COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1997

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

IN THE MATTER OF
THE REFUSAL OF DEBRA J. FINDLAY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBRA J. FINDLAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Debra Findlay appeals an order revoking her motor vehicle operating privilege based on her refusal to submit to an implied consent blood alcohol test. She claims the circuit court erred in denying her motion to dismiss the refusal proceedings. Because the issues Findlay raises in this appeal were decided in the State's favor in ***State v. Thorstad***, 2000 WI App 199, __Wis. 2d__, 618 N.W.2d 240, *review denied*, 2000 WI 121 (Wis. Oct. 17, 2000), we affirm the order.

BACKGROUND

¶2 Findlay was arrested for operating a motor vehicle while under the influence of an intoxicant (OMVWI). She refused to submit to a test to determine her blood alcohol content, in violation of Wisconsin's informed consent law. *See* WIS. STAT. § 343.305(2).

¶3 Findlay timely filed a request for a refusal hearing and moved to dismiss the proceeding. She argued, in part, that the taking of a blood sample would have violated the Fourth Amendment, and, consequently, that she should not be punished for refusing to submit to the test.[2] The circuit court denied her motion, and, based on the officer's testimony, ordered her operating privilege revoked. Findlay appeals the revocation order.

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[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.

[2] Findlay also argued that the officer lacked probable cause to arrest her. The circuit court concluded otherwise, and Findlay does not pursue the issue on appeal.

ANALYSIS

¶4 The basic 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 circuit 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 Findlay argues that "blood testing cannot be a police reflex." She claims that the holding in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 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. She 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 Findlay, a police choice to draw blood instead of obtaining a breath sample is unreasonable because the blood test is more "intrusive."[3]

¶6 As Findlay concedes in correspondence to this court, we have recently considered, and rejected, precisely the arguments she makes in this appeal. *See* ***State v. Thorstad***, 2000 WI App 199, __Wis. 2d__, 618 N.W.2d 240,

[3] Findlay summarizes her 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."

review denied, 2000 WI 121 (Wis. Oct. 17, 2000). 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.[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 Findlay 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). Findlay 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 Findlay's argument.

¶8 Contrary to Findlay's contentions, the State 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 199 at ¶6 (citing ***Bohling***, 173 Wis. 2d at 539-40). The United States Supreme Court rejected in ***Richards*** the "overgeneralization" that, when executing a search

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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).

warrant in a felony drug investigation, a police officer never needs to knock due to concerns for safety and preservation of evidence. *See* ***Richards***, 520 U.S. at 387-88, 393. In contrast, the present case involves an undisputed fact, recognized by the United States Supreme Court, that alcohol rapidly dissipates from the bloodstream. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966). Findlay has pointed to no circumstances under which alcohol in the bloodstream does not behave in that fashion, and we are aware of none. In sum, exigent circumstances existed, justifying a warrantless search. Accordingly, Findlay is properly subject to punishment for refusing to submit to the blood test.

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.