COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2474-CR **Cir. Ct. No. 2015CM97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN SCHNELLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Benjamin Schneller appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a), and resisting an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

officer, contrary to WIS. STAT. § 946.41(1). Schneller contends that the results of his blood sample should have been suppressed because the warrant authorized the collection of a blood sample, but did not separately authorize the testing of the sample. Schneller argues that testing of the blood sample was a separate search and that the warrant authorizing the taking of his blood must have also specifically authorized the testing of that blood, or an additional warrant authorizing the testing of his blood must have been obtained. I affirm for the reasons discussed below.

BACKGROUND

¶2 Schneller was charged with OWI and operating with a prohibited blood alcohol concentration, third offense, and resisting an officer. The investigation that led to the charges against Schneller began when a Columbia County Sheriff's Department deputy responded to the scene of a car accident involving Schneller. When the deputy arrived at the scene, he observed Schneller run from the scene of the accident into some nearby woods. The deputy chased after Schneller and took Schneller into custody.

¶3 Another deputy then made contact with Schneller and observed a number of indicators suggesting that Schneller was intoxicated. The deputy requested that Schneller submit to a blood test under the Implied Consent Law. Schneller refused the test. A search warrant was subsequently issued for obtaining a blood draw and Schneller's blood was drawn pursuant to the warrant. Subsequent testing of the blood sample revealed a blood alcohol content of 0.180.

¶4 Schneller filed a motion to suppress the blood test result, and after holding an evidentiary hearing, the court denied the motion. Schneller subsequently plead no contest to OWI, third offense, and resisting an officer.

DISCUSSION

¶5 Schneller contends the blood test result must be suppressed because the search warrant authorized only the drawing of his blood, not the testing of his blood. Schneller argues that under the Fourth Amendment, the warrant, or a separate warrant, must have expressly authorized the testing of his blood.

¶6 In ***State v. Erstad***, No. 2015AP2675, unpublished slip op. (July 28, 2016), this court addressed and rejected substantially the same issue as presented in this case. Although I am not bound by ***Erstad***, I adopt and repeat its reasoning.

¶7 In ***State v. Riedel***, 2003 WI App 18, 259 Wis. 2d 921, 656 N.W.2d 789, this court made clear that once police lawfully obtain a blood sample in the course of a drunk driving investigation, they do not need to obtain further authorization to test the blood for the presence of the alcohol. The ***Riedel*** court explained:

> This court has concluded that [***United States v. Snyder***, 852 2d 471 (9th Cir. 1988)] and [***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)] stand for the proposition that the "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant. Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components." [***State v.*** **]** ***VanLaarhoven***, 2001 WI App 275[,] ¶16[, 248 Wis.2d 881, 637 N.W.2d 411]. We find the reasoning of ***Snyder***, ***Petron***e and ***VanLaarhoven*** persuasive, and we adopt their holdings here. We therefore conclude that the police were not required to obtain a warrant prior to submitting Riedel's blood for analysis.

Riedel, 259 Wis. 2d 921, ¶16. The ***Riedel*** court concluded that the "analysis of Riedel's blood was simply the examination of evidence obtained pursuant to a valid search." ***Id.***, ¶17.

¶8 Schneller argues that ***Riedel*** is not controlling here because that case was decided prior to ***Riley v. California***, __ U.S. ___, 134 S.Ct. 2473, 2494-95 (2014), wherein the United States Supreme Court held that police must obtain a warrant before searching a cell phone obtained incident to an arrest. Schneller argues that this court's conclusion in ***Riedel*** that "examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant" is in direct conflict with the Supreme Court's holding in ***Riley*** that the examination of evidence seized incident to an arrest requires a judicially authorized warrant. *See* ***Riedel***, 259 Wis. 2d 921, ¶16. Schneller argues that following ***Riley***, the taking of blood and the testing of a blood sample are separate events requiring separate legal justifications.

¶9 I am not persuaded. ***Riley*** addressed the narrow issue of whether a warrant is required to search a cell phone that is seized incident to an arrest. ***Riley***, __ U.S. ___, 134 S.Ct. 2473, 2484-85. ***Riley*** did not address the taking or testing of blood, nor did it address whether a separate warrant would be required to search a cell phone if the cell phone was taken not incident to an arrest, but instead pursuant to a warrant. Accordingly, I conclude that ***Riley*** does not directly conflict with ***Riedel***, to which I remain bound. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court … has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). If Schneller seeks to modify or overrule ***Riedel*** in light of ***Riley***, those arguments must be directed at our supreme court. *See* ***id.***

¶10 Schneller also appears to be arguing that ***Riedel*** is distinguishable from the present case in that ***Riedel*** involved blood draws that were justified by the per se exigency exception. I fail to see why that matters. Exigency did not

play a role in the ***Riedel*** court's analysis of what police may do with a blood sample once they have lawfully obtained it.

CONCLUSION

¶11 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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