

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED

11-15-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP001146-CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Eric M. Doule
Defendant- Appellant,

REPLY BRIEF OF DEFENDANT – APPELLANT

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

JOHN MILLER CARROLL LAW OFFICE
Attorney for Defendant – Appellant

John Miller Carroll
State Bar. No. 1010478

226 S. State St.
Appleton WI 54911
(920) 734-4878

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2-3
SUPPLEMENTAL AUTHORITY.....	3-7
ARGUMENT.....	4-11
<i>I. The blood draw of Doule was not a valid consent search.....</i>	<i>4-7</i>
<i>II. physical actions clearly indicate that Doule was not willing to cooperate with the search.....</i>	<i>7-10</i>
<i>III. The State has failed to respond to the Defendants argument concerning compliance with reasonableness factors and its burden concerning an exigent circumstance therefore those arguments are Waived</i>	<i>10-11</i>
CONCLUSION.....	12-13
CERTIFICATION OF FORM AND LENGTH.....	14
ELECTRONIC BRIEF CERTIFICATION.....	15

TABLE OF AUTHORITIES

<i>State v. Artic</i> , 2010 WI 83, ¶¶ 32–33, 327 Wis.2d 392, 786 N.W.2d 430....	3
<i>State v. Johnson</i> , 177 Wis.2d 224, 233, 501 N.W.2d 876 (Ct.App.1993).....	3
<u><i>State v. Padley</i></u> , 2014 WI App 65, ¶ 64, 354 Wis. 2d 545.....	3
<i>United States v. Griffin</i> , 530 F.2d 739, 741 (7th Cir.1976).....	7
<i>United States v. Donlon</i> , 909 F.2d 650, 652 (1st Cir.1990).....	7
<u><i>State v. Phillips</i></u> , 218 Wis. 2d 180, 197, 577 N.W.2d 794, 802 (1998).....	7
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 378, 383 (1989)	11
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808, 815-816 (1985).....	11

ISSUES PRESENTED FOR REVIEW

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 Doule's 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 was present in Outagamie County Circuit Court for a hearing on a motion to suppress the results of a warrantless blood draw. (R. 17)

On March 4th, 2016, the Defendants motion was denied.(R. 20) Subsequently, Eric Doule (herein after “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, Doule was stopped by Officer Vue. (R. 35, 5-6) Officer Vue seized Doule for speeding. A short time after the stop, officers forcibly entered Doule’s 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. (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 Doule's blood he physically resisted. (R. 35) During the course of the 3 attempts to draw blood the Phlebotomist withdrew from the procedures as it was unsafe to continue. (R. 35, 45) After the second attempt at a blood draw Doule's 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 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 Doule's blood was taken. (R. 32)

SUPPLEMENTAL AUTHORITY

Valid Consent

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. 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

ARGUMENT

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

1. The state in its response relies almost exclusively on coerced statements being grounds for a finding of consent and ignores the conduct of the defendant nearly entirely.
2. Similarly the State down plays all interaction the Defendant had with the seizing officers. This is for good reason. That is, from the very beginning of this stop, the facts clearly illustrate that there is not valid consent to support a warrantless blood draw.
3. From the very beginning of this stop it was apparent that anything that was done was non-consensual. (R. 35; 31-32)
4. Prosecutor Alex Duros stipulated that the Defendant did not want to get out of the car, that he was belligerent to the officer and that the defendant was forcibly removed from the vehicle. (R 35;32)
5. From the original extension of this traffic stop until released Doule did not cooperate with the arresting officers. (R. 35; 31-32)
6. 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)
7. When Vue begins the traffic stop of Doule, Doule supply's his license to Vue and then rolls up his window and instructs the officer that he is unwilling to answer any questions. (R. 35, 30)
8. Vue continually questions Doule and is continually denied answers. (R. 35, 32)

9. Doule was stopped for speeding , there is no odor of alcohol during his initial encounter.
10. Eventually Doule’s car door is opened by the officer’s use of a wedge to prop the door and unlock it. (R. 35, 33)
11. Doule is then commanded out of his vehicle under the apprehension that force will be used to get him to comply. (R. 35, 38)
12. 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)
13. There are nearly constant inquiries into the authority and procedures employed by the officers. Doule is not cooperating and there is no valid consent. (R. 32)
14. The moment Doule was forced out of his vehicle by the apprehension of harm to his person **this encounter became non-consensual.**
15. 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 and forced him to comply with their actions.
16. To say that Doule did anything consensually after this point would require ignoring the fact that everything that occurred beyond Doule’s removal from the vehicle was the result of non-consensual police action.
17. “And if woman resists to a point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not “consent”.” – *Black’s Law Dictionary, Fifth Ed.*

18. The next large indication of the officers lack of consent becomes apparent in the conversations surrounding the execution of the informing the accused form itself.
19. 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 answering 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)
20. Evidence of this lack of consent and the use of coercion in obtaining consent is illustrated by Vue failing to initial the final lines on the form. (R. 32) (R. 35, 15)
21. 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 .(35, 29-32)
22. After the second abandoned draw where Doule was physically stabbed with a needle a superior officer was called to the scene. (R.32)
23. The Phlebotomist terminated attempting to pull Doule's blood because it was dangerous. (R. 32)
24. Rather, than apply for a warrant the superior officer assisted by helping restrain Doule further.
25. 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)

26. The words gestures and conduct of the Defendant all indicate a lack and withdrawal of consent.

II. *Doule's physical actions clearly indicate that he was not willing to cooperate with the search.*

27. Under *Phillips* the Supreme Court of Wisconsin has indicated that words alone are not the only factor to consider in evaluating consent.

28. Rather there the Court clearly illustrates that consent can be indicated by conduct.

29. Here the conduct of Doule clearly implicates from the onset of interactions to any reasonable person that this was not a consensual encounter. (R. 35, 18-19)

30. Upon arrival to the hospital Doule is handcuffed behind his back and surrounded by multiple officers. (R. 35, 18-19)

31. 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)

32. These are the same officers that he refused to talk to during the traffic stop.

33. These are the same officers that removed him against his will from his vehicle.

34. During this blood draw at all times relevant the conditions surrounding the procedure are not reasonable. (R. 35, 18-19)

35. There are cars coming. (R. 35, 41)

36. There are residual fluids on the ground in the vicinity. (R. 35, 41)
37. In this garage there were three separate attempts made to draw Doule's blood. (R. 35, 18)
38. 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)
39. 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)
40. 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)
41. At this time Doule is not cooperating, has not cooperated for well over an hour and is clearly a non-consenting, uncooperative, hostile suspect. (R.32)
42. Upon the second attempt, Doule's skin is punctured and the Phlebotomist expresses her concern. (R. 32) (R. 35, 24)
43. 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)
44. A supervisor is then called to the scene. (R. 32)
45. 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)
46. A telephonic warrant could have been obtained in less time. (R. 35, 25)

47. 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)
48. After some time the supervisor arrives and joins in the restraint of Doule. (R. 32)
49. Upon the third attempt a sample of Doule's blood was obtained. (R. 32)
50. These events took in excess of an hour. (R. 35, 25)

“Once the phlebotomist was ready to draw Eric's blood, he became uncooperative and would not sit still for her to draw his blood. Does that accurately represent what's in your report:

A: (No response)

A: That that what that statement says, I guess is a better was, correct?

A: Correct, but this is before my revision.” (R. 35, 21)

51. All of these actions clearly illustrate intentional, dangerous and physical resisting the needle. (R. 32) (R. 35)
52. 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)
53. 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 been issued ordering a forcible blood draw in less time than it factually took to obtain this blood sample in a nonsterile and dangerous way.

54. Further, the procedure invoked by the officers present is questionable and there is a genuine safety concern involved .

III. The State has failed to respond to the Defendants arguments therefore those arguments are Waived

55. The appellant in its Brief under sub heading II and III, clearly raised an issue with non-compliance with reasonableness factors as well as the states failure to prove exigent circumstances.

56. The state failed entirely to address either of these issues in its Response.

57. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989) (failure to argue in brief in opposition is a waiver of argument); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985) (failure to argue in brief in opposition is a waiver of argument.

58. “Nonjurisdictional defects of this sort should be brought to the Court's attention *no later* than in respondent's brief in opposition; if not, it is within the Court's discretion to deem the defect waived.” Pp. 2431–2432 *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 808, 105 S. Ct. 2427, 2428, 85 L. Ed. 2d 791 (1985)

59. Due to the states failure to address the issue raised by the appellant, the unreasonableness argument raised by

the appellant remains entirely undisputed. As the State failed to respond to the issue the argument should be deemed waived.

CONCLUSION

The traffic stop of Doule was non-consensual and coerced from its very inception. Doule provided the seizing officer with in his information and then refused to cooperate in any other way. Shortly after Doule's car was forcibly entered and he was compelled by threat of force out of the vehicle. The state has stipulated he was removed against his will. Nothing during this stop would indicate under the totality of the circumstances to any reasonable person that this was valid, non-coerced consent. Rather the facts clearly illustrate this was not a consensual encounter in any way. Further the draw itself violates the reasonableness requirement raised by the Appellant in his brief and is left entirely unaddressed by the state in its response.

Consent was not obtained at the time of the blood draw. The facts surrounding the draw make only one implicit indication, that is, this was not a consensual action. This draw is warrantless and non-consensual but also conducted in an unreasonable manner. As, 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 phlebotomist terminated the attempts due to safety concerns.
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, as evidenced by the Phlebotomist leaving after the second attempt.

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

Dated this ____ day of November, 2016.

Respectfully Submitted,
JOHN MILLER CARROLL
LAW OFFICE

By: _____

John Miller Carroll
State Bar # 1010478

226 S. State St.
Appleton, WI 54911
(920)734-4878

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 2,944 words.

Dated this 14th day of November, 2016.

John Miller Carroll
State Bar #1010478

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 14th day of November, 2016.

John Miller Carroll
State Bar #01010478