COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP280-CR **Cir. Ct. No. 2016CT633**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAITLIN C. SUMNICHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Kaitlin C. Sumnicht appeals from a judgment convicting her of operating a motor vehicle while intoxicated (OWI), second

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

offense, and challenges the order denying her motions to suppress evidence on grounds that she did not voluntarily consent to having her blood tested and that she later revoked any purported consent. Because we conclude that the evidence was sufficient to show that she voluntarily consented to the test and further conclude that her consent could not be revoked after her blood was drawn, we affirm.

BACKGROUND

¶2 On July 9, 2016, Sumnicht was operating a motor vehicle when she was pulled over by Deputy Shawn Glasel of the Winnebago County Sheriff's Department. Glasel suspected that Sumnicht was intoxicated. After administering field sobriety tests, he arrested Sumnicht for OWI and took her to a hospital for a blood draw.

¶3 While a handcuffed Sumnicht sat in the backseat of the police vehicle, Glasel read to her the statutory Informing the Accused form, ending with the question printed on the form: "Will you submit to an evidentiary chemical test of your blood?" After receiving what he considered to be Sumnicht's consent, the blood draw was completed.

¶4 On July 12, 2016, Sumnicht's counsel sent a letter to the Wisconsin State Laboratory of Hygiene, which would analyze the blood sample:

> It is my understanding that as of this date a sample has been received but has not yet been analyzed. Kaitlin C. Sumnicht is asserting her right to privacy in her blood and requests that no analysis be run without a warrant authorizing so, signed by a neutral and detached magistrate upon a showing of probable cause and specifying the goal of analysis….
>
> ….
>
> A copy of this letter is directed to the Winnebago County District Attorney's Office. We request that you

> consult with that office prior to any analysis of the blood sample.

The lab received Sumnicht's sample on July 18, 2016, and conducted an analysis on July 20, 2016. The analysis showed a blood alcohol content of 0.154.

¶5 Sumnicht was charged with OWI, second offense, contrary to WIS. STAT. § 346.63(1)(a), and operating with a prohibited alcohol concentration (PAC), second offense, contrary to § 346.63(1)(b). Sumnicht filed two suppression motions—one challenging whether she voluntarily consented to the blood test and the other challenging the blood analysis being performed after her attorney requested that no analysis take place without a warrant.

¶6 At the motion hearing, Glasel testified that he read the Informing the Accused form to Sumnicht verbatim. When asked whether she would submit to a blood test, "[s]he stated she would," and he checked the box marked "yes" on the form. Glasel could not recall her "exact words," but "[s]he didn't say no." He also could not recall whether Sumnicht had any questions about the form, but, if she did, he would have re-read certain parts of the form as he has been trained to do.

¶7 The circuit court denied the motions. Based on the Informing the Accused form, the deputy's testimony, and the absence of any rebuttal evidence, the court concluded that Sumnicht voluntarily consented to the blood test. The court also concluded that, despite her attorney's letter, her consent could not be subsequently withdrawn because "the right to test the blood follows" from her original consent.

¶8 Per agreement, Sumnicht entered a no contest plea to OWI, second offense, and the PAC charge was dismissed. After sentencing, the court stayed the penalties pending this appeal.

DISCUSSION

Standard of Review

¶9 A circuit court's findings of evidentiary or historic fact—such as consent to a search—are not to be overturned unless they are clearly erroneous. ***State v. Richter***, 2000 WI 58, ¶26, 235 Wis. 2d 524, 612 N.W.2d 29). But the application of those facts to constitutional principles—such as whether consent to a search is voluntary and whether consent to a blood test, once given, can be revoked after the draw—presents issues of law which we review de novo. ***State v. Riedel***, 2003 WI App 18, ¶5, 259 Wis. 2d 921, 656 N.W.2d 789; ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

The Law on Voluntary Consent to Search

¶10 The Fourth Amendment of the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV; *see also* WIS. CONST. art. I, § 11. A blood test conducted by law enforcement is a search subject to constitutional protections. ***Schmerber v. California***, 384 U.S. 757, 767 (1966).

¶11 A warrantless search is presumptively unreasonable, "[b]ut there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834 (citation omitted). One of the "jealously and carefully

drawn" exceptions to the warrant requirement is the search pursuant to voluntary consent. ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994) (citation omitted).

¶12 To prove voluntary consent, the State must show by clear and convincing evidence "that consent to the blood draw was 'given in fact by words, gestures, or conduct' and that the consent was 'voluntary.'" ***State v. Blackman***, 2017 WI 77, ¶54, 377 Wis. 2d 339, 898 N.W.2d 774 (emphasis and citation omitted). Not suited to bright-line rules, determining whether consent is voluntary entails evaluating the totality of the circumstances. ***State v. Artic***, 2010 WI 83, ¶32, 327 Wis. 2d 392, 786 N.W.2d 430.

¶13 This search was conducted under Wisconsin's implied consent law. WIS. STAT. § 343.305. The law aims to help law enforcement secure evidence of intoxication or controlled substances by persuading drivers to consent to a chemical test by leveling a penalty on those who refuse. *See* ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987); *see also* ***Missouri v. McNeely***, 569 U.S. 141, 160-161 ("States have a broad range of legal tools … to secure BAC evidence," including the adoption of "implied consent laws that require motorists … to consent to BAC testing … [with] significant consequences" when they refuse); sec. 343.305(2), (3), (9). The law provides in pertinent part: "Upon arrest of a person for [OWI], a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose [of determining the quantity of alcohol or controlled substances]." Sec. 343.305(3). When the officer requests the test, the officer must read the

Informing the Accused form, which explains that, if the driver refuses to take the test, there will be penalties.[2] Sec. 343.305(4).

[2] The Informing the Accused form read to Sumnicht stated as follows:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.
>
> In addition, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood.

The next line on the form states: "Will you submit to an evidentiary chemical test of your _____?" Glasel handwrote "blood" in the blank space.

Sumnicht Voluntarily Consented to the Blood Draw

¶14 Sumnicht argues that the State failed to clearly and convincingly prove that she voluntarily consented to the blood test. She asserts that the State did not properly develop a factual record of Glasel's interaction with her, providing no evidence of her demeanor, of her understanding of what Glasel was telling her, or of details on what she actually said that made Glasel believe consent was given. We disagree.[3]

¶15 The State met its burden by showing the following: Glasel read the statutory Informing the Accused form verbatim, which lays out the choice to take or refuse the test; per the form, Glasel then posed a nonleading question, "Will you submit to an evidentiary chemical test of your blood?"; although understandably not able to recall the exact words used during the arrest three months prior, Glasel testified that "[s]he stated she would" take the test; and this prompted Glasel to check mark the box "yes" on the form. This factual record is sufficiently developed to conclude that Sumnicht voluntarily consented. Further inquiry would be appropriate if there were indications that Sumnicht's demeanor or understanding were cause for concern or if there was any evidence that countered

[3] The State emphasizes the consent that is implied under the statute, citing several recent implied consent cases, including ***State v. Brar***, 2017 WI 73, ¶29, 376 Wis. 2d 685, 898 N.W.2d 499 ("He availed himself of the roads of Wisconsin, and as a result, he consented through his conduct to a blood draw."). Sumnicht asserts that the proper implied consent framework is set forth in ***State v. Padley***, 2014 WI App 65, ¶¶25-27, 354 Wis. 2d 545, 849 N.W.2d 867, **(**and other implied consent cases) which distinguished implied consent from voluntary consent at the time of the blood draw. We need not resolve any analytical differences relating to implied consent as any such differences do not affect our review and resolution of this case. We assume, for the purpose of this appeal, that express consent is needed when the defendant is presented with the Informing the Accused form.

or undermined the State's. But Sumnicht does not allege, much less show, that there were such indications or evidence.

¶16 Sumnicht stresses that the State did not prove that she responded in an "affirmative" manner, asserting that "[a]ll Glasel could state with confidence was that Sumnicht 'did not say no.'" This is incorrect. On direct examination, Glasel testified that, upon requesting that she take the test, Sumnicht "stated she would" and he then checked "yes" on the form. This testimony showing her affirmative response is not undercut by Glasel's later testimony that "[s]he didn't say no," which was stated during cross-examination after he acknowledged that he could not recall the exact words used.

¶17 Sumnicht argues that the Informing the Accused form was flawed by asking if she would "submit" rather than if she would "consent." "Submit" connotes yielding to authority, Sumnicht asserts, and fails to convey that she was free to make a choice. We disagree. The nuance between "submit" and "consent" does not overcome the uncontested evidence showing her voluntary consent, particularly when she has not actually alleged that she was misled by the wording. Further, "submit" is not an inappropriate term in this context. The statute itself uses the term multiple times. *See, e.g.*, WIS. STAT. § 343.305(5) and (7) ("[i]f the person submits to a test"). In fact, the supreme court has approved of the adequacy and accuracy of Informing the Accused forms developed by the Wisconsin Department of Transportation and which use the term "submit" (the

department also drafted the form in this case). *See* ***State v. Piddington***, 2001 WI 24, ¶¶6 n.5, 18 n.8, 241 Wis. 2d 754, 623 N.W.2d 528.[4]

¶18 Sumnicht's arguments do not show that the circuit court's finding of consent was clearly erroneous, nor do they persuade us that her consent was not voluntary.

Sumnicht Could Not Revoke Her Consent after the Blood Draw

¶19 Sumnicht argues that, even if we conclude that she voluntarily consented to the test, she revoked that consent via her attorney's letter before her blood was analyzed. Sumnicht notes that "[o]ne who consents to a search 'may of course delimit as [one] chooses the scope of the search to which [one] consents.'" ***State v. Matejka***, 2001 WI 5, ¶37, 241 Wis. 2d 52, 621 N.W.2d 891 (quoting ***Florida v. Jimeno***, 500 U.S. 248, 252 (1991)). Because the search was not completed, she asserts, until the analysis was conducted, she could revoke her consent at any time prior to the analysis. Once she revoked, Sumnicht argues that

[4] Sumnicht points out that Glasel went over the Informing the Accused form with her while she was under arrest, in handcuffs, and seated in the backseat of the squad car—circumstances not especially conducive to choosing freely. *See* ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971). Other than noting these circumstances, however, Sumnicht does not elaborate as to how they affected her consent or its voluntariness. We will not develop and then address arguments. *See* ***Wilmet v. Liberty Mut. Ins. Co.***, 2017 WI App 16, ¶7 n.2, 374 Wis. 2d 413, 893 N.W.2d 251. In any event, her circumstances, without more, are insufficient to outweigh the evidence showing her affirmative voluntary consent. *See* ***Gautreaux***, 52 Wis. 2d at 492-93 (Although the state's burden to show voluntariness of consent may be more difficult, "there is no presumption a consent to a search given by a person under arrest is involuntary and coerced as a matter of law.").

she "was entitled to rely on the privacy of the information" in her sample, and its analysis without a warrant violated her constitutional rights. We disagree.[5]

¶20 Consent to a search may be limited or revoked, provided that the intent to limit or revoke is unequivocally made. ***Matejka***, 241 Wis. 2d 52, ¶37; ***State v. Wantland***, 2014 WI 58, ¶¶33-34, 355 Wis. 2d 135, 848 N.W.2d 810. "Unequivocal acts or statements sufficient to constitute withdrawal of consent may include slamming shut the trunk of a car during a search, grabbing back the item to be searched from the officer, and shouting 'No wait' before a search could be completed." ***Wantland***, 355 Wis. 2d 135, ¶34 (citations omitted).

¶21 Here, however, Sumnicht's attempt to revoke was simply too late. Contrary to the premise of her argument, the search does not consist of multiple parts and is not ongoing until the analysis is conducted. Rather, the search ended upon the blood being drawn. From that point on, the evidence was lawfully seized, and the subsequent examination of seized evidence is part and parcel of the lawful search and seizure. Namely, Wisconsin courts have squarely rejected arguments challenging the examination of lawfully seized evidence, including subsequent testing of blood drawn pursuant to a warrant, consent, or exigent circumstances. The lawful extraction of blood and subsequent testing of the blood are a single event for fourth amendment purposes. *See* ***Riedel***, 259 Wis. 2d 921, ¶16 (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

[5] Sumnicht concedes that, if we conclude, as we do, that she provided voluntary consent, her consent was not just for a blood draw, but for a chemical testing of her blood. Because she was asked for an "evidentiary chemical test" of her blood, she agrees that consent here "cover[s] both the collection and analysis of her blood." Her argument is that she later revoked that consent.

not require a judicially authorized warrant." (citation omitted)); ***State v. VanLaarhoven***, 2001 WI App 275, ¶¶13, 16, 248 Wis. 2d 881, 637 N.W.2d 411 ("'[T]he right to seize the blood … encompass[ed] the right to conduct a blood-alcohol test at some later time,'" precluding a "defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance.") (citation omitted)). Thus, by the time the attorney's letter was sent, the search was already over and the search- and seizure-related constitutional protections had been satisfied.

¶22 Sumnicht argues that these cases are not directly controlling, as they do not address revocation. We disagree. As ***Riedel*** and ***VanLaarhoven*** make clear, the search and seizure of the blood was completed at the time of the lawful blood draw. Both decisions relied upon and cited the apt analysis set forth in ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, ¶31 n.7, 272 Wis. 2d 444, 681 N.W.2d 479. In ***Petrone***, police seized rolls of film pursuant to a warrant and subsequently developed them. In rejecting the defendant's argument that the development of the film constituted a second search requiring a warrant, the court reasoned as follows:

> Developing the film is simply a method of examining a lawfully seized object. Law enforcement officers may employ various methods to examine objects lawfully seized in the execution of a warrant. For example, blood stains or substances gathered in a lawful search may be subjected to laboratory analysis.... Developing the film made the information on the film accessible, just as laboratory tests expose what is already present in a substance but not visible with the naked eye. Developing the film did not constitute ... a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant.

Petrone, 161 Wis. 2d at 545 (citation omitted). Likewise, analysis of Sumnicht's blood was simply a method of examining lawfully seized evidence.[6]

¶23 By driving on Wisconsin roadways, Sumnicht had impliedly consented to taking a blood test.[7] She was given the opportunity to revoke her consent at the time that Glasel read to her the Informing the Accused form. "[O]nce a person has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the requested test …." ***State v. Rydeski***, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997). By voluntarily consenting to taking the test, Sumnicht passed on the opportunity to revoke her implied consent.

By the Court.—Judgment affirmed.

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

[6] Courts that have directly addressed this issue have reached the same conclusion under their states' implied consent laws. *See, e.g.*, ***State v. Simmons***, 605 S.E.2d 846, 848 (Ga. Ct. App. 2004) (finding "no basis … to permit the withdrawal of consent to State testing once consent has been given"); ***People v. Woodard***, No. 336512, 2017 WL 4158047, at *9 (Mich. Ct. App. Sept. 19, 2017) (concluding the issue is not withdrawing consent, but whether a defendant should be allowed "to prevent the police from examining the evidence—i.e., her blood—which was lawfully collected during the consent search"). Though not binding, decisions from other jurisdictions can serve as persuasive authority. *See* ***Power Sys. Analysis, Inc. v. City of Bloomer***, 197 Wis. 2d 817, 826, 541 N.W.2d 214 (Ct. App. 1995).

[7] Under Wisconsin's implied consent law, the sole purpose of the testing was to determine the concentration of alcohol or drugs in Sumnicht's blood. *See* WIS. STAT. § 343.305(2). No suggestion has been made that law enforcement used the testing for any other purpose.