NOT DESIGNATED FOR PUBLICATION

No. 125,332

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SHANE EUGENE JOHNSON,
Appellant.

MEMORANDUM OPINION

Appeal from Graham District Court; PRESTON PRATT, judge. Opinion filed June 2, 2023. Affirmed.

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

Jill A. Elliott, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PER CURIAM: A late-night, one-car accident led to Shane Eugene Johnson being charged with driving under the influence (DUI). Following a bench trial on stipulated facts, the district court convicted Johnson of DUI. Johnson appeals and argues that the district court erred in denying his motion to suppress the results of the blood test that showed his blood alcohol level over the legal limit. But on our review of the record, we conclude that Johnson unequivocally consented to the blood draw and his consent was gained without duress or coercion, so we affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Following a January 2021 one-vehicle accident in which he was the driver, the State charged Johnson with driving under the influence of alcohol (second offense). As part of the proceedings, Johnson moved to suppress the results of a blood test obtained by the State, which showed his blood alcohol level at almost three times the legal limit. Johnson acknowledged that he was provided with the implied consent advisory, commonly referred to as the DC-70 Implied Consent Advisory, see K.S.A. 8-1001(d), both orally and in writing. But he argued that the advisory was unconstitutionally coercive because it "contain[ed] false and misleading statements regarding a defendant's statutory and constitutional rights." He maintained that, as a result, any consent he provided for the blood draw was involuntary and resulted from coercion, so the test results must be suppressed.

The district court conducted an evidentiary hearing on Johnson's motion to suppress. Although both the motion and defense counsel's opening statement at that hearing focused on the constitutionality of the advisory, the parties' closing arguments were not so limited. Instead, both parties focused on the totality of the circumstances surrounding the consent. During that hearing, both Cole Presley, sheriff of Graham County, and Alexander Riggins, an officer with the Hill City Police Department, testified.

Sheriff Presley testified that he responded to the report of an accident on the night of January 23, 2021. Sheriff Presley observed that Johnson's pickup truck had gone off the road and crashed into a tree, totaling the truck. Johnson was sitting in the driver's seat and talking on the phone. Presley testified that Johnson looked "[l]ike he'd been in a wreck and was drunk" and was bleeding from an abrasion on his face.

Sheriff Presley asked Johnson some questions to evaluate whether he was injured, to which Johnson provided only short, terse answers. At one point, Johnson looked at

Sheriff Presley and said, "'I'm drunk.'" Sheriff Presley found it difficult to converse with Johnson due to how much Johnson had been drinking and because Johnson was obviously in a lot of pain. In addition to the difficulties communicating, Johnson's eyes were glassy and bloodshot, and he smelled like alcohol.

Based on Johnson's injuries, Sheriff Presley believed Johnson needed to go to the emergency room for treatment. Johnson initially did not want to go to the hospital. However, after Sheriff Presley told Johnson that he would go to jail for DUI if he did not go to the hospital, Johnson agreed to go to the hospital. Sheriff Presley contacted Officer Riggins and asked him to seek consent from Johnson for a blood draw at the hospital.

Officer Riggins arrived at the hospital a few minutes after Johnson. He observed that Johnson had lacerations on his lip, slightly slurred speech, and delayed response time to questions. After nurses conducted their initial observations, Officer Riggins asked Johnson for his state-issued identification card. Johnson had some difficulty retrieving it, fumbling as he tried to pull the identification card out, but he eventually provided it to Officer Riggins.

Officer Riggins then presented two copies of a DC-70 implied consent advisory form. He offered one to Johnson, but Johnson did not reach out to take it, so Officer Riggins placed the form on Johnson's chest. This form stated that refusal to submit to a blood alcohol test would result in suspension of driving privileges for one year. It also stated that test failure would result in suspension of driving privileges for 30 days to one year and that the results of testing may be used in a criminal action. Officer Riggins read the blood test portion of the form to Johnson and asked him for a yes or no answer as to whether he consented to a blood draw. Johnson replied, "Maybe." Officer Riggins again asked for a yes or no response, and Johnson's wife also told him that he needed to answer yes or no. Johnson then said, "Yes." Officer Riggins then reread the blood test section of the DC-70 form to Johnson and asked Johnson again for a yes or no answer. Johnson

said, "Yes," again. Officer Riggins testified that Johnson never made any statements to the officer directly saying he did not want the blood draw.

Before the blood draw was conducted, Johnson asked his wife if he had to do a blood draw. His wife responded that he had already said yes. Officer Riggins also heard Johnson ask the nurse whether he had to do a blood draw. Although this indicated to Officer Riggins that Johnson was hesitant to have his blood drawn, Johnson did not ask Officer Riggins any direct questions or make any other indication that he did not consent to the blood draw. Officer Riggins did not ask Johnson if he had any questions, but he believed that Johnson had an adequate opportunity to ask questions as he was in the room with Johnson for 20 minutes.

At the conclusion of the evidentiary hearing, the district court denied Johnson's motion to suppress. The court noted that warrantless searches are per se unreasonable unless they fall under an exception and the exception at issue was Johnson's consent. To find consent, the State had to prove that the consent was unequivocal, specific, freely given, and obtained without duress or coercion. In determining whether Johnson voluntarily consented to the blood draw, the district court focused solely on the constitutionality of the implied consent advisory. The district court recognized that a person might feel coerced into agreeing to a blood draw because the person does not want the civil penalty that accompanies refusal. This type of coercion, however, was not unconstitutional because Johnson was accurately informed of the consequences his choices would have. Johnson had the opportunity to refuse consent and he voluntarily gave his consent for the blood draw. After he did so, he never specifically withdrew that consent, and he allowed his blood to be drawn.

The case later proceeded to a bench trial on stipulated facts. The district court found Johnson guilty of driving under the influence of alcohol.

Johnson appeals.

DID THE DISTRICT COURT ERR IN DENYING THE MOTION TO SUPPRESS?

Johnson argues on appeal that the State failed to prove that his consent to the blood draw was unequivocal and free from coercion.

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). This case has no disputed facts, given the nature of the parties' stipulations. The parties focus instead on the legal question of whether the facts established that Johnson consented to the blood draw.

The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches. Testing for blood alcohol content constitutes a search. Thus, a warrantless blood draw "is per se unreasonable unless a valid exception to the Fourth Amendment applies." *City of Kingman v. Ary*, 312 Kan. 408, 410, 475 P.3d 1240 (2020). Consent is an exception to the warrant requirement, and the issue here is whether the State proved that Johnson consented to the blood draw. See 312 Kan. at 410-11.

As articulated by the Kansas Supreme Court, the "existence, voluntariness, and scope of a consent to search is a question of fact to be determined from the totality of the circumstances." *State v. Daino*, 312 Kan. 390, 397, 475 P.3d 354 (2020). The State bears the burden to demonstrate the validity of a defendant's consent by a preponderance of the evidence. 312 Kan. at 397. To meet this burden, a showing of "mere acquiescence" is not enough. "Instead, to demonstrate valid consent, the State must (1) provide clear and positive testimony that consent was unequivocal, specific, and freely and intelligently

given; and (2) demonstrate the absence of duress or coercion, express or implied." 312 Kan. at 397.

Johnson claims that the district court erred by failing to focus on his "clear equivocation about taking the blood test, nor the duress he was obviously under," but instead focusing on whether telling Johnson if he refused his license would be suspended for a year was proper. Johnson notes that the threat to suspend his license if he did not consent to the test was a relevant factor to consider, but that "his clear duress and equivocation are what render his alleged consent insufficient."

It is true that the district court focused on the effect of the implied consent advisory when determining whether Johnson consented. But this is, after all, what Johnson asked the court to consider in his motion to suppress. The only basis Johnson provided for suppression in his motion was that the implied consent advisory was unconstitutionally coercive and, thus, Johnson did not voluntarily consent to the blood draw. However, Johnson's counsel did mention at the motion hearing that his argument was not limited to the constitutionality of the implied consent advisory. But given the framing of the issue in the motion, it is unsurprising that the district court focused on the constitutionality of the advisory. In any event, Johnson did not ask the district court to make additional findings. "In the absence of a request by a party to the district court for additional findings . . . we generally assume that the court made the findings necessary to support its ruling." *Douglas Landscape and Design v. Miles*, 51 Kan. App. 2d 779, 787, 355 P.3d 700 (2015).

Johnson highlights several facts which he says show that his consent was not unequivocal or free from duress or coercion. He notes that he was in a serious collision which resulted in lacerations to his face. He was in pain and having difficulty communicating. These statements accurately reflect the evidence. Sheriff Presley testified it was "tough to carry on a conversation because of how much [Johnson had] been

drinking" and because Johnson was trying to hide how much pain he was in. Officer Riggins also observed Johnson being questioned at the hospital and thought "his speech was slightly slurred and his response times to answering questions was a little longer than normal."

It is true that when considering the totality of the circumstances in evaluating whether consent to search is valid, "'account must be taken of . . . the possibly vulnerable subjective state of the person who consents.'" *State v. Spagnola*, 295 Kan. 1098, 1108, 289 P.3d 68 (2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 229, 93 S. Ct. 2041, 36 L. Ed. 2d 854 [1973]). However, consent is not "rendered any less voluntary because the defendant has been drinking" as long as the defendant understands what is happening and is fully oriented. *State v. Chiles*, 226 Kan. 140, 145, 595 P.2d 1130 (1979); see also *State v. White*, 225 Kan. 87, 92, 587 P.2d 1259 (1978) (rejecting argument that defendants' intoxication rendered them unable to understand *Miranda* warnings because the defendants "understood that they were under arrest, knew where they were, and were fully oriented").

While the evidence shows that Johnson's ability to communicate was impaired by his intoxication and injuries, it does not demonstrate that Johnson failed to understand what was occurring. His responses to the nurses were delayed, but he did respond. When Officer Riggins asked Johnson for his identification, Johnson provided it without objection. Johnson also answered when Officer Riggins asked him whether he consented to a blood draw, though his initial "maybe" response was not what Officer Riggins asked for. When Johnson's wife told him to answer "yes" or "no," Johnson answered "yes" without question. Officer Riggins asked Johnson a second time whether he consented to the blood draw and Johnson said "yes" again. During this conversation, Johnson did not ask Officer Riggins any questions or exhibit any confusion over what was being asked of him.

Next, Johnson argues that his hesitancy in consenting to the blood draw rendered his consent invalid. He notes that he initially answered "maybe" when asked if he consented to the blood draw and he also asked his wife whether he had to submit to the test. Johnson maintains that, despite Officer Riggins knowing that Johnson was hesitant to consent, the officer did not ask Johnson if he had any questions or tell him that he had the right to refuse the blood draw. For these reasons, Johnson claims that his consent was not unequivocal.

On review of the record, we disagree. The difficulty with Johnson's argument is that it equates hesitation with equivocality, and the words are not synonymous. "Equivocal" means "[h]aving more than one meaning or sense; ambiguous." Black's Law Dictionary 682 (11th ed. 2019). Conversely, "unequivocal" means "[u]nambiguous; clear; free from uncertainty." Black's Law Dictionary 1839 (11th ed. 2019). Although Johnson's initial "maybe" answer may have been equivocal, the blood draw was not completed after his "maybe" answer. It was only taken after he unequivocally replied "yes"—twice—to Officer Riggins' question as to whether he consented to the blood draw. His "yes" answers were unambiguous and had only one meaning—Johnson agreed to the blood draw.

Johnson's initial hesitation in agreeing to the blood draw does not undermine his ultimate decision to consent. It is not uncommon for people to consent to something that they are hesitant to do, especially when they must choose between two less-than-ideal options. For example, a person may consent to a dental procedure even if the person does not want to undergo the procedure because the person decides that not having the procedure would be even worse than going through with it. Here, Johnson had the option of refusing to submit to the test, which would result in his driving privileges being suspended for one year or submitting to the test and risking license suspension and criminal action. Even if Johnson were initially hesitant to answer "yes" because of the consequences that could flow from his decision, he did so clearly and freely. And

Johnson's argument that Officer Riggins did not tell him he could refuse is unconvincing, because the officer clearly told Johnson he could refuse the test—twice orally and once in writing through the implied consent advisory.

Johnson also asserts that he was "coerced" into going to the hospital by Sheriff Presley because the sheriff told him that he could either go to hospital or be arrested and taken to jail for DUI. He makes a similar allegation that Officer Riggins coerced him into agreeing to the blood draw by telling him that refusal to consent would result in his driver's license being suspended for a year. We find that neither of these statements was unconstitutionally coercive. The Kansas Supreme Court has held that "consent does not become involuntary merely because someone is advised of legal ramifications of their choice, even if those consequences are serious and negative." *State v. Nece*, 303 Kan. 888, 894, 367 P.3d 1260 (2016). In fact, "[a]ccurately informing a driver of the lawful consequences that flow from his or her decision to refuse to submit to blood-alcohol testing 'ensures' that the driver 'makes an informed choice whether to engage in that behavior or not.' [Citation omitted.]" 303 Kan. at 895.

Here, the State established by a preponderance of the evidence that Johnson's consent to the blood draw was unequivocal, specific, and freely given. He clearly and unquestionably answered "yes" when Officer Riggins asked for his consent to the blood draw, and when asked a second time he provided the same answer. The State also established by a preponderance of the evidence that Johnson's decision to consent was made without duress or coercion. Officer Riggins gave Johnson the opportunity to decline or accept the blood draw and did not take any actions to influence that decision. For these reasons, we find that the district court did not err in denying the motion to suppress.

Affirmed.