COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2675-CR **Cir. Ct. No. 2014CT395**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAUREN ANN ERSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Lauren Erstad appeals the circuit court's judgment convicting her of operating a motor vehicle while under the influence of

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

an intoxicant as a second offense. Erstad's arguments relate to the search warrant that authorized the collection of a sample of her blood. Erstad does *not* argue that probable cause to collect the blood sample was lacking on the face of the warrant. Rather, Erstad argues that the warrant affidavit contained false information and that, without this information, probable cause was absent. In addition, Erstad argues that, although the warrant authorized *collection* of a blood sample, the warrant did not authorize *testing* the sample, and that this testing was a separate search that required an additional warrant or a warrant exception. Like the circuit court, I reject these arguments, and I affirm the judgment.

Background

¶2 The investigation that led to Erstad's arrest began when a police officer responded to the scene of a car accident involving Erstad. As detailed further below, the officer observed a number of indicators suggesting that Erstad was intoxicated.

¶3 The officer requested that Erstad submit to a blood test under the Implied Consent Law. Based on Erstad's response, the officer determined that Erstad refused the test. The officer proceeded by applying for a search warrant to obtain a blood sample.

¶4 The warrant issued, and Erstad's blood was drawn pursuant to the warrant. Subsequent testing of the blood sample revealed a blood alcohol content of 0.226. Erstad filed motions to suppress the blood test result, and, after holding an evidentiary hearing, the circuit court denied the motions.

Discussion

A. Information In Warrant Affidavit

¶5 Erstad first argues that the officer included false information in the search warrant affidavit and that, without this information, probable cause to collect her blood sample was lacking. I disagree that there was any false information that mattered.

¶6 Before addressing the affidavit contents and the allegedly false information, I first briefly summarize the applicable legal standards:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks v. Delaware, 438 U.S. 154, 155-56 (1978); *see also* ***id.*** at 171-72; ***State v. Mann***, 123 Wis. 2d 375, 385-86, 388-89, 367 N.W.2d 209 (1985).

¶7 Here, Erstad received a hearing on her allegations that the search warrant contained false information that required suppression. Thus, we are beyond the preliminary showing stage, and the question is whether Erstad demonstrated that the officer knowingly and intentionally, or with reckless disregard for the truth, included false information in the search warrant affidavit

and, if so, whether that information was necessary to supply probable cause. *See* ***Franks***, 438 U.S. at 156.

¶8 "The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances." ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" ***Id.*** (quoted source omitted). Determining whether there is probable cause based on a given set of facts is a question of law for de novo review. *See* ***State v. McAttee***, 2001 WI App 262, ¶8, 248 Wis. 2d 865, 637 N.W.2d 774.

¶9 The search warrant affidavit in this case appears to be based on a form document consisting of boiler plate, check boxes, and other sections in which the officer may add text based on the particular circumstances. As completed by the officer here, the affidavit included numerous assertions that I list below. As we shall see, I agree with the circuit court that very little information in the affidavit was incorrect and that any such incorrect information was not needed to supply probable cause. As the circuit court's decision implicitly recognized, this makes it unnecessary to decide whether the officer had the requisite intent or reckless disregard for the truth.

¶10 The information in the warrant affidavit included the following assertions, with boldface type added to highlight the information that Erstad argues was false:

- The officer had been a law enforcement officer since June 1999.
- The officer had training in the investigation of cases in which drivers are suspected of operating a motor vehicle while under the influence of alcohol or controlled substances.

- The officer had been trained to administer field sobriety tests, and used those tests in numerous investigations of operating-while-intoxicated-or-impaired cases.

- While on duty during his 10:30 p.m. to 7:00 a.m. shift, the officer was dispatched to the scene **because of a report of a drunken driver**.

- The officer observed that the vehicle on the scene had been involved in an accident.

- The officer knew that the person identified as Erstad was driving the vehicle because **the officer "personally witnessed" Erstad "driving or operating" the vehicle** and because Erstad admitted to driving the vehicle.

- An odor of intoxicants was coming from Erstad's person.

- Erstad had glassy and bloodshot eyes.

- Erstad had slurred speech.

- Erstad had difficulty keeping her balance and was exhibiting "[p]oor motor skills."

- Erstad initially admitted to having 3 to 4 drinks, and later said she drank "a lot."

- Erstad performed the horizontal gaze nystagmus field sobriety test, and exhibited "6 of 6 possible clues."

- The other two field sobriety tests were not performed.

- A check of Erstad's driving record indicated that she had one "prior conviction[] that would be counted for sentencing purposes under Chapter 346."

- Erstad's arrest for operating a motor vehicle while under the influence of an intoxicant and/or drugs occurred at 4:25 a.m.

- Erstad was read the informing the accused form pursuant to the Wisconsin Implied Consent Law but **refused to submit** to the requested blood test.

¶11 To repeat, Erstad does *not* argue that these affidavit assertions, considered in their totality, failed to supply probable cause to collect a blood sample. I agree with this implicit concession, and conclude that the totality of the circumstances, as outlined in the affidavit, readily supplied the requisite probable cause. Without rehashing all of the details, I note in particular that the circumstances included that Erstad was involved in an accident, that the accident occurred during late night or early morning hours, that Erstad exhibited a number of signs of intoxication, and that Erstad admitted to significant drinking.

¶12 As indicated by the boldface type above, Erstad instead argues that the following three statements are false: (1) that the officer was dispatched because of a report of a drunken driver; (2) that the officer personally witnessed Erstad driving or operating the vehicle; and (3) that Erstad refused to submit to the requested blood test. I address each statement below.

1. Dispatched Because Of A Report Of A Drunken Driver

¶13 At the suppression hearing, the officer testified that he was dispatched because of a report of a *traffic accident*, thus contradicting the affidavit, where he checked a box stating that he was dispatched because of a report of a drunken driver. The circuit court disregarded this affidavit statement and concluded that the statement was not necessary to supply probable cause. I agree. Whether the officer was dispatched because of a report of an accident or a report of a drunken driver was of little significance in light of the other incriminating circumstances that were set forth in the affidavit.

2. Personally Witnessed Driving Or Operating

¶14 The officer checked a box in the affidavit stating that he "personally witnessed" Erstad "driving or operating" the vehicle. The officer's later testimony, however, showed that he arrived on the scene after Erstad's vehicle had come to rest turned over on its roof. Erstad was the only person in the vehicle and, although the keys were in the ignition, the vehicle was not running.

¶15 Based on this testimony, the circuit court appeared to determine, or simply assumed without deciding, that the officer's affidavit statement was false. The court thus disregarded the statement, but concluded that the statement was not necessary to supply probable cause. Again I agree with the circuit court's conclusion. I put aside whether, under the legal definition of "operate," the officer's statement might be characterized as sufficiently truthful. Either way, the statement was superfluous because, as already noted, the officer also stated in the affidavit that Erstad admitted to driving the vehicle.

3. Refusal To Submit To Blood Test

¶16 At the suppression hearing, the officer elaborated on why he checked the box in the affidavit stating that Erstad refused to submit to the requested blood test. The officer explained that, after he read Erstad the informing the accused form and asked Erstad to submit to the test, Erstad became "very argumentative" and was "yelling." The officer informed Erstad that he would instead get a warrant. Erstad told him not to get a warrant and that she would agree to the test, but only because the officer was "making her" or "forcing her." Erstad also said she wanted an attorney. At that point, the officer determined that Erstad had refused the test and the officer decided to apply for the warrant.

¶17 Based on this testimony, I agree with the circuit court's implicit determination that the officer did not falsely state in his affidavit that Erstad refused to submit to the blood test. "Conduct that is 'uncooperative' … results in refusal." ***State v. Reitter***, 227 Wis. 2d 213, 234, 595 N.W.2d 646 (1999); *see also generally* ***id.*** at 234-37. Likewise, "[a] defendant who conditions submission to a chemical test upon the ability to confer with an attorney 'refuses' to take the test." ***Id.*** at 235.

¶18 To sum up so far, I agree with the circuit court that the first two challenged statements are not necessary to supply probable cause and that the third is not false.

4. An Additional Omissions Argument

¶19 Erstad appears to develop an additional argument, not raised in the circuit court, that the officer also *omitted* pertinent information from the affidavit. According to Erstad, this information included that:

- Erstad was conveyed to a hospital by ambulance and needed to be treated there because of the seriousness of her injuries.
- Erstad's vehicle was turned over on its roof and was totaled, with extremely serious damage.
- Erstad had difficulty getting out of the vehicle.
- Erstad was complaining of injuries, including a foot injury.
- Erstad was upset and crying.

I deem this omitted-information argument forfeited and, on that basis, I reject it. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are

forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues). I also observe that this omitted-information argument plainly lacks merit. *See* ***Mann***, 123 Wis. 2d at 385-86, 388-89 (discussing the standards for omitted information); ***State v. Manuel***, 213 Wis. 2d 308, 316-17, 570 N.W.2d 601 (Ct. App. 1997) (same); ***State v. Gordon***, 159 Wis. 2d 335, 350-51, 464 N.W.2d 91 (Ct. App. 1990) (same).

B. Testing Of Blood Sample

¶20 I turn to Erstad's argument that the blood test result must be suppressed because the search warrant authorized only *drawing* her blood, not *testing* it. Erstad characterizes the testing of her blood as a "separate search for Fourth Amendment purposes" and, therefore, as requiring an additional warrant or a warrant exception.

¶21 Whether the express terms of the warrant failed to authorize testing of Erstad's blood seems debatable, but rather than engage in that debate, I reject Erstad's testing argument for the same reason the circuit court did: This type of "separate search" argument was put to rest in ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789 (WI App 2002).[2]

¶22 ***Riedel*** makes clear that, once police lawfully obtain a blood sample in the course of a drunk driving investigation, they need not obtain further

[2] In the course of Erstad's argument that the warrant failed to authorize testing, Erstad shifts gears and argues that the warrant was overbroad because it put no limits on what the police could do with her blood. I find it difficult to reconcile these arguments. Regardless, Erstad failed to raise her warrant-is-overbroad argument in the circuit court. Accordingly, I deem that argument forfeited and reject it on that basis. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177.

authorization to test the blood for the presence of alcohol. The court in ***Riedel*** explained:

> This court has concluded that ***Snyder*** and ***Petrone*** stand for the proposition that the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components." ***VanLaarhoven***, 2001 WI App 275 at ¶16. We find the reasoning of ***Snyder***, ***Petrone*** and ***VanLaarhoven*** persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis.

Id., ¶16; *see also* ***id.***, ¶17 (concluding that "analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search").

¶23 Erstad argues that the United States Supreme Court's decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), calls ***Riedel*** into question. In ***McNeely***, the Court held that the natural metabolization of alcohol in the bloodstream is not a per se exigency justifying warrantless, nonconsensual blood draws. ***McNeely***, 133 S. Ct. at 1560-61; *see also* ***State v. Foster***, 2014 WI 131, ¶¶39-40, 360 Wis. 2d 12, 856 N.W.2d 847 (discussing ***McNeely***).

¶24 Erstad's argument as to why ***McNeely*** calls ***Riedel*** into question is not clear, but the argument appears to be based on an assertion that ***Riedel*** and the cases it builds upon involved blood draws that were justified by the per se exigency exception that ***McNeely*** rejected, or by a mixture of this per se exception and the Implied Consent Law. Taking this assertion as true, I fail to see why it matters. Neither exigency nor the Implied Consent Law played a role in the ***Riedel*** court's analysis of what police may do with a blood sample once they have lawfully obtained it. *See* ***Riedel***, 259 Wis. 2d 921, ¶¶7-17. And, for the reasons

explained above, Erstad's blood was lawfully obtained based *not* on exigent circumstances or the Implied Consent Law but instead based on *a warrant*.

¶25 In another attempt to get around ***Riedel***, Erstad argues that the ***Riedel*** court failed to address pertinent language in a different United States Supreme Court case, ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602 (1989). That language in ***Skinner*** refers to the testing of blood as a "further invasion" of privacy interests. *See* ***id.*** at 616. Erstad is wrong about ***Riedel*** and ***Skinner***. The court in ***Riedel*** acknowledged the pertinent ***Skinner*** language, and concluded that that language does not address whether the testing of lawfully obtained blood is a separate search. *See* ***Riedel***, 259 Wis. 2d 921, ¶16 n.6.

¶26 Erstad makes other arguments relating to ***Riedel*** but, as far as I can tell, these remaining arguments are tantamount to a request to modify or overrule ***Riedel***. Such arguments must be directed at our supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

Conclusion

¶27 For the reasons stated above, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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