COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1342-CR **Cir. Ct. No. 2008CF122**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES RALPH WHITWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 VERGERONT, J. James Ralph Whitwell appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

eighth offense, in violation of WIS. STAT. § 346.63(1)(b) (2009-10),[1] and an order denying his motion for postconviction relief. Whitwell contends the warrantless blood draw violated his constitutional right to be free from unreasonable searches, and he challenges the circuit court's ruling on two independent grounds. First, he asserts, the circuit court's factual finding that he did not present a medical basis for his objection at the time of the blood draw is clearly erroneous. Second, he asserts, even if the circuit court correctly found he did not state a medical basis for his objection at the time of the blood draw, his objection was nevertheless objectively reasonable because he demonstrated at the suppression hearing that he did have a medical basis for his objection.

¶2 We disagree with Whitwell on both points. We conclude that the circuit court's factual finding on what Whitwell said at the time of the draw is not clearly erroneous. We also conclude that his objection was not objectively reasonable because he did not provide a medical basis for his condition at the time of the blood draw. Accordingly, we affirm.

BACKGROUND

¶3 Whitwell was arrested by Deputy Cliff Coulthard of the Douglas County Sheriff's Department for operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). Deputy Coulthard transported Whitwell to a hospital for a blood draw. Whitwell objected to the blood draw, and it was performed over his objection. The result showed his blood alcohol level was .149 grams of alcohol per milliliter of blood.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Whitwell was charged with operating with a prohibited blood alcohol concentration, eighth offense, and operating while intoxicated, eighth offense. He moved to suppress the results of the blood draw on the ground that the nonconsensual, warrantless blood draw was unconstitutional because he presented a reasonable objection to the blood draw.

¶5 The evidence at the hearing on the motion to suppress was conflicting, and we discuss it in more detail later in this opinion. We give a brief summary here.

¶6 Whitwell testified that his objection to the blood draw was based on a medical condition that made blood draws dangerous for him absent certain precautions. He testified that he informed Deputy Coulthard and Linda Hoff, the laboratory technician who performed the blood draw, that he had a fear of needles, that he needed to see a doctor before the blood draw could be safely performed, and that certain procedures needed to be followed or antibiotics administered before the blood draw could occur, none of which occurred.

¶7 Deputy Coulthard testified that he remembered that Whitwell stated he did not like needles, but he did not recall that Whitwell stated that medical problems might ensue if Whitwell's blood was drawn. Hoff testified that no one presented to her for a blood draw had ever reported having a medical condition requiring specific procedures to be followed prior to a blood draw.

¶8 Following this hearing, the court issued a written decision denying Whitwell's motion to suppress. The court found that Whitwell objected to the blood draw on the ground that he feared needles, not on the ground that he had a medical condition requiring special procedures for a blood draw. The court concluded that Whitwell's objection to the blood draw because of a fear of

needles, without further explanation, was not a reasonable objection to the blood draw. Because of its conclusion that Whitwell did not present a reasonable objection to the blood draw at the time of the draw, the court held that the blood draw was constitutional.

¶9 After a jury trial Whitwell was convicted of operating with a prohibited blood alcohol concentration of .02 or more, eighth offense, and acquitted of operating while intoxicated, eighth offense. Whitwell filed a postconviction motion seeking to overturn the conviction on the ground that the results of the blood draw should have been suppressed. The circuit court denied the motion.

DISCUSSION

¶10 On appeal Whitwell contends that the warrantless blood draw violated his right under the United States and Wisconsin Constitutions to be free from unreasonable searches. The circuit court therefore erred, he contends, in denying his pretrial and his postconviction motions to suppress the results of the blood draw. According to Whitwell, the circuit court erred in two ways. First, Whitwell asserts, the court's finding that he objected to the blood draw only on the ground that he was afraid of needles and did not give a medical basis for his objection is clearly erroneous. Second, Whitwell asserts, even if he did not state a medical basis for his objection at the time of the blood draw, his objection was nevertheless objectively reasonable because he demonstrated at the suppression hearing that he did have a medical basis for his objection.

¶11 The State responds that the circuit court's finding that Whitwell did not provide a medical basis for his objection at the time of the blood draw is supported by the record and is therefore not clearly erroneous. In addition, the

State responds that, based on the circuit court's findings, the circumstances of the blood draw come within the warrant exception for exigent circumstances, as articulated in ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶12 When we review a decision granting or denying the suppression of evidence on constitutional grounds, we affirm the circuit court's findings of historical fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). We review de novo whether the court correctly applied the relevant constitutional principles to the historical facts. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182 (citation omitted).

¶13 Both article I, section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution guarantee citizens the right to be free from "unreasonable searches." ***State v. Faust***, 2004 WI 99, ¶10, 274 Wis. 2d 183, 682 N.W.2d 371 (citation omitted). Accordingly, "[s]ubject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable." ***Id.***, ¶11. A governmental search based upon "exigent circumstances" is one of these exceptions. ***Id.***

¶14 In ***Bohling***, the court concluded that "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw." ***Bohling***, 173 Wis. 2d at 533. The court explained:

> [A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 533-34.

¶15 In this case only the fourth requirement is at issue: whether Whitwell presented a reasonable objection to the blood draw. For the reasons we explain below, we agree with the State that the circuit court's finding that Whitwell expressed only a fear of needles at the time of the blood draw is not clearly erroneous. We also agree with the circuit court and the State that Whitwell's objection was not reasonable because he provided no medical basis for his fear of needles at the time of his objection. In arriving at this conclusion, we reject Whitwell's argument that the reasonableness of his objection should be based on the evidence he presented at the suppression hearing.

¶16 We first address Whitwell's challenge to the court's fact finding. Whitwell contends that the court erred in not finding that, as he testified, he told both Deputy Coulthard and Hoff that certain procedures needed to be performed prior to the blood draw and that he needed to see a doctor before the blood draw. Whitwell asserts that the testimony of Deputy Coulthard and Hoff does not provide a basis for a contrary finding because neither testified that Whitwell did not make those statements. Rather, Whitwell asserts, they testified only that they did not remember him making those statements.

¶17 In support of this argument, Whitwell relies on ***Merco Distributing Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 267 N.W.2d 652 (1978). In that case, the supreme court concluded that the evidence was insufficient to support the circuit court's finding that an alarm company's negligence was a substantial factor in the burglary from the warehouse of one of its customers. ***Id.*** at 459. The supreme court reached this result because it determined that "there was no credible evidence upon which the trier of fact [could] base a reasoned

choice between the two possible inferences." ***Id.*** at 460. One possible inference was that, had the alarm company acted differently, the burglary would have been thwarted, and the other possible inference was that the burglary would have occurred anyway. ***Id.*** Thus, the supreme court stated, "any finding of causation would be in the realm of speculation and conjecture." ***Id.*** (citation omitted).

¶18 We do not agree with Whitwell that the deficiency in the evidence in ***Merco Distributing*** is present in this case. In ***Merco Distributing*** evidence regarding causation was missing. In contrast, the circuit court here was presented with credible evidence from which it could reasonably infer that Whitwell did not tell either Deputy Coulthard or Hoff that his objection to the blood draw was based on a medical condition.

¶19 The circuit court explicitly concluded that the testimony of Deputy Coulthard and Hoff was credible. This credible testimony included Deputy Coulthard's testimony that Whitwell told him that Whitwell did not like needles and therefore would not take the blood test. Deputy Coulthard also testified that he did not recall Whitwell making any statements that medical problems might ensue if Whitwell was given a blood draw. From this testimony a fact finder could reasonably infer, as the circuit court did here, that the deputy did not recall any statements from Whitwell about medical problems because Whitwell did not make any.

¶20 The same is true of Hoff's testimony. Hoff testified that she did not have a specific recollection of Whitwell being presented to her for a blood draw. However, she also testified that she had never been present during a blood draw where the person having their blood drawn asked to first see a doctor because of a specific medical condition. If that had occurred, she testified, she would have

taken action on such a statement and she would have remembered the occurrence. Based on this testimony, a fact finder could reasonably infer, as the circuit court did here, that Whitwell did not tell Hoff about a medical condition or ask to see a doctor. Moreover, the reasonableness of the inferences the court drew from the testimony of Deputy Coulthard and of Hoff is strengthened when their testimony is considered together.

¶21 In short, although Whitwell contends that he did mention his medical condition to both Deputy Coulthard and Hoff and did say he needed to see a doctor, the circuit court found Whitwell not credible and explained why. Whitwell presents arguments that, in essence, ask us to substitute our judgment of his credibility for that of the circuit court. However, assessing the credibility of witnesses is for the trier of fact; it is not the role of this court. *See* WIS. STAT. § 805.17(2); ***Fidelity & Deposit Co. v. First Nat'l Bank of Kenosha***, 98 Wis. 2d 474, 484-85, 297 N.W.2d 46 (Ct. App. 1980).

¶22 Accordingly, we conclude the circuit court's finding that Whitwell did not object to the blood draw on medical grounds is not clearly erroneous.

¶23 We next address Whitwell's argument that, even if he mentioned only his fear of needles at the time of the blood draw, and did not mention his medical condition or ask to see a doctor at that time, he still presented a "reasonable objection to the blood draw." *See* ***Bohling***, 173 Wis. 2d at 534. This

is so, according to Whitwell, because he did present evidence of his medical condition at the suppression hearing.[2]

¶24 Whitwell acknowledges that ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, and ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d 347 (Ct. App. 1992), both hold that expression of a fear of needles, in itself, is not a reasonable objection.[3] However, he asserts, both cases "appear to be premised on the fact that none of the defendants provided the court with a medical or religious basis to explain their fear." That is true; but neither case suggests that the court would have considered additional evidence presented at a suppression hearing explaining the basis of the defendant's fear of needles, even if the defendant did not identify the basis for his fear at the time of the proposed blood draw. Instead, the focus in both cases was on what the arrestee told the officer at

[2] In its decision on the postconviction motion, the circuit court assumed Whitwell was correct that he did not need to prove that he referred to his medical condition at the time of the blood draw, as long as he proved at a suppression hearing that he had a medical condition that made his objection reasonable. The court then concluded that the evidence Whitwell presented at the suppression hearing was not sufficient to prove that he had a medical condition that would have provided a reasonable basis for objecting to the blood draw. We do not address the adequacy of this evidence at the suppression hearing because we conclude the proper focus is on what Whitwell said at the time of the blood draw.

[3] In ***State v. Krause***, 168 Wis. 2d 578, 588, 484 N.W.2d 347 (Ct. App. 1992), the defendant's statements to the officer were that he "didn't believe in needles" and "didn't want AIDs." We stated that "[t]hese isolated comments do not establish that Krause is 'one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing' whose wishes the ***Schmerber*** court declined to address." ***Id.*** at 588 (citing ***Schmerber v. California***, 384 U.S. 757, 771 (1966)). Because we contrasted the statements made by Krause to "the few who [had] grounds of fear" referred to in ***Schmerber***, it may be unclear whether we were treating Krause's statements as the equivalent of a statement that he feared needles. However, ***State v. Krajewski***, 2002 WI 97, ¶¶49-53, 255 Wis. 2d 98, 648 N.W.2d 385, decided after ***Krause***, clearly holds that a defendant's statement to an officer that he or she has a fear of needles does not in itself provide a reasonable basis for an objection.

the time of the blood draw. *See* ***Krajewski*** 255 Wis. 2d 98, ¶¶49, 52; ***Krause***, 168 Wis. 2d at 588.

¶25 Indeed, part of the court's reasoning in ***Krajewski*** is inconsistent with the proposition that a defendant need not identify the basis for his or her fear of needles until the suppression hearing. The court in ***Krajewski*** concluded that a reasonable objection to a blood draw must be based on "a physical disability or disease unrelated to the use of alcohol [and other specified substances]," adopting the standard from WIS. STAT. § 343.305(9)(a)5.c. for refusal hearings.[4] ***Krajewski***, 255 Wis. 2d 98, ¶51. The court then explained that this standard "*will permit a different chemical test* for a person who shows that he or she is a hemophiliac or suffers from some other ailment that renders him or her unable to reasonably submit to a blood test." ***Id.***, ¶52 (emphasis added). If the basis for the defendant's fear of needles is not identified at the time the defendant objects to the blood draw, the officer does not know that he or she is to give the defendant a different test.

¶26 We do not agree with Whitwell that the ***Krajewski*** court's adoption of the standard from WIS. STAT. § 343.305(9)(a)5.c. supports the proposition that he may wait until the suppression hearing to identify the medical reasons for his objection. Whitwell asserts that, because the ***Krajewski*** court adopted this

[4] If a person arrested for violation of WIS. STAT. § 346.63(1) refuses to submit to the statutorily prescribed tests, the person may request a hearing at which issues relating to the propriety of the refusal are determined. WIS. STAT. § 343.305(3)-(5), (9). Section 343.305(9)(a)5.c. provides that one of the issues at a refusal hearing is:

> Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

standard and because supplemental information is permitted at refusal hearings, supplemental information is or should also be permitted at a suppression hearing to demonstrate that an objection to a blood draw is reasonable under ***Bohling***. Assuming without deciding that this is an accurate characterization of the scope of a refusal hearing, we see no basis in ***Krajewski*** for concluding that the court intended that Fourth Amendment challenges under ***Bohling*** would follow suit. The court's discussion in ***Krajewski*** referred only to § 343.305(9)(a)5.c., which, the court stated, "represents a valid standard to apply in situations outside the statute." ***Krajewski***, 255 Wis. 2d 98, ¶52. The court did not mention any other provision relating to refusal hearings. And, as we have already noted, the court's explanation for adopting this standard is inconsistent with allowing the defendant to wait until a suppression hearing to identify a medical reason for the objection.

¶27 In addition to the absence of support in either ***Krause*** or ***Krajewski*** for Whitwell's position, there is a more fundamental problem with his position: the evident illogic of determining the reasonableness of an officer's conduct based on information the officer did not have at the time. We note that the standard for determining whether the exigent circumstances exception to the warrant requirement applies expressly rests on the circumstances known to the officer at the time of the search: "whether a police officer[,] *under … circumstances known to the officer at the time*[,] reasonably believes that delay in procuring a warrant would … risk destruction of evidence …." ***Bohling***, 173 Wis. 2d at 538 (quotation omitted) (omissions in original) (emphasis added). We recognize that the fourth ***Bohling*** element goes not to the existence of exigent circumstances, but to the reasonableness of the police conduct given the exigent circumstances. *See* ***Krajewski***, 255 Wis. 2d 98, ¶45 (existence of exigent circumstances based upon the first two ***Bohling*** elements does not relieve the State from proving the third

and fourth elements, which go to reasonableness). However, the obvious question that Whitwell does not address is: why are circumstances unknown to an officer at the time of a search irrelevant in determining whether exigent circumstances exist but relevant in determining whether an officer acts reasonably in the exigent circumstances?

¶28 Whitwell contends in his reply brief that, if the reasonableness of an officer's conduct is based on the circumstances known to him or her at the time of the search, we must consider not only what the officer *actually* knew, but also what the officer "reasonably should have known." According to Whitwell, when an arrestee states that he or she has a fear of needles, a reasonable officer would ask the arrestee to explain the basis of that fear, and, if an officer orders a blood draw without doing that, the officer acts unreasonably. In support of this argument, Whitwell cites ***United States v. Leon***, 468 U.S. 897, 922 n.23 (1984). However ***Leon*** does not support Whitwell's argument. In ***Leon*** the Supreme Court concluded that the exclusionary rule does not bar the use of evidence obtained by officers acting in objectively reasonable reliance on a search warrant that is ultimately found invalid. ***Leon***, 468 U.S. at 922-23. This standard, however, does not include facts not known to the officer when assessing whether the officer's reliance was reasonable. Instead, the ***Leon*** standard looks to the facts known to the officer, and, for example, asks whether the warrant is so facially deficient "that the executing officers cannot reasonably presume it to be valid." ***Id.*** at 923 (citation omitted).

¶29 We also observe that the approach Whitwell advocates could result in the suppression of evidence even though the blood draw was reasonable at the time it occurred based on the circumstances then known to the officer. We agree with the State that this is inconsistent with the purpose of the exclusionary rule,

which "is to deter unlawful conduct … by barring the use of evidence unconstitutionally obtained." ***State v. Artic***, 2010 WI 83, ¶65, 327 Wis. 2d 392, 786 N.W.2d 430 (citation omitted).

¶30 In summary, we conclude Whitwell's objection was not a reasonable objection because, as found by the circuit court, he told Deputy Coulthard and Hoff only that he was afraid of needles and not that he had a medical condition that made a blood draw dangerous absent special procedures.

CONCLUSION

¶31 We affirm the judgment of conviction and the order denying Whitwell's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.