COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1796-CR **Cir. Ct. No. 99-CT-166**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARL F. BEAVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Earl Beaver appeals from a judgment of conviction for operating a motor vehicle while intoxicated—second offense, and from an

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

order denying his motion to suppress the results of his blood test. Beaver contends that analysis of a legally seized blood draw is a separate search requiring a warrant. Beaver also challenges the constitutionality of Wisconsin's Implied Consent Law, WIS. STAT. § 343.305. Under ***State v. VanLaarhoven***, 2001 WI App 275, ___Wis. 2d ___, 637 N.W.2d 411, the State was not required to obtain a warrant to lawfully analyze Beaver's blood. Because the State was authorized to analyze Beaver's blood with or without his consent, we need not address the constitutionality of the Implied Consent Law. Accordingly, we affirm.

Background

¶2 For the purpose of his motion, Beaver does not dispute the facts surrounding his arrest, as alleged by the State.[2] On May 2, 1999, after failing field sobriety tests administered by an officer of the Baraboo Police Department, Beaver was arrested for operating a motor vehicle while under the influence of an intoxicant. Beaver submitted to a blood draw after being read the "Informing the Accused" form required by WIS. STAT. § 343.305. A warrantless draw of his blood was taken at St. Clare Hospital. The subsequent analysis of this blood sample revealed a blood alcohol content of .269.

¶3 The State charged Beaver with operating a motor vehicle while intoxicated—second offense. Beaver moved to suppress the results of the analysis

[2] In its appellate brief, the State mentions a stipulation between the parties that the court use Beaver's police report as the facts for motion purposes. The appendix to the State's appellate brief contains copies of Beaver's police report and the "Informing the Accused" form. However, neither document appears in the actual circuit court record. In making our decision, we may rely only on facts in the circuit court record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). It is therefore inappropriate for the State to include non-record items in its appendix, and to refer to these items in its brief. We anticipate that future briefs from the State will refrain from this practice.

of his blood. He argued that the taking of his blood, even if legal without a warrant, did not authorize the later analysis of the blood. The trial court denied his motion to suppress. Beaver pleaded no contest to and was convicted of operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(b), second offense. He appeals.

Analysis

¶4 The issue Beaver presents on appeal requires the application of the constitutional principles of search and seizure. The application of constitutional principles to the undisputed facts is a question of law that we decide without deference to the circuit court's decision. ***VanLaarhoven***, 2001 WI App 275 at ¶5. Despite our de novo standard of review, we nonetheless value the trial court's decision on the issues. ***Id.***

¶5 Beaver concedes, for purposes of this appeal, that his blood draw was a constitutionally valid seizure, justified by the exigency exception to the warrant requirement. *See* ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240. We therefore need not decide whether the blood draw satisfied the requirements of ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993). He argues, however, that analysis of the legally seized blood is a separate search requiring a warrant. The state responds that this argument was foreclosed by ***VanLaarhoven***.

¶6 The defendant in ***VanLaarhoven*** consented to a chemical test of his blood after being arrested for operating a motor vehicle while intoxicated. 2001 WI App 275 at ¶2. The results of his blood test established a blood alcohol concentration above the legal limit. ***Id.*** He appealed from the circuit court's denial of his motion to suppress, arguing that his blood sample, once obtained,

could not be analyzed for evidentiary purposes without first obtaining a warrant. ***Id.*** at ¶4.

¶7 Like Beaver, the defendant in ***VanLaarhoven*** relied on ***United States v. Jacobsen***, 466 U.S. 109 (1984), ***Walter v. United States***, 447 U.S. 649 (1980), and ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602 (1989), to support his contention that the analysis of legally seized blood is a separate search requiring a warrant. However, after addressing each case, the ***VanLaarhoven*** court found ***United States v. Snyder***, 852 F.2d 471 (9th Cir. 1988), and ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), to be controlling.[3] ***VanLaarhoven***, 2001 WI App 275 at ¶12.

¶8 In ***Snyder***, the defendant was arrested for operating while intoxicated after a sample of his blood was taken and tested. 852 F.2d at 472. Snyder moved to suppress the results of the blood sample analysis, claiming it to be an unreasonable search. ***Id.*** The trial court denied the motion to suppress. ***Id.*** On appeal, the ***Snyder*** court, relying heavily on ***Schmerber v. California***, 384 U.S. 757 (1966), affirmed, saying: "The flaw in Snyder's argument is his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too

[3] We recognize that ***State v. VanLaarhoven***, 2001 WI App 275, ___ Wis. 2d ___, 637 N.W.2d 411, distinguished ***Walter v. United States***, 447 U.S. 649 (1980), and ***United States v. Jacobsen***, 466 U.S. 109 (1984), based on the fact that VanLaarhoven had given his consent to the blood draw and test while the defendants in ***Walter*** and ***Jacobsen*** had consented to nothing. ***VanLaarhoven***, 2001 WI App 275 at ¶¶9-10. In the case before us, the State relies not on consent to justify the search, but on exigent circumstances. Beaver does not explain how or why, however, ***Walter*** and ***Jacobsen*** provide authority for his argument when blood is obtained through exigent circumstances rather than consent or otherwise provide authority for treating exigency differently from consent. Because we may decline to consider undeveloped arguments, we will not explore this issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992)

many separate incidents … the right to seize the blood ... encompass[es] the right to conduct a blood-alcohol test at some later time." ***Id.*** at 473-74.

¶9 In ***Petrone***, police were allowed to develop and view legally seized film in order to determine whether its nature was pornographic. 161 Wis. 2d at 537. Petrone sought to suppress the developed photographs, arguing that developing the film was beyond the authority of the warrant. ***Id.*** at 539. Petrone argued that even if the seizure of the film was legal, its subsequent development, or analysis, was a separate search, requiring its own warrant. ***Id.*** at 544. The supreme court rejected this argument. ***Id.*** at ¶545. It reasoned that developing the film was simply a method of examining a lawfully seized object. ***Id.***[4]

¶10 After discussing ***Petrone*** and ***Snyder***, the ***VanLaarhoven*** court held: "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," 2001 WI App 275 at ¶16. Under ***VanLaarhoven***, because the State was legally entitled to seize Beaver's blood, it was also entitled to analyze it without obtaining a warrant.

¶11 In addition to the cases addressed by ***VanLaarhoven***, Beaver contends that ***State v. Betterley***, 191 Wis. 2d 406, 529 N.W.2d 216 (1995), contradicts the proposition that the State may search whatever they have legally seized. The facts in ***Betterley*** are different from those in ***Beaver*** and we do not read the holding in ***Betterley*** to support Beaver's position. Further, Beaver fails to

[4] The supreme court did not consider the applicability of ***United States v. Jacobsen***, which stated: "Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package." 466 U.S. at 114.

indicate how ***Betterley*** applies to his case. The court of appeals may decline to review an issue inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, we will not consider this undeveloped argument.

¶12 Beaver also argues that ***VanLaarhoven*** is not dispositive because it does not address the constitutionality of Wisconsin's Implied Consent Statute. This argument assumes, however, that Beaver's consent was necessary to validate the search. This assumption is incorrect.

¶13 There are several exceptions to the Fourth Amendment's warrant requirement. Consent is one such exception. "The presence of exigent circumstances is another exception to the Fourth Amendment's requirement that law enforcement authorities obtain a warrant to conduct a search." ***Thorstad***, 2000 WI App 199 at ¶6. Interpreting ***Schmerber*** and ***Bohling***, ***Thorstad*** upheld the warrantless seizure of blood because the rapid dissipation of alcohol from the bloodstream constitutes exigent circumstances. ***Id.***

¶14 ***Thorstad*** held that the seizure of blood is permitted without a warrant under the exigent circumstances exception. ***Id.*** Subsequently, ***VanLaarhoven*** held that the analysis of legally seized blood is not a separate search for Fourth Amendment purposes, 2001 WI App 275 at ¶16. ***Id.*** Again, although ***VanLaarhoven*** distinguished ***Walter*** and ***Jacobsen*** based on consent rather than exigency, Beaver has pointed to no authority that suggests the exigency exception requires a different analysis. Therefore, because the blood test was made lawful under the exigent circumstances exception, we need not determine

whether Beaver gave his valid consent or whether the Implied Consent Statute is unconstitutional.[5]

¶15 Finally, Beaver asks this court to determine whether the State has a "compelling need" analyzed under the "strict scrutiny" test to analyze a blood sample without a warrant. Again, this determination is not necessary because exigency validates the seizure according to ***Thorstad***, 2000 WI App 199 at ¶17, and the analysis is the same event as that seizure according to ***VanLaarhoven***, 2001 WI App 275 at ¶16.

By the Court.—Judgment and order affirmed.

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[5] It is similarly unnecessary to address Beaver's contention that the blood analysis can not be justified as a search incident to the arrest.