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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.

REPLY BRIEF 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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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 BASED ON WITHDRAWING HIS CONSENT TO BLOOD TESTING.

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

Again, Mr. Kane concedes the ***State v. Randall*** decision impacts this case and that this Court is bound by the Wisconsin Supreme Court.[1] The rationale of the Supreme Court, however, is unclear. There was no majority that agreed on the exact basis for reversing the ***Randall*** Court of Appeals decision. Further, Mr. Kane briefs this claim so as not to 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. 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.[2]

[1] ***Randall,*** 2019 WI 80, 387 Wis. 2d 774, 930 N.W.2d 223.
[2] ***Id.*** ¶ 3.

The decision does not provide a cohesive legal theory for analyzing the withdrawal of consent issue. The Court's decision was fractured. There was no agreement as to the legal basis upon which Ms. Randall's consent could not be withdrawn. Where a decision is fractured, its precedential value is curtailed.[3] Though the decisions in ***State v. Lane*** and ***State v. Ayotte*** were issued, these decisions do not control, as they are unpublished.[4] There is no published decision holding that the lead opinion and concurrence in ***Randall*** present a cohesive framework for evaluating withdrawing consent in evidentiary blood draws following an operating while under the influence case.

The lead opinion, authored by Justice Kelly, relies on the legal theories of a reduced privacy interest incident to an arrest.[5] No party argued such a theory in briefing or oral argument.[6] 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

[3] *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.").
[4] ***State v. Ayotte***, 2019 WI App 48, 388 Wis. 2d 475; ***State v. Lane***, 2019AP 153-CR, slip op.
[5] ***Randall***, 2019 WI 80, ¶ 20.
[6] ***Randall***, 2019 WI 80, ¶ 67 (Roggensack, J., concurring).

alcohol concentration in her blood. The lead opinion found this "troubling."[7] 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?[8] What prohibits the State from testing any sample drawn for medical purposes?[9] Per the lead opinion, the concurrence's reasoning "has no bounds."[10]

The State argues the lead and concurring opinions are identical and the lead and concurring opinions rely upon the same rationale.[11] But that is not so. The concurrence simply concludes there is no privacy interest in the blood sample.[12] Mr. Kane does not dispute the outcome is the same in both the lead and concurring opinions—the lead opinion readily acknowledges that.[13] But it is incorrect that the reasoning in both decisions is identical.

By concluding the respondent in ***Randall*** retained a privacy interest in her blood after her arrest (but before any blood testing occurred), the lead opinion agrees with the reasoning in ***Birchfield v. North Dakota*** and ***Schmerber v. California*** that a blood draw and

[7] ***Randall***, 2019 WI 80, ¶ 37.
[8] ***Id.***
[9] ***Id.***
[10] ***Id.***
[11] State Br. 16–17.
[12] ***Randall,*** 2019 WI 80, ¶ 42 (Roggensack, J., concurring).
[13] ***Id.*** ¶ 37.

testing is a search.[14] The concurrence does not completely agree with this precedent. 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.[15] These facts indicate Mr. Kane did not wish to submit to the evidentiary test. This contrasted with the clear, unequivocal original consent given in the ***Randall*** case.[16] Therefore, there is a question of whether the consent here was actually valid. If the consent was not valid, there was no consent to withdraw, putting this case outside the purview of ***Randall***. Mr. Kane, as illustrated in his original brief and in this reply brief, argues his consent was not voluntary and thus not valid. The State does not respond to this argument.

[14] ***Birchfield***, 136 S. Ct. 2160, 2178 (2016); ***Schmerber***, 384 U.S. 757, 767 (1966).
[15] R.58 at 11–12.
[16] ***Randall***, 2019 WI 80, ¶ 2.

B. Mr. Kane properly withdrew his consent; any subsequent analysis was unlawful.

For the reasons stated in his original brief, Mr. Kane asks this Court to suppress the unlawful analysis of his blood.

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

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

On October 24, 2017, Deputy Clauer arrested Mr. Kane for OWI.[17] Mr. Kane was handcuffed and placed in the back seat of the squad car before being asked to submit to a blood test.[18] He was handcuffed, with the handcuffs behind his back.[19] At one point, Mr. Kane complained about the handcuffs or asked Deputy Clauer to loosen them.[20] There was a grate between Deputy Clauer and himself.[21] Deputy Clauer read the Informing the Accused form verbatim.[22] Deputy Clauer acknowledged that in response, Mr. Kane

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

stated something to the effect of, "I don't believe I have any choice, so yes."[23]

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.[24] The State cites to ***State v. Brar*** for that argument.[25]

In ***Brar***, the appellant challenged whether his consent to an evidentiary blood test following an OWI arrest could be voluntary.[26] The Court considered whether the appellant's answer to being read the Informing the Accused form was voluntary consent.[27] The appellant stated, "Of course," and "I don't want my license revocated."[28] The appellant also asked the officer if he needed a warrant to draw his blood, to which the officer shook his head.[29] The Court concluded the appellant voluntarily consented to the blood test

[23] *Id.* at 8.
[24] R.58 at 11–12; State Br. at 9.
[25] State Br. at 8; ***Brar,*** 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499.
[26] ***Id.*** ¶ 2.
[27] ***Id.***
[28] ***Id.***
[29] ***Id.*** ¶ 6.

because consent was shown first, and once consent is shown, no warrant need be gotten.[30]

In contrast, here, Mr. Kane's response was entirely different. A school of thought exists to believe that the "of course" statement in ***Brar*** was the appellant agreeing to submit based on his belief he did not have a choice. The appellant argued this, but the Supreme Court held that statement indicated consent. This is quite different from the statement here.[31] Moreover, after the ***State v. Dalton*** decision, which held a refusal to submit to blood testing could not enhance a person's sentence for OWI, the fact that the appellant in ***Brar*** said he did not want his license "revocated" provides a further argument that his consent could not be voluntary.[32] This exact issue (of voluntary consent) is before this Court in ***State v. Mulholland***.[33] However, putting this argument aside, the appellant in ***Brar*** used different language than Mr. Kane did.[34] It is indisputable that "Of course" and "Under those circumstances, I don't believe I have a choice" do not hold the same meaning or implication.[35] One implies consent. The

[30] ***Id.***
[31] ***Id.*** ¶ 2.
[32] ***State v. Dalton***, 2018 WI 86, 383 Wis. 2d 147, 914 N.W.2d 120.
[33] ***State v. Mulholland***, 2019AP1066 – CR.
[34] ***Brar***, 2017 WI 73, ¶ 9.
[35] R.58 at 11.

other expresses clear reticence, if not unwillingness to submit. This could not be voluntary consent.

The situation is much more like that in ***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.[36] In ***Johnson***, the Court noted that the defendant was not actually asked to provide consent to a search.[37] Likewise, Mr. Kane was not asked to consent to search but was asked if he would submit. Further, the Court in ***Johnson*** found the appellant's response indicated the appellant did not validly consent to the search.[38] Here, Mr. Kane expressed more patent reluctance to submit. By noting that he did not feel he had a choice, whether that was due to the Informing the Accused form 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.

Furthermore, it is not the arrestee's burden to show whether he gave in to a blood test through acquiescence to police authority or decided to agree after weighing his options. It is the State's burden to show the consent was unequivocal. Mr. Kane clearly did not

[36] ***Johnson***, 2007 WI 32, ¶ 19.
[37] ***Id***.
[38] ***Id.***

unequivocally consent. By his own words, he did not feel he had a choice. The deputy did not bother to correct him that he did have a choice. Mr. Kane's statement cannot be construed otherwise. This was not consent "freely and voluntarily given" and does not satisfy ***Bumper v. North Carolina***.[39]

The State says Mr. Kane consented to blood testing when he drove on Wisconsin roads.[40] Yet ***State v. Padley*** illustrated that the implied consent law does not mandate consent.[41] No binding authority in this state holds driving equates consent. What the law does is require an arrestee to make a difficult choice.[42] The choice is: Consent to blood testing and presumably face prosecution for OWI, or refuse and suffer the penalties for refusing.[43] The law is no substitute for a case-by-case analysis of consent.

Under ***State v. Artic***, the Court should consider Mr. Kane's personal characteristics in determining whether any consent was voluntarily provided.[44] 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

[39] ***Bumper***, 391 U.S. 543, 548 (1968).
[40] State Br. 11.
[41] ***Padley***, 2014 WI App 65, ¶¶26–27, 354 Wis. 2d 545, 849 N.W.2d 867.
[42] ***Id.***
[43] ***Id.***
[44] ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 NW.2d 430.

reading the ITAF, the deputy told Mr. Kane that first they will go over paperwork and then they will go to the hospital.[45]

By informing Mr. Kane, before reading the form, that they would be going to the hospital, the deputy 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.[46] Mr. Kane was in custody, complained of handcuffs, and expressly stated he felt he did not have a choice in submitting to the testing. The fact he laughed while in custody does not mean the conversation was congenial. People laugh when feeling nervous. Any finding by the circuit court to the contrary is erroneous. The equivocal response was not true consent.[47]

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

[45] R.58 at 16.
[46] R.58 at 11.
[47] ***Artic***, 2010 WI 83, ¶ 33.

he voluntarily consented to blood testing. The State must not be allowed to 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 suppress been granted in circuit court, Mr. Kane would not have pled to the OWI offense.

B. The inevitable discovery doctrine is inapplicable here.

For the first time, the State raises the inevitable discovery doctrine to argue "tainted evidence may be admissible if the tainted evidence would have been inevitably discovered by lawful means."[48] This argument was not raised in circuit court and is therefore barred from being raised in this Court.[49] If the issue of inevitable discovery is to be raised, the issue should be addressed in circuit court, where the court will hear the parties on the matter. The circuit court may determine whether inevitable discovery saves this involuntary blood draw.

[48] State Br. at 19 (internal quotation and citation omitted).
[49] *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶ 23, 303 Wis .2d 258, 735 N.W.2d 93 ("Generally, arguments raised for the first time on appeal are deemed waived.").

As the defense understands it, should the Court conclude Mr. Kane's right to be free from unlawful searches was violated, the State argues Mr. Kane's blood results, which were inculpatory, would have been discovered anyway. Specifically, if Mr. Kane refused, the officer would have obtained a warrant.

There are a few problems with this analysis. First, the issue is not whether Mr. Kane *refused* but whether his consent was *voluntary*. As a preliminary matter, even if a warrant was issued based on a refusal, that does not address whether Mr. Kane voluntarily consented to the blood test. At no point has Mr. Kane asserted he refused to submit to the blood test. Accordingly, any questions of refusing testing are inapplicable, and the State may not base its inevitable discovery argument on the State obtaining a warrant on that basis.

In addition, the State completely speculates that the arresting deputy would have requested a warrant or that a judge would grant the proposed warrant. In the event of a refusal, an arresting officer does not even necessarily obtain a warrant. The officer may initiate a refusal proceeding by issuing a Notice of Intent to Revoke without ever obtaining a warrant for a sample of a person's blood.

In addition, the State argues inevitable discovery by citing to cases inapplicable here. For example, in ***Nix v. Williams***, following an

interrogation, the police learned the location of the victim's corpse.[50] The Supreme Court upheld the conviction, finding that under inevitable discovery, the area the defendant stated the body could be found was in an area searchers also could have readily (and would have) found.[51] The facts of this case could not be further from the facts of ***Nix***. There are no search parties, rooting around in Mr. Kane's blood sample. In fact, such searching would be unreasonable and unlawful under the Fourth Amendment. As the State's arguments against exclusion are inapplicable here, and as the State first raises the issue on appeal, this Court need not consider them.

[50] 467 U.S. 431, 434–35 (1984).
[51] ***Id.*** at 443.

CONCLUSION

For the reasons stated above and in his original brief, 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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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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APPENDIX