IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No.: 2019-00499CFAXMX
Division: Felony

EVAN HAMILTON,

Defendant.
_____/

ORDER ON MOTION TO SUPPRESS

THIS CAUSE having come on before the Court upon the Defendant's Motion to Suppress, and the Court being otherwise duly advised in the premises finds as follows:

Findings of Fact

On February 23, 2019, the Florida Wildlife Commission (FWC) conducted a blood draw on the Defendant. The blood draw was done without a warrant.

According to the testimony of Investigator Johnston, the lead investigator in this case, he was advised of the underlying accident on Saturday February 23, 2019, at approximately 4:00 p.m., shortly after the accident occurred.

At the scene, probable cause was established that Defendant was under the influence of alcohol, and while the under the influence was operating a vessel resulting in death of the victim. Defendant had a distinct odor of alcohol coming from his person and he had slurred speech. He could not recite the alphabet correctly. Witnesses placed him as the driver of the vessel at the time he made a sharp turn ejecting the passengers and striking the victim with the boat propeller killing him. Witnesses testified to the Defendant drinking alcohol prior to the crash. Law enforcement discovered empty alcohol containers in the vessel. Based on the above, Investigator Johnston

directed Officer Mallow to do a blood draw of the Defendant. Officer Mallow asked the Defendant to consent to the draw. The Defendant said, "not now."

Officer Mallow had told the Defendant that the State required a blood draw because a fatality was involved. After the Defendant declined to consent to the blood draw, the FWC investigators left. However, they returned 30 minutes later and said that a Florida statute required them to take the Defendant's blood no matter what it took to get it. Hearing Transcript, p. 55.

Investigator Johnston stated under oath: "I told Evan Hamilton that the State requires us to take blood." Deposition Transcript, p. 13. The Defendant's father was also present for this discussion. Hearing Transcript, p. 39. Investigator Johnston said, "we had to draw blood from him" and "we will draw blood from you." Deposition Transcript, p. 13. During the hearing, Investigator Johnston admitted that he said he would do whatever it took to get the Defendant's blood. Hearing Transcript, p. 32. He said the statute required the blood draw, and he was going to get it from the Defendant "one way or the other." Hearing Transcript, p. 32. He said the Defendant "wasn't going to leave until we took blood from him." Hearing Transcript, p. 34. Investigator Johnston never mentioned the requirement of a warrant or that if he refused, they would secure a warrant. To the contrary, he admitted that the effort to obtain the blood was based "purely" on the statute. The Defendant subsequently provided a blood sample.

Conclusions of Law

The operative statute in this case is Fl. Statute 327.353. This is not an implied consent case under Fl. Statute 327.352. It is important to address the "implied consent" cases because the reasoning is now applicable in non-implied consent cases as is the case at bar. In *Birchfield v.*

North Dakota, 136 S. Ct. 2160 (2016), the United States Supreme Court held that "implied consent" statutes do not overcome the constitutional requirement of a warrant. There is no question that taking a blood sample is a search. *Birchfield*, at 2173. Thus, unlike a breath test, the more intrusive blood draw requires a warrant under the Fourth Amendment. *Id.*, at 2173, 2184 absent valid consent or exigent circumstances. In the *Birchfield* case, the prosecution argued that the implied consent statute supported the investigator's claim that such a draw could be "required." *Id.* at 2186. The Court responded that the implied consent statutes may not compel a motorist to give blood absent a warrant. *Id.*, at 2172. Just like the Defendant in this case, one of the Petitioners in *Birchfield* "submitted to a blood test after police told him that the law required his submission." *Id.*, at 2186. This was "erroneous." *Id.*, at 2186 (discussion of Petitioner Beylund); *see also State v. Liles*, 191 So. 3d 484, 487 (Fla. 5th DCA 2016). *Liles* was a 316.1933 DUI manslaughter case with the same statutory language in this BUI manslaughter case.

The Fifth District Court of Appeal recently confirmed after *Lyles* that this continues to be the law in Florida, that is, absent valid consent or other exigencies a warrant is required. *See Dusan v. State*, 45 Fla. L. Weekly D1117 (Fla. 5th DCA May 14, 2021) (also finding that it was not in good faith to conduct a warrantless blood draw given the clear law on this issue at this point).

Whether consent was freely and voluntarily given is determined by the totality of the circumstances. *See Montes–Valeton v. State*, 216 So. 3d 475, 480 (Fla. 2017) (finding that the defendant's consent was involuntary). "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v. Royer*, 460 U.S. 491, 497 (1983). The Court finds that the State has failed to meet its burden in the instant case.

It does not constitute consent under the Fourth Amendment to first tell a suspect that law enforcement has the authority to conduct such a search when they in fact have no such authority. Mere acquiescence to the mandates of authority does not constitute consent. *See Powell v. State*, 332 So. 2d 105, 107 (Fla. 1st DCA 1976) ("It is clear that appellant's consent to this search was not a free and voluntary waiver of a search warrant but was merely *submission to the apparent authority* of the three officers who had informed him that they had authority under the law to search his trailer and would obtain a search warrant, when as a matter of fact, they had no authority to make the search unless they obtained a search warrant.") (emphasis added). As explained by the Tenth Circuit Court of Appeals in *United States v. Harrison*, 639 F.3d 1273, 1279-1280 (10th Cir. 2011):

> [G]overnment actions are coercive when they imply an individual has no right to refuse consent to search. E.g., *Bumper v. North 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.... Where there is coercion there cannot be consent.").

See also United States v. McWeeney, 454 F.3d 1030, 1036 (9th Cir. 2006) ("[I]f ... officers ... coerce[d] [motorists] into believing that they had no authority to withdraw their consent, the officers violated [the motorists] Fourth Amendment rights and the search was illegal.").

In this case, the officers testified that this particular blood draw was based "purely" on the statute. In truth, the officers' direction to the Defendant after his initial refusal that "we will draw blood from you" left him no lawful ability to oppose the officers. The officers' command that they would take his blood no matter what and that there was no way he was going anywhere until they got his blood vitiated any notion of voluntary consent. Law enforcement relied in good faith on the plain reading Fl. Statute 327.353. Nowhere in the statute does it say that if a law enforcement

officer has probable cause to believe that a vessel operated by a person under the influence of alcoholic beverages has caused the death of a human being, that the officer must obtain a warrant absent consent or exigent circumstances before obtaining a blood draw. See *State v. Serrago* 875 So.2d 815 (Fla. 2nd DCA 2004). It appears after *Missouri v. McNeely* 1335 S.Ct. 1552, the reasoning in *Serrago* is suspect. As stated earlier good faith may not be considered under these circumstances. The State relies on *Miller v. State*, 250 So.3d 144 (Fla. 1st DCA 2018) in its position that Defendant's consent was freely and voluntarily given. Unlike in *Miller,* the Defendant here was never told if he did not consent, they would seek a warrant. In fact, the Court stated the law enforcement officer accurately described to Miller what would happen if a warrant were sought. He even said he would have to go to a judge's house at night to secure the warrant. The fact that law enforcement in this case would have sought a warrant if the Defendant did not consent was never a factor in the Defendant's decision making. Because law enforcement was not actively seeking a warrant the inevitable discovery doctrine does not apply.

Given the totality of the circumstances, this was not a case of voluntary consent, and a warrant was required in order to take the Defendant's blood under the Fourth Amendment absent any exigencies. Therefore, the evidence from the blood draw search must be suppressed.

Wherefore, it is ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted.

DONE AND ORDERED in Chambers, at Crawfordville, Wakulla County, Florida, this 27th day of September, 2021.

CIRCUIT JUDGE

Copies furnished to:

Thomas M. Findley, Esquire; Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Brian Miller, Esquire; Office of the State Attorney
Michael Ufferman, Esquire