COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP792-CR **Cir. Ct. No. 2013CT17**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES MICHAEL WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed*.

¶1 HRUZ, J.[1] James Warren appeals a judgment convicting him of operating while intoxicated (OWI), as a third offense. Warren argues the results of his postarrest blood test should be suppressed because he had a reasonable,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted

medically based objection to his blood being drawn and, accordingly, his conviction should be vacated. We affirm, although on different grounds than the circuit court.

BACKGROUND

¶2 After a February 10, 2013 traffic stop was extended into an OWI investigation, Warren was arrested for operating while intoxicated and transported by law enforcement to a local hospital. There, City of Spooner police officer Derek Ricci read Warren the "Informing the Accused" form and asked Warren to submit to an evidentiary test of his blood. Warren refused, but he did not provide a reason for his refusal.[2] Ultimately, a warrantless, nonconsensual blood sample was taken.

¶3 Warren was charged with OWI and driving with a prohibited alcohol content (PAC), both as third offenses. He moved to suppress the results of his blood draw, arguing exigent circumstances were not present so as to render reasonable his warrantless, nonconsensual blood draw. At the suppression hearing, and as relevant to this appeal, Warren testified that he had undergone back fusion surgery in December 2012, and he experienced issues with infection from the date of the surgery through February 2013. Nevertheless, Warren and Ricci each testified that Warren did not raise a fear of infection or provide any

[2] Ricci testified at the suppression hearing that Warren indicated he would not submit to a sample of his blood during the transport to the hospital, when Warren told Ricci "that the seat belt wasn't on him; being he was unsecured, that I could not take his blood and that he knew his rights." Warren neither restated this reason nor provided any other reason for refusing to consent to the blood draw at the hospital.

medical reason, either general or specific, to refuse the test prior to the blood draw.

¶4 The circuit court found that Warren was at the hospital within a half hour of his arrest, and that there were no exigent circumstances present. It therefore concluded, under ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013), which it applied retroactively, that the blood draw was an unreasonable search in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. The court also found Warren had a valid reason to refuse to consent to the blood draw given his postsurgery infection issues. Nevertheless, the circuit court denied Warren's suppression motion, reasoning Ricci had acted in good faith and had reasonably relied on the City of Spooner police department's Policy and Procedures Manual "in ignoring the four-part test of ***Bohling***[3] and the warrant requirement."[4] Warren ultimately pleaded no contest to OWI, third. He now appeals.

STANDARD OF REVIEW

¶5 We consider whether the circuit court erred in applying the good-faith exception to the exclusionary rule and denying Warren's suppression motion. We will uphold the circuit court's findings of fact unless clearly erroneous. ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010).

[3] ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by* ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013).

[4] The circuit court noted that the City of Spooner police department's Policies and Procedures Manual stated that "if the subject refuses to allow blood to be taken, it can be taken as evidence of a crime" and that "on a second or – offense or higher where there is an OWI test refusal, blood shall be taken even if the suspect refuses consent[.]"

However, we independently review the circuit court's application of those facts to principles of law. ***Id.***

DISCUSSION

¶6 At the time of Warren's arrest, ***Bohling*** was the law in Wisconsin with respect to warrantless nonconsensual blood draws. Looking to ***Schmerber v. California***, 384 U.S. 757 (1966), the ***Bohling*** court held that exigent circumstances justifying a warrantless blood draw were "caused solely by the fact that the amount of alcohol in a person's blood stream diminishes over time." ***Bohling***, 173 Wis. 2d at 539-40. The ***Bohling*** court further explained that a warrantless blood sample, taken at the direction of law enforcement, would be permissible under the following conditions:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 533-34.

¶7 Focusing exclusively on the fourth ***Bohling*** prong, Warren argues that his blood test results should be suppressed because he had a reasonable, medically based objection to the blood draw, albeit one he never stated prior to the draw. He insists that under the controlling law at the time of his arrest, as stated in ***Bohling***, the State failed to prove that exigent circumstances justified the

compelled blood draw because it was unable to prove that Warren lacked a reasonable objection to the blood draw.[5]

¶8 In response, the State first observes that "the language of ***Bohling*** indicates an officer may proceed to do a forced blood draw if the other three criteria are met and 'the arrestee presents no reasonable objection to the blood draw.'" (Citation omitted.) The State argues further, "This language presupposes that a reasonable objection has to be verbalized by the defendant so the officer is made aware of it at the time of the blood draw, in order for him to make a determination of whether he can or cannot proceed." Warren replies that ***Bohling*** does not expressly require the arrestee to present his or her reasonable objection before the blood draw.

¶9 Looking to case law applying ***Bohling***, the State contends that our supreme court has placed the burden of explaining a reasonable basis to object to a blood test on an OWI defendant, such as one who had explicitly requested to take a breath test instead of a blood draw because he feared needles. *See* ***State v. Krajewski***, 2002 WI 97, ¶49, 255 Wis. 2d 98, 648 N.W.2d 385 ("The record does

[5] Two months after Warren's arrest and blood draw, the United States Supreme Court issued ***McNeely***, 133 S. Ct. 1552, which abrogated ***Bohling***, 173 Wis. 2d 529, "to the extent that [***Bohling***] held the natural dissipation of alcohol in a person's bloodstream constitutes a per se exigency so as to justify a warrantless nonconsensual blood draw under certain circumstances." ***State v. Kennedy***, 2014 WI 132, ¶6, 359 Wis. 2d 454, 856 N.W.2d 834.

Warren accordingly argued in his suppression motion that exigent circumstances beyond the normal dissipation of alcohol from the blood did not exist in his case. Insofar as ***McNeely*** was litigated in Warren's case, that aspect of the circuit court's decision is not being appealed. Further, Warren concedes on appeal that governing Wisconsin law provides there is no misconduct to deter where law enforcement officers reasonably relied on the "clear and settled precedent" of ***Bohling*** as it existed prior to ***NcNeely***, and thus the good-faith exception to the exclusionary rule applies in such cases. ***Kennedy***, 359 Wis. 2d 454, ¶37; *see also* ***State v. Foster***, 2014 WI 131, ¶¶8, 56, 360 Wis. 2d 12, 856 N.W.2d 847. We note that ***Kennedy*** and ***Foster*** were not decided until after the circuit court's rulings in this case.

not provide evidence that Krajewski explained the basis for his alleged fear[.]"); *see also* ***State v. Krause***, 168 Wis. 2d 578, 585, 588, 484 N.W.2d 347 (Ct. App. 1992) (pre-***Bohling*** case applying ***Schmerber*** and rejecting defendant's argument that he was constitutionally protected from a blood test for OWI because he had informed the police officer he "'didn't believe in needles' and 'd[id]n't want AIDS.'"). Here, the State notes, the only objection Warren presented either at or before the time of his refusal was his belief that his "rights" had been violated when he was not seat-belted in the squad car on the drive to the hospital. This, the State argues, was not a reasonable objection to the blood draw, and Warren does not contend on appeal it was.

¶10 We agree with the State that ***Bohling*** allowed a warrantless blood draw if law enforcement satisfied the first three conditions at the time of the draw, so long as "the arrestee present[ed] no reasonable objection to the blood draw." ***Bohling***, 173 Wis. 2d at 534. ***Bohling*** did not require police officers to ask arrestees whether they had any objections to blood testing. It required only that a warrantless, nonconsensual blood draw not occur if the arrestee offered a reasonable objection to it. We are persuaded of this conclusion by the fourth condition's use of "the arrestee" as its subject and "presents" as its verb. The court in ***Bohling*** could have mandated that an officer ascertain whether an arrestee had a reasonable objection to a blood draw before he or she could order one; it did not do so.

¶11 Warren next asserts that ***Bohling*** should be interpreted as placing the burden on a defendant to present evidence of a reasonable objection only at the suppression hearing, and that such a formulation is consistent with Fourth Amendment cases where evidence relevant to the constitutionality of a search is presented by the State and defendant at a suppression hearing. Warren seeks to

distinguish ***Krajewski*** and ***Krause*** by arguing both cases were concerned with the reasonableness, not the timing, of the defendants' objections to the warrantless blood draws. We do not disagree with Warren's reading of the focus of these cases; nevertheless, ***Krajewski*** is still a post-***Bohling*** supreme court case that clearly places weight on what the arrestee told the officer at the time of the blood draw. ***Krajewski***, 255 Wis. 2d 98, ¶49. Meanwhile, Warren does not cite any case in which a court's analysis of the fourth ***Bohling*** condition considered reasons to refuse a blood draw first proffered after the draw was performed.

¶12 In addition, we observe the fourth ***Bohling*** condition—along with the rest of the conditions—is written in the present tense. This wording strongly suggests an arrestee must "present" his or her reasonable objection at or before the time of the testing. Indeed, the third and fourth prongs of the ***Bohling*** test are both concerned with reasonableness, and we consider it illogical to require examination of the reasonableness of an officer's decision based on information not made available to the officer at the time he or she ordered the blood draw. *See* ***Bohling***, 173 Wis. 2d at 533-34. Further, ***Bohling*** refers to an *arrestee* presenting a reasonable objection, rather than a defendant, as one would be at the time of a suppression hearing. In addition, ***Bohling*** itself states that the determination of whether exigent circumstances exist so as to be excepted from the warrant requirement rests upon law enforcement's knowledge at the time: "whether a police officer[,] under … circumstances known to the officer at the time[,] reasonably believes that delay in procuring a warrant would … risk destruction of evidence…." ***Id.*** at 538 (citation omitted) (omissions in original). In short, both ***Bohling*** generally and its four conditions for a permissible warrantless blood draw

contemplated a determination of exigency based on what is known at the time of the blood draw.[6]

¶13 In this case, Warren had a reasonable objection to having his blood drawn. However, the onus is on an arrestee to explain the basis for his or her objection at the time of the blood draw, and Warren cannot overcome, after the fact, his failure to do so. Law enforcement officers must be able to rely on their knowledge at the time they are acting. The only objection Warren contemporaneously raised was not a reasonable basis to refuse consent. In addition, despite Warren's argument otherwise, a suppression hearing still is necessary to assess the validity and actuality of the arrestee's alleged objection, rather than as the forum to present such an objection in the first instance.

¶14 Lastly, Warren contends the circuit court erred by applying the good-faith exception to preclude suppression of the blood evidence on the basis that officer Ricci followed a police department manual that instructed officers contrary to the law. Warren argues the exclusionary rule must be applied because police did not act "in accordance with clear and settled Wisconsin precedent." He relies on the circuit court's summarization of the Spooner police department's manual, which said "blood shall be taken even if the suspect refuses consent."

[6] Moreover, Warren's argument that the burden of establishing the nonexistence of a reasonable objection remains with the State at all times would necessarily make an officer's inquiry into an arrestee's basis to object to the blood draw largely irrelevant. Under Warren's argument, even if the arrestee did not answer the inquiry or if he or she provided some other reason, the arrestee, now as a defendant, could later proffer a new reason for objecting which, if reasonable, would mean ***Bohling*** was not adhered to, despite the officer having asked, prior to the draw, if any reason existed. In this sense, Warren's characterization in his reply brief of the State's position—that Warren "forfeited" his constitutional rights to privacy by failing to affirmatively assert his reason for objecting to the blood draw—misses the mark. The issue is not one of forfeiture of a constitutional right but, rather, whether the good-faith exception to the exclusionary rule applies under the circumstances of this case.

Warren asserts the manual "wrongly interpreted the 'clear and settled precedent' from ***Bohling***[,] [and] [b]ecause it did not accurately reflect the established law in Wisconsin, no officer could reasonably rely on the manual, rather than the Wisconsin Supreme Court's statement of the law."

¶15 We agree with Warren's critique of the police department's manual insomuch as its instructions are an incomplete statement of the law under ***Bohling***. We disagree, however, regarding the relevance of the police manual's infirmities to this particular case. Warren does not cite any evidence in the record that Ricci relied on the manual in contravention of ***Bohling***. In particular, Ricci did not order a blood draw despite Warren proffering a reasonable objection prior to the draw. Rather, as explained above, Ricci complied with ***Bohling***, including its fourth condition, irrespective of the policy manual's contents.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.