IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-190522 C-190523
Plaintiff-Appellee,	:	TRIAL NOS. C-19TRC-23128A C-19TRC-23128C
vs.	:	
ANDREW ALBRIGHT,	:	*O P I N I O N.*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 3, 2021

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Alex Scott Havlin,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

A. Brian McIntosh for Defendant-Appellant.

BERGERON, Judge.

{¶1} Faced with a badly injured driver suspected of imbibing and nascent Supreme Court precedent, the trial court denied defendant Andrew Albright's motion to suppress the results of his blood draw. In doing so, the trial court invoked the authority of *Mitchell v. Wisconsin,* a plurality opinion involving applicability of the "exigent circumstances" doctrine to drivers under the influence of alcohol. 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019).

{¶2} But there was no need for the trial court to wade into choppy constitutional waters. Mr. Albright's motion to suppress could and should have been resolved on statutory grounds. Because he raises no challenge to the applicability of Ohio's implied consent statute on appeal, we overrule Mr. Albright's sole assignment of error and affirm his conviction.

I.

{¶3} In June 2019, Andrew Albright crashed his car in a single-car accident. He sustained serious injuries, and authorities transported him directly from the scene of the crash to the emergency room. Colerain Township Police Officer Adam Quinn responded to the crash and later accompanied Mr. Albright to the emergency room.

{¶4} At the emergency room, Officer Quinn read Mr. Albright his *Miranda* rights. He also read a BMV Form 2255, advising Mr. Albright that he was under arrest for operating a vehicle under the influence ("OVI"). While Officer Quinn read the forms, Mr. Albright lay groaning unintelligibly on his hospital bed. The nurse then administered a "sternum rub," a painful procedure that involved applying pressure to Mr. Albright's chest to gauge his alertness. When Mr. Albright jolted

awake, Officer Quinn asked if he would consent to a blood draw. Mr. Albright responded: "Take whatever you want." Emergency room staff completed a blood draw, which eventually tested positive for fentanyl and norfentanyl. Officer Quinn later testified that he was unsure, due to Mr. Albright's injuries and behavior, whether Mr. Albright was genuinely conscious during the encounter.

{¶5} Charged with OVI in violation of R.C. 4511.19(A)(1)(a), OVI in violation of R.C. 4511.19(A)(1)(j), and driving under OVI suspension in violation of R.C. 4510.14, Mr. Albright moved to suppress his statements granting consent to the blood draw as well as the results of the blood draw. The hearing on the motion to suppress revolved around whether or not Mr. Albright was conscious when Officer Quinn read his *Miranda* rights. A secondary issue concerned Mr. Albright's consciousness when Officer Quinn recited the BMV Form 2255 and declared him under arrest. Officer Quinn's body camera captured his full interaction with Mr. Albright at the emergency room, and both defense and prosecution counsels relied heavily on the footage in furtherance of their arguments.

{¶6} At the motion to suppress hearing, the prosecutor argued that the body camera footage showed that Mr. Albright was conscious and gave actual, knowing consent to the blood draw. Defense counsel insisted to the contrary, contending that the extent of Mr. Albright's injuries and his generally unintelligible groaning reflected a lack of consciousness until the sternum rub jolted him awake—and then only briefly. Building on that premise, defense counsel maintained that Mr. Albright had not been properly advised of his *Miranda* rights by virtue of his foggy mental state, and that any hint of consent by Mr. Albright was both uninformed and a product of "torture" via the sternum rub.

{¶7} Toward the end of the hearing, the state offered an "in-the-alternative" argument to support denial of the motion. Even if Mr. Albright were unconscious, the prosecution asserted, the United States Supreme Court's recent holding in *Mitchell v. Wisconsin,* 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2020), established the Fourth Amendment constitutionality of a blood draw from an unconscious driver under the "exigent circumstances" doctrine. After taking a few days to ponder these arguments and review *Mitchell*, the trial court denied Mr. Albright's motion to suppress. The court found that "Mr. Albright was either unconscious or in a stupor at the time of the events." It then held "that under the rule of *Mitchell v. Wisconsin*, [for] a criminal defendant who is either unconscious or in a stupor, the State is not required to seek a warrant for a blood draw." Neither party—nor the court—ever addressed Ohio's statutory framework for implied consent of an unconscious driver in an OVI case.

{¶8} Following the trial court's denial of his motion to suppress, Mr. Albright pled no contest to OVI in violation of R.C. 4511.19(A)(1)(a) and driving under OVI suspension. He received a 180-day sentence on each charge, to be served consecutively, along with fines, court costs, and a driver's license suspension. He now appeals, asserting a single assignment of error.

II.

{¶9} In his sole assignment of error, Mr. Albright contends that the trial court went astray "by broadly interpreting the U.S. Supreme Court decision of *Mitchell v. Wisconsin* to apply to all cases of unconscious persons," not only those suspected of driving under the influence of alcohol. But we need not wrestle with the

proper application of *Mitchell* to dispose of this appeal, because statutory grounds suffice for resolving the motion to suppress.

{¶10} "Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard." *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945 (1st Dist.), ¶ 11. We review "whether the facts satisfy the applicable legal standard" de novo. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶11} Before diving into Mr. Albright's claim, it is helpful to review the Supreme Court's holding in *Mitchell*. *Mitchell* concerned "a narrow but important category of [DUI] cases: those in which the driver is unconscious and therefore cannot be given a breath test." *Mitchell,* 588 U.S. ___, 139 S.Ct. 2525, 2531, 204 L.Ed.2d 1040. A Wisconsin driver arrested for driving under the influence of alcohol moved to suppress the results of his blood test on Fourth Amendment grounds, challenging application of Wisconsin's implied-consent statute to his case. *Id.* at 2532. The Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." *Id.* But the *Mitchell* court stopped short of answering this question: instead, in a plurality opinion authored by Justice Alito, four Justices held that in drunk-driving cases involving an unconscious driver, "the exigent-circumstances rule almost always permits a blood test without a warrant." *Id.* at 2531.

{¶12} The trouble for Mr. Albright is that *Mitchell* does not actually resolve his motion to suppress—or, for that matter, this appeal. The state now concedes that the trial court should not have relied on *Mitchell* to deny Mr. Albright's motion to suppress. Instead, it points to Ohio's implied consent statute for unconscious drivers in R.C. 4511.191(A), which provides, in relevant part:

> R.C. 4511.191(A)(2): Any person who operates a vehicle, streetcar, or trackless trolley upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle, streetcar, or trackless trolley shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance.
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> R.C. 4511.191(A)(4): Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (A)(2) of this section, and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

Under R.C. 4511.191(A)(4), an unconscious driver is deemed to have consented to a blood draw. And the Ohio Supreme Court has squarely held that " 'Section 4511.191 * * * does not violate the search and seizure provision of the Fourth Amendment * * * .' " *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, ¶ 18, quoting *State v. Starnes*, 21 Ohio St.2d 38, 254 N.E.2d 675 (1970).

{¶13} Mr. Albright does not challenge the trial court's factual finding that he was "unconscious or in a stupor" at the time of his blood draw (and we note that the word "stupor" is sufficient to invoke the portion of the statute concerning a person

"in a condition rendering the person incapable of refusal"). Nor do we see any reason to disturb this finding on appeal. Badly injured, Mr. Albright was moaning unintelligibly and lying back on his hospital bed; Officer Quinn testified that he remained unsure throughout the encounter whether Mr. Albright was conscious. Moreover, Mr. Albright offers us no argument as to why R.C. 4511.191(A)(4) should not apply in his case.

{¶14} It is unfortunate that neither party addressed the implications of R.C. 4511.191(A) below, but "[t]he trial court can be right for the wrong reasons." *In re L.S.*, 1st Dist. Hamilton No. C-150526, 2016-Ohio-5582, ¶ 20 (upholding denial of a motion to suppress under the automobile exception, rather than the inventory search exception relied upon by the trial court). Accordingly, we overrule Mr. Albright's assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

ZAYAS, P.J., and **MYERS, J.,** concur**.**

Please note:

The court has recorded its entry on the date of the release of this opinion.