COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1711-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AARON J. OVERBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: JAMES R. ERICKSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Aaron Overberg appeals a conviction for operating while under the influence of an intoxicant (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Overberg contends that the trial court erred by denying his

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

motion to suppress the results of a blood test when the blood was taken without his consent and after he had refused the test.[2] Overberg asserts that the implied consent statute supplies the exclusive remedy for an OWI suspect's refusal to submit to a chemical test to determine blood alcohol content. Overberg's position is contrary to controlling precedent. The judgment of conviction is therefore affirmed.

BACKGROUND

¶2 Officer Kip Harris arrested Overberg for OWI after observing suspicious operating and indications of intoxication.[3] Before the arrest, Harris learned that Overberg had a previous OWI conviction and therefore the current matter involved a potential crime. Harris read the Informing the Accused form to Overberg in compliance with the implied consent law.[4] Overberg initially agreed to submit to a blood test. At the hospital, however, Overberg indicated that he would not submit to a blood test without first consulting with his attorney. Another officer who was at the hospital advised Overberg that while he would have the right to consult with an attorney, his blood would have to be drawn immediately. Overberg insisted upon first consulting with his attorney, which Harris interpreted as a refusal under the implied consent law.[5] Harris and the other

[2] He also argues that the trial court properly found that the blood was drawn without Overberg's consent. The State did not cross-appeal this finding, and therefore this court need not consider Overberg's argument in this regard.

[3] Further details leading to the arrest are unnecessary. The trial court found that Harris had probable cause to arrest Overberg, who does not challenge this finding on appeal.

[4] *See generally* WIS. STAT. § 343.305 and, specifically, subsec. 343.305(4), recited below.

[5] A defendant who conditions submission to a chemical test upon the ability to confer with an attorney "refuses" to take the test. *See* ***State v. Reitter***, 227 Wis. 2d 213, 237, 595 N.W.2d 646 (1999).

officer restrained Overberg while a nurse drew a blood sample. An analysis of Overberg's blood indicated an alcohol to blood concentration of .159 grams per 100 milliliters.

¶3 Overberg moved to suppress the blood test result. He argued, essentially, that the implied consent law provided the remedy for refusing to submit to a chemical test to determine his blood alcohol content. Because a suspect is asked to consent to a test, Overberg suggested, the law therefore implies a right to refuse rather than to be forcibly subjected to an intrusive search. He opined that the implied consent law was intended to prevent this type of coercive, warrantless search.

¶4 The trial court denied Overberg's motion. It found that Harris had probable cause to arrest Overberg for OWI and that Harris was investigating a criminal matter.[6] It further found that because all of the Intoxilyzers in the county were inoperable, there were exigent circumstances to justify the warrantless blood seizure. Finally, the trial court, addressing Overberg's core contention, held that the implied consent law did not limit the State's authority to obtain evidence in a criminal investigation under the applicable case law.

¶5 On appeal, Overberg repeats his contention that the implied consent law provides the exclusive remedy for a refusal to submit to a chemical test. He

[6] As seen below, this court's decision rests in substantial part upon the supreme court's holding in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). In ***Bohling***, the court stated that "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 …." ***Id.*** at 533-34 (emphasis added). ***Bohling's*** material language is unambiguous: It does not limit law enforcement's authority to obtain nonconsensual implied consent blood samples exclusively in criminal cases.

observes that the implied consent law provides specific consequences upon a refusal that an officer does not have the option to ignore implementing.[7] Moreover, Overberg argues, neither the implied consent law nor any other statute authorizes law enforcement to respond to a refusal by compelling testing.

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[7] WISCONSIN STAT. § 343.305(4) and (9)(a) provide:

> (4) INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."
>
> (9) REFUSALS; NOTICE AND COURT HEARING. (a) If a person refuses to take a test under sub. (3) (a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.

STANDARD OF REVIEW

¶6 This appeal presents a legal question, specifically whether the implied consent law provides the exclusive remedy upon a refusal to submit to evidentiary testing so that law enforcement cannot obtain evidence by other legal means. This court decides the issue de novo. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

DISCUSSION

¶7 The legislature enacted the implied consent law to combat drunk driving. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The law was designed to facilitate the collection of evidence and to secure convictions, not to enhance the rights of alleged drunk drivers. ***Id.*** at 224; ***State v. Crandall***, 133 Wis. 2d 251, 258, 394 N.W.2d 905 (1986). Given the legislature's intentions in passing the statute, courts construe the implied consent law liberally. ***Reitter***, 227 Wis. 2d at 223-25. With these precepts in mind, this court turns to Overberg's contentions.

¶8 Overberg offers several theories in support of his "exclusive remedy" argument. He perceives the implied consent law's purpose as delineating "specific but limited procedures, consequences and penalties that are strongly deterrent of refusals but less likely to provoke physical confrontations between intoxicated arrestees and police than forcibly withdrawing an arrestee's blood." Further, Overberg speculates that the legislature had strong policy reasons for not allowing refusing suspects to be forcibly restrained. As enacted, he argues, the implied consent law provides the immediate, "powerful" response of the virtual certainties that the license will be revoked and the fact-finder at a trial will receive compelling evidence of guilt. As to the latter, Overberg indicates that "[i]n many

cases, evidence of a refusal provides more powerful, and less susceptible to impeachment, inculpatory evidence than blood-alcohol concentration."

¶9 Overberg provides no case, or statutory or historical authority for his contention that the legislature enacted the implied consent law to deter both refusals and physical confrontations. Indeed, Wisconsin courts, as demonstrated above, have spoken to the legislative intent expressed by WIS. STAT. § 343.305. On this record, it is speculative whether the concerns Overberg resourcefully identifies were further legislative considerations. This court does not address speculative arguments. ***State v. Tarantino***, 157 Wis. 2d 199, 217, 458 N.W.2d 582 (Ct. App. 1990).

¶10 The same may be said for the "powerful response-powerful evidence" theory. Indeed, this postulation is contrary to cases holding that the purpose of the implied consent law is to keep the highways safe for the public, which includes obtaining suspects' blood alcohol content in order to obtain evidence to prosecute drunk drivers. *See* ***State v. Busch***, 217 Wis. 2d 429, 445, 576 N.W.2d 904 (1998).

¶11 Overberg also relies on language in ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), which suggests an OWI suspect has a right to refuse a chemical test, albeit subject to consequences.

> Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. Section 343.305(2), STATS. A person may revoke consent, however, by simply refusing to take the test. *See* § 343.305(9). Thus, a driver has a "right" not to take the chemical test (although there are certain risks and consequences inherent in this choice).

From this "right," and by analogy to ***Miranda v. Arizona***, 384 U.S. 436 (1966),[8] "when an arrestee refuses a chemical test, police efforts to compel submission to such a test must cease, except as specified by statute."

¶12 Overberg's reliance on this passage is misplaced for two reasons. First, ***Quelle*** did not address the issue at hand; it was a "subjective confusion" case. The court therefore did not have an opportunity to evaluate its observation in light of the arguments Overberg raises. It did not consider whether a suspect's refusal must be honored in all instances. Thus, when placed in proper context, it appears that the ***Quelle*** court merely meant that an OWI suspect has the right not to voluntarily take a test, by "revoking" consent. This construction comports with cases that consistently hold that, under appropriate circumstances, a suspect's blood may be withdrawn regardless of consent. *See* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966); ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

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[8] This court rejected an analogy to ***Miranda v. Arizona***, 384 U.S. 436 (1966), in the context of the Informing the Accused form's sufficiency.

> As we discussed in ***Quelle***, unlike ***Miranda*** warnings which have constitutional underpinnings, the "informing the accused" requirement is purely statutory. The Supreme Court in ***Schmerber v. California***, 384 U.S. 757 (1966) held that a state-compelled blood test following a person's arrest for OMVWI does not violate the Fourth, Fifth or Fourteenth Amendments to the U.S. Constitution. Thus, an arrestee's understanding or comprehension of the information required to be provided under WIS. STAT. § 343.305(4) is not needed to legitimize a knowing and informed waiver of constitutional rights, as is the case with ***Miranda*** warnings. We conclude that the legislature could have chosen to implement the implied consent law without directing law enforcement to inform arrestees of any of the information the statute specifies.

State v. Piddington, 2000 WI App. 44, ¶16, 233 Wis. 2d 257, 607 N.W.2d 303 (citation omitted).

¶13 Second, and most importantly, under Overberg's interpretation this passage from ***Quelle*** directly contradicts our supreme court's repeated holding that a driver in this state has no right to refuse to take a chemical test. "The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways. By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." ***State v. Zielke***, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987) (citation omitted); *see also* ***Reitter***, 227 Wis. 2d at 225, ("[D]rivers accused of operating a vehicle while intoxicated have no 'right' to refuse a chemical test."); ***Crandall***, 133 Wis. 2d at 255 ("In Wisconsin there is no constitutional or statutory right to refuse" evidentiary testing); ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980). "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Thus, the language in ***Quelle*** notwithstanding, Overberg does not have a right to refuse to submit to evidentiary testing.

¶14 Two rules of law control this appeal. The first, which Overberg does not address, is that the refusal to submit to a chemical test under WIS. STAT. § 343.305 is a civil matter and a separate substantive offense from OWI under WIS. STAT. § 346.63(1).[9] *See* ***Zielke***, 137 Wis. 2d at 47-48.

> The point of departure for the court's analysis is the recognition that two separate substantive offenses are potentially operative in all prosecutions involving intoxicated use of a vehicle. The first offense which may

[9] This circumstance is sufficient to meet another assertion that Overberg makes: that permitting police to obtain evidence of intoxication by force after a refusal in disregard of WIS. STAT. § 343.305 procedures and consequences renders them surplusage. The implied consent law supplies enforceable consequences for its violation, albeit discrete from those applicable to a rules-of-the-road violation.

> arise in a case involving intoxicated use of a vehicle is refusing to submit to a chemical test under sec. 343.305(2), Stats. If a driver refuses to take a test he or she faces automatic license revocation. The second substantive offense may involve operating while intoxicated (OWI), sec. 346.63 …. The penalties for violation of th[is] statute may include all or a combination of fines, imprisonment and license revocation.

Id. at 47. Further, the ***Zielke*** court held that the implied consent law did not provide the exclusive means by which police could obtain chemical test evidence of driver intoxication.[10] ***Id.*** at 41.

¶15 The other controlling precedent is found in ***Bohling***. Bohling was arrested for OWI and refused to take an Intoxilyzer test. *See* ***id.*** at 534. He was then informed of the department's policy to administer blood tests in cases such as Bohling's. ***Id.*** When he objected, the officer advised Bohling that restraint would be used if necessary. ***Id.*** at 534-35. Bohling's blood was eventually drawn without a warrant and without his consent. ***Id.*** at 535.

¶16 The ***Bohling*** court, relying on ***Schmerber***, 384 U.S. at 770-71, held that when there are exigent circumstances,[11]

> 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

[10] From this premise, ***Zielke*** concluded that evidence obtained without compliance with implied consent law procedures did not have to be suppressed. ***State v. Zielke***, 137 Wis. 2d 39, 51, 403 N.W.2d 427 (1987).

[11] Although ***Bohling*** arguably stands in part for the proposition that alcohol's dissipation from the blood constitutes an exigency sufficient to justify a warrantless blood draw, in this case the trial court found that the unavailability of Intoxilyzers supplied the exigency. Overberg has not challenged this finding. *See* ***id.*** at 533-34.

> 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). Overberg does not contend that the four ***Bohling*** criteria were not satisfied under the facts of this case. Therefore, the warrantless blood draw was proper.

¶17 Overberg attempts to distinguish ***Bohling*** and ***Zielke*** on the basis that they did not address the precise issue he presents in this appeal. While that is true, their core principles are applicable and, cumulatively, controlling. Thus under ***Zielke***, the criminal prosecution for OWI is a separate matter from the implied consent violation. Moreover, while it appears true that the implied consent law does supply the exclusive remedy for it's violation, it does not follow that it precludes law enforcement from pursuing other constitutional avenues for collecting evidence of a traffic code violation. Indeed, ***Zielke*** held that WIS. STAT. § 343.305 does not delimit the manner in which evidence is obtained to prove that Overberg operated while intoxicated. Further, under ***Bohling***, evidence resulting from the warrantless blood-draw is admissible. 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 principles enunciated in ***Zielke*** and ***Bohling*** are present in this case, they control and the trial court therefore properly denied Overberg's motion.

By the Court.—Judgment affirmed.

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