COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1319 **Cir. Ct. No. 99-TR-9640**

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

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

V.

GARY O. KLOOSTRA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Gary Kloostra appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI)

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

in violation of a Columbia County ordinance. He claims the trial court erred in denying his motion to suppress evidence of the results of a test of his blood for alcohol concentration. Specifically, Kloostra argues that the County should have obtained a warrant prior to analyzing the blood sample it withdrew from him, and that because his consent to the testing of his blood was "coerced," it cannot be relied on as an exception to the Fourth Amendment's warrant requirement. We reject Kloostra's contentions and affirm the appealed judgment.

BACKGROUND

¶2 The underlying facts are not in dispute. A Columbia County sheriff's deputy arrested Kloostra for OMVWI and transported him to a hospital to obtain a sample of his blood. The deputy read Kloostra the "Informing the Accused" information, *see* WIS. STAT. § 343.305(4), and Kloostra agreed to submit to the testing of his blood.

¶3 Kloostra moved the circuit court, among other things, to suppress the evidence of the blood test results on the grounds that his consent to the test was coerced, and that the County needed to obtain a search warrant prior to analyzing the blood sample taken from him. The court denied Kloostra's motions and found him guilty of OMVWI on stipulated evidence, which included the blood test result of .169g/100mL. Kloostra appeals the subsequently entered judgment of conviction.

ANALYSIS

¶4 After filing his notice of appeal, but prior to any briefing, Kloostra moved this court to defer briefing of the appeal because of the pendency of our consideration of the appeal in ***State v. VanLaarhoven***, 2001 WI App 275, 248

Wis. 2d 881, 637 N.W.2d 411. In that motion, Kloostra asserted that "the issues presented in this appeal are identical to those raised in ***VanLaarhoven***," and that he believed "that a decision in the ***VanLaarhoven*** appeal will be controlling precedent for this case and will, consequently, control the decision of this case."

¶5 We concluded in ***VanLaarhoven*** that the State was not obligated to obtain a search warrant in order to analyze a lawfully seized blood sample for alcohol concentration. ***Id***. at ¶¶16-17. Despite Kloostra's assertions and concessions when he sought to defer briefing of this appeal, he contends in his reply brief that although ***VanLaarhoven*** "might seem controlling," our opinion in that case "controls neither of the issues before this court" in the present appeal. Kloostra now argues that because we noted in ***VanLaarhoven*** that the defendant had "consented to a taking of a sample of his blood and the chemical analysis of that sample," ***id***. at ¶8, Kloostra's challenge to the validity of his consent undermines the applicability of the ***VanLaarhoven*** holding to this case. Because we did not initially grant Kloostra's motion to defer briefing of this appeal, we cannot conclude that he is judicially estopped from now changing his position. ***State v. Petty***, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996).

¶6 Nonetheless, we conclude that ***VanLaarhoven*** definitively establishes that the taking of a blood sample and its subsequent analysis for alcohol content cannot be uncoupled for Fourth Amendment purposes. That is, Kloostra cannot now argue that even though a blood sample was lawfully obtained without a search warrant, the arresting agency should first have obtained a warrant before analyzing the sample. Our conclusion on this point was explicit:

> [T]he 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. [The cited

> precedents] refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement.
>
> …VanLaarhoven is wrong in his argument that the chemical analysis of his blood sample is a separate event for warrant requirement purposes.

Id. at ¶¶16-17.

¶7 An officer who has arrested a person for OMVWI may obtain a sample of that person's blood without a warrant, based on the existence of probable cause and exigent circumstances,[2] and without the person's consent.[3] ***VanLaarhoven*** establishes that so long as a blood sample was "lawfully taken," law enforcement may have it analyzed without obtaining a search warrant. ***VanLaarhoven***, 2001 WI App 275 at ¶17. The only question which remains, then, is whether a different result than in ***VanLaarhoven*** is required here because Kloostra claims that his consent to the taking of a blood sample and its subsequent testing was coerced, and thus invalid for Fourth Amendment purposes.

¶8 Kloostra does not allege that the arresting deputy made any specific threats or applied coercion beyond that which Kloostra claims arises under WIS. STAT. § 343.305, Wisconsin's "Implied Consent" law. Under the statute, drivers in Wisconsin are deemed to have consented to the testing of their blood, breath or urine for alcohol concentration, and if a driver refuses to submit to a lawful request for such testing, his or her driving privileges may be revoked. *See*

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[2] *See* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993); ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 616, 618 N.W.2d 240.

[3] *See* ***State v. Marshall***, No. 01-1403-CR (Wis. Ct. App. Feb. 5, 2002, recommended for publication).

§§ 343.305 (2) and (10). Kloostra argues that the threatened sanction of a loss of driving privileges constitutes a coercive measure that invalidates any actual, valid consent for Fourth Amendment purposes. He notes that the legislature may not by statute circumvent Fourth Amendment protections, which he asserts it has done in enacting § 343.305. Finally, he argues that we must measure the constitutionality of this government action by applying a stricter standard than the "rational relationship" test.

¶9 In short, without expressly saying so, Kloostra is attempting to have us declare portions of § 343.305 unconstitutional. The only way Kloostra can avoid our holding in ***VanLaarhoven*** is if we agree with him that the implied consent provisions of § 343.305 are impermissibly coercive, and thus in violation of the Fourth Amendment. We have searched the record and our own correspondence file to determine whether Kloostra has notified the Attorney General of his claim that the coercion implicit in § 343.305 violates the Fourth Amendment. We find no indication that he has done so. Accordingly, because the State has not been given the opportunity to defend the validity of the statute in question, and because we are therefore deprived of "the opportunity to analyze questions of constitutional dimension from a perspective that is not limited to the narrow interests and views of the private parties to the action," we decline to take up Kloostra's constitutional challenge to the implied consent law. *See* ***Estate of Fessler v. William B. Tanner Co., Inc.***, 100 Wis. 2d 437, 441-44, 302 N.W.2d 414 (1981).

CONCLUSION

¶10 For the reasons discussed above we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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