

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP689-CR

Cir. Ct. No. 2007CF766

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JEFFREY S. KEESEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
WILBUR W. WARREN III, Judge. *Reversed and cause remanded with
directions.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 BROWN, C.J. Jeffrey Keesee was involved in a fatal motor vehicle accident. Officers at the scene could not find any of the factors that would support intoxication but obtained Keesee's consent to a blood draw nonetheless.

However, prior to the blood draw at the hospital, even though Keesee was not under arrest and had been told he was not under arrest, an officer read him the implied consent form which advised Keesee that he *was* under arrest and stood to be penalized if he did not consent to the test. The trial court found that the reading of the form negated the earlier consent because it “placed in the defendant’s mind the idea that this is something that he had to do ... under the circumstances.” But Keesee never testified, never told the court what effect, if any, the reading of the form had on him. So, there is no foundation for the trial court’s finding of fact—if indeed it was meant as a finding of fact. And we hold that the circumstance did not present a situation of coercion per se. Because the trial court found that there was a valid consent at the scene and because we disagree that such consent was rendered nugatory by the reading of the implied consent form, we reverse and remand with directions.

BACKGROUND

¶2 The facts are as follows: The accident occurred on May 10, 2007, at approximately 9:00 p.m. Keesee’s vehicle collided with a motorcycle. At the scene, Keesee explained to officers that he was talking on his cell phone, with his wife seated next to him and his thirteen-year-old daughter in the back seat. As he was making a left turn onto the highway, his daughter screamed “Look out, Dad!” By that time, it was too late and he hit the oncoming motorcycle. The motorcyclist was sprawled on the road and was pronounced dead at the hospital. Three Twin Lakes police officers investigating the accident made contact with Keesee. None of the three officers detected any alcohol on his breath. Nor did they find that his speech was slurred. And, they could observe nothing otherwise present which would lead them to suspect that alcohol was a factor in the collision.

¶3 Still, one officer asked Keesee to consent to a blood draw “to establish whether there [were] any intoxicants in his system.” Another officer told Keesee it would be in his “best interest” to take the test because “if he hadn’t had anything to drink, it would show that.” Kessee “thought it over” and said he would. The plan was to take him to the hospital in a squad car, have the blood draw performed and then transport him to his residence when the test was completed. He was not under arrest at the scene. He was not handcuffed and his movements were not restrained in any way. Keesee got into the squad car under his own power and by his own will. During the fifteen minute trip to the hospital, Keesee never said anything about changing his mind.

¶4 At the hospital, one of the officers read Keesee the Informing the Accused form which is used in operating while intoxicated arrests, even though Keesee was not under arrest for operating while intoxicated. During the reading of the form, where it explains to the subject that he or she has been arrested for driving while intoxicated, the officer told Keesee that there are “some phrases in there that say you’re under arrest” but clarified to Keesee “that he wasn’t under arrest.” After the form was read to Keesee, the officer again told him that he was not under arrest. But Keesee now wanted to talk with his wife first. She was also at the hospital, being treated in the emergency room. The officer told Keesee that he was free to leave the room and talk to her, if he wished. Keesee left and was gone five minutes. When he returned, he told the officer that he would still consent to a blood draw. Keesee took the test. The officer and his sergeant then left the hospital. Keesee stayed at the hospital to be with his family.

¶5 About a mile from the hospital, the officer and his sergeant were contacted and told to try to obtain a “secondary blood sample.” The officers drove back to the hospital parking lot and asked Kessee to take this secondary test.

Keesee refused to take another blood test because, he said, he wanted to leave with his family since they were leaving at that time. The officers honored that refusal and he was free to leave.

¶6 The blood draw subsequently showed that Keesee's blood alcohol content was 0.125 grams per 100 milliliters. A complaint was then sworn charging him with five counts: homicide by intoxicated use of a vehicle, homicide by use of a vehicle with a prohibited alcohol content, homicide by negligent operation of a vehicle, operating while intoxicated and causing injury and operating with a prohibited alcohol concentration causing injury. Following the bindover, Keesee brought a motion to suppress the blood test results, maintaining that he did not consent. The trial court held the hearing and the three officers testified, relating the same facts as we already described. As we said earlier, Keesee did not testify. Neither did his wife.

¶7 In arguments before the court after testimony had been completed, Keesee's counsel claimed that the reading of the implied consent form totally "eviscerated" any consent or voluntariness because, as we understand the argument, consent is a fluid concept such that Keesee had the right to change his mind about consenting up to the moment the test was performed. Counsel asserted that

the last thing [Keesee] hears ... is that if you don't take it, your operating privileges are going to be revoked and you'll be subject to other penalties, plus, the fact that you refused testing can be used against you in court. [The officer] had absolutely no authority to read him those warnings, to threaten him with driver's license revocation or other penalties. He had the absolute right to refuse, and they didn't do that....

When they read that warning to him, they basically took away his right to refuse that test because they told him there would be implications if he did not take it.

¶8 The trial court agreed with counsel’s argument. But before doing so, the court first found that Keesee did initially consent to the blood draw while at the scene. The court announced that although it was concerned about the representation made to Keesee that it would be in his best interest to take the blood test, the facts showed that Keesee knew he was not in custody, knew he could leave if he wanted to and knew he was not being forced to take the test or come to the hospital.

¶9 Having made that finding regarding initial consent, the court then focused on the main thrust of the argument presented by Keesee’s counsel—the effect of the officer’s having read the informed consent form to Keesee. The court stated its concern as

whether that consent was freely and voluntarily given, a concern that by choosing the Informing the Accused, by providing the threats, consequences, other penalties, use of refusals in a court of law *all placed in the defendant’s mind the idea* that this is something that he had to do and that under the circumstances, he voluntarily went through with the taking of the test in light of the consequences that were provided. (Emphasis added.)

¶10 The court granted the motion to suppress the results of the blood test and the State appeals.

DISCUSSION

¶11 The overriding function of the Fourth Amendment is to protect personal privacy and dignity against an unwarranted intrusion by the State. *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)). A blood draw is such a bodily intrusion. However, the Fourth Amendment neither forbids nor prohibits all bodily intrusions. *Winston*, 470 U.S. at 760. Rather, the Amendment’s function is to constrain against

intrusions “which are not justified in the circumstances, or which are made in an improper manner.” *Id.* (quoting *Schmerber*, 384 U.S. at 768). Consent to search is an exception to the warrant requirement. *State v. Johnson*, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993). To fall within the warrant exception, “the consent must be voluntary under the totality of the circumstances and not the product of duress or coercion, express or implied.” *State v. Stankus*, 220 Wis. 2d 232, 237-38, 582 N.W.2d 468 (Ct. App. 1998).

¶12 Whether an individual consented to a search is a question of fact which we review under the clearly erroneous standard. *State v. Wallace*, 2002 WI App 61, ¶16, 251 Wis. 2d 625, 642 N.W.2d 549, *overruled on other grounds by State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611. “Whether the consent was voluntary, however, is a question of ‘constitutional fact,’ which we review independently of the [trial] court, applying constitutional principles to the facts as found by the trial court.” *Id.* As a well established exception to the Fourth Amendment’s warrant requirement, consent must be a “free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.” *Id.*, ¶17 (citation omitted). If the State demonstrates by clear and convincing evidence that consent was without duress or coercion, the burden shifts to the defendant to show that the police used improper means to obtain consent. *State v. Hughes*, 2000 WI 24 ¶42, 233 Wis. 2d 280, 607 N.W.2d 621. No single factor is dispositive. *Id.*, ¶41. We look, as we just said, to the totality of the circumstances, with special emphasis placed on the circumstances surrounding the consent to search and the characteristics of the defendant. *Id.*

¶13 First, to the extent that Keesee is arguing in his responsive brief that his *initial* consent at the scene was coerced by improper police tactics, we reject the claim as did the trial court. Keesee was not under arrest, was able to move

about freely and was not pressured into giving consent. He had time to consider it, he did consider it and he decided to take the test. In this context, the fact that an officer told him it would be in his “best interest” to take the test is not coercive conduct anymore than it would be coercive for a detective to suggest to the spouse of a murdered husband or wife that he or she submit to a DNA test so as to remove that spouse from a hint of suspicion. In short, when a person is not under arrest or even close to it and is not restrained in any way, the decision to take a test to remove all suspicion is a product of free will. It is not a Hobson’s choice, but a considered and reasonable one. The trial court’s decision that Keesee voluntarily gave consent for the blood test while at the scene of the accident is not clearly erroneous.

¶14 Now to the main issue of whether the reading of the form negated Keesee’s earlier consent. We agree with the trial court to a certain extent. Keesee was told he was not under arrest. The blood test was just to make sure alcohol was not involved. Keesee knew going in that this was the purpose for taking the test. There was no reason to read the informed consent form. So, we agree with the trial court to the extent that, had the form not been read, this would be an “open-and-shut case for consent.”

¶15 And we also agree with the apparent rationale of the trial court that Keesee, although having been informed that he was not under arrest, might nevertheless have been confused and concerned about that assurance upon hearing what the form says: that he stood to lose his operating privileges if he did not consent, that if he took the test and was found to have more alcohol in his system than permitted by law, his operating privileges would be suspended, that the results would be used against him in a court of law and that he was being asked to “submit” to the test rather than “consent” to it.

¶16 But whether Keesee *may* have been concerned and confused and whether he *actually was* concerned and confused are two different questions. We say again that Keesee never testified. So, we do not know if Keesee was actually affected by the reading of the Informing the Accused form to the extent that he felt he no longer had a choice in deciding whether to continue with his consent to the taking of the test. We do not know, Keesee's counsel does not know and the trial court does not know. Yet, the trial court said that the reading of the form "placed in [Keesee's] mind the idea that this is something that he had to do." The law is, as we previously explained, that whether a person consents to the search is a question of fact that we review under the clearly erroneous standard.

¶17 Here, there is no evidence to support the trial court's finding as to what was going on in Keesee's mind at the time. All we have in the record is that, after the form was read to him, Keesee wanted to talk it over again with his wife before deciding whether to go through with the test. He was told that he could do that and he went to the emergency room to talk to his wife, came back five minutes later and said he still wanted to take the test. Really, nothing had changed. The officers wanted him to take the test to alleviate any doubt about whether alcohol was involved. Keesee knew this as the purpose both before and after the form was read to him. If he was now thinking that he no longer had a choice, the record does not say so. So, to the extent that the court's *ratio decidendi* is based on a factual finding, it is clearly erroneous.

¶18 It may be that the trial court was not making a finding of fact as much as it was holding that the reading of the form was inherently coercive. Perhaps the trial court was saying that, as a matter of law, reading the implied consent form to a person who is not under arrest and has nonetheless freely and voluntarily decided to take the test to alleviate all possibility of suspicion is

improper coercion per se. If that is the holding of the trial court's decision, we disagree.

¶19 The law regarding coercion has been the subject of intense scrutiny by both state and federal courts. Our research discloses that while physical violence is coercion as a matter of law, psychological coercion provokes no per se rule and is a question of fact. See *United States v. Miller*, 984 F.2d 1028, 1030 (9th Cir. 1993). With regard to psychological coercion, a court must review the totality of the circumstances to determine the affect upon the will of the defendant. *Id.* at 1031. This involves a question of causation.

¶20 For example, in *Colorado v. Connelly*, 479 U.S. 157, 165 (1986), while discussing coercion as it relates to confessions, the United States Supreme Court held that the alleged coercive conduct must be causally related to the confession, such that there is a “link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other.” By extension, in the context of consent to draw blood, we read *Connelly* to say that we must engage in a fact specific exercise of discovering whether there existed a *link* between the allegedly coercive conduct (the reading of the form) and the decision to agree to the blood draw on the other. Courts may not just assume the link; there must be evidence supporting it. As the court in *Miller* said, we must look at the totality of the circumstances involved and their effect upon the will of the defendant. *Miller*, 984 F.2d at 1031. The *Miller* court wrote that “[t]he pivotal question in each case is whether the defendant's will was overborne.” *Id.* Thus, the question is one of causation.

¶21 Wisconsin law has long held that the question of causation is a question of fact to be inferred from the circumstances by the trier of fact. *Johnson*

v. Misericordia Cmty. Hosp., 97 Wis. 2d 521, 560, 294 N.W.2d 501 (Ct. App. 1980). We conclude that, if the trial court decided that the reading of the implied consent form per se prejudicially affected Keesee's earlier consent, it was error to do so. As we have said, the issue is a fact specific one. Whether consent was voluntary under all the circumstances is a question of fact. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

¶22 Here, there was no factual evidence to support the link between the reading of the form and Keesee's ultimate decision to go through with the testing. Thus, the only evidence in the record is the clear and convincing evidence that Keesee knew he had a choice to make, and he made that choice without coercion. There was no interference with his human autonomy and personal prerogatives. We reverse and remand with directions that the State be allowed to put the results of the blood draw into evidence in any future proceeding requiring it.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

