COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP85 **Cir. Ct. No. 2012TR296**

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

IN THE MATTER OF THE REFUSAL OF BRADLEY H. HART:

STATE OF WISCONSIN/CITY OF STURGEON BAY,

PLAINTIFF-RESPONDENT,

V.

BRADLEY H. HART,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Bradley Hart appeals an order concluding he unlawfully refused to take a test for intoxication after arrest, contrary to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

STAT. § 343.305(9). He argues the circuit court erred by finding he refused the test, the implied consent law violates his right to due process, and the subsequent blood draw was unlawful. We reject Hart's arguments and affirm.

BACKGROUND

¶2 On January 29, 2012, officer Kyle Engebose arrested Hart for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a). Engebose transported Hart to a hospital for a blood alcohol test. At the hospital, Engebose read Hart the "Informing the Accused" form, as required by WIS. STAT. § 343.305(4). The form states:

> 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.

¶3 Engebose then asked Hart if he would "submit to an evidentiary chemical test of [his] blood?" Hart refused.

¶4 After Hart refused, Engebose told Hart that, despite his refusal, his blood would be drawn. Engebose gave Hart a second opportunity to consent to a blood draw. Hart, however, iterated his refusal. When Hart's blood was ultimately drawn, he did not physically resist the nurse administering the blood draw.

¶5 Before the circuit court, Hart argued he did not refuse the chemical test, "he simply erroneously used the word 'refuse' in his discussion and eventual understanding of his rights." He asserted that, "[o]nce he understood fully, he consented immediately."

¶6 The circuit court rejected Hart's argument and found Hart refused to submit to an evidentiary chemical test of his blood and his refusal was unlawful. The court noted that, after being read the Informing the Accused form, the officer gave Hart two opportunities to consent to the blood draw, and Hart refused both times.

DISCUSSION

I. Evidence of Refusal

¶7 On appeal, Hart renews his argument that he did not refuse to submit to the chemical test. He argues the circuit court's finding that he refused the

chemical test was clearly erroneous because his "conduct did not constitute a refusal." Specifically, Hart contends that, because he is from Illinois where the laws are different, and because he ultimately allowed the nurse to draw blood from his arm without any physical resistance, we should conclude that he did not refuse to submit to an evidentiary chemical test.

¶8 Whether Hart refused to submit to a test is a question of fact. We will not reverse a circuit court's factual finding unless clearly erroneous. ***State v. Goss***, 2011 WI 104, ¶16, 338 Wis. 2d 72, 806 N.W.2d 918. Here, the circuit court found Hart unequivocally refused to submit to an evidentiary chemical test despite being asked to submit on two occasions. This finding is supported by the record; therefore, it is not clearly erroneous.

¶9 We also observe that, irrespective of whether Hart is a resident of Illinois, he was advised of the Wisconsin implied consent law *before* he was asked to submit to an evidentiary chemical test of his blood. Moreover, even if Hart's lack of physical resistance could be construed as him later consenting to the blood draw, this does not change the fact that, before the blood draw, he twice refused to submit to the test. *See* ***State v. Rydeski***, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997) ("A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants[.]").

II. Constitutionality of the Implied Consent Law

¶10 Hart next argues the implied consent law question—"Will you submit to an evidentiary chemical test of your blood?"— is unconstitutional. He contends the question violates an individual's right to due process because it "is not a question at all," the "answer makes no difference as to the outcome," and the officer will simply take a sample of an individual's blood even if the individual

refuses. He also argues that, because he did not have the right to refuse the test, it was unconstitutional for the officer to ask him whether he would submit to the chemical test.

¶11 Hart failed to raise his constitutional objections in the circuit court. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***Id.*** Accordingly, we decline to address Hart's constitutional arguments.

III. Unlawful Blood Draw

¶12 Finally, Hart objects to the blood draw taken after he refused the test. He relies on the recently decided ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), to argue the officer should have obtained a warrant before forcing Hart to submit to a blood draw.[2] *See* ***id.*** at 1556 (holding the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the warrant requirement; rather, an exigency in this context must be determined case by case based on the totality of the circumstances).

¶13 However, Hart's reliance on ***McNeely*** is misplaced. Hart is charged with violating the implied consent law, not operating while intoxicated.[3] We are

[2] The Court's decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), was decided during briefing in this case. Hart relied on ***McNeely*** for the first time in his reply brief. We allowed the State to file a letter in response to Hart's ***McNeely*** argument.

[3] The Court's decision in ***McNeely*** does not impact the implied consent law. When rejecting a categorical exception to the warrant requirement based on the natural metabolization of alcohol in the bloodstream, the ***McNeely*** Court recognized:

(continued)

concerned only with whether Hart refused to submit to a chemical test. Any warrantless blood draw that occurred after Hart violated the implied consent law is outside the scope of this appeal. Stated another way, whether an officer's warrantless blood draw was unlawful and the test results should be suppressed has no bearing on whether Hart violated the implied consent law.

By the Court.—Order affirmed.

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

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense …. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

McNeely, 133 S. Ct. at 1566.