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May 1, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2535-CR State of Wisconsin v. Patric J. Minehan (L.C. #2016CF369)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Patric J. Minehan appeals from a judgment convicting him of fourth-offense operating with a restricted controlled substance. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

Minehan was injured in a rollover accident caused by a speeding driver in another vehicle attempting to elude a Winnebago County sheriff's deputy. The deputy found Minehan shaken up and bleeding from a head wound but alert. Minehan told the deputy that, except for pain from the head injury, he was fine. A second deputy, Jason Fosler, followed Minehan to the hospital. Minehan's head laceration required staples but he had no other major injuries. Despite observing no indices of intoxication or impairment, Fosler asked Minehan to sign a consent form for a legal blood draw "to assist in the prosecution of the other driver." Fosler testified that Minehan appeared "calm" and "in good spirits." ER personnel said he was stable. Minehan agreed to sign. Tests revealed trace amounts of THC.

The State charged Minehan with operating a motor vehicle with a restricted controlled substance in his blood. He moved to suppress the blood-draw evidence on grounds that his consent was not free and voluntary due to his head injury and the confusion of the ER setting. After the circuit court found that Minehan voluntarily consented, he pled no contest. His sentence of six months in jail, the mandatory minimum, was stayed pending this appeal.

On review of a motion to suppress, we uphold the circuit court's findings of historical fact and credibility unless they are clearly erroneous but we independently review the application of the constitutional principles to the facts. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. The State bears the burden of proving by clear and convincing evidence that

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

consent was given freely and voluntarily. *State v. Artic*, 2010 WI 83, ¶32, 327 Wis. 2d 392, 786 N.W.2d 430. Determining voluntariness is a mixed question of fact and law based upon an evaluation of the totality of the circumstances. *Id.* The test is whether, under the totality of the circumstances, consent was given without duress or coercion, either expressed or implied. *State v. Phillips*, 218 Wis. 2d 180, 197-93, 577 N.W.2d 794 (1998).

Six factors play into the voluntariness of consent: (1) police deception or trickery; (2) police intimidation; (3) police congeniality; (4) the nature of the consenter's response; (5) the consenter's personal characteristics, emotional state, and prior police contact; and (6) whether police explained that consent could be refused. *Artic*, 327 Wis. 2d 392, ¶33. Each of the factors supports the conclusion that Minehan voluntarily consented to the blood draw.

Fosler testified that he explained to Minehan why he requested the blood sample, gave Minehan an overview of the consent form, and that, when requesting consent, he typically informs the person that the purpose of the blood draw is to determine if something in their system impaired their driving. Minehan did not contradict Fosler's testimony or indicate that Fosler deviated from his usual practice. We see no police deception or trickery. Likewise, nothing in the record suggests that the encounter between Minehan and Fosler was threatening or intimidating or at all uncongenial. Minehan now emphasizes the fact of his head injury and the confusion of the ER setting but offers nothing about Fosler's approach to show that he was intimidated into signing the consent.

As to Minehan's characteristics, he was twenty-nine years old, had prior similar contacts with police, and appears to be intelligent and educated. Fosler testified that he was "calm" and in "pretty good spirits," and ER personnel found him stable.

Minehan argues, however, that, as he was in the ER, visibly in pain from a head wound, and “potentially” under the influence of pain medication “after nearly losing his life,” the State had an even higher burden to prove that he was capable of giving and, in fact, gave voluntary consent. But there is no evidence that Minehan was either overcome by pain or under the influence of pain medication so as to affect his ability to understand the request for a blood draw or that his ability to withstand the request was overcome. Although his vehicle rolled over multiple times and he *might* have suffered far greater injuries, nothing in the record suggests that he “nearly los[t] his life” or was rendered unable to competently give his consent. The nature of Minehan’s characteristics do not give rise to concern.

As to the sixth *Artic* factor, Fosler did not testify specifically on this point. The consent form Minehan signed, however, states, “I have been advised of my right to refuse to consent to a search of my person.” As noted, he had prior contacts with police for similar offenses. A reasonable inference is that Minehan knew he could refuse to consent to the blood draw. But even if this factor weighs against voluntariness, it does not heavily do so, *see Artic*, 327 Wis. 2d 392, ¶61, and the other five factors weigh in favor of the voluntariness of his consent. Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals