COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3610-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID A. KRIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

DYKMAN, P.J.[1] David A. Krier appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a third offense, in violation of § 346.63(1)(b), STATS. Krier contends that the original trial judge correctly granted his motion to suppress the results of his blood tests,

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

and a successor judge was not empowered to reverse that order. Krier also contends that the successor judge erroneously relied upon an exigent circumstances theory not supported by the record. Because the evidence was sufficient to find exigent circumstances, and because a successor judge may reverse the legal decisions of a predecessor, we affirm the circuit court's decision.

On December 21, 1996, David A. Krier was in a one-vehicle accident requiring his hospitalization. Deputy Olson of the Crawford County Sheriff's Department went to the hospital and spoke with a Boscobel police officer, who identified Krier as the driver of the vehicle. Deputy Olson approached Krier, who was receiving medical attention, and noticed a strong odor of intoxicants. He checked Krier's driving record and found that Krier had been convicted of OWI twice in the previous ten years: on February 21, 1989, and April 24, 1991.

Deputy Olson was under the mistaken impression that five years was the cut-off point for counting the number of prior convictions. He told Krier that he should take the blood test because this would be considered his first offense. When Krier refused to consent to a blood test, Olson said that it would be to his advantage to take the test, because a refusal might result in Krier losing his driver's license for up to a year, while he probably would not lose his license for that length of time upon conviction of a first offense. Finally, Krier agreed to take the test. He testified that he did so because Deputy Olson claimed that this would be a first offense and Olson had given him a citation for a first-offense violation.

On June 2, 1997, Judge Kent Houck suppressed the blood test results and entered findings of fact. Judge Houck found that Krier had refused to take the blood test. He determined that Deputy Olson erroneously believed Krier's offense

would be treated as a first offense because the earlier convictions were more than five years old. He found that the deputy wrote the ticket as a first offense and had informed Krier that he would be better off taking the test because, with the test, he would get a lower suspension. Judge Houck also found that the officer's incorrect statement of law was an unintentional misrepresentation.

The State then questioned whether Krier's initial refusals could be introduced at trial. Judge Houck asked for briefs on the issue. The State also submitted a memorandum asking Judge Houck to reconsider his oral ruling suppressing the blood test results. Judge Houck refused to reverse his earlier decision. He ruled that the State could introduce evidence of the refusal, and he barred the defense from introducing evidence of Krier's eventual consent.

Judge Houck then retired, and Judge Leineweber became the presiding Judge in the case. The State filed a motion in limine requesting that the State be permitted to use evidence of the refusal in its case and that the defendant not be allowed to rebut with evidence of the consent or the test. Although Judge Houck had already decided the issue, Judge Leineweber asked the parties to file supplemental briefs addressing the admissibility of the blood test results.

Judge Leineweber concluded that Judge Houck's original suppression order was incorrect and that he, as successor judge, had the authority to vacate that order. He ruled the evidence taken at the suppression hearing before Judge Houck, "provided an ample basis for admissibility of the defendant's blood test results pursuant to the exigent circumstances exception to the warrant requirement." Because of this decision, Krier stipulated to dispositive facts, and the court found him guilty of OWI as a third offense. Judge Leineweber sentenced Krier to 120 days in the county jail and a fine.

On appeal, Krier contends that Judge Leineweber lacked the authority to modify the pretrial order entered by Judge Houck since the order was based on testimony elicited before Judge Houck. Second, Krier asserts that Judge Leineweber erroneously reversed his predecessor's order and relied on a theory of exigent circumstances not supported by the record. Both of these issues are questions of law and therefore subject to de novo review. *See* ***State v. Williams***, 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 604-05 (1981) (de novo review in situations where the facts are undisputed).

The supreme court has held that a successor judge is not entirely bound by the decisions of a predecessor. *See* ***Starke v. Village of Pewaukee***, 85 Wis.2d 272, 270 N.W.2d 219 (1978). In ***Starke***, the court stated that "a successor judge may in the exercise of due care modify or reverse decisions, judgments or rulings of his predecessor if this does not require a weighing of testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications." ***Id.*** at 283, 270 N.W.2d at 224. The underlying rationale for this rule is that "the power to modify a judicial ruling resides in the court and not in the person of the individual judge, who is merely the personification of the powers of the court." ***Id.***

Krier claims that Judge Leineweber made factual findings and weighed the testimony provided to Judge Houck, violating the rule established in ***Starke***. However, he fails to identify the testimony Judge Leineweber weighed or what additional factual findings he made. Krier only makes a conclusory statement that Judge Leineweber "found that the testimony at the evidentiary hearing supported a warrantless seizure of David Krier's blood under the exigent circumstances exception to the warrant requirement." This statement fails to

identify the testimony Judge Leineweber weighed, and does not demonstrate how Judge Leineweber's decision violated the rule set forth in ***Starke***.

We disagree with Krier's conclusion that Judge Leineweber weighed the testimony presented before Judge Houck. Judge Leineweber merely concluded that Judge Houck did not consider the exigent circumstance exception to the Fourth Amendment. Judge Leineweber acquiesced in Judge Houck's decision that Krier did not consent to the blood test. Judge Leineweber noted that "[t]he original judge's finding that the defendant's consent was involuntary is not being reversed or modified in any way; it stands as originally made. The other factual findings made by Judge Houck are also being left untouched." Judge Leineweber did not alter Judge Houck's finding that there was no consent. Instead, he explained that Krier's blood test was admissible because the facts, as determined by Judge Houck, demonstrated exigent circumstances.

Finally, Judge Leineweber's decision was a constitutional finding of fact, which is a question of law subject to de novo review. *See* ***State v. Arroyo***, 166 Wis.2d 74, 79, 479 N.W.2d 549, 551 (Ct. App. 1991). If appellate courts may review constitutional findings of fact de novo, successor judges should also be permitted to do so because of the important constitutional questions present in our legal system. We conclude that Judge Leineweber had the authority to correct an erroneous conclusion of law—that Krier's blood test results should be suppressed.

Krier also contends that Judge Leineweber erred in finding exigent circumstances for the blood tests. The Wisconsin Supreme Court and the United States Supreme Court have acknowledged that there may be exigent circumstances permitting a blood test for a person suspected of OWI. In ***State v. Bohling***, 173 Wis.2d 529, 533, 494 N.W.2d 399, 400 (1993), the Wisconsin Supreme Court

stated "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw." In ***Bohling*****,** the court permitted law enforcement officers to take warrantless blood samples in the "following circumstances:

> (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. The United States Supreme Court has also allowed the use of a blood test incident to arrest to determine a suspect's blood alcohol content under an exigent circumstances theory. *See* ***Schmerber v. California***, 384 U.S. 757, 771 (1966).

Krier argues that the arresting officer did not rely on a theory of exigent circumstances when he requested the blood test, and therefore the exigent circumstance exception to the Fourth Amendment does not apply. He argues "[t]here was no evidence that the officer who seized the evidence had knowledge that the evidentiary value would be lost with time, and acted for that reason."

Exigent circumstances are determined based on an objective test. *See* ***State v. Smith***, 131 Wis.2d 220, 230, 388 N.W.2d 601, 606 (1986). The test is "[w]hether a police officer under the circumstances … reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence." ***Id.*** Using an objective test, Deputy Olson's actual belief at the time of the arrest is irrelevant. The question is whether a reasonable police officer would believe that the evidence would be destroyed if he or she waited to get a warrant. Judge Leineweber did not need to rely on the testimony of Deputy Olson or

discover if Deputy Olson believed there to be exigent circumstances. Instead, Judge Leineweber determined that a reasonable police officer would believe the evidence would be lost if the officer waited to get a warrant.

It is common knowledge that the body burns alcohol, and courts have recognized this fact. The ***Schmerber*** court acknowledged this when it explained "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." ***Schmerber***, 384 U.S. at 770 (cited with approval in ***Bohling***, 173 Wis.2d at 539, 494 N.W.2d at 402). The reasoning used in ***Schmerber*** to find exigent circumstances is equally applicable to the facts of this case. "Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." ***Id.*** at 770-71. We conclude that the facts demonstrate exigent circumstances.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.