COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2807

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

CITY OF FOUNTAIN CITY,

PLAINTIFF-APPELLANT,

V.

LANCE WILSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Buffalo County: JOHN A. DAMON, Judge. *Reversed and cause remanded.*

¶1 CANE, C.J.[1] The City of Fountain City appeals an order[2] suppressing the test results for blood drawn from Lance Wilson. Wilson was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The petition for leave to file a nonfinal order was granted November 15, 1999.

lawfully arrested for operating a motor vehicle while under the influence of intoxicants, but initially refused to give a blood sample as the primary requested test because he was afraid of needles. Instead, he offered to give a breath or urine sample as the primary test. After being advised that he had to take the blood test or his license would be revoked, he agreed to take the blood test while continuing to express his fear about the usage of needles. A county nurse at the police station then withdrew a sample of Wilson's blood, which tested at .159%.

¶2 Without considering the reasonableness of Wilson's objection to the blood sample, the circuit court concluded that because there were no exigent circumstances to justify the taking of Wilson's blood, the blood test results must be suppressed. The order is reversed.

¶3 Wilson argues that the blood test administered after his arrest violated the Fourth Amendment to the United States Constitution. He contends that the test was an unreasonable seizure of evidence since the City could have used a less intrusive breath or urine test. He also asserts that the warrantless blood draw was not justified by exigent circumstances because, in his case, a breath or urine test would have provided the same evidence.

¶4 The City and Wilson stipulated to the underlying facts. When the material facts are undisputed, whether a search is permissible under the Fourth Amendment is a question of law this court reviews without deference to the circuit court. *See* ***State v. Seibel***, 163 Wis. 2d 164, 171-72, 471 N.W.2d 226 (1991).

¶5 In his challenge to the blood test, Wilson relies on ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998). In that case, the ninth circuit held that when an arrestee consents to a breath or urine test, and such tests are available, to require a blood test violates the Fourth Amendment because it is unreasonable and

not justified by exigent circumstances. *See* ***id***. at 1207. However, the ***Nelson*** court addressed California's implied consent law, which, at the time, allowed the arrestee to choose between a blood, breath or urine test. *See* ***id***. at 1201. In contrast, Wisconsin's implied consent law allows the law enforcement agency to designate which test will be administered first. *See* WIS. STAT. § 343.305(2).[3] Thus, the arresting officer's decision to administer a blood test on Wilson was justified by statute.

¶6 In ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), our supreme court held that, as long as certain elements are met, the State is entitled to withdraw a sample of an intoxicated driver's blood regardless of whether the driver voluntarily submits to the testing. ***Bohling's*** analysis began with the United States Supreme Court's decision in ***Schmerber v. California***, 384 U.S. 757 (1966). Although there the Court recognized that "[t]he integrity of an individual's person is a cherished value of our society," ***Schmerber***, 384 U.S. at 772, it held that

[3] WISCONSIN STAT. § 343.305(2) provides:

> **(2)** IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first.

withdrawing blood from an arrestee who had refused a breath test was reasonable. *See* ***id.*** at 770-71.

¶7 Using the ***Schmerber*** analysis, the ***Bohling*** court concluded that under certain circumstances the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a permissible warrantless blood draw at the direction of a law enforcement officer. *See* ***id.*** at 533-34. The court explained that a warrantless blood draw is permissible when:

> (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. (footnote omitted). Wilson disputes only the last two conditions. He contends that (1) the manner in which the blood sample was taken "was not a reasonable one" because alternative tests were available, and (2) he presented a "reasonable objection" based on his fear of needles.

1. Reasonableness of Blood Draw

¶8 In ***State v. Krause***, 168 Wis. 2d 578, 589, 484 N.W.2d 347 (Ct. App. 1992), this court enumerated various factors to consider in determining whether blood is drawn in a reasonable manner. Claiming that the blood draw was unreasonable here, Wilson focuses on two of those factors: (1) that he made a reasonable request for an alternate test, and (2) that an alternative test was available.

¶9 Since ***Krause,*** our supreme court in ***Bohling*** held that a warrantless blood draw is permissible "at the direction of a law enforcement officer." ***Id***. at 533. The court used this language despite Bohling's earlier refusal to take a breath test. In any event, Wisconsin's implied consent law allows a law enforcement agency to designate which test will be administered first. *See* WIS. STAT. § 343.305(2). The availability of alternate tests is not a factor that a police officer must consider in deciding whether to draw blood.[4]

2. Reasonable Objection

¶10 Wilson fails to explain how his claimed fear of needles constitutes a reasonable objection. He does not claim that he has any medical or religious basis for his fear or objection. His bald assertion is not objectively reasonable. If this court concluded that Wilson's objection was reasonable, there would be no standard for reasonable objections.[5]

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[4]Wilson cites ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), for the proposition that when an arrestee has agreed to submit to a breath test which is available, the government's need for a blood test disappears. However, as stated previously, ***Nelson*** specifically noted that it was interpreting California's implied consent law, which provided that an arrestee has the option of choosing which test to take. "Thus, in California, breath and urine tests are equally effective as a blood test in determining whether a suspect has violated the [California equivalent of OWI] law." ***Id***. at 1201. As stated before, Wisconsin's implied consent law allows the law enforcement agency to designate which test will be administered first. *See* WIS. STAT. § 343.305(2). This court recognizes that a law enforcement agency may determine that breath or urine testing is not as effective as a blood draw in the practical context of prosecuting intoxicated drivers.

[5] Wilson questions the validity of ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), arguing that the United States Supreme Court's decision in ***Richards v. Wisconsin***, 520 U.S. 385 (1997), prohibits blanket exceptions to the warrant requirement for intrusive searches. Even if this court were to agree with Wilson's argument, however, "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Further, ***Bohling*** did not hold that alcohol dissipating in blood always constitutes sufficient exigency to justify a warrantless blood draw. The court required the presence of various other factors, including the absence of a "reasonable objection." The ***Bohling*** decision therefore does not amount to a blanket exception to the warrant requirement.

By the Court.—Order reversed and cause remanded for further proceedings.

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