COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1311-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COLLEEN B. DUNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 SNYDER, J.[1] On October 4, 1998, Colleen B. Dunn was arrested in Walworth county for operating a motor vehicle while under the influence of an intoxicant (OAWI), as a repeat offender, contrary to WIS. STAT. §§ 346.63(1)(a)

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

and 346.65(2). A blood alcohol sample was then seized which resulted in a prohibited blood alcohol test report. After Dunn's motion to suppress the alcohol test results was denied, she entered a plea to the OAWI charge.[2] She appeals from the denial of her suppression motion and from the OAWI conviction.

¶2 After her arrest, Dunn was transported to the Lakeland Medical Center and was asked to submit to a blood sample withdrawal. The arresting officer requested a blood sample rather than a breath sample because "[i]t is the policy of the sheriff's department that if a person is arrested for operating while intoxicated, if it is the second offense, which is a criminal offense, we take and draw blood." After Dunn refused to consent to a blood withdrawal, a blood sample was obtained at the officer's direction based upon department policy. During this time, an operating Intoxilyzer machine was available for breath sample test purposes.

¶3 Dunn concedes that the appellate issue, whether police can constitutionally require blood withdrawal for alcohol test purposes when an alternative breath analysis system is available, is "legally identical" to the issue presented in ***State v. Thorstad***, 2000 WI App 199, ___ Wis. 2d ___, 618 N.W.2d 240.[3] Based upon the ***Thorstad*** holding, we affirm the order denying Dunn's suppression motion and the OAWI judgment of conviction.

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[2] Dunn was also cited for a violation of WIS. STAT. § 346.63(1)(b), as a repeater based upon the test results, but stands convicted of the OAWI charge.

[3] On October 12, 1999, Dunn moved this court to suspend her appeal pending release of ***Thorstad*** because "the legal issue presented in this appeal is identical to that presented by the State's appeal in Thorstad." The ***Thorstad*** decision was released on August 17, 2000, and this court inquired whether Dunn wished to pursue her appeal in light of the decision, recommended for publication, being unfavorable to her appellate position. Dunn declined to withdraw the appeal but made no request to brief or distinguish the ***Thorstad*** holding, and makes no argument that ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), was not followed in her case.

¶4 Dunn contends that ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), is no longer controlling law in Wisconsin concerning police obtaining a warrantless blood test. This is erroneous. ***Thorstad*** reaffirms the validity of ***Bohling*** and concludes that ***Bohling*** establishes the constitutional standard for the administration of a warrantless blood test in Wisconsin, that a warrantless blood sample taken at the direction of a law enforcement officer is permissible, that ***Bohling*** permits warrantless blood tests because the rapid dissipation of alcohol from the bloodstream constitutes exigent circumstances, and that exigent circumstances is an exception to the Fourth Amendment's warrant requirement. *See* ***Thorstad***, 2000 WI App 199 at ¶6. ***Thorstad*** also reiterates that ***Bohling*** does not require that the subject of the blood test consent or voluntarily submit to the blood withdrawal. *See* ***Thorstad***, 2000 WI App 199 at ¶10. We are duty bound to follow controlling precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶5 Dunn cites to the holding in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), and maintains that in Wisconsin a coerced blood sample is unconstitutionally unreasonable because the evidentiary significance of breath and blood samples is the same and that "blood testing cannot be a police reflex." We reject the ***Nelson*** analysis because we are bound by the supreme court's holding in ***Bohling***. *See* ***Thorstad***, 2000 WI App 199 at ¶9.

¶6 Lastly, Dunn suggests in her reply brief that an officer has a constitutional duty to first request a breath sample because ***Bohling*** conditions the admission of warrantless blood sample evidence on the arrestee presenting no reasonable objection to the blood draw. We are unable to read ***Bohling*** to include such a duty and Dunn fails to cite to any such constitutional directive. Because

Thorstad controls the disposition of Dunn's appeal, we affirm the order denying the suppression motion and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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