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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2020 AP 188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM LAWRENCE BONFIGLIO,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully Submitted,
WILLIAM LAWRENCE BONFIGLIO,
Defendant-Appellant.

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I. The State misapplies Krause and skews the Court's rationale to attempt to justify the use of unreasonable force.

In ***State v. Krause***, the Court went through the necessary factors to determine whether the force used to execute a blood draw was necessary.[1] The Court established that the proper test for a determination of excessive force is whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them.[2] The Court went on to highlight pertinent factors to consider when making a determination of reasonableness:

1. Severity of the crime at issue;
2. Whether the suspect posed an immediate threat to the safety of the officers or others; and
3. Whether the defendant actively resisted.[3]

In *Krause*, the Court determined that because the defendant posed an immediate threat by (1) kicking and spitting, (2) interfering with the officer's driving, (3) fighting and prohibiting the technician from drawing blood, and (4) spitting at officers while flailing, even after a pillow was placed on his head to prevent such; the force used by restraining Krause was reasonable.[4] The Court

[1] 168 Wis. 2d 578 (1992).
[2] *Graham v. Connor*, 490 U.S. 386 (1989).
[3] See *Krause,* 168 Wis. 2d (1992).
[4] See *id.*

repeatedly highlighted that Krause posed a danger to the officers, the medical personnel, as well as himself.[5] The Court also established that it still had to consider whether Krause actively resisted the blood draw. The Court concluded that given Krause's behavior during the entirety of the interaction with officers and medical personnel, the force used to restrain Krause was reasonable.[6]

Conversely, the State proffered no such evidence establishing the need for forcible restraint in Mr. Bonfiglio's case. There was neither an immediate threat to officers nor was there physical resistance at any time throughout officers' encounter with Mr. Bonfiglio. Rather, the State concedes: "It is true that Mr. Bonfiglio's resistance was relatively minor. However, against the low level of resistance police applied commensurately limited force.[7]"

The State glossed over the officer's justification for the force used-- Mr. Bonfiglio's statement which the officer did not seek to clarify. The facts established at the hearing were that when the nurse and officers identified from which arm Mr. Bonfiglio's blood would be taken, Mr. Bonfiglio stated that they would have a hard time getting the blood from that arm/him.[8] Subsequently, without clarification of his statement, the officers placed Mr. Bonfiglio in a restraining hold.[9] He was held in this position, until it was understood he would comply; two officers held each respective arm as a nurse stood by with a needle preparing to puncture the very arm

[5] See *id*.
[6] See *id.*
[7] Respondent's Brief at 12.
[8] R.36 at 23, 24.
[9] Id.

that Mr. Bonfiglio informed officers would be difficult from which to draw blood. Subsequently, the blood was seized.[10]

The State seeks to portray the sole statement by Bonfiglio as a "thinly veiled threat to physically resist an effort to draw his blood sample.[11]" This is simply baseless self-serving conjecture alluded to by a fledgling officer, who lacked experience and was discharged due to failing field training.[12]

Not only was there an insufficient showing to justify force, but the former officer conceded that Mr. Bonfiglio never clearly conveyed an intention to resist.[13] What the State fails to acknowledge is *Krause* establishes the principle that force is reasonable when it is required based upon the facts and circumstances—force is unreasonable if it not clearly necessary.[14] Force cannot be determined to be necessary based upon speculation and a lack of articulable facts.[15]

In the case at bar, it is an untrained former officer that surmised he could use more than regular force to take Mr. Bonfiglio's blood. His subjective conjecture does not take the place of objective evidence. Further, Krause's case was a higher level OWI (fourth offense), making Mr. Bonfiglio's case less severe and even less meriting of force.[16] There was no reliable evidence adduced to suggest that he was

[10] R.36 at 23.
[11] Respondent's Brief at 12-13.
[12] R.36 at 4, 15.
[13] R.36 at 23.
[14] See *State v. Krause*, 168 Wis. 2d (1992).
[15] *Id.*
[16] *Id.*

even mildly resistant on-scene, in the squad car or in the hospital.[17] Further, it is uncontroverted that at no point did he ever 'actively' resist.[18]

However, the State seeks to forge a new standard: the ability to employ 'a little' force even when force is objectively unreasonable.[19] The *Krause* Court never alluded to such a standard. In *Krause*, the Court, based on the facts clearly established at the hearing, stated "the force would have ceased if Krause's resisting had ceased.[20]" Problematically, the State asserts, "The court in this case can express the same principle as a certainty: Police stopped using force when Mr. Bonfiglio's resistance ended.[21]" This assertion is erroneous for two reasons (1) unlike *Krause*, there were no objective facts proffered at the hearing that justified the use of force and (2) there were no facts adduced at the hearing to show that Bonfiglio resisted.[22] Therefore, Mr. Bonfiglio's case is quite dissimilar from *Krause*.

All factors the *Krause* Court established to weigh when determining whether force is excessive or reasonable under the circumstances when applied to this case weigh against the use of any force being necessary or reasonable to attain a blood draw. Individually, all factors support the determination that the force used with Bonfiglio was unreasonable; cumulatively, that determination is patent. The State's implicit suggestion that this Court should use a different standard is unwarranted.

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[17] See *id.*
[18] R.36 at 23-24.
[19] See Respondent's Brief.
[20] *Krause* at 592.
[21] Respondent's Brief p.13.
[22] See R.36 at 23-24.

II. The Court did shift the burden of proof onto Bonfiglio to prove unreasonableness of the force used to gain his compliance.

The State contends that the Court did not engage in burden shifting.[23] What the State ignores is what the circuit court judge stated:

> And the testimony that the two officers at some point in the hospital, one on each side, grabbed one of Mr. Bonfiglio's arms and held him—We don't have any testimony on how long this hold was for, whether it was a mere 15 seconds, five seconds, three minutes. I don't know. But we don't have anything with that, nor is there anything to indicate it unreasonably or unduly caused Mr. Bonfiglio some type of injury.[24]

The court relied on a few factors in ruling in favor of the State: the fact that the State had a warrant, that Bonfiglio presented no testimony evidence of injuries and that the defense did not establish how long the restraining hold lasted.[25] Thus, the court essentially determined the burden was on the defense to show the force was unreasonable and not upon the State to show it was reasonable.[26]

Further, the court stated, "I don't know" regarding a paucity of facts shown during the hearing.[27] An inference is a deduction—bringing or drawing of one thing from another.[28] By its very denotation, one cannot infer when there is an unknown to draw the inference from. Therefore, Bonfiglio contends that rather than inferring the court simply resolved omissions against the defense.[29]

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[23] Respondent Brief p.15.
[24] R.36 at 40.
[25] R.36 at 37-41.
[26] See R.36 at 40.
[27] Id.
[28] Merriam Webster's Dictionary 20th Century, Unabridged, 2nd Edition 1964.
[29] See R.36 at 40.

III. The State mistakenly asserts that Bonfiglio misstates the facts with regard to belligerence.

The State misunderstands Mr. Bonfiglio's argument. While the State's sole witness, former Officer Boschert, testified that from his recollection Mr. Bonfiglio was resistant, this recollection was inconsistent with what was in his report and how he was trained and tended to undermine the reliability of his testimony on the stand. The facts were established at the hearing; it is up to this Court to determine whether those facts justified the force here. The officer's conclusions are irrelevant.

The trial court dismissed the fact that former Officer Boschert lacked training, that he was not able to ever become a real officer, and that his report noted no belligerent conduct or physically-resistant behavior.

Finally, he could not speak to anything that did or did not occur in the room with Officer Vogel before the forcible blood draw was conducted.[30] Lastly, the court ignored the fact he testified inconsistently with his report, which weighs against his reliability and credibility. This was the State's sole witness.[31]

> **Q:** … [y]ou had been employed with the City of Columbus Police Department; is that correct?
>
> **A:** Correct.
>
> **Q:** Okay. And that was between May to November?
>
> **A:** Correct.
>
> **Q:** And you stated that you are no longer with them because you didn't—was it complete FTO training?

[30] *Id.*
[31] R.36 at 29.

A: Didn't pass, complete, yeah, FTO training…

Q: Okay. And in the course of your training, you were taught how to write reports?

A: Yes, correct.

Q: And you did write a report about this incident?

A: Yes, correct.

Q: … Did you take field notes while this incident was occurring?

A: I can't recall that…

A: Probably, yes.

Q: Okay. And then you base your report off the notes you take on scene?

A: Yes…

Q: Okay. And you do that because you rely on those reports as well as the state does when they – if they choose to issue a charge?

A: Correct.

Q: Okay. And you wrote that report closer in time to the incident than today?

A: Oh, definitely…

Q: Did you put in your report when you wrote it that throughout your interactions with him, Mr. Bonfiglio was repeatedly swearing at you?

A: In the report, I do not believe so.

Q: Okay. And again, that report was put closer in time to when this incident occurred, right?

A: Correct.[32]

Former officer Boschert testified he is no longer an officer because he could not complete/pass his field training.[33] He was an officer for only approximately five

[32] R. 36 at 15-17.
[33] *Id.*

months. This has a direct bearing upon his conclusions, perceptions and actions taken on that day.[34] This officer should not be deemed to be sufficiently experienced to determine that force may be used to extract blood from an arrestee.[35] Moreover, Officer Vogel, who was with Mr. Bonfiglio while former officer Boschert was absent at the hospital, was never called to establish why he used force as well. The State failed to meet this burden with respect to this officer's use of force.[36]

The State is correct that "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.[37]" In Mr. Bonfiglio's case, there was uncontradicted testimony by the former officer that based upon his recollection, Bonfiglio was belligerent.[38] However, what the State fails to apply is the rest of the court's rationale—"something in the case which discredits the testimony.[39]" As was established at the hearing, this officer who had been in that vocation for only five months was trained to use field notes to create reports closer in time to the event because prosecutors, courts and others rely on them.[40] In this case, he could not recall whether he had field notes. Much more problematic is that his report is devoid of any facts or

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Ashraf v. Ashraf*, 134 Wis. 2d 336, 397 N.W.2d 128, 132 (Ct. App. 1986).
[38] R.36.
[39] *Ashraf*, 134 Wis. 2d 336.
[40] R.36 at 15-17.

assertions that Bonfiglio was in any way belligerent.[41] It was also established that he was testifying at a time much further removed than when his report was drafted and therefore solely (and conveniently) only relying on his memory at the time of the suppression hearing.[42] He offered no reason as to why his report was devoid of any assertions that Bonfiglio was belligerent.[43] This is not a seasoned officer who routinely testifies and is trained to recall facts and write reports and may from time to time excise information; rather, this is a fledgling officer—a fledgling officer who was discharged five months later cannot be relied upon for the court's analysis.[44] All of this bears directly upon his reliability and credibility and thus negates any inference the State wishes to draw solely based on testimony that is inconsistent with this discharged officer's report. Therefore, as the caselaw has directed, a number of things occurred that discredited his testimony:

1. Officer Boschert failed to follow his training in how to write reports
2. his report said nothing of belligerence by Bonfiglio
3. his report was inconsistent with his testimony
4. he rendered no reason as to the inconsistency
5. he was discharged due to an inability to pass field training[45]

There is no way a court could rely on the testimony of this particular officer with nothing more. The defense sufficiently delineated several reasons as to why his

[41] See *id.*
[42] See *id.*
[43] See *id.*
[44] See *id.*
[45] R.36. at 15-17.

memory of belligerence was unreliable and could not justify the force used to garner the acquiescence of Bonfiglio to the blood draw. Furthermore, the State cites no authority as to how an assertion of verbal belligerence, albeit tenuous, justifies the use of physical force.[46]

Lastly, the State failed to present the one reliable witness: Officer Vogel, who may have been able to testify to any suggested belligerence of Mr. Bonfiglio before the use of what Bonfiglio contends was unreasonable force.

> **Q:** Okay. And according to your report, Mr. Bonfiglio was wheeled in while he's in the hospital, in a wheelchair; is that correct?
>
> **A:** Correct.
>
> **Q:** Okay. And then eventually you get to the room where you intend to have the blood draw done; is that right?
>
> **A:** Correct.
>
> **Q:** Okay. And is it you or Officer -- I don't want to misstate his name. Is it Vogel?
>
> **A:** Correct.
>
> **Q:** Is it you or Officer Vogel that obtains the telephonic warrant?
>
> **A:** It was me…
>
> **Q:** Okay. And so, there was a period of time where you were not with Mr. Bonfiglio. He was left with Officer Vogel.
>
> **A:** Correct.
>
> **Q:** Okay.
>
> **A:** Because, unfortunately, the -- we were supposed to be in hospital room 7, but we were put in a different one because somebody else was in there. So, I had to leave the room because they only have the search warrant on one computer.[47]

[46] See Respondent's Brief.
[47] R.36 at 21-22.

No reason was given by the prosecutor for why Officer Vogel who was left alone with Bonfiglio for a period of time did not testify.[48] No evidence was presented as to what Officer Vogel, the only officer in the room with Bonfiglio, observed when he was with Bonfiglio in the room right before force was used to compel the blood draw.[49] Summarily, no reason was given as to why Officer Vogel did not testify. Nevertheless, the court resolved the inconsistencies, paucity of evidence, and unreliable testimony against Bonfiglio.

IV. The State concedes that force was used to gain the compliance of Bonfiglio for the blood draw, but contrary to its own position contends that the blood draw was not forcibly done.

The State agrees that force was used.[50] Further, the State tends to argue at length that the force used was minimal.[51] The purpose of the force used is made evident by former Officer Boschert's testimony:

> **Q:** So the escort hold was to obtain the blood, correct?
>
> **A:** Correct.[52]

The State contends that because the hold ceased before the blood was drawn then the blood was not forcibly taken.[53] The State cites no authority for this contention that contemporaneity of force is necessary to establish that a blood draw was done

[48] See R.36.
[49] Id.
[50] See Respondent's Brief.
[51] See Respondent's Brief p.13.
[52] R.36 at 15.
[53] Respondent's Brief p.17.

by force. Moreover, if that is the State's position, its entire argument regarding Bonfiglio's belligerence is unnecessary as this unfounded and purported belligerence was proffered to establish a justification for the force used to compel the blood draw.

Bonfiglio contends that the force used to compel the blood draw was unreasonable. Moreover, if neither side contends that force was used, and the testimony is that force was used to compel acquiescence to the blood draw, then the *sequitur* is that the blood draw was forcibly done. It was established at the hearing that Mr. Bonfiglio reacted to the escort hold by indicating that he would comply with the blood draw.[54] Therefore, force was used to execute the blood draw.

[54] R.36 at 14.

CONCLUSION

For the reasons in this and Bonfiglio's original brief, it is respectfully requested this Court reverse the circuit court's orders denying the suppression motion and remand the matter for further proceedings. Had the Court granted the suppression motion, Bonfiglio would not have pled guilty.

Dated at Madison, Wisconsin, July 30, 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:

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