COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2681-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SHANE A. MAHLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J. The State appeals an order suppressing the test results from blood involuntarily drawn from Shane Mahler. Mahler was lawfully arrested for operating a motor vehicle while under the influence of intoxicants but refused to give a blood sample because he claimed he was afraid of needles and feared the possibility of contracting HIV. Instead, he offered to give a breath sample as an alternative test. Without considering the reasonableness of Mahler's

objection to the blood sample, the circuit court decided that Mahler's request for an alternative test was reasonable. The court relied on its finding that the alternative test was available and that administering the alternative initial test would not have been overly burdensome to the State's prosecution efforts. Based on those considerations, the circuit court concluded that the blood draw was unreasonable.

¶2 This court concludes, however, that a police officer is not required to consider a lawfully arrested suspect's request for an alternative test. Absent a reasonable objection, the officer has the authority to use a reasonable procedure in drawing blood. Because Mahler's objection for refusing a blood draw was not reasonable, the circuit court's order is reversed.

BACKGROUND

¶3 Eau Claire police officer James Southworth stopped Mahler on May 28, 1998, just after 2 a.m. Mahler does not contest that Southworth lawfully placed him under arrest for operating a motor vehicle while intoxicated and, accordingly, this court will not go into greater detail regarding the arrest.

¶4 Southworth transported Mahler directly to a nearby hospital. At the hospital, Southworth asked Mahler if he would consent to a blood test. Mahler refused, explaining that he disliked needles and was afraid of HIV.[1] Mahler offered to give a breath sample as a substitute test. Southworth nevertheless

[1] These facts are taken from Mahler's testimony at the suppression hearing. Although Southworth had no independent recollection regarding some of the specific details of Mahler's testimony, the trial court found Mahler's testimony accurate. The State does not challenge the court's finding of credibility.

ordered Mahler's blood drawn. Mahler did not physically resist, and a laboratory technician drew his blood shortly after 2:30 a.m.

¶5 At the suppression hearing, Southworth testified that the Eau Claire Police Department has a policy of obtaining blood tests from intoxicated drivers. He has personally witnessed approximately fifty blood draws for OWI-related offenses and has experienced no problems with the procedure. With regard to breath testing, however, Southworth explained that he has witnessed a variety of problems.[2] Southworth also stated that in his opinion blood samples can be obtained faster and easier than breath samples. He was unsure at the time whether the necessary equipment and a certified operator were available for a breath test.[3]

DISCUSSION

¶6 The State does not challenge any of the trial court's factual findings. 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).

¶7 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

[2] Southworth explained that of the 10 or 15 breath-testing procedures he has witnessed, suspects have had difficulties giving adequate breath samples. He also witnessed other problems associated with the mandatory 20-minute observation period before a sample may be obtained.

[3] The State stipulated at the hearing that an Intoxilyzer machine was operable and a certified operator was available that morning. Factoring in the distance from the hospital to the police department, the court reasoned that the officer could have obtained a breath test with only a 15- to 30-minute delay.

voluntarily submits to the testing.[4] ***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," ***id.*** at 772, the Court held that withdrawing blood from an arrestee who had refused a breath test was reasonable. *See* ***id.*** at 770-71. The Court expressly reserved the question, however, whether the government could take blood when other tests were available or requested. *See* ***id.*** at 771.

¶8 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). Mahler disputes only the last two conditions. He contends that (1) the manner in which the blood sample was taken "was not a reasonable

[4] Wisconsin courts have long recognized exceptions to the warrant requirement where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference. *See* ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). In ***Smith***, the court recognized four circumstances that, when measured against the time needed to obtain a warrant, constitute the exigent circumstances: "(1) An arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence would be destroyed, and (4) a likelihood that the suspect would flee." ***Id.*** at 229.

one" because alternative tests were available, and (2) he presented a "reasonable objection" based on his fear of HIV and needles.

1. Reasonableness of Blood Draw

¶9 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, Mahler 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.

¶10 However, ***Krause*** was decided before ***Bohling***. ***Bohling*** held that a warrantless blood draw is permissible "at the direction of a law enforcement officer." 173 Wis. 2d at 533. The court used this language despite Bohling's earlier refusal to take a breath test. Bohling's refusal of an alternate test played no role in the court's ultimate decision that an officer may draw blood without a search warrant. Further, 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.[5]

[5] Mahler 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, ***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]." ***Id.*** at 1201. As previously noted, 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 testing is not equally effective in the practical context of prosecuting intoxicated drivers.

2. Reasonable Objection

¶11 This court readily rejects Mahler's argument that his fear of needles and HIV is a reasonable objection. It is well established that reasonableness is an objective standard. *See* ***Ter Maat v. Barnett***, 156 Wis. 2d 737, 742, 457 N.W.2d 551 (Ct. App. 1990). As a practical matter, Mahler provides no objective basis for fearing that he could contract HIV while having his blood drawn. He does not dispute that his blood was drawn in a hospital under medically accepted standards. He has not identified any scientific evidence, and this court is aware of none, that he faced any statistically significant chance of contracting HIV as a patient under contemporary advances in drawing blood and laboratory hygiene.[6]

¶12 Mahler also 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 either of Mahler's unsubstantiated objections was reasonable, there would be no standard for reasonable objections.[7]

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[6] This court acknowledges that "preventing blood exposure is the primary means of preventing occupationally acquired [HIV] infection." Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Services, *Update: Provisional Public Health Service Recommendations for Chemoprophylaxis After Occupational Exposure to HIV*, 276 JAMA 90 (1996).

[7] Mahler does attack 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 Mahler'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 blood dissipating in alcohol 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.

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