COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1516

Cir. Ct. Nos. 00-TR-3597
00-TR-3932

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

JEFFERSON COUNTY,

PLAINTIFF-RESPONDENT,

V.

JESSE A. MARCELLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Jesse A. Marcelle appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while under the

[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.

influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. Marcelle contends the court erred in denying his motions to suppress evidence of his blood alcohol content. For the following reasons, we affirm.

¶2 On June 16, 2000, Marcelle was arrested for operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a) and for operating a motor vehicle with a prohibited alcohol concentration in violation of § 346.63(1)(b). Marcelle was read an Informing the Accused form in compliance with WIS. STAT. § 343.305(4). Among other things, the form explained that if Marcelle refused to submit to chemical testing of his blood, his operating privilege would be revoked. *See* § 343.305(4). Marcelle submitted to a blood draw.

¶3 Marcelle filed two motions to suppress evidence of his blood alcohol content. The first motion was based on a warrantless blood draw, while the second motion was based on a warrantless blood analysis. The circuit court orally denied those motions, and a stipulated trial ensued. The court found Marcelle guilty of both charges, but sentenced him with respect to only the charge for operating a motor vehicle while under the influence of an intoxicant, pursuant to WIS. STAT. § 346.63(1)(a). The other charge was dismissed on the court's own motion without prejudice. Marcelle appealed.

¶4 On appeal, Marcelle acknowledges that this court's decision in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, controls with respect to his first motion challenging the warrantless blood draw. In ***Thorstad***, we stated that a warrantless blood test falls under the "exigent circumstances"

exception to the Fourth Amendment's warrant requirement because of the rapid dissipation of alcohol in the bloodstream. ***Id.*** at ¶6.[2]

¶5 Nevertheless, Marcelle argues that the circuit court erred in dismissing his motion to suppress evidence based on a warrantless blood analysis. More specifically, Marcelle argues that the analysis of his blood was a separate constitutional event from the draw of his blood, which cannot be justified on the basis of the "exigent circumstances" exception to the warrant requirement. This is because once the blood was removed from his body, there was no longer a threat of the alcohol's dissipation.

¶6 After the State filed its responsive brief, but before Marcelle filed his reply brief, we issued a decision on this precise issue in ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411. In ***VanLaarhoven***, the defendant similarly challenged the analysis of his blood on the basis that no exigency existed justifying a warrantless analysis. ***Id.*** at ¶3. We concluded that, pursuant to WIS. STAT. § 343.305, all individuals who apply for a driver's license give consent not only to providing a sample, but also consent to the chemical analysis of that sample. ***Id.*** at ¶7. We also stated that in addition to impliedly consenting, the defendant in ***VanLaarhoven*** twice voluntarily submitted to the testing. ***Id.*** at ¶8.

¶7 Finally, relying on ***United States v. Snyder***, 852 F.2d 471 (9th Cir. 1988), and ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), we concluded that the seizure and separate analysis of the blood are a single event for

[2] Marcelle does not suggest that his blood draw does not meet the four requirements set forth in ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

Fourth Amendment purposes. ***VanLaarhoven***, 2001 WI App 275 at ¶¶12-17. Thus, the "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." ***Id.*** at ¶16.

¶8 Our analysis in this case is controlled by ***VanLaarhoven***. Pursuant to WIS. STAT. § 343.305, Marcelle is deemed to have impliedly consented to the draw and analysis of his blood. Additionally, Marcelle was read the Informing the Accused form and chose not to revoke that consent, but to voluntarily submit to the testing procedure encompassing both the draw and the analysis. Thus, no warrant was required to analyze Marcelle's blood because he consented to that analysis. *See* ***State v. Callaway***, 106 Wis. 2d 503, 510, 317 N.W.2d 428 (1982) (included in the exceptions to the warrant requirement is consent to search).

¶9 Marcelle contends in his reply brief that ***VanLaarhoven*** is not controlling because in that case the defendant apparently did not challenge the constitutionality of Wisconsin's Implied Consent Law, as Marcelle has done both in the circuit court and before this court. Marcelle suggests that his consent was coerced under WIS. STAT. § 343.305 and, therefore, he did not actually consent to a draw and analysis of his blood. We decline to consider Marcelle's argument challenging the constitutionality of § 343.305 because we find no evidence, either from Marcelle's brief or from the record, to indicate that Marcelle ever notified the attorney general of his constitutional challenge.

¶10 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." WIS. 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 to laws, and not just to declaratory judgments). Under ***Kurtz***, a party is "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." ***State v. Mark A.***, 177 Wis. 2d 551, 561 n.8, 503 N.W.2d 275 (Ct. App. 1993).

¶11 Even if we were to consider and accept Marcelle's constitutional challenge, we would not reverse the circuit court's decision to dismiss his motions to suppress evidence. ***VanLaarhoven*** indicates that law enforcement officers may constitutionally examine evidence that is lawfully seized either with a warrant or under one of the exceptions to the warrant requirement. ***VanLaarhoven***, 2001 WI App 275 at ¶13 n.4. Thus, even assuming that Marcelle's consent could not be considered as an exception to the warrant requirement, a decision that we do not make, we would still find that his warrantless blood draw was constitutionally valid under the "exigent circumstances" exception to the warrant requirement. Accordingly, no warrant was required for the analysis of the constitutionally seized blood.

By the Court.—Judgment affirmed.

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