COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0546-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS J. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: T.J. GRITTON, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Douglas J. Miller appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (OWPAC) pursuant to WIS. STAT. § 346.63(1)(b). Miller challenges the denial of

[1] This appeal is decided by one judge pursuant to WIS. STATS. § 752.31(2)(f) and (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

his motion to suppress the results of a chemical test of his blood. Specifically, Miller contends that the police were required to obtain a search warrant before submitting his blood sample for testing. We reject Miller's argument. We affirm the judgment of conviction.

¶2 The facts are not in dispute. Miller was arrested for operating a motor vehicle while intoxicated. He was advised under the Implied Consent Law and refused to submit to a blood test. Nonetheless, the police seized a blood sample from Miller. Some days later, the sample was submitted to the Wisconsin State Hygiene Laboratory for analysis. The results established a prohibited alcohol concentration.

¶3 Miller was charged with OWPAC. He responded with a motion to suppress. However, this motion did not challenge the warrantless seizure of his blood by the police following his arrest. Rather, he challenged the later analysis of his blood sample by the state laboratory. Miller claimed that a search warrant was required to allow the State to analyze the blood sample. The trial court rejected Miller's motion to suppress. Miller then pled no contest and he appeals from the judgment of conviction.

¶4 Miller likens this case to ***Walter v. United States***, 447 U.S. 649 (1980), where the United States Supreme Court held that a warrant was required before the police could screen suspected pornographic films that had been turned over to them by a private party. The Court said, "The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents." ***Id***. at 654. The Court further said:

> When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization….

> If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy…. [T]he Government may not exceed the scope of the private search unless it has the right to make an independent search.

Id. at 656-57.

¶5 The Supreme Court further addressed ***Walter*** in ***United States v. Jacobsen***, 466 U.S. 109 (1984).[2] In ***Jacobsen***, as in ***Walter***, the police acquired possession of the evidence (cocaine) via a private party. The Court said:

> The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search. That standard was adopted by a majority of the Court in [***Walter***]….
>
> [T]he legality of the governmental search must be tested by the scope of the antecedent private search.

Jacobsen, 466 U.S. at 115-16. The ***Jacobsen*** Court concluded that the warrantless field testing of the suspected cocaine did not exceed the scope of the private search. ***Id***. at 122-26. The Court stated:

> The field test at issue could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine…. We must first determine whether this can be considered a "search" subject to the Fourth Amendment—did it infringe an expectation of privacy that society is prepared to consider reasonable?
>
> ….
>
> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy….
>
> ….

[2] In his reply brief, Miller says that he addressed ***United States v. Jacobsen***, 466 U.S. 109 (1984), in his brief-in-chief and he complains that the State did not respond to that case. But Miller's brief-in-chief does not cite to ***Jacobsen***.

> Here … the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search under the Fourth Amendment.

Id. at 122-24.

¶6 Here, the police did not come into the possession of Miller's blood sample via a private party. So we question on a threshold basis whether ***Walter*** and ***Jacobsen*** apply. But even if they do, it is clear that the warrantless testing of Miller's blood sample was directly related to the purpose of the antecedent seizure of the sample. The purpose of the initial seizure was to preserve the blood sample for future testing and that is precisely what the State did with the sample. The linkage between the two events is akin to that in ***Jacobsen*** where the police took possession of the suspected cocaine for purposes of testing.

¶7 Moreover, we see this case as on all fours with ***United States v. Snyder***, 852 F.2d 471 (9th Cir. 1988). There, the defendant was arrested for operating while intoxicated and a blood sample was taken without the defendant's consent. Two days later, the sample was submitted for analysis without a warrant. The defendant brought a motion to suppress, claiming that the warrantless analysis of the blood sample was an unreasonable search. The trial court denied the motion. ***Id***. at 472-73.

¶8 Relying largely on ***Schmerber v. California***, 384 U.S. 757 (1966), the ***Snyder*** court upheld the trial court's ruling. The court said:

> The flaw in Snyder's argument is his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for fourth amendment purposes…. It seems clear, however, that ***Schmerber*** viewed the seizure and separate search of the blood as a single event for fourth amendment purposes….

> The [***Schmerber***] Court therefore necessarily viewed the right to seize the blood as encompassing the right to conduct a blood-alcohol test at some later time.

Snyder, 852 F.2d at 473-74. We find ***Snyder*** persuasive and we adopt its reasoning and holding.

¶9 We uphold the trial court's ruling denying Miller's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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