COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2001

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.

No. 01-0709-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. SMAXWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

¶1 BROWN, J.[1] Michael A. Smaxwell appeals from a judgment of conviction for operating a motor vehicle while intoxicated, third offense. Smaxwell argues that there was neither consent nor exigent circumstances to

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

justify the warrantless search of his garage prior to his arrest. He also argues that the warrantless blood draw without his consent was illegal. We disagree on both issues and affirm.

FACTS

¶2 On May 22, 1999, law enforcement officials in the city of Menasha received a call that a possibly intoxicated driver had nearly caused two accidents at the intersection of 12th Street and Racine Road. Officer Ginger Tralongo responded and spoke to two witnesses that were inside a gas station at that intersection. One witness indicated that a pickup truck had struck a mailbox at the end of a driveway, drove over the lawn and then entered the garage located there. Tralongo then approached the garage where she heard noises that sounded as if someone inside might be stumbling around.

¶3 Tralongo then knocked on the outside door of a breezeway that connected the garage to the house. A woman named Sandy Prinsen answered the door. There is conflicting testimony as to what transpired next. Tralongo testified that she asked Prinsen for permission to look inside the garage and that Prinsen gave consent. Prinsen testified that no officer asked permission to go inside the garage and no permission was given. Gary Cutler, another officer on the scene, testified that he entered the garage after he saw Prinsen make a hand gesture towards the garage, which he interpreted as her directing them into the garage. He could not hear the conversation between Tralongo and Prinsen.

¶4 Upon entering the garage, Cutler observed Smaxwell laying on the floor of the garage. Cutler approached Smaxwell because he was concerned that he may be injured or have a medical problem. When he tried to help Smaxwell to his feet, he smelled alcohol and noticed Smaxwell's speech was very thick, slowed

and slurred. Cutler asked Smaxwell if he would submit to field sobriety tests. Smaxwell's response was that he could not pass the tests, so why bother. Cutler then placed Smaxwell under arrest for operating while under the influence of intoxicants. Smaxwell had also told the officer that he had been drinking at a local bar.

¶5 Smaxwell was then transported to Theda Clark Hospital in order to perform a blood test. Smaxwell initially refused the blood test at the hospital. Cutler advised him that under these circumstances, if he would not voluntarily give a blood sample, then they would take one against his wishes. Smaxwell again refused to allow the blood draw. When Cutler requested the assistance of other officers to hold Smaxwell down, however, Smaxwell submitted to the blood test. The results of his blood alcohol test were .387 percent.

¶6 Smaxwell moved to suppress the blood draw evidence as the fruit of an illegal search and seizure. The trial court denied the motion. Smaxwell then pled no contest, was sentenced and now appeals the order denying his motion to suppress.

ISSUES

¶7 The trial court made factual findings based on the credibility of witnesses at the hearing. For purposes of our review, we accept those factual findings unless they are against the great weight and clear preponderance of the evidence. ***State v. Johnson***, 177 Wis. 2d 224, 230, 501 N.W.2d 876 (Ct. App. 1993). We independently determine, however, whether those facts satisfy the constitutional requirement of reasonableness. ***Id.*** at 231.

¶8 The trial court found that the officers were given permission to enter the garage. This factual finding was based on weighing the credibility of the witnesses, including Tralongo, Cutler and Prinsen. We determine that the factual findings that the trial court made were not against the great weight of the evidence. The trial court also found that once the officers had entered the garage, their concern for Smaxwell's safety as he lay collapsed on the ground justified further investigation pursuant to the community caretaker function of the police. *See* ***State v. Anderson***, 142 Wis. 2d 162, 167, 417 N.W.2d 411 (Ct. App. 1987), *aff'd after remand*, 149 Wis. 2d 663, 439 N.W.2d 840 (Ct. App. 1989), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). Again, this finding is based on the officers' testimony and is not against the great weight of the evidence. We further agree with the trial court that once the officers were legitimately present inside the garage and had approached Smaxwell, they were legitimately in a position to smell the odor of intoxicants and observe Smaxwell's slurred speech—observations that provided probable cause for the arrest. Therefore, we affirm the trial court's finding that the officers had consent to enter the garage and once inside, that they had probable cause to arrest.[2]

¶9 Smaxwell also argues that the blood test should have been suppressed because a forced blood draw violates his Fourth Amendment rights. He posits that the consequence of refusing a blood test is automatic revocation of the driver's license under the implied consent law, but not a forced blood draw.

[2] Smaxwell argues that ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), commands a different outcome. In ***Welsh***, the United States Supreme Court held that the Fourth Amendment prohibits a warrantless entry into an individual's home to make an arrest for the civil traffic offense of operating a motor vehicle while intoxicated. ***Id.*** at 754-55. ***Welsh*** is not controlling in this case, however, because it was premised on the lack of valid consent to enter the defendant's home in the first instance. ***Id.*** at 743 n.1.

Stated differently, he argues that the implied consent statute is the exclusive remedy for a defendant's refusal to submit to a chemical test to determine blood alcohol content. We reject Smaxwell's contention.

¶10 Smaxwell's argument contradicts our supreme court's frequent holding that a driver in Wisconsin has no right to refuse to take a chemical test of his or her blood. "The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways. By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." ***State v Zielke***, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987). Therefore, Smaxwell did not have the right to refuse to submit to the testing of his blood.

¶11 Furthermore, Smaxwell fails to recognize that refusal to submit to a chemical blood test, WIS. STAT. § 343.305, and operating while under the influence, WIS. STAT. § 346.63(1), are separate offenses. ***Zielke***, 137 Wis. 2d at 47-49. While the implied consent law may provide the exclusive remedy for a violation of its law, it does not follow that the statute precludes officers from employing other means of collecting evidence. The ***Zielke*** case held that the implied consent law is not the only means by which the police can obtain chemical test evidence of driver intoxication. *See* ***id.*** at 41. Simply put, nothing in the implied consent statute prevents the admissibility of legally obtained chemical evidence in the separate and distinct prosecution for intoxicated use of a vehicle. ***Id.*** at 51.

¶12 Furthermore, the Wisconsin Supreme Court has clarified that a forcible warrantless blood draw does not violate the Fourth Amendment if the conditions in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), are satisfied. In ***Bohling***, the defendant refused to consent to a blood draw after a

lawful arrest for operating while under the influence. ***Id***. at 534-35. The defendant was informed that restraint would be used if he did not cooperate. ***Id***. Bohling then submitted to the test but never signed the consent form. ***Id.*** at 535. The court held that:

> [T]he dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw. Consequently, a warrantless blood draw ... 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.

Id. at 533-34 (footnote omitted). Applying the ***Bohling*** factors to this case, we have already determined that Smaxwell was arrested lawfully based on probable cause that arose after the officers entered the garage with Prinsen's consent. It was clearly visible that Smaxwell was intoxicated, and he admitted to having been drinking and not being able to pass sobriety tests. Therefore, the first two factors have been met. Further, Smaxwell presented no evidence raising an issue as to whether the third and fourth factors had been met. Therefore, we conclude that the ***Bohling***, factors have been satisfied and that the blood draw was legal.

¶13 Because we disagree with Smaxwell on both issues presented on appeal, the decision of the trial court is affirmed.

By the Court.—Judgment affirmed.

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