COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0272-CR **Cir. Ct. No. 99-CT-33**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAWN L. GRAWEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Dawn Grawey appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, in violation of WIS. STAT. § 346.63(1), and the circuit court's order denying her

[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.

motion to reconsider its decision not to suppress evidence of her refusal to submit to a blood draw. The issue on appeal is whether Grawey's refusal of a blood draw was reasonable under ***State v. Bohling***, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993). We hold her refusal was not reasonable. Accordingly, we affirm.

BACKGROUND

¶2 Grawey moved to suppress evidence of her refusal to submit to a blood draw, asserting that her refusal was justified because a warrantless seizure of her blood would be an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. Grawey testified as follows at the hearing on her motion to suppress. On March 6, 1999, she was arrested by Avoca Police Officer Travis Wiegel for operation of a motor vehicle while under the influence of an intoxicant. After Grawey arrived at the Iowa County Sheriff's Department, she was asked to submit to a blood draw, which she refused. Officer Wiegel questioned Grawey, and there was another officer present as well. Grawey testified that she refused to submit to the blood draw because the last time she submitted to a draw in conjunction with a July 1998 OWI arrest, the needle was "erroneously removed" from her arm, leaving her bleeding, her arm "gaping open," and a scar on the arm. When asked what was going through her mind when she made the decision to refuse the blood draw, Grawey replied, "Fear, fear of this happening again, fear of needles now." On cross-examination Grawey stated she did not recall whether she told the officer that she had suffered the previous experience with a blood draw. On redirect, however, Grawey testified that she remembered having mentioned the previous experience, but said she did not remember whether she told Officer Wiegel or the other officer present.

¶3 The court denied the motion, concluding that Grawey's refusal to submit to the test was admissible as consciousness of guilt. Following a trial on stipulated facts to the court, Grawey was convicted of OWI. Grawey filed a postconviction motion challenging the court's ruling admitting evidence of her refusal. She contended the court did not have an adequate opportunity to rule on whether Grawey's refusal was reasonable. The court denied the motion stating that it had decided the refusal was not reasonable.

DISCUSSION

¶4 On appeal Grawey renews her argument that the Fourth Amendment applies to her refusal to submit to a blood test even though her blood was never actually seized. According to Grawey, a driver's refusal to submit to a blood test cannot be used in court where, if blood had actually been drawn in spite of that refusal, the test results would have been inadmissible because the draw was an unconstitutional seizure. We will assume without deciding that this premise is correct.

¶5 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right "against unreasonable searches and seizures."[2] Warrantless searches are generally unreasonable. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966). In ***Schmerber***, the U.S. Supreme Court held that the warrantless taking of blood over the defendant's objection did not violate the defendant's Fourth Amendment

[2] We interpret article I, section 11 of the Wisconsin Constitution in a manner that conforms to the interpretation of the Fourth Amendment to the United States Constitution. *See* ***State v. Guzman***, 166 Wis. 2d 577, 586-87, 480 N.W.2d 446 (1992).

rights. ***Id.*** at 772. The Court also stated, "Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'Breathalyzer' test petitioner refused …. We need not decide whether such wishes would have to be respected." ***Id.*** at 771. In Wisconsin, dissipation of alcohol from a person's bloodstream constitutes exigent circumstances justifying a warrantless search and is reasonable under the Fourth Amendment if four criteria are met.[3] ***Bohling***, 173 Wis. 2d at 533-34. The fourth criterion is at issue here: "the arrestee presents no reasonable objection to the blood draw." ***Id.*** at 534.

¶6 The reasonableness of a search or seizure under the Fourth Amendment is judged using an objective standard. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). Grawey's testimony is unclear regarding what she told police officers of the reason for her refusal, and the court made no finding on this. For purposes of this discussion, we will assume she told the officers that she was afraid of needles because of her prior experience with a blood draw. Grawey contends that because of her prior bad experience with a blood draw, her refusal was reasonable. We disagree.

¶7 The court in ***Schmerber*** expressly did not decide whether a wish for another type of test would have to be respected because of a person's fear of a blood draw; however, the language used clearly contemplates that if such an

[3] The four criteria are: (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).

exception exists, it would be in very limited circumstances: "one of *the few* who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing." ***Schmerber***, 384 U.S. at 771 (emphasis added). ***State v. Krause***, 168 Wis. 2d 578, 588, 484 N.W.2d 347 (Ct. App. 1992), mentions some of the factors that bear on whether an objection based on fear might be considered a reasonable objection. There we held that isolated comments that the defendant "didn't believe in needles" and "d[id]n't want AIDS," coupled with no evidence that indicated he preferred an alternative test or that the police refused a reasonable request for an alternative test, made it "reasonable to assume that [his] refusal and belligerence were born of his intoxication, rather than arising from a genuine fear or health concern." ***Id.*** Of course, the facts in this case are different from ***Krause***—there is no evidence Grawey was belligerent and she did, on the facts we are assuming, tell the officer of her prior bad experience with needles as an explanation for her fear. However, ***Krause*** is instructive in that we there considered it relevant whether Krause asked for an alternative test.

¶8 When an officer is faced with an objection to a blood draw based on a fear of needles—even when supported by the prior incident Grawey experienced—the officer has very little basis for evaluating the reasonableness of that objection. How is the officer to know whether the objection is based on a genuine and intense fear, or on a very common preference not to have one's skin pierced with a needle, or on a desire not to permit the gathering of evidence of intoxication? If, however, the person objecting also offers to take an alternative test, the officer at least has an objective basis for eliminating the possibility that the person's refusal is based on a desire to prevent gathering evidence of intoxication. We also observe that ***Schmerber*** speaks in terms of whether "such wishes" would have to be respected—that is, the preference for another test.

Schmerber, 384 U.S. at 771. ***Schmerber*** thus frames the possible exceptions not in terms of blanket refusals, but in terms of a preference for other tests.

¶9 In this case Grawey told the officers she was afraid of needles because of a prior bad experience, but did not offer to take an alternative test. We conclude that an officer, acting reasonably, could decide that her objection was therefore not reasonable. Accordingly, the trial court correctly concluded the Fourth Amendment did not prohibit introduction of the evidence of her refusal.[4]

By the Court.—Judgment and order affirmed.

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

[4] Because it is unnecessary, we do not decide whether Grawey's objection would have been reasonable under ***Bohling*** had she requested an alternative test. We also emphasize we do not hold that an objection is never reasonable unless an alternative test is requested.