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DISTRICT III

April 27, 2021

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

2020AP700-CR

State of Wisconsin v. Dennis Raymond Tollers
(L. C. No. 2017CF318)

Before Stark, P.J., Hruz and Seidl, 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).

Dennis Tollers appeals from a judgment convicting him of operating a motor vehicle with a prohibited blood alcohol concentration, as a fourth offense. The sole issue on appeal is whether law enforcement used unreasonable force during the execution of a search warrant for an involuntary blood draw. 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

(2019-20).¹ We reject the challenge to the execution of the search warrant and affirm the judgment of conviction.

The following facts produced at a suppression hearing are uncontested on appeal. Douglas County sheriff's deputy Cory Fossum arrested Tollers at his residence for suspected drunk driving and transported him to a local hospital for a blood draw. Fossum read Tollers the Informing the Accused form, and he asked Tollers whether he would submit to a chemical test of his blood. Tollers did not consent, instead asking for an attorney and asking Fossum whether he would consider "being kicked in the face" as cooperation. Law enforcement then obtained a search warrant to draw Tollers' blood.

A phlebotomist performed the blood draw at the hospital in the presence of Fossum, another deputy, and a security guard. The phlebotomist observed Tollers making "combative comments" toward the deputies prior to the blood draw, but she did not recall or document the deputies using any physical force or violence on Tollers. Due to Tollers' comment about kicking Fossum in the face, Fossum "escorted" Tollers down onto the floor while he was handcuffed, and he "stabilized" him by using a knee to his back to hold Tollers' face down to prevent him from moving during the blood draw. However, the phlebotomist was unable to successfully draw blood while Tollers' arms were handcuffed behind his back, so she tried again after the deputies freed one of Tollers' arms from restraint. Tollers offered no physical resistance during the blood draw or at any other point during the encounter. He was not injured and did not claim to have suffered any pain or discomfort during the incident.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

When reviewing a motion to suppress evidence, we will uphold the circuit court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. We will, however, independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *Hindsley*, 237 Wis. 2d 358, ¶22.

The constitutional provision applicable here is the Fourth Amendment, which limits the degree of force that may be used in executing a search warrant to that which is “objectively reasonable” in light of the facts and circumstances confronting law enforcement. See *State v. Krause*, 168 Wis. 2d 578, 586, 589, 484 N.W.2d 347 (Ct. App. 1992). Factors to consider in evaluating the reasonableness of the manner in which a blood sample is taken include: (1) whether the procedure was performed by medical personnel in a proper setting according to accepted medical standards; (2) the severity of the crime at issue; (3) the need for the sample; (4) whether the defendant actively resisted or posed an immediate threat to the safety of law enforcement; and (5) whether law enforcement refused a reasonable request for an alternate test. *Id.*

The only contested fact before us pertains to the fourth *Krause* factor—whether Tollers’ comment about kicking Fossum in the face was a joke, as Tollers contends, or a threat to the safety of law enforcement. The circuit court’s finding that Fossum reasonably viewed the comment as a threat is supported by the phlebotomist’s characterization of Tollers’ tone as combative, as well as Tollers’ apparent intoxication at the time, and is not clearly erroneous.

We turn next to the totality of the circumstances under which the blood sample was taken. Tollers’ blood draw was performed by medical personnel in a hospital setting. The blood

sample was necessary because the alleged crime at issue was a felony offense of operating a motor vehicle while intoxicated or with a prohibited blood alcohol level. While Tollers did not offer physical resistance, he made verbal threats to law enforcement who were present. The record does not reflect that Tollers requested an alternate test, or that one would have been available. Under these circumstances, we conclude that holding Tollers down on the floor with a minimal, noninjurious use of force while attempting to draw his blood was a reasonable measure to protect the safety of the law enforcement and the phlebotomist. We conclude the circuit court properly denied the suppression motion.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* 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