COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2367-CR **Cir. Ct. No. 2013CT125**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. WALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: TODD J. HEPLER, Judge. *Affirmed*.

¶1 FITZPATRICK, J.[1] Keith Wall was convicted of operating a motor vehicle while intoxicated, third offense. Wall moved to suppress a blood test result, arguing that it should be excluded from evidence because it was obtained

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

without a warrant and because the law enforcement officers exercised excessive force in obtaining the sample. The Columbia County Circuit Court denied the motion, finding that the officers sought the test based on a good faith reliance on precedent and that the officers did not exercise excessive force in restraining Wall for the test. For the reasons outlined below, I affirm.[2]

BACKGROUND

¶2 The following facts are gleaned from the circuit court's findings and the record. In March 2013, Columbia County Sheriff Deputy Cory Miller initiated a traffic stop of Keith Wall after witnessing two traffic violations by Wall. During the stop, Deputy Miller suspected that Wall was intoxicated and had Wall perform field sobriety tests. After seeing indications that Wall was intoxicated and discovering that this may be Wall's third offense, Deputy Miller took Wall to Divine Savior Hospital for a chemical test of Wall's blood.

¶3 Upon arriving at the hospital, Deputy Miller read to Wall a form entitled "Informing the Accused" and asked Wall if he would voluntarily submit to a blood draw. Wall refused, claiming that he was afraid of needles. Of interest is that the circuit court made no finding that Wall was, in fact, afraid of needles. After he was unable to determine if Wall would resist the blood draw and after noticing Wall's increasing agitation, Deputy Miller requested assistance from the Portage Police Department.

[2] The Honorable Todd Hepler entered the judgment of conviction. The Honorable Daniel George entered the order denying the defendant's motion to suppress.

¶4 When Officers Bagnall and Stumpf of the Portage Police Department arrived at the hospital, Deputy Miller retrieved a restraint chair from an adjacent room to facilitate the blood draw. Wall voluntarily sat in the chair and was initially cooperative as the officers applied the restraints. However, once the officers removed Wall's handcuffs, Wall resisted the officers and refused to move his arms. Officer Bagnall then applied a pressure point technique which caused the release of Wall's right arm and allowed Deputy Miller and Officer Stumpf to place Wall's arm in the strap. Wall eventually calmed down, and the blood technician was able to draw Wall's blood. The results showed Wall's blood alcohol concentration was 0.178.

¶5 Wall was charged with operating a motor vehicle while intoxicated, third offense, and operating with a prohibited alcohol concentration, third offense. Wall moved to suppress the evidence from the blood draw, arguing the warrantless and nonconsensual blood draw violated Wall's Fourth Amendment rights and that the officers violated his due process rights because they acted unreasonably by using excessive force. The Columbia County Circuit Court denied the motion, and Wall pleaded no contest to the charge of operating a motor vehicle while intoxicated, third offense. Wall now appeals.

DISCUSSION

¶6 The primary issue on appeal is whether the extraction of Wall's blood sample without a warrant was reasonable under the Fourth Amendment. Wall argues that the involuntary and warrantless blood draw, and the officers' alleged use of excessive force, violated his constitutional right to be free from unreasonable searches and his right to due process. As a result, Wall contends that the circuit court erred in denying his motion to suppress the blood test evidence. I

reject Wall's arguments and affirm the circuit court's decision to deny Wall's motion to suppress.

¶7 Both of these issues involve the application of constitutional principles. I accept the circuit court's findings of fact unless those are clearly erroneous. ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. However, I review de novo the application of constitutional principles to those facts. ***Id.***

I. The warrantless blood draw did not violate Wall's Fourth Amendment rights.

¶8 I first address Wall's contention that the warrantless blood draw violated his Fourth Amendment right to be free from unreasonable searches. Since Deputy Miller was acting with good faith reliance on existing precedent when submitting Wall to a blood draw without a warrant, I affirm the circuit court's decision.[3]

¶9 The right to be secure from unreasonable searches and seizures is protected by the both the United States Constitution and the Wisconsin Constitution. U.S. Const. amend. IV; Wis. Const. art. I § 11. Warrantless searches are considered per se unreasonable under the Fourth Amendment unless those searches come within the confines of a few well-delineated exceptions. ***State v. Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. A government search based on exigent circumstances, such as when evidence will be

[3] Wall does not respond to the State's arguments regarding ***Missouri v. McNeely***, 569 U.S. 141 (2013) and ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) in his reply brief. Generally, unrefuted arguments are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). However, I choose to address the merits of the argument.

lost or destroyed in the time it would take to obtain a warrant, is one of those exceptions. ***Id.*** Where there has been an unlawful search, the illegally obtained evidence will be suppressed as a consequence of law enforcement's misconduct. ***Dearborn***, 327 Wis. 2d 252, ¶15.

¶10 Wall argues that the holding of ***Missouri v. McNeely***, 569 U.S. 141 (2013) controls this case. In ***McNeely***, the Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a blanket exigent circumstance to justify an exception to the Fourth Amendment's search warrant requirements. However, prior to the Court's holding in ***McNeely***, Wisconsin had a longstanding decision, ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), holding that the metabolization of alcohol into the bloodstream does constitute an exigent circumstance. Importantly, a good faith exception to the exclusionary rule applies when law enforcement officers reasonably rely on well-settled precedent. ***Dearborn***, 327 Wis. 2d 252, ¶4. That is, "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." ***Id.***

¶11 Here, the ***McNeely*** decision was handed down on April 17, 2013, but Wall was arrested on March 22, 2013. Therefore, when Deputy Miller and the Portage Police officers caused the blood draw without a warrant, they were reasonably relying on well-settled Wisconsin precedent, namely ***Bohling***. This good-faith reliance on existing precedent offers an exception to the exclusionary

rule. Therefore, the circuit court did not err in concluding that the warrantless blood draw did not violate Wall's Fourth Amendment rights.[4]

II. The officers' use of force was reasonable.

¶12 Wall next argues that the blood draw was unreasonable due to the officers' use of excessive force. Wall's case is analogous to ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d 347 (Ct. App. 1992), where we justified officers' use of force for a suspect who was resisting a blood draw. Based on the circumstances surrounding Wall's blood draw, I affirm the decision of the circuit court that the officers' use of force was reasonable.

¶13 As explained above, prior to the Supreme Court's holding in ***McNeely***, officers were permitted to take a blood sample without a warrant so long as the taking met Fourth Amendment reasonableness standards. "The reasonableness of a questioned action is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ***Krause***, 168 Wis. 2d at 586. "[W]hether the force used was excessive is determined by an evaluation of 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.'" ***Id.*** at 589 (quoting ***Hammer v. Gross***, 932 F.3d 842, 845 (9th Cir.)). In making these determinations, I consider several relevant factors, such as whether

[4] Wall also argues that the holding in ***State v. Faust***, 2004 WI 99, 274 Wis. 2d 183, 682 N.W.2d 371, modified the holding in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). I reject this argument. The ***Faust*** court, relying on ***Bohling***, merely concluded "that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw." ***Faust***, 274 Wis. 2d 183, ¶23. This did not modify ***Bohling***'s holding that a warrantless blood draw can fall into the exigent circumstances exception.

the test was administered by medical personnel in a proper setting, the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of himself or others, and whether the suspect was actively resisting. ***Id.***

¶14 Here, Wall's blood was drawn in a reasonable environment, Divine Savior Hospital and by trained personnel. Additionally, as the court noted in ***Krause***, operation of a motor vehicle while intoxicated is a crime with significant social costs. ***Id.*** at 590. Wall, while initially cooperative with the officers, began actively resisting in a manner that could have injured himself or the officers present. Wall was resisting in a manner that required, at one point, as many as three officers to restrain him in order for the technicians to safely administer the blood draw. He also clearly indicated that he would not agree to the blood draw. These circumstances demonstrate that the officers' use of force was reasonable. Therefore, I agree with the circuit court's conclusion.

CONCLUSION

¶15 For the forgoing reasons, I affirm the circuit court's decision to deny Wall's motion to suppress.

By the Court.—Judgment affirmed.

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