COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1827-CR **Cir. Ct. No. 2013CT391**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN P. VONGVAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Melvin P. Vongvay appeals from the circuit court's denial of his motion to suppress evidence and judgment of conviction for operating a motor vehicle while under the influence (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Vongvay argues that the results of his nonconsensual, warrantless blood test should have been suppressed by the circuit court as there were no exigent circumstances necessitating a blood test without a warrant. We affirm, as the totality of the circumstances demonstrates that the warrantless blood draw was constitutionally justified by exigent circumstances.

BACKGROUND

¶2 Vongvay was stopped between 3:43 a.m. and 3:47 a.m. on November 3, 2013, for traveling thirteen miles per hour over the legal speed limit in the Village of Sharon, Wisconsin. Officer Derrick Goetsch observed that Vongvay's "eyes were red, bloodshot and glassy" and "smelled an odor of intoxicants emit from the vehicle." Goetsch asked Vongvay whether he had been drinking, to which Vongvay replied that "he had been consuming alcohol approximately two hours earlier with friends or at a friend's house." Goetsch performed field sobriety tests on Vongvay, which yielded several clues of impairment. Vongvay refused to submit to a preliminary breath test. Based on his opinion that Vongvay was impaired, Goetsch arrested Vongvay at 4:07 a.m. and transported him to the Village of Sharon Police Department.

¶3 At the time of his arrest, Goetsch asked Vongvay whether he had any prior OWI arrests, and Vongvay stated that he did not. Goetsch was unable to

[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.

verify this information as Walworth County dispatch informed him that the transaction information for management of enforcement (TIME) system was down and was taking a long time to return criminal/driving histories. Goetsch asked dispatch to inform him of any prior OWI convictions as soon as possible, and Goetsch proceeded as if this was Vongvay's first offense—a noncriminal offense. *See* ***State v. Verhagen***, 2013 WI App 16, ¶18, 346 Wis. 2d 196, 827 N.W.2d 891.

¶4 At the police department, Goetsch read Vongvay the informing the accused form and again asked him to submit to a breath test. Vongvay refused, and Goetsch transported Vongvay to the Walworth County Jail as he had no ties to the community and he was unable to post bond on the citations. At 5:55 a.m., while in the jail parking lot, Goetsch learned from dispatch that Vongvay had a prior OWI. Since Goetsch had probable cause to believe that this was now a criminal OWI offense, Goetsch called Police Chief Brad Buchholz for advice on how to proceed. Buchholz advised Goetsch to call Assistant District Attorney Diane Donohoo, who instructed Goetsch to read the informing the accused form to Vongvay again and request a chemical test of his blood. Vongvay refused to consent to the blood test at 6:12 a.m., and Goetsch proceeded across the street to Lakeland Medical Center. Vongvay's blood was drawn without a warrant at 6:41 a.m., just minutes shy of three hours from the time of Vongvay's traffic stop, which revealed that Vongvay's blood alcohol concentration was .188.

¶5 Vongvay filed a motion to suppress on the ground that Goetsch failed to obtain a search warrant for his blood in violation of his constitutional rights. At the evidentiary hearing, Goetsch testified that he made the decision to draw Vongvay's blood without a warrant because he understood the importance of having the blood drawn within three hours of the traffic stop. He also testified that there was an electronic search warrant procedure in place at the time of the

incident; however, the forms were at the police department and it would have taken twenty-five to thirty minutes to drive back to the police department. Additionally, he explained, the affidavit would have taken fifteen to twenty minutes to complete, and, if everything proceeded correctly, another fifteen to twenty minutes to receive the search warrant. The circuit court found that the blood draw met the exigent circumstances exception. Vongvay appeals.

DISCUSSION

¶6 Vongvay argues that the circuit court erred in denying the motion to suppress as the State did not establish that exigent circumstances justified the warrantless, nonconsensual blood draw. An order denying a motion to suppress evidence is a question of constitutional fact. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. A question of constitutional fact is a two-step inquiry. ***Id.*** "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***Id.*** (citations omitted).

¶7 When police draw blood in order to test it for evidence of a crime, a search under the Fourth Amendment has occurred. *See* ***id.***, ¶31. "[W]arrantless searches are per se unreasonable unless they fall within a well-recognized exception to the warrant requirement." ***State v. Foster***, 2014 WI 131, ¶32, 360 Wis. 2d 12, 856 N.W.2d 847. In Wisconsin, a warrantless blood draw complies with the Fourth Amendment if: "(1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the

suspect did not reasonably object to the blood draw." ***Tullberg***, 359 Wis. 2d 421, ¶31.

¶8 Vongvay does not allege that Goetsch lacked probable cause, that his blood was drawn in an unreasonable manner, or that he offered a reasonable objection to the blood draw. Vongvay argues only that exigent circumstances did not support the warrantless drawing of his blood. The State responds that the warrantless search in this case was justified under the exigent circumstances exception. This exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." ***Missouri v. McNeely***, 133 S. Ct. 1552, 1558 (2013).

¶9 We conclude that the circuit court properly denied Vongvay's motion to suppress evidence as the totality of the circumstances demonstrate that exigent circumstances justified a blood draw without obtaining a warrant. One well-recognized exigent circumstance is the threat of "imminent destruction of evidence." ***Id.*** at 1559; ***State v. Parisi***, 2016 WI 10, ¶32, 367 Wis. 2d 1, 875 N.W.2d 619. In ***Schmerber v. California***, 384 U.S. 757 (1966), the Supreme Court recognized that due to the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," a police officer may reasonably believe that a delay "to obtain a warrant" would "threaten[] 'the destruction of evidence.'"[2] ***Id.*** at 770 (citation omitted).

[2] In 2013, the Supreme Court added to its exigency jurisprudence in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), which simply held that police may no longer rely *solely* on the rapid dissipation of alcohol in the blood to establish the exigent circumstances necessary for a warrantless blood draw. *See* ***id.*** at 1556.

¶10 The concern with destruction of evidence in OWI cases is reflected in Wisconsin law, which establishes a three-hour window for the automatic admissibility of blood test evidence. WIS. STAT. § 885.235(1g). After the three-hour window, the evidence is only admissible "if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony." Sec. 885.235(3). In ***McNeely***, the Court explained that "longer intervals may raise questions about the accuracy of the [blood alcohol concentration] calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." ***McNeely***, 133 S. Ct. at 1563.

¶11 Goetsch followed all the proper procedures after stopping Vongvay, and he did not improperly delay in obtaining a warrant. Goetsch specifically asked Vongvay if he had ever been arrested for an OWI, which Vongvay denied. Goetsch's lack of knowledge of Vongvay's prior OWI was a result of the TIME system being inoperable. Had Vongvay acknowledged that he had a prior OWI, Goetsch could have easily begun the process of obtaining a search warrant for the blood draw immediately upon arriving at the police station. When Vongvay was arrested and when he was processed at the police station, Goetsch did not have probable cause to believe that Vongvay had committed a criminal offense. *See* ***State v. Goss***, 2011 WI 104, ¶22 & n.19, 338 Wis. 2d 72, 806 N.W.2d 918. Once Goetsch learned that Vongvay had a prior OWI, over two hours after the initial traffic stop, he reasonably concluded that if he completed the warrant application process he would have risked the destruction and admissibility of the evidence. Under the circumstances, Goetsch acted reasonably, which is "the touchstone of the Fourth Amendment." ***Tullberg***, 359 Wis. 2d. 421, ¶51.

¶12 For the foregoing reasons, we conclude that Vongvay's warrantless blood draw was constitutionally justified by exigent circumstances.

By the Court.—Judgment and order affirmed.

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