COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1403-CR **Cir. Ct. No. 2016CT26**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COLLIN M. GALLAGHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lafayette County: DUANE M. JORGENSON, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Collin Gallagher appeals the circuit court's judgment convicting him of a third intoxicated driving offense. Gallagher argues

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2015-16 version.

that the circuit court should have suppressed blood test results evidencing Gallagher's intoxication. For the reasons below, I affirm.

¶2 Gallagher was arrested for an intoxicated driving offense, and the police obtained a warrant authorizing them to take a sample of Gallagher's blood. Gallagher does not dispute that the warrant was supported by probable cause to believe that he was committing an intoxicated driving offense. Gallagher nonetheless argues that the blood test results should have been suppressed.

¶3 As I understand Gallagher's supporting arguments, they depend on the premise that there are only two ways to interpret the warrant, and that either of these interpretations leads to suppression. The first way—which corresponds to Gallagher's main argument—is that the warrant authorizes the taking of Gallagher's blood but not subsequent testing of the blood. The second way—which corresponds to what appears to be an alternative argument—is that the warrant implicitly and improperly authorizes unlimited testing of Gallagher's blood.

¶4 I address each of these alternative arguments in separate sections below. I first note, however, that there appears to be a third reasonable interpretation of the warrant, namely, that it authorizes the testing of Gallagher's blood only for the purpose of obtaining evidence of an intoxicated driving offense. I need not decide whether this third interpretation is not only reasonable but perhaps the only logical interpretation. Instead, it is sufficient to explain why Gallagher fails to persuade me that either of his two interpretations leads to suppression.

A. Gallagher's First Interpretation of The Warrant —The Warrant Authorizes the Seizure of Gallagher's Blood, But Not Subsequent Testing

¶5 As noted, Gallagher's first interpretation of the warrant is that it authorized only the taking of his blood and not subsequent testing of the blood. Gallagher argues that, because the warrant did not authorize testing, police exceeded the scope of the warrant by testing his blood for evidence of an intoxicated driving offense.

¶6 In rejecting this argument, the circuit court relied on ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789 (2002). I agree with the circuit court that ***Riedel*** requires rejection of this argument. Under ***Riedel***, once police have lawfully obtained a blood sample in the course of investigating an intoxicated driving offense, they need no further justification to test the blood for evidence of that offense. The court explained in ***Riedel***:

> This court has concluded that ***Snyder*** and ***Petrone*** stand for the proposition that the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components." ***VanLaarhoven***, 2001 WI App 275 at ¶16. We find the reasoning of ***Snyder***, ***Petrone*** and ***VanLaarhoven*** persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis.

Id., ¶16 (footnote omitted); *see also* ***id.***, ¶17 (concluding that "analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search").

¶7 Gallagher argues that both ***Riedel*** and ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, a case on which ***Riedel*** relied, do

not apply when, as here, a blood sample is obtained pursuant to a warrant. In ***Riedel*** the blood sample was deemed lawfully obtained based on exigent circumstances, *see* ***Riedel***, 259 Wis. 2d 921, ¶17, and in ***VanLaarhoven*** the blood sample was obtained based on the Implied Consent Law, *see* ***VanLaarhoven***, 248 Wis. 2d 881, ¶¶2, 17. Gallagher argues that a warrant search must be strictly limited to the terms of the warrant. And, as noted, under Gallagher's interpretation of the warrant that I address in this section, the warrant does not authorize testing.

¶8 The problem for Gallagher is that ***Riedel*** does not support this warrant/non-warrant distinction. To the contrary, ***Riedel*** indicates that it does not matter whether blood was obtained by a warrant or other means, so long as the blood was lawfully obtained. This is evident from ***Riedel***'s framing of the issue, its reasoning, and its conclusion. Even though there was *no warrant* in ***Riedel***, the court framed the issue as whether a "second search warrant" was needed to test blood that was lawfully obtained. *See* ***Riedel***, 259 Wis. 2d 921, ¶9. Then, the court in ***Riedel*** spoke in terms of whether a blood sample was obtained in a "lawful" or "valid" manner, not whether it was lawfully obtained with or without a warrant. *See* ***id.***, ¶¶16-17. The ***Riedel*** court rejected the defendant's argument that subsequent testing was a "second search" within the meaning of the Fourth Amendment. *See* ***id.***, ¶¶4, 7, 16 & n.6.

¶9 Returning to the facts here, there is no dispute that the warrant authorized police to obtain a blood sample from Gallagher based on probable cause to believe that Gallagher was engaged in an intoxicated driving offense. And, it is apparent that the particular means of legally obtaining the defendant's blood in ***Riedel*** did not matter to the court's conclusion that neither a "second

search warrant" nor any other legal justification was necessary to test legally obtained blood for evidence of the intoxicated driving offense.

¶10 Gallagher may be arguing that the warrant context here matters because warrants are subject to the particularity requirement, and that the warrant in this case was not sufficiently particular because it was silent as to testing. If that is Gallagher's argument, I conclude that it conflicts with ***Riedel*** and, therefore, must be directed to our supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). To repeat, the only reasonable teaching of ***Riedel*** is that, once police have lawfully obtained a blood sample in the course of investigating an intoxicated driving offense, no further justification is necessary to test the blood for evidence of that offense.

¶11 Gallagher argues that ***Riedel*** conflicts with a subsequent United States Supreme Court decision, ***Riley v. California***, 134 S. Ct. 2473 (2014). I disagree that there is a conflict. In ***Riley***, the Court concluded that police must obtain a warrant to search the contents of a cell phone that is seized incident to arrest. *See* ***id.*** at 2480, 2484-85. ***Riley*** does not address the testing of blood. Nor is it apparent how ***Riley*** might be applied outside the context of a search incident to arrest.

¶12 It is true that, before ***Riley***, ***Riedel*** and case law on which ***Riedel*** relied might have been applied to allow what ***Riley*** prohibits: the warrantless search of a cell phone incident to arrest. But that does not mean that ***Riedel*** and ***Riley*** conflict. Similarly, Gallagher does not show a conflict between ***Riedel*** and other recent Supreme Court cases that Gallagher cites. Rather, Gallagher's

discussion of these cases, at best, amounts to an argument that ***Riedel*** should be modified or overruled in light of the principles behind those cases. This argument must be directed to our state supreme court. *See* ***Cook***, 208 Wis. 2d at 189-90.

B. Gallagher's Alternative Interpretation of the Warrant—The Warrant Implicitly Authorizes Unlimited Blood Testing

¶13 Gallagher's alternative interpretation of the warrant is that it implicitly and broadly authorizes unlimited testing of his blood. Under this interpretation, of course, the warrant *does* authorize the testing that occurred here, namely, the testing of Gallagher's blood for evidence of an intoxicated driving offense. Gallagher nonetheless argues that, under this interpretation, the blood test results must be suppressed. For the following reasons, I reject this argument.

¶14 Gallagher's supporting argument on this topic is not well developed but appears to pertain to the evil of general warrants and the particularity requirement. Gallagher quotes the following portion of ***Coolidge v. New Hampshire***, 403 U.S. 443 (1971):

> The second, distinct objective [of the warrant requirement] is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.

Id. at 467 (citations omitted).

¶15 Relying on this passage from ***Coolidge***, Gallagher goes on to argue as follows:

> If implicit authorization to analyze the blood sample can be read into the warrant, then additional authorizations could also be read in, eliminating any expectation of privacy that a citizen would possess in his or her blood. The very purpose of a warrant, the purpose of the Fourth Amendment, is to appropriately limit the authority of the government.
>
> If authority for blood analysis can be implied from the face of the warrant, then the warrant is an overbroad "general warrant," which is invalid under the Fourth Amendment. The historical purpose of the particularity requirement was to prohibit a "general warrant" authorizing the "general, exploratory rummaging through a person's papers and effects." The founders of this country did not trust law enforcement officers to receive a general warrant and then abide by some ephemeral "implicit" limitations. The warrant must be explicit; "nothing is left to the discretion of the officer executing the warrant."

(Footnotes omitted.)

¶16 Gallagher thus appears to take the view that a warrant that authorizes the testing of blood without specifying the particular type of testing is akin to a general warrant that authorizes the police to rummage through all of a person's papers and effects. I disagree that the warrant here is akin to a general warrant. At most, the warrant is overly broad by not expressly limiting the testing of Gallagher's blood to evidence of an intoxicated driving offense. But even if the warrant is viewed as overly broad in this way, Gallagher makes no assertion that the police in fact tested his blood for anything other than evidence of an intoxicated driving offense. Absent such an assertion, or further explanatory argument, Gallagher does not persuade me that suppression of the blood test results here is appropriate.

By the Court.—Judgment affirmed.

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