COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0993-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WADE M. HARSHMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

¶1 HOOVER, P.J. Wade Harshman appeals an order denying his motion to suppress the results of a blood test taken in connection with his arrest for operating a motor vehicle while under the influence of an intoxicant (OWI) in

violation of WIS. STAT. § 346.63(1)(a).[1] Harshman advances four arguments: The arresting officer went beyond the bounds of a proper investigative detention; (2) controlling Wisconsin authority creates an "exigency per se" rule when evidence of blood alcohol content is sought; (3) this court should eschew a per se rule in favor of a case-by-case analysis; (4) the results of the blood test should be suppressed because he gave a reason for not submitting and was willing to take an alternative test. This court concludes that the arresting officer stayed within the proper bounds of an investigative detention and that the blood test was not administered in violation of the Fourth Amendment. The order is therefore affirmed.

FACTS

¶2 The following facts are undisputed. At approximately 1:38 a.m., deputy Robert Hevey clocked Harshman's vehicle at ninety-six miles per hour in a fifty-mile-per-hour zone. Hevey pursued Harshman, eventually catching up to him after Harshman had exited the highway onto North Clairemont Avenue. Hevey observed Harshman's vehicle cross into the right-hand lane and then into the left-hand lane, both times without signaling the lane change. Hevey activated his emergency lights but Harshman, then traveling at approximately five miles per hour over the speed limit, did not respond. Harshman then signaled to make a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

left-hand turn and, when he came to the intersection, he stopped, rolled down his window, stuck his head out, and pointed left toward a parking lot. Harshman entered the lot, "made a very large circle and it took him a while to finally come to a stop."

¶3 As Hevey approached the vehicle, he observed a driver's license sticking out the driver's window, which had been rolled down approximately one inch. Hevey testified that he had encountered such "odd" behavior from a driver during a traffic stop on only one or two occasions during his nearly thirty years in law enforcement. When Hevey requested that Harshman roll down the window, Harshman replied, "I'm not going to do anything that you want me to, I want my lawyer." It was Hevey's experience that people who have been drinking frequently resist opening their windows to prevent the odor of intoxicants from escaping. When Hevey therefore moved closer to determine whether he could detect an odor coming from the vehicle, he noted a strong odor of intoxicants.

¶4 Hevey testified that he asked Harshman approximately twenty-five to fifty times to roll down his window, and approximately twenty-five times to open the door and step out of the vehicle, and each time Harshman refused to comply. Hevey then handed Harshman's driver's license to another officer who had arrived on the scene, who checked Harshman's driving record. That check revealed that Harshman had been arrested for OWI on two prior occasions. When the second officer finished running the check, he too attempted in vain to gain

Harshman's cooperation in opening the window or exiting the vehicle. At that point Hevey opened the driver's side door of Harshman's vehicle.

¶5 Harshman was arrested for OWI. While Harshman was being transported to a hospital for a blood draw, he indicated that he would not allow officers to draw blood. Harshman testified that during the transport, he informed Hevey that he was afraid of needles. Hevey informed Harshman that because this was a third offense, state law mandated a blood test.[2]

¶6 At the hospital, Harshman again refused to submit to a blood sample withdrawal, but offered to take an alternative test. Hevey again informed him that a blood test was required. Shortly thereafter, a medical technician performed a blood draw while officers and hospital security restrained Harshman.

STANDARD OF REVIEW

¶7 The facts are undisputed and, therefore, this court considers de novo whether a search or seizure violated the Fourth Amendment. *See* ***State v. Drogsvold***, 104 Wis. 2d 247, 265, 311 N.W.2d 243 (Ct. App. 1981).

[2] Neither party addresses whether Hevey's understanding of the law was correct. This court therefore does not address what effect the requirement might have on the analysis.

SCOPE OF DETENTION

¶8 Harshman contends that Hevey improperly extended the otherwise constitutional detention both by stepping toward Harshman's vehicle to determine whether he could detect an odor of intoxicants and by opening the door.[3] He reasons that Hevey stopped him for speeding and he so informed Harshman. By the time Hevey stepped closer to the door, he already had Harshman's driver's license and license plate number, all of the information needed to process a speeding citation. He then asserts that Hevey extended "the stop to investigate other activity for which no basis existed at the time." He later reiterates that at the time Hevey moved closer to the door, there were no new facts known to the officer that would give have given him a reasonable and articulable basis to extend the investigative traffic detention that had occurred as a result of the speeding violation.

¶9 In ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), the court held that once a vehicle has been stopped upon an officer's reasonable belief that that the driver is violating a traffic law, the driver may be asked questions reasonably related to the nature of the stop. *See* ***id.*** at 93. Harshman seizes upon the following language in ***Betow***:

> The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an 'articulable suspicion' exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "[t]he stop and inquiry [are] reasonably related in scope to the justification for their initiation." Stated another way, the scope of questions asked during an investigative stop must bear a reasonable relationship to the reasons for which the stop was made in the first place.

Id. at 94 (citation omitted).

¶10 The quotations cited and assertions made in Harshman's brief imply that Hevey's further investigation exceeded the lawful scope of speeding detention because it was not reasonably related to the violation for which Harshman was stopped. This court rejects Harshman's contention.

¶11 Harshman implicitly assumes that once Hevey determined that a particular violation had occurred, he was essentially bound by that determination. This assumption runs contrary to the authority Harshman himself relies upon:

> Once a justifiable stop is made—as is the case here—the scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention—keeping in mind that these factors, like the factors justifying the stop in the first place, must be "particularized" and "objective." If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable

[3] Harshman offers no authority for the proposition that, under the facts of this case, Hevey violated Harshman's constitutional rights by opening the door and extracting him once Hevey reasonably suspected an OWI violation. This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

> suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.

Id. (citation and footnote omitted).

¶12 Further, and significantly in light of the foregoing citation, Harshman's contention rests upon a faulty premise. As indicated, he asserts that there was no basis to investigate "other activity." This misconstrues the evidence. Contrary to Harshman's view that "there were not any new facts known to the officer" at the time Hevey extended the detention to investigate whether Harshman was operating under the influence, Harshman's suspicious behavior,[4] combined with Hevey's experience in interpreting its probable significance, provided additional particularized and objective suspicious factors justifying further inquiry. The strong odor of intoxicants then supplied an explanation for Harshman's conduct, both while driving and during the stop, and a sufficient basis for his

[4] Harshman's unusual behavior includes a "gross traffic violation," his initial failure to respond to the emergency lights, the manner of driving in the parking lot, sticking the driver's license through a small gap in the window, and his failure to otherwise cooperate with Hevey's requests.

arrest.[5] The trial court thus correctly held that Hevey was justified in extending his investigative stop.

BLOOD DRAW

¶13 In Harshman's second argument, he anticipates "[t]he State will likely contend that an exigency always justifies a warrantless blood draw to obtain evidence of intoxication because alcohol dissipates rapidly in the blood stream." Then, without any further reference to or analysis of the holding, he cites ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), and implicitly invites this court to first conclude that ***Bohling*** created "a per se rule that there always was an exigency when evidence of blood alcohol content is sought due to dissipation."[6] Harshman next argues why this court should reject such an interpretation of ***Bohling*** in favor of a case-by-case exigency approach.

[5] Harshman acknowledges that, under ***Betow***, Hevey could ask him questions reasonably related to the nature of the stop. *See* ***State v. Betow***, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). He asserts, however, that because Hevey had not questioned him, there was no "investigative line of questioning which occurred that gave rise to additional suspicions …." Harshman, presumably referring to his refusal to open the window, contends that he was therefore standing on his legal right not to speak face to face with the officer. What may be legal, however, may also under the totality of the circumstances give rise to a reasonable suspicion of wrongdoing." ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996) (officer need not observe an unlawful act to have reasonable suspicion).

[6] Harshman did not articulate this argument before the trial court. Rather, his argument was confined to urging the court to adopt the reasoning in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), discussed below. As a general rule, we will not decide issues that have not first been raised in the trial court. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). However, the State and trial court relied on ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), and this court deems it controlling under the facts of this case. Harshman's argument will therefore be considered.

¶14 While there may be language in ***Bohling*** that could be interpreted to support a per se rule permitting a warrantless seizure of blood for evidentiary use, *see* ***id.*** at 539, that is not necessarily a correct interpretation. In ***Bohling***, our supreme court considered whether, *under certain circumstances*, the fact that the percentage of alcohol in a person's bloodstream rapidly diminishes after drinking stops alone constitutes a sufficient exigency to justify a warrantless blood draw. The circumstances the court identified were that the blood draw is taken at the law enforcement officer's direction from a person lawfully arrested for a drunk-driving-related violation or crime, and there is a clear indication that the blood draw will produce evidence of intoxication.

¶15 ***Bohling*** held

> that under the foregoing circumstances the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw. Consequently, a warrantless blood sample taken at the direction of a law enforcement officer is permissible under 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. at 533-34 (footnote omitted).

¶16 Regardless whether ***Bohling*** established a per se rule regarding warrantless seizure of an OWI suspect's blood, it nonetheless established the

constitutional requirements for such seizures. This court is bound by the decisions of the supreme court. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). Because the circumstances recited in ***Bohling*** are present in this case, it controls and the trial court therefore properly denied Harshman's motion.[7]

¶17 The applicability of ***Bohling*** notwithstanding, Harshman contends that the blood draw violated the Fourth Amendment because he agreed to submit to a readily available breath test.[8] He argues that the blood demand was unreasonable because a breath test was readily available, the breath test carries the same evidentiary weight as a blood test, and the breath test is less intrusive.[9] Harshman also argues that ***Schmerber v. California***, 384 U.S. 757 (1966), and ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), require the conclusion that because blood tests are inherently more intrusive than breath tests, when a

[7] Harshman does not contend otherwise, and therefore a specific analysis need not be undertaken.

[8] Harshman couches his argument under two headings, but this court discerns them in a single contention. To the extent the arguments in Section II of his brief: "The Circuit Court Correctly [sic] Concluded That The Seizure … Was Unreasonable Under The Fourth Amendment," are distinct from his principle contention, this court will not address them. They were not specifically addressed to or by the trial court. *See* note 6.

[9] To the extent the breath test's availability is a necessary component to Harshman's position, it fails on this basis alone. He speculates that a Breathalyzer test "could have been administered at the county jail which is a short distance from the hospital. There would not have been a significant delay between leaving the hospital and having the [B]reathalyzer test administered." As the State notes, however, there is nothing in the record to support these assertions.

defendant agrees to submit to a breath test, the State's need for a blood test disappears.[10] This court rejects his argument.

¶18 ***Schmerber*** allows the State to force a person suspected of OWI to submit to a blood extraction over the suspect's objection.[11] *See* ***South Dakota v. Neville***, 459 U.S. 553, 559 (1983). Harshman suggests this theme in his first "blood draw" argument. He notes that ***Schmerber*** reserved the question whether exigent circumstances exist permitting blood to be taken when other less intrusive tests are available. He then moves to a brief discussion of ***Nelson***, a case involving 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

[10] Before Harshman develops what this court perceives as his principal argument, he first contends that his objection to withdrawing blood was reasonable because it was due to fear of needles "and health concerns." Later in Harshman's brief, he repeatedly refers to his fear of needles "and presumably HIV." At the motion hearing, however, the only reason Harshman gave for refusing the blood test was his fear of needles. Dismayingly, in light of counsel's implication, the record is utterly devoid of evidence that even inferentially supports the assertion that health concerns played a role in Harshman's refusal.

This court need not undertake an independent analysis of whether a refusal to submit to a lawful request to provide a blood sample because of fear of needles is reasonable. Rather, it is apparent that Harshman concedes it is not. This court can surmise no other explanation for his belief that it was necessary to supply an additional, fictional reason for refusing.

[11] The ***Schmerber*** Court indicated that it need not decide whether the preference for a different test must be respected because of the suspect's fear, concern for health, or religious scruples. *See* ***Schmerber v. California***, 384 U.S. 757, 771 (1966). Harshman offers no analysis concerning why the only fear testified to, a fear of needles, is the type of fear the ***Schmerber*** Court envisioned, rather than a minor intrusion into an individual's body that the Court expressly concluded the constitution permitted. This court declines to consider arguments that are undeveloped. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

option to take a breath or urine test instead." ***Id.*** at 1199. The ninth circuit, relying in part on ***Schmerber***, concluded that when an OWI suspect agrees to undergo an alternative blood alcohol content test, it is unreasonable for the State to insist on a blood test and the Fourth Amendment is thus violated. *See* ***id.*** at 1207.

¶19 ***Nelson*** does not control. First, Wisconsin courts are not bound by decisions of the federal courts. *See* ***Thompson v. Village of Hales Corners***, 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983). More importantly, ***Nelson*** does not address the precise issue before this court. A law enforcement agency in California is required to advise a driver that he or she can *choose* between a breath and blood test.[12] By contrast, under WIS. STAT. § 343.305(2), the agency may designate the primary test the driver must take.[13] This court thus concludes that a federal court decision concerning whether it is unreasonable under the Fourth Amendment to deny California OWI suspects their statutorily guaranteed choice is of no precedential value in Wisconsin.

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[12] 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 v. City of Irvine***, 143 F.3d 1196, 1201 (9th Cir. 1998).

[13] 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." *See also* ***In re Bardwell***, 83 Wis. 2d 891, 896, 266 N.W.2d 618 (1978), where the supreme court concluded that it is solely the law enforcement agency's decision 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.

By the Court.—Order affirmed.

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