COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1406-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY J. POWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Timothy Powers appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims the trial court erred in denying his motion to suppress

[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.

evidence of the results of a blood test that was administered following his arrest. Because the issues Powers 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 Sauk County Sheriff's Deputy arrested Powers for OMVWI and transported him to a hospital to have a sample of his blood withdrawn. The sample was analyzed at the State Laboratory of Hygiene, which reported an alcohol concentration of 0.213%. Powers 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.[2]

¶3 The deputy testified at the suppression hearing that he requested Powers to give a blood sample solely because it was it was the "standard practice and policy" of his department "that any person who is charged with [OMVWI] second or above be taken for a blood draw." He also acknowledged that "an intoxilyzer machine … was available to use that evening." The trial court concluded that the taking of the blood sample from Powers did not violate the Fourth Amendment because he had given implied and actual consent to the testing of his blood, and because "[h]e did not express a preference for one type of test over another." The court also noted that the "fact that there would be a less intrusive measure available, I don't believe is controlling, since it is the agency's statutory right to set the primary test." Subsequently, Powers pleaded no contest

[2] Powers also challenged the validity of the initial traffic stop but does not do so on appeal.

to OMVWI, and he now appeals, challenging the denial of the suppression motion.[3]

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 Powers argues that "implied consent" is a legal fiction, that his consent to a blood test was coerced, and thus, that he gave no valid consent to the drawing of his blood for purposes of the Fourth Amendment. He also asserts that "blood testing cannot be a police reflex." According to Powers, 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, in Powers's view, a police officer's choice to draw blood without a warrant, instead of obtaining a breath sample,

[3] *See* WIS. STAT. 971.31(10). We note that although the appealed judgment of conviction was entered by Judge Virginia Wolfe, Judge James Evenson heard and denied the suppression motion at issue.

constitutes an unreasonable search and seizure, and thus violates the Fourth Amendment.[4]

¶6 We have recently considered, and rejected, the arguments Powers makes in this appeal. *See* ***State v. Thorstad***, 2000 WI App 199, No. 99-1765-CR.[5] There, as here, an OMVWI arrestee was subjected to a warrantless blood draw, to which he agreed after being informed of the requirements of Wisconsin's implied consent law. *See* ***id***. at ¶2. 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.[6] 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. And, in response to the defendant's argument that his blood test "was an unreasonable search because it was involuntary and nonconsensual," we noted that "***Bohling***

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[4] Powers summarizes his argument as follows: "Under the Fourth Amendment, police are not allowed the unfettered freedom to mandate blood testing. No Wisconsin case has ever said that they have that power…."

[5] After this appeal was submitted for decision, this court, on its own motion, elected to defer its consideration and disposition pending the release of our opinion in ***State v. Thorstad***. Powers based his suppression motion on the same grounds as did the defendant in ***Thorstad***, and we concluded that the decision in the ***Thorstad*** appeal would likely control the outcome of this one.

[6] 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).

does not require that the subject of the blood test give consent or voluntarily take the test." ***Id***. at ¶10.

¶7 Powers asserts that ***Bohling*** is distinguishable because, there, the defendant created his own exigency by refusing to submit to a proffered breath test. He argues that when the supreme court alluded to "the foregoing circumstances" when it set out the four requirements for the taking of warrantless blood samples (see footnote 6), the court was referring to a breath test refusal. *See* ***Bohling***, 173 Wis. 2d at 533. We disagree. The cited language occurs in the third paragraph of the court's opinion. The only prior reference to the "circumstances" of the case occurs in the first paragraph:

> The issue in this case is whether the fact that the percentage of alcohol in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency under the Fourth Amendment to the United States Constitution and Article I Section 11 of the Wisconsin Constitution, to justify a warrantless blood draw under *the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication.*

Id. (emphasis added). These circumstances are also present in this case, just as they were in ***Thorstad***, and thus, we affirm the trial court's denial of Powers's motion to suppress.

CONCLUSION

¶8 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.