COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0490 **Cir. Ct. No. 99-TR-8567**

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

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

ROY D. WICKLUND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

¶1 BROWN, J.[1] Roy D. Wicklund appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) in violation of a

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

Winnebago County ordinance. Wicklund challenges the trial court's ruling denying his motions to suppress evidence of a blood test. We affirm the judgment.

¶2 The relevant facts are not in dispute. A Winnebago County law enforcement officer arrested Wicklund for OWI and transported him to a hospital to obtain a sample of his blood. The officer read the Informing the Accused information and Wicklund submitted to the testing of his blood. The result was a blood alcohol concentration of 0.18 %.

¶3 Wicklund moved to suppress the blood test evidence on the grounds that his consent to the test was coerced and that the County needed to obtain a search warrant prior to analyzing the blood sample taken from him. The core of his argument on appeal is that the State does not have the constitutional authority to require a suspect to submit to an intrusive blood test when a breath test with an identical statutory evidentiary weight and admissibility is available. We understand this argument to raise a constitutional challenge to Wisconsin's implied consent law.

¶4 Wicklund acknowledges that his challenge to the constitutionality of the implied consent law and the warrantless taking of his blood sample are currently governed by this court's decision in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 2000 WI 121, 239 Wis. 2d 310, 619 N.W.2d 93 (Wis. Oct. 17, 2000) (No. 99-1765-CR), *cert. denied*, ***Thorstad v. Wisconsin***, 531 U.S. 1153 (2001), which relied on our supreme court's decision in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). In ***Bohling***, the supreme court held that a warrantless blood sample taken at the direction of a law enforcement officer is permissible if the following conditions are met:

> (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 534 (footnote omitted).

¶5 Wicklund makes no argument that the criteria in ***Bohling*** were not satisfied in this case. Rather, he suggests that we should hold this case until the supreme court has issued its opinion in ***State v. Krajewski***, No. 99-3165-CR, unpublished order (WI App Dec. 5, 2000), *review granted*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001), in which, he asserts, the court will examine "the right of police to require blood testing in drunk driving cases when breath testing is practically available."

¶6 In ***Krajewski***, the defendant registered an objection to the blood test based on a fear of needles. ***Id.*** at 2. That fact distinguishes ***Krajewski*** from the case before us now. Here, Wicklund makes no assertion that he objected to the blood test. His argument is that the implied consent law, as a matter of law, coerces a suspect's consent. This argument was raised and rejected in ***Thorstad***, which holds, based on facts almost identical to these, that if the requirements of ***Bohling*** are met, our inquiry need go no further. ***Thorstad***, 2000 WI App 199 at ¶¶10-11.

¶7 We are not persuaded that the supreme court will be revisiting the constitutionality of the implied consent law in ***Krajewski***. Rather, it appears the court will be examining if a blood draw survives the test of reasonableness under the Fourth Amendment when the suspect has expressed a fear of needles and

requested a breath test rather than a blood draw. Wicklund does not make that argument in this case.

¶8 As to his challenge to the warrantless testing of his blood sample, Wicklund acknowledges this court's recent holding in ***State v. VanLaarhoven***, 2001 WI App 275, ¶7, 248 Wis. 2d 881, 637 N.W.2d 411, that a warrant is not required for the testing of blood evidence otherwise lawfully seized. Wicklund asserts that ***VanLaarhoven*** is not controlling because in that case the defendant apparently did not challenge the constitutionality of the implied consent law, as he has done here. Wicklund, in other words, claims his blood sample was not lawfully seized in the first instance because it was coerced under WIS. STAT. § 343.305. But, as we have noted, ***Thorstad*** says otherwise.

¶9 We reject Wicklund's constitutional challenges and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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