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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2020 AP 188 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WILLIAM LAWRENCE BONFIGLIO,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM A FINAL ORDER ENTERED ON DECEMBER 6, 2019 IN
THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE TROY
CROSS PRESIDING

Respectfully submitted,

STATE OF WISCONSIN,
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STATEMENT OF THE ISSUE

DID LAW ENFORCEMENT OFFICERS USE OBJECTIVELY REASONABLE FORCE WHEN THEY EMPLOYED AN “ESCORT HOLD,” WITH JUST ENOUGH FORCE TO HOLD THE DEFENDANT’S ARMS STATIONARY, FOR A SHORT PERIOD OF TIME AFTER THE DEFENDANT BEHAVED UNCOOPERATIVELY

AND BELIGERANTLY DURING THE COURSE OF THE INVESTIGATION, ARREST, AND CUSTODY OF THE DEFENDANT AND AFTER THE DEFENDANT TOLD THE LAW ENFORCEMENT OFFICERS WOULD "HAVE A HARD TIME" EXECUTING A WARRANT WHEN PRESENTED WITH A SEARCH WARRANT AUTHORIZING AN INVOLUNTARY BLOOD DRAW

Answered by the trial court: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Because resolution of this appeal requires the application of well-established Fourth Amendment standards on reasonable use of force during the execution of a search warrant, and because the parties' briefs should adequately set forth the facts and the relevant law, the State does not request oral argument or publication.

STATEMENT OF THE CASE AND FACTS

On October 4th, 2018 City of Columbus Police Department Officer Kyle Boschert observed a vehicle travelling at seventy-seven miles per hour in an area where the speed limit was twenty-five miles per hour. R. 36 at 5. Officer Boschert stopped the speeding vehicle and found the driver to be William Bonfiglio, the Defendant-Appellant. R. 36 at 5.

In addition to speeding, Mr. Bonfiglio had bloodshot eyes and the odor of intoxicants coming from his breath. R. 36 at 5. Officer Boschert administered an horizontal gaze nystagmus test and a preliminary breath test (the result of which was a reading of .118) to Mr. Bonfiglio. R. 36 at 6.

Officer Boschert searched Mr. Bonfiglio and found an inhaler in Mr. Bonfiglio's pocket. R. at 7. When Officer

Boschert pulled the inhaler out of Mr. Bonfiglio's pocket, Mr. Bonfiglio complained of breathing problems and stated he needed the inhaler. R. 36 at 7-8. Prior to that moment, Mr. Bonfiglio showed no signs of experiencing any medical emergency—and even completed a preliminary breath test without apparent difficulty. R. 36 at 6-8. Additionally, at that time, Mr. Bonfiglio's emotional demeanor went from calm to belligerent. R. 36 at 9.

Officer Boschert promptly called EMS to the location of the traffic stop. R. 36 at 8. EMS personnel gave Mr. Bonfiglio his inhaler and then "cleared without transport," which Officer Boschert understood as a clear indication that Mr. Bonfiglio was okay. R. 36 at 8. Mr. Bonfiglio calmed down. R. 36 at 9-10.

However, when Officer Boschert tried to help Mr. Bonfiglio into the back of a squad car, Mr. Bonfiglio's purported breathing problems returned. R. 36 at 10. Officer Boschert took Mr. Bonfiglio to the nearest hospital—Columbus Hospital and once again stood by as medical professionals examined and "cleared" Mr. Bonfiglio. R. 36 at 11.

By that time, Mr. Bonfiglio's belligerence had returned as well. R. 36 at 11. Mr. Bonfiglio swore, disrupted other rooms, and made sure that the interaction was as hard as possible. R. 36 at 11-12. Mr. Bonfiglio remained silent after being read the informing the accused form. R. 36 at 12. Officer Boschert then applied for, and received, a search warrant that authorized a seizure of the Defendant's blood.

R. 36 at 12.

Officer Boschert presented the search warrant to Mr. Bonfiglio. R. 36 at 12-13. Mr. Bonfiglio replied "You're going to have a hard time doing that" or "You are going to have difficulty getting that" R. 36 at 12, 13, 23.

Officer Boschert understood Mr. Bonfiglio's statement as an expressed intention to resist the blood draw. R. 36 at 13. Therefore, Officer Boschert placed both of his arms on Mr. Bonfiglio's right arm to hold Mr. Bonfiglio's right arm against the bed. R. 36 at 13. Officer Boschert pressed down "[j]ust hard enough to hold [Mr. Bonfiglio's] arm down." R. 36 at 13.

Officer Boschert observed another officer (Officer Vogel) similarly hold Mr. Bonfiglio's left arm against the bed. R. 36 at 13. Neither Officer Boschert nor Officer Vogel caused Mr. Bonfiglio any pain or injury. R. 36 at 13-14, 40.

Officer Boschert and Officer Vogel maintained their hold of Mr. Bonfiglio's arms for a "short time" until Mr. Bonfiglio indicated that he would cooperate with the blood draw. R. 13-14, 41. When Mr. Bonfiglio stated that he would comply with the blood draw, Officer Boschert and Officer Vogel stopped holding Mr. Bonfiglio's arms down. R. 36 at 14.

Thereafter, Mr. Bonfiglio cooperated with the blood draw without any further application of force by either Officer Boschert or Officer Vogel. R. 36 at 14. Neither Officer Vogel nor Officer Boschert were physically touching Mr. Bonfiglio when a nurse drew Mr. Bonfiglio's blood. R. 36 at

14, 27.

Procedural Status of the Case Leading to the Appeal

The State filed a criminal complaint alleging that Mr. Bonfiglio Operated a Motor Vehicle While Intoxicated as a Second Offense. R. 3. Mr. Bonfiglio moved to suppress "all evidence obtained from a blood draw pursuant to a search warrant" on the grounds that the escort hold employed by law enforcement officers "was clearly not reasonable force." R. 17 at 1.

The circuit court held an evidentiary hearing on to address the Mr. Bonfiglio's Motion to Suppress on November 22, 2019. R. 36. After taking testimony from the State's only witness (Officer Boschert) and offering the Defendant an opportunity to call witnesses (which the Defense declined), the Court denied the Defendant's motion to suppress. R. 36 at 29, 41. Mr. Bonfiglio now appeals the Circuit Court's denial of his motion to suppress evidence obtained from the blood draw.

Mr. Bonfiglio also filed a motion for reconsideration of the Circuit Court's denial of the suppression motion. R. 19 However, Mr. Bonfiglio does not, apparently, appeal from the Court's denial of the motion for reconsideration.

STANDARD OF REVIEW

A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed de novo. State v. Popp, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471.

When reviewing the circuit court's findings of fact for clear error, this court should not examine the record for evidence to support a finding of fact that the circuit court did not make, but should look for evidence to support a finding of fact that the circuit court did make. Hawes v. Germantown Mut. Ins. Co., 103 Wis. 2d 524, 543, 309 N.W.2d 356, (Ct. App. 1981).

Finally, if the circuit court failed to make an express finding, this court may assume that the circuit court made implicit findings that support its decision. State v. Echols, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993).

ARGUMENT

THE LAW ENFORCEMENT OFFICERS USED REASONABLE FORCE WHEN THEY USED AN "ESCORT HOLD" FOR A "SHORT" PERIOD OF TIME TO HOLD THE DEFENDANT'S ARMS DOWN AFTER THE DEFENDANT PREVIOUSLY BEHAVED UNCOOPERATIVELY AND TOLD LAW ENFORCEMENT OFFICERS THAT THEY WOULD HAVE A HARD TIME EXECUTING A SEARCH WARRANT THAT AUTHORIZED AN INVOLUNTARY BLOOD DRAW.

I. Officers Boschert and Vogel did not use "unreasonable" force in executing the search warrant that authorized an involuntary blood draw.

A. General Fourth Amendment Considerations

Mr. Bonfiglio argues that Officer Boschert and Officer Vogel violated his Fourth Amendment right to be free from unreasonable searches and seizures. Bonfiglio's Br. at 16.

"Whether a search and seizure pursuant to a warrant is constitutionally valid is a two-part inquiry. First, the Warrant Clause demands that all warrants be validly issued. Second, the Reasonableness Clause requires that warrants be reasonably executed." State v. Pinder, 2018 WI 106, ¶¶ 45-

46, 384 Wis. 2d 416, 450, 919 N.W.2d 568, 585.

"As in other Fourth Amendment contexts... the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

A law enforcement officer can constitutionally employ force in obtaining a blood sample so long as the force used was "objectively reasonable" in consideration of the facts and circumstances the officer faced. State v. Krause, 168 Wis. 2d 578, 484 N.W.2d 347 (1992).

B. State v. Krause: the closest case on point

In State v. Krause, the Court of Appeals set forth a list of factors it considered in deciding that police did not employ unreasonable force in obtaining an involuntary blood sample from a Defendant arrested for operating a motor vehicle while intoxicated. Krause, 168 Wis. 2d at 589. Because a Fourth Amendment "reasonableness" test is "not capable of precise definition or mechanical application", the list of factors considered by the Krause court, while highly probative, should not be considered as exhaustive. Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

The Krause Court explicitly considered the setting and

procedure used to draw the suspect's blood, the severity of the crime at issue, whether the suspect posed an immediate threat, whether the suspect actively resisted, whether the police refused the suspect's reasonable request for an alternative test, and the degree of the authority's need for the sample. Krause at 589. While not separately citing it as a factor in its analysis, the Krause court also considered the degree of force used by police. See, Krause at 590-591. In Krause, the Court determined that a blood draw in a hospital, by a medical technician, which was facilitated through police use of physical force to restrain a combative subject, was a reasonable procedure. Krause at 590.

1. Environment in which the blood was drawn

a. In Krause

First, the Krause court wrote that it "must consider, for example, whether the test was administered by medical personnel in a proper setting according to accepted medical procedures." Krause at 589. Because the suspect's blood was drawn in a medical facility according to accepted standards, this factor added to the reasonableness of the blood draw in Krause. Krause at 590.

b. In this case

In this case too, the Defendant's blood sample was drawn in a medical setting by a trained medical professional. R. 36 at 14. So, just as was true in Krause, this factor strengthens the justification for Officer

Boschert's and Officer Vogel's use of force. Krause at 590.

2. Severity of the crime

a. In Krause

Next, the Court determined that because the State has a substantial interest in apprehending, punishing, and deterring drunk drivers, the fact that the Defendant was accused of a drunk driving offense weighed "most heavily" in favor of the officer's use of force in obtaining a sample of the Defendant's blood. Krause at 590. It is worth emphasizing that the Court did not appear to factor the number of times the Krause had previously been convicted of drunk driving. Id. That is, when assessing the severity of the crime, the Krause court focused on the nature of the offense, not the potential criminal penalties that could be imposed for that offense. Id.

b. In this case

As was true in Krause, the fact that Mr. Bonfiglio was suspected of operating a motor vehicle while intoxicated weighs "most heavily" in favor of Officer Boschert and Officer Vogel's use of force to obtain an evidentiary sample of Mr. Bonfiglio's blood. Krause at 590. Mr. Bonfiglio argues that because he was charged with OWI 2nd, the crime at issue in this case is less severe than the crime alleged in Krause. Bonfiglio's Br. at 23. But that is a distinction that the Krause court did not draw. On the contrary, when considering the severity of the crime, the Krause court emphasized the danger posed by drunk drivers,

not the penalties that a drunk driver could face as a repeat offender. Krause at 590. Under the standard used by the Krause court, there is no legally meaningful distinction between the severity of the crime alleged in Krause and the crime committed by Mr. Bonfiglio.

3. The threat posed by the Defendant, weighed against the force used by police

a. In Krause

In Krause, the Court next examined the Krause's conduct to determine whether or not the Defendant posed an immediate threat. Because the Defendant in Krause was kicking, spitting, and moving his arm (to prevent a technician from drawing blood), the Krause court held that police were justified in overcoming the Defendant's resistance by putting a pillowcase on the Defendant's head, tying the Defendant's feet down, and physically holding the Defendant's arms in place while a medical technician drew the blood sample. Krause at 585, 591. Additionally, the Court was satisfied that the use of force would have ceased if the Krause's resisting had ceased; therefore this factor weighed in favor of the officer's use of force. Krause at 591.

b. In this case

It is true that Mr. Bonfiglio's resistance was relatively minor. However, against that low level of resistance, police applied commensurately limited force. Mr. Bonfiglio expressed a thinly veiled threat to physically

resist an effort to draw his blood sample. R. 36 at 13. Police reacted to that threat by holding Mr. Bonfiglio's arms down "just hard enough to hold [the arm] down." R. 36 13. The force used by police did not cause Mr. Bonfiglio pain or injury. R. 36 at 13, 40. Mr. Bonfiglio reacted to the escort hold by indicating that he would comply with the blood draw. R. 36 at 14. Officer Boschert and Officer Vogel then released Mr. Bonfiglio's arms. R. 36 at 14, 27.

The use of force in this case is clearly more reasonable than the use of force in Krause. In State v. Krause the court could only express confidence that "the force would have ceased if Krause's resisting had ceased." Krause at 592. The court in this case can express the same principle as a certainty: Police stopped using force when Mr. Bonfiglio's resistance ended. R. 36 at 14.

4. Defendant's request for alternative test (if any)

a. In Krause

Next, the Krause court held that because the Defendant had refused all tests, and there was no evidence Krause made a request for an alternative test, this factor weighed in favor of finding the use of force to be "reasonable." Krause at 592.

b. In this case

There is no indication that Mr. Bonfiglio requested an reasonable alternative to the blood draw. Therefore, this factor tends to justify the force used by Officer Boschert and Officer Vogel to effectuate the blood draw. Krause, 168

Wis. 2d at 592.

5. The State's need for the blood evidence

a. In Krause

Finally, in examining the State's need for evidence, the Krause court again considered the fact Krause was accused of operating a motor vehicle while intoxicated. Krause at 592. Because the court considered scientific evidence of the Defendant's BAC to be essential to the State's ability to secure a conviction, the State was justified in using such force as was needed to overcome the Defendant's resistance to obtain the blood sample. Krause at 592.

b. In this case

Mr. Bonfiglio does not argue that the State had no need for the evidentiary sample of his blood. Such an argument would be meritless. "[A]ccurate, scientific evidence of BAC is needed to secure OWI convictions so that those who drive while intoxicated will be punished and others will be deterred from doing so." Krause 168 Wis. 2d at 592. Thus, this final factor again tends to show that the escort hold used by Officer Boschert and Officer Vogel was reasonable under the circumstances.

II. Mr. Bonfiglio's brief fails to engage with the pertinent facts of the record.

Mr. Bonfiglio makes two fundamental errors in setting forth what he perceives to be the facts of the case. First, Mr. Bonfiglio misconstrues the circuit court's drawing

reasonable inferences from the testimony as "burden shifting". Bonfiglio's Br. at 26. Second and relatedly, Mr. Bonfiglio attempts to recast the facts of the case by independently drawing his desired inferences from the uncontradicted testimony of Kyle Boschert. In this same vein, and most egregiously, Mr. Bonfiglio asserts facts that are directly contrary to the circuit court's findings of fact.

A. The Circuit Court did not impermissibly shift the burden of proof.

Mr. Bonfiglio argues that the circuit court engaged in impermissible burden shifting. Bonfiglio's Br. at 26. This Court should disregard this argument as undeveloped. See, State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633, (Ct. App. 1992). None of the cases cited by Mr. Bonfiglio appear to have anything to do with the process by which a circuit court may use to find facts¹.

¹ In contending that the circuit court engaged in "burden-shifting" Mr. Bonfiglio cites to United States v. Ramirez, 523 U.S. 65, 72 (1998) (a case in which the U.S. Supreme Court found the execution of a "no knock" search warrant to be reasonable. Page 72 of the opinion appears to focus on the application of 18 U.S.C. § 3109); State v. Eason, 234 Wis. 2d 396, 610 N.W. 2d 208 (2000) (sic) (a the Court of Appeals case which was later reversed by the Wisconsin Supreme Court in State v. Eason, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. In general, the case focuses whether a "no knock" search warrant was properly authorized and whether evidence should be suppressed after the warrant was authorized without a sufficient basis.); and State v. Stevens, 213 Wis. 2d 324 (Ct. App. 1997) (sic) (a Court of Appeals that held evidence should be suppressed when police knocked down a door without allowing sufficient time for the owner to open the door after announcing their presence). Bonfiglio's. Br. at 26.

To the extent Mr. Bonfiglio makes a recognizable argument, it is misguided. Mr. Bonfiglio fails to recognize that “[i]nferences and presumptions are a staple of our adversary system of factfinding.” Cty. Court of Ulster Cty., N. Y. v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979) (emphasis added). “It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” State v. Poellinger, 153 Wis. 2d 493, 506, 451 N.W.2d 752, 757 (1990).

At the same time, “the court cannot disregard uncontradicted testimony as to the existence of some fact or the happening of some event in the absence of something in the case which discredits the testimony or renders it against reasonable probabilities.” Ashraf v. Ashraf, 134 Wis. 2d 336, 345, 397 N.W.2d 128, 132 (Ct. App. 1986).

B. Mr. Bonfiglio’s asserts facts that are contrary to the circuit court’s findings of fact.

1. The blood draw was not “forcibly done.”

In this case, the Circuit Court specifically found “that at the time the blood was drawn, Mr. Bonfiglio was not being held by the officers.” R. 36 at 31. Yet, in his brief to this court, Mr. Bonfiglio asserts that “the blood withdrawal was forcibly done” and “the officers placed Mr. Bonfiglio in a forcible escort hold, and the blood withdrawal was then forcibly done.” Bonfiglio’s Br. at 8,

10.

The closest Mr. Bonfiglio's brief comes to acknowledging that police officers were not exerting physical force upon him at the time of the actual blood draw is when he admits that he was "unable to move *until* it was understood that he would comply." Bonfiglio's Br. at 7 (emphasis added).

2. Police officers used on escort hold on Mr. Bonfiglio for a "short" period of time.

The Defendant asserts that the law enforcement officers employed the escort hold for an "unknown" period of time. Bonfiglio's Br. at 7. The Defendant seems to argue that a failure to establish the time elapsed, down to the second, must lead to the conclusion that the length of the hold was unreasonably long. Bonfiglio's Br. at 26.

But, the circuit court found that Officer Boschert and Officer Vogel each "grabbed an arm for what [the court] perceive[d] to be a *short period of time*." R. 36 at 41 (emphasis added).

This factual finding is eminently reasonable, in light of the uncontradicted testimony of Kyle Boschert:

Q After -- after you began holding his arm down, how did he react to that?

A He said he would comply.

Q When he said that he would comply, what did you do?

A We released. We released his arms.

Q You and Officer Vogel both.

A Correct.

R.37 at 14

3. Mr. Bonfiglio experienced no pain from, and was not injured by, the escort hold.

In similar fashion, Mr. Bonfiglio contends that the record does not establish “whether as a result [of the officers’ actions] Mr. Bonfiglio was injured.” Bonfiglio’s Br. at 26. Simply put, that is not a fair characterization of the facts found by, and relied on, by the circuit court.

The circuit court explained that there was nothing in the record to “indicate [the escort hold]... caused Mr. Bonfiglio some type of injury.” R. 36 at 40. The State contends that the court’s explanation of its ruling contains an implicit (reasonable) conclusion that Mr. Bonfiglio was not injured. R. 36 at 40. That finding of fact is not “clearly erroneous” based on the evidence that the court heard during the hearing. State v. Popp, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855 N.W. 2d 471. Indeed, when one considers the fact that Mr. Bonfiglio never alleged that the escort hold caused him injury or pain, the circuit court’s implicit finding that Mr. Bonfiglio did not experience injury or pain is all the more reasonable. See, R. 17.

4. Mr. Bonfiglio engaged in uncooperative behavior

Nor is it true, as Mr. Bonfiglio argues that “[t]here was no evidence adduced to suggest that [Mr. Bonfiglio] was even mildly resistant on scene, in the squad car or in the hospital.” Bonfiglio’s Br. at 23. To make this assertion,

the Defense blithely ignores Mr. Boschert's testimony that:

- Mr. Bonfiglio was upset, belligerent, and swearing when he first started complaining of breathing problems. R. 36 at 9.
- Mr. Bonfiglio was upset and belligerent after being cleared by medical staff at the Columbus Hospital. R. 36 at 11.
- At Columbus Hospital, Mr. Bonfiglio made Officer Boschert's custody of Mr. Bonfiglio as hard as possible by swearing and disrupting other rooms. R. 36 at 11-12.
- Mr. Bonfiglio stated "You're going to have a hard time doing that" when presented with a search warrant authorizing an involuntary blood draw. R. 12, 13.
- Mr. Boschert's (reasonable) conclusion that Mr. Bonfiglio's purported breathing problems were a ruse intended to delay and disrupt the OWI investigation. R. 36 at 26-27.

And, again, Mr. Bonfiglio's "no evidence of resistance" argument is contrary to the circuit court's findings of fact. In denying Mr. Bonfiglio's suppression motion below, the circuit court implicitly credited Mr. Boschert's testimony that described Mr. Bonfiglio's belligerence and profanity by acknowledging that Mr. Boschert's testimony was "unchallenged." R. 36 at 38. The Court further explained that even if it were to hypothetically cast that evidence in

the light most favorable to Mr. Bonfiglio, the extremely limited use of force would be justified. R. 36 at 38.

Ultimately, the Circuit Court described Mr. Bonfiglio's conduct as "being cooperative and then being uncooperative, and back and forth, and there's no real rhyme nor reason to it." R. 36 at 38.

Mr. Bonfiglio makes only conclusory contentions that the circuit court's findings of fact were clearly erroneous. Bonfiglio's Br. at 26. Despite Mr. Bonfiglio's dissatisfaction with them, the facts as actually found by the circuit court doom his appeal.

CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to reject Mr. Bonfiglio's appeal and affirm the order of the circuit court.

Dated this 2nd Day of July, 2020.

Respectfully submitted,

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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:

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 20 pages.

Dated: July 2, 2020.

Signed,

Jordan Lippert
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