COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0691-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. MEDDAUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Timothy Meddaugh appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration. Meddaugh challenges the denial of his motion to suppress 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.

results of a chemical test of his blood. He contends that police should have obtained a search warrant before conducting the blood analysis. We conclude that, under Wisconsin's Implied Consent Law, Meddaugh consented to both the blood draw and its subsequent analysis. We therefore affirm the judgment of conviction.

BACKGROUND

¶2 A Portage County Sheriff's Department officer arrested Meddaugh for operating a motor vehicle while under the influence of an intoxicant (OMVWI). After being informed of his rights under the Implied Consent Law, WIS. STAT. § 343.305(4), Meddaugh agreed to submit to a blood draw. The arresting officer transported him to a hospital where a blood sample was drawn, the analysis of which subsequently revealed a blood alcohol concentration of 0.197%.

¶3 Meddaugh moved to suppress the evidence of his blood alcohol content on several grounds. The trial court denied his motions, and Meddaugh pled no contest to operating a motor vehicle with a prohibited alcohol concentration. Meddaugh appeals the judgment of conviction.[2]

ANALYSIS

¶4 The question before us is whether the analysis of an OMVWI arrestee's blood without a search warrant violates the Fourth Amendment's

[2] In a criminal case, a defendant may appeal the denial of a motion to suppress evidence following a plea of guilty or no contest. WIS. STAT. § 971.31(10).

prohibition against unreasonable searches and seizures.[3] Application of constitutional principles to undisputed facts is a question of law which we decide de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶5 Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures.[4] Warrantless searches are per se unreasonable unless they fall within a few carefully delineated exceptions. ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). Among the exceptions to the warrant requirement is a search conducted pursuant to consent. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). We conclude that the consent exception applies on the present facts.

¶6 WISCONSIN STAT. § 343.305(2) provides:

> Any person who … drives or 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 … or when required to do so…. Any such *tests* shall be administered upon the request of a law enforcement officer.

[3] We recently addressed this very issue in ***State v. VanLaarhoven***, No. 01-0222-CR (Wis. Ct. App. Oct. 10, 2001), recommended for publication. We find the reasoning of this opinion persuasive and we adopt it here.

[4] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." The language of article I, section 11 of the Wisconsin Constitution is virtually identical. In interpreting this section of the Wisconsin Constitution, the Wisconsin Supreme Court consistently conforms to the law of search and seizure developed by the United States Supreme Court. *See* ***State v. Guzman***, 166 Wis. 2d 577, 586-87, 480 N.W.2d 446 (1992).

> The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 *tests* … and may designate which of the *tests* shall be administered first.

(Emphasis added.) Thus, anyone driving on public highways in Wisconsin is deemed to have consented to the *testing* of his or her blood under the circumstances set forth in the statute. ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980). The language of the statute does not make a distinction between the drawing of blood and its subsequent analysis—it refers only to "tests" of blood. "A person may revoke consent, however, by simply refusing to take the test." ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995). Meddaugh did not revoke his consent, and we conclude that, by operation of law and his submission to the test, he consented to both the drawing of his blood and its subsequent analysis.

¶7 Meddaugh argues, however, that any exigency which justified the blood draw vanished once his blood was drawn, and that police should have obtained a search warrant before having his blood analyzed. He emphasizes that the analysis did not occur until several days after his blood was drawn, giving police ample time within which to have applied for a search warrant.

¶8 Meddaugh cites ***Schmerber v. California***, 384 U.S. 757 (1966) and ***State v Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 2000 WI 121, 239 Wis. 2d 310, 619 N.W.2d 93, for the proposition that the seizure of blood from an OMVWI arrestee is justified only by the exigent circumstances exception to the warrant requirement. The issue in the cited cases was whether a warrant was required before drawing a blood sample, however, and neither court addressed the question of whether the analysis of the blood was a separate search which might require a warrant. Moreover, both cases treated the

blood draw and its subsequent analysis as one event, referring to both the draw and the analysis as a "test." *See* ***Schmerber***, 384 U.S. at 771; *see also* ***Thorstad***, 2000 WI App 199 at ¶14.

¶9 Meddaugh also relies on ***United States v. Jacobsen***, 466 U.S. 109 (1984), and ***Walter v. United States***, 447 U.S. 649 (1980), for the proposition that the legal authority to seize does not necessarily provide legal authority to search what has been seized. The U.S. Supreme Court in ***Jacobsen*** held that DEA agents were not required to obtain a warrant prior to testing a suspicious white powder found inside a package, because the expectation of privacy had already been frustrated by the prior discovery of the powder by a private party. ***Jacobsen***, 466 U.S. at 117. Meddaugh finds support for his position, however, in the Court's statement that even where exigent circumstances justify the seizure of evidence, "the Fourth Amendment requires that [police] obtain a warrant before examining the contents" if no other exception to the warrant requirement exists. ***Id***. at 114. Similarly, Meddaugh contends that the holding in ***Walter*** supports his argument because the Court concluded that the viewing of pornographic films by federal agents was unlawful because they had not obtained a search warrant to do so. ***Walter***, 447 U.S. at 657.

¶10 Neither of these cases are controlling on the present facts, however. As we have discussed, Meddaugh consented to having his blood tested, and the analysis of his blood sample was authorized by his consent.[5] That a blood draw

[5] For the same reason, we are not persuaded by Meddaugh's reliance on ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602, 623-33 (1989). Even if Meddaugh could be said to have a reasonable expectation of privacy in the blood sample taken from him, his consent to its testing waived any privacy interest he may have had in the sample.

and its subsequent analysis are one event finds support not only in the wording of the Implied Consent Law, but also in cases whose Fourth Amendment analyses we deem more relevant to the present facts than those in the cases cited by Meddaugh.

¶11 The defendant in ***United States v. Snyder***, 852 F.2d 471 (9th Cir. 1988) was arrested after the vehicle he was driving struck and injured a military police officer. ***Id***. at 472. Arresting officers took a blood sample without the defendant's consent and submitted it for analysis without a warrant. ***Id***. Snyder did not contest the blood draw, but challenged the blood analysis. He contended, as Meddaugh does, that any exigency which justified the blood draw had dissipated after the blood was drawn because the alcohol content in the sample is preserved indefinitely, allowing the police ample time to obtain a warrant. ***Id***. at 473. The Ninth Circuit rejected the argument:

> The flaw in Snyder's argument is his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for fourth amendment purposes…. It seems clear, however, that ***Schmerber*** viewed the seizure and separate search of the blood as a single event for fourth amendment purposes. As the Court stated in defining the nature of its inquiry, "the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness."
>
> The only justification for the seizure of defendant's blood was the need to obtain evidence of alcohol content. The Court [in ***Schmerber***] therefore necessarily viewed the right to seize the blood as encompassing the right to conduct a blood- alcohol test at some later time.

Id. at 473-74 (citation omitted).

¶12 The Wisconsin Supreme Court in ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), considered the question of whether the developing of

film lawfully seized under a search warrant "was a second, separate search for which a warrant should have been obtained." ***Id.*** at 544. The court concluded that a second warrant was not required, reasoning as follows:

> Developing the film is simply a method of examining a lawfully seized object. Law enforcement officers may employ various methods to examine objects lawfully seized in the execution of a warrant. For example, blood stains or substances gathered in a lawful search may be subjected to laboratory analysis. The defendant surely could not have objected had the deputies used a magnifying glass to examine lawfully seized documents or had enlarged a lawfully seized photograph in order to examine the photograph in greater detail. Developing the film made the information on the film accessible, just as laboratory tests expose what is already present in a substance but not visible with the naked eye. Developing the film did not constitute, as the defendant asserts, a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant. The deputies simply used technological aids to assist them in determining whether items within the scope of the warrant were in fact evidence of the crime alleged.

Id. at 545 (citation and footnote omitted).

¶13 We likewise conclude here that the analysis of Meddaugh's blood sample was "simply a method of examining a lawfully seized object," for which a warrant was not required.

CONCLUSION

¶14 For the reasons discussed above, we affirm the appealed judgment of conviction.

By the Court.—Judgment affirmed.

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