COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP746-CR **Cir. Ct. No. 2013CF393**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUENTIN M. HOLMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Quentin Holmes appeals from a judgment convicting him of operating while intoxicated (OWI), seventh, eighth, or ninth offense. We conclude that exigent circumstances justified a warrantless, nonconsensual blood draw. We affirm.

¶2 The essential facts are undisputed. Washington County Sheriff's Deputy Peter Schultz responded at about 4:00 a.m. to a witness's report of a single-car rollover accident. He found a "confused" and "very disoriented" Holmes alone in the back seat of the vehicle smelling strongly of intoxicants, and with bloodshot, glassy eyes. He had facial lacerations and soon began complaining of abdominal pain. An ambulance took Holmes to a local hospital, where Flight for Life awaited to transport him to Froedtert Hospital in Milwaukee. Schultz knew of Holmes' prior OWIs, which restricted him to a 0.02 blood alcohol level for driving. Holmes was arrested for suspicion of OWI. He refused a blood draw. Schultz was unaware if any judge was available to issue a warrant at that time. His supervisor, Lieutenant Robert Martin, directed him to drive to Froedtert to secure a blood test and to not take the time seeking a warrant would entail.

¶3 Alleging an unconstitutional search and seizure, Holmes filed a motion to suppress the test result. He argued that the deputies erroneously considered only dissipation of alcohol as the basis for the warrantless draw. *See* ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552, 1556 (2013). Schultz and Martin testified that securing and filling out a warrant would have taken approximately forty-five minutes. Holmes presented no evidence that an alternative, more efficient procedure was available or that a magistrate or judge was available to issue a warrant.

¶4 The circuit court denied the motion. Looking to ***McNeely*** and ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966), it concluded that under the totality of the circumstances, the officers reasonably believed that exigent circumstances justified the decision to not seek a warrant, as the delay entailed in seeking one would result in the destruction of evidence.

¶5 Holmes pled guilty to OWI, seventh, eighth, or ninth offense. Two other counts, operating with a prohibited alcohol concentration (PAC), seventh, eighth, or ninth offense, and operating after revocation, were dismissed and read in. This appeal followed.

¶6 We apply a two-part standard of review to a circuit court's decision on a suppression motion: we review findings of fact under the clearly erroneous standard, and independently review the application of law to those facts. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. The same inquiry applies when determining whether exigent circumstances justified a warrantless search. ***State v. Richter***, 2000 WI 58, ¶26, 235 Wis. 2d 524, 612 N.W.2d 29.

¶7 Warrantless searches are presumptively unconstitutional. ***State v. Henderson***, 2001 WI 97, ¶19, 245 Wis. 2d 345, 629 N.W.2d 613. One exception to the warrant requirement is the exigent circumstances doctrine, which holds that a warrantless search comports with the Fourth Amendment if the need to search is urgent and there is insufficient time to obtain a warrant. ***State v. Robinson***, 2010 WI 80, ¶¶24, 30, 327 Wis. 2d 302, 786 N.W.2d 463. "An officer is justified in conducting a warrantless search to prevent the destruction of evidence." ***State v. Howes***, 2017 WI 18, ¶37, 373 Wis. 2d 468, 893 N.W.2d 812.

¶8 To decide if exigent circumstances justified a search, a reviewing court assesses whether, under the circumstances known at the time, law

enforcement officers reasonably believed that a delay in procuring a warrant would risk the destruction of evidence. ***State v. Tullberg***, 2014 WI 134, ¶41, 359 Wis. 2d 421, 857 N.W.2d 120. "Evidence of a crime is destroyed as alcohol is eliminated from the bloodstream of a drunken driver." ***Id.***, ¶42. "[T]he natural dissipation of alcohol in the bloodstream may support a finding of exigency in a specific case" but "does not do so categorically." ***McNeely***, 133 S. Ct. at 1563. The reasonableness of a warrantless blood test must be determined case by case based on the totality of the circumstances. ***Id.***; ***Tullberg***, 359 Wis. 2d 421, ¶42.

¶9 Here, exigency did not rest solely on a concern over the dissipation of Holmes' blood alcohol. Also in the mix was his ambulance transport to West Bend, his nearly immediate Flight for Life transfer to Milwaukee, and the uncertainty about the nature and extent of treatment he might require. Schultz testified that dispatching a second deputy to the hospital so that Schultz could seek a warrant would have added yet another fifteen minutes.[1] Martin, Schultz's supervisor, testified that he decided on a warrantless blood draw because it would take at least forty-five minutes to get a warrant, which could mean not only further alcohol dissipation but the tainting of Holmes' blood if drugs were administered to him at the hospital.

¶10 The circuit court found that investigating the accident, clearing the accident scene, assessing Holmes' condition, and transporting him to one hospital and then another unavoidably consumed time. The EMTs, Flight for Life operators, and hospital nursing staff only reluctantly allowed Schultz to get into

[1] Schultz himself had no authority to dispatch another deputy, and it is questionable whether another deputy could have obtained a warrant in his stead, as Schultz was the only officer with firsthand knowledge of Holmes' apparent intoxication.

the ambulance to read Holmes the Informing the Accused form, as they wanted to immediately transport him out of concern for his medical condition, and flatly refused to hold Holmes at the hospital while Schultz drove to obtain a search warrant. It concluded that, as alcohol is known to dissipate over time and Holmes likely would be medicated at the hospital, Martin and Schultz reasonably believed that they were confronted with an emergency in which, under the circumstances, the delay necessary to obtain a warrant threatened the destruction of evidence, thus obviating the need for a warrant.

¶11 These findings are not clearly erroneous. From an evidentiary perspective, Holmes' injuries, his emergency transport to two different hospitals, and the likelihood of medical treatment and administration of drugs, all would take up valuable time. Under these "special facts," exigent circumstances justified the warrantless blood draw. *See* ***Schmerber***, 384 U.S. at 771.

¶12 We make a final point. Advancements in technology since ***Schmerber*** was decided in 1966 have greatly reduced the time and effort needed to secure a warrant for drunk-driving investigations before an investigatory blood draw is performed. *See* ***McNeely***, 133 S. Ct. at 1562; *see also* ***State v. Kennedy***, 2014 WI 132, ¶30, 359 Wis. 2d 454, 856 N.W.2d 834. In many jurisdictions, police officers or prosecutors apply for search warrants remotely via telephonic or radio communication, e-mail, or video conferencing, or use standard-form warrant applications. *See* ***McNeely***, 133 S. Ct. at 1562. We encourage Wisconsin counties that still adhere to traditional methods to explore reasonable, more expeditious means. "[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***Id.*** at 1561.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.