COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0489-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS E. DAHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

¶1 DYKMAN, P.J. Thomas Dahl appeals from a judgment of conviction and from an order denying his motion to suppress evidence. Dahl contends that WIS. STAT. § 343.305, Wisconsin's Implied Consent Law, is unconstitutional under the Fourth Amendment to the United States Constitution, and that testing blood drawn in compliance with the Implied Consent Law is a separate search, requiring a warrant. We disagree and affirm.

¶2 On March 17, 2000, Dahl was arrested for operating a motor vehicle under the influence of an intoxicant. The arresting officer read the "Informing the Accused" form to Dahl in compliance with WIS. STAT. § 343.305(4). Dahl submitted to a blood draw, and the sample was sent to the Wisconsin State Hygiene Lab for testing.

¶3 Dahl first argues that his blood was drawn and tested without his consent. Although he acknowledges that express consent is not required under § 343.305, he contends that Wisconsin's Implied Consent Law is not a constitutionally valid consent under the Fourth Amendment because it is coerced. He explains his contention in headings titled "Coerced Consent is Not Valid," "The 'Implied Consent' Law," "The Fiction of 'Implied Consent,'" "Rational Relationship," and "Precedent."

¶4 The record does not show, however, that Dahl has notified the attorney general of his constitutional challenge to the statute. When a constitutional challenge to a statute is made, the attorney general must be "served with a copy of the proceeding and be entitled to be heard." WISCONSIN STAT. § 806.04(11); *see* ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979) (holding that § 806.04(11) applies to all constitutional challenges of laws and not just declaratory judgments). "Under the ***Kurtz*** rule a party will be foreclosed from challenging the validity of a statute unless the attorney general is given an opportunity to appear before the court and defend the law as constitutionally proper." ***In Matter of Estate of Fessler***, 100 Wis. 2d 437, 443, 302 N.W.2d 414 (1981). The record does not show that Dahl notified the attorney general of his constitutional challenge. We therefore decline to address this issue.

¶5 Dahl also contends that testing a blood sample is a search separate from the drawing of the blood sample, and requires a warrant. Whether a search is reasonable is a question of constitutional law that we review de novo. *See* ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶6 Dahl relies on three United States Supreme Court cases to support his argument that the testing of blood is a separate search necessitating a warrant. Those cases do not support his contention. In ***Walter v. United States***, 447 U.S. 649 (1980), a third party received illegal pornographic tapes from the defendant, and turned them over to the FBI. ***Id.*** at 651-52. FBI agents then viewed the tapes without a warrant. ***Id.*** at 652. The court held that this warrantless search in the absence of exigent circumstances and without prior consent was illegal. ***Id.*** at 651. Dahl's situation differs from ***Walter*** in that Dahl consented to the search and seizure of his blood. Although Dahl asserts that his consent was coerced, this assertion relies on Dahl's claim that WIS. STAT. § 343.305 is unconstitutional. We have addressed that assertion earlier in this opinion. Dahl consented to the search after being told that his blood would be tested for alcohol content. *See* WIS. STAT. §§ 343.305(2) and (3). And WIS. STAT. § 968.10(2) provides that searches and seizures are permitted when made with consent. In ***Walter***, the defendant consented to nothing. It is not surprising, therefore, that the Supreme Court required a warrant before the federal agents could view the films given to them by a person not employed by the government.

¶7 In ***Skinner v. Railway Labor Executive's Assoc.***, 489 U.S. 602, 633 (1989), the court concluded that certain federal regulations requiring that railroad employees involved in railroad accidents provide blood and urine samples did not violate the Fourth Amendment to the United States Constitution. Dahl does not tell us what portion of this opinion he relies upon for his assertion that blood draw

and subsequent testing are two events, each requiring a separate warrant. We doubt that ***Skinner*** so holds. But assuming that ***Skinner*** can be read for such an assertion, there is nothing in ***Skinner*** holding that consent is not an exception to the Fourth Amendment warrant requirement. And as we explained in our discussion of ***Walter***, Dahl has consented to both the extraction of his blood and its subsequent testing.

¶8 Dahl also relies upon ***United States v. Jacobsen***, 466 U.S. 109 (1984), for the proposition that police may not *search* without a warrant merely because they were entitled to *seize* without a warrant. In ***Jacobsen***, the court stated that even when a package is lawfully seized to prevent destruction or loss of suspected contraband, the Fourth Amendment requires government agents to obtain a warrant before examining the contents. ***Id.*** at 114. However, like ***Skinner***, ***Jacobsen*** does not hold that consent is not an exception to the Fourth Amendment warrant requirement. Dahl consented to the extraction and testing of his blood.

¶9 We conclude that ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), is more on point. There, the court confronted the issue whether the development of film seized lawfully is a separate search from the seizure, thus requiring another warrant. ***Id.*** at 544-45. The court held that development did not constitute a separate search and compared it to the legality of testing blood that has already been drawn. ***Id.*** at 545 (citing ***State v. Warren***, 309 N.C. 224, 306 S.E.2d 446, 449 (1983)). Similarly, the analysis of blood lawfully seized by the State does not constitute a separate search.

¶10 Dahl also argues that the State cannot be trusted to perform testing of blood without a warrant, because it will abuse this power and publicize personal

information that could be learned from testing. We are not persuaded. Blood drawn as evidence under the Implied Consent Law is restricted in its use by the State under 42 U.S.C. § 290dd-2(c), and cannot be used for determining a defendant's DNA code and entering it into the State's sexual offender database, or for testing for communicable diseases.[1] Moreover, the supreme court has previously stated that Wisconsin's interest in enforcing its drunk driving laws is vital, whereas the resulting intrusion on individual privacy from a blood draw is minimal. ***State v. Bohling***, 173 Wis. 2d 529, 545, 494 N.W.2d 399 (1993).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[1] 42 U.S.C. § 290dd-2(c) provides:

> Except as authorized by a court order granted under subsection (b)(2)(C), no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.