COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0543-CR **Cir. Ct. No. 03CT001082**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

WESLEY MICHAEL LUND,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Reversed and cause remanded with directions*.

¶1 DEININGER, P.J.[1] The State appeals an order prohibiting it from introducing a blood test result into evidence in its prosecution of Wesley Lund for

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

operating a motor vehicle while under the influence of an intoxicant (OMVWI). The trial court suppressed the evidence after concluding that (1) the State failed to comply with the procedures set forth in the implied consent statute, WIS. STAT. § 343.305; (2) Lund did not voluntarily consent to a blood test; and (3) there were no exigent circumstances justifying a warrantless blood draw. We conclude that, although the State did not comply with the implied consent statute, the blood test evidence was constitutionally obtained. Thus, although the State forfeited the right to have the test result automatically admitted into evidence, it is nonetheless admissible on a proper showing of its relevance and probative value. Accordingly we reverse the appealed order and remand for further proceedings.

BACKGROUND

¶2 A Rock County sheriff's deputy arrested Lund after observing him driving his vehicle erratically on the wrong side of the road. The deputy pulled him over and observed that his eyes were bloodshot and his speech slurred. When asked if he had been drinking, Lund replied that he had consumed "six to seven beers." The deputy administered field sobriety tests, on which Lund performed poorly. The deputy then arrested Lund for OMVWI and took him to the Edgerton Police Department for a breath test.

¶3 The deputy issued Lund a citation for OMVWI, second offense, and read him the Informing the Accused form, which told Lund, among other things, that his drivers license would be revoked if he refused to take a requested test. Lund agreed to take a breath test and one was administered. The results were invalid, however, due to residual alcohol in Lund's mouth. The deputy then took Lund to the Rock County Sheriff's Department, where he again read Lund the Informing the Accused form and asked him if he would submit to an evidentiary

chemical test of his blood. Lund agreed. The duty nurse at the Rock County jail, a licensed practical nurse (LPN), drew a sample of Lund's blood that was subsequently tested, revealing a blood-alcohol level of .222 g/100 mL.

¶4 The State charged Lund with OMVWI, second offense, and the companion charge of operating a motor vehicle with a prohibited alcohol concentration (PAC). Lund moved to suppress the blood test results on the grounds that the person who administered the blood test was not authorized to do so under the implied consent law, WIS. STAT. § 343.305(5)(b). He also challenged it on Fourth Amendment grounds, asserting that exigent circumstances did not exist and the sample was not obtained in a reasonable manner. The trial court accepted Lund's arguments and ordered the test result suppressed. Specifically, the court concluded the State had not complied with § 343.305(5)(b), Lund had not voluntarily consented to the blood test, and the State had not established that exigent circumstances existed or that the blood draw had been done in a reasonable manner. The State appeals. *See* WIS. STAT. § 974.05(1)(d)2. (providing that the State may appeal an order suppressing evidence).

ANALYSIS

¶5 Whether the procedures employed in obtaining a blood sample from someone suspected of OMVWI meet the requirements of the implied consent law involves the application of a statute to the facts of record and, thus, presents a question of law that we decide de novo. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). By the same token, whether the blood evidence was obtained in violation of the Fourth Amendment is a question of constitutional law that we decide independently of the trial court. *See* ***State v. Thorstad***, 2000 WI App 199, ¶4, 238 Wis. 2d 666, 618 N.W.2d 240. To the extent that either of

these questions involve factual findings made by the trial court, we must accept those findings unless they are clearly erroneous. ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶4, 256 Wis. 2d 1032, 650 N.W.2d 891.[2]

¶6 We agree with the trial court that the blood test in this case did not meet the requirements of the implied consent law. WISCONSIN STAT. § 343.305(5)(b) provides as follows:

> Blood may be withdrawn from the person arrested for violation of s. 346.63 (1) … to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician*.

Id. (Emphasis added.) LPNs are plainly not included in the list of medically trained personnel qualified to draw blood under the statute unless they are "acting under the direction of a physician." We agree with Lund that, even if we accept the State's construction that "direction" does not require that a doctor be on premises at the time blood is drawn, the evidence regarding whether the LPN on duty at the jail was "under the direction of a physician" when she drew Lund's blood is equivocal at best.[3] We cannot conclude on this record, therefore, that the

[2] Lund argues that the trial court's "finding" that the blood sample was taken in an unreasonable manner is one of fact that we must review under the clearly erroneous standard. It is not. Whether a search or seizure challenged on Fourth Amendment grounds was reasonable is a question of constitutional law that we review de novo. ***State v. Thorstad***, 2000 WI App 199, ¶4, 238 Wis. 2d 666, 618 N.W.2d 240.

[3] There is no dispute that no physician was at the jail on the night in question. The LPN was asked on cross-examination, "So you weren't acting under the direction of a physician that night?" She replied, "No, sir." On redirect, the LPN said that her "company has been instructed by the doctor who is on staff, that it's okay for you to draw blood."

trial court erred in determining that the State had not shown that Lund's blood sample was drawn by a person authorized under the implied consent law to do so.

¶7 Although we agree with Lund that the State failed to satisfy the requirements of the implied consent law, our conclusion does not preclude the admission of the blood test result at trial. *See* ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987) ("[N]oncompliance with the procedures set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible ….") The State's failure to comply with WIS. STAT. § 343.305(5)(b) precludes it from having the test result automatically admitted under § 343.305(5)(d),[4] and, had Lund refused to submit to the test, the State could not have revoked his drivers license or introduced the fact of his refusal at trial. *See* ***Zielke*****,** 137 Wis. 2d at 53-54. The State has not, however, forfeited the right to use the blood test evidence at trial, after establishing its relevance and probative value. The admissibility at trial of Lund's blood test result turns on whether it was "constitutionally obtained." ***Id***. at 52.

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[4] WISCONSIN STAT. § 343.305(5)(d) provides, in part, as follows:

> At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or having a prohibited alcohol concentration … *the results of a test administered in accordance with this section are admissible* on the issue of whether the person was under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or any issue relating to the person's alcohol concentration….

(Emphasis added.)

¶8 Accordingly, we next address whether the blood draw in this case violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Because the blood sample was obtained without a warrant, the State bears the burden of establishing that the sample was obtained by way of a recognized exception to the Fourth Amendment's warrant requirement. *See* ***State v. Bohling***, 173 Wis. 2d 529, 536-37, 494 N.W.2d 399 (1993). The State asserts that the present record supports two such exceptions, "consent of the driver" and "exigent circumstances supported by probable cause to arrest." *See* ***Zielke***, 137 Wis. 2d at 52.

¶9 The State contends that, because the trial court found that Lund had "agreed to go do the blood test," we should conclude that he consented to the blood draw for Fourth Amendment purposes. Lund argues, however, that Lund's consent was not voluntary, but coerced, because the deputy read him the Informing the Accused form a second time, a document which threatened Lund that his driver's license would be revoked if he refused to submit to the blood test.

¶10 We concluded in ***Walitalo*** that reading the Informing the Accused form does not constitute "actual coercion or improper police conduct" because it simply informs a defendant of the truth—that driving privileges will be revoked if the defendant refuses to submit to a chemical test that is requested and conducted under WIS. STAT. § 343.305. ***Walitalo***, 256 Wis. 2d at 1038-39. Lund asserts that our holding in ***Walitalo*** is not applicable on the present facts because of the State's failure to comply with the requirements of § 343.305(5) for obtaining the blood sample. Because of the noncompliance with the statute, the threatened license revocation for refusing the test was, in Lund's view, not a truthful statement. In essence, Lund argues that his consent was to the taking of a blood sample in

accordance with § 343.305, and he did *not* voluntarily consent to give a blood sample taken in any way other than that prescribed by statute.

¶11 Because we conclude that the State has established the second warrant exception it relies on, exigent circumstances with probable cause to arrest, we do not address whether a court's subsequent conclusion that a blood test was not obtained in accordance with WIS. STAT. § 343.305 renders a consent to a test, given after being read the Informing the Accused form, involuntary for constitutional purposes. We will assume, without deciding, that Lund's consent was invalid and thus the blood draw cannot be deemed a reasonable seizure on the basis of consent.

¶12 The Wisconsin Supreme Court, relying on the conclusion of the United States Supreme Court in ***Schmerber v. California***, 384 U.S. 757 (1966), has determined that the rapid dissipation of alcohol from the blood stream constitutes exigent circumstances, thus permitting blood to be drawn without a warrant under certain circumstances. ***Bohling***, 173 Wis. 2d at 539-40. The court has identified four requirements that must be met to permit a warrantless blood draw under the exigent circumstances exception:

> (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.

Id. at 534 (footnote omitted).

¶13 Lund does not dispute that the first and second ***Bohling*** requirements are met on this record. We agree that the record plainly establishes

that Lund was arrested on probable cause for OMVWI and that the deputy's purpose in obtaining the blood sample was to obtain evidence that Lund was intoxicated. Moreover, it would seem that the existence of probable cause for an OMVWI arrest also satisfies the requirement for "a clear indication that the blood draw will produce evidence of intoxication," so long as the test is performed within a reasonable time after the arrest. *See* ***Thorstad***, 238 Wis. 2d at 674 (noting that "clear indication" is equivalent to "reasonable suspicion," which is "less than probable cause"). Here, the record indicates that the blood sample was drawn at 12:47 a.m., barely an hour after the deputy had stopped and arrested Lund.

¶14 We also conclude that the fourth ***Bohling*** requirement is met on the present record, and Lund does not contend otherwise. Even though he argues that his consent to give a blood sample was not "voluntary" for Fourth Amendment purposes, Lund does not claim to have presented "a reasonable objection" to the blood draw. Moreover, as we have noted, the trial court found that Lund "agreed" to submit to the blood test, a finding that essentially negates any claim that Lund presented a reasonable objection to having a blood sample taken.

¶15 Thus, the dispositive issue in this case is whether the blood sample was taken from Lund using a reasonable method performed in a reasonable manner. ***Bohling,*** 173 Wis. 2d at 534. We have previously explained that there is a spectrum of reasonableness, extending from a blood draw in a medical setting by a medical professional, "which is generally reasonable," to one performed in a non-medical setting by a non-medical professional, "which would raise 'serious questions' of reasonableness." ***State v. Daggett***, 2002 WI App 32, ¶15, 250 Wis. 2d 112, 640 N.W.2d 546 (citation omitted). We noted in ***Daggett*** that the blood sample in that case, taken by a medical professional (a physician) in a non-medical setting (a jail booking room), fell between the endpoints of the spectrum.

We had little difficulty in concluding, however, that in the absence of evidence of "an unjustified element of personal risk of infection and pain," or of evidence that drawing a blood sample in the jail booking room posed a danger to the defendant's health, the method and manner were both reasonable. ***Id***., ¶¶14-18.

¶16 There is little difference between the ***Daggett*** facts and those now before us, save for the substitution of an LPN for a physician as the sample taker. We conclude that difference is of no consequence. An LPN is plainly a "medical professional." *See, e.g.*, WIS. STAT. § 441.10. The nurse testified that she had obtained her degree to become a licensed practical nurse by attending a technical college in Iowa for eighteen months, that she underwent an additional four months of training to obtain a certification to do blood draws and that she performs about "14 to 15" blood draws a month for the sheriff's department. Lund argues, however, that because we noted in ***Daggett***, 250 Wis. 2d 112, ¶16, that physicians are among those authorized under the implied consent law to perform blood draws, a blood sample must be taken by a person authorized under WIS. STAT. § 343.305(5)(b) in order to satisfy the reasonable method and manner requirement under ***Bohling***. We disagree.

¶17 Although we cited the inclusion of physicians in WIS. STAT. § 343.305(5)(b) as evidence of the reasonableness of the blood draw in ***Daggett***, we did not say, or even imply, that only samples taken by persons authorized under § 343.305(5)(b) can meet the constitutional standard. To the contrary, ***Bohling*** says no such thing, and we accepted in ***Daggett*** the State's argument that ***Bohling*** established no "bright line" rules for determining the reasonableness of a given blood draw. *See* ***Daggett***, 250 Wis. 2d 112, ¶11. Rather, the reasonableness of the method and manner of drawing blood, like other Fourth Amendment reasonableness inquiries, must be determined by considering all of the relevant

facts and circumstances. *See* ***Schmerber***, 384 U.S. at 772.[5] The present record presents no basis on which we could conclude that the taking of Lund's blood sample by an LPN instead of by a physician rendered the method or manner of the blood draw unreasonable.

¶18 Lund also challenges the reasonableness of the location of the blood draw in this case, noting that the nurse testified only that she believed it was done in her office at the jail, but she was not altogether sure of that fact. Regardless of whether the sample was drawn in the nurse's office or in some other room within the jail, we conclude that it was not unreasonable because of its location absent evidence that the location of the draw "presented [a] danger to [Lund]'s health." ***Daggett***, 250 Wis. 2d 112, ¶18. There is no such evidence in the present record. The nurse testified that she followed all applicable "sterile" and "antiseptic" procedures and that the method and procedure she employed was no different than if she had taken the sample in a hospital.

¶19 Thus, as we did in ***Daggett*** with respect to a sample drawn by a physician in a jail booking room, we conclude that the blood sample taken in this

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[5] The Court said this in ***Schmerber***:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber v. California, 384 U.S. 757, 772 (1966).

case by an LPN in a room at the jail satisfies the ***Bohling*** requirement that the method and manner of drawing a blood sample be reasonable. The licensed practical nurse who drew Lund's blood was a medical professional who was trained and experienced in drawing blood. Nothing in the record refutes her testimony that she took the proper steps in drawing a blood sample from Lund in a way that minimized any risk of infection or disease, and nothing in the record indicates that the blood draw in this case was dangerous or posed a health risk to Lund.

¶20 Finally, we briefly address Lund's claim that, even if all four of the ***Bohling*** criteria are met, no "exigent circumstances" were present in this case. This is so, according to Lund, because the deputy could have simply waited twenty minutes and administered a second breath test, or requested a urine test, either of which alternatives would have produced evidence of Lund's intoxication in less time than was consumed in transporting him to the jail and obtaining a blood sample from him. We reject this argument because the availability of alternative methods for obtaining evidence of intoxication does not eliminate the exigency created by the dissipation of alcohol from the bloodstream.

¶21 The supreme court explained in ***State v. Krajewski***, 2002 WI 97, ¶32, 255 Wis. 2d 98, 648 N.W.2d 385, that the "rapid dissipation of alcohol in the blood stream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for drunk driving." Moreover, "[t]he exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken." ***Id***., ¶40. Neither the availability of alternative tests nor the accused's willingness to submit to them alters this conclusion. *See* ***id***., ¶¶36-45. The four ***Bohling*** requirements

are thus both necessary and sufficient to render a warrantless blood draw constitutional under the exigent circumstances exception. *See* ***id***., ¶¶32-33, 44-45.

¶22 We therefore conclude that evidence of the result of the blood test performed on the blood drawn from Lund is admissible at a trial of the OMVWI and PAC charges pending against him.

CONCLUSION

¶23 For the reasons discussed above, we reverse the appealed order and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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