COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2010

A. John Voelker
Acting 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. 2010AP1084-CR **Cir. Ct. No. 2008CM1388**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. MALINOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Travis Malinowski appeals a judgment convicting him of operating a motor vehicle while under the influence of a controlled substance (OWI), second offense. Malinowski argues the State violated the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Fourth Amendment by drawing his blood without a warrant. He contends that, while ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), permits police to draw blood without a warrant from a person arrested for driving under the influence of alcohol, a warrant is required when police suspect the arrestee is under the influence of drugs.

¶2 We conclude, as a matter of first impression, that exigent circumstances permit a warrantless blood draw from a person arrested for operating while under the influence of a controlled substance. We therefore affirm.

BACKGROUND

¶3 At 11:36 p.m. on May 17, 2008, officer Leah Long of the Everest Metro Police Department observed a vehicle stopped at a green light, forcing traffic to maneuver around it. The vehicle eventually proceeded through the green light, traveling about ten miles per hour below the posted speed limit. After Long observed the vehicle weaving in and out of its lane, she initiated a traffic stop.

¶4 Long identified Malinowski as the driver of the vehicle. Malinowski appeared lethargic and confused. Long asked Malinowski for his driver's license about six times before he successfully complied with her request. She asked Malinowski where he was coming from, and he responded that he "didn't know." When she asked him where he lived, "he didn't know for several seconds, and then it [came] to him."

¶5 Long asked Malinowski to exit the vehicle, but he stumbled when he stood up, and Long had to prevent him from falling over. Long then administered three field sobriety tests, none of which Malinowski was able to complete

successfully. Malinowski had "extreme difficulty" understanding and following Long's instructions. Based on Malinowski's failure to complete the field sobriety tests, Long administered a preliminary breath test for alcohol, which registered zero.

¶6 Because the preliminary breath test was negative, Long suspected Malinowski was under the influence of drugs or was suffering from a medical condition. Long placed Malinowski under arrest and transported him to a hospital to test his blood for controlled substances. After Malinowski refused to consent to a blood test, Long ordered his blood drawn anyway.

¶7 Malinowski moved to suppress the blood test results, arguing that the warrantless blood draw violated the Fourth Amendment. Malinowski contended Long should have obtained a warrant before drawing his blood. The State argued exigent circumstances permitted the warrantless blood draw because "drugs in the blood will over time pass through [the body]." The circuit court denied Malinowski's suppression motion, finding that exigent circumstances justified taking his blood without a warrant. Malinowski pled no contest and now appeals.

DISCUSSION

¶8 "[W]hether a search comports with the Fourth Amendment is a question of constitutional fact." ***State v. Carroll***, 2010 WI 8, ¶17, 322 Wis. 2d 299, 778 N.W.2d 1. We uphold the circuit court's findings of fact unless clearly erroneous, but we independently determine the application of constitutional principles to those facts. ***Id.***

¶9 Both the Fourth Amendment to the United States Constitution and article I, sec. 11, of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Generally, a search by law enforcement should be conducted pursuant to a search warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. Warrantless searches are deemed unreasonable per se unless they fall within one of "a few specifically established and well-delineated exceptions." ***Id.*** (quoting ***Coolidge v. New Hampshire***, 403 U.S. 443, 455 (1971)).

¶10 One exception occurs when a warrantless search is conducted based on "exigent circumstances." ***Bohling***, 173 Wis. 2d at 537. "A well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant." ***Id.*** at 537-38. Our supreme court has held that "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw." ***Id.*** at 533. Consequently, exigent circumstances permit police to obtain blood without a warrant and without consent when: (1) the blood 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 reasonable and is performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to the blood draw. ***Id.*** at 533-34.

¶11 If Long had suspected that Malinowski was under the influence of alcohol, ***Bohling*** clearly would have permitted her to order a warrantless blood

draw.[2] However, Malinowski argues this case is different from ***Bohling*** because Long knew Malinowski was not under the influence of alcohol and instead suspected he was under the influence of a controlled substance. Malinowski contends that, while alcohol in the blood begins to diminish shortly after drinking stops, the same is not true of drugs. Thus, he argues exigent circumstances are not present in a case where drugs, rather than alcohol, form the basis for an OWI arrest. The circuit court in this case declined to distinguish between drugs and alcohol, stating:

> [A]lthough there are some drugs that dissipate longer than alcohol, there are also some that will dissipate in a relatively short period of time. And without the blood test, you don't even know what type of drug it is, if it is a drug, and you don't know whether or not it's going to dissipate in a short period of time or longer.
>
> And I think there [were] indeed exigent circumstances present which required the prompt taking of the blood to determine if he was consuming some sort of drug, or drug analog, and what it was, and the closer, of course, that is to the time of driving may be important as to the quantity of the drugs in him at the time that he was driving.

¶12 To date, no Wisconsin case has considered whether exigent circumstances permit a warrantless blood draw when police suspect that an impaired driver is under the influence of drugs rather than alcohol. Because this is an issue of first impression, we may consider persuasive authority from other jurisdictions. *See* ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶67, 237 Wis. 2d 19, 614 N.W.2d 443.

[2] Malinowski stipulated that Long had probable cause to arrest him for operating while under the influence. Malinowski does not argue that the method used to take his blood was unreasonable or that it was performed in an unreasonable manner, nor does he argue that he presented a reasonable objection to the blood draw. *See* ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶13 A majority of jurisdictions that have addressed this issue make no distinction between the dissipation of alcohol and drugs from the blood stream. *See, e.g.*, ***United States v. Edmo***, 140 F.3d 1289, 1292 (9th Cir. 1998); ***People v. Ritchie***, 181 Cal. Rptr. 773, 774-775 (Cal. Ct. App. 1982); ***State v. Strong***, 493 N.W.2d 834, 837 (Iowa 1992); ***Holloman v. State***, 820 So. 2d 52, 55 (Miss. Ct. App. 2002); ***State v. Steimel***, 921 A.2d 378, 385 (N.H. 2007); ***State v. Hanson***, 588 N.W.2d 885, 892-93 (S.D. 1999); ***State v. Baldwin***, 37 P.3d 1220, 1224-25 (Wash. Ct. App. 2001); *see also* ***Skinner v. Railway Labor Execs.' Ass'n***, 489 U.S. 602, 623 (1989) ("Although the metabolites of some drugs remain in the urine for longer periods of time … the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."). *But see* ***State v. Jones***, 895 P.2d 643, 644 (Nev. 1995); ***Rawlings v. Police Dep't of Jersey City***, 627 A.2d 602, 612 (N.J. 1993) (no exigent circumstances because cocaine can be detected in urine for two to five days).

¶14 We agree with the majority of jurisdictions that it is not necessary to distinguish between alcohol and drugs for purposes of the exigent circumstances exception. We find the California Court of Appeal's reasoning in ***Ritchie*** particularly persuasive. In that case, the defendant was suspected of driving while under the influence of drugs. ***Ritchie***, 181 Cal. Rptr. at 774. The defendant requested a breath test, but the arresting officer knew that a breath test would not indicate the presence of any drugs in the defendant's system. ***Id.*** The defendant refused to consent to a blood test, but the officer nevertheless ordered a warrantless blood draw to test for controlled substances. ***Id.*** The trial court granted the defendant's motion to suppress the test results, holding there were no exigent circumstances because there was no evidence that the particular drug in the defendant's blood would dissipate quickly. ***Id.***

¶15 The court of appeal reversed, holding that exigent circumstances were present because "drugs in the blood stream, like alcohol, dissipate." ***Id.*** at 775. The court reasoned:

> The municipal court apparently felt that a distinction exists between the ingestion of alcohol and the ingestion of drugs. We detect no appreciable difference. It is a matter of common knowledge that from the moment of ingestion the body begins to eliminate drugs from the system. While the rate of dissipation may depend on many factors, one, of course, being the type of drug involved, nevertheless, the amount of drug in the blood stream does diminish with the passage of time.

Id. at 774. The court stated that distinguishing between alcohol and drugs for purposes of the exigent circumstances exception is a "needless refinement and distinction." ***Id.*** at 775.

¶16 We agree with the ***Ritchie*** court's analysis. Like alcohol, the amount of drugs present in the blood stream begins to dissipate following consumption. Thus, the mere passage of time operates to destroy evidence of the defendant's intoxication. For this reason, exigent circumstances justified the warrantless draw of Malinowski's blood.

¶17 Malinowski argues that even if drugs dissipate from the blood over time, and even if some drugs dissipate rapidly, there were no exigent circumstances in this case because Long had no way of knowing how quickly the particular drugs in Malinowski's blood would dissipate. However, we again agree with the ***Ritchie*** court that there is "no basis for a requirement that law enforcement officials ascertain the nature of the drug ingested in order to determine just how fast it will dissipate." ***Id.*** "Although some drugs may be detectable for long enough that police can obtain a warrant, police officers cannot know with certainty which drugs are affecting [a] suspect[]" until a blood test is

performed. ***Steimel***, 921 A.2d at 385. Because police cannot know which drugs an arrestee has taken without first testing the arrestee's blood,[3] accepting Malinowski's argument would mean that police could almost never obtain a blood draw of a suspected drug-influenced driver without first obtaining a warrant.

¶18 Here, Long suspected Malinowski was under the influence of a controlled substance, but she did not know which controlled substance he had taken. Consequently, she could not ascertain how quickly that substance would dissipate from Malinowski's blood stream without first obtaining a blood sample. Contrary to Malinowski's contention, Long's ignorance of which drugs Malinowski had taken actually contributed to the exigency that justified ordering a warrantless blood draw.

By the Court.—Judgment affirmed.

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

[3] Even if a suspect admits ingesting a particular drug, the information the suspect gives police may not be correct. *See, e.g.*, ***United States v. Edmo***, 140 F.3d 1289, 1291 (9th Cir. 1998) (defendant told officers he consumed methamphetamine and cocaine but a urine test revealed only the presence of marijuana).