COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0674-CR **Cir. Ct. No. 02-CT-008**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLOS A. MERINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Menominee County: JAMES R. HABECK, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Carlos Merino appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, second offense. He argues the warrantless draw of his blood violated the Fourth Amendment. Specifically, he objects to being injected with a tranquilizer when he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

was physically resisting the blood draw. We conclude the blood draw was reasonable and therefore we affirm the judgment.

BACKGROUND

¶2 On April 5, 2002, Merino was arrested for operating while under the influence and was transported to the Shawano County Sheriff's Department. There, he was informed of his rights regarding chemical testing of his breath. Merino refused a breath test. The officers decided to transport Merino to the Shawano Medical Center for a blood draw.

¶3 Merino said he would not go to the hospital and began fighting with an officer and two jailers. He refused to get into the squad car so he was physically placed inside the car. Upon arrival at the hospital, Merino would not exit the squad. He went limp and had to be carried in. He was placed in a wheelchair and taken to the emergency room, where officers lifted him onto the bed. The officers, a nurse, and a security guard took the handcuffs off Merino and placed four-point restraints on him.

¶4 Doctor F. Mark Moore testified that the restraints were not drawn tightly because they "don't like to do that." As a result, Merino was able to move his arms six to eight inches off the cart. Merino flailed his arms and pulled out of the restraints, so that the doctor was unable to take his blood. The doctor ordered a nurse to inject Merino with a tranquilizer, Haldol. Sometime after the injection, Merino fell asleep and his blood was drawn. Merino later awoke in jail.

¶5 The test revealed that Merino's blood alcohol level was .209%. Merino filed a motion to suppress the results of the blood test, arguing his blood was seized illegally in violation of the Fourth Amendment. After a hearing, the

court denied the motion, determining that the blood draw was reasonable under the circumstances. Merino ultimately pled guilty to operating while intoxicated, second offense. He now appeals.

DISCUSSION

¶6 When reviewing a trial court's order denying a motion to suppress evidence, we will uphold the trial court's factual findings unless they are clearly erroneous; that is, against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether the facts as found by the court meet statutory and constitutional standards is a question of law that we review independently. *See* ***id.*** at 137-38.

¶7 Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. ***State v. Bohling***, 173 Wis. 2d 529, 536, 494 N.W.2d 399 (1993). Exigent circumstances are one such exception and permit a warrantless blood draw without consent. *See* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966).

¶8 ***Bohling*** requires the police to meet four criteria for a warrantless blood draw: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving-related violation; (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 is performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to the blood draw. ***Bohling***, 173 Wis. 2d at 533-34. Here, Merino focuses on the third factor in arguing that injecting the tranquilizer was unreasonable.

¶9 Merino cites ***Winston v. Lee***, 470 U.S. 753 (1985), in support of his claim. In ***Winston***, the Supreme Court determined that the state could not compel a robbery suspect to undergo a surgical operation to remove a bullet from his body. ***Id.*** The Court concluded there was no compelling need to recover the bullet, that the surgery would severely intrude on the suspect's privacy, and it was therefore unreasonable. ***Id.*** at 766-67.

¶10 However, the Indiana Supreme Court determined in ***Carr v. State***, 728 N.E.2d 125, 129 (Ind. 2000), that a defendant may be prevented from invoking ***Winston*** when the need for a procedure is entirely attributable to the defendant's resistance. The court concluded that to find otherwise would give suspects an incentive to refuse to comply with a search in order to force a procedure that the suspect could claim violated his or her constitutional rights.[2] ***Id.*** Here, Merino was refusing to submit to blood testing, and the doctor's resort to tranquilization was entirely due to Merino's own actions. Consistent with ***Carr***, Merino cannot rely on ***Winston*** to argue that the procedure was unreasonable.

¶11 Further, in ***State v. Cary***, 230 A.2d 384, 388 (N.J. 1967), the New Jersey Supreme Court determined that, "If the defendant chooses to resist, the physician performing the test together with other authorized personnel may take such medically appropriate steps as they would use to control any difficult patient; only inappropriate force is condemned." Here, the doctor testified that Merino "was quite combative and required four point restraints to control his

[2] In ***Carr***, the defendant was refusing to comply with a valid search warrant for a dental impression. ***Carr v. State***, 728 N.E.2d 125, 128-29 (Ind. 2000). As a result, the method used to obtain the impression was more severe than would otherwise be required. ***Id.*** Although the present case does not involve a search warrant, it does involve a valid blood testing procedure. We therefore apply the same analysis.

combativeness, and actually required chemical restraints as well." He stated that the tranquilization was required "in order to accomplish testing …." He also testified that he had sedated people before in order to accomplish a blood draw.[3]

¶12 We conclude that the use of a tranquilizer to obtain a blood sample from Merino was reasonable and therefore not a violation of the Fourth Amendment.

By the Court.—Judgment affirmed.

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

[3] In its brief, the State argues the six factors for determining whether force is reasonable as listed in ***State v. Krause***, 168 Wis. 2d 578, 589, 484 N.W.2d 347 (1992). Merino contends that this case goes beyond ***Krause*** because he was injected with a tranquilizer, whereas Krause was merely physically restrained. Because we directly address Merino's argument, we find it unnecessary also to address the ***Krause*** factors.