COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3448-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MALCOLM M. MUMM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Malcolm M. Mumm appeals from the denial of his suppression motions and his conviction of operating a motor vehicle with a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

prohibited blood alcohol concentration (BAC), second offense, contrary to WIS. STAT. § 346.63(1)(b). He contends that the illegal seizure of his blood sample and the analysis of that sample required suppression of the BAC test results. We disagree and affirm the order and the conviction.

¶2 The facts are undisputed. Mumm was arrested by Fond du Lac County Deputy Sheriff Ray A. Olig for operating a vehicle while under the influence of intoxicants, contrary to WIS. STAT. § 346.63(1)(a), on March 5, 2000. Olig requested that Mumm provide a blood sample for evidentiary analysis under WIS. STAT. § 343.305, the Wisconsin Implied Consent law. Mumm was read the standard Informing the Accused form advising him of the required information contained in § 343.305(4) and (4m). Mumm concedes that "so informed, [he] submitted to the taking from him of a blood sample." The analysis of Mumm's blood sample indicated a blood alcohol content of 0.217% by weight.

¶3 In spite of his consent to the blood withdrawal, Mumm contends that both the withdrawal and the testing of the blood sample were illegal. As Mumm concedes in his brief, we have recently considered and rejected the exact argument he makes in this appeal as to the blood withdrawal. ***State v. Thorstad***, 238 Wis. 2d 666, 618 N.W.2d 240 (Ct. App. 2000), *review denied*, 239 Wis. 2d 310, 619 N.W.2d 93 (No. 99-1765-CR) (Wis. Oct. 17, 2000), *cert. denied*, ***Thorstad v. Wis.***, ___ U.S. ___, 121 S. Ct. 1099 (2001). ***Thorstad*** is dispositive of Mumm's blood withdrawal claim and we need not address that issue further.

¶4 In his second appellate contention, Mumm suggests that his blood sample, once obtained, cannot be analyzed for evidentiary purposes without obtaining a second search warrant. In ***Thorstad***, citing to ***Schmerber v. California***, 384 U.S. 757, 769-70 (1966), we acknowledged that the seizure of an

Implied Consent Law blood sample falls under the "exigent circumstances" exception to the warrant requirement. ***Thorstad***, 238 Wis. 2d at 670 ("[B]ecause the human body rapidly eliminates alcohol from the system, 'the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.'"). However, Mumm contends that the exigency is over once the blood sample is obtained and the authority of the police to act further, without a judicially issued warrant, is terminated. Whether a police agency needs a warrant to analyze legally obtained evidence presents a question of law that we review de novo. *See* ***id.*** at 669.

¶5 Mumm relies on two federal cases to provide the reasoning for his position that the blood sample is a seizure separate from the blood search and is entitled to its own protections before the test results are admissible as evidence. In ***State v. Jacobsen***, 466 U.S. 109 (1984), the agents seized a package to prevent loss or destruction of suspected contraband (cocaine observed in a box and turned over to authorities by private workers), and the United States Supreme Court stated:

> Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.

Id. at 114 (footnote omitted).

¶6 In his reply brief, Mumm cites to ***Walter v. United States***, 447 U.S. 649 (1980), as support for his position that legal authority does not imply legal authority to search. In ***Walter***, federal agents were called concerning mistakenly addressed and delivered sexually explicit eight-millimeter films. ***Id.*** at 651-52. A private employee of the addressee-in-error turned the films over to federal agents

who viewed the films without first obtaining a warrant. Walter was convicted of interstate transportation of obscene films, and his conviction was overturned when the United States Supreme Court suppressed the film evidence because the seizure of the films did not yield trial evidence without a viewing of the films, and a viewing of the films was "further investigation" that required a warrant. Mumm contends that the ***Jacobsen*** and ***Walter*** reasoning should apply here because the "[s]eizure of the blood samples does not yield the trial evidence." Neither case is persuasive.

¶7 Mumm's situation differs from ***Jacobsen*** and ***Walter*** in that Mumm consented to the seizure of the blood evidence. "A search of a person … may be made and things may be seized when the search is made: ... (2) With consent." WIS. STAT. § 968.10(2). Mumm also consented to the blood withdrawal after being advised that the blood sample would be tested for use as evidence under the Implied Consent Law. "A search of a person … may be made and things may be seized when the search is made: ... (6) As otherwise authorized by law." Sec. 968.10(6).

¶8 The Implied Consent Law states, in part, that "[u]pon arrest of a person for violation of s. 346.63(1) … a law enforcement officer may request the person to provide [a sample] of his or her … blood … for the purpose specified under sub. (2)." WIS. STAT. § 343.305(3)(a). Subsection (2) states, in part:

> Any person who … drives or operates a motor vehicle upon the public highways of this state … is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer under sub. (3)(a) ....

Sec. 343.305(2). We are satisfied that the testing of Mumm's blood sample was pursuant to a procedure otherwise authorized under the law. Mumm raises no challenges to the constitutionality of WIS. STAT. § 968.10(2) or (6).

¶9 Even had Mumm not consented to the taking of the blood sample after being advised that the blood would be analyzed for evidentiary purposes, a constitutional challenge to the evidentiary analysis would fail. In ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), our supreme court looked to ***Schmerber*** and held that a warrantless blood draw did not violate the reasonableness requirement of the Fourth Amendment under certain conditions. ***Bohling***, 173 Wis. 2d at 547-48. Those conditions are: (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.*** at 537. Mumm does not challenge the first three of the ***Bohling*** conditions and presented no objection to the blood draw after being advised that it would be tested for evidentiary purposes under the Implied Consent Law.

¶10 We are satisfied that Mumm's blood sample was seized as evidence with his consent and as otherwise authorized under the Implied Consent Law. Therefore, the sample analysis and its use as evidence were not unlawful or contrary to Mumm's constitutional rights.

By the Court.—Judgment and order affirmed.

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