COURT OF APPEALS DECISION DATED AND FILED

February 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2069-CR **Cir. Ct. No. 99-CT-595**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEANNE M. HANSON,

DEFENDANT-APPELLANT.

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

¶1 NETTESHEIM, P.J.[1] Jeanne M. Hanson appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a repeat offender pursuant to WIS. STAT. §§ 346.63(1)(a) and 345.55(2)(b). Hanson

[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.

challenges the trial court's ruling denying her motion to suppress evidence of a blood test. We affirm the judgment.

¶2 The relevant facts are not in dispute. The City of Pewaukee Police Department arrested Hanson for OWI on February 28, 1999. She was transported to a local hospital where she was informed of her rights and obligations under the implied consent law. *See* WIS. STAT. § 343.305(4). In response, Hanson agreed to submit to a blood test. The result was a blood alcohol concentration of .219%.

¶3 Hanson 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, Hanson moved to suppress the warrantless testing of her blood sample. The core of her 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 Hanson's motions to suppress. Hanson then pled no contest and she takes this appeal.

¶4 Hanson acknowledges that her challenges to the constitutionality of the implied consent law and the warrantless taking of her 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***, 121 S. Ct. 1099 (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 534 (footnote omitted).[2]

¶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 court has issued its opinion. However, in ***Krajewski***, the defendant registered an objection to the blood test based on a fear of needles. ***Id***. unpublished order at 2. That markedly sets this case off from ***Krajewski***. In this case, Hanson did not register any objection to the blood test. As a result, Hanson 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. Hanson makes no argument that those criteria were not satisfied in this case.

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[2] 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***, 121 S. Ct. 1099 (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***, 2000 WI App 216, 247 Wis. 2d 554, 634 N.W.2d 867.

¶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. Hanson cannot make that argument under the facts of this case.

¶7 As to her challenge to the warrantless testing of her blood sample, Hanson 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 evidence otherwise lawfully seized. Hanson argues that ***VanLaarhoven*** is not satisfied because her 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 Hanson's constitutional challenges. We 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.