COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0691

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL R. SAICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Michael Saich 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 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 Saich 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¶2 A Wisconsin State Patrol Trooper arrested Saich for OMVWI and transported him to have a sample of his blood withdrawn. The sample was analyzed at the State Laboratory of Hygiene, which reported an alcohol concentration of .150%. Saich 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 The trooper testified at the suppression hearing that he requested Saich give a blood sample because he believed that Saich was borderline over the legal limit and taking medication. He also acknowledged that he "would have [had] access … to the Intoxilyzer at the Dane County Sheriff's Office," which was approximately one mile closer than the hospital. The trial court concluded that the taking of the blood sample from Saich did not violate the Fourth Amendment because he had given implied consent to the testing of his blood, and because the United States Supreme Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *See* ***Vernonia Sch. Dist. 47J v. Acton***, 515 U.S. 646, 663 (1995). Subsequently, a

jury found Saich guilty of OMVWI, and he now appeals, challenging the denial of the suppression motions.[2]

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 Saich 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 Saich, a

[2] Saich was also found guilty of operating a motor vehicle with a prohibited alcohol concentration, but the court imposed a penalty only on the OMVWI charge. *See* WIS. STAT. § 346.63(1).

police choice to draw blood instead of obtaining a breath sample is unreasonable because the blood test is more "intrusive."[3]

¶6 As Saich concedes in his reply brief, we have recently considered, and rejected, precisely the arguments he makes in this appeal. *See* ***State v. Thorstad***, 2000 WI App 199, No. 99-1765-CR, *review denied*, (Wis. Oct. 17, 2000).[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 Saich 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

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[3] Saich 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."

[4] The State moved to stay the proceedings in this appeal pending the release of this court's opinion in ***State v. Thorstad***. The State asserted in its motion that "both ***State v. Thorstad*** … and this appeal raise the identical issue." Further, the State informed us that "a decision in ***Thorstad*** will likely resolve any issue in 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).

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 Saich's motions 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.