COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2433-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRENT L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Brent Miller appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims the trial court erred in denying his motions to suppress evidence of the

[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.

results of a blood test that was administered following his arrest. Because the issues Miller raises in this appeal were decided in the State's favor in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied,* 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 913 (Wis. Oct. 17, 2000), we affirm the conviction.

BACKGROUND

¶2 A City of Jefferson Police Officer arrested Miller for OMVWI and transported him to a clinic to have a sample of his blood withdrawn. The sample was analyzed at the State Laboratory of Hygiene, which reported an alcohol concentration of .259%. Miller moved to suppress evidence of the blood test result because the blood sample was taken without a warrant, and because it constituted an unreasonable seizure due to the availability of an alternative means of obtaining the evidence, specifically, a breath test.[2]

¶3 The prosecution and defense counsel stipulated to admission of the officer's incident report, the "Informing the Accused" form, the State of Wisconsin blood analysis report, and to the fact that the officer could have administered a breath test at the time of the arrest. The officer also testified at the suppression hearing. The trial court denied the suppression motions after hearing arguments of counsel. The court concluded that the taking of a blood sample from Miller did not violate the Fourth Amendment because he had voluntarily

[2] Miller also moved to suppress evidence obtained as a result of an unlawful stop. However, he withdrew this motion from the trial court's consideration, and does not pursue the issue on appeal.

consented to the testing of his blood. Subsequently, Miller pled guilty to OMVWI. He now appeals, challenging the denial of his suppression motion.[3]

ANALYSIS

¶4 The question presented by this appeal is a purely legal one, specifically, whether a police officer violates the Fourth Amendment's prohibition against unreasonable searches and seizures when he or she obtains a blood sample from an OMVWI arrestee, even though the arresting officer could have obtained a breath test instead. We decide the issue de novo, owing no deference to the trial court's conclusion on the matter. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

¶5 Miller argues that implied consent is a legal fiction, that his consent to a blood test was coerced, and thus, he gave no valid consent to the drawing of his blood for purposes of the Fourth Amendment. He also asserts that "blood testing cannot be a police reflex." According to Miller, the holding in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), establishes that the operation of Wisconsin's implied consent law, which permits a police officer to designate whether a person arrested for OMVWI should be subjected to a blood test as opposed to a breath test, may result in unreasonable seizures under the Fourth Amendment. He points out that results of the testing of a driver's blood or breath for alcohol concentration have identical evidentiary impact. *See* WIS. STAT. § 885.235(1g). Thus, according to Miller, a police choice to draw blood instead of

[3] In a criminal case, a defendant may appeal the denial of a motion to suppress evidence following a plea of guilty. WIS. STAT. § 971.31(10).

obtaining a breath sample is unreasonable because the blood test is more "intrusive."[4]

¶6 As Miller concedes in correspondence to this court, we have recently considered, and rejected, precisely the arguments he makes in this appeal. ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied,* 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 913 (Wis. Oct. 17, 2000).[5] We concluded in ***Thorstad*** that, so long as the four requirements outlined by the supreme court in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), are met, there is no Fourth Amendment violation when the police obtain a blood sample from an OMVWI arrestee.[6] We specifically rejected the ***Nelson v. City of Irvine*** analysis, concluding that we are bound by the supreme court's holding in ***Bohling***. ***Thorstad***, 2000 WI App 199 at ¶9.

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[4] Miller summarizes his argument as follows: "Where, as here, there is a less-intrusive and equally effective and available means of gathering evidence of intoxication and prohibited alcohol concentration through at least equally available means, there can be no justification for requiring the suspect to submit to blood analysis."

[5] After this appeal was submitted for decision, Miller moved to defer its consideration and disposition pending the release of this court's opinion in ***State v. Thorstad***. He asserted in his motion that "[t]he legal issue presented in this appeal is identical to that presented by the State's appeal in ***Thorstad***." Further, Miller informed us that he "believes that a decision in the ***Thorstad*** appeal will be controlling precedent for that issue in this case and will, consequently, control the decision of that issue in this case."

[6] The ***Bohling*** requirements are as follows:

> (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.

State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993) (footnote omitted).

¶7 Miller asserts that ***Bohling*** is distinguishable because, there, the defendant created his own exigency by refusing to submit to a proffered breath test. He argues that when the supreme court alluded to "the foregoing circumstances" when it set out the four requirements for the taking of warrantless blood samples (see footnote 6), the court was referring to a breath test refusal. *See* ***Bohling***, 173 Wis. 2d at 533. We disagree. The cited language occurs in the third paragraph of the court's opinion. The only prior reference to the circumstances of the case occurs in the first paragraph:

> The issue in this case is whether the fact that the percentage of alcohol in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency under the Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution, to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication.

Id. These circumstances are also present in this case, just as they were in ***Thorstad***, and thus, we affirm the trial court's denial of Miller's motions to suppress.

¶8 Miller also asserts that blood test was "unreasonable" based on two United States Supreme Court decisions. First, he claims that "[b]alancing the interests of the driver in his bodily security and integrity against the interest of the State in securing the evidence, this search was 'unreasonable,'" citing ***Welsh v. Wisconsin***, 466 U.S. 740 (1984). However, ***Welsh*** involved a warrantless seizure of the defendant in his home, whereas this case involves a search of Miller after he was pulled over to the side of the road and arrested for driving while intoxicated on a public highway. As the Wisconsin Supreme Court has recognized, "in the

context of driving on public highways, public safety concerns reduce a driver's expectation of privacy." ***Bohling***, 173 Wis. 2d at 541. The court also noted its conclusion "strikes a favorable balance between an individual's right to be free from unreasonable searches and Wisconsin's interest in enforcing its drunk driving laws. Wisconsin's interest is vital whereas the resulting intrusion on individual privacy is minimal." ***Id.*** at 545. Miller has pointed to no facts to show why the balancing of interests should be different in his case. Accordingly, we are bound to follow the Wisconsin Supreme Court's conclusions in ***Bohling***.

¶9 Second, Miller contends that "exigency isn't determined by the nature of the offense being investigated," but rather by a case-by-case analysis of the totality of the circumstances, citing ***Richards v. Wisconsin***, 520 U.S. 385 (1997). We reject Miller's argument because the State has shown exigency in this case. As we stated in ***Thorstad***, "[t]he ***Bohling*** court specifically noted that … warrantless blood tests [are permitted] because the rapid dissipation of alcohol from the bloodstream constitutes exigent circumstances." ***Thorstad***, 2000 WI App at ¶6 (citing ***Bohling***, 173 Wis. 2d at 539-40). The United States Supreme Court rejected in ***Richards*** the "overgeneralization" that, when executing a search warrant in a felony drug investigation, a police officer never needs to knock due to concerns for safety and preservation of evidence. ***Richards***, 520 U.S. at 387-88, 393. By contrast, the present case involves an undisputed fact, recognized by the United States Supreme Court, that alcohol rapidly dissipates from the bloodstream. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966). Miller has pointed to no circumstances under which alcohol in the bloodstream does not behave in that fashion, and we are aware of none. For the reasons stated above, the testing of Miller's blood was reasonable. Accordingly, we affirm the trial court's denial of Miller's motion to suppress.

CONCLUSION

¶10 Because we conclude that the disposition of this appeal is controlled by our holding in ***State v. Thorstad***, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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