COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1518-CR **Cir. Ct. No. 2016CT1061**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JESSICA M. RANDALL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] The State of Wisconsin appeals the circuit court's decision and order granting Jessica Randall's motion to suppress the results of a blood test. The circuit court granted Randall's motion to suppress

[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 unless otherwise noted.

because: under the applicable law, Randall had the right to withdraw her consent to the blood test after her blood was taken but before it was tested, so long as she clearly and unequivocally withdrew her consent; Randall did clearly and unequivocally withdraw her consent; and, therefore, the State's subsequent blood testing was without a lawful basis and its use as evidence would violate Randall's Fourth Amendment rights.

¶2 On appeal, the State does not dispute that Randall's attempt to withdraw her consent was clear and unequivocal. Rather, the State argues that Randall no longer had the right to withdraw her consent and that Randall's withdrawal attempt came too late because, as a matter of law, an individual can only withdraw his or her consent to a blood test before the blood is taken, not after. Based on the applicable law, I disagree. The circuit court properly suppressed the blood test results because: (1) the taking and testing of the blood, together, comprise a single search to which constitutional protections attach, *see* ***State v. VanLaarhoven***, 2001 WI App 275, ¶16, 248 Wis. 2d 881, 637 N.W.2d 411; and (2) the search had not yet been completed when Randall withdrew her consent before the blood was tested and, therefore, Randall retained her right to withdraw her consent to continuation of that search, *see* ***State v. Wantland***, 2014 WI 58, ¶33-34, 355 Wis. 2d 135, 848 N.W.2d 810. Accordingly, I affirm the decision of the circuit court.

BACKGROUND

¶3 On October 29, 2016, Randall was arrested for operating a vehicle while under the influence of an intoxicant. The arresting officer read Randall the

"Informing the Accused"[2] form and Randall answered "yes" when asked if she would submit to an evidentiary blood test. Randall was taken to a hospital and her blood was taken consistent with the procedures set forth in WIS. STAT. § 343.305.

¶4 On October 31, 2016, Randall's counsel sent a letter to the Wisconsin State Laboratory of Hygiene stating,

> It is my understanding that as of this date a blood sample belonging to [Randall] has been received but has not yet been analyzed. [Randall] hereby revokes any previous consent that she may have provided to the collection and analysis of her blood, asserts her right to privacy in her blood, and demands that no analysis be run without specific authorization by a neutral and detached magistrate upon a showing of probable cause and specifying the goal of analysis.

¶5 On November 4, 2016, the laboratory acknowledged receipt of Randall's letter and on November 7, 2016, the laboratory tested Randall's blood. The State charged Randall with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as a third offense.

¶6 Randall moved the circuit court to suppress the results of the blood test on the ground that she withdrew her consent to the search of her blood before

[2] "[T]he Informing the Accused form is mandated by WIS. STAT. § 343.305(4), and informs the driver that he or she has been arrested for drunk driving; that law enforcement wants to take a sample of his or her breath, blood or urine to determine the alcohol concentration in the driver's system; that refusal to submit to the test will result in negative consequences; and, the driver may take additional tests after completing the first test." ***State v. VanLaarhoven***, 2001 WI App 275, ¶8 n.3, 248 Wis. 2d 881, 637 N.W.2d 411.

the blood was tested and, therefore, the State's testing of her blood after her withdrawal of consent was without a lawful basis.[3]

¶7 The circuit court held a hearing on Randall's motion. The court ruled, "as a matter of constitutional law, the defendant … did withdraw her consent for the search prior to the blood being tested. I believe she has that right. She retained the right to withdraw that consent." Because Randall retained the right to withdraw her consent and exercised that right, the court concluded that the State's subsequent testing of Randall's blood was without a lawful basis and the use of those test results would violate Randall's constitutional rights. The State appeals.

DISCUSSION

¶8 At issue is whether the circuit court erred in granting Randall's motion to suppress the results of the blood test on the grounds that use of the test results at trial would violate her rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.[4] In reviewing a motion to suppress, this court upholds the circuit court's findings of fact unless they are clearly erroneous and independently applies constitutional principles to those facts. ***Wantland***, 355 Wis. 2d 135, ¶¶18-19; *see* WIS. STAT. § 805.17(2).

[3] Randall also moved the circuit court to suppress the blood test results on the ground that her initial consent was not voluntary, free, intelligent, or unequivocal. The circuit court rejected this argument and Randall does not renew this argument on appeal.

[4] Because "Article I, Section 11 is the state analogue to the Fourth Amendment and protects persons against unreasonable searches and seizures," I use the term "Fourth Amendment" to refer to the protections provided under both the federal and Wisconsin constitutions. ***State v. Arias***, 2008 WI 84, ¶13, 311 Wis. 2d 358, 752 N.W.2d 748.

¶9 The Fourth Amendment forbids unreasonable searches and seizures. ***State v. Boggess***, 115 Wis. 2d 443, 448-49, 340 N.W.2d 516 (1983). Warrantless searches are presumptively unreasonable, subject to certain carefully delineated exceptions. ***Id.*** at 449. "One well-established exception to the warrant requirement of the Fourth Amendment is a search conducted pursuant to consent." ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998); *see also* ***State v. Brar***, 2017 WI 73, ¶16, 376 Wis. 2d 685, 898 N.W.2d 499. A person who voluntarily consents to a search may subsequently limit or withdraw consent if that limitation or withdrawal is expressed with clear and unequivocal intent. *See* ***Wantland***, 355 Wis. 2d 135, ¶¶33-34.

¶10 Here, it is undisputed that Randall voluntarily consented to have her blood taken and tested, her blood was taken, and before the blood was tested she clearly and unequivocally withdrew her consent to the search of her blood. The narrow issue on appeal is whether Randall had the right to withdraw her consent to the search after her blood was taken but before it was tested. As I explain, I conclude that under the applicable law Randall had the right to withdraw her consent before the blood was tested and, therefore, the State was without a lawful basis under the Fourth Amendment to test her blood. My conclusion is based on the rulings in ***VanLaarhoven***, 248 Wis. 2d 881, and ***Wantland***, 355 Wis. 2d 135. I then address and reject the State's arguments to the contrary.

I. Randall had the right to withdraw her consent to the search of her blood before the blood was tested

¶11 In ***VanLaarhoven***, this court set the beginning and end points of a search of a person's blood, specifically ruling that the taking and testing of blood comprise one continuous search under the Fourth Amendment. 248 Wis. 2d 881, ¶¶8, 13, 16-17. In ***VanLaarhoven***, police arrested VanLaarhoven for operating a

vehicle while intoxicated, VanLaarhoven consented to a chemical blood test, and his blood was taken and tested. ***Id.***, ¶2. VanLaarhoven moved to suppress the results of the blood test, arguing that although the taking of his blood was lawful, the testing of his blood was "a separate search necessitating a warrant." ***Id.***, ¶¶3-4, 9. This court rejected his argument, reasoning that testing of blood lawfully taken pursuant to a "warrant requirement or an exception to the warrant requirement is *an essential part of the [search]*" and that defendants may not "parse the lawful [search] of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement." ***Id.***, ¶16 (emphasis added). This court concluded that by consenting after having been read the Informing the Accused form, VanLaarhoven "consented to a taking of a sample of his blood and the chemical analysis of that sample." ***Id.***, ¶8. Thus, ***VanLaarhoven*** teaches us that there is one continuous search that begins with the taking of blood and continues through the testing of that blood. *See also* ***State v. Riedel***, 2003 WI App 18, ¶16, 259 Wis. 2d 921, 656 N.W.2d 789 (2002) (holding, in a case in which the driver's blood was taken pursuant to the exigent circumstances exception to the warrant requirement, that no additional warrant was required to test the blood lawfully taken).

¶12 The principle that a person has a right to withdraw consent to a search before the search is completed stems from our supreme court's decision in ***Wantland***, 355 Wis. 2d 135. In ***Wantland***, the court considered whether Wantland withdrew the driver's consent to the search of a vehicle in which Wantland was a passenger when the officer observed a briefcase in the back hatch of the vehicle and Wantland asked the officer, "Got a warrant for that?" ***Id.***, ¶¶2-5. The court ruled that Wantland did not "effectively withdraw the driver's consent" because his question to the officer was ambiguous. ***Id.***, ¶¶5, 42-44.

While Wantland could have withdrawn consent to the continuation of the search of the vehicle before the officer removed the briefcase, his ambiguous question to the officer did not effectuate such withdrawal. ***Id.*** The court contrasted Wantland's ambiguous question to the officer with the following "[u]nequivocal acts or statements sufficient to constitute withdrawal" of consent: "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*." ***Id.***, ¶34 (emphasis added) (*citing* ***United States v. Flores***, 48 F.3d 467, 468 (10th Cir. 1995); ***United States v. Ho***, 94 F.3d 932, 934 (5th Cir. 1996); ***United States v. Fuentes***, 105 F.3d 487, 489 (9th Cir. 1997). Thus, ***Wantland*** teaches us that so long as a search has not yet been completed, an individual has the right to withdraw consent to continuation of the search through unequivocal actions or statements.

¶13 Based on ***VanLaarhoven*** and ***Wantland***, I conclude that while no *additional authority* is needed to continue a lawful search of someone's blood by testing the blood that has been taken, that search cannot continue when the original authority is revoked, such as when a warrant has been deemed invalid or consent has been withdrawn. So here, following ***VanLaarhoven*** and ***Wantland***, the search of Randall's blood, which comprised both the taking and testing of the blood, had not yet been completed at the time when the officials at the state laboratory possessed Randall's blood but had not yet tested Randall's blood; therefore, before the blood was tested Randall had the right to withdraw her consent to the continuation of that search. Accordingly, when Randall clearly and unequivocally withdrew her consent to the search of her blood before it was tested, the State lost its only lawful basis for the warrantless search and its subsequent testing was done in violation of Randall's Fourth Amendment rights.

II. The State's arguments

¶14 The State concedes that the testing of Randall's blood is not a separate search from the taking of her blood, and that the search to which Randall consented comprised both the taking and testing of her blood. But, the State points to no controlling legal authority concluding that a person who consents to the taking and testing of blood loses the right to withdraw consent before the search is completed with the testing of the blood. Rather, the State urges this court to reach that conclusion based on its interpretations of an unpublished decision by this court, ***State v. Sumnicht***, No. 2017AP280-CR, unpublished slip op. (WI App Dec. 20, 2017), the Wisconsin implied consent law, the United States Supreme Court case ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016), and public policy. I address and reject each of the State's arguments.

A. State v. Sumnicht

¶15 First, the State argues that this court should reach the same conclusion as was reached in ***Sumnicht***, which involved similar factual and legal issues. Sumnicht, like Randall, was arrested for operating a vehicle while intoxicated and voluntarily consented to a blood test, but, before the blood was tested, Sumnicht sent a letter to the Wisconsin State Laboratory of Hygiene and the district attorney's office, withdrawing her consent to the testing of the blood. No. 2017AP280-CR, ¶¶2-4. On the issue of whether Sumnicht had the right to withdraw her consent after her blood was taken but before the blood was tested, the ***Sumnicht*** court affirmed the circuit court's denial of Sumnicht's suppression motion, concluding that "her consent could not be revoked after her blood was drawn." ***Id.***, ¶1. Citing ***VanLaarhoven*** and two non-Wisconsin cases addressing whether a defendant has the right to withdraw his or her consent to a blood test

after the blood has been taken but before it has been tested, the ***Sumnicht*** court reasoned that "the search ended upon the blood being drawn." ***Sumnicht***, No. 2017AP280-CR, ¶21.

¶16 I am not bound by the ***Sumnicht*** opinion, and, as explained above, I conclude that the controlling case on which the ***Sumnicht*** court relied, ***VanLaarhoven***, when taken together with ***Wantland***, compels a different result. To repeat: From the language in ***VanLaarhoven*** prohibiting "pars[ing] the lawful seizure of a blood sample into multiple components, *each to be given independent significance for purposes of the warrant requirement*," 248 Wis. 2d 881, ¶16 (emphasis added), it is apparent that Randall's consent to the search of her blood included both the taking and the testing of that blood;[5] and under ***Wantland***, 355 Wis. 2d 135, ¶¶33-35, she had the right to withdraw consent to continuation of the search before the blood was tested.

¶17 In addition, the ***Sumnicht*** court's reliance on two non-Wisconsin cases, ***State v. Simmons***, 270 Ga. App. 301, 605 S.E.2d 846 (Ga. Ct. App. 2004), and ***People v. Woodard***, 321 Mich. App. 377, 909 N.W.2d 299 (2017), is misplaced and, as I explain, these cases have no persuasive value as they relate to this case.

¶18 In ***Simmons***, Simmons initially consented to a blood test, his blood was taken, but, before his blood was tested, he withdrew his consent to the blood

[5] The statutory language in WIS. STAT. § 343.305(4) and (5) relating to the request for "a chemical test specimen" and the administration of the test, and the language in the Informing the Accused form itself, support this scope of the search, by referring to the driver's submission to or refusal of "the test" or "testing," indicating that the search extends from the taking of the blood through its testing, from which it is reasonably inferred that consent may be withdrawn before the testing is accomplished.

test. 270 Ga. App. at 301-302. Simmons moved the circuit court to suppress the results of his blood test and the court granted his motion on the ground that Simmons could withdraw his consent to the blood test at "any time before the blood sample has been analyzed." ***Id.*** The Georgia Court of Appeals reversed, concluding that *under the Georgia implied consent statute*, Simmons could not withdraw consent to the blood test once consent had been given and his blood was drawn. 270 Ga. App. at 303-304. The opinion does not contain any analysis of the issue under the Georgia Constitution or the United States Constitution. ***Id.*** Thus, ***Simmons*** is unpersuasive because the court based its holding solely upon Georgia's implied consent statute and did not decide the issue as a matter of constitutional law.

¶19 Like the defendant in ***Simmons***, the defendant in ***Woodard*** consented to a blood test, her blood was drawn, but, before the blood was tested, she withdrew her consent to the blood test. 909 N.W.2d at 302. The circuit court denied Woodard's motion to suppress the results of her blood test on the ground that "testing of a lawfully obtained sample did not violate the Fourth Amendment." ***Id.*** On appeal, Woodard did not challenge the lawfulness of the initial blood draw; rather, she "maintain[ed] that the subsequent analysis of her blood constituted a separate and distinct search," before which she could withdraw her consent to that separate search. ***Id.*** at 303. The Michigan Court of Appeals described the issue as follows: "In short, we must decide whether the analysis of a blood sample, obtained with consent for the purposes of alcohol testing, constitutes a 'search' within the meaning of the Fourth Amendment." ***Id.*** at 304.

¶20 The Michigan Court of Appeals rejected Woodard's argument, affirming the circuit court's denial of Woodard's motion to suppress. ***Id.*** at 310. First, the court relied on ***Johnson v. Quander***, 370 U.S. App. D.C. 167, 178, 440

F.3d 489 (2006) as persuasive authority to conclude that "this search, i.e., this physical intrusion beneath the skin, is completed upon the drawing of blood." ***Woodard***, 909 N.W.2d at 304. The ***Woodard*** court also cited ***VanLaarhoven***, ***id.*** at 306, and concluded that the testing of lawfully seized blood "does not constitute a distinct search for Fourth Amendment purposes and any effort to withdraw consent after this evidence has been lawfully obtained cannot succeed." ***Id.*** at 305-306. Additionally, it held that "collection and testing of blood are 'a single event for fourth amendment purposes'" and "blood which has been lawfully collected for analysis may be analyzed without infringing additional privacy interests or raising separate Fourth Amendment concerns." ***Id.*** at 306, 307 (quoting ***United States v. Snyder***, 852 F.2d 471, 474 (9th Cir. 1988)). Finally, the court reasoned that Woodard's argument contravened long-established precedent, that the revocation of consent does not deprive the police of examining any evidence obtained during the course of the consent search. ***Woodard***, 909 N.W.2d at 309 & n.9.

¶21 The holding in ***Woodard*** is unpersuasive as it relates to this case for at least the following reasons. First, Woodard argued that the taking and testing of blood for a chemical blood test was "a separate and distinct search," ***id.*** at 303, whereas, here, Randall argues that the taking and testing of blood comprise one single constitutional search. This distinction is significant because the issue of withdrawal of consent only arises in the context of a single ongoing search. *See* ***id.*** at 310 ("Ultimately, this is not a case about withdrawing consent to search; it is a case in which the search to obtain the defendant's blood has been completed."). Thus, in ***Woodard***, unlike here, the court was actually considering whether new consent was needed for a separate search.

¶22 Second, the court in ***Woodard*** erroneously relied on ***Johnson***, 370 U.S. App. D.C. 167, 178, for the proposition that "this search … is completed upon the drawing of blood." 909 N.W.2d at 304-305. ***Johnson*** is inapposite because it involved a probationer, who because of his status as a probationer enjoyed fewer and more limited expectations of privacy under the Fourth Amendment, and because the issue in ***Johnson*** did not involve consent or withdrawal of consent to a blood test. ***Johnson***, 370 U.S. App. D.C. at 176-178. Rather, Johnson challenged "the government's retention of his blood sample [, that he was required to provide pursuant to 42 U.S.C. §§ 14135-14135e,] which he claims might be retested with new technologies in the future." ***Id.*** Additionally, the ***Woodard*** court's adoption of the holding in ***Johnson***, that the search is completed at the blood draw, appears to conflict with the court's later adoption of the holding in ***VanLaarhoven***, that the taking and testing of blood comprise a single constitutional search. ***Woodard***, 909 N.W.2d at 306.

¶23 Third, I am unconvinced that the reasoning in ***Woodard***, that "a defendant who consents to the search in which evidence is seized cannot, by revoking consent, prevent the police from examining the lawfully obtained evidence," 909 N.W.2d at 309, applies here. Again, we have concluded in ***VanLaarhoven*** that the taking and testing of blood comprise a single constitutional search, whereas the reasoning in ***Woodard*** would inappropriately parse that single search into two components, grant only the "taking" component constitutional protections, and demote the "testing" component to mere "examination." Because this court has concluded that testing is a part of the single constitutional search, this court cannot strip away the attendant constitutional protections by relabeling it "examination."

B. Wisconsin implied consent law

¶24 The State next argues that "[t]he [implied consent] law authorizes withdrawal of consent before submission to a request for a sample, but not after." However, the State neither cites relevant legal authority in support of this argument, nor develops or explains how statutory authorization, or lack thereof, is material to whether the results of the blood test should have been suppressed as a matter of constitutional law. Accordingly, I do not consider this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."); ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564 ("Ordinarily, we will not address undeveloped arguments ....").[6]

C. Reasonable expectation of privacy

¶25 The State also argues that "[t]he analysis of a sample given under the implied consent law is not a constitutional search because a person who has submitted a blood sample does not have a reasonable expectation of privacy in the blood." The State acknowledges that the testing of Randall's blood "was not a separate search," but reasons that "privacy interests that [courts have] recognized in regard to blood tests apply only to the blood draw, not to analysis of the blood by a lab." However, the State has forfeited this argument. At the motion hearing,

[6] Whether Randall's withdrawal of consent after her blood was taken and before it was tested constitutes a refusal subjecting Randall to the consequences set forth in the implied consent law is not before us. *See* WIS. STAT. § 343.305(9)(a). Rather, this appeal concerns only the constitutionality of the continuation of the search of Randall's blood after she withdrew her consent.

Randall argued that the Supreme Court in ***Birchfield***, 136 S. Ct. 2160, explicitly recognized that individuals have separate and distinct privacy interests in the taking of their blood and the testing of that blood. The State did not dispute this at the hearing or develop any argument before the circuit court that an individual has a privacy interest only in the taking of blood, and not in the testing of that blood. Accordingly, I do not consider this argument further. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 ("Issues that are not preserved at the circuit court ... generally will not be considered on appeal.").

D. Public policy

¶26 Finally, the State argues that "[w]ithdrawal of consent" and "requirement of a warrant for analysis of blood samples submitted under the implied consent law would be contrary to the policy behind implied consent laws." This court may not abridge an individual's constitutional rights on grounds of public policy. "Public policy on a given subject is determined either by the constitution itself or by statutes passed within constitutional limitations…. When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court." ***Progressive Northern Ins. Co. v. Romanshek***, 2005 WI 67, ¶60, 281 Wis. 2d 300, 697 N.W.2d 417 (quoted source omitted). Because I have concluded that the State did not act within constitutional limitations when it tested Randall's blood after she withdrew consent to the continuation of the search of her blood, its policy argument is unavailing as a legal argument to this court.[7]

[7] Randall did not appeal the circuit court's ruling that she has no right to have the blood destroyed, and this opinion does not address whether the State may obtain a warrant to test any blood that remains in its custody.

CONCLUSION

¶27 For the foregoing reasons, I affirm the decision of the circuit court.

By the Court.—Order affirmed.

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