STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 1885 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JUSTIN T. KANE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER
ENTERED ON JULY 6, 2018, BY THE
IOWA COUNTY CIRCUIT COURT,
THE HONORABLE MARGARET M. KOEHLER PRESIDING.

Respectfully submitted,

JUSTIN T. KANE,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

I. WHETHER THE STATE PROVIDED CLEAR AND CONVINCING EVIDENCE THAT MR. KANE VOLUNTARILY CONSENTED TO AN EVIDENTIARY CHEMICAL TEST OF HIS BLOOD.

II. DID THE CIRCUIT COURT ERR WHEN IT HELD THAT THE WARRANTLESS ANALYSIS OF MR. KANE'S BLOOD, WHICH TOOK PLACE AFTER HE WITHDREW HIS CONSENT TO TESTING, VIOLATED HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNLAWFUL SEARCHES AND SEIZURES?

STATEMENT ON PUBLICATION

Defendant-appellant does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Mr. Kane's two motions, in which he moved to suppress the results of an evidentiary chemical analysis of his blood after an arrest for operating while under the influence of an intoxicant.[1]

On October 24, 2017, Deputy Tom Clauer arrested Mr. Kane for operating while under the influence of an intoxicant ("OWI"). Deputy Clauer handcuffed Mr. Kane behind his back.[2] He placed Mr. Kane in the back of his squad car.[3] Deputy Clauer informed Mr. Kane they would be filling out paperwork and then would go to the hospital.[4] Still in the squad car, the deputy read the Informing the Accused form ("ITAF").[5] Mr. Kane was still handcuffed behind his back, despite complaining of the handcuffs.[6] After the deputy read Mr. Kane the ITAF, he asked Mr. Kane whether he would submit to a blood test.[7] Mr. Kane's response was, "Under those circumstances, I don't believe I have a choice. Yes."[8] That response sufficed for the

[1] R.58 at 27; 30; R.47.
[2] R.58 at 8.
[3] R.58 at 7.
[4] R.58 at 16.
[5] *Id.* at 6.
[6] *Id.* at 8.
[7] *Id.* at 7.
[8] R.58 at 11.

deputy. Deputy Clauer took Mr. Kane to the hospital, where his blood was drawn.[9]

On November 1, 2017, Mr. Kane sent a letter to the Wisconsin State Lab of Hygiene "revok[ing] any previous consent that he may have provided to the collection and analysis of his blood."[10] On November 3, 2017, the lab received Mr. Kane's letter.[11] The Lab disregarded Mr. Kane's letter and analyzed the sample on November 8, 2017.[12] On November 9, 2017, the Lab issued a report, showing a blood alcohol concentration above the legal limit.[13]

On November 22, 2017, the Iowa County District Attorney's Office charged Mr. Kane with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as a third offense.[14] Because the laboratory's analysis of his blood after he revoked consent was unlawful, Mr. Kane moved to suppress the test result.[15] He also moved to suppress the test result because his consent to submit to the blood draw had not been voluntary. [16]

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[9] R.19.
[10] R.18 at 5.
[11] *Id.* at 7.
[12] *Id.* at 8.
[13] *Id.*
[14] R.5.
[15] R.18.
[16] R.19.

On March 29, 2018, the Honorable Margaret M. Koehler presided over an evidentiary hearing in both matters. At the hearing, Deputy Clauer testified that after arresting Mr. Kane, he was handcuffed. Mr. Kane complained of the handcuffs.[17] The deputy stated he did not loosen the handcuffs because they would pinch an arrestee more that way.[18] He testified he read the ITAF to Mr. Kane. Deputy Clauer testified that, after reading the form to Mr. Kane, he selected "Yes" on the form.[19] Despite marking "Yes," the deputy acknowledged Mr. Kane's true response was something like, "I don't believe I have any choice, so yes."[20]

With regard to the warrantless analysis of the blood testing matter, at the motion hearing, Mr. Kane entered several pieces of evidence into the record: Mr. Kane's letter revoking consent to blood testing, [21] a copy of the certified mail receipt, which demonstrates the Lab received Mr. Kane's letter revoking consent,[22] and the Lab's alcohol analysis report, with testing completed on Mr. Kane's sample after he revoked consent.[23]

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[17] R.58 at 5–6.
[18] *Id.*
[19] *Id.* at 7.
[20] *Id.* at 8.
[21] *Id.* at 9–10.
[22] *Id.* at 10.
[23] *Id.*

The circuit court denied Mr. Kane's two motions. With regard to the involuntary consent issue, the court found Mr. Kane did not acquiesce to the search or agree under duress but freely and voluntarily consented.[24] The court found several factors weighed in favor of the State: the fact the ITAF informed Mr. Kane he could refuse, Mr. Kane's two prior OWI convictions, and the nonthreatening and apparently congenial request for the blood test. [25]

In considering personal factors to Mr. Kane, the court noted he was 34 years old, and no facts presented demonstrated he was "physically, mentally, or emotionally challenged."[26] The court dismissed the facts surrounding the handcuffs and Mr. Kane's complaints, stating Mr. Kane only complained after the deputy read the ITAF, and that a person is almost always read the ITAF (i.e. asked to submit to an evidentiary test) when arrested.[27] Further, that person would almost always be in handcuffs after an OWI arrest.[28]

In determining the warrantless analysis of blood claim, the court held Mr. Kane could not withdraw his consent to testing after initially giving it.[29] The court relied on ***State v. Van Laarhoven***, as

[24] R.58 at 25.
[25] R.58 at 25–26.
[26] *Id.* at 26.
[27] *Id.* at 27.
[28] *Id.*
[29] *Id.* at 29.

well as ***Snyder***, stating that the blood draw and subsequent analysis are one continuous event.[30] The court stated that once an arrestee gives consent and his blood is drawn, he cannot withdraw consent.[31]

On July 6, 2018, Mr. Kane entered a guilty plea to operating while under the influence of an intoxicant, third offense.[32]

Mr. Kane now appeals the circuit court's order denying his two suppression motions.

ARGUMENT

Mr. Kane respectfully requests that this Court reverse the circuit court's decision denying his suppression motions.

I. THE CIRCUIT COURT INCORRECTLY DENIED MR. KANE'S MOTION TO SUPPRESS.

A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.[33] Appellate courts uphold findings of historical facts unless they are clearly erroneous.[34]

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[30] *Id.*
[31] *Id*
[32] R.36.
[33] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[34] ***State v. Robinson***, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463.

B. *State v. Randall* does not provide controlling precedent.

Since the time the State appealed this case, the Supreme Court accepted review in ***State v. Randall***.[35] Very recently, the Court issued its decision.[36] The State has not addressed the Supreme Court decision; however, Mr. Kane concedes the decision impacts this case and that this Court is bound by the Wisconsin Supreme Court. The rationale of the Supreme Court, however, is unclear as there was no majority that agreed on the exact basis for reversing the ***Randall*** Court of Appeals decision. Mr. Kane still submits this brief to not waive any argument should there be further federal review in this matter.

In ***State v. Randall***, the Wisconsin Supreme Court found that Ms. Randall could not withdraw previously given consent to her blood testing. More specifically, in ***Randall***, the respondent, following her arrest for operating while impaired, attempted to revoke her consent to blood testing by letter to the Wisconsin State Hygiene Lab.[37]

The decision does not provide a cohesive legal theory for analyzing the relevant legal claim. More specifically, the Court's decision was fractured. There was no agreement as to the legal basis

[35] ***State v. Randall***, 2018 WI 107, 384 Wis. 2d 772, 921 N.W.2d 509.
[36] ***Randall,*** 2019 WI 80, 387 Wis. 2d 774, 930 N.W.2d 223.
[37] ***Randall***, 2019 WI 80, ¶ 3.

upon which Ms. Randall's consent could not be withdrawn. Where a decision is fractured, its precedential value is curtailed.[38]

The lead opinion, authored by Justice Kelley, relies on the legal theories of a reduced privacy interest incident to an arrest.[39] No party argued such a theory in briefing or oral argument.[40] Moreover, the cases the lead opinion relies upon are cases where there was a concern for the destruction of evidence or police safety.

The concurring opinion, authorized by Justice Roggensack, concludes the respondent-defendant had no privacy interest in the alcohol concentration in her blood. The lead opinion found this "troubling."[41] In fact, the lead opinion repeats many of the same concerns outlined by Ms. Randall: What prohibits the State from testing a non-arrestee's blood for substances out of curiosity?[42] What prohibits the State from testing any sample drawn for medical purposes?[43] According to the lead opinion, the concurrence's reasoning "has no bounds."[44]

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[38] *See* ***State v. Elam***, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) ("a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court.").
[39] ***Randall***, 2019 WI 80, ¶ 20.
[40] ***Randall***, 2019 WI 80, ¶ 67 (Roggensack, J., concurring).
[41] ***Randall***, 2019 WI 80, ¶ 37.
[42] ***Id.***
[43] ***Id.***
[44] ***Id.***

Here, it would be difficult to extrapolate any law from ***Randall*** other than that Ms. Randall's suppression order was reversed upon the facts of that case. A fractured decision provides little guidance to lower courts on the law. As noted above, there was no consensus on the legal reasoning of the Court or the doctrines it employed. It is therefore incorrect to fully rely on ***Randall*** here.

Moreover, even if this Court were to find that the ***Randall*** decision was a cohesive decision, the facts here are distinguishable. First, though both Ms. Randall and Mr. Kane were asked whether they would submit to a blood test, on the night in question, Mr. Kane did not readily agree to the blood test as Ms. Randall did. On the night of his arrest, Mr. Kane actually told the officer he did not feel he had a choice in whether to submit to the blood test.[45] These facts indicate Mr. Kane did not wish to submit to the evidentiary test. This was in contrast to the clear, unequivocal original consent given in the ***Randall*** case.[46]

[45] R.58 at 11–12.
[46] ***Randall***, 2019 WI 80, ¶ 2.

C. A person has a legitimate privacy interest in the information contained in a sample of his blood.

A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol, drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and profiles suitable for identification purposes. For these reasons, the United States Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy.[47]

The United States Supreme Court has consistently recognized an expectation of privacy in the information contained within biological samples—a privacy interest distinct from the collection of the samples in the first place. In the 1989 case ***Skinner v. Railway Labor Executives' Association***, the Court explained:

> [I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of … privacy interests.[48]

In 2001, the United States Supreme Court decided the case of ***Ferguson v. City of Charleston***, where warrantless drug testing was conducted on lawfully-obtained urine samples.[49] Despite the

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[47] ***Skinner v. Ry. Labor Executives' Ass'n***, 489 U.S. 602, 616 (1989).
[48] ***Skinner***, 489 U.S. 602, 616 (1989).
[49] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).

collection of the urine itself being lawful, the Court, citing to ***Skinner***, held that "[T]he urine tests … were *indisputably* searches within the meaning of the Fourth Amendment."[50]

In ***Birchfield v. North Dakota***,[51] the Supreme Court commented on the information contained in a blood sample, as distinct from a breath sample:

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.[52]

The caselaw is unambiguous that individuals have a legitimate and recognized privacy interest in the information contained in their own blood. The ***Randall*** lead opinion recognized the inherent privacy interest in blood, stating:

> The similarities between a smart phone and a blood sample in terms of the amount of information they each contain, and the personal nature of that information, are such that we must pay particular attention to what the Supreme Court said about the State's access to it.[53]

[50] *Id*. at 76 (emphasis supplied).
[51] 136 S. Ct. 2160 (2016).
[52] ***Id.*** at 2178.
[53] ***Randall***, 2019 WI 80, ¶ 34.

Here, the Court referenced ***Riley v. California***.[54] In ***Riley v. California***, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches.[55] Of course, a blood sample analysis and a cell phone search are not exactly alike. Both a cell phone and a blood sample have vast amounts of unanalyzed personal information contained within.

The question in ***Riley*** was whether police could analyze the contents of a lawfully-seized cell phone under the Fourth Amendment.[56] The Court recognized that a huge amount of personal information could be stored on or accessed through a cell phone, including information implicating significant privacy concerns, such as medical records.[57] The Court ultimately decided:

> [A] warrant is generally required before such a search, even when a cell phone is seized incident to arrest … Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[58]

Analyzing a blood sample, like searching a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant or a warrant exception to search these items. It is irrelevant that ***Riley*** involved a search incident to arrest and Ms.

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[54] ***Riley v. California***, 134 S. Ct. 2473 (2014).
[55] ***Riley v. California***, 134 S. Ct. 2473 (2014).
[56] ***Riley***, 134 S. Ct. at 2480.
[57] ***Id***. at 2490.
[58] ***Id.*** at 2493, 2495.

Randall initially consented to the analysis of her blood. The foundational legal principle is identical: Even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful. Because the government had no legal justification for the blood analysis after Ms. Randall withdrew her consent, it was an unlawful search, and the test results were suppressed.

The State cited to ***State v. VanLaarhoven*** and ***State v. Riedel*** to argue that analyzing the blood sample at issue did not require an independent legal justification.[59] Yet ***VanLaarhoven*** does not control here. In ***VanLaarhoven***, the Wisconsin Court of Appeals held that no warrant was necessary to analyze the defendant's blood where the police relied upon the defendant's *unretracted* consent to the search.[60]

Neither ***VanLaarhoven*** nor ***Riedel*** apply to the facts of Mr. Kane's case. Because he purportedly consented to the analysis of his blood but then promptly withdrew it, Mr. Kane did not suggest to the trial court, as in ***VanLaarhoven*** and ***Riedel***, that a warrant was required to analyze his blood *notwithstanding* his consent. The point is that the original justification for the seizure *and* analysis of the

[59] R.58 at 13; ***VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W. 2d 411; ***Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 929, 656 N.W.2d 789 (internal citations and punctuation omitted).
[60] ***VanLaarhoven***, 2001 WI App 27, ¶ 17.

blood—his consent—ceased to exist. Without the existence of valid consent, the search should have promptly ceased.

D. The implied consent law does not affect the analysis here.

The police can ask for consent to search without a specific statutory scheme. Citizens can give, refuse, modify, or withdraw consent without such a statutory scheme. The implied consent law was designed to facilitate the collection of evidence by allowing the State to penalize drivers who do not provide consent.[61] It permits the State to penalize a driver who refuses to consent, but it does not directly create or compel consent.

While the government does possess an interest in keeping public highways safe, citizens also possess a right to be free from unreasonable searches. There is no need for these rights to conflict with one another. Police have many methods at their disposal for the collection of evidence in criminal cases. Each method has its potential benefits and potential drawbacks. The benefit of relying on consent is that it can save police the small amount of work that would be required to obtain a warrant prior to a blood draw. One drawback from the

[61] *Cf.* ***State v. Gibson***, 2001 WI App 71, ¶ 7, 242 Wis. 2d 267, 626 N.W.2d 73; ***State v. Padley***, 2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867; ***State v. Brar***, 2017 WI 73, ¶¶ 44–86, 376 Wis. 2d 685, 898 N.W.2d 499 (Kelly, J., concurring).

government's point of view is that relying solely on consent brings the blood analysis process under the umbrella of Fourth-Amendment caselaw concerning voluntary consent—including the well-recognized right to modify or revoke consent at any time.[62]

E. A person may withdraw his consent to the testing of his blood at any point before that search is complete.

"One who consents to a search 'may of course delimit as he chooses the scope of the search to which he consents.'"[63] When consent, previously given, is modified, limited, or withdrawn, this must be done by an unequivocal act or statement.[64] "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."[65]

There is no reason why the search of a blood sample should be treated as categorically different than the search of a cell phone, an automobile, or a dwelling. Consent to an evidentiary chemical blood analysis may be withdrawn, just as one may withdraw consent to any

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[62] ***State v. Wantland***, 355 Wis. 2d 135, 152, 848 N.W.2d 810 (2014).
[63] ***State v. Matejka***, 2001 WI 5, ¶ 37, 241 Wis.2d 52, 621 N.W.2d 891 (*quoting* ***Florida v. Jimeno***, 500 U.S. 248, 252 (1991)).
[64] ***Wantland***, 355 Wis. 2d 135, 152, 848 N.W.2d 810 (2014).
[65] ***United States v. Sanders***, 424 F.3d 768, 774 (8th Cir. 2005) (*quoting* ***United States v. Gray***, 369 F.3d 1024, 1026 (8th Cir. 2004)); *see also* ***United States v. Alfaro***, 935 F.2d 64, 67 (5th Cir. 1991); ***Payton v. Commonwealth***, 327 S.W.3d 468, 478 (Ky. 2010).

other Fourth-Amendment search. For example, a person might consent to the search of a house but withdraw that consent before the search is completed. It would clearly be unacceptable for law enforcement officers to ignore the withdrawal of consent and remain in the house solely because of the initial consent.[66]

When the search at issue is the scientific analysis of blood, the duration of the search is typically stretched over days or weeks rather than the minutes or hours that might be involved in the search of a home or automobile. But the relevant time period being longer or shorter does not change the basic legal principles.[67] If the consent is withdrawn before the search is completed—whether that is several minutes or several days after consent is initially provided—any search must immediately cease.

The analysis must begin with ***Schmerber v. California***, a 1966 United States Supreme Court case that addressed a slew of constitutional challenges to a blood draw in an operating while under the influence case.[68] The ***Schmerber*** Court found, *inter alia*, that the

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[66] *See e.g.* ***United States v. Buckingham***, 433 F.3d 508, 513 (6th Cir. 2006); ***Painter v. Robertson***, 185 F.3d 557, 567 (6th Cir. 1999) (holding that upon a revocation of consent the search should be terminated instantly, and the officers should promptly depart the premises).

[67] *See* ***United States v. Casellas-Toro***, 807 F.3d 380 (1st. Cir. 2015) (where, when the defendant's automobile was searched 21 days after he provided consent, it was held that the search was still justified by the defendant's initial and un-retracted consent).

[68] ***Schmerber v. California***, 384 U.S. 757 (1966).

Fifth Amendment's right against self-incrimination does not preclude the police from obtaining a blood sample, and that the Sixth Amendment did not afford the defendant the right to an attorney prior to the blood sample being collected.[69] But the ***Schmerber*** Court also held that a blood draw *does* fall within the protection of the Fourth Amendment:

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.[70]

The Court then went on to find that the collection of the defendant's blood was a lawful warrantless search and seizure because of the existence of exigent circumstances.[71]

Schmerber was followed in 1983 by ***South Dakota v. Neville***, which addressed the question of whether the refusal to take a test was admissible as consciousness of guilt.[72] The defendant argued that his refusal was protected by the Fifth Amendment and commentary on his refusal at trial would thus be unconstitutional.[73] The ***Neville*** Court, following ***Schmerber***, found that a refusal was not protected by the

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[69] ***Id.*** at 761, 766.
[70] ***Id***. at 767.
[71] ***Id.*** at 770–71.
[72] ***South Dakota v. Neville***, 459 U.S. 553 (1983).
[73] ***Id.*** at 556.

Fifth Amendment.[74] ***Neville*** also addressed, and denied, a Fifth Amendment due process claim.[75] It did not address the Fourth Amendment.

There is no caselaw holding that the Fourth Amendment ceases to protect a citizen who has been arrested for OWI. Indeed, ***Schmerber*** explicitly states that the Fourth Amendment *does* apply to OWI blood draws, and the State's exact position on this subject failed to obtain a majority in ***State v. Brar***.[76] The caselaw establishes that a person does not have the right to refuse a blood draw under Wis. Stat. § 343.305 without statutory penalties being applied, that a refusal may be used against a person in court, and that a person does not have the right to consult with an attorney before making the decision. But the Fourth Amendment cannot simply be abrogated by statute. The implied consent law creates a penalty structure to help the police obtain consent—but the existence of this law and this penalty structure only serve to highlight that the collection of the blood is still being justified by the subject's consent. Questions of consent to search fall within the scope of the Fourth Amendment.

[74] ***Id.*** at 564.
[75] ***Id.*** at 566.
[76] ***Schmerber v. California***, 384 U.S. at 767; ***Brar***, 2017 WI 73.

F. Mr. Kane properly withdrew his consent.

Before any analysis occurred, Mr. Kane sent a letter to the laboratory, the arresting law enforcement agency, and the District Attorney's office. The letter explicitly stated that he, "revokes any previous consent that he may have provided to the collection and analysis of his blood, asserts his right to privacy in his blood, and demands that no analysis be run without [a warrant]."[77]

This letter was clear and direct. "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?"[78] Any reasonable person reading this letter would understand that Mr. Kane withdrew consent to blood analysis and had asserted his right to privacy. The trial court made a factual finding that Mr. Kane properly withdrew his consent to his blood sample's analysis. The State does not challenge this finding.

The Wisconsin State Laboratory of Hygiene disregarded Mr. Kane's letter and conducted an ethanol analysis of his blood sample.[79] This analysis was an unlawful search. The government's only

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[77] R.18 at 5.
[78] ***Jimeno***, 500 U.S. at 251, (*citing* ***Illinois v. Rodriguez***, 497 U.S. 177, 183–89 (1990); ***Florida v. Royer***, 460 U.S. 491, 501–02 (1983)).
[79] R. 24 at 5.

justification for testing Mr. Kane's blood was that it was a search pursuant to voluntary consent. But Mr. Kane, through his letter to the laboratory, clearly and unequivocally withdrew that consent before the analysis took place. The State did not dispute this point. Therefore, the government's analysis of his blood sample was an unlawful search and seizure in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, and the results of the analysis were properly suppressed.

II. THE CIRCUIT COURT ERRED IN HOLDING MR. KANE'S CONSENT WAS VOLUNTARY.

A. Standard of Review

An appellate court reviews *de novo* a circuit court's legal conclusions.[80] An appellate court reviews a circuit court's findings on whether a person has voluntarily consented based on clearly erroneous review.[81]

[80] ***Guzman***, 166 Wis. 2d at 586.
[81] ***State v. Johnson***, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182.

B. Mr. Kane's consent to blood testing was involuntary under *State v. Artic.*

The Fourth Amendment to the United States Constitution and Article 1, § 11 of the Wisconsin Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." The essential purpose of the prohibition against unreasonable searches and seizures is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[82] Warrantless searches are *per se* unreasonable and therefore unlawful, subject to a few "well-delineated" exceptions.[83]

A blood draw conducted at the direction of the police is a search, subject to these constitutional reasonableness standards.[84] Here, no warrant was obtained for the search of Mr. Kane's blood. Instead, the State relies on one of the "carefully drawn" exceptions to the warrant requirement of the Fourth Amendment—a search pursuant to voluntary consent.[85]

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[82] ***State v. Boggess***, 115 Wis. 2d 443, 448–49, 340 N.W.2d 516 (1983).
[83] ***State v. Williams***, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834 (internal citation omitted).
[84] "Such testing procedures plainly constitute searches of 'persons[.]' … 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." ***Schmerber v. California***, 384 U.S. 757, 767, 770 (1966).
[85] ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994) (*citing* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973)).

When relying on consent, the burden is on the State to present clear and convincing evidence, "that consent to the blood draw was 'given in fact by words, gestures, or conduct' and that the consent was 'voluntary.'"[86] The State must first meet its burden to show consent-in-fact by the presentation of "positive evidence" of the defendant's choice.[87] If it has met this initial burden, it must then also present evidence that the defendant's consent-in-fact was "an essentially free and unconstrained choice, not the product of duress or coercion, express or implied."[88]

Whether consent to search is voluntary cannot be determined by bright-line rules but requires courts to evaluate the totality of the circumstances.[89] In ***State v. Artic***, the Court set forth a non-exclusive list of factors to be considered in determining the voluntariness of consent to search:

> (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, non-threatening, and cooperative, or the opposite;
> (4) how the defendant responded to the request to search;

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[86] ***State v. Blackman***, 2017 WI 77, ¶ 54, 377 Wis. 2d 339, 898 N.W.2d 774, *citing* ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430 (emphasis added in ***Blackman***).
[87] ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971).
[88] ***Blackman***, 2017 WI 77, ¶ 56 (internal citations and punctuation omitted).
[89] ***State v. Artic***, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430.

> (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.[90]

In addition to these factors, the Wisconsin Supreme Court has noted that the State's burden to show voluntary consent is "more difficult" when the defendant is in custody at the time that consent is given.[91]

Although Wisconsin's implied consent law[92] indicates that Wisconsin drivers "are deemed to have given consent" to evidentiary chemical testing, this "implied consent" cannot be read as a *per se* method of satisfying the constitutional requirement of voluntary consent. Rather, the implied consent law serves to "provide[] an incentive for voluntary chemical testing, *i.e.*, not facing civil refusal procedures and automatic revocation[.]"[93] In ***State v. Padley***, the Court of Appeals clearly explained the distinction between "implied consent" and "voluntary consent":

> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a

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[90] ***Id.*** ¶ 33, *citing* ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998) (formatting added).
[91] ***Gautreaux v. State***, 52 Wis. 2d at 492.
[92] Wis. Stat. § 343.305 (2016–17).
[93] ***State v. Marshall***, 2002 WI App 73, ¶ 13, 251 Wis. 2d 408, 642 N.W.2d 571.

> driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized. This penalty scenario for "refusals" created by the implied consent law sets the scene for the second consent issue.
>
> The State's power to penalize a refusal via the implied consent law, under circumstances specified by the legislature, gives law enforcement the right to force a driver to make what is for many drivers a difficult choice. The officer offers the following choices: (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law. When this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent.[94]

More recently, Wisconsin Supreme Court Justice Kelly explained that the implied consent law is, "part of a mechanism designed to obtain indirectly what it cannot (and does not) create directly—consent to a blood test."[95] The statutory mechanism exists to "cajole drivers into giving … real consent" and "punishes a driver by revoking his operating privileges if he refuses an officer's request for a blood sample."[96]

Perhaps because the implied consent law is "not a model of clarity,"[97] some have argued that choosing to travel on a Wisconsin

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[94] ***State v. Padley***, 2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867
[95] ***State v. Brar***, 2017 WI 73, ¶ 56, 376 Wis. 2d 685, 898 N.W.2d 499 (Kelly, J., concurring).
[96] ***Id.***
[97] ***Id.*** ¶ 49 (Kelly, J., concurring).

highway is itself voluntary, constitutional consent to a blood draw.[98] Yet this theory is not supported by the current state of Wisconsin caselaw. In ***State v. Blackman***, the State argued that ***Padley***'s discussion of voluntary consent was erroneous, and that the defendant had voluntarily consented simply by driving on the highway.[99] The majority in ***Blackman*** acknowledged the State's argument in a footnote and proceeded to thoroughly analyze the voluntariness of the defendant's consent at the time of his conversation with the police, rather than simply deeming the consent to have occurred by virtue of his travelling on the highway.[100] Although a concurring opinion was filed, suggesting that two of the justices might have been sympathetic to the State's argument,[101] the four-justice majority, as well as the one-justice dissent conducted their analyses consistently with the framework set forth in ***Padley***.[102] Therefore, the ***Padley*** framework continues to be binding precedent, and any voluntariness analysis must center on the interactions between the defendant and law enforcement at the time that his or her consent is requested.

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[98] *See, e.g.*, ***State v. Howes***, 2017 WI 18, ¶ 85, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring).
[99] ***Blackman***, 2017 WI 77, ¶ 54, n.20; *see also* Brief and Supplemental Appendix of Plaintiff-Appellant-Petitioner (*sic.*) for ***State v. Blackman***, *accessible at* https://wscca.wicourts.gov/caseDetails.do?caseNo=2015AP000450.
[100] ***Blackman***, 2017 WI 77, ¶¶ 54–67.
[101] ***Id.*** ¶ 89 (Ziegler, J., concurring).
[102] ***Id.*** ¶¶ 54–67, 117–22.

Another facet to the analysis of voluntary consent is that, in the clear majority of Wisconsin OWI cases, the defendant is never actually asked to "consent" to a search. The script used by most Wisconsin law enforcement officers, which was indeed used in this case, asks if the defendant will "submit to an evidentiary chemical test" of his or her blood. "Submit" might commonly be defined as to "yield oneself to the authority or will of another…surrender…to permit oneself to be subjected to something."[103] This choice of words, suggesting submission to authority rather than voluntary consent, does not adequately convey to the defendant the freedom to make the "difficult, but permissible choice" between providing or withholding consent to a warrantless search.[104]

The law is well established that the "orderly submission" or "acquiescence" of a citizen to a police officer's request does not, standing alone, establish voluntary consent to search.[105] For example, in ***State v. Johnson***, voluntary consent was not found when the defendant stated, "I don't have a problem with that" in response to a law enforcement officer's declared intention to search his vehicle.[106]

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[103]Webster's Third New International Dictionary (1993), *available at* http://www.mirriam-webster.com/dictionary/submit.
[104] ***Padley***, 2014 WI App 65, ¶ 28.
[105] *See* ***Amos v. United States***, 255 U.S. 313 (1921); ***Johnson v. United States***, 333 U.S. 10 (1948); ***Bumper v. North Carolina***, 391 U.S. 543 (1968); ***State v. Geibel***, 2006 WI App 239, 297 Wis. 2d 446, 724 N.W.2d 402.
[106] ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182.

On October 24, 2017, Deputy Clauer arrested Mr. Kane for OWI.[107] Mr. Kane was handcuffed and placed in the back seat of the squad car before being asked to submit to a blood test.[108] He was handcuffed, with the handcuffs behind his back.[109] At one point, Mr. Kane complained about the handcuffs or asked Deputy Clauer to loosen them.[110] There was a grate between Deputy Clauer and himself.[111] Deputy Clauer read the Informing the Accused form verbatim.[112] Deputy Clauer acknowledged that in response, Mr. Kane stated something to the effect of, "I don't believe I have any choice, so yes."[113]

The existence of the implied consent law does not shift the burden of proof to the defendant when he challenges whether he voluntarily consented to a search. Rather, the implied consent law is a penalty structure that requires the defendant to make a difficult choice. The State retains the burden of presenting positive evidence, to a clear and convincing standard, that the defendant did not simply acquiesce to a display of police authority but made "an essentially free

[107] R.58 at 7.
[108] R.58 at 8.
[109] *Id.*
[110] *Id.* at 5.
[111] *Id.* at 9.
[112] *Id.* at 6.
[113] *Id.* at 8.

and unconstrained choice, not the product of duress or coercion, express or implied."[114]

The State has not attempted to meet its burden other than by essentially stating Mr. Kane must have voluntarily consented because his statement, "Under those circumstances, I don't believe I have a choice. Yes," referred to the Informing the Accused Form's contents, and not physical pain from being in handcuffs.[115] This scenario is analogous to ***State v. Johnson***, where the defendant said, "I don't have a problem with that," in response to a law enforcement officer's declared intention to search his vehicle.[116] In ***Johnson***, the Court noted that the defendant was not actually asked to provide consent to a search.[117] Likewise, Mr. Kane was not asked to consent to search but was asked if he would submit. If the police intend to ask for voluntary consent, rather than a submission or acquiescence to authority, then they should ask for voluntary consent, not submission. By noting that he did not feel he had a choice, whether that was due to the ITAF telling him he would be subject to refusal penalties, or whether it was due to physical pain, or a hybrid of both, that is not clear unequivocal consent. It is not the arrestee's burden to show

[114] ***Blackman***, 2017 WI 77, ¶ 56 (internal citations and punctuation omitted).
[115] R.58 at 11–12.
[116] ***Johnson***, 2007 WI 32, ¶ 19.
[117] ***Id***.

whether he gave in to a blood test through acquiescence to police authority or made a decision to agree after weighing his options. It is the State's burden to show the consent was unequivocal. Mr. Kane's adding in words beyond "yes" when asked if he would submit takes this case out of the run of the mill drunk driving case into one where the State did not meet its burden.

In addition, the Court should consider Mr. Kane's personal characteristics in determining whether any consent was voluntarily provided.[118] At the time the deputy read the Informing the Accused, Mr. Kane was handcuffed in the backseat of a squad vehicle. The handcuffs were behind his back and were uncomfortable. Before reading the ITAF, the deputy told Mr. Kane that first they will go over paperwork and then they will go to the hospital.[119]

Further, in considering whether consent was given, the Court necessarily considers Mr. Kane's response to the question of whether he would submit to the blood test. Mr. Kane did not state an unequivocal "Yes," as the circuit court seemed to believe.[120] His response was "Under those circumstances, I don't believe I have a choice."[121] By his own words, Mr. Kane indicated he did not feel he

[118] ***State v. Artic***, 2010 WI 83, ¶ 29.
[119] R.58 at 16.
[120] R.58 at 25.
[121] *Id.* at 11.

was free to refuse the search and he, therefore, acquiesced to authority. The circuit court's ruling was erroneous. The fact that the deputy informed Mr. Kane, before reading the form, that they would be going to the hospital, sent Mr. Kane the message that there was only one option and only one way the situation would play out. This could not be the free, unconstrained choice that is required under the caselaw.

Though the deputy and Mr. Kane were "laughing" at one point during their contact, that does not mean the conditions surrounding the request to search were congenial, nonthreatening, and cooperative.[122] Mr. Kane was in custody, complained of handcuffs, and expressly stated he felt he did not have a choice in submitting to the testing. Any finding by the circuit court to the contrary is erroneous. The equivocal response was not true consent.

The State argued in the trial court that by the deputy reading the ITAF, Mr. Kane understood he could refuse the testing.[123] But the deputy did not state anything after Mr. Kane told him he did not believe he had a choice. The deputy did not inform Mr. Kane he had a choice. By failing to respond, the deputy confirmed Mr. Kane's belief: that he simply needed Mr. Kane to acquiesce to the search.

[122] R.58 at 11.
[123] R.58 at 12.

Moreover, the State has not presented any evidence to suggest that Mr. Kane has a greater-than-average knowledge of the law or of legal principles. The circuit court noted Mr. Kane was charged with an OWI, third offense, but did not explain what that signified, other than, "he appeared to know what the routine was going to be."[124] Further, even if Mr. Kane had been read the ITAF before an arrest, there were no facts presented to definitively state he had been read the ITAF before, or to show what Mr. Kane's experiences had been. These characteristics favor a finding that he did not voluntarily consent to the search.

In conclusion, the evidence in this case establishes that Mr. Kane, an average man, while handcuffed, permitted the government to collect his blood. There is nothing in the record to demonstrate that he voluntarily consented to blood testing. The State has chosen to rely on a bare-bones record, which, if found to be sufficient here, would render the legal distinction between acquiescence and voluntary consent hopelessly blurred. Because the State has not met its burden, the Court must find that Mr. Kane did not voluntarily consent to blood testing. All evidence derived from the collection and analysis of his blood sample should have been suppressed. Had the motion to

[124] R.58 at 23.

suppress been granted in circuit court, Mr. Kane would not have pled to the OWI offense.

CONCLUSION

For the reasons stated above, Mr. Kane respectfully requests that this Court reverse the circuit court's orders denying both suppression motions and remand the matter for further proceedings.

Dated at Madison, Wisconsin, _____, 2019.

Respectfully submitted,

JUSTIN T. KANE,
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APPENDIX