IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN D. HIGGINS,	§	
	§	No. 408, 2013
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. ID No. 1302007551
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 22, 2014
Decided: April 1, 2014

Before **HOLLAND**, **BERGER**, and **JACOBS**, Justices.

O R D E R

This 1st day of April 2014, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Defendant-below/appellant Brian D. Higgins ("Higgins") appeals from a felony conviction for driving while under the influence ("DUI"), under 21 *Del. C.* § 4177(a) and (d)(3). Specifically, Higgins challenges the Superior Court's denial of his motion to suppress blood test results. Higgins claims that he did not voluntarily consent to having his blood drawn, and that this Court should require law enforcement officials to obtain written consent before drawing blood from suspects in DUI cases. We find no merit to Higgins' appeal and affirm.

2. Higgins was involved in a single car accident on September 3, 2012 in Newark, Delaware. The collision sheered a telephone pole in half, uprooted a small tree, and caused significant damage to Higgins' car.[1] At approximately 4:20 p.m., Newark Police Officer Daniel Bystricky arrived at the scene to investigate the accident. Upon his arrival, Officer Bystricky observed that Higgins' clothing was "disheveled," Higgins was resisting the emergency medical crew's efforts to take him to the hospital, Higgins' eyes were bloodshot and glassy, and a "very faint" odor of alcohol emanated from him. Eventually, Higgins was taken to Christiana Hospital and Officer Bystricky arrived at the hospital sometime thereafter.[2]

3. At Christiana, hospital personnel told Officer Bystricky that they would draw Higgins' blood (for a blood alcohol concentration test) only if Higgins signed a written consent form. Higgins indicated that he would not sign a consent form. Accordingly, Officer Bystricky called Omega Medical Center and requested an Omega phlebotomist come to Christiana Hospital to draw Higgins' blood. While waiting for the phlebotomist, Officer Bystricky possibly[3] told Higgins that if he

[1] A witness (who had been driving in the opposite direction at the time of the accident) told the police that Higgins had been speeding and then veered off the road.

[2] Officer Bystricky testified that he arrived at the hospital a little over an hour after he had arrived at the scene of the accident.

[3] Officer Bystricky testified that, although he could not recall, it was a "possibility" that he told Higgins of the consequences of refusing the blood draw.

refused the blood draw, he would lose his driver's license for one year. Bystricky also admonished Higgins that "he was lucky that he hadn't hit a kid that day."[4] According to Bystricky's testimony, Higgins responded by saying "fine, I'll give blood."[5] Bystricky further testified that Higgins cooperated while the phlebotomist drew his blood. The blood sample test revealed a blood alcohol concentration of 0.20.

4. Higgins was arrested on February 26, 2013, and thereafter was indicted for felony DUI under 21 *Del. C.* § 4177 by a Superior Court grand jury.[6] On May 6, 2013, Higgins moved to suppress all evidence gathered by the Newark Police, including Higgins' blood test results. After a hearing at which Officer Bystricky testified, the trial judge denied that motion on June 28, 2013, ruling that Higgins had voluntarily consented to having his blood drawn. On July 18, 2013, Higgins was found guilty on a stipulated trial record. He was sentenced that same day to two years in custody at Level V, suspended after 90 days for one year at Level III probation. Higgins timely appealed.

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[4] Appellant's Appendix at A16.

[5] *Id.*

[6] Higgins was initially charged with misdemeanor DUI in October 2012. However, because this offense was Higgins' third DUI offense, the misdemeanor charge was dropped and he was charged with felony DUI in accordance with 21 *Del. C.* § 4177(d)(3).

5. We review a trial court's denial of a motion to suppress, after an evidentiary hearing, for abuse of discretion.[7] A trial judge's legal conclusions are reviewed *de novo*,[8] and we will not disturb a trial judge's factual findings unless they are clearly erroneous.[9]

6. Higgins' sole claim on appeal is that the trial judge erred by denying his suppression motion, because the blood test results were the fruit of an illegal search in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Therefore, Higgins argues, his conviction must be vacated and a new trial must be granted. Higgins argues that by: (i) calling the Omega phlebotomist after Higgins had refused to sign a hospital consent form, (ii) (possibly) telling Higgins that he would lose his license if he did not consent, and (iii) admonishing Higgins for his dangerous conduct, Officer Bystricky coerced Higgins' consent to the blood draw. Higgins also urges this Court to adopt a new rule that would require law enforcement officers to obtain the written consent of suspects in DUI cases before drawing their blood. The State responds that Higgins' consent was voluntarily given and was not a product of coercion and, moreover, that even if Higgins did not consent, exigent circumstances justified the search.

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[7] *McAllister v. State*, 807 A.2d 1119, 1122 (Del. 2002) (citing *Liu v. State*, 628 A.2d 1376, 1379 (Del. 1993); *Alston v. State*, 554 A.2d 304, 308 (Del. 1989)).

[8] *McAllister*, 807 A.2d at 1123 (citing *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990)).

[9] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008).

7. The main issue presented is whether the Superior Court erred in finding that Higgins had voluntarily consented to having his blood drawn. We conclude that the court did not err. It therefore is unnecessary to address the issue of whether exigent circumstances justified the warrantless search.[10]

8. The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures."[11] A warrantless search is deemed *per se* unreasonable unless that search falls within a recognized exception.[12] One recognized exception is a search conducted with a person's voluntary consent.[13] To be deemed "voluntary," consent need not be "knowing and intelligent,"[14] but it cannot be the product of coercion by threat or force.[15] Whether or not consent was given voluntarily is determined by examining "the totality of the circumstances surrounding the consent, including (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with police; and (4) the length of detention and

[10] Because it is not necessary to resolve this case, we refrain from creating a new rule requiring police officers to obtain the written consent of DUI suspects before taking a blood sample.

[11] U.S. CONST. amend. IV. It is well established that drawing blood constitutes a search covered by the Fourth Amendment. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013).

[12] *Missouri*, 133 S. Ct. at 1558; *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

[13] *Cooke*, 977 A.2d at 855 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

[14] *Id.* (citing *Schneckloth*, 412 U.S. at 241).

[15] *Schneckloth*, 412 U.S. at 233.

the nature of questioning, including the use of physical punishment or other coercive police behavior."[16] The State bears the burden of showing that consent was voluntarily given.[17]

9. Here, the totality of the circumstances establishes that Higgins voluntarily consented to the blood draw. Because this constituted his third DUI offense, Higgins was not an ignorant "newcomer to the law."[18] No argument is made that Higgins' age, intelligence, or education precluded his voluntary consent.[19] And, Officer Bystricky's testimony shows that Higgins was generally cooperative with police, even if somewhat argumentative with the emergency medical personnel.

10. The determination as to whether Higgins' consent was voluntary turns on whether the police (here, Officer Bystricky) used coercive tactics to obtain that consent.[20] We conclude that Bystricky did not. First, informing Higgins of the consequence of refusal (loss of license) was not coercive. Indeed, 21 *Del. C.*

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[16] *Cooke*, 977 A.2d at 855.

[17] *Schneckloth*, 412 U.S. at 222.

[18] *See United States v. Watson*, 423 U.S. 411, 424-25 (1976) (explaining that defendant, who had previously been arrested for a similar offense, was not a newcomer to the law).

[19] The trial court found that although Higgins was intoxicated, "he was sober enough to have given consent." Appellant's Appendix at A31. *See United States v. Luciano*, 329 F.3d 1, 8 (1st Cir. 2003) (concluding that defendant was sufficiently sober to give voluntary consent).

[20] It stands to reason that coercion requires some sinister action (even if implied) on the part of law enforcement. *See Schneckloth*, 412 U.S. at 233.

§ 2742(a), clearly permits police to inform a DUI suspect of that consequence.[21] Second, Officer Bystricky's discussion of the seriousness of Higgins' conduct did not contain any veiled threats—he attempted to reason with Higgins.[22] Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search.[23] Finally, calling the Omega phlebotomist did not cause Higgins to "acquiesce[] to a claim of lawful authority."[24] Neither Officer Bystricky nor the phlebotomist represented that they had authority to draw Higgins blood without his consent. Given the totality of the circumstances, Higgins voluntarily consented to the blood draw. Therefore, the trial court did not abuse its discretion, or commit any error, by finding that

[21] 21 *Del. C.* § 2742(a) provides, in part, that "[i]f a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test shall not be given . . . ." *See McCann v. State*, 588 A.2d 1100, 1101 (Del. 1991) ("According to [§ 2742(a)], a person suspected of DUI has no right to refuse chemical testing unless a police officer informs him that he may lose his license for a year if he withholds consent.").

[22] Higgins' citation to *Brewer v. Williams*, 430 U.S. 387 (1977) and the "Christian burial speech" is inapposite. *Brewer* involved a violation of a defendant's Sixth Amendment right to counsel, where a law enforcement officer made comments intended to elicit a confession outside of the presence of defendant's attorney.

[23] *See Schneckloth*, 412 U.S. at 233 ("[A]lthough [defendant] had at first refused to turn the [evidence] over, he had soon been persuaded to do so and . . . force or threat of force had not been employed to persuade him.") (discussing *Davis v. United States*, 328 U.S. 582 (1946)).

[24] *Bumper v. N. Carolina*, 391 U.S. 543, 550 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

Higgins' consent was voluntarily given and, as a consequence, denying his suppression motion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice