**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

August 9, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2286**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BARRY R. DREWS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 ANDERSON, J. Barry R. Drews asserts that his aversion to needles obliged the arresting officer to offer a breath test rather than a blood test to determine his blood alcohol concentration. The implied consent law unequivocally allows the arresting agency to designate which test shall be

administered first and unquestionably operates to dispel any notion that the driver may choose which test he or she will take. Therefore, we affirm.

¶2 A Sheboygan county sheriff's deputy stopped Drews for suspected drunk driving. After Drews failed field sobriety tests, he was issued a citation for his second offense operating while intoxicated in violation of WIS. STAT. § 346.63(1)(a) (1997-98).[1] The arresting officer placed Drews in the rear of his squad car and drove to Sheboygan Memorial Medical Center to have a blood sample taken. At the hospital, Drews refused to submit to a blood test, and the arresting officer served Drews with a "Notice of Intent to Revoke Operating Privilege." Drews filed a timely request for a refusal hearing.

¶3 The trial court found Drews's refusal to be unreasonable.

> I think in general, if not specific, statements, Mr. Drews did indicate that he had an aversion to needles and, based upon that, preferred to have the breath test as the primary test. I'm also satisfied that the statute does not allow him to make a choice. I do not believe in light of all the circumstances presented, the mere statement in some fashion he had an aversion to needles is sufficient to make the Department's actions in requesting a blood draw to be unreasonable which would further invalidate his actions.

¶4 Drews appeals. He insists that the arresting officer's persistence in demanding that he submit to a blood draw was violative of the Fourth Amendment because he had agreed to submit to a readily available breath test. Relying upon ***Schmerber v. California***, 384 U.S. 757 (1966), and ***Zielke v. State***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), Drews suggests that "reasonable requests by

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

defendants for alternate chemical tests should be honored" or there could be a constitutional violation.

¶5 Whether a refusal to take a chemical test to determine blood alcohol concentration in a driver's body is reasonable is a question of law which we review de novo. *See* ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). Additionally, the interpretation of WIS. STAT. § 343.305 and its application to undisputed facts present questions of law that we review de novo. *See* ***State v. Schirmang***, 210 Wis. 2d 324, 329, 565 N.W.2d 225 (Ct. App. 1997). In conducting this de novo review, we will accept the historical facts found by the trial court unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶6 Sheboygan County Sheriff's Deputy Tom Antonie was the only witness at the refusal hearing. Antonie placed Drews under arrest after he failed several field sobriety tests and took him to Sheboygan Memorial Medical Center for a blood draw. The deputy testified that the blood test was his department's primary test and the urine test was the alternate test because of "problems with the Intoxilyzer." According to Antonie, en route to the hospital Drews made mention that he did not like needles and would rather take the breath test. The deputy read the "Informing the Accused" form to Drews in the hospital parking lot and escorted him into the hospital. Before the lab technician arrived to take a blood sample, the deputy completed the necessary paperwork and gave copies to Drews. As Drews was reading the "Informing the Accused" form, he stated he believed he had the choice to take whatever test he wanted.

¶7 Antonie explained the form to Drews. After reading the form for several more minutes, Drews said, "I don't, I don't believe I should have to take a blood test. I should be allowed to take a different test if I want." The deputy

asked him a third time what he wanted to do, and Drews replied, "I don't want this blood test. I'm out of here." Drews again refused the blood test after Antonie read him the "Informing the Accused" form a second time. Antonie then took Drews to the jail where he issued him a "Notice of Intent to Revoke Operating Privilege" because of his repeated refusal to submit to a blood test.

¶8 Drews contends that the deputy's request that he submit to a blood test was violative of the Fourth Amendment because he agreed to submit to a readily available breath test. He argues that the deputy's request was unreasonable because the breath test was readily available, the breath test carries the same evidentiary weight as a blood test, and the breath test is less intrusive than a blood test. Drews argues that ***Schmerber***, ***Winston v. Lee***, 470 U.S. 753 (1985), and ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), command the conclusion that because blood tests are inherently more intrusive than breath tests, when a defendant agrees to submit to a breath test, the State's need for a blood test disappears.

¶9 Drews begins his analysis with ***Schmerber***. He claims that ***Schmerber*** does not answer the question of whether the government can take blood when other less intrusive tests are available. He finds support for this claim in this passage:

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused…. We need not decide whether such wishes would have to be respected.

***Schmerber***, 384 U.S. at 771. He finds further support in the closing passages of ***Schmerber***:

> 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.

***Id.*** at 772.[2]

¶10 Drews moves on to ***Winston*** and focuses on that case's interpretation of ***Schmerber***. He maintains that ***Winston*** clarifies that a court must consider three factors in determining the "reasonableness" of a blood test: First, it must consider the extent to which the procedure may threaten the safety or health of an individual; second, it must evaluate the extent of intrusion upon the individual's dignity; and, third, it must weigh the first two individual interests against the community's interest in fairly and accurately determining guilt or innocence. He insists that only the third factor is in dispute in this case, and the trial court erred in not considering the availability of other less intrusive means of obtaining the same evidence.

¶11 Drews's final building block in his analysis is ***Nelson***. ***Nelson*** was a proposed class action alleging 42 U.S.C. § 1983 (1994) violations. The class representatives alleged that "following their arrests for driving under the influence of alcohol they were coerced into submitting to blood tests in order to determine their blood alcohol level, and deprived of the statutorily mandated option to take a breath or urine test instead." ***Nelson***, 143 F.3d at 1199. The Ninth Circuit

[2] Here, Drews makes no claim nor presents any evidence that he is "one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing" whose wishes the ***Schmerber*** Court declined to address. ***Schmerber v. California***, 384 U.S. 757, 771 (1966). In fact, Drews is contending that any reasonable request for an alternate chemical test must be honored even where the defendant does not base the request on "grounds of fear, concern for health, or religious scruple." Therefore, we also decline to address wishes for an alternate test premised on those grounds and limit our discussion to situations where the defendant does not give a reason for requesting an alternate test.

reversed the district court's dismissal of the action on the pleadings. Relying on ***Schmerber*** and ***Winston***, the Ninth Circuit concluded that when a drunk driving arrestee agrees to undergo a breath or urine test, it is unreasonable for the State to insist on a blood test and the Fourth Amendment is violated. *See* ***Nelson***, 143 F.3d at 1207.

¶12 Drews's analysis is flawed by a basic misunderstanding of ***Schmerber***, ***Winston*** and ***Nelson*** and by failing to include ***South Dakota v. Neville,*** 459 U.S. 553 (1983), in his analysis. In ***Schmerber***, Schmerber was hospitalized as a result of his involvement in a single-vehicle injury accident. *See* ***Schmerber***, 384 U.S. at 758. The investigating officer noticed signs that Schmerber had been drinking and after Schmerber refused, upon the advice of counsel, to submit to either a breathalyzer test or blood test, the officer directed the treating physician to draw a blood sample. *See* ***id.*** at 758-59. The United States Supreme Court affirmed Schmerber's conviction for drunk driving.

¶13 ***Schmerber*** is not an implied consent law case; California did not enact an implied consent law until after Schmerber's arrest. *See* ***Dunn v. Petit***, 388 A.2d 809, 812 n.1 (R.I. 1978). Rather, ***Schmerber*** stands for the proposition that a state can force a person suspected of drunk driving to submit to an extraction of blood for the purpose of conducting a blood alcohol test. *See* ***State v. Owens***, 418 N.W.2d 340, 343 (Iowa 1988). ***Schmerber*** provides an alternative to the implied consent law. ***Schmerber*** permits a state to force a motorist to undergo a chemical test and avoid the right—granted in the implied consent law—of the motorist to refuse to submit to such a test. *See* ***State v. Newton***, 636 P.2d 393, 400 (Ore. 1981). Consequently, ***Schmerber*** provides guidance in those limited situations where police seek to extract blood over the objection of the defendant.

¶14 ***Winston*** is of no help to Drews because it is also limited to state-coerced extraction of evidence. In ***Winston***, a Virginia trial judge granted the motion of the Commonwealth of Virginia to force Winston to submit to surgery for the removal of what was thought to be a bullet which would be evidence of Winston's guilt. *See* ***Winston***, 470 U.S. at 756-57. The Supreme Court, using ***Schmerber*** as a useful framework for cases involving coerced surgical intrusions, held that the state-coerced removal of the bullet would violate Winston's Fourth Amendment rights. *See* ***Winston***, 470 U.S. at 760, 766. Accordingly, ***Winston*** is limited to forcible intrusions under the skin of a defendant, and it is not an implied consent case.

¶15 ***Nelson*** does not support Drews's contention that under Wisconsin's implied consent law the driver's request for the less intrusive breath test makes the deputy's demand for a blood test unreasonable. Procedurally, ***Nelson*** arises from a motion for judgment on the pleadings and all of the allegations in the complaint were taken as true. *See* ***Nelson***, 143 F.3d at 1200. Whether the request that the arrestees submit to blood tests was in fact unreasonable under the Fourth Amendment has not been tested in the adversarial arena. *See* ***id.*** at 1207.[3] A general pronouncement—founded upon untested allegations—that an unproven violation of California's implied consent law might be unreasonable under the Fourth Amendment is of no value in Wisconsin.

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[3] The ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), court additionally stated:

> [T]he "touchstone of the Fourth Amendment is reasonableness," … which "is measured in objective terms by examining the totality of the circumstances." Factual development at trial may affect the ultimate determination whether the plaintiffs' requests for alternative forms of testing, which the police refused to respect, were in fact reasonable under the circumstances.

¶16 Substantively, ***Nelson*** is of no assistance to the interpretation of Wisconsin's implied consent law. WISCONSIN STAT. § 343.305(2) allows a law enforcement agency to designate the primary test the driver must take.[4] By contrast, a law enforcement agency in California is required to advise a driver that he or she can choose between a breath and blood test.[5] Whether denying a California drunk driving arrestee of his or her statutorily guaranteed choice is unreasonable under the Fourth Amendment is of no value in Wisconsin.

¶17 ***Neville*** was not incorporated into Drews's analysis of federal cases; nevertheless, it is instructive. The question in ***Neville*** was whether the admission into evidence of a defendant's refusal to submit to a blood alcohol test offended his or her right against self-incrimination. *See* ***Neville***, 459 U.S. at 554. In answering the question in the negative, the Supreme Court distinguished the situation addressed by ***Schmerber*** from the situation addressed by an implied consent law.

> Schmerber … clearly allows a State to *force* a person suspected of driving while intoxicated *to submit* to a blood-alcohol test. South Dakota, however, has declined to authorize its police officers to *administer* a blood-alcohol test *against the suspect's will*. Rather, *to avoid violent confrontations*, the South Dakota statute permits a suspect to refuse the test, and indeed requires the police officers to inform the suspect of his rights to refuse.

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[4] WISCONSIN STAT. § 343.305(2) provides in part, "The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first."

[5] CALIFORNIA VEH. CODE § 23612(2)(A) (West 2000) provides in part, "If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice." In ***Nelson***, the equivalent language was found in CAL. VEH. CODE § 23157 (West 1997). *See* ***Nelson***, 143 F.3d at 1201.

***Neville***, 459 U.S. at 559-60 (emphasis added).[6] We conclude that the emphasized language in ***Neville*** teaches that the concerns of ***Schmerber*** are limited to situations where law enforcement seeks to physically force a drunk driving arrestee to submit to an extraction of his or her blood for a blood alcohol test.

¶18 Drews concludes his analysis with a reference to ***Zielke***. He asserts that the Wisconsin Supreme Court cautioned that "reasonable requests by defendants for alternate chemical tests should be honored or risk a constitutional violation." Drews finds support for this argument in the following passage from ***Zielke***. He quotes ***Zielke*** as follows:

> We agree with the ***Schmerber*** court that "[t]he integrity of an individual's person is a cherished value of our society…." We caution that the constitutional foundation of warrantless chemical evidence searches could give way if the "police … refused to respect a reasonable request to undergo a different form of testing…."

***Zielke***, 137 Wis. 2d at 54-55 (quoting ***Schmerber***, 384 U.S. at 772, 760 n.4).

¶19 ***Zielke*** cannot be read to support Drews's argument. In ***Zielke***, the court considered the question of "whether the implied consent law sets forth the exclusive method of gathering chemical test evidence thereby requiring suppression upon noncompliance…." ***Id.*** at 44. Zielke was arrested for operating while intoxicated after causing a fatal accident. At the hospital, the arresting

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[6] Wisconsin also requires its police officers to advise a drunk driving arrestee that he or she can refuse to take a blood alcohol test. *See* WIS. STAT. § 343.305(4). Like South Dakota, Wisconsin relies upon incentives in the implied consent law to encourage police to rely upon the implied consent law rather than upon ***Schmerber***. The driver's license will be revoked if the suspect refuses to submit to the test. *See* § 343.305(9)(a). The test results are automatically admissible at trial. *See* § 343.305(5)(d). The test results are prima facie evidence of intoxication. *See* WIS. STAT. §§ 343.305(5)(d), 885.235. The driver's refusal to submit to the test is admissible at trial as consciousness of guilt. *See* ***State v. Bolstad***, 124 Wis. 2d 576, 585, 370 N.W.2d 257 (1985).

officer secured Zielke's consent to a blood test. Upon the advice of an assistant district attorney, the arresting officer did not advise Zielke "about any consequences flowing from refusal to submit to a test, nor did he read from the 'Informing the Accused Form.'" ***Id.*** at 43. The trial court suppressed the test results, reasoning that the implied consent law was the exclusive means to obtain a chemical test of a driver's blood alcohol level. *See* ***id.*** at 44. The supreme court reversed, reasoning that the blood sample was constitutionally obtained and there was nothing in the implied consent law rendering the results inadmissible in a criminal prosecution. *See* ***id.*** at 52. Because ***Zielke*** did not address a defendant's request to take a blood alcohol test other than the one designated by the law enforcement agency, it cannot offer any substantive support for Drews's arguments.

¶20 Further, the passage Drews cites to does not support his contention that "reasonable requests by defendants for alternate chemical tests should be honored or risk a constitutional violation." First, Drews fails to quote correctly the entire passage from ***Zielke***, which provides:

> We agree with the ***Schmerber*** court that "[t]he integrity of an individual's person is a cherished value of our society…. [And permitting minor intrusions] under stringently limited conditions in no way indicates that … substantial intrusions …" are permitted. We caution that the constitutional foundation of warrantless chemical evidence searches could give way if the "police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force."

***Id.*** at 54-55 (quoting ***Schmerber***, 384 U.S. at 772, 760 n.4). Second, when the passage from ***Schmerber*** is read with an understanding of ***Neville***, the only possible conclusion is that "a reasonable request to undergo a different form of

testing" can only arise when law enforcement is on the verge of forcibly extracting a blood sample.

¶21 In summary, regarding Drews's suggestion that refusing to submit to a blood test is reasonable if one offers to take a breath test instead, we conclude that this is not the law in Wisconsin. The law in Wisconsin is found in ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 266 N.W.2d 618 (1978). In ***Bardwell***, the supreme court concluded that it is solely the law enforcement agency's decision about which test to designate as the first of three alternate tests, and the driver does not have the right to refuse the first test offered and select one of the other two. *See* ***id.*** at 896, 901.

*By the Court.*—Order affirmed.

Recommended for publication in the official reports.