

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2003

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.

Appeal No. 02-2567-CR

Cir. Ct. No. 99-CT-138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN L. RUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Bryan Rupp appeals the circuit court order denying his motion to suppress evidence obtained from a blood draw and his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). Additionally, all further references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

subsequent judgment of conviction for operating a motor vehicle while intoxicated (OMVWI), contrary to WIS. STAT. § 346.63(1)(a), second offense. Because we conclude that there is nothing in the arguments presented on appeal that bears on the circuit court's judgment of conviction for a violation of § 346.63(1)(a), we affirm the judgment of the circuit court.

BACKGROUND

¶2 On August 20, 1999, at approximately 6:24 p.m., officer Daniel Bandi of the Green County Sheriff's Department observed a vehicle traveling at extremely slow speed down a hill. Bandi then observed the vehicle cross the center line and move back into its lane of traffic in a fast and jerky motion. Bandi followed the vehicle for a short distance and watched as it continued to swerve in its lane of traffic, at one point coming within two to three feet of striking a parked vehicle. Bandi activated his emergency lights and siren, stopped the vehicle and approached Rupp. Bandi immediately smelled a very strong odor of intoxicants coming from inside the car. He asked Rupp for his driver's license and noticed that Rupp struggled to remove his wallet from his back pocket. Bandi also noticed that Rupp's speech was extremely slurred and that his eyes were glassy and bloodshot. Bandi asked Rupp to exit the vehicle and perform field sobriety tests, Rupp agreed.

¶3 Bandi first conducted the horizontal gaze nystagmus test. Next, Bandi instructed Rupp to complete the walk and turn test; Rupp lost his balance, side stepped and missed each of the nine heel-to-toe steps by at least eight inches. Bandi then instructed Rupp to complete the one leg stand test. Rupp attempted to raise his foot off the ground but immediately lost his balance and informed Bandi that he was unable to perform the test because of a mosquito bite. Bandi agreed to

“try something else.” Bandi then instructed Rupp to perform the count down test; Bandi observed Rupp sway in a circular motion as he counted down from 37 to 16. Finally, Bandi instructed Rupp to complete the Romberg balance test. Based on Rupp’s poor performance on the sobriety tests, Bandi arrested him for OMVWI. Bandi read Rupp the Informing the Accused form, as required by WIS. STAT. § 343.305(4), and asked him to submit a sample of his blood for testing. Rupp refused. Blood was drawn from Rupp,² which produced a blood alcohol level of .297, a prohibited alcohol concentration (PAC) for a driver of a motor vehicle under Wisconsin law, pursuant to WIS. STAT. § 346.63(1)(b).

¶4 Rupp moved to suppress the results of the blood test. The court denied his motion, and he pled no contest to OMVWI based on a stipulation of facts.³

DISCUSSION

Standard of Review.

¶5 The facts relevant to Rupp’s conviction were stipulated. Therefore, whether those facts and the legal arguments presented on appeal require reversal is a question of law that we review *de novo*. See *Monroe County v. Kruse*, 76 Wis. 2d 126, 128, 250 N.W.2d 375, 376 (1977).

² Although Rupp refused to submit to a voluntary blood test, an officer may acknowledge the refusal, issue the “Notice of Intent to Revoke Operating Privileges” form as provided by WIS. STAT. § 343.305(9)(a) and then proceed with an involuntary blood test, provided the conditions specified in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) are satisfied. *State v. Marshall*, 2002 WI App 73, ¶12, 251 Wis. 2d 408, 642 N.W.2d 571, review denied, 2002 WI 109, 254 Wis. 2d 262, 648 N.W.2d 477. Rupp does not challenge the blood draw on the grounds that the *Bohling* requirements were not met.

³ Those same facts are the facts used in this appeal.

Conviction.

¶6 Rupp appeals his judgment of conviction for OMVWI, a violation of WIS. STAT. § 346.63(1)(a).⁴ Rupp alleges that the conviction is invalid because the blood draw and the subsequent chemical analysis of his blood violated his Fourth Amendment protections against unreasonable searches and seizures. Rupp argues that his blood was seized without a warrant and that the threatened sanction of a loss of driving privileges for refusing to submit to a chemical test for intoxication invalidates his consent to the blood analysis for Fourth Amendment purposes. Stated differently, Rupp challenges the constitutionality of Wisconsin's implied consent law, WIS. STAT. § 343.305(2), and thereby, his conviction.

¶7 In order to sustain its burden of proof for the OMVWI conviction, the prosecution was required to establish that (1) Rupp was operating a vehicle on the highway and (2) Rupp was under the influence of intoxicants. *Kruse*, 76 Wis. 2d at 131, 250 N.W.2d at 377. The supreme court has recognized that a driver may have a PAC according to the terms of WIS. STAT. § 346.63(1)(b), but not be under the influence of an intoxicant. *State v. Bohacheff*, 114 Wis. 2d 402, 415-16, 338 N.W.2d 466, 473 (1983). Therefore, a finding of guilt for driving with a PAC is not tantamount to a finding of guilt for OMVWI. *See id.*

¶8 On appeal for his conviction of OMVWI, Rupp does not argue that he would not have been convicted of OMVWI if the suppression motion relating to the blood test had been granted, nor does he argue that the evidence contained within the stipulation of facts used by the circuit court is insufficient to support his

⁴ While Rupp was charged with violations of both WIS. STAT. §§ 346.63(1)(a) and 346.63(1)(b), he was convicted of violating only § 346.63(1)(a).

conviction of OMVWI, without the results of the blood test. Therefore, the arguments that Rupp presents in this appeal could not result in a reversal of his judgment of conviction for OMVWI, even if we were to accept his views as accurate statements of the law, which we do not.

¶9 Accordingly, although the State argues that Rupp's conviction should be affirmed under the holdings in *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, 123 S. Ct. 704 (Dec. 16, 2002) and *State v. Wintlend*, 2002 WI App 314, ___ Wis. 2d ___, 655 N.W.2d 745, *review denied*, 2003 WI 16, 657 N.W.2d 708 (Jan. 14, 2003) (No. 02-0965-CR), because we conclude that there is nothing in the arguments presented in this appeal that bears on the circuit court's judgment of conviction for Rupp's violation of WIS. STAT. § 346.63(1)(a), we do not analyze the applicability of *Krajewski*, *Wintlend*, or any other case relating to the Fourth Amendment issues raised by Rupp. Instead, we affirm the judgment of the circuit court without further discussion.

By the Court.—Judgment and order affirmed.

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

