COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1146-CR **Cir. Ct. No. 2015CT600**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC M. DOULE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: VINCENT R. BISKUPIC, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Eric Doule appeals a judgment of conviction for third-offense operating a motor vehicle while intoxicated (OWI). Doule argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

circuit court erred in denying his motion to suppress evidence by concluding he had voluntarily consented to a blood draw. We conclude Doule's constitutional rights were not violated. Accordingly, we affirm.

BACKGROUND

¶2 Officer Lia Vue testified at the suppression hearing that he stopped Doule's vehicle in response to a citizen's report that Doule's vehicle was traveling at excessive speeds and swerving on the road.[2] Doule was uncooperative with Vue while being questioned during the stop, eventually rolling up his window and locking himself in his vehicle after Vue requested his phone number. Another officer arrived a short time later and unlocked the vehicle's driver-side door, after which Doule exited the vehicle under his own power. Doule failed field sobriety tests and was arrested.

¶3 Vue read Doule the Informing the Accused form while Doule was seated in the back seat of Vue's squad car. *See* WIS. STAT. § 343.305(4). When Vue finished reading the form, Vue asked Doule if he was willing to submit to a chemical test of his blood. Doule, who was described as belligerent during most of this encounter, initially said, "I'm not going to say no," but after Vue explained it was "a yes-or-no question," Doule answered "yes." Vue transported Doule to an area hospital to conduct the blood draw. While "[Doule] was uncooperative" during the trip, he did not mention the blood draw or indicate any refusal to submit to it.

[2] Doule's arguments in the circuit court and on appeal do not challenge the reasonableness of the traffic stop or whether there was probable cause to arrest him for OWI.

¶4 The blood draw was conducted in the hospital's garage after Vue was informed the hospital had no other room. Because Doule remained "vulgar and vocal" in the garage toward Vue as well as toward a second officer and a phlebotomist, Vue handcuffed Doule's arms behind his back in preparation for a blood draw. Three blood draws were attempted on Doule over the course of about one hour. The first two attempts were unsuccessful, as Doule tensed up and moved away from the needle used for the blood draw as it punctured his skin. Vue radioed for a third officer to assist and Doule's hands were cuffed in front of his body for a third attempt, during which blood was successfully drawn without incident.

¶5 While Doule mentioned he was uncomfortable during the attempts, he never said anything indicating he wanted to stop the blood draw or that police should get a warrant. Indeed, because Doule was being uncooperative during the first two attempts, Vue specifically asked Doule before the third attempt whether he wanted to have his blood drawn, and Doule stated "yes." In addition to Vue's testimony, the circuit court viewed video footage from Vue's body camera, recorded during the stop and the blood draw.

¶6 Doule testified at the hearing that he exited the car under his own power once the door was unlocked, but he was frightened by the encounter. In response to Vue reading him the Informing the Accused form, Doule claimed he said he wanted to go home and did not recall saying "yes." Doule testified that he said "stop" or "no" in between the second and third attempted blood draw, but he could not remember expressly telling the officers they could not take his blood.

¶7 The circuit court denied the suppression motion in a written order. The court specifically found Doule's testimony not credible. Meanwhile, based on

Vue's testimony and the body camera footage, the court found, first, that Doule consented to a blood draw, and, second, that Doule did not withdraw that consent. Doule then pled no contest to third-offense OWI and now appeals pursuant to WIS. STAT. § 971.31(10).

DISCUSSION

¶8 The Fourth Amendment requires that a blood draw of an OWI suspect must be conducted pursuant to a search warrant when one may be reasonably obtained. ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552, 1561 (2013); *see also* ***Birchfield v. North Dakota***, 579 U.S. ___, 136 S. Ct. 2160, 2184-85 (2016) (blood draw without a warrant not permitted as a search incident to arrest for driving while intoxicated). Like other searches, however, a person's consent to having his or her blood drawn serves as a valid exception to the warrant requirement if such consent is "freely and voluntarily given." ***State v. Padley***, 2014 WI App 65, ¶62, 354 Wis. 2d 545, 849 N.W.2d 867 (citing ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968)). Consent is voluntary when it is the product of "'an essentially free and unconstrained choice' … not 'the product of duress or coercion, express or implied[,]'" on the part of law enforcement. ***State v. Artic***, 2010 WI 83, ¶32, 327 Wis. 2d 392, 786 N.W.2d 430 (quoting ***Schneckloth v. Bustamonte***, 412 U.S. 218, 227 (1973)).

¶9 Appellate review of a motion to suppress presents a question of constitutional fact, which consists of two steps. ***State v. Phillips***, 218 Wis. 2d 180, 190-91, 577 N.W.2d 794 (1998). We uphold the circuit court's findings of fact unless they are clearly erroneous, but we apply constitutional principles to those findings independent of the circuit court's conclusions. ***Id.*** Specific to the current issue, "whether consent was given in fact by words, gestures, or conduct" is a

question of historical fact, which we will uphold unless contrary to the great weight and clear preponderance of the evidence. ***Artic***, 327 Wis. 2d 392, ¶30. Whether such consent was voluntary, however, is a mixed question of fact and law we review under the totality of the circumstances. ***Id.***, ¶32.

¶10 Doule initially argues he never gave consent to the blood draw due to his uncooperative demeanor during the stop as well as his physical actions during the blood draw. The record belies his claim. Doule conflates voluntariness with consent throughout his briefing and ignores our standard of review; whether he gave consent is not a question of law, but one of historical fact for the circuit court. *See* ***id.***, ¶¶30, 32. This court cannot engage in its own independent fact finding. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Here, the circuit court found Doule consented to the blood draw upon responding "yes" once Vue read to him the Informing the Accused form and that Doule continued to say "yes" when asked about having his blood drawn in the hospital garage. The court was entitled to resolve the credibility dispute that emerged between Vue's and Doule's respective testimony in its findings on whether Doule consented. *See* ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979). Doule does not argue the circuit court's findings in favor of the State were clearly erroneous.[3]

¶11 Doule next argues any consent Vue obtained from Doule pursuant to Vue's reading of the Informing the Accused form was invalid, which we construe

[3] Despite his emphasis on his own uncooperative and vulgar behavior during the attempted blood draws in the hospital garage, Doule fails to develop a legal argument or cite relevant authority regarding his withdrawal of consent. Accordingly, we do not address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

to mean his consent was involuntary. The State must show by clear and convincing evidence that consent was freely and voluntarily given. ***Artic***, 327 Wis. 2d 392, ¶32. When reviewing whether a defendant's consent was voluntary, we may consider:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

Id., ¶33 (citing ***Phillips***, 218 Wis. 2d at 198-203).

¶12 Doule does not specifically claim that any of ***Artic***'s factors support his argument. He instead argues his consent was involuntary because he was unwilling to talk to Vue after the traffic stop, he supposedly was "forcibly" taken from his vehicle when it was unlocked by law enforcement, and he indicated through his conduct that he did not want to be seized or arrested. Whether law enforcement seized Doule against his will, however, is largely irrelevant to whether his consent to the blood draw was voluntary. The traffic stop and the arrest are distinct events from the reading of the Informing the Accused form in this case, and Doule offers no legitimate explanation for why his subjective unwillingness to be arrested should negate the voluntariness of his consent to the blood draw. Doule has otherwise never argued that either his seizure or arrest for suspected OWI was constitutionally impermissible or, for that matter, that law enforcement conduct during the stop was otherwise improper.

¶13 We conclude the State, based on the record in this case, established Doule's consent to the blood draw was voluntary. We do so based on the circuit court's findings of fact from Vue's testimony and the video recording. Doule does not argue Vue failed to follow standard OWI protocol when he read the Informing the Accused form. This reading was free of any undue attempts to trick or otherwise threaten Doule into providing a blood draw. Doule may have acted belligerent toward law enforcement throughout this encounter and attempted to steer the reading of the form to unrelated topics, but that does not render his ultimate decision to consent involuntary. Doule's argument is also undermined by the fact he never mentioned the blood draw on the trip to the hospital and he continued to say "yes" to the blood draw during the two unsuccessful attempts to draw blood in the garage.[4] By reading the form to Doule and expressly informing him at the conclusion that it was a "yes-or-no question," Vue accurately informed Doule he could decline the blood draw and face having his driving privileges revoked.[5] *See* WIS. STAT. § 343.305(4). We therefore conclude Doule's voluntary consent to the search validated the blood draw under the Fourth Amendment. *See* ***Padley***, 354 Wis. 2d 545, ¶¶62, 74.

¶14 Finally, we note that Doule's appellate briefing raises a vague argument regarding whether the manner in which the blood draw was conducted

[4] As to the fifth factor, the record establishes that Doule received a high school diploma and was employed as an electrical and mechanical technician in the past.

[5] Doule asserts the Informing the Accused form entered in this case evinces coercion or a lack of consent because Vue failed to initial the final four lines on the form after reading it to him. Doule fails, however, to develop an argument as to why this omission is significant in terms of his voluntariness or that Vue's recitation of the form did not substantially comply with WIS. STAT. § 343.305(4) requirements. We shall not address this undeveloped argument. *See* ***Pettit***, 171 Wis. 2d at 646-47.

was constitutionally reasonable. Doule cites ***State v. Tullberg***, 2014 WI 134, ¶31, 359 Wis. 2d 421, 857 N.W.2d 120, to argue the "warrantless, nonconsensual blood draw" that he allegedly suffered was, amongst other considerations, unreasonably performed. It seems Doule tethers his "unreasonableness" argument to his argument that the search that occurred here was nonconsensual and warrantless. However, this issue of reasonableness also arises in the context of consensual blood draws under ***Schmerber v. California***, 384 U.S. 757, 771-72 (1966). *See, e.g.*, ***State v. Kozel***, 2017 WI 3, ¶¶40-47, ___ Wis. 2d ___, ___ N.W.2d ___. The State's response brief fails to address Doule's "reasonableness" argument in any manner, understandably prompting Doule to argue in his reply brief that the State forfeited any argument on the issue and conceded the blood draw was unreasonable. It certainly would have behooved the State to have addressed Doule's argument regarding the constitutional reasonableness of this search, even if voluntary consent occurred. *See* ***State v. Daggett***, 2002 WI App 32, ¶¶15-18, 250 Wis. 2d 112, 640 N.W.2d 546. But despite this failure, Doule cannot prevail on this issue on appeal given what occurred in the circuit court.

¶15 "A litigant must raise an issue with sufficient prominence such that the [circuit] court understands that it is being called upon to make a ruling." ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656. Doule's initial motion to suppress argued the blood draw was unconstitutional because it was executed without a warrant; there was no mention of the reasonableness of the manner in which the blood draw was conducted. Doule's only assertion in the circuit court that the attempts to draw his blood were themselves unreasonable came in an apparently unsolicited "letter brief" sent after the suppression hearing, but—much like with his appellate argument—he failed to

disentangle this issue from his argument about whether the blood draw was supported by consent or was warrantless. *See* ***Tullberg***, 359 Wis. 2d 421, ¶31.

¶16 Doule's failure to adequately and clearly pursue the reasonableness-of-the-search matter resulted in the circuit court not addressing that specific issue in its order denying the suppression motion. As a consequence, the court did not make any findings of fact regarding the conditions surrounding the blood draws, particularly the one draw that was accomplished (save for the undisputed fact they all occurred in a hospital garage). *See* ***Daggett***, 250 Wis. 2d 112, ¶14 (***Schmerber*** "did not categorically reject the possibility that a blood draw could take place in a non-medical setting."). Nothing in the record shows Doule attempted to rectify this omission by bringing it to the circuit court's attention. Because consideration of the constitutional reasonableness of the circumstances in which the blood draws occurred are dependent on findings of fact, we are not equipped to deal with the issue in this appeal, and we do not entertain Doule's largely undeveloped appellate argument in this regard. *See* ***State v. Bodoh***, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (appellate courts may address issue not considered below "only when the new issue raised is a question of law, the parties have thoroughly briefed the issue, and there are no disputed issues of fact regarding the new issue").

By the Court.—Judgment affirmed.

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