COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3043-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WAYNE T. SCHIMKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Wayne T. Schimke appeals from his conviction for a second offense of operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). He is challenging the trial court's refusal to suppress

[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 unless otherwise noted.

the results of a blood draw performed to gain evidence of his blood alcohol concentration. On appeal, he contends that the blood draw was an "unreasonable" search and seizure because the arresting officer had a less intrusive means of obtaining evidence of his blood alcohol concentration.

¶2 Prior to Schimke filing his initial brief, we decided ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, ___ Wis. 2d ___, 619 N.W.2d 93 (Wis. Oct. 17, 2000) (No. 99-1765-CR). In ***Thorstad***, we were presented with the same issue that was raised by Schimke. We held that the blood draw "was admissible because it met the constitutional requirements for warrantless blood tests set out in [***State v.***] ***Bohling***." ***Thorstad***, 2000 WI App 199 at ¶1 (citing ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993)).

¶3 In his initial brief, Schimke contends that ***Thorstad*** was wrongly decided. Even if we were to agree with Schimke, we may not overrule, modify or withdraw language from published opinions of the court of appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶4 Before Schimke's reply brief was due, the Wisconsin Supreme Court denied a petition for review in ***Thorstad***. In lieu of a reply brief, Schimke filed a letter advising the court that he "cannot ethically submit a reply brief and argue that the trial court erred in denying his suppression motions in light of the current state of the law." We have independently reviewed the record in this appeal as well as the written legal argument submitted by Schimke and the State, and we conclude that ***Thorstad*** directly governs this appeal. Therefore, we affirm.

¶5 It is a rare occasion for appellate counsel to concede that new authority is factually indistinguishable from the case on appeal and controls the

disposition of the appeal. We take the opportunity to commend Attorney Ralph A. Kalal, appellate counsel for Schimke, for his adherence to the high ethical standards of this profession.

By the Court.—Judgment affirmed.

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