COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2337-CR **Cir. Ct. No. 00-CT-157**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL L. ZUERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 DEININGER, J.[1] Russell Zuerner appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

[1] This appeal 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 unless otherwise noted.

(OMVWI) as a third offense. He claims the trial court erred in denying his motion to suppress evidence of the results of a test of his blood for alcohol concentration. Specifically, Zuerner argues that the State should have obtained a breath test instead of a blood test, and that it should have obtained a warrant prior to analyzing the blood sample it withdrew from him. He also contends that because his consent to the testing of his blood was "coerced," it cannot be relied on as an exception to the Fourth Amendment's warrant requirement. We reject Zuerner's contentions and affirm the appealed judgment insofar as it convicts him of OMVWI.

¶2 Zuerner also seeks to be re-sentenced as a second-time OMVWI offender instead of a third-time offender. He claims that one of his prior OMVWI convictions may not be used to enhance his present penalty because the conviction was obtained in violation of his Sixth Amendment right to counsel. We agree that, on the present record, Zuerner has made a prima facie showing that his prior criminal OMVWI conviction may be invalid for penalty enhancement purposes, and we remand for a new sentencing hearing.

BACKGROUND

¶3 The record contains no transcript of evidentiary proceedings, but the underlying facts do not seem to be in dispute. The following summary is taken from the criminal complaint and the trial court's memorandum decision. A City of Baraboo police officer arrested Zuerner for OMVWI and transported him to a hospital to obtain a sample of his blood. The officer read Zuerner the "Informing the Accused" information, *see* WIS. STAT. § 343.305(4), and Zuerner agreed to submit to the testing of his blood, which produced a result of .306% blood ethanol

by weight. Zuerner had previously been convicted of OMVWI in 1990, and again in 1993.

¶4 Zuerner moved the circuit court, among other things, to suppress the evidence of the blood test results on the grounds that (1) the arresting officer should have obtained a breath test instead of a blood test; (2) his consent to the blood test was coerced; and (3) the State needed to obtain a search warrant prior to analyzing the blood sample taken from him. The court denied Zuerner's motions and he pled no contest to the charge of OMVWI, reserving, however, the right to challenge one of his prior convictions for sentence enhancement purposes.

¶5 At his sentencing hearing, Zuerner moved the court to disregard his 1993 OMVWI conviction for sentencing purposes on the grounds that he had not "knowingly, intelligently, and voluntarily" waived counsel prior to pleading no contest to the 1993 criminal charge. Zuerner produced a copy of the 1993 judgment of conviction, clerk's minutes, a guilty plea questionnaire and a transcript of the 1993 plea and sentencing hearing. The court denied Zuerner's motion, concluding that the court had properly found in 1993 that his waiver of counsel was "free, knowing and voluntary." Accordingly, the court sentenced Zuerner as a third-time OMVWI offender and imposed a seventy-five-day jail sentence, a thirty-month drivers license revocation, a fine and costs.

¶6 Zuerner appeals the subsequently entered judgment of conviction, challenging both the court's denial of his motion to suppress evidence and its sentencing him as a third-time OMVWI offender.

ANALYSIS

¶7 Zuerner lists as the first issue in his appeal whether drawing a blood sample is "unconstitutionally unreasonable … because the State could have made a breath test available instead." The trial court in its written decision, however, stated that Zuerner had conceded for the purposes of his suppression motion "that the blood draw was constitutionally acceptable but that the warrantless testing thereafter constituted the constitutionally infirm act." Regardless of whether he previously conceded the issue, Zuerner acknowledges that the issue has been decided adversely to him in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240. He states that he wishes to preserve the issue "for further judicial review," believing that the supreme court may overrule or modify the ***Thorstad*** holding in a case now pending before it, ***State v. Krajewski***, No. 99-3165-CR. Thus, Zuerner's first issue has either been waived by his concession in the trial court, or its disposition in this court is controlled by ***Thorstad***. We discuss it no further.

¶8 Zuerner further acknowledges that our holding in ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, largely disposes of his claim that the Baraboo police needed to obtain a search warrant before having his blood sample analyzed. Specifically, Zuerner concedes that his "second search motion" in this case is "virtually verbatim identical" to the motion made in ***VanLaarhoven***. We concluded in ***VanLaarhoven*** that the State was not obligated to obtain a search warrant in order to analyze a lawfully seized blood sample for alcohol concentration. ***Id***. at ¶¶16-17. Zuerner contends, however, that ***VanLaarhoven*** "is no precedent for the present case." Zuerner contends that because we noted in ***VanLaarhoven*** that the defendant had "consented to a taking of a sample of his blood and the chemical analysis of that sample," ***id***. at ¶8,

Zuerner's challenge to the validity of his consent in this case undermines the applicability of the ***VanLaarhoven*** holding.

¶9 We nonetheless conclude that ***VanLaarhoven*** definitively establishes that the taking of a blood sample and its subsequent analysis for alcohol content cannot be uncoupled for Fourth Amendment purposes. That is, Zuerner cannot now argue that even though a blood sample was lawfully obtained without a search warrant, the arresting agency should first have obtained a warrant before analyzing the sample. Our conclusion on this point was explicit in ***VanLaarhoven***:

> [T]he 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. [The cited precedents] refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement.
>
> …VanLaarhoven is wrong in his argument that the chemical analysis of his blood sample is a separate event for warrant requirement purposes.

Id. at ¶¶16-17.

¶10 An officer who has arrested a person for OMVWI may obtain a sample of that person's blood without a warrant, based on the existence of probable cause and exigent circumstances,[2] and without the person's consent.[3] ***VanLaarhoven*** establishes that so long as a blood sample was "lawfully taken,"

[2] *See* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993); ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240.

[3] *See* ***State v. Marshall***, 2002 WI App 73, 251 Wis. 2d 408, 642 N.W.2d 571.

law enforcement may have it analyzed without obtaining a search warrant. ***VanLaarhoven***, 2001 WI App 275 at ¶17. The only question which remains, then, is whether a different result than in ***VanLaarhoven*** is required here because Zuerner claims that his consent to the taking of a blood sample and its subsequent testing was coerced, and thus invalid for Fourth Amendment purposes.

¶11 Zuerner does not allege that the arresting officer made any specific threats or applied coercion beyond that which Zuerner claims arises under WIS. STAT. § 343.305, Wisconsin's "Implied Consent" law. Under the statute, drivers in Wisconsin are deemed to have consented to the testing of their blood, breath or urine for alcohol concentration, and if a driver refuses to submit to a lawful request for such testing, his or her driving privileges may be revoked. *See* §§ 343.305(2) and (10). Zuerner argues that the threatened sanction of a loss of driving privileges constitutes a coercive measure that invalidates any actual, valid consent for Fourth Amendment purposes. He notes that the legislature may not by statute circumvent Fourth Amendment protections, which he asserts it has done in enacting § 343.305. Finally, he argues that we must measure the constitutionality of this government action by applying a stricter standard than the "rational relationship" test.

¶12 In short, Zuerner is attempting to have us declare portions of WIS. STAT. § 343.305 unconstitutional.[4] The only way Zuerner can avoid our holding in ***VanLaarhoven*** is if we agree with him that the implied consent provisions of

[4] For example, Zuerner argues that WIS. STAT. § 343.305 does not enjoy a presumption of validity when challenged as a facial violation of the Fourth Amendment. He also asserts that if the search in this case "is unconstitutional, the statute that authorized it is either unconstitutional on its face or applied."

§ 343.305 are impermissibly coercive, and thus in violation of the Fourth Amendment. We have searched the record and our own correspondence file to determine whether Zuerner has notified the Attorney General of his claim that the coercion implicit in § 343.305 violates the Fourth Amendment. We find no indication that he has done so. Accordingly, because the State[5] has not been given the opportunity to defend the validity of the statute in question, and because we are therefore deprived of "the opportunity to analyze questions of constitutional dimension from a perspective that is not limited to the narrow interests and views of the private parties to the action," we decline to take up Zuerner's constitutional challenge to the implied consent law. *See* ***Estate of Fessler v. William B. Tanner Co.***, 100 Wis. 2d 437, 441-44, 302 N.W.2d 414 (1981).

¶13 Zuerner's final contention is that the trial court erred in sentencing him as a third-time OMVWI offender instead of as a second offender. In support of his motion to disallow his 1993 criminal OMVWI conviction for purposes of his present sentencing, Zuerner submitted a transcript of the plea hearing in the 1993 case. Zuerner entered a no contest plea at his initial appearance on the charge of OMVWI, second offense. After the court informed Zuerner of the charge and penalties, he stated that he wished to plead no contest to the charge, and the following colloquy ensued:

> THE COURT: Now, you've given me this waiver of right to attorney form. Did you fill this out yourself?
>
> THE DEFENDANT: Yes, I did.

[5] The State appears in this one-judge appeal by an assistant district attorney for Sauk County. The attorney general has not participated in the case, either in the circuit court or on appeal.

> THE COURT: Is this your signature on the last page?
>
> ….
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you able to read, write and understand English?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Has anyone made any promises or threats to get you to proceed here today without a lawyer?
>
> THE DEFENDANT: No.
>
> THE COURT: On this record, I will find that the Defendant freely, willingly and voluntarily … waives his right to an attorney.

The court then proceeded to receive and accept Zuerner's plea to OMVWI, second offense. Although a copy of the plea questionnaire which Zuerner completed is in the record, the "waiver of right to attorney form" referred to in the above colloquy is not.

¶14 Defendants have a constitutional right to challenge a prior state conviction during enhanced sentencing proceedings predicated on the prior conviction when they allege a violation of their constitutional right to an attorney in the prior case. *See* ***State v. Hahn***, 2000 WI 118, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528.[6] When a defendant makes such a challenge, he or she "bears the initial burden of coming forward with evidence to make a prima facie showing of

[6] Zuerner also cites as error the trial court's initial conclusion that he could not challenge a prior conviction in the instant proceedings. The court went on, however, to deny Zuerner's motion on the merits, concluding that Zuerner's 1993 "waiver of counsel was free, knowing and voluntary."

a constitutional deprivation in the prior proceeding." ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). We conclude that Zuerner has done so here.

> To prove … a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

State v. Klessig, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (citation omitted). Although the 1993 colloquy arguably satisfied the first and fourth criteria, it did not fulfill the second and possibly the third.

¶15 When a prima facie showing is made that a prior conviction involved a violation of the right to counsel, "the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." ***Baker***, 169 Wis. 2d at 77. Here, the State did not do so, both because the apparent "last minute" filing of Zuerner's motion and supporting documents may not have allowed it to obtain additional items from the record of the 1993 conviction (which was in a different county), and because the court did not give the State the opportunity to respond to Zuerner's motion before ruling.

¶16 The State does not argue that Zuerner's motion was properly denied as untimely, and we thus have before us a record indicating the 1993 conviction is constitutionally suspect. Accordingly, we remand for a new sentencing hearing at which the State shall be given the opportunity to meet its burden of establishing a proper waiver of counsel precedent to Zuerner's 1993 OMVWI conviction. The

State may be able to show that Zuerner's waiver was in fact knowing and voluntary by obtaining the waiver form the 1993 court relied upon, or by examining Zuerner on his knowledge and understanding of the 1993 charges and penalties, his right to counsel, and "the difficulties and disadvantages of self-representation." ***Klessig***, 211 Wis. 2d at 206. If the State makes a proper showing, the present sentence may be re-imposed. If not, the court must sentence Zuerner as a second-time OMVWI offender.

CONCLUSION

¶17 For the reasons discussed above we affirm the appealed judgment insofar as it convicts Zuerner of OMVWI. We vacate his sentence, however, and remand for a new sentencing proceeding consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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