COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1573-CR **Cir. Ct. No. 2014CT357**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY A. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Bradley Anderson appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

second offense, and the circuit court's order denying his motion to suppress evidence that police obtained through a blood draw that Anderson argues was performed in violation of his constitutional rights. Specifically, Anderson argues that the State failed to carry its burden of showing that his consent to the blood draw was voluntary and that, even if Anderson did at first voluntarily give consent, he later withdrew that consent before his blood was drawn. For the following reasons, I reject both arguments and affirm.

BACKGROUND

¶2 Anderson moved to suppress the State's use at trial of the chemical test results from blood that was drawn from his body at the direction of police following his arrest on a charge of operating a motor vehicle while intoxicated. Anderson contended that "the blood test results stem from a warrantless, non-consensual, and unreasonable search and seizure of the defendant's blood," in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. Anderson argued that this was true for two reasons: the consent for the blood draw that Anderson gave to the arresting police officer was not voluntarily given, and, even if he had given voluntary consent, he later "unequivocally revoked that consent" to the officer before the blood draw.

¶3 Only the police officer who arrested Anderson and directed the blood draw testified at the suppression hearing, giving testimony that included the following. At the scene of the arrest, the officer read to Anderson from the Informing the Accused form and obtained Anderson's permission for an

evidentiary test of his blood.[2] At the scene during field sobriety testing, as well as after his arrest, Anderson was not cooperative and appeared to intentionally interrupt the officer "in an attempt to distract" the officer, "to get me off the task at hand." Anderson's "loud verbal conduct continued" during the officer's 20-minute drive in transporting Anderson to a hospital for purposes of a blood draw.

¶4 The officer further testified that, once they arrived at the hospital, Anderson was still "uncooperative." For example, when a phlebotomist appeared and asked Anderson to identify himself, Anderson replied, "You tell me who I am." Because Anderson was not cooperative and for safety reasons, because "things" might "escalat[e]," once at the hospital the officer decided not to remove the handcuffs that had been placed on Anderson at the time of his arrest. The officer testified that she thought that removing the handcuffs might "jeopardize my safety and the phlebotomist's safety[,] especially with the use of the needle … for the blood draw," and because the three of them were in close quarters, namely, a small "triage room."

¶5 The officer asked if the phlebotomist could perform the blood draw while Anderson's hands were handcuffed behind his back, and the phlebotomist replied that she could. This is what occurred. The officer did not understand Anderson ever to refuse the blood draw or to revoke his consent.

¶6 The circuit court denied the suppression motion based on the court's conclusions that Anderson voluntarily consented to the blood draw and that he did not later withdraw that consent. Before explaining those conclusions, the circuit

[2] The "Informing the Accused" form, promulgated by the Wisconsin Department of Transportation, incorporates the language in WIS. STAT. § 343.305(4) that the legislature requires police officers to read in requesting that a person submit to chemical testing.

court noted that it had looked at and listened "very closely" to police recordings that captured interactions between the officer and Anderson when the officer read to Anderson from the Informing the Accused form and Anderson consented to a blood draw, and also when Anderson and the officer were at the hospital.

¶7 Based on the hearing testimony and the recordings, the court made findings that included the following. At the hospital, Anderson "does talk about asking the cuffs to be taken off, and [the officer] wouldn't take the cuffs off. And that also comes up later on when they're taking the blood." Shortly before the blood draw, Anderson says that he "wants to see the needle poked into this arm, and he [tries] to say, I have the right to see the needle poked in my arm." The court made the following findings regarding Anderson's protests at the hospital:

> [Anderson's] refusal is not a refusal of the testing. What it really is, is [that Anderson] doesn't like the process and that's very clear to me. He doesn't like this idea that his arm is behind his back when they're taking his blood. I don't think that this is a refusal to tak[e] the test, he just didn't like that the hands are secured, he can't see the needle going into his arm, and that's very clear.
>
> He's talking about the manner in which the blood is being drawn, and I listened to that a couple different times, trying to see if there's a distinction about, does he assert, well, no, I'm refusing … the search, but he doesn't really say that, he just doesn't like the process.
>
> … I don't see it as a refusal at all. I see it as just basically [a] complaint about the process, and that doesn't [rise] to the level of refusal to the testing, ….

DISCUSSION

Consent

¶8 I first address the consent issue. Anderson does not dispute that, at the scene of his arrest, he eventually responded affirmatively to the officer's

question, "Will you submit to an evidentiary chemical test of your blood?" Anderson also does not contest that the officer accurately read from the Informing the Accused form to him. Instead, Anderson's first argument is that the State failed to carry its burden of showing that his consent was voluntary, in light of two facts: (1) that the officer informed him, in accurately reading from the Informing the Accused form, "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;" and (2) that the officer told Anderson, before he consented, that she would obtain a search warrant to authorize a blood draw if he refused to consent. I now explain why I reject both parts of this argument, addressing the two parts in turn.

¶9 Regarding the first part, under a prior opinion of this court, it is doubtful that the contents of the Informing the Accused form may be considered to be coercive in a manner or to a degree that could render the consent here involuntary. In ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, this court concluded that aspects of WIS. STAT. § 343.305 that could be deemed coercive are not unreasonable under the Fourth Amendment, given factors that include the "safe, relatively painless and commonplace" nature of a blood draw and the State's compelling interest in detecting and deterring drunk driving. *See* ***id***. at ¶¶17-18. I acknowledge that this is a potentially complex topic. However, I pursue it no further, given that the State relies on ***Wintlend*** in its responsive brief, and Anderson implicitly concedes the point by failing to address ***Wintlend*** in his reply brief. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in

reply brief to an argument made in respondent's brief may be taken as a concession).[3]

¶10 I turn now to Anderson's argument that the officer's statements to Anderson about a search warrant—that the officer was prepared, if necessary, to "fill out a search warrant" and "get permission" from a judge to "take your blood with the reasonable amount of force necessary to do so"—served to coercively extract Anderson's consent. I reject this aspect of Anderson's argument, because he fails to come to grips with the clear statement in ***State v. Artic***, 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430, that, in evaluating as part of the totality of the circumstances analysis whether police threatened a suspect, "Threatening to obtain a search warrant does not vitiate consent if 'the expressed intention to obtain a warrant is genuine ... and not merely a pretext to induce submission.'" ***Id.***, ¶41 (quoting ***United States v. White***, 979 F.2d 539 (7th Cir. 1992)).

¶11 Anderson argues that ***Artic*** cannot be boiled down to this proposition, but this argument fails for at least two reasons. First, the statement in ***Artic*** directly rebuts the premise of Anderson's argument that what the officer told Anderson here about applying for and getting a search warrant should be treated as a coercive threat for purposes of voluntariness analysis. Second, when our supreme court chooses to summarize its positions in concise statements, I am not

[3] Anderson makes one undeveloped, brief reference to ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, in his principal brief, making the broad and vague assertion that "[t]he facts of [***Wintlend***] clearly go well beyond the reading of the Implied Consent advisory," but he does not explain why I should conclude, seemingly contrary to ***Wintlend***, that any aspect of the Informing the Accused form constituted duress or coercion in a manner or to a degree that might have rendered his consent involuntary. This is the argument that I would expect him to offer in the reply brief, if any such argument were available to him.

free to treat such a statement as dictum. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

¶12 Anderson may intend to argue that the officer's expressed intention was not "genuine" or that it was a "pretext to induce submission," because the officer implied to Anderson that she could obtain a search warrant promptly, but at the same time the officer testified at the suppression hearing that obtaining a search warrant in her jurisdiction could be time consuming. However, if intended, such an argument would be meritless, because the officer's positions can be reasonably reconciled. The officer did not tell Anderson that she would obtain the search warrant within any particular period of time, and the officer did not testify that she would have been unable to obtain a search warrant even if she had applied some effort to the task.

Withdrawal Of Consent

¶13 Anderson's second argument is that, assuming that he voluntarily consented, he withdrew that consent at the hospital, shortly before or just as the phlebotomist went to insert the needle into one of his arms, while the arm was bent behind his back due to the handcuffs. Anderson does not appear to challenge the court's factual finding, quoted above, that it would have been "very clear" to the officer that Anderson's protest at the hospital was not that Anderson no longer consented to have his blood taken, but that Anderson objected to the *manner* in which the blood draw was about to be performed—that he wanted to be released from the handcuffs and that he wanted to "see the needle going into his arm." Instead, Anderson's argument is that, regardless of the reason he actually gave for protesting, the officer should have treated his protest as withdrawal of consent for

the blood draw. That is, Anderson contends that the circuit court erred by considering Anderson's expressed motivations in protesting.[4]

¶14 This argument runs afoul of a legal standard that Anderson concedes applies. I accept Anderson's concession that withdrawal of consent in this context requires an "unequivocal act or statement of withdrawal." Applying that standard to the circuit court findings of fact, which Anderson does not attempt to show are clearly erroneous, yields only one answer: Anderson's protests about the manner of the blood draw were not "an unequivocal act or statement of withdrawal" of consent to have his blood drawn.

¶15 It is true that at one point Anderson stated, "I refuse—I refuse." When considered in isolation, this sounds like withdrawal of consent. However, this statement came in the midst of many other statements and more broadly a course of conduct, the meaning of which was evaluated in its factual context by the circuit court. Under the circuit court's interpretation, it is as though Anderson protested as follows: "I reject this way of drawing my blood. I insist on a different method." It would be the same if Anderson had protested, "I don't want this particular nurse to draw my blood," or "I insist on doing this at a different hospital." Any time after he first gave consent, Anderson could have indicated, in an unequivocal manner, that he was withdrawing his consent to a blood draw, that the blood draw should not happen in any manner. The circuit court did not clearly err in finding that he failed to do so.

[4] Putting aside the protest issue, Anderson does not suggest that there was any statutory or constitutional obstacle to the officer directing, or the phlebotomist performing, the blood draw using the approach that was used, with Anderson's hands secured behind his back with handcuffs.

CONCLUSION

¶16 For all of these reasons, I affirm, and need not reach the State's alternative argument, and Anderson's counterarguments, about whether there were exigent circumstances permitting the blood draw, even without voluntary consent for a blood draw that was not unequivocally withdrawn.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.