COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1144 **Cir. Ct. No. 99-TR-10157**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES BESSERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] James Bessert appeals from a forfeiture judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to WIS. STAT. § 346.63(1)(b). Bessert challenges

[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.

the trial court's ruling denying his motion to suppress evidence of a blood test. We affirm the judgment.[2]

¶2 The relevant facts are not in dispute. On August 29, 1999, Bessert was arrested for PAC and operating a motor vehicle while intoxciated.[3] Following the arrest, the police informed Bessert of his rights and obligations under the implied consent law. *See* WIS. STAT. § 343.305(4). In response, Bessert agreed to submit to a blood test. The result was a blood alcohol concentration of .22%.

¶3 Bessert brought a motion to suppress the blood test evidence, challenging the constitutionality of the implied consent law that permits the warrantless taking of a suspect's blood sample. In addition, Bessert moved to suppress the warrantless testing of his blood sample. The core of his argument, renewed on appeal, was that the State does not have the constitutional option of requiring a suspect to submit to an intrusive blood test when a breath test with identical statutory evidentiary weight and admissibility is available. The trial court denied Bessert's motions to suppress. The State and Bessert then entered into a stipulation as to the facts. Bessert pled no contest and he takes this appeal.

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[2] Except for our recital of the facts, this opinion is an exact repeat of our unpublished opinion in ***State v. Hanson***, No. 01-2069-CR, unpublished slip op. (Wis. Ct. App. Feb. 27, 2002). We repeat the ***Hanson*** language in this case because the issues are the same, the appellant's attorney is the same, and the appellant's brief is a mirror image (except for the facts) of that filed in ***Hanson***.

[3] It is unclear whether Bessert was also charged with operating while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a). The appellate record reveals a uniform traffic citation that charges Bessert with PAC. There is no corresponding citation charging Bessert with OWI. However, the trial court noted a further charge of OWI at the conclusion of the bench trial. In response, the State dismissed the OWI charge after the trial court found Bessert guilty of PAC.

¶4 Bessert acknowledges that his challenges 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 (U.S. Wis. Feb. 20, 2001) (No. 00-1145), which interpreted 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 533-34 (footnote omitted).[4]

¶5 We acknowledge that the supreme court is revisiting this issue, *see* ***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), and we have considered whether we should hold this case until the supreme

[4] To ***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 (U.S. Wis. Feb. 20, 2001) (No. 00-1145), and ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), we add this court's opinion in ***State v. Wodenjak***, 2001 WI App 216, 247 Wis. 2d 554, 634 N.W.2d 867, *review denied*, 2001 WI 117, 247 Wis. 2d 1036, 635 N.W.2d 784 (Wis. Oct. 23, 2001) (No. 00-3419-CR).

court has issued its opinion. However, in ***Krajewski***, the defendant registered an objection to the blood test based on a fear of needles. ***Id***. at 2. That markedly sets this case off from ***Krajewski***. In this case, Bessert did not register any objection to the blood test. As a result, Bessert mounts a much broader assault, arguing that the implied consent law, as a matter of law, coerces a suspect's consent. ***Bohling*** rejected that argument, and instead set out the criteria under which a warrantless blood draw would be constitutional. ***Bohling***, 173 Wis. 2d at 534. Bessert makes no argument that those criteria were not satisfied in this case.

¶6 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 asked for a breath test rather than a blood draw. Bessert cannot make that argument under the facts of this case.

¶7 As to his challenge to the warrantless testing of his blood sample, Bessert acknowledges this court's recent holding in ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, that a warrant is not required for the testing of evidence otherwise lawfully seized. ***Id***. at ¶17. Bessert argues that ***VanLaarhoven*** is not satisfied because his blood sample was not lawfully seized in the first instance because of the unconstitutionality of the implied consent law. But, as we have noted, ***Thorstad*** says otherwise.

¶8 We reject Bessert's constitutional challenges. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published.[5] *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] The State asks that we publish this opinion, noting the repeated trial and appellate court litigation of the issues and the likelihood of similar litigation in the future. While we acknowledge this history and the State's prediction for the future, we note that our opinion is based on existing precedent that governs the issue. Therefore, at least at this time, we see no need to publish this opinion.