

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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. 99-1553

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

TOWN OF DELAVAN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY L. LANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ In this appeal, Jeffrey L. Lange contends that the implied consent law, WIS. STAT. § 343.05, is unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution. In the trial court,

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

Lange challenged the warrantless extraction of his blood by the police under the implied consent law following his arrest for operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63. Specifically, Lange argued that under *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998), the police should have used the less invasive breath testing procedure under the implied consent law. He also contended that the test was coercive and nonconsensual and that “exigent circumstances” did not exist to support the warrantless extraction of his blood.

¶2 The trial court denied Lange’s motion to suppress. Lange then stipulated to a set of facts upon which the court found him guilty of OWI.² Lange appeals from the ensuing judgment of conviction.

¶3 In his brief-in-chief to this court, Lange stated that the issue is identical to that in *State v. Thorstad*, 2000 WI App 199, No. 99-1765-CR, a case then pending in the court of appeals. In light of that, we granted Lange’s request to stay further proceedings in this appeal pending this court’s decision in *Thorstad*.³ Thereafter, the court of appeals issued its decision in *Thorstad*, holding that *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), represented the “constitutional standard” for administration of a warrantless blood

² The trial court found Lange guilty of both paragraphs of WIS. STAT. § 346.63: operating while under the influence of an intoxicant pursuant to para. (1)(a) and operating with a prohibited alcohol concentration pursuant to para. (1)(b). However, the court imposed a single penalty pursuant to para. (1)(c).

³ The law firm which represented the appellant in *State v. Thorstad*, 2000 WI App 199, No. 99-1765-CR, also represents Lange in this appeal.

test.⁴ See *Thorstad*, 2000 WI App 199 at ¶11. Lange makes no argument that *Bohling* was not followed in this case.

¶4 Following the release of *Thorstad*, the State filed its respondent's brief citing to *Thorstad* in defense of the trial court's ruling. Having acknowledged in his brief-in-chief that this case is "legally identical" to *Thorstad*, Lange's reply brief understandably makes no effort to distinguish *Thorstad*. In fact, Lange's reply brief does not even acknowledge *Thorstad*.

¶5 We agree with Lange that the legal issue in this case is the very one addressed by *Thorstad*. And we are duty bound to follow *Thorstad*. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). For the reasons stated in *Thorstad*, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

⁴ Thus, the court of appeals also rejected Thorstad's reliance on *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998). See *Thorstad*, 2000 WI App 199 at ¶9.

