COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1784-CR **Cir. Ct. No. 2014CF204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN E. LORING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Brian Loring appeals a judgment of conviction for operating a motor vehicle with a restricted controlled substance in his blood, as a

fifth offense. *See* WIS. STAT. § 346.63(1)(am) (2015-16).[1] On appeal, Loring contends that the circuit court erred when it denied his pretrial motion to suppress the results of a blood test. Because the record demonstrates by clear and convincing evidence that Loring voluntarily consented to the blood draw, we affirm.

BACKGROUND

¶2 On October 19, 2013, at 4:57 p.m., Columbia County Sheriff's Deputy Emily Morgan stopped a vehicle whose registered owner's driving status was suspended. While Morgan was speaking with the driver, Loring, she observed a glass pipe sticking out of a bag under the center armrest. Loring admitted that he had smoked marijuana at about 8:00 or 9:00 a.m. that same day. Based on this admission and upon seeing the pipe, Morgan searched the vehicle. The search revealed an open beer bottle, a six-pack of beer, and a grinder that contained a substance that later tested positive for THC. Loring told Morgan that he had drunk one beer earlier that day. Morgan asked Loring if he would be willing to submit to field sobriety testing and Loring agreed. The conditions outside were windy and rainy, so Morgan asked if Loring would be willing to be transported to Divine Savior Hospital for the tests. He agreed to be transported there. Before Morgan transported Loring to the hospital, she also asked if he would be willing to submit to a blood draw, and Loring agreed.

¶3 At the hospital, Morgan administered field sobriety tests, but did not find that Loring was impaired based on the tests. At the hearing on the motion to

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

suppress, Morgan testified that, based on Loring's admission to smoking marijuana earlier in the day and upon the evidence found in Loring's car, she suspected that Loring had been operating a vehicle with a detectable amount of a restricted controlled substance in his blood. At the hospital, Morgan read him an "Informing the Accused" form, verbatim. Loring again consented to the blood draw. The blood draw was conducted after Loring signed the Informing the Accused form. Morgan transported Loring to jail, where he was booked on a charge of possession of drug paraphernalia. Morgan did not cite Loring for operating with a detectable amount of a restricted controlled substance in his blood until several months later, when she received the report from the Wisconsin Crime Lab with the results of the blood test. The report indicated that Loring's blood sample tested positive for Delta-9-tetrahydrocannabinol and opiates, specifically morphine.

¶4 Loring moved to suppress the results of the blood test. The circuit court denied the motion after a hearing. Loring later pled no contest to the charge of operating a motor vehicle on a highway with a restricted substance in his blood, as a fifth offense. The possession of drug paraphernalia charge was dismissed, pursuant to the plea agreement. The circuit court withheld sentence and placed Loring on probation for three years, ordering that he comply with certain conditions of supervision. Loring now appeals, arguing that the court erred when it denied his motion to suppress. We affirm, but on different grounds than the circuit court. *See* ***Vanstone v. Town of Delafield,*** 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds different than those relied on by the circuit court).

STANDARD OF REVIEW

¶5 The denial of a motion to suppress is analyzed under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267.

DISCUSSION

¶6 Consent to a search is an exception to the Fourth Amendment requirements of both a warrant and probable cause. ***Village of Little Chute v. Walitalo,*** 2002 WI App 211, ¶7, 256 Wis. 2d 1032, 650 N.W.2d 891. Assessing whether a person voluntarily consented to a blood draw involves a two-step analysis. ***Id.,*** ¶8. We must first determine whether the person, in fact, consented to the blood draw. ***Id.*** Here, Loring does not dispute that he actually consented to the blood draw. The record demonstrates that Loring consented twice to the blood draw, once before being transported to the hospital and then again at the hospital, after Morgan read him the Informing the Accused form.

¶7 We turn, then, to the second step of the analysis, which requires us to examine whether the consent was voluntarily given. ***Id.,*** ¶9. The State bears the burden of establishing, by clear and convincing evidence, that the consent was voluntary. ***Id.*** In ***State v. Artic,*** 2010 WI 83, 327 Wis. 2d 392, 786 N.W.2d 430, our supreme court enumerated multiple non-exclusive factors to be considered when determining whether consent is voluntary:

> (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.

¶8 Loring argues that his consent to the blood draw was not voluntary because he was misled by law enforcement. He argues that, when Deputy Morgan read him the Informing the Accused form, she erroneously informed him that he had been arrested for an offense enumerated under WIS. STAT. § 343.305(3)(a) and that he was legally compelled to consent to a blood draw. The problem with this argument is that it glosses over the fact that Loring previously consented to the blood draw before Morgan read him the form, and he never withdrew his consent.

¶9 Loring argues in his reply brief that there is not enough evidence to establish, by clear and convincing evidence, that his initial consent was voluntary. We disagree. Morgan testified that she asked Loring about the blood draw before she transported him to the hospital, and that Loring "said he would submit to it." Loring does not dispute this fact, nor does he allege any other facts that would support a conclusion that his initial consent was involuntary. When we apply the factors from ***Artic***, there is nothing in the record or in Loring's briefs to suggest that Morgan used deception, trickery, or misrepresentation in her dialogue with Loring to persuade him to give his initial consent. ***Id.***, ¶33. There is also nothing in the record or in Loring's briefs to suggest that he was convinced not to withdraw his initial consent by what Morgan read to him at the hospital.

¶10 In addition, the record and briefs are void of any suggestion that Morgan threatened Loring, physically intimidated him, or deprived him of basic needs. *See* ***id.*** Morgan testified that she placed handcuffs on Loring pursuant to a department policy requiring deputies to handcuff people before transporting them. However, there is no evidence that Morgan's use of handcuffs was related to her efforts to obtain consent to the blood draw. The State asserts that the interaction between Morgan and Loring was congenial and non-confrontational, and Loring does not dispute this assertion in his reply brief. *See* ***id.*** In addition, there is no evidence suggesting that Loring lacked the maturity, education, or intelligence to understand what Morgan was asking of him when she requested consent to a blood draw, and Loring does not make any allegation to the contrary. Indeed, Loring's history of interactions with law enforcement, having been convicted on four prior occasions for operating under the influence, supports the conclusion that he was capable of understanding Morgan's request.

¶11 In sum, we are satisfied that clear and convincing evidence in the record demonstrates that Loring voluntarily consented to the blood draw, such that his motion to suppress the test results was properly denied.

By the Court.—Judgment affirmed.

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