COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2395-CR **Cir. Ct. No. 00-CT-202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOYD W. PIGMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Boyd Pigman appeals from a judgment convicting him after a bench trial for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, in violation of WIS. STAT. § 346.63(1)(a). He contends that the Informing the Accused form read to him after he was arrested

[1] This opinion is decided by one judge pursunt to WIS. STAT. § 752.31(2). All statutory references are to the 1999-2000 version.

for OWI was misleading because it failed to tell him that he has no right to refuse an evidentiary test for his blood alcohol content and therefore violates the Due Process Clause of the Wisconsin Constitution. The conviction is affirmed.

¶2 The underlying facts are undisputed. After a police officer stopped Pigman for speeding, the officer noted an odor of intoxicants coming from Pigman, who admitted that he had consumed a few drinks. When Pigman failed a series of field sobriety tests, the officer placed him under arrest for OWI and transported him to the Barron County jail, where he was read the Informing the Accused form. After Pigman refused to take a breath test, the police took him to a hospital, where a blood sample was drawn without his consent. The blood test revealed an alcohol concentration of .152%.[2]

¶3 Pigman filed a motion to suppress the blood test results, arguing that if the police can ignore a refusal under the statutory scheme, then in fact there is no right of refusal. He reasoned then, as he does now, that if there is no right of refusal, then the warnings required under WIS. STAT. § 343.305(4) are inaccurate and violate due process. The trial court denied the motion.

¶4 Pigman does not dispute that the officer had probable cause to arrest him and that the officer complied with the informational provisions of WIS. STAT. § 343.305(4). Pigman also does not claim that his alleged refusal to submit to the test was due to a physical inability unrelated to his use of alcohol. Because the relevant facts are undisputed, and Pigman does not claim that the trial court's

[2] The officer also charged Pigman with operating a motor vehicle with a prohibited alcohol concentration (BAC), second offense, in violation of WIS. STAT. § 346.65(2)(b). However the refusal charge was merged with the OWI charge and is not a part of the judgment of conviction.

factual findings were clearly erroneous, this appeal presents a question of law that this court reviews de novo. *See* ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

¶5 WISCONSIN STAT. § 343.305(2), a portion of Wisconsin's implied consent law, provides, in part:

> Any person who ... 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.

The warnings provided under the implied consent law, § 343.305(4), include the following:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

¶6 Further, WIS. STAT. § 343.305(9)(a) provides in relevant part:

> If a person refuses to take a test under sub. (3)(a) [authorizing a law enforcement officer to "request the person to provide one or more samples of his or her breath, blood or urine"], the law enforcement officer shall immediately take possession of the person's license and prepare a notice to revoke ... the person's operating privilege.

¶7 Thus, the legislature has specified that if a person refuses to take a test, his or her license will be revoked and the officer, upon the refusal, shall immediately take action to bring about the revocation. Relying on these statutes,

Pigman reasons that the Informing the Accused form misled him to believe that he had a right to refuse the test when in fact he had no such right because the officer could require him to submit to a blood test without his consent. Hence, he reasons that he was denied due process and that the blood test results must be suppressed. We are not persuaded.

¶8 We must keep in mind that we are reviewing a conviction for OWI, not for a refusal to take the requested breath test or the imposition of statutory consequences for unreasonably refusing to take the requested test. Here, the blood test was taken at the hospital without Pigman's consent, and its results were admitted into evidence as part of the trial on the OWI charge. Therefore, the real issue is whether the involuntary blood test was taken as part of an unlawful search or seizure.

¶9 In ***Schmerber v. California***, 384 U.S. 757, 767, 772 (1966), the Supreme Court held that a state-compelled blood test following a person's arrest for operating while intoxicated does not violate the Fourth, Fifth or Fourteenth Amendments to the United States Constitution. Thus, an arrestee's understanding or comprehension of the information required to be provided under WIS. STAT. § 343.305(4) is not needed to legitimize a knowing and informed waiver of constitutional rights, as is the case with ***Miranda***[3] warnings. From this premise, the court in ***Zielke*** concluded that evidence obtained without compliance with implied consent law procedures did not have to be suppressed. ***State v. Zielke***, 137 Wis. 2d 39, 51-52, 403 N.W.2d 427 (1987). As stated in ***Zielke***:

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> However, even though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats., prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle. … [W]e *hold that if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution.* Chemical test evidence may be otherwise legally obtained if it is seized pursuant to a valid search warrant, ***Schmerber***, 384 U.S. at 770, incident to a lawful arrest, ***Scales***, 64 Wis. 2d at 493, under exigent circumstances supported by probable cause to arrest, ***Schmerber***, 384 U.S. at 769-71, or with the consent of the driver, *cf.* ***State v. Fillyaw***, 104 Wis. 2d 700, 716-18, 312 N.W.2d 795 (1981) (a warrant is not required for a blood sample if the defendant voluntarily consents to the seizure); *accord* ***City of Bismarck v. Hoffner***, 379 N.W.2d 797, 799 (N.D. 1985) (procedural requirements of implied consent statute do not apply where actual consent is given or sought.).

Id. at 51-53 (emphasis added).

¶10 Moreover, blood may be drawn involuntarily, and without a warrant, from a person lawfully arrested for a drunk-driving related offense. ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993). We agree with the State that any defects in the Informing the Accused form, if there are any, are irrelevant to the admissibility of the independently obtained blood test. In fact, the legislature has specifically provided that the implied consent law does not prevent law enforcement from using other lawful means to obtain evidence. *See* WIS. STAT. § 343.305(3)(c).[4]

[4] WISCONSIN STAT. § 343.305 "Tests for intoxication" provides in part: "**(2)** … (c) This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means."

¶11 Consequently, any challenge to the blood test taken independently of the implied consent law would have to be made under the Fourth Amendment as an unreasonable search or seizure.[5] However, Pigman does not challenge the lawfulness of the blood draw. Thus, we agree with the trial court's denial of Pigman's motion to suppress the blood test results. Consequently, the conviction is affirmed.

By the Court.—Judgment affirmed.

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

[5] The ***Bohling*** court, relying on ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966), held that when there are exigent circumstances,

> a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (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.

State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993) (footnote omitted). Pigman does not contend that the four ***Bohling*** criteria were not satisfied under the facts of this case.