STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2019 AP 000370 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

BARRY J. KRULL,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION

ENTERED IN THE CIRCUIT COURT FOR SHAWANO COUNTY
THE HONORABLE WILLIAM F. KUSSEL, JR. PRESIDING

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ISSUES PRESENTED FOR REVIEW

Was the detention of the Defendant-Appellant on private property unlawful?

The Circuit Court answered: No.

Suggested Answer on Appeal: Yes.

Did the blood draw violate the Defendant-Appellant's Fourth Amendment Constitutional Rights?

The Circuit Court answered: No.

Suggested Answer on Appeal: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant does not request publication as the issues raised in this appeal deal with application of well-settled legal standards to its unique facts.

STATEMENT OF THE CASE

This is an appeal from a *Judgment of Conviction* (R. 34) entered in Shawano County Circuit Court, the Honorable William F. Kussel, Jr., presiding judge.

On June 21, 2016, the State of Wisconsin filed a *Criminal Complaint* which charged the Defendant-Appellant, Barry J. Krull with one count of Operating a Motor Vehicle While Intoxicated-Third Offense, contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)(3), and 343.307(1), and one count of Operating with Prohibited Alcohol Concentration-Third Offense, contrary to Wis. Stat. §§ 346.63(1)(b), 346.65(2)(am)(3), and 343.307(1). (R. 3).

On November 22, 2016, Mr. Krull filed a *Motion to Suppress Evidence* wherein he asserted that his Fourth Amendment rights were violated when he was seized on private property and his blood was drawn absent a warrant. (R. 11). A *Motion Hearing* was held on March 3, 2017, and testimony was elicited from Deputy Bartz, Deputy Rogers, and Mr. Krull. (R. 44). On October 18, 2017, after additional testimony was elicited from Deputy Rogers, Judge Kussel made an oral ruling on Mr. Krull's *Motion to Suppress Evidence.* (R. 45). First, Judge Kussel found that the detention of Mr. Krull on private property was lawful. (*Id*. at 18). Second, Judge Kussel found that the warrantless blood draw did not violate Mr. Krull's Fourth Amendment Constitutional Rights. (*Id.* at 23).

On January 2, 2019, a *Plea and Sentencing Hearing* was held, at which Mr. Krull entered a plea of 'no contest' to Operating a Motor Vehicle While Intoxicated-Third Offense. (R. 48). Judge Kussel found that Mr. Krull knowingly, voluntarily and intelligently entered such plea and accordingly found Mr. Krull guilty. (*Id.* at 8). Judge Kussel imposed a sentence of 45-days jail, $1,744 fine and cost, and 24-months revocation of driving privileges. (*Id*. at 16). On the same day, Judge Kussel signed an *Order to Stay Execution of Sentence* (R. 33) due to Mr. Krull's intention to seek appellate review of his *Motion to Suppress Evidence.* (R. 11).

A *Judgement of Conviction* was entered on January 11, 2019 (R. 34). A timely *Notice of Intent to Pursue Postconviction Relief* was filed on January 14, 2019. (R. 36).

STATEMENT OF THE FACTS

On May 22, 2016, at approximately 8:38 p.m., Deputy Bartz, of the Shawano County Sheriff's Department was traveling westbound, in a marked squad vehicle, on Highway 156 in Shawano County. (R. 12 at 2). In her front passenger seat was Deputy Rogers, who is also with the Shawano County

Sheriff's Department. (R. 44 at 5:12-13). Deputy Bartz was on "field training" with Deputy Rogers because she was new to the sheriff's department. (*Id.* at 5:4-5).

While traveling westbound on Highway 156 near the intersection of Old 147 Road, the deputies observed Mr. Krull's vehicle in the opposing lane of traffic headed eastbound. (R. 12 at 2). Per the speed radar, his vehicle was traveling 67 miles-per-hour in a 55 mile-per-hour speed zone. (R. 44 at 5-6:25-1). Consequently, the deputies decided to turn their squad car around to conduct a traffic stop. (*Id.* at 7:2-3). After passing the deputies' squad car, Mr. Krull made a right turn onto Old 47 Road. (R. 12 at 2).

Mr. Krull turned into the private driveway of a residence on Old 47 Road, specifically N636 Old Road. *Id.* The owner of this residence is Mr. Krull's good friend, Mr. Blooma. (R. 44 at 60-61:25-1). Mr. Krull and Mr. Blooma work together in the construction industry and see each other regularly. (*Id.* at 61:3-10). They own tools in common and such tools are kept in Mr. Blooma's garage. (*Id.* at 61:11-19). Mr. Krull frequents and uses Mr. Blooma's residential property often. (*Id.* at 61:20-25). On the day of the incident, Mr. Blooma invited Mr. Krull to his property to discuss work related subjects. (*Id.* at 62:1-11).

Mr. Krull pulled his vehicle into the driveway about 30-40 feet and parked near a garage. (*Id.* at 50:9-10). Following suit, Deputy Bartz pulled into the residential driveway and parked the squad car. (*Id.* at 7-8:15-8). When Deputy Bartz activated the squad car's overhead red-and-blue lights is disputed. At the *Motion Hearing,* Deputy Bartz testified that she activated the lights as she turned onto Old 47 Road. (*Id.* at 7:13-14). Deputy Rogers testified at the first motion hearing that he could not recall at what specific point the lights were activated. (*Id.* at 50:3-5). Mr. Krull testified that Deputy Bartz, only upon the prompting of Deputy Rogers, activated the lights after she pulled into the driveway and parked. (*Id.* at 65:18-22).

According to the deputies' testimony, they observed Mr. Krull exit his vehicle and walk toward the garage structure on the property. (*Id.* at 8:14-17; *Id.* at 51:9-15). Then they exited the squad car and verbally called out to the driver instructing him to stop walking toward the garage and to come talk to Deputy Bartz. (*Id.* at 8:19-22; *Id.* at 51:9-15). According to Mr. Krull's testimony, he first observed the squad car after he was parked in the private driveway. (*Id.* at 60:5-24). At the time he observed Deputy Bartz pull the squad car into the driveway, he had already exited his vehicle and was walking towards his friends on scene. *Id.* His friends were socializing in and near the garage structure. (*Id.* at 25-26:3-5).

Deputy Bartz identified the driver, by way of a Wisconsin Driver's license, as Mr. Krull. (*Id.* at 8-9:23-3). According to Deputy Bartz, during this initial interaction, she observed an odor of intoxicants about Mr. Krull. (*Id.* at 27-28:21-8). She also observed that he displayed small eye pupil size and slurred speech. *Id.* Upon inquiry, Mr. Krull advised that he had consumed four (4) beers between 4:00 p.m. and up until about 15 minutes before his interaction with the deputies. (*Id.* at 9:21-25).

Next, Deputy Bartz ran Mr. Krull's name via DOT records and learned that Mr. Krull had two prior OWI convictions. (*Id.* at 30:7-11). Deputy Bartz then decided to have Mr. Krull perform standardized field sobriety tests (SFSTs). (*Id.* at 30:17-20). Specifically, she had Mr. Krull perform the Horizontal Gaze Nystagmus exercise, the Walk-and-Turn exercise, and the one-Leg Stand exercise. (*Id.* at 30:21-24;31-32:21-1;35:20-22). In Deputy Bartz's opinion Mr. Krull did not perform the SFSTs in a satisfactory manner. (*Id.* at 39:12-16).

Following the SFSTs, Deputy Bartz requested Mr. Krull submit a sample of his breath into a preliminary breath test (PBT) machine. (*Id.* at 14:20-22). It is undisputed that Mr. Krull refused to submit to the PBT; however, there is a dispute as to the exact sequence of the events as it relates to whether the PBT was requested by Deputy Bartz before or after she stated her intent to arrest Mr. Krull. According to Deputy Bartz, she requested the PBT before the arrest of Mr. Krull. (*Id.* at 14-15:20-2). According to Mr. Krull, Deputy Bartz stated her intent to arrest right after the SFSTs. (*Id.* at 66:1-12). Mr. Krull refused the PBT because he was already told by Deputy Bartz that she was going to arrest him. *Id.*

Mr. Krull was arrested, handcuffed, and his person was searched. (*Id.* at 40:8-12). The search turned up a cellular phone. *Id.* Mr. Krull immediately voiced concern to Deputy Bartz regarding his small child who was then under the care of a babysitter. (*Id.* at 40:13-15). Mr. Krull requested access to his cell phone so he could make calls to arrange childcare. (*Id.* at 41:1-4). In response, Deputy Bartz advised Mr. Krull that she would allow him to make phone calls only if he was "cooperative." (*Id.* at 41-42:22-1).

Mr. Krull was placed in the back of the deputies' squad car. (*Id.* at 41:1-7). He did not make any phone calls before leaving the private driveway. *Id.* Shortly thereafter, the

deputies transported him to a hospital which was about 15-20 miles away. (*Id.* at 55:21-24). During this transport, Mr. Krull continued expressing concerns over making childcare arrangements and repeatedly asked to make phone calls. (*Id.* at 42:8-12). Deputy Rogers took possession of Mr. Krull's cell phone and, under the direction of Mr. Krull, called a person on the cell phone via the speaker phone feature. (*Id.* at 42:13-15). Mr. Krull was able to get ahold of his brother and make only partial childcare arrangements. (*Id.* at 67-68:21-13).

Upon arrival at the hospital, Deputy Bartz read verbatim the "Informing the Accused," a Department of Transportation form, to Mr. Krull. (*Id.* at 43:15-20). Mr. Krull submitted to a blood draw and a blood sample was collected by a medical staffer at the hospital. (*Id.* at 43:3-9). Following the blood draw, Mr. Krull continued his requests to Deputy Bartz to make phone calls for childcare arrangements. *Id.* At the *Motion Hearing*, Deputy Bartz acknowledged that Mr. Krull was concerned about his young child throughout the entire process and he consistently mentioned his need to make childcare arrangements. (*Id.* at 44:1-6).

STANDARD OF REVIEW

"In reviewing a denial of a motion to suppress evidence" on Fourth Amendment grounds, this Court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499, 501 (Ct. App. 1999) (citing *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997)). "Whether a stop or detention meets statutory and constitutional standards, however, is a question of law subject to *de novo* review." *Id.*

SUMMARY OF THE ARGUMENT

Mr. Krull's Fourth Amendment Constitutional rights were violated when he was unlawfully detained on private

property. Mr. Krull was originally detained on a private driveway for a speeding violation. This detention, however, became an investigatory stop when Deputy Bartz began questioning him about his drinking that night. The private driveway is curtilage to the private residence and is therefore protected by the Fourth Amendment. Moreover, Mr. Krull possessed a reasonable expectation of privacy in the private driveway.

Mr. Krull's Fourth Amendment rights were further violated when his blood was drawn absent a warrant. Because the officers did not have a warrant, there were no exigent circumstances present, and the search-incident-to-arrest doctrine does not apply to blood draws, the blood draw was only lawful if Mr. Krull voluntarily consented to it. He did not. Mr. Krull's consent was not voluntary as it was premised solely on him being cooperative in exchange for a phone call to arrange childcare. Because Mr. Krull's Fourth Amendment rights were violated, this Court should reverse the circuit court's denial of Mr. Krull's motion to suppress.

ARGUMENT

I. Mr. Krull's Fourth Amendment Rights Were Violated When he was Seized on a Private, Residential Driveway.

Mr. Krull's Fourth Amendment rights were violated when he was seized on the private driveway. The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV. A seizure occurs when, in view of all the circumstances surrounding an incident, a reasonable person would have believed he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Mr. Krull was unlawfully seized under either *Jones* or *Katz*. Absent a warrant, an individual cannot be seized when he is in a "constitutionally protected area," *United States v. Jones*, 565 U.S. 400, 406-07 (2012), or he has a "reasonable expectation of privacy" in the area in which he is seized. *Katz v. United States*, 389 U.S. 347, 361 (1967). Here, an unlawful seizure occurred because (1) the driveway lies within the

curtilage of a "constitutionally protected area," and (2) Mr. Krull has a reasonable expectation of privacy in the area he was seized.

a. Mr. Krull's seizure was unlawful because it occurred on private property.

A police officer may stop a vehicle when he reasonably believes a driver is violating a traffic law. *Betow*, 226 Wis. 2d at 93 (Ct. App. 1999). A routine traffic stop, which is a relatively brief encounter, is "more analogous to a so-called *Terry* stop than to formal arrest." *Rodriguez v. United States*, 135 S.Ct. 1609, 1614-15 (2015). Like a *Terry* stop, the duration of a routine traffic encounter is limited to the time reasonably necessary to complete the mission of issuing a ticket. *Id.* A traffic stop can "become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission." *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate "additional suspicious factors [that] come to the officer's attention." *Betow*, 226 Wis. 2d at 94 (Ct. App. 1999) (citing *United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1994)). An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion. *See State v. Colstad*, 2003 WI App 25, ¶ 13, 2260 Wis. 2d 406, 659 N.W.2d 680 (2014); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). In this regard, the legal extension of a traffic stop is essentially a *Terry* investigatory stop. *State v. Arias*, 2008 WI 84, ¶ 35, 311 Wis. 2d 358, 752 N.W.2d 748.

Investigatory detentions (i.e. *Terry* stops) cannot occur on private property. *See State v. Munroe*, 2001 WI App 104, ¶ 13, n. 4, 244 Wis.2d 1, 630 N.W.2d 223 ("[B]oth *Terry* and § 968.24 authorize such stops in public places, not in homes or hotel rooms."); *State v. Stout*, 2002 WI App 41, ¶ 1, 250 Wis. 2d 768, 641 N.W.2d 474 ("We hold that the doctrine only applies to stops made in a public place and police may not enter an abode based on *Terry*."); and Wis. Stat. § 968.24 (After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a **public place** for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand

the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.) (Bolding supplied for emphasis).

Mr. Krull was seized the moment Deputy Bartz and Deputy Rogers verbally demanded that he halt and come have a discussion with them. Arguably, this seizure was justified on probable cause grounds for the speeding violation; however, the moment Deputy Bartz converted this matter into an OWI investigation, she possessed only, at best, reasonable suspicion-and not probable cause-of an OWI violation. Therefore, she was holding Mr. Krull in an investigatory detention (i.e., a *Terry* stop) which cannot occur on private property.

b. An unlawful seizure occurred under *Dunn* because the private driveway Mr. Krull was seized on is within the curtilage of the private residence.

A home's curtilage is afforded as much Fourth Amendment protection as the interior walls of the dwelling. *See State v. Martwick*, 2000 WI 5, ¶ 26, 231 Wis. 2d 801, 604 N.W.2d 552. Curtilage is "the area 'immediately surrounding and associated with the home.'" *Collins v. Virginia,* 138 S.Ct. 1663 (2018) (citing *Florida v. Jardines,* 569 U.S. 1, 6 (2013)) (quoting *Oliver v. United States,* 466 U.S. 170, 180 (1984)). There are four factors in finding curtilage: "[1] the proximity of the area claimed to be curtilage to the home; [2] whether the area is included within an enclosure surrounding the home; [3] the nature of the uses to which the area is put; and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987). These four factors, however, are not determinative. *Id.* Rather, "they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

In this case, the private driveway Mr. Krull was seized upon is in the curtilage of the residential home and worthy of Fourth Amendment protection. First, the driveway is a gravel driveway that directly abuts the garage. The residential home and a barn are also only a short distance from the driveway.

Second, the driveway is included within the residential property. The driveway, specifically the portion Mr. Krull was seized upon, is enclosed on three sides by the residential home, a barn, and the garage. Importantly, the driveway is located within the parameters of a single-family residence and there are no immediate neighbors. Third, Mr. Blooma and Mr. Krull both store their work tools in the garage. The garage is also used as a place for social gatherings. Fourth, steps have been taken to protect the driveway, specifically the portion Mr. Krull was seized upon, from observation by people passing by. The driveway has been situated in the middle of three buildings and directly abuts the garage. Additionally, the driveway extends a distance into the property and is not visible from any neighboring properties. For these reasons, the private driveway lies within the curtilage of the residential property and is therefore entitled to Fourth Amendment protection.

c. An unlawful seizure also occurred under *Katz* because Mr. Krull had a reasonable expectation of privacy in the private driveway.

Absent a warrant, when a seizure occurs where an individual has a reasonable expectation of privacy the seizure violates the Fourth Amendment. *Katz*, 389 U.S. at 361 (1967). An individual has a "reasonable expectation of privacy" when (1) he has a subjective expectation of privacy in the area in which he is seized, and (2) that expectation of privacy is one that society is prepared to recognize as reasonable. *Id.* In evaluating whether society recognizes an expectation of privacy as reasonable, it is important to recognize that the test is "not whether the individual chose to conceal asserted 'private activity,' but instead whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver*, 466 U.S. at 181-83 (1984).

This Court has held that a non-overnight guest who regularly used a property and had a firmly rooted relationship with the host and property has a reasonable expectation of privacy in the property. *State v. Trecroci,* 2001 WI App 126, ¶ 59, 246 Wis. 2d 261, 630 N.W.2d 555. Relatedly, Mr. Krull regularly uses his good friend, Mr. Blooma's property and has a firmly rooted relationship with both Mr. Blooma and his property.

Additionally, the situation here can be likened to that in *Jones v. United States*, 362 U.S. 257 (1960). There, the Court held that a short-term overnight guest had a reasonable expectation of privacy in a friend's house even though he was only there overnight. *Id.* It can be inferred that the Court found his expectation of privacy reasonable due to the sanctity that the Court has afforded to homes. *Payton v. New York*, 445 U.S. 573 (1980).

Like the defendant in *Jones*, Mr. Krull has a reasonable expectation of privacy in the private driveway because it is an extension of the garage which he frequently visits and stores his work tools in. Accordingly, if the Court finds that there was no unlawful seizure under *Jones*, there would still be an unlawful seizure under *Katz*. No matter which constitutional test is applied, an unlawful seizure occurred because the officers "infringe[d] upon the personal and societal values protected by the Fourth Amendment." *Oliver*, 466 U.S. at 181-83 (1984).

II. The Blood Draw Violated Mr. Krull's Rights Under the Fourth Amendment to the Constitution.

A blood draw is a "search" under the Fourth Amendment and must be reasonable to be lawful. *See generally Missouri v. McNeely*, 569 U.S. 141 (2013). *McNeely* stands for the general proposition that a search warrant is generally required for a blood draw to pass constitutional muster, even post-arrest. The *McNeely* Court made this abundantly clear:

> Our cases have held that a warrantless search of the person is reasonable **only if it falls within a recognized exception. That principle applies to the type of search at issue in this case,** which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individuals' "most personal and deep-rooted expectations of privacy."

McNeely, 569 U.S. at 147 (2013) (bolding supplied for emphasis) (citations omitted). The United States Supreme Court has held "that a warrantless search of the person is reasonable only if it falls within a recognized exception." *Id.*

(citing *United States v. Robinson*, 414 U.S. 218, 224 (1973)). Such constitutional principles apply to blood draw cases. *Id.* Therefore, Mr. Krull's warrantless blood draw is only constitutional if it falls into an established warrant-exception. Under the circumstances of this case, the only three applicable warrant-exceptions are: (1) the exigent circumstances doctrine; (2) the search-incident-to-arrest doctrine; and (3) voluntary consent. For the reasons state below, none of these exceptions apply.

a. No exigent circumstances were present.

In *McNeely*, the United States Supreme Court held, in the context of an OWI, that the natural metabolic dissipation of alcohol from the blood stream after its consumption does not constitute a *per se* exigency to force a warrantless blood draw. 569 U.S. at 149-51. Rather, for a warrantless blood draw to be reasonable, exigent circumstances must exist. *Id.*

There were no exigent circumstances present in Mr. Krull's case that could justify the warrantless blood draw. Further, there were no inordinate or pressing circumstances that interfered with Deputy Bartz's ability to apply for a search warrant. In fact, this was "not a situation where evidence law enforcement could not otherwise [have] gain[ed] access to was obtained by unlawful means." (R. 13 at 8-9). Under this factual backdrop, there were no exigent circumstances to justify the warrantless blood draw.

b. The Search-Incident-to-Arrest doctrine does not apply.

In *Birchfield v. North Dakota*, the United States Supreme Court held that a blood draw, unlike the taking of a breath sample, cannot be justified under the search-incident-to-arrest exception to the Fourth Amendment's general warrant requirement. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2185 (2016) ("[W]e conclude that a breath test, but not a blood test, may be administered as a search incident to arrest for drunk

driving."). Therefore, Mr. Krull's warrantless blood draw cannot be justified under a search-incident-to-arrest theory.

c. Mr. Krull did not voluntarily consent to the warrantless blood draw.

Mr. Krull did not voluntarily consent to the warrantless blood draw simply because Deputy Bartz read the *Informing the Accused* form verbatim to him, nor did he voluntarily consent when he affirmed his implied consent under the law. Wisconsin's Implied Consent Law (WICL) does not create, in and of itself, an "exception" to the Fourth Amendment's warrant requirement, and the *Informing the Accused* form does not render an arrestee's consent involuntary.

At the outset, it is critical to explain the distinction between affirming "implied consent" under WICL from "voluntary consent." While these two kinds of consent may overlap in some instances, the concepts are certainly *not* coextensive. WICL does not create an exception to the Fourth Amendment's warrant-requirement. Put differently, the interplay between Fourth Amendment law and WICL is appropriately explained as an issue of whether WICL "consent" falls within the constitutional concept of "voluntary consent." If a person provides "consent" under WICL, which would likewise constitute "voluntary consent" under the rubric of Fourth Amendment analysis, such "consent" would pass constitutional muster. If, however, the "consent" under WICL is not voluntarily made, as demanded by the Fourth Amendment, then such "consent" is not constitutionally valid and thus renders a blood draw unreasonable in the absence of a warrant.

A voluntary consent analysis has two steps. First, the court determines whether there was consent-in-fact by the defendant. *State v. Phillips,* 218 Wis. 2d 180, 190-194, 577 N.W.2d 794, 800 (1998). In the first step of this analysis, the

court examines what the defendant said or did. *Id.* If consent-in-fact is found, the second step is to determine whether the defendant's consent was constitutionally valid. *Id.* "Consent-in-fact" is constitutionally valid if it is "freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *see Phillips*, 218 Wis. 2d at 194-95 (1998).

Consent that is the product of duress, coercion or misrepresentation by law enforcement is not voluntarily given consent. *Schneckloth*, 412 U.S. at 227 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). There is no single fact, the absence or presence of, that determines whether consent was voluntarily given. *Schneckloth*, 412 U.S. at 226 (1973). Rather, in order to determine whether consent was voluntarily given, the totality of the circumstances of each individual case must be examined. *Id.* at 233. In examining the totality of the circumstances, courts consider "both the circumstances surrounding the consent and the characteristics of the defendant." *Phillips*, 218 Wis. 2d at 198 (1998) (additional citations omitted). In addressing the issue of consent, it is crucial to not conflate consent-in-fact with the voluntariness of the consent inquiry. When a verbal response is given, consent to search and the voluntariness of the consent are two separate issues that require separate determinations. *Id.* at 196-97.

Here, Mr. Krull was read the *Informing the Accused* form by Deputy Bartz. The form's language tracks the mandatory information and warnings set out under WICL.[1]

[1] Per Wis. Stat. § 343.305(4), the language is as follows:

"You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of

The form's language concludes with the question of "Will you submit to an evidentiary chemical test of your blood?" In this case, Mr. Krull, in some form or fashion, answered in the affirmative and thus affirmed his "implied consent."

Under the two-step analysis, Mr. Krull's affirmation of his implied consent under WICL satisfies the consent-in-fact step of the test. The next step, though, is to determine whether Mr. Krull's consent was "freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (1973). It was not.

Following his arrest by Deputy Bartz and throughout most of his interaction with her, Mr. Krull was extremely concerned about securing childcare for his young son. The general concern a parent has for a child, especially one who is very young, is a natural and well-understood concept. Little explanation is required to fully illustrate the high impact a child's welfare and well-being can have on a parent.

Upon arrest, Mr. Krull immediately voiced concern to Deputy Bartz regarding childcare. He specifically requested he be permitted to access his cell phone to place calls to arrange childcare. In direct response to this request, Deputy Bartz advised Mr. Krull that so long as he was "cooperative" she

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alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.

would allow him to make phone calls. (R. 44 at 41-42:22-1). At the *Motion Hearing*, Deputy Bartz explained that "normally when someone is cooperative with me, I allow them to make phone calls" but "when they are uncooperative they more or less don't get a phone call." (*Id.* at 41:13-21).

Following his arrest, Mr. Krull was immediately transported to a hospital. During the transport, he was allowed to make a phone call on his cell phone with the assistance of Deputy Rogers. Though he was able to get in contact with his brother, he was not able to fully secure childcare; it was only a temporary fix.

Once at the hospital, Deputy Bartz read *the Informing the Accused* form to Mr. Krull, where he provided consent-in-fact. Mr. Krull felt it was necessary to submit to the blood draw if he wished to make additional phone calls, so he did submit; however, he felt pressured to do so and his decision was not the product of free and voluntary choice. Rather, it was done out of perceived necessity so he, a parent, could secure childcare for his young son. Following completion of his blood draw, Mr. Krull continued to voice concern related to his child and continued requesting permission to make phone calls.

The totality of the circumstances highlights the overall pressures at play against Mr. Krull. First, subsequent to his arrest, he immediately voiced concern about his need to arrange childcare. He requested use of his cell phone to do so. Deputy Bartz told him he would be allowed to make some phone calls, but only if he cooperated with her. In other words, Deputy Bartz communicated to Mr. Krull that his ability to make phone calls to secure childcare arrangements was absolutely conditioned on him being "cooperative" with her. A reasonable person in Mr. Krull's position would understand Deputy Bartz's statements to mean, inter alia, that he must comply with her every demand or instruction through the process should he wish to be permitted to make phone calls.

Of note, and in stark contrast to his submission to the blood draw, Mr. Krull refused to submit to Deputy Bartz's PBT device upon request. This is a material consideration in the consent analysis. Mr. Krull, before being advised that his "cooperation" was required to make a phone call, clearly asserted a denial towards Deputy Bartz's request for a breath test. "[A]n initial refusal to permit a search when asked 'also militates against a finding of voluntariness.'" *Munroe*, 2001 WI App 104, ¶ 10 (citing *State v. Kiekhefer*, 212 Wis. 2d 460, 472, 569 N.W.2d 316, 324 (Ct. App. 1997)). While this holding comes from a case dealing with an initial refusal to search an area that was ultimately searched by police, the reasoning is nonetheless persuasive to the facts of this case.

According to Wisconsin precedent, the reading of the *Informing the Accused* form to an arrestee and the threat of revocation and "other penalties" does not invalidate a suspect's consent. *State v. Wintlend,* 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745; *Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis.2d 1032, 650 N.W.2d 891. These decisions were limited to the assertion that WICL's information/warnings, in and of itself, did not override valid consent. *See Id.* The facts of this case clearly go well beyond the reading of the *Informing the Accused* form information/warnings. Here, Mr. Krull was advised he better cooperate should he wish to make phone calls to arrange childcare. He interpreted this to mean that he must submit to the blood draw. Deputy Bartz created improper influence and pressure that affected Mr. Krull's decision and led to his ultimate acquiesce to the blood draw. Unlike the cases involving only the reading of WICL's information/warnings, which merely tells a person what will happen if they refuse, this situation had added variables. Mr. Krull was led to believe that refusing consent would preclude him from making childcare arrangements.

CONCLUSION

Mr. Krull's Fourth Amendment Constitutional rights were twice violated. They were first violated when he was unlawfully detained on private property. Mr. Krull was seized on a constitutionally protected area in which he had a reasonable expectation of privacy. Mr. Krull's Fourth Amendment rights were further violated when a warrantless blood draw was performed on him absent voluntary consent. For these reasons, it is respectfully requested that the Court of Appeals reverse the circuit court's denial of the motion to suppress evidence in this matter.

Dated this 17th day of June 2019.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I, Chadwick J. Kaehne, hereby certify that this portion of the brief (respondent portion) conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,645 words.

Dated this 17th day of June 2019.

_____

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ELECTRONIC BRIEF CERTIFICATION

I, Chadwick J. Kaehne, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 17th day of June 2019.

_____

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2019 AP 000370 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

BARRY J. KRULL,

Defendant – Appellant.

AFFIDAVIT OF MAILING

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)ss
SHAWANO COUNTY)

I, Jason Masterson, being first duly sworn, under oath, states:

1. That I am a Paralegal at Kaehne, Cottle, Pasquale & Associates, S.C.
2. That on June 17, 2019, I did deposit in a mail receptacle for the United States Postal Service, in a sealed package, correctly addressed for delivery to the Wisconsin Clerk of Court of Appeals, with postage pre-paid for first class mail, or class at least equally expeditious, ten (10) copies the *Brief and Appendix of the Defendant- Appellant*, relative to the above-entitled matter.
3. That on the same day, I also sent via U.S. Mail, first class (or a class at least equally expeditious), three (3) service copies of the *Brief and Appendix of the Defendant-Appellant* to the Shawano County District Attorney's Office.

Dated: June____, 2019.

_____
Jason Masterson
Paralegal

Subscribed and sworn to before
me this ____ June, 2019:

_____
Alison Spradling, Notary Public
Winnebago County, State of Wisconsin
My Commission Expires: _____.