COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2528-CR **Cir. Ct. No. 00-CT-215**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

YVETTE M. THAYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Yvette Thayer appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Thayer argues that the blood test results should have been suppressed because the Informing the Accused

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

form was misleading by implying she had a right to refuse a blood test. We disagree and affirm the conviction.

BACKGROUND

¶2 On October 18, 2000, Barron County sheriff's deputy Jason Hagen was dispatched to investigate an accident. Upon arriving, Hagen saw a vehicle in a ditch. When Hagen looked in the vehicle, the driver, later determined to be Thayer, appeared to be asleep or passed out. After waking her, Hagen noted that Thayer had a strong odor of intoxicants, slurred speech, and difficulty maintaining balance.

¶3 Hagen arrested Thayer for OWI and transported her to the local hospital for a blood test. Once at the hospital Thayer was read the Informing the Accused form and was asked if she would submit to a blood test. Thayer said no. Then Hagen advised her that a blood sample would be drawn without her consent. The test revealed a blood alcohol concentration of .217%.

¶4 Thayer filed a motion to suppress the blood test results, arguing that the statutory scheme was inaccurate and misleading because it informed Thayer that she had a right to refuse consent to a test when, in fact, the police could ignore her refusal and compel the test. The circuit court denied the motion.

STANDARD OF REVIEW

¶5 Because the relevant facts are undisputed and Thayer does not claim the circuit court's factual findings were clearly erroneous, this appeal presents a question of law that we review independently. *See* ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

DISCUSSION

¶6 WISCONSIN STAT. § 343.305(2), a portion of Wisconsin's implied consent law, provides, in part:

> Any person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer ….

The warnings provided under the implied consent law, § 343.305(4), include the following:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

¶7 Further, WIS. STAT. § 343.305(9)(a) provides in relevant part:

> If a person refuses to take a test under [343.305] sub. (3)(a) [authorizing a law enforcement officer to "request the person to provide one or more samples of his or her breath, blood or urine"], the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke ... the person's operating privilege.

¶8 Thus, the legislature has specified that if a person refuses to take a test, his or her license will be revoked and the officer, upon the refusal, shall immediately take the actions to bring about the revocation. Relying on these statutes, Thayer reasons that the Informing the Accused form misled her into believing that she had a right to refuse the test when in fact the police can require

her to submit to a blood test even if she refuses. She claims the warning should have told her that she had no right to refuse the test. Hence, she reasons that she was denied due process and the blood test results must be suppressed.

¶9 However, this is a prosecution for OWI. It is not a proceeding based on a refusal to take the requested breath test or for the imposition of statutory consequences for improperly refusing to take the requested test. The blood test was taken at the hospital without Thayer's consent. Therefore, the real issue is whether the involuntary blood test was taken as part of an unlawful search or seizure.

¶10 In ***Schmerber v. California***, 384 U.S. 757 (1966), the Supreme Court held that a state-compelled blood test following a person's arrest for OWI does not violate the Fourth, Fifth or Fourteenth Amendments to the United States Constitution. Thus, an arrestee's understanding or comprehension of the information required to be provided under WIS. STAT. § 343.305(4) is not needed to legitimize a knowing and informed waiver of constitutional rights, as is the case with ***Miranda***[2] warnings.

¶11 From this premise, the court in ***State v. Zielke***, 137 Wis. 2d 39, 51-52, 403 N.W.2d 427 (1987), concluded that evidence obtained without compliance with implied consent law procedures did not have to be suppressed. "[N]othing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats., prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

intoxicated use of a vehicle." ***Id.*** at 51. "To so hold would give greater rights to an alleged drunk driver under the fourth amendment than those afforded any other criminal defendant." ***Id.*** at 51-52. Therefore, ***Zielke*** held that "if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." ***Id.*** at 52.

¶12 Accordingly, we agree with the State. The claimed defects in the Informing the Accused form are irrelevant to the admissibility of the independently obtained blood test. In fact, WIS. STAT. § 343.305(3)(c) recognizes this. It specifically provides that the implied consent law does not prevent law enforcement from using other lawful means to obtain evidence.[3] Moreover, blood may be drawn involuntarily, and without a warrant, from a person lawfully arrested for a drunk-driving related offense. ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶13 Consequently, any challenge to the blood test taken independently of the implied consent law would have to be made under the Fourth Amendment as an unreasonable search or seizure.[4] However, Thayer does not challenge the

[3] WISCONSIN STAT. § 343.305 "Tests for intoxication" provides in part: "**(3)** … (c) This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means."

[4] The ***Bohling*** court, relying on ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966), held that when there are exigent circumstances,

(continued)

lawfulness of the blood draw on that basis. Thus, we agree with the circuit court's denial of Thayer's motion to suppress the blood test results.

By the Court.—Judgment affirmed.

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

> a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (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.

State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993) (footnote omitted). Thayer does not contend that the four ***Bohling*** criteria were not satisfied under the facts of this case.