COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1261-CR **Cir. Ct. No. 2014CT776**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NAVDEEP S. BRAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Navdeep S. Brar appeals a judgment of conviction for operating while intoxicated (OWI), third offense, and a circuit court

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

order denying his motion to suppress evidence of blood test results. We conclude that the record supports the circuit court's finding that Brar gave consent to the blood test and that his consent was voluntary. For those reasons, we affirm.

BACKGROUND

¶2 City of Middleton police officer Michael Wood stopped a vehicle Brar was driving for driving 51 m.p.h. in a posted 30 m.p.h. zone. Brar was subsequently arrested based on evidence that he was driving under the influence. Brar does not challenge the stop or his subsequent arrest for OWI.

¶3 Officer Wood transported Brar to the police department and presented Brar with an "informing the accused form", and read the contents of the form to Brar. Officer Wood believed that Brar affirmed that he would take an evidentiary chemical test. Brar asked the officer a couple of questions related to the blood test, after which the officer transported Brar to a hospital to have his blood drawn and tested for intoxicants. The test results indicated that Brar's blood alcohol content was above the applicable legal limit.

¶4 Brar filed motions with the circuit court to suppress the results of the blood test on the grounds that he did not consent to the test and that even assuming he gave consent, it was involuntary because the officer incorrectly informed Brar that a warrant was not required in order to obtain a sample of Brar's blood.

¶5 The circuit court held a hearing on Brar's motion to suppress. Officer Wood testified and a video recording of the discussion the officer and Brar had regarding the blood test was presented and received as evidence. The officer testified that he read the informing the accused form to Brar and then asked Brar "will you submit to an evidentiary chemical test of your blood?" Brar asked what

kind of test would be conducted and the officer said that it would be a test of Brar's blood. Brar then asked if a search warrant was required before his blood could be drawn, to which the officer shook his head indicating "no." Subsequently, Brar's blood was drawn and tested.

¶6 At the close of evidence, the circuit court found, under the totality of the circumstances and reasonable inferences that the court drew from the evidence, that Brar gave consent to have his blood drawn and that his consent was voluntary. More detail will be provided in the discussion section about the grounds underlying the court's findings. Accordingly, the court denied Brar's motion to suppress the blood test evidence. Brar pled no contest to OWI, third offense. Brar appeals.

STANDARD OF REVIEW

¶7 Whether a police officer's conduct violates Fourth Amendment protections against unreasonable searches and seizures is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. Further, we review a motion to suppress under a two step analysis. ***State v. Robinson***, 2009 WI App 97, ¶9, 320 Wis. 2d 689, 770 N.W.2d 721. We will uphold the court's findings of historical fact unless those findings are clearly erroneous, but the application of constitutional principles to these facts presents a question of law that we review de novo. ***Id.***

DISCUSSION

¶8 Brar argues that he did not give consent to have his blood drawn, and, in the alternative, the consent he gave to the blood draw was involuntary because the officer incorrectly indicated that a search warrant was not required

before Brar's blood could be drawn. Both issues implicate the court's factual findings, which we conclude are reasonable and supported by the record.

Consent

¶9 Consent to be searched is one of the exceptions to the general bar against unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution. As such, for consent to be valid, it must be "freely and voluntarily" given. ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968); ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (quoted source omitted). "Consent is voluntary if it is given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" ***State v. Padley***, 2014 WI App 65, ¶62, 354 Wis. 2d 545, 849 N.W. 2d 867 (quoted source omitted). "Orderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not knowing, intelligent and voluntary consent under the Fourth Amendment." ***State v. Giebel***, 2006 WI App 239, ¶18, 297 Wis. 2d 446, 724 N.W.2d 402.

¶10 To determine whether consent is voluntary, we take a totality of the circumstances approach, "including the circumstances surrounding consent and the characteristics of the defendant." ***Padley***, 354 Wis. 2d 545, ¶64. The State must prove by "clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." ***Id.*** (quoted source omitted).

¶11 After the circuit court concluded taking evidence at the motion hearing, the court found that Brar had consented to have his blood drawn. The court relied on the following evidence and credited Officer Wood's testimony.

¶12 The court first clarified the distinction between implied consent and constitutional consent; the issue in this case is whether the State established that there was actual constitutional consent to the blood draw.

¶13 The circuit court considered Officer Wood's testimony and a videotape recording the exchanges between Wood and Brar after the stop and at the police station. The court weighed heavily Wood's testimony regarding the circumstances surrounding the reading of the informing the accused form to Brar.

¶14 Wood testified that after he arrested Brar for OWI and took him to the Middleton police station, Wood read the entire informing the accused form to Brar, which ends with the question "[w]ill you submit to an evidentiary chemical test of your blood?" Wood testified that Brar's response was to the effect of "of course, [I don't] want to have [my] license revoked." Wood testified he understood Brar's statements to mean that he was consenting to have his blood drawn. Indeed, the court took note that Wood then recorded a "yes" on the informing the accused form to indicate Brar's willingness to submit to the blood test.

¶15 Wood further testified that Brar asked what kind of test would be conducted and Wood told him a blood test. Brar then asked whether a warrant was needed for the blood test, to which Wood responded by shaking his head, indicating "no."

¶16 During its oral ruling, the circuit court acknowledged that the evidence could be reasonably construed as Brer not giving consent. However, the court found that Wood's interpretation that Brar's statements amounted to consent were reasonable under the circumstances.

¶17 Taking a broader view of the circumstances, the circuit court noted that Brar showed no indications that he fought against having a blood test. Of particular note, the court observed that Brar did not protest or say that he was not consenting to the blood test. The court found Brar's lack of fight against having his blood drawn consistent with Wood's testimony that Brar consented to the blood draw.

¶18 Based on the totality of the circumstances, the circuit court reasonably concluded that Brar consented to have his blood drawn and tested for the purpose of determining Brar's blood alcohol content. Having made this conclusion, the next question is whether Brar voluntarily gave his consent. Based on the above facts and the following facts found by the court, we conclude that Brar voluntarily gave consent to have his blood tested.

Voluntary Consent

¶19 Brar argues that, if the facts are viewed as him giving consent to the blood draw, he gave consent to the blood draw only because Officer Wood incorrectly indicated to Brar that a search warrant was not needed to conduct the blood test. In other words, Brar argues that he consented to the search only because Officer Wood incorrectly represented that he had the authority to proceed with the blood draw without a warrant, and therefore his consent to the blood draw was not a knowing, intelligent and voluntary consent under the Fourth Amendment. *See* ***Giebel***, 297 Wis. 2d 446, ¶18. We reject Brar's argument because it is, for the most part, undeveloped, and to the extent that it is developed, his argument is confusing and at times incoherent.

¶20 Brar's primary problem with his lack of voluntary consent argument is that it ignores that the circuit court's finding of voluntary consent was based on

facts that the court objectively found, and facts that are supported by the record. Most of those facts are included in the background section of this opinion. For instance, the court found that Baer's consent was voluntary based on evidence that Brar did not demonstrate any resistance at the police station and at the hospital to having his blood drawn.

¶21 The circuit court also rejected Brar's argument that he involuntarily consented to the blood draw because the officer wrongly informed Brar that a search warrant was not needed to do the draw, for the obvious reason that a warrant is unnecessary to obtain a person's blood when that person consents to the blood draw. To the extent that Brar develops an argument that a search warrant was required to obtain a blood draw, Brar relies on unsupported innuendo to suggest that a person in Brar's circumstances—a person who is unaware of the distinctions between when a warrant is required or not—should be informed of such distinctions presumably in the course of reading the informing the accused form to a suspect. Brar finds no support in any legal authority imposing such a requirement. In addition, Brar does not complain that he did not understand any part of the informing the accused form Officer Wood read to him prior to proceeding with the blood draw. Thus, it was reasonable for the court, based on the totality of the circumstances and applying an objective standard, to find that Brar voluntarily consented to submit to a blood draw after he was read the informing the accused form.

¶22 In sum, the evidence presented at the suppression hearing supports the circuit court's findings and legal conclusions that Brar consented to the blood draw and that his consent was voluntarily given. We affirm.

By the Court.—Judgment affirmed.

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