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OF WISCONSIN

NO. 2017AP002367-CR

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent.

v.

KEITH A. WALL,

Defendant-Appellant.

On Appeal From the Circuit Court for Columbia County
Case No. 2013CT000125, The Honorable Judge Todd J. Hepler

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT KEITH A. WALL

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STATEMENT OF THE ISSUES

1. Whether the circuit court erred in concluding that, under the Fourth Amendment to the U.S. Constitution, the evidence obtained from a warrantless blood draw contrary to the holding in *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013), should not be excluded because the law enforcement officers acted in good faith reliance on prior case law.

   Answered no by the circuit court.

2. Whether the circuit court erred in concluding that, under the Fifth Amendment to the U.S. Constitution, the evidence obtained from a violent police encounter should not be excluded under the Due Process Clause and *Rochin v. California*, 342 U.S. 165 (1952).

   Answered no by the circuit court.

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant Keith A. Wall does not request oral argument.

STATEMENT ON PUBLICATION

This Court's opinion should be published pursuant to Wis. Stat. §§ 809.23(1)(a)2. and 4.

STATEMENT OF THE CASE

A. Statement of Facts

On March 22, 2013, Deputy Cory Miller ("Deputy Miller") of the Columbia County Sheriff's Office arrested Defendant-Appellant Keith A. Wall ("Wall") on suspicion of operating a motor vehicle while intoxicated. (R. 75 at 5:23-6:3.) Deputy Miller transported Wall to Divine Savior Hospital located in Portage, Wisconsin. (*Id.,* 7:2-4.) Wall complied with Deputy Miller's instruction to enter the hospital. (*Id.,* 70:3-22.) Wall complied with Deputy Miller's instruction to sit in a restraint chair. (*Id.,* 11:24-3, 13:8-13, 70:3-22.)

Deputy Miller asked Wall to submit to a chemical test of his blood, i.e., a blood draw. (*Id.,* 8:1-3, 58:17-59:7) Wall did not consent to the blood draw because he fears needles. (*Id.,* 8:1-7, 25:6-8, 39:19-22, 58-17-59:7.) Deputy Miller read a form entitled "Informing the Accused" to Wall. (*Id.,* 19:19-25, 29:13-5, 59:8-12.) The "Informing the Accused" form does not state that law enforcement will forcibly take blood upon a refusal to a blood draw. (*Id.,* 20:1-4.) Deputy Miller made the decision to forcibly take blood from Wall solely because Wall had been previously convicted of operating while intoxicated. (*Id.,* 20:9-24, 22:5-23:2.)

Officer Robert Bagnall ("Officer Bagnall") of the City of Portage Police Department was dispatched to the hospital to assist with the blood draw. (*Id.,* 28:6-9.) Officer Bagnall made the decision to apply a "mandibular compliance hold" on Wall's head. (*Id.,* 31:21-32:10.) In applying the "mandibular

compliance hold" Officer Bagnall pulled on Wall's chin using the weight of his body to secure Wall's head. (*Id.,* 41:3-7, 20-24.) Officer Bagnall described the "mandibular compliance hold" in the following testimony:

> Q: Sure, I just want to slow that down a little bit. Are you telling me you applied the pressure and your left arm at the same time or did you apply the left arm first and then the pressure?
>
> **A: Well, you can't do it at the same time because you have to get the head stabilized and you have to lean into it. So you are using your other hand to assist in that. Then when you're going forward and pushing down, then of course that's when the application is made.**

(*Id.,* 42:8-17.)

While Officer Bagnall was applying the "mandibular compliance hold," Wall was fully restrained in a chair. (*Id.,* 41:13-15, 61:20-61:7, 63:6-9.) Officer Bagnall applied the "mandibular compliance hold" on Wall for at least a minute and half, even though Wall presented his arm "immediately." (*Id.,* 33:16-34:2, 53:14-16.) The pain Wall experienced was "excruciating." (*Id.,* 62:13-63:5) Officer Bagnall intentionally caused pain to Wall. (*Id.,* 23:6-25, 32:22-33:5.)

The "mandibular compliance hold" does not cause bleeding. (*Id.,* 47:21-25.) Thus Officer Bagnall caused Wall's ear to bleed by either misapplying the "mandibular compliance hold" or using some other technique. (*Id.,* 63:16-18.) Wall received treatment and care from Dr. Robert S. Waters ("Dr. Waters") of Waters Integrative Health Center as a result of the injuries he sustained from law enforcement officers. (*Id.,* 63:19-64:3)

B. Procedural History

Wall filed a motion to suppress the blood evidence under the Fourth and Fifth Amendments to the U.S. Constitution. (R. 8.) The circuit court held an evidentiary hearing on November 11, 2013. (R. 74.) The circuit court delivered an oral ruling denying Wall's motion on December 3, 2013. (R. 76.) The circuit court subsequently entered an order denying the motion on December 4, 2013. (R. 10.) Wall later entered a conditional plea of guilty and the circuit court entered a judgment of conviction on May 24, 2017. (R. 61; R. 84.)

STANDARD OF REVIEW

This Court evaluates the circuit court's findings of fact under a clearly erroneous standard. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. The application of constitutional principles to the facts, however, is a question of law that is reviewed de novo. *State v. Horngren*, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508.

ARGUMENT

I. The circuit court erred when it concluded that the exclusionary rule should not be applied to the blood draw in Wall's case.

The Fourth Amendment protects people "against unreasonable searches and seizures" and requires a warrant based "upon probable cause" before the government can search or seize, "persons, houses, papers, and effects." U.S. Const. amend. IV; see also Wis. Const. art. I §11. Thus, a warrantless search is per se unreasonable unless it falls within a recognized exception. *McNeely*, 133 S. Ct. 1552, 1558 (2013). Exigent circumstances justify a warrantless, nonconsensual search only if "police action literally must be 'now or never' to preserve the evidence of the crime." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). In *McNeely*, the U.S. Supreme Court concluded that "the State did not meet its burden of demonstrating an exigent circumstance existed," 133 S. Ct. at 1567-68, when it ordered a warrantless, nonconsensual blood draw because the State did not believe it needed a warrant. The facts of this case are similar and, therefore, the blood evidence should be suppressed.

The circuit court reasoned that the officers were relying on *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1992). (R. 76 at 3-4.) In *Bohling*, the Wisconsin Supreme Court created a per se rule that exigency exists in every drunk-driving case because alcohol rapidly dissipates in the bloodstream. 173 Wis. 2d at 539, 494 N.W.2d at 402. A decade later, however, *State v. Faust*, 2004 WI 99, ¶33 n. 16, 274 Wis. 2d 183, 682 N.W.2d 371 (2004), modified the holding

in *Bohling*: "[W]e reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the totality of the circumstances of each individual case." See also *id.* at ¶32 ("There may well be circumstances where the police have obtained sufficient evidence of the defendant's level of intoxication that a further test would be unreasonable under the circumstances presented."). As such, since *Faust* Wisconsin courts had been required to look at the totality of the circumstances when determining whether warrantless, nonconsensual blood draws are supported by exigent circumstances. See also *Birchfield v. North Dakota*¸ 136 S. Ct. 2160, 2185 (2016) ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.").

The facts of this case show that the forced blood draw was unreasonable under *Faust*. Prior to forcibly taking Wall's blood, Deputy Miller had obtained evidence of Wall's alleged impairment through various field sobriety tests and a breath test. (*Id.,* 18:13-24.); see *Faust*, 2004 WI 99, ¶32 (further testing may be unreasonable); *Birchfield*¸ 136 S. Ct. 2160, 2185 ("breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests. . . .").

Deputy Miller informed Wall that it was unlawful for him to refuse a request for a chemical test of his blood. (R. 75 at 19:19-25.) Wis. Stat. §§ 343.305(9) and (10) were enacted specifically to make some refusals unlawful. Neither of those sections permit the use of force that Wall was subjected to. Indeed, the language of those statutes acknowledge that there are circumstances under which a person may properly refuse a request for a chemical test. And, naturally, those sections provide punishments those that refuse. Importantly, nowhere in § 343.305(4)—which states the language that must be read to a suspect—does it state that blood will be forcibly taken upon refusal.

Additionally, the officers were aware that Wall's reluctance was caused by his fear of needles. (R. 75 at 8:1-7, 25:6-8, 39:19-22, 58:17-59:7.) Despite his fear of needles, and the knowledge that the officers wanted a blood specimen, Wall complied with Deputy Miller's instructions to enter the hospital and to sit in the restraint chair. (*Id.,* 11:24-3, 13:8-13, 70:3-22.) Wall was not resisting: he was scared. (*Id.,* 60:25-61:12, 61:20-62:23.)

The decision to forcibly take Wall's blood was unreasonable under the Fourth Amendment and should be suppressed accordingly.

II. The circuit court erred when it concluded that the blood draw did not violate Wall's due process rights.

The Due Process Clause requires suppression of the physical evidence obtained without valid consent from Wall's body. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to bodily integrity."). The U.S. Supreme Court has recognized that substantive due process may be violated by a "cognizable level of executive abuse of power." See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). For a due process claim, "there is no meaningful distinction between physical and psychological harm." *United States v. Cuervelo,* 949 F.2d 559, 565 (2d Cir. 1991) (citing *United States v. Chin,* 934 F.2d 393, 399 n.4 (2d Cir. 1991)). While the Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly," the law prohibits an abuse of police power that offends "the community's sense of fair play and decency." *Dowling v. United States,* 493 U.S. 342, 352-53 (1990).

It is for this reason that involuntary confessions, even if obtained by means of police coercion that is only psychological in nature, is inadmissible for any purpose. Indeed, the Supreme Court "mandate[s] the exclusion of reliable and probative evidence for *all* purposes . . . when it is derived from involuntary statements." *Michigan v. Harvey,* 494 U.S. 344, 351 (1990) (citing *New Jersey v. Portash,* 440 U.S. 450,459 (1979) (holding compelled incriminating statements

inadmissible for impeachment purposes)). As the U.S. Supreme Court explained in *Watkins v. Sowders,* 449 U.S. 341 (1981), "while an involuntary confession is inadmissible in part because such a confession is likely to be unreliable, it is also inadmissible even if it is true, because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *Id.* at 347 (quoting *Jackson v. Denno,* 378 U.S. 368, 386 (1964)).

If the blood extracted from Wall's body is analogized to involuntary statements, they would be inadmissible against Wall even if highly probative of his guilt. As *Rochin v. California*, 342 U.S. 165 (1952), observed:

> To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

Id., 173-174.

"'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use

of evidence, whether true or false.'" *Colorado v. Connelly,* 479 U.S. 157, 167 (1986) (quoting *Lisenba v. California,* 314 U.S. 219, 236 (1941)). *Rochin* and its progeny thus reveal the Court's continuing vigilance in ensuring that the "Due Process Clause imposes limitations on the government's ability to coerce individuals into participating in criminal prosecutions." *Doe v. United States,* 487 U.S. 201, 214 n. 13 (1988).

The government did not cite a compelling government interest or exigency that motivated the officers to engage in the practices at issue. There was plenty of time and numerous opportunities for the officers to pause, consider their course of conduct and evaluate their options. They were not engaged in hot pursuit or alone on a deserted highway making split second decisions regarding how to proceed without knowing whether the person they were confronting was armed or otherwise dangerous. To the contrary, all of these activities took place in the confines of a hospital in which Wall walked into at an officer's instruction.

Consider Officer Jeffrey Stumpf's ("Officer Stumpf") below testimony:

> Q: And you -- were you the one that was restraining his right arm?
> **A: I wasn't restraining it. I was trying to get it out.**
>
> Q: And how were you trying to get it out?
> **A: I had ahold of it by the upper arm.**
>
> Q: Were you just pulling it out or –
> **A: I was trying to pull it out, yes. I wasn't exerting any unnecessary force, no. I was just trying to ease it out.**

> Q: And the reason why you weren't trying to jerk it out is because you were concerned about hurting Mr. Wall?
> **A: Yes.**

(R. 75 at 55:19-56:7.) Officer Stumpf was the only officer trained on the restraint chair used. (*Id.* at 10:23-25, 21:20-22, 54:17-55:6.) Officer Stumpf's training and experience led him to conclude that it would be unreasonable to forcibly pull on Wall's arm to obtain a blood sample. (*Id.* at 55:19-56:7.) Officer Stumpf also had familiarity with the mandibular compression hold technique. (*Id.* at 56:18-19.) Using his training and experience, Officer Stumpf did not apply the technique to Wall because it was unreasonable under the circumstances. (*Id.* at 55:19-56:7.)

Officer Bagnall, by contrast, testified that the mandibular hold was part of his training for "defensive activities." (*Id.,* 35:22-36:5.) Officer Bagnall was not, however, presented with a person that was resisting or fighting with him. And prior to applying the mandibular hold, Officer Bagnall testified that Wall was fully restrained in a chair. (*Id.,* 41:13-15.) So use of defensive tactics was plainly unreasonable.

Although the officers were obviously eager to obtain evidence of a crime, this motivation presumably exists in every police investigation. Wall was not a known trafficker of drugs which law enforcement had finally seized as the culmination of a lengthy and resource intensive investigation. He was, instead, a suspicious driver in a suspicious vehicle which had been stopped for a traffic

violation. Moreover, the officers' activities in this case were not narrowly tailored to the objective they sought to achieve. *Glucksberg*, 521 U.S. at 720-21 (explaining the "features" of substantive due process are "that the Due Process Clause specially protects those fundamental rights and liberties . . . implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" and that the government cannot infringe thereon "unless the infringement is narrowly tailored to serve a compelling state interest") (internal citations and quotation marks omitted).

In urging this narrow conclusion based upon the unique facts presented in this case, Wall asks this Court to give force to the Constitution's "assur[ance] . . . that no man is to be convicted on unconstitutional evidence." *Mapp v. Ohio,* 367 U.S. 643, 657 (1961). A contrary conclusion would "minimize the important and fundamental nature of the individual's right to liberty," *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992) (internal quotation marks omitted), and endorse an abuse of police power fundamentally at odds with our system of criminal justice, violate the principle that "convictions cannot be brought about by methods that offend 'a sense of justice,'" *Rochin,* 342 U.S. at 173 (quoting *Brown v. Mississippi,* 297 U.S. 278, 285-86 (1936)), and tacitly approve of law enforcement's use of deceptive and coercive practices that violate the Constitution and that are rife with the potential for further and even more egregious abuse.

CONCLUSION

The circuit court's order denying Wall's motion to suppress the blood evidence should be reversed.

Dated in Milwaukee, Wisconsin, on this 16th day of February, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,613 words.

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ELECTRONIC BRIEF AND APPENDIX CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief and appendix which complies with the requirements of Wis. Stat. §§ 809.19(12) and (13). I further certify that the electronic brief and appendix are identical in content and format to the printed form of the brief and appendix filed as of this date. A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Dated in Milwaukee, Wisconsin, on this 16th day of February, 2018.

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MAILING CERTIFICATION

I certify that I have mailed three paper copies of this brief and appendix by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days to the following counsel of record for plaintiff-respondent:

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