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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

2016AP001146 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Eric M. Doule,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT BRANCH 6 FOR OUTAGAMIE COUNTY

The Honorable Vincent R. Biskupic, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, requests neither oral argument nor publication because resolution of this case requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE AND STATEMENT OF THE ISSUES

As respondent, the State exercises its option not to present a statement of the issues and statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will outline the issues and present additional facts in the "Argument" portion of its brief.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE DEFENDANT VOLUNTARILY CONSENTED TO THE BLOOD DRAW

The Fourth Amendment to the United States Constitution provides citizens the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. This Amendment requires law enforcement officers, in most instances, to obtain a search warrant prior to conducting a search. *See State v. Krajewski*, 2002 WI 97, ¶ 24, 255 Wis. 2d 98, 648 N.W.2d 385. However, there are "a few specifically established and well-delineated exceptions," *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971), including searches conducted pursuant to consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Artic*, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430.

For consent to be considered a valid exception to the warrant requirement, it must be given freely and voluntarily. *Schneckloth*, 412 U.S. at 222. The Wisconsin Supreme Court has identified a list of non-exclusive factors for a reviewing court to consider when determining whether consent was given voluntarily:

> (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 were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant has 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.

Artic, 327 Wis. 2d 392, ¶ 33; *see also State v. Phillips*, 218 Wis. 2d 180, 198-203, 577 N.W.2d 794 (1998).

When we consider the foregoing factors in conjunction with the testimony from Officer Lia Vue from the Grand Chute Police Department, it is clear that the defendant freely and voluntarily consented to the blood draw. When the defendant was first asked if he would submit to a chemical test of his blood, he stated, "I'm not going to say no." (R.9:14-15). Immediately thereafter, the defendant responded affirmatively and stated that he would submit to a chemical test of his blood. (R.9:19-24). On the ride to the hospital, the defendant never once mentioned that he no longer wanted to consent to a blood draw. (R.10:8-14). In fact, he never even mentioned the blood draw. (R.10:19-20).

When the defendant was at the hospital, he never withdrew his consent to a blood draw. (R.11:4-6). The defendant's hands were behind his back due to his uncooperativeness, but even at that point he never withdrew consent. (R.11:13-22). Due to the fact that the defendant was being uncooperative, Officer Vandenberg asked him, "Are you going to take the blood test?" and the defendant responded, "Yes." (R.12:3-13).

There is no evidence of trickery or misrepresentation on behalf of the police officers, nor is there evidence of physical threats or verbal intimidation. *See Artic*, 327 Wis. 2d 392, ¶ 33. Instead, the police followed Operating While Intoxicated ("OWI") protocols and obtained clear and unequivocal consent to the blood draw by the defendant. Although the defendant was intoxicated and vulgar (*see* R.11:1-3), he did not waiver on his decision to consent to the blood draw.

The defendant's consent is evident from the Informing the Accused Form which was read verbatim by Officer Vue to the defendant. (*See* Exhibit from 11/04/2015 Motion Hearing). At the motion hearing, Officer Vue testified about this form and the questioning that preceded:

ADA DUROS:	At the end of that form did you ask the defendant if he was willing to submit to a chemical test of his blood?
OFFICER VUE:	Yes.
ADA DUROS:	What was his response?
OFFICER VUE:	He stated yes . . . He originally stated that he would not say no.
ADA DUROS:	So he said I'm not going to say no?
OFFICER VUE:	Correct.
ADA DUROS:	Do you know how many times he said that?
OFFICER VUE:	I don't recall.
ADA DUROS:	And then did you ultimately ask him – Did you tell him it's a yes or no question? Will you submit to it?
OFFICER VUE:	Yes.
ADA DUROS:	And what was his answer.
OFFICER VUE:	He stated yes.

(R. 9:6-24). After the defendant was transported to the hospital, he continued to consent to the blood draw:

ADA DUROS:	Prior to drawing the blood from the defendant, was there any point where he told you he did not want to submit to a blood draw?

OFFICER VUE: Negative. Officer Vandenberg did ask him if he wanted to get his blood drawn. He stated yes.

ADA DUROS: So he was being uncooperative and Officer Vandenberg asked him something like are you going to take the blood test?

OFFICER VUE: Correct.

ADA DUROS: And what was his response?

OFFICER VUE: He stated yes.

(R.12:3-13).

Despite the defendant consenting to the blood draw on numerous occasions, the defendant nevertheless argues that the defendant's "physical actions clearly indicate that he was not willing to cooperate with the search." (Def.'s Br. at 12). The defendant relies on the fact that he "pulled away from the needle," "tenses up and pulls away," and "flees from the nurse causing a panic." (Def.'s Br. at 12). First, there is no evidence that the defendant "fle[d] from the nurse." Notwithstanding that fact, the defendant's argument that his actions constituted withdrawal of consent is unsupported by caselaw and common sense. Officer Vue testified that he has been present at numerous blood draws in the past, and oftentimes individuals are hesitant to get their blood drawn. (R.26:12-21). Officer Vue further testified that it is not uncommon for a phlebotomist to have to attempt the blood draw more than once. (R.26:12-14). Additionally, Officer Vue has observed individuals who have been afraid of needles and, therefore, have tensed up. (R.26:15-21). These facts alone do not constitute withdrawal of consent when the defendant's words were clear and unequivocal.

In this case, the circuit court properly considered the circumstances and context of the defendant's statements when determining whether the defendant voluntarily

consented to the blood draw. After reviewing the testimony and video evidence, the circuit court determined that "the defendant never made any explicit statement refusing to give the blood sample." (Court's Decision March 3, 2016 at 1). Furthermore, the court, after listening to the defendant's testimony, characterized his testimony as "suspect." (*Id.*). After discussing the proper caselaw related to consent, the circuit court determined that "the blood draw was proper and a warrant was not needed." (*Id.* at 2). The circuit court's determination that the defendant voluntarily consented to the blood draw was reasoned and not contrary to the great weight and clear preponderance of the evidence. *See Artic*, 327 Wis. 2d 392, ¶ 30. Therefore, the circuit court's findings should be upheld.

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the circuit court.

Respectfully submitted this 26th day of October, 2016.

By:_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 6 pages.

Dated: October 26, 2016

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on October 26, 2016, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: October 26, 2016
Signature: _____

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 26th day of October, 2016.

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