COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1581 **Cir. Ct. No. 2013TR15163**

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

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

ALPESH SHAH

DEFENDANT-APPELLANT

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

¶1 BRASH, J.[1] Alpesh Shah appeals a judgment convicting him of operating a motor vehicle with a restricted controlled substance in his blood, contrary to WIS. STAT. § 346.63(1)(am). Shah argues that because there were no

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

exigent circumstances, the warrantless blood draw was unlawful. We disagree and affirm.

BACKGROUND

¶2 On December 2, 2012, at approximately 8:30 a.m., Milwaukee County Sheriff's Deputy Christopher Leranth was on patrol on the interstate in a marked squad car. A second marked squad car was in the vicinity of Leranth with its emergency lights on. Leranth observed a vehicle pass him at an elevated rate of speed. Shah was driving the vehicle. Leranth determined that Shah was traveling at approximately eighty-four miles per hour. The posted speed limit on that portion of the interstate was fifty miles per hour. Leranth also observed Shah straddle two lanes of traffic for a period of time.

¶3 Leranth activated his emergency lights and initiated a traffic stop. When Leranth made contact with the vehicle, Shah, the sole occupant of the vehicle, rolled his window down three to four inches. Leranth immediately smelled a strong odor of burnt marijuana. Leranth asked Shah to roll the window down further and when Shah complied, the odor of burnt marijuana became more prominent. Shah's eyes were red, glassy, and bloodshot. Based on these observations, Leranth suspected that Shah had been smoking marijuana.

¶4 Leranth had Shah exit the vehicle. Leranth then searched the vehicle. During his search of the vehicle, Leranth recovered a glass pipe partially filled with what he believed to be freshly-burnt marijuana, and a glass jar that contained suspected fresh marijuana from the center console. Leranth testified that the smell of marijuana coming from the car was overwhelming.

¶5 Milwaukee County Sheriff's Deputy James Jarvis responded to assist Leranth in the administration of field sobriety tests. Shah admitted to Jarvis that he had consumed four to five drinks at approximately 1:00 a.m. Shah also admitted to smoking marijuana a couple of days before, but denied smoking it that morning.

¶6 Jarvis attempted to administer field sobriety tests to Shah. Shah completed the horizontal gaze nystagmus test, declined two other field tests for medical reasons, but did recite part of the alphabet as requested. At the conclusion of the field sobriety tests, Shah was placed under arrest. Based on the fact that Shah passed two marked squad cars at a high rate of speed, his lane deviation, the strong odor of marijuana coming from the vehicle, and Shah's bloodshot eyes, Leranth believed Shah was under the influence of marijuana while operating a motor vehicle.

¶7 Leranth transported Shah to Froedtert Hospital for a blood draw under the implied consent law. At the hospital, Shah refused to submit to the blood draw. Following Shah's refusal, Leranth had medical personnel perform a non-consensual, warrantless blood draw, which occurred at 10:30 a.m. The results of the blood draw showed that Shah had 2.5 ng/mL of Delta-9-THC in his blood. Based on these results, Shah was issued a citation for operating a motor vehicle with a restricted controlled substance in his blood, contrary to Wis. Stat. § 346.63(1)(am).[2]

[2] Shah was also cited for other violations. The only issue on appeal, however, is Shah's operating a motor vehicle with a restricted controlled substance in his blood. As such, we do not discuss these other citations.

¶8 Shah filed a motion to suppress the blood test results. In his motion, Shah made the following arguments: (1) under ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013), exigent circumstances did not exist, per se; (2) while the dissipation of alcohol from the blood might lead to an exigent circumstance, there was no similar concern regarding THC; and (3) ample time existed for the deputy to procure a warrant for Shah's blood.

¶9 A hearing was held on Shah's suppression motion on January 29, 2015. At the hearing, Leranth testified that, although he was aware of no circumstances that would have prevented him from getting a warrant for the blood draw, he did not do so because there was no warrant requirement at the time of Shah's arrest on December 2, 2012. When asked why he requested a warrantless blood draw, Leranth testified that he believed Shah was under the influence of marijuana. Leranth further stated:

> A: Because I felt he was under the influence or had marijuana in his system while he was driving.
>
> Q: Okay. There's no evidence of marijuana in his system over time?
>
> A: It dissipates. You're still going to find it. But it dissipates, the level dissipates.

The circuit court denied Shah's motion to suppress.

¶10 A court trial was held on June 30 and July 1, 2015. After hearing from the witnesses and the arguments of counsel, the circuit court found Shah guilty of operating a motor vehicle with a restricted controlled substance in his blood. This appeal follows.

DISCUSSION

¶11 Shah argues that the warrantless blood draw was unlawful because no exigency existed.[3] We disagree.

¶12 A motion to suppress presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***id.*** Where the circuit court does not make specific findings, we review the record independently. *See* ***Turner v. State***, 76 Wis. 2d 1, 18-19, 250 N.W.2d 706 (1977). We review the circuit court's application of constitutional principles *de novo*. *See* ***Casarez***, 314 Wis. 2d 661, ¶9.

¶13 The Fourth Amendment of the United States Constitution provides for "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures." U.S. CONST. amend. IV. Article I, § 11 of the Wisconsin Constitution also prohibits "unreasonable searches and seizures." *See* WIS. CONST. art. I, § 11. "'[W]arrantless searches are per se unreasonable unless they

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[3] In his brief, Shah presents two issues as follows:

> I. Whether a police officer can claim "exigent circumstances" to justify a forcible blood draw from a driver the officer is investigating for a civil charge, when the only evidence there is probable cause to believe may be found is the mere *presence* of THC, which the officer believes the driver has very recently ingested, when the officer knows, and the prosecution concedes, that THC will remain in the bloodstream for a prolonged period of time.
>
> II. Whether it was objectively reasonable to apply the *per se* exigency rationale of ***State v. Bohling***, which was a case involving alcohol and an offense where the precise measurement of alcohol was critical, to circumstances involving THC, where only its mere presence mattered. (Some formatting changed).

Because we believe these issues to be substantially similar, we address them holistically.

fall within a well-recognized exception to the warrant requirement."' ***State v. Parisi***, 2016 WI 10, ¶28, 367 Wis. 2d 1, 875 N.W.2d 619 (citation omitted; bracket in original).

¶14 One well-recognized exception to the warrant requirement is the doctrine of exigent circumstances. *See* ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621. "This exception 'applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.'" *See* ***Parisi***, 367 Wis. 2d 1, ¶29 (citation omitted). To determine if exigent circumstances justified a search, we must determine "whether the police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would … risk the destruction of evidence." *See* ***State v. Robinson***, 2010 WI 80, ¶30, 327 Wis. 2d 302, 786 N.W.2d 463. This is an objective test. *See* ***id.***

¶15 The good faith exception precludes the application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court. *See* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (involving the search of a vehicle incident to arrest, prior to the Supreme Court's decision in ***Arizona v. Gant***, 556 U.S. 332 (2009)). Until the United States Supreme Court's decision in ***McNeely***, in Wisconsin, forced blood draws—blood taken without consent and without a warrant—were governed by ***State v. Bohling***, 173 Wis. 2d 529, 844 N.W.2d 396 (1993). *See* ***State v. Reese***, 2014 WI App 27, ¶17, 353 Wis. 2d 266, 844 N.W.2d 396.

¶16 In ***Bohling***, the supreme court held that officers were permitted to obtain blood without a warrant and without consent when:

> (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.

See ***id.***, 173 Wis. 2d at 533-34.[4] Noting that ***Bohling*** specifically stated that the dissipation of alcohol from a person's system constitutes an exigent circumstance, the County argues that the dissipation of a controlled substance creates the same exigency. We agree.

¶17 Parties agree that, like alcohol, a controlled substance will be eliminated from a person's blood in time. While the elimination period may differ from that of alcohol, and while some controlled substances may be detectible in a person's blood long enough for a warrant to be obtained, there is no way for an officer to know whether that time exists when making an arrest for operating while under the influence of a controlled substance. Furthermore, an officer cannot be certain when the drug was consumed, and cannot be expected to know dissipation rates for every controlled substance.

¶18 Here, Shah admitted to smoking marijuana within the past couple of days, but denied smoking it the morning of the traffic stop. When Leranth first

[4] Shah 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).

made contact with Shah, however, he immediately smelled a strong odor of burnt marijuana. During his search of the vehicle, Leranth recovered a glass pipe partially filled with marijuana; the glass pipe did not appear to be warm as if it had recently been used. Furthermore, Shah's eyes were red, glassy, and bloodshot. Therefore, while Shah's admission makes it clear that he consumed marijuana sometime within the past couple of days, there was no way for Leranth to be certain when Shah actually consumed marijuana, increasing the need for a timely chemical blood test.

¶19 We have previously held in an unpublished decision that exigent circumstances permit a warrantless blood draw from a person arrested for operating while under the influence of a controlled substance. *See* ***State v. Malinowski***, No. 2010AP1084-CR, unpublished slip op. (WI App Nov. 30, 2010). Shah, however, argues that because he was charged with, and ultimately convicted of, operating a motor vehicle with a restricted controlled substance in his blood, dissipation is irrelevant because the law requires only the presence—not any particular amount—of the restricted controlled substance.[5] We find, however, that the record supports the conclusion that Leranth and Jarvis suspected Shah was operating a motor vehicle while under the influence of marijuana.

¶20 Leranth testified that he "felt [Shah] was possibly under the influence of marijuana while operating the motor vehicle." Asked specifically about the charge for which Shah was arrested, Leranth testified:

[5] In making this argument, Shah appears to concede that a forced blood draw would be permitted under ***Bohling*** when the arresting officer suspects the driver of being under the influence of a restricted controlled substance, as we previously held in ***State v. Malinowski***, No. 2010AP1084-CR, unpublished slip op. (WI App Nov. 30, 2010).

> Q: Okay. But you had arrested Alpesh Shah for operating a motor vehicle while under the influence of THC, correct?
>
> A: Correct.

Furthermore, Jarvis testified that Shah was arrested for impaired driving. Jarvis testified that, following the field sobriety tests "Mr. Shah was handcuffed and detained and put in the rear of Deputy Leranth's car for … a blood draw for determining … impaired driving while under the influence of marijuana." Jarvis further testified:

> Q: So based on what you said was the drinking earlier, the lack of ability to follow orders, the driving, the fact that you guys found the marijuana pipe with marijuana in it, suspected marijuana, and the driving that you placed him under arrest for that impaired driving?
>
> A: That's correct.

¶21 While Shah is correct that the level of a restricted controlled substance is generally irrelevant to the charge of operating a motor vehicle with a restricted controlled substance in the blood, the level could be relevant to a charge of operating a motor vehicle while under the influence of a controlled substance, where the County would need to prove impairment. That the County did not ultimately proceed on an operating a motor vehicle while under the influence of a controlled substance charge is irrelevant. The question here is whether, at the time of Shah's seizure, there was a reasonable belief that "a delay in procuring a warrant would … risk the destruction of evidence"—that is, the dissipation of marijuana in Shah's blood. *See* ***Robinson***, 327 Wis. 2d 302, ¶30. Accordingly, based on our review of the record, we conclude that under ***Bohling***—the law at the time Shah was stopped by Leranth—exigent circumstances permitted a warrantless, non-consensual blood draw from a person arrested for operating a motor vehicle while under the influence of a controlled substance.

¶22 Nevertheless, even if ***Bohling*** does not permit warrantless, non-consensual blood draws where drugs alone are implicated, we would still affirm.

¶23 Shah informed Jarvis that he had consumed four to five drinks, ending at approximately 1:00 a.m. That admission, combined with Shah's driving at a high rate of speed, passing two marked squad cars, and his glassy and bloodshot eyes is sufficient to warrant a reasonable officer to believe that Shah was under the influence of alcohol.

¶24 Shah argues that this case was never an operating under the influence of alcohol case. This argument is misleading and misguided. Shah was in fact charged with operating with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b) in Milwaukee County Circuit Court Case No. 2013TR15164. While this charge was ultimately dismissed, it does not negate the fact that Leranth and Jarvis suspected Shah to be under the influence of alcohol at the time of his arrest.

¶25 The record demonstrates that Leranth and Jarvis did suspect both marijuana and alcohol-related impairment. Testifying about the decision to arrest Shah, Jarvis stated:

> The decision [to arrest Shah] was based on representations that he had indicated that he had drank up until 1:00 that morning with four to five drinks, his inability to follow orders, the inability to ascertain through the standardized field sobriety tests that he possibly could not be following orders, and the strong odor of marijuana, as well as the contents found in the vehicle, in conjunction with the report from Deputy Leranth that he personally observed him pass the fully-marked squad car at a high rate of speed.

¶26 Moreover, that Shah reported last consuming alcohol some seven-and-a-half hours before the stop made the need to draw blood without delay even more urgent.

¶27 For all the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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