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OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 18 AP 1885-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUSTIN T. KANE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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Plaintiff-Respondent

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STATEMENT ON PUBLICATION

Plaintiff-respondent does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument in this case would be appropriate only if the Court of Appeals determines the submitted briefs fail to fully present the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Pursuant to Wisconsin Statute section 809.81(3)(a)(2) the respondent-plaintiff concurs with the recited Statement of the Case and Facts provided by the appellant-defendant.

ARGUMENT

The State respondent-plaintiff ("the State") respectfully requests that the Court affirm the decision of the Iowa County Circuit Court to deny the appellant-defendant's ("Kane's") suppression motions for the reasons set forth herein. The State's arguments are presented reversed to those presented in Kane's brief to follow the chronological flow of the issues as they arose.

I. THE STATE PROVIDED SUFFICIENT EVIDENCE TO ESTABLISH DEFENDANT'S CONSENT WAS VOLUNTARY

a. Standard of Review

The State agrees with Kane's statement as to the proper standards of review for issues of fact and law.

b. The defendant consented to the testing of his sample of blood.

Kane's main argument in support of its contention that the State failed to meet its evidentiary burden is that Kane stated something to the effect of "I don't believe I have any choice, so yes" with his objectively affirmative response to the requested sample test. The statement is insufficient to overcome the totality of evidence presented by the State evidencing consent.

Kane contends the statement establishes evidence of acquiescence rather than voluntary consent. This argument is inconsistent with Wisconsin law.

The Wisconsin Supreme Court in ***State v. Brar*** affirmed acquiescence "causes Fourth Amendment problems when the acquiescence is made to claimed lawful authority to search, when no such lawful authority exists."[1] For acquiescence to occur, the arresting officer would have to make as assertion of lawful authority that did not exist.[2]

In ***Brar***, the defendant-appellant ("Brar") appealed the decision of the court of appeals affirming the circuit court's denial of Brar's motion to suppress blood test evidence.[3] Brar argued in his suppression motion that the results of his blood test constituted an illegal search as he did not provide consent.[4] Without consent, Brar argued, the arresting officer was required to obtain a search warrant.[5]

As in the present matter, the arresting officer in ***Brar*** appropriately read the Informing the Accused Form ("ITAF") after obtaining probable cause that Brar operated a motor vehicle while intoxicated.[6] Brar interrupted the officer

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[1] ***State v. Brar,*** 2017 WI 73, ¶ 40, 376 Wis. 2d 685, 898 N.W.2d 499 (*citing* ***State v. Johnson***, 2007 WI 32, ¶ 69, ***Bumper v. North Carolina***, 391 U.S. at 548-49, 88 S.Ct. 1788).

[2] ***Id.*** at ¶ 40 (Roggensack, J., dissenting) (*referencing* ***Bumper***, 391 U.S. at 548, 88 S.Ct. 1788 (Issue of whether search is justified when consent was given only after officer claimed possession of a search warrant.)).

[3] ***Id.*** at ¶ 1.

[4] ***Id.*** at ¶ 2.

[5] ***Id.*** at ¶ 2.

[6] ***Id.*** at ¶ 3.

numerous times during the reading of the form with questions or comments relating to the form.[7] Brar also continued to ask questions after giving consent to the blood draw.[8]

The questions Brar asked after granting consent included inquiring as to the kind test would be administered and if the officer needed a warrant for the draw.[9] To the first question, the officer stated he would conduct a blood draw.[10] To the second, the officer shook his head in the negative.[11]

Blood was then drawn and the results showed a BAC of 0.186.[12] Brar moved to suppress the evidence and the circuit court then held a hearing.[13]

In addressing Brar's motion to suppress, the circuit court found that Brar responded to the officer's blood draw request by saying "of course" followed then by something to the effect of "I do not want my license revocated".[14] Brar, as with the defendant in this case, gave an additional statement beyond simple affirmation of consent.

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[7] ***Brar,*** 2017 WI 73, ¶ 5.
[8] ***Id.*** at ¶ 6.
[9] ***Id.***
[10] ***Id.***
[11] ***Id.***
[12] ***Id.*** at ¶ 7.
[13] ***Id.*** at ¶ 8.
[14] ***Id.*** at ¶¶ 31, 32.

The court of appeals noted that Brar consented to the blood draw pursuant to Wisconsin's implied consent law.[15] The Court noted that "[a]n individual's consent given by virtue of driving on Wisconsin's roads… is one incarnation of consent by conduct."[16] Consent can be inferred or expressed, and the ***Brar*** Court noted that consent can be inferred from context.[17] The "context" ***Brar*** references refers to an individual operating on roads in states that have adopted implied consent law.[18]

The State met its initial burden of consent to search because Kane operated a motor vehicle on a Wisconsin highway subject to Wisconsin's implied consent law. "Therefore, lest there be any doubt, consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment."[19]

The State acknowledges that consent is not voluntary if it is "no more than acquiescence to a claim of lawful authority.[20] However, despite Kane's reliance upon his statements that supplemented his affirmation to the draw,

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[15] ***Brar***, 2017 WI 73, ¶ 29.
[16] ***Id.*** at ¶ 21 (*referencing* **Wis. Stat. s. 343.305(2)**).
[17] ***Id.*** at ¶ 22 (*referencing* ***Birchfield v. North Dakota***, 136 S.Ct. 2160, 2185, 195 L.Ed.2d 560 (2016)).
[18] ***Id.*** at ¶ 22.
[19] ***Id.*** at ¶ 23.
[20] ***Id.*** at ¶ 32.

"[t]here is no single fact, the absence or presence of which, determines whether consent was voluntarily given."[21] Instead, the analysis relies upon a review of the totality of the circumstance.[22]

The Iowa County Circuit Court correctly cited ***State v. Van Laarhoven***, 248 Wis. 2d 881, when it found that the defendant gave implied voluntary consent to the blood draw "when he chose to drive on Wisconsin roads."[23] Further, Kane's statement "I don't believe I have a choice. Yes." reaffirms his voluntary consent just as Brar's statement of "Of course. I do not want my license revocated." did.[24]

Again, consent to draw was given when Kane drove his vehicle on Wisconsin roads. Kane's response to the ITAF did not act as a revocation, but instead affirmed his consent.

The State established, under the totality of the circumstances test, that Kane's continued consent to the draw was voluntary through its collection. Kane was read the ITAF verbatim after being taken into custody.[25] The ITAF language is codified under Wis. Stat. s. 343.305(4), and Kane was accordingly "informed of his opportunity to withdraw consent

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[21] ***Brar***, 2017 WI 73 at ¶ 25 (*referencing* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 226 (1973)).
[22] ***Id.*** ¶ 25 (*referencing* ***Schneckloth***, 412 U.S. at 223).
[23] ***Id.*** at ¶ 35.
[24] ***Id.*** at ¶ 35.
[25] R.58 at 6.

to a blood draw when the officer read him the Informing the Accused Form."[26]

The Iowa County Circuit Court found Kane was an adult with no physical, emotional, or mental challenges.[27] Kane was cuffed per usual in arrest situations, and the dialogue between Kane and the officer was cordial and nonthreatening.[28] Kane also had two previous OWIs, so he was experienced in arrest and chemical test procedures.[29] Kane complained about the tightness of the handcuffs, but that occurred only after he was read the ITAF.[30]

In noting Kane's statement about the handcuffs, the officer testified that if he were to loosen the cuffs, it would cause Kane's wrists to rotate and pinch him even worse.[31] Loosening the cuffs would have made it more painful.[32]

Kane argues that the Court's analysis regarding acquiescence should focus on his statement. The Court needs to turn the lens and look at whether Kane's continued consent was "overborne" by the arresting officer.[33] It is not illegal, or even bad practice, for an officer to inform a person what

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[26] ***Brar*** at ¶ 39.
[27] R.58 at 26.
[28] R.58 at 25, 27.
[29] R.58 at 25-26.
[30] R.58 at 27.
[31] R.58 at 5-6.
[32] R.58 at 6.
[33] ***Brar*** at ¶ 39 (*referencing* ***Schneckloth***, 412 U.S. at 226).

is going to happen if the person makes a decision so long as the officer is telling the truth.[34] "While police cannot use deceit or trickery, they are entitled to make true statements."[35] The totality of the evidence presented at the motion hearing establishes that the officer was not being deceptive or conducting otherwise bad practice. Therefore, not only did Kane not overtly withdraw consent after hearing the ITAF read to him, he maintained his consent to the blood draw and did not acquiesce to legal authority.

Accordingly, based upon the findings of the Court, and the law recited by the State at the Motion hearing and as supplemented by this brief, the Court respectfully requests that the Court affirm the circuit court's decision to deny Kane's motions.

II. THE DEFENDANT COULD NOT WITHDRAW CONSENT TO TEST HIS BLOOD SAMPLE BECAUSE THE SEARCH ENDED WHEN THE STATE COMPLETED THE BLOOD DRAW

a. Standard of Review

The State agrees with Kane's statement as to the proper standards of review for issues regarding the circuit court's legal conclusions and findings on voluntary consent before the Court of Appeals.

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[34] ***Village of Little Chute v. Walitalo,*** 2002 WI App 211, ¶ 11, 256 Wis. 2d 1032, 650 N.W.2d 891.
[35] ***Id.*** at ¶ 11.

b. *State v. Randall* holds the blood test is irrelevant for 4th Amendment considerations, making the purported written withdrawal of consent moot.

Review of this file's record demonstrates the weight the anticipated decision in ***Randall*** would bear given the similarity of issues between the two matters. ***Randall*** overruled the Court of Appeals' affirmation of the Dane County Circuit Court's suppression of blood evidence after a similar purported withdraw of consent.[36] Kane asserts ***Randall*** is not binding law.

Concurring and lead opinions may be combined to reach a majority holding on an issue. "When a fragmented Court decides a case and no single rationale explaining the results enjoys the assent of the five [United States Supreme Court] justices, 'the holding of the Court made be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds….'"[37]

Wisconsin recognizes the same authority for courts to recognize concurring opinions when reaching a majority

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[36] ***State v. Randall,*** 2019 WI 80, ¶ 39, 387 Wis. 2d 774, 930 N.W.2d 223.

[37] ***Marks v. United States,*** 430 U.S. 188, 193 (1977) (*citing* ***Gregg v. Georgia***, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

decision on a particular point.[38] "A fractured opinion mandates a specific result when the parties are in a 'substantially identical position.'"[39] Finding a legal opinion of the majority is not required; only an legal standard that, when applied, would produce a result of which the majority of justices would agree.[40]

The ***Randall*** lead decision, achieved with the aid of Chief Justice Roggensack's concurrence, was not fractured as to the 4th Amendment implications regarding delayed withdrawn consent. The difference between the lead opinion and the concurrence involved Ms. Randall's privacy interests, not the 4th Amendment considerations of the late consent withdrawal.[41]

> For the reasons explained above, Ms. Randall lost her privacy interests in the alcohol and drug concentration in her blood when she was arrested for intoxicated driving. The concurrence, for some unexplained reason, says she never had such an interest. That is an assertion too broad, too unbound, to be accepted.[42]

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[38] ***State v. Dowe,*** 120 Wis. 2d 192, 194 (1984) (*referencing* ***Grantham Transfer Co. v. Hawes,*** 225 Ga. 436, 169 S.E.2d 290 (1969); ***Primus v. Clark,*** 58 N.M. 588, 273 P.2d 963 (1954); 21 C.J.S. *Courts* section 184 (1940)).

[39] ***State v. Deadwiller,*** 2013 WI 75, ¶ 30, 350 Wis. 2d 138 (*citing* ***Berwind Corp. v. Comm'r of Soc. Sec.***, 307 F.3d 222, 234 (3d Cir. 2002)).

[40] ***Id.,*** at ¶ 30 (*citing* ***People v. Dungo,*** 55 Cal.4th 608, 147 Cal.Rptr.3d 527, 286 P.3d 442, 455 (2012)(Chin, J., concurring)).

[41] ***Randall,*** 2019 WI 80, ¶ 38.

[42] ***Id.*** at ¶ 38.

The lead opinion in ***Randall*** stated that the search ended "when the State completed the blood draw".[43] Because the search ended with the blood draw, the defendant had no privacy interest in the amount of alcohol in his blood.[44] With no privacy interest comes no legally-significant search.[45] The defendant's consent was not necessary once the blood was drawn, which nullifies the impact of the defendant's revoked consent.[46]

The concurring opinion in ***Randall*** makes an identical finding:

> [O]nce the search of the motorist's body has been conducted by lawfully drawing a blood sample, the subsequent testing of the evidence seized to determine its alcohol concentration has no further Fourth Amendment implications. This is so because there is no reasonable expectation of privacy in the alcohol concentration of a blood sample that has been voluntarily submitted to police for a blood alcohol testing.[47]

In reflecting upon the concurrence regarding the single-search issue, Justice Kelly states in Footnote 14 of his lead opinion that his and Justice Roggensack's opinions on this issue are "really just two ways of saying the same thing."[48] Contrary to Kane's argument, Justice Kelly acknowledges what

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[43] ***Randall*** at ¶ 39.
[44] ***Id.***
[45] ***Id.***
[46] ***Id.***
[47] ***Id.*** at ¶ 55.
[48] ***Id.*** at ¶ 39, n. 14.

the findings of the lead opinion and Chief Justice Roggensack's concurrence come to the same conclusion under identical rationale: there was one search, which ended with the draw, and the defendant could therefore not withdraw consent once that search ended.[49]

Both opinions would agree that Kane was too late in his written withdraw of consent for the same reason: he no longer had a privacy interest in the blood sample.

Given the lead opinion and concurrence agree that the blood test was not a subsequent search subject to 4th Amendment protections, ***Randall*** should be read as providing binding precedent upon the lower appellate courts on this issue.

Accordingly, the Court of Appeals should affirm the decision of the Iowa County Circuit Court to deny Kane's motion to suppress.

III. IN THE ALTERNATIVE, THE EXCLUSIONARY RULE IS INAPPLICABLE UNDER THE INEVITABLE DISCOVERY DOCTRINE

a. Standard of Review

The court is to accept the circuit court's factual findings unless those findings are clearly erroneous.[50]

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[49] ***Randall*** at ¶ 55.

[50] ***State v. Jackson,*** 2016 WI 56, ¶ 45, 369 Wis. 2d 673, 882 N.W.2d 422 (*citing* ***State v. Dearborn***, 2010 WI 84, ¶ 13, 327 Wis. 2d 252, 786 N.W.2d 97 (internal citation omitted)).

Application of those facts to constitutional principles is an issue of law that the court reviews *de novo*.[51]

b. Factual Findings by the Circuit Court are Sufficient to Apply the Inevitable Discovery Doctrine

The court is to accept the circuit court's factual findings unless those findings are clearly erroneous.[52] Application of those facts to constitutional principles is an issue of law that the court reviews *de novo*.[53]

If the Court determines the blood evidence obtained and tested by the State is tainted and subject to exclusion, the evidence would have been inevitably discovered by lawful means, and should therefore not be subject to suppression.

Exclusion of evidence at trial, referred to as the "exclusionary rule", is a judicial remedy for defendants when evidence is obtained by way of a constitutional violation.[54] Exclusion of evidence, however, is not an automatic remedy.[55] Courts are to exclude evidence "only when the benefits of deterring police misconduct 'outweigh the substantial costs

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[51] ***Jackson*** at ¶ 45 (*referencing* ***Dearborn,*** 2010 WI 84 at ¶ 13, (internal citations omitted).
[52] ***Id.*** (*citing* ***Dearborn*** at ¶ 13 (internal citations omitted)).
[53] ***Id.*** (*referencing* ***Dearborn*** at ¶ 13, (internal citations omitted).
[54] ***Id.*** at ¶ 46, (*referencing* ***Dearborn*** at ¶ 13, (internal citations omitted)).
[55] ***Id.*** (*citing* ***Dearborn*** at ¶ 35,27).

to the truth-seeking and law enforcement objections of the criminal justice system.'"[56]

If evidence obtained is subject to exclusion pursuant to the analysis described herein, the evidence may nonetheless be admissible pursuant to the inevitable discovery exception.[57]

The inevitable discovery doctrine states that tainted evidence "may be admissible if the tainted evidence would have been inevitably discovered by lawful means."[58] When presented with this issue, a court is to use the following criteria in its analysis: "Has the prosecution met its burden of proving by preponderance of the evidence that it inevitably would have discovered the evidence sought to be suppressed?"[59]

Although the circuit court was not provided with this issue as it found no 4th Amendment violation, it did find that "[t]here was reasonable cause to stop or seize the vehicle…".[60] It also found as follows:

> The officer saw the vehicle go left of the centerline and then abruptly swerve back to the lane going through

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[56] ***Jackson*** at ¶ 46. (citing ***Dearborn***, 2010 WI 84 at ¶ 38).
[57] ***Id.*** at ¶ 47 (*referencing* ***Nix v. Williams***, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); ***State v. Lopez***, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996) (internal citations omitted)).
[58] ***Id.*** at ¶ 47 (*citing* ***State v. Lopez***, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996) (internal citations omitted)).
[59] ***Id.*** at ¶ 66.
[60] R.58 at 24.

> the fog line. At times going between 35 to 40 miles per hour in a 55 limit. The field sobriety tests were administered. And the PBT showed a breath result of .17. Thereafter, the defendant was arrested and handcuffed and placed in the back of the law enforcement officer's vehicle.[61]

If presented with an affidavit in support of a search warrant for a blood draw, the magistrate would have needed to be "apprised of sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked with the commission of a crime."[62] If this court finds the officer should have accepted Kane's statement "I don't believe I have any choice, so yes" as some form of refusal, the circuit court's findings demonstrate that the State established by a preponderance that an independent neutral magistrate would have issued a warrant to commence the blood draw.

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[61] R.58 at 24-25.

[62] ***Bast v. State***, 87 Wis. 2d 689, 692, 275 N.W.2d 682 (1979) (*referencing* ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)).

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the Iowa County Circuit Court's orders denying both of the defendant's suppression motions.

Alternatively, the State requests that this Court affirm on the basis of the doctrine of inevitability or, otherwise, remain to the trial court for determination on this issue.

Dated at Dodgeville, Wisconsin, 4 of October, 2019.

Respectfully submitted,

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Plaintiff-Respondent

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with monospaced font. The length of this brief is twenty-two (22) pages.

Dated at Dodgeville, Wisconsin, 4 of October, 2019.

Signed,

By: _____

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STATE OF WISCONSIN

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CERTIFICATION

Pursuant to Wisconsin Statute section 809.19(12)(f), I hereby certify that the text of the electronic copy of the Plaintiff-Respondent's Response Brief is identical to the text of the paper copy of the aforementioned brief.

Dated at Dodgeville, Wisconsin, 4th of October, 2019.

Signed,

By: _____
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