COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1601

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

COUNTY OF IOWA,

PLAINTIFF-RESPONDENT,

v.

STEPHEN C. BIDWELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Stephen Bidwell appeals an order convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims the trial court erred in denying his motions to suppress evidence of the

[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.

results of a blood test that was administered following his arrest. Because the issues Bidwell raises in this appeal were decided in the State's favor in ***State v. Thorstad***, 2000 WI App 199, No. 99-1765-CR, *review denied,* (Wis. Oct. 17, 2000) we affirm the conviction.

BACKGROUND

¶2 An Iowa County Sheriff's Deputy arrested Bidwell for OMVWI and transported him to a hospital to have a sample of his blood withdrawn.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 .169%. Bidwell 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 motions after hearing arguments of counsel. The trial court concluded that the taking of the blood sample from Bidwell 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, Bidwell stipulated to a set of facts, based on which the trial court found him guilty. He now appeals, challenging the denial of the suppression motions.

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 Bidwell argues that "blood testing cannot be a police reflex." He claims that the holding in ***Nelson v. 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 Bidwell, a police choice to draw blood instead of obtaining a breath sample is unreasonable because the blood test is more "intrusive."[2]

¶6 We have recently considered, and rejected, precisely the arguments Bidwell makes in this appeal. *See* ***State v. Thorstad***, 2000 WI App 199, No. 99-1765-CR, *review denied,* (Wis. Oct. 17, 2000).[3] We concluded in ***Thorstad*** that, so long as the four requirements outlined by the supreme court in ***State v. Bohling***,

[2] Bidwell summarizes his argument as follows: "Where, as here, there is an available means of gathering evidence of intoxication and prohibited alcohol concentration – breath testing – which has the same evidentiary weight and admissibility as blood test results, there can be no Constitutionally acceptable justification for requiring the suspect to submit to blood analysis."

[3] After this appeal was submitted for decision, Bidwell moved to defer its consideration and disposition pending the release of this court's opinion in ***State v. Thorstad***. Bidwell 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, Bidwell 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."

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.[4] 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 Bidwell asserts that ***Bohling*** is no longer good law because its view of "exigent circumstances" has been overruled in ***Richards v. Wisconsin***, 520 U.S. 385 (1997), and ***Wilson v. Arkansas***, 514 U.S. 927 (1995). Bidwell interprets these cases to mean "exigency isn't determined by the nature of the offense being investigated," but rather by a case-by-case analysis of the totality of the circumstances. We reject Bidwell's argument.

¶8 Contrary to Bidwell's contentions, the County has shown exigency in this case. As we stated in ***Thorstad***, "[t]he ***Bohling*** court specifically noted that … warrantless blood tests [are permitted] because the rapid dissipation of alcohol from the bloodstream constitutes exigent circumstances." ***Thorstad***, 2000 WI App at ¶6 (citing ***Bohling***, 173 Wis. 2d at 539-40). This also applies in the present case. In any event, Bidwell's reliance on ***Richards*** is misplaced. The United States Supreme Court there rejected the "overgeneralization" that, when executing a search warrant in a felony drug investigation, a police officer never needs to

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[4] 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).

knock due to concerns for safety and preservation of evidence. *See* ***Richards***, 520 U.S. at 387-88, 393. In contrast, we are dealing here with an undisputed statement, recognized by the United States Supreme Court, that alcohol rapidly dissipates from the bloodstream. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966). In sum, exigent circumstances existed, justifying a warrantless search.

CONCLUSION

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

By the Court.—Order affirmed.

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