COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2366-CR **Cir. Ct. No. 2012CT1089**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NEIL A. MORTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Neil Morton appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense. Morton contends the circuit court erred in failing to suppress the results of his blood test

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

because the results were obtained without a warrant and in the absence of exigent circumstances. I conclude that this court's recent opinion in ***State v. Reese***, 2014 WI App 27, ___ Wis. 2d ___, ___ N.W.2d ___, is controlling and that because the arresting officer was acting in good faith reliance on established Wisconsin Supreme Court precedent at the time the blood draw was obtained, the circuit court did not err in denying Morton's motion to suppress. Accordingly, I affirm.

DISCUSSION

¶2 Morton was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration, as third offenses. Morton moved the circuit court to suppress the results of his warrantless blood draw, relying on the United States Supreme Court's recent opinion in ***Missouri v. McNeely***, ___ U.S. ___, 133 S. Ct. 1552, 1563 (2013), wherein the Supreme Court held that the natural dissipation of alcohol in the blood does not, standing alone, constitute an exigency justifying a warrantless blood draw. In this case, after the vehicle Morton was driving was stopped, Morton was placed under arrest and transported to Meriter Hospital for a blood test, which he refused. Over Morton's objection, a warrantless blood draw was conducted, which indicated that Morton's blood alcohol concentration was over the legal limit.

¶3 The circuit court denied Morton's motion to suppress. The circuit court determined that under ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, the blood draw was admissible because at the time the blood draw was obtained, the officer was relying on clear Wisconsin precedent that the natural dissipation of alcohol from a person's bloodstream alone constituted a per se exigency justifying an exception to the warrant requirement for nonconsensual

blood testing in drunk driving arrests. *See* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *cert. denied*, ***Bohling v. Wisconsin***, 510 U.S. 836 (1993).

¶4 Morton argues that the validity of his blood draw should not be upheld because the only evidence of exigent circumstances in this case justifying the warrantless blood draw was the natural dissipation of alcohol from his blood stream, which the United States Supreme Court held in ***McNeely*** does not alone constitute a per se exigency justifying a warrantless blood draw. *See* ***McNeely***, ___ U.S. ___, 133 S. Ct. 1552, 1563. Morton argues that the good faith exception articulated in ***Dearborn***, wherein remedy of exclusion for a constitutional violation was not applied where the officer's conduct was undertaken with the "objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court," should not be applied post-***McNeely***, and thus not in his case. ***Dearborn***, 327 Wis. 2d 252, ¶4.

¶5 We recently addressed this issue in ***Reese.*** In ***Reese***, as in this case, the only evidence of exigent circumstances justifying a warrantless blood draw was the natural dissipation of alcohol from the defendant's blood stream. ***Reese***, ___ Wis. 2d ___, ¶19. The blood draw in ***Reese*** was obtained after our supreme court's opinion in ***Bohling***, wherein the court held that the natural dissipation of alcohol alone constitutes an exigent circumstance justifying a warrantless blood draw, but before ***McNeely***, wherein the United States Supreme Court held that it does not. We held in ***Reese*** that the ***Dearborn*** good faith exception should apply and that the warrantless blood draw should not be suppressed even though ***McNeely*** makes clear that the dissipation of alcohol from the blood system does not alone justify a warrantless blood draw. *See* ***id.***, ¶22. We observed that the officer in ***Reese*** was following clear and settled Wisconsin precedent when the blood draw was obtained and that any deterrent effect on officer misconduct

would be nonexistent because at the time of the blood draw, the officer did not and could not have known that he was violating the Fourth Amendment. ***Id.***

¶6 I am bound by this court's decision in ***Reese.*** *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185–190, 560 N.W.2d 246 (1997) (the court of appeals is bound by published decisions of the court of appeals). Accordingly, I conclude that in this case, where a warrantless blood draw was obtained after ***Bohling*** but prior to ***McNeely***, and where the appellant has not argued that the officer was not following clear, well-settled Wisconsin precedent when obtaining the warrantless blood draw, the good faith exception precludes suppression of the blood draw evidence. Accordingly, I affirm the decision of the circuit court denying Morton's motion to suppress and the judgment of conviction.

By the Court.—Judgment affirmed.

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