

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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. 01-0310-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN A. COSTELLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.¹ Shaun A. Costello appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Costello argues that the trial court erred in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

denying his motion to suppress the results of a blood test taken without a warrant. Costello argues that the blood test was unreasonable because he had submitted to a preliminary breath test and was willing to submit to a second breath test. Costello additionally argues that the blood sample was taken in violation of the Fourth Amendment to the United States Constitution because there were no exigent circumstances. We reject Costello's arguments. We affirm the trial court's order and the judgment of conviction.

FACTS

¶2 On February 4, 2000, the State filed a complaint against Costello alleging that he operated a motor vehicle while intoxicated, third offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2), and operated a motor vehicle with a prohibited alcohol concentration (PAC) contrary to §§ 346.63(1)(b), 346.65(2) and 340.01(46m). Costello responded with a motion to suppress the result of the blood alcohol test on the grounds that the blood sample was seized from his person in violation of his constitutional rights.² The court held a hearing on Costello's motion on April 24, 2000.

¶3 The events leading to Costello's arrest are not in dispute. At the motion hearing, Officer Shawn Reif of the City of Whitewater Police Department testified that on January 7, 2000, he stopped the vehicle Costello was operating for a traffic violation. While questioning Costello, Reif noticed indicators of possible intoxication. After administering field sobriety tests, Reif asked Costello to

² Costello additionally argued that the blood sample was taken following an illegal traffic stop. He does not renew his challenge to the legality of the traffic stop on appeal.

submit to a preliminary breath test. Costello agreed. The test result was .206%. Reif then arrested Costello for operating a motor vehicle while intoxicated.

¶4 Reif testified that after he placed Costello under arrest, he transported Costello to the police department. While en route, Reif informed Costello that because this was his third offense, he would be subject to a mandatory blood draw. Reif testified that City of Whitewater Police Department policy is to conduct blood tests as the primary test for intoxication when it is a suspect's second or subsequent OWI offense. According to Reif, Costello then became argumentative and told him that a person could not be forced to submit to a blood draw in the United States.

¶5 Upon arrival at the police department, Reif read Costello the Informing the Accused form and transported Costello to the Fort Atkinson Hospital. Costello refused to submit to an evidentiary test of his blood or any other test, stating that he had already submitted to a breath test prior to his arrest. Costello became physically resistive at the hospital and Reif and his accompanying officer contacted the Fort Atkinson Police Department for back-up assistance with the blood draw. According to Reif's testimony, Costello did not express any fear of needles and Costello did not offer to take another kind of test. Costello testified to the contrary. According to Costello, he indicated a fear of needles and offered to take a second breath test.

¶6 Costello finally permitted the nurse to take a blood sample and he was transported back to the City of Whitewater Police Department. The sample was later submitted for testing, the results of which indicated a blood alcohol concentration of .206%.

¶7 At the close of the suppression hearing, Costello argued that the blood test results should be suppressed because the police did not grant his request to submit to an alternative test. The State contended that the officers were permitted to indicate the primary test pursuant to WIS. STAT. § 343.305(2). The trial court agreed and additionally found that Costello had not made a reasonable objection to the blood draw. Costello appeals the trial court's ruling denying his motion to suppress and from the subsequent judgment of conviction for OWI.

DISCUSSION

¶8 On appeal, Costello argues that the City of Whitewater Police Department's policy mandating a blood draw for second and subsequent OWI violations is unreasonable in his case because he had already submitted to a preliminary breath test and was willing to submit to a second breath test. He additionally argues that the blood draw was unreasonable because it was taken absent exigent circumstances and was not the most "expedient and efficient" test available.³ Essentially, Costello argues that the search was unreasonable because he was willing to submit to a less intrusive breath test, which was not offered to him by the officers.⁴ Whether a search satisfied the reasonableness standard of the

³ Costello bases this argument on Reif's testimony that an operable Intoximeter machine was available at the City of Whitewater Police Department which, if he had been offered a breath test, would have made it unnecessary to take him to the hospital in Fort Atkinson.

⁴ The trial court did not make a finding to resolve the conflicting testimony as to whether Costello requested a breath test. Instead, the trial court noted the conflict in testimony and found that whether Costello requested a breath test "[didn't] really matter" because the officer has the authority to obtain an involuntary blood sample regardless. The State now asks this court to resolve the conflict in testimony on appeal. We decline to do so as the effect would be to usurp the function of the trial court. See *Barrera v. State*, 99 Wis. 2d 269, 282, 298 N.W.2d 647 (1980). Further, given our holding in this case, the trial court's observation was correct. Our holding would be the same regardless of the trial court's finding on this issue, had it made one.

Fourth Amendment presents a question of law that we review de novo. *See State v. Wodenjak*, 2001 WI App 216, ¶5, No. 00-3419-CR.

¶9 Our recent holding in *Wodenjak* controls the issue on appeal. *Wodenjak* argued, as does Costello, that there was no exigency justifying a blood test because the less invasive breath test procedure was available to the police and because a breath test result has the same evidentiary value as a blood test result. *Id.* at ¶11. We rejected *Wodenjak*'s argument. We held that the dissipation of alcohol from a person's blood constitutes an exigent circumstance justifying a warrantless blood draw subject to the conditions set forth in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). *Wodenjak*, 2001 WI App 216 at ¶12.

¶10 In *Bohling*, our supreme court held that a warrantless blood sample taken at the direction of a law enforcement officer is permissible if the following conditions are met:

- (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.

Bohling, 173 Wis. 2d at 534 (footnote omitted).

¶11 With respect to the *Bohling* conditions, *Wodenjak* contended that his willingness to take the available breath test rendered the method used to take blood unreasonable under the third condition and also constituted a reasonable objection under the fourth condition. *Wodenjak*, 2001 WI App 216 at ¶11.

¶12 In addressing Wodenjak's argument that the third and fourth conditions of *Bohling* had not been met, we stated:

[B]oth the United States Supreme Court and the Wisconsin Supreme Court have put their constitutional stamp of approval on the warrantless taking of a blood draw subject to certain conditions and controls. Those conditions and controls do not require the police to consider alternate tests. Therefore, Wodenjak's request for the less invasive breath test and the availability of such a test did not deprive [the officer] of his authority to obtain a blood sample from Wodenjak under *Bohling*.

Wodenjak, 2001 WI App 216 at ¶13.

¶13 For the reasons set forth in *Wodenjak*, Costello's challenges to the blood draw, and to the officer's failure to offer him a breath test, similarly fail. While Costello does not contend that the blood test did not meet the conditions of *Bohling*, he argues that the test was unreasonable because the police department's policy does not permit officers to make a reasonable decision to offer a more convenient and expedient breath test. However, the law is clear: once there are exigent circumstances justifying a warrantless search, the officer has the authority to designate the primary test. See *State v. Stary*, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). This is so whether the officer designates the primary test at the direction of department policy or, in the absence of such policy, at his or her own discretion.⁵

⁵ With respect to blood, urine or breath testing, WIS. STAT. § 343.305(2) provides in relevant part, "Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency ... may designate which of the tests shall be administered first."

CONCLUSION

¶14 We conclude that the trial court properly exercised its discretion in denying Costello's motion to suppress the results of his blood test. We therefore uphold the trial court's ruling and the judgment of conviction.

By the Court.—Judgment affirmed.

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

