

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 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. 02-0062-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CT-14

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE M. HENRICKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Lee Henrickson appeals a judgment convicting him of driving while under the influence of an intoxicant, second offense, in violation of WIS. STAT. § 346.63(1)(a). He contends the circuit court

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

erroneously interpreted and applied the Fourth Amendment prohibition against unreasonable searches and seizures and, as a result, erred in denying his pretrial motion to suppress the results of the test of his blood for alcohol concentration. The application of the Fourth Amendment to undisputed facts presents a question of law, which we review de novo. *State v. VanLaarhoven*, 2001 WI App 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411. We conclude the trial court did not err and we affirm.

¶2 Henrickson first contends the draw of his blood was unconstitutionally unreasonable under the Fourth Amendment because the State could have made a breath test available instead. Henrickson acknowledges that this issue has been decided adversely against him in *State v Thorstad*, 2000 WI App 199, ¶9, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 2000 WI 121, 239 Wis. 2d 310, 619 N.W.2d 93 (Wis. Oct. 17, 2000) (No. 99-1765-CR), but wishes to preserve it for judicial review, believing the supreme court may overrule *Thorstad* when deciding a case now pending before it, *State v. Krajewski*, No 99-3165-CR, unpublished order (Wis. Ct. App. Dec. 5, 2000), *review granted*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001). We are bound by *Thorstad* and therefore conclude the draw of Henrickson's blood did not violate the Fourth Amendment on this ground.

¶3 Henrickson's second contention is that the testing of his blood for alcohol is a search under the Fourth Amendment and is a distinct event, for Fourth Amendment purposes, from the drawing of his blood; as a separate search, he continues, it violates the Fourth Amendment because it is a warrantless search that is not justified by exigent circumstances and is without consent. We rejected the premise of this argument in *VanLaarhoven*, 2001 WI App 275 at ¶16-17, holding that analysis of legally seized blood is not a separate search for Fourth

Amendment purposes. Henrickson acknowledges *VanLaarhoven*, but asserts it does not resolve the issue he is raising here. According to Henrickson, *VanLaarhoven* relied on the implied consent statute, WIS. STAT. § 343.305, as justification for the warrantless testing, and he is challenging that implied consent as constitutionally infirm because it is coercive.

¶4 We conclude that this second issue is resolved by reading *Thorstad* and *VanLaarhoven* together. *Thorstad* holds that the seizure of blood in circumstances such as existed in this case is permitted under the exigent circumstances exception to the warrant requirement of the Fourth Amendment. *Thorstad*, 2000 WI App 199 at ¶¶6, 10. Since *VanLaarhoven* holds that the analysis of legally seized blood is not a separate search for Fourth Amendment purposes, and since Henrickson’s blood was legally seized, then analysis of Henrickson’s blood is lawful under the Fourth Amendment whether he consented or not.

By the Court.—Judgment affirmed.

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

