# COURT OF APPEALS DECISION DATED AND FILED

May 23, 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. 01-2995-CR STATE OF WISCONSIN

Cir. Ct. No. 99-CT-472

## IN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT J. FREY,

**DEFENDANT-APPELLANT.** 

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

¶1 ROGGENSACK, J. Scott J. Frey appeals a judgment of conviction for operating a motor vehicle while intoxicated (OMVWI), in violation of WIS.

<sup>&</sup>lt;sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STAT. § 346.63(1)(a), as a third offense. His conviction arose out of an incident that occurred November 14, 1999. At approximately 12:15 a.m., Officer W. Richards of the Sauk Prairie Police Department saw a vehicle weaving from side-to-side on the roadway. Richards noticed that at times the vehicle was driving down the middle of the roadway, crowding other vehicles as they approached. The officer stopped the vehicle and made contact with Frey who was the driver. Richards stated that he could smell the odor of intoxicants coming from the interior of the vehicle where Frey was sitting and that Frey's eyes were red and glassy. The officer performed field sobriety tests on Frey, which he did not complete satisfactorily. Therefore, he was arrested for OMVWI and transported to the Sauk Prairie Memorial Hospital where his blood was drawn for testing. The tests showed he had a blood alcohol level of .258, a prohibited alcohol content (PAC), and he was cited for a violation of § 346.63(1)(b) as well as OMVWI.

¶2 Prior to trial, Frey moved to suppress evidence of the blood draw that he contends was performed in violation of the Fourth Amendment for the following reasons: there was no warrant permitting blood to be drawn, there existed a statutorily available breath test and a warrant was also required to conduct the blood tests. The circuit court denied his motion to suppress, and Frey pled to the charges. For the reason set forth below, we affirm.

#### **DISCUSSION**

### Standard of Review.

We sustain a circuit court's findings of fact related to a suppression motion unless the facts found are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Whether the established facts are sufficient to constitute a reasonable search is a question of constitutional fact that

we review *de novo*. *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446, 448 (1992).

#### Conviction.

Frey appeals the judgment of conviction based on what he alleges are a warrantless, unreasonable blood draw and a warrantless blood test. However, the judgment of conviction is for a violation of WIS. STAT. § 346.63(1)(a), which is for OMVWI. It is not for a violation of PAC, contrary to § 346.63(1)(b). We note that Frey does not argue on appeal that he would not have pled guilty to OMVWI if the suppression motion had been granted or that the evidence was insufficient to support his conviction of OMVWI without the results of the blood test. Therefore, the arguments that Frey seeks to preserve by this appeal would not result in a reversal of his judgment of conviction, even if there were not cases contrary to his position as he admits *State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240 and *State v. VanLaarhoven*, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, are.

Because we conclude there is nothing in the arguments presented in this appeal that bears on the circuit court's judgment of conviction for a violation of WIS. STAT. § 346.63(1)(a), we do not analyze the applicability of *Thorstad* and *VanLaarhoven* to the Fourth Amendment issues raised by Frey. Accordingly, we affirm the judgment of the circuit court without further discussion.

By the Court.—Judgment affirmed.

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