attempts took over an hour to complete,(R. 32) (R. 35, 25)
5. Doule was tense and withdrew his arm from each attempt, (R. 32)
6. At all times Doule was physically restrained, (R. 32) (R. 35)
7. The resistance of Doule resulted in a substantial risk of harm to and the arresting officers,
8. The attempts were so clearly unreasonable that the Phlebotomist terminated further attempts due to the danger created by Doule physically resisting the officers. (R. 32)
9. Upon the final attempt there were atleast three officers holding Doule form withdrawing his arm, which was clearly his intent. (R. 32) (R. 35, 25)
10. It is incorrect to say that a driver who consents to a blood draw after receiving the advisement contained in the "Informing the Accused" form has given "implied consent." If a driver consents under that circumstance, that consent is actual consent, not implied consent. If the driver refuses to consent, he *or she thereby withdraws "implied consent"* and accepts the consequences of that choice. *See, e.g., McNeely,* 133 S.Ct. at 1566 (Implied consent laws "impose significant consequences when a motorist withdraws consent."); *State v. Neitzel,* 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980) State v. Padley, 2014 WI App 65, ¶ 38, 354 Wis. 2d 545, 570–71, 849 N.W.2d 867, 879, review denied, 2014 WI 122, ¶ 38, 855 N.W.2d 695

11. In order for consent to constitute a valid exception to the warrant requirement of the Fourth Amendment, ***it must be freely and voluntarily given***. *Bumper v. North Carolina,* 391 U.S. 543, 548–49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *State v. Phillips,* 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).
12. Warrantless forced blood draws are unlawful unless justified by a recognized exigency. Missouri v. McNeely, 133 S. Ct. 1552, 1555, 185 L. Ed. 2d 696 (2013)
13. When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. Missouri v. McNeely, 133 S. Ct. 1552, 1555, 185 L. Ed. 2d 696 (2013)

III. The State failed to meet its burden of proving an exigent circumstance.

14. In response to the defendants questions the State focused on electing testimony of the physical completion of the informing the accused consent form and presented no argument as to any exigent circumstance. The issue of exigent circumstance

remains unaddressed by the State and there remain many questions as to whether or not valid consent was obtained or if it was obtained if consent was withdrawn prior to the procedure of drawing blood.

15. The Fourth Amendment principle that: a warrantless search of the person is reasonable only if falls within a recognized exception clearly applies here. Case Law appears to govern in that:

> "when officers in drunk-driving investigation can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search the fourth amendment mandates they do so. "See Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013): *McDonald v. United States*, 335 US 451, 456, 69 S. Ct. 191, 93 L.Ed 153.

16. Further, "Unlike a situation where a suspect has control over easily disposable evidence, BAC evidence naturally dissipates in a gradual and relatively predictable way." *See McNeely this time citing* Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973)

17. The other factors of intoxication largely eliminate any argument for exigency in this case. Moreover, "because an officer must typically take a dwi suspect to a medical facility and obtain a trained medical professionals assistance before having a blood test conducted some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether a warrant is obtained." *Id.* "The natural

dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant". *Id.*

18. In this case the facts are clear and largely uncontested.
19. At around 10pm Doule was seized, his car was forcibly entered and he was compelled out under the threat of the use of force. (R. 35, 32)
20. At around midnight the Doule was produced to the AMC parking garage, where he was restrained and subjected to 3 attempts to draw his blood over an approximately 45-60 minute span. (R. 32)

"Q: And would you agree that the reason that the first two were terminated was because the defendant was not cooperating and he was moving away from the needle?
A: Correct. " (R. 35,19)

" Q: Do you recall officers telling you to stop moving, stop resisting, telling you that you weren't cooperating, and instructing you to not tense up when they were trying to pull blood from your body?
A: Yep
Q: Do you recall being restrained by several officers at this time?
A: I believe it was two the first two times, then three the last time, which I couldn't do anything then. " (R. 35, 39 Line 13- 22)…

"Q Okay. So let's talk about that. Let's talk about the second time actually on the second occasion where you were - - At the second attempt where they were trying

to draw your blood, you were in fact stuck with the needle, were you not.?

A: Yes, I was.

Q: At that time you pulled away, right? You pulled away?

A: Yep.

Q: It wasn't your intent to allow them to pull your blood at that time, correct?

A: I'm sorry. Could you repeat it?

THE COURT: What was your intent at that time?

THE WITNESS: To Pull away.

THE COURT: Yeah. Why?

THE WITNESS: I didn't want to submit.

By Mr. Fredrickson:

Q: Okay. There were three officers holding you down?

A: Yes."(R. 35, 39 lines 23-25, 40 lines 1 -17)

21. All of this occurred while the defendant was clearly intentionally, dangerously and physically resisting the needle. During the first two attempts there was an officer on each side of the Defendant and a phlebotomist attempting to hold him while he tensed up and pulled away. (R. 32) (R. 35)

22. At the time that the blood was in fact drawn from the defendant there was a third officer holding Doule's handcuffed arms as well as a phlebotomist the original two officers. (R. 32)

23. All of this occurred while Doule remained handcuffed. Doule's resistance through the entire ordeal is not contested. Doule did

not listen to officer's commands from approximately 1030pm – 1am. (R. 35, 30-32)

24. The three attempts occurred over at least an hour, well within the time frame to acquire a warrant. (R. 35, 25)

25. If the Officers would have called for a telephonic warrant after the second failed attempt where Doule pulled away from a Phlebotomist that had partially inserted a needle into his arm from behind him, then the warrant would have likely been returned ordering a forcible blood draw in less time than it factually took to obtain this blood sample in a nonsterile and dangerous way.

26. The procedure invoked by the officers present is questionable and there is a genuine safety concern involved when the accused pulls away from a phlebotomist several times during a procedure so precise that the goal is to insert a large needle into a very precise location (vein).

CONCLUSION

Doule consent was not obtained at the time of the blood draw as his actions at the time clearly indicate that he is not consenting to a needle being placed in his arm. The facts surrounding the draw make only one implicit indication, that is , this was not a consensual action.

Further, the blood draw in question clearly fails the 2nd and 3rd prongs of the test established by the Supreme Court of Wisconsin to be used for justifying such an invasive intrusion in that;

1. The conditions were not safe because the subject undoubtedly moved from the needle several times during the procedure and needed to be restrained using multiple officers,

2. The parking garage was not a sanitary environment,

3. The methods employed by the arresting officers were unreasonable as they were not effective, sanitary, or efficient and subjected the defendant to multiple attempts to stick him with a needle that could have clearly led to injury of both the suspect and the others involved.

the denial of the Doule's, suppression motion should be reversed and his Judgment of conviction vacated as the officers conducting the search of Doules blood did not adequately conform to the statutory requirements for obtaining consent or taking blood from an unwilling suspect. The matter should be remitted to the Circuit Court with the instruction that the Chemical Test of Doules blood be excluded from trial.

Dated this 30th day of August, 2016.

Respectfully Submitted,

JOHN MILLER CARROLL
LAW OFFICE

By: _____

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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,642 words.

Dated this 30th day of August, 2016.

_____

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ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 30th day of August, 2016.

_____

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