COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0684-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KYLE D. WILLENKAMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Kyle Willenkamp appeals his judgment of conviction and an order denying his motion to suppress the results of a blood test taken in connection with his arrest for operating a motor vehicle while under the

[1] This appeal 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 noted.

influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). Willenkamp advances two arguments: (1) the implied consent law is unconstitutional as applied; and (2) a deputy's modification of the implied consent warning improperly coerced Willenkamp to submit to the blood test by threatening revocation for lack of compliance. We reject Willenkamp's arguments and affirm.

BACKGROUND

¶2 Outagamie County Sheriff's Deputy Sarah Fauske stopped Willenkamp for suspected drunk driving. After failing field sobriety tests, Willenkamp was placed under arrest. The deputy read the required implied consent warning, with one modification. *See* WIS. STAT. § 343.305(4).[2] In

[2] WISCONSIN STAT. § 343.305(4) reads as follows:

> INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

(continued)

addition to stating that she wanted to test one or more samples of Willenkamp's breath, blood or urine, the deputy added the phrase "our policy is blood."

¶3 Willenkamp indicated that he would take the blood test. He did not indicate any reservations about having blood taken nor did he ask for an alternative form of testing. The deputy transported Willenkamp to St. Elizabeth Hospital where blood was drawn. The test revealed an alcohol concentration of .231 %.

¶4 Willenkamp was subsequently charged with operating a motor vehicle while under the influence of an intoxicant (second offense), contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration (second offense), contrary to WIS. STAT. § 346.63(1)(b). He sought suppression of the blood test results by filing a motion challenging the manner in which his consent to testing had been obtained. The trial court denied his motion. Willenkamp then entered a plea of no contest and was found guilty. This appeal followed.

DISCUSSION

¶5 When the material facts are undisputed, the reasonableness of a search is a question of constitutional law that we review independently. *See* ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

¶6 In ***Schmerber v. California***, 384 U.S. 757 (1966), the Supreme Court recognized that "[t]he integrity of an individual's person is a cherished value of our society." ***Id.*** at 772. However, 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 of whether the government could take blood when other tests were available or requested. *See* ***id.*** at 771.

¶7 Using the ***Schmerber*** analysis, ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), concluded that under certain circumstances the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw at the direction of a law enforcement officer. 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.

¶8 Willenkamp argues that the sheriff's department policy of having blood as the primary test constitutes an unreasonable search under the Fourth Amendment. He relies heavily on ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), to bolster his argument. In ***Nelson***, the Ninth Circuit held that "[w]hen an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the

… failure to perform the requested alternative test." ***Id.*** at 1205. Therefore, "blood tests [become] not only unnecessary and unreasonable, but violate[] the Fourth Amendment's warrant requirement." ***Id.*** However, ***Nelson*** was a class action where the ninth circuit limited the plaintiff class to those who had requested or consented to a breath or urine test instead of a blood test. *See* ***id.*** at 1203 n.3. Further, California's implied consent law actually gives the option to the defendant while Wisconsin gives officers the right to designate the primary test to be performed. *See* ***Nelson***, 143 F.3d at 1207-08. In any event, ***Nelson*** is not binding in Wisconsin. To the extent that ***Nelson*** is in conflict with the exigent circumstances analysis of ***Bohling*** and ***Schmerber***, it is not for this court to resolve that conflict. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶9 ***Bohling*** permits a warrantless blood draw when, among other things, "the arrestee presents no reasonable objection to the blood draw." ***Bohling***, 173 Wis. 2d at 534. We need not delineate what sorts of objections might be considered reasonable objections because Willenkamp did not present any objections, reasonable or otherwise. He did not refuse to take the test, nor does the record reveal that he gave any indication that he would prefer another test. Because the requirements of ***Bohling*** were satisfied, we conclude that Willenkamp's blood test was a reasonable search under the Fourth Amendment.

¶10 Willenkamp also contends that the deputy coerced him into submitting to the blood test by informing him that revocation would be a consequence for not going along with departmental policy, thus depriving him of an opportunity to assert a reasonable objection to blood as the primary test. Thus, the issue is whether the addition of "our policy is blood" by the deputy changed the tenor of the form or the rights of the defendant. According to Willenkamp, the

implied consent law allows the deputy to elect the primary test to be given; however, the policy articulated by the deputy exceeded the statutory authority. We disagree.

¶11 In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), a three-part standard was fashioned in addressing the warning process under the implied consent law:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver; (2) Is the lack or oversupply of information misleading; and (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

Id. at 280. In Wisconsin, law enforcement officials have the right to designate the primary test to be performed. *See* ***State v. Donner***, 192 Wis. 2d 305, 312, 531 N.W.2d 369 (Ct. App. 1995). Advising the defendant of which option the deputy has elected during the reading of the implied consent warning does not misstate the law. Even if the additional language had misstated the law, Willenkamp did not voice any reservation to taking the blood test or request an alternate test. When asked by the deputy if he consented to the taking of the blood test, Willenkamp affirmatively stated that he did consent.

¶12 We readily reject Willenkamp's argument that the additional language in the implied consent warning exceeded the statutory authority. There was no testimony that indicates Willenkamp was coerced into consenting to the blood test, thus giving up his right to assert a reasonable objection to the blood test. The deputy did not act illegally when she informed Willenkamp that the department's policy was blood. The form and the law clearly gave her the right to

designate the primary test to be performed. Therefore, the deputy did not exceed her duty by simply stating what she had authority to do.

By the Court.—Judgment and order affirmed.

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