COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1384-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Richard Edwards appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

(OMVWI). He claims the trial court erred in denying his motion to suppress evidence of the results of a blood test that was administered following his arrest. Because the issues Edwards raises in this appeal were decided in the State's favor in ***State v. Thorstad***, 2000 WI App 199, No. 99-1765-CR, we affirm the conviction.

BACKGROUND

¶2 A City of Sun Prairie police officer arrested Edwards for OMVWI and transported him to have a sample of his blood withdrawn by a "trained medical professional." The sample was analyzed at the State Laboratory of Hygiene, which reported an alcohol concentration of 0.213%. Edwards moved to suppress evidence of the blood test result because the blood sample was taken without a warrant, and because it constituted an unreasonable seizure due to the availability of an alternative means of obtaining the evidence, specifically, a breath test.

¶3 No evidentiary hearing was conducted, and the trial court denied the suppression motion after hearing arguments of counsel. The trial court concluded that the taking of the blood sample from Edwards did not violate the Fourth Amendment because he had given implied consent to the testing of his blood, and because the taking of the sample was justified by exigent circumstances. Subsequently, Edwards pleaded no contest to OMVWI, and he now appeals, challenging the denial of the suppression motion.[2]

[2] *See* WIS. STAT. 971.31(10).

ANALYSIS

¶4 The question presented by this appeal is a purely legal one, specifically, whether a police officer violates the Fourth Amendment's prohibition against unreasonable searches and seizures when he or she obtains a blood sample from an OMVWI arrestee, even though the arresting officer could have obtained a breath test instead. We decide the issue de novo, owing no deference to the trial court's conclusion on the matter. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

¶5 Edwards argues that "blood testing cannot be a police reflex." He claims that the holding in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir.), *cert. denied*, 525 U.S. 981 (1998), establishes that the operation of Wisconsin's implied consent law, which permits a police officer to designate whether a person arrested for OMVWI should be subjected to a blood test as opposed to a breath test, may result in unreasonable seizures under the Fourth Amendment. He points out that results of the testing of a driver's blood or breath for alcohol concentration have identical evidentiary impact. *See* WIS. STAT. 885.235(1g). Thus, according to Edwards, a police choice to draw blood instead of obtaining a breath sample is unreasonable because the blood test is more "intrusive."[3]

¶6 We have recently considered, and rejected, precisely the arguments Edwards makes in this appeal. *See* ***State v. Thorstad***, 2000 WI App 199, No. 99-

[3] Edwards summarizes his argument as follows: "Where, as here, there is a less-intrusive and equally effective and available means of gathering evidence of intoxication and prohibited alcohol concentration through at least equally available means, there can be no justification for requiring the suspect to submit to blood analysis."

1765-CR.[4] We concluded in ***Thorstad*** that, so long as the four requirements outlined by the supreme court in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), are met, there is no Fourth Amendment violation when the police obtain a blood sample from an OMVWI arrestee.[5] We specifically rejected the ***Nelson v. City of Irvine*** analysis, concluding that we are bound by the supreme court's holding in ***Bohling***. *See* ***Thorstad***, 2000 WI App 199 at ¶9.

¶7 Edwards asserts that ***Bohling*** is distinguishable because, there, the defendant "created his own 'exigency'" by refusing to submit to a proffered breath test. Edwards also argues that ***Bohling*** supports his position in this case because the supreme court concluded that a delay in taking a blood sample may imperil the evidence of blood concentration. He claims that "it is obvious that breath testing is vastly quicker than blood sampling." The problem with these arguments is that there is no factual basis in the record to support them. We do not know, for instance, whether Edwards requested a breath test, or was offered one and refused

[4] After this appeal was submitted for decision, Edwards moved to defer its consideration and disposition pending the release of this court's opinion in ***State v. Thorstad***. Edwards asserted in his motion that "[t]he legal issue presented in this appeal is identical to that presented by the State's appeal in ***Thorstad***." Further, Edwards informed us that he "believes that a decision in the ***Thorstad*** appeal will be controlling precedent for that issue in this case and will, consequently, control the decision of this case."

[5] The ***Bohling*** requirements are as follows:

> (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) (footnote omitted).

it, or whether the police could have obtained a breath test more quickly than the blood sample.

¶8 Edwards claims, however, that the lack of a proper evidentiary record should not be held against him because the motion he filed requested an evidentiary hearing. We disagree. During argument on Edward's motion, the prosecutor told the court, "I think we can dispose of this motion on a legal basis without getting anywhere on the evidence. I don't think there is any dispute that the officers requested that Mr. Edwards submit to a blood draw and ultimately that blood that was taken was tested." Edwards's counsel did not disagree with the prosecutor's statement, and made no objection to the court proceeding to decide the motion without an evidentiary hearing.

CONCLUSION

¶9 Because we conclude that the disposition of this appeal is controlled by our holding in ***State v. Thorstad***, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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