

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 21, 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. 02-0700-CR**

**Cir. Ct. No. 00-CT-473**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JON G. ROSE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for La Crosse County:  
RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 DYKMAN, J.<sup>1</sup> Jon Rose appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI),

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<sup>1</sup> 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.

second offense. Rose contends the circuit court erred in denying his motions to suppress evidence. He argues that Wisconsin's Implied Consent Law, WIS. STAT. § 343.305, violates the Fourth Amendment to the United States Constitution and that the police may not analyze a blood sample seized from an intoxicated driver without obtaining a warrant.<sup>2</sup> We disagree and therefore affirm.

¶2 On October 16, 2000, an officer arrested Rose for OMVWI after Rose failed two field sobriety tests and refused to submit to other field tests, proclaiming, "I'm drunk and you're going to arrest me anyway." The officer read the "Informing the Accused" form to Rose in compliance with WIS. STAT. § 343.305(4). Rose submitted to a blood draw at St. Francis Hospital.

¶3 Rose raises two issues: (1) May police draw blood from a driver arrested for OMVWI when a statutory breath test of equal evidentiary value and equally easy admissibility could have been administered instead? (2) May the police analyze, without first obtaining a warrant, a blood sample drawn from a driver who has been arrested without a warrant for OMVWI?

¶4 Rose first claims the arresting officer had a duty to administer a breathalyzer test in lieu of a blood test. Rose's briefs concede that this case is controlled by *State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, and mention the then-pending supreme court case of *State v. Krajewski*. The supreme court recently decided *Krajewski*, wherein it held that

a warrantless nonconsensual blood draw from a person arrested on probable cause for a drunk driving offense is

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<sup>2</sup> The second of these two issues is considered in *State v. Wintlend*, No. 02-0964 (Ct. App. Nov. 6, 2002). *Wintlend* will come before the publication committee on December 18, 2002, and as a result, we do not consider it. See WIS. STAT. RULE 809.23(3).

constitutional based on the exigent circumstances exception to the warrant requirement of the Fourth Amendment, even if the person offers to submit to a chemical test other than the blood test chosen by law enforcement, provided that the blood draw complies with the factors enumerated in *Bohling*.

*State v. Krajewski*, 2002 WI 97, ¶3, \_\_\_ Wis. 2d \_\_\_, 648 N.W.2d 385. Moreover, there is no evidence in the record that Rose requested an alternate test or objected to the blood draw. We need not explore this issue further.

¶5 Rose next argues that Wisconsin's Implied Consent Law compels consent, thereby violating the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. Both constitutions guarantee citizens the right to be free from unreasonable searches and seizures. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). We interpret the Wisconsin Constitution in accordance with the Supreme Court's interpretations of the search and seizure provisions of the federal constitution. *See State v. Fry*, 131 Wis. 2d 153, 172-73, 388 N.W.2d 565 (1986). The Supreme Court "has consistently held that warrantless searches are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions." *State v. Bohling*, 173 Wis. 2d 529, 536, 494 N.W.2d 399 (1993) (quoting *State v. Murdock*, 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990)). We review the application of constitutional principles to undisputed facts on a de novo basis. *State v. VanLaarhoven*, 2001 WI App 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411.

¶6 Exigent circumstances are an exception to the Fourth Amendment and permit a warrantless blood draw without consent. *See Schmerber v. California*, 384 U.S. 757, 770-71 (1966). Because exigent circumstances justified a warrantless blood test after a lawful arrest, we need not consider whether the Wisconsin Implied Consent Law constitutes a coercive measure that invalidates

consent for Fourth Amendment purposes. “When a first vessel crosses a sea to a desired harbor, there is no good purpose served by finding out whether a different ship could have made the same successful journey.” *Meyer v. Ludwig*, 65 Wis. 2d 280, 292, 222 N.W.2d 679 (1974).

¶7 Consistent with *Schmerber*, *Bohling* requires the police to meet four criteria for a warrantless blood draw: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for an OMVWI-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 is performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to the blood draw. *Bohling*, 173 Wis. 2d at 533-34.

¶8 Rose does not address whether the blood draw meets all of the *Bohling* requirements. The State contends it does, and we agree. First, the laboratory seized the blood sample after the officer arrested Rose for operating a motor vehicle while intoxicated. Rose does not claim the police used the sample for any purpose other than to obtain evidence of his intoxication. Second, Rose told the officer he was drunk, failed two field sobriety tests, and smelled of alcohol. There was a clear indication the blood draw would produce evidence of intoxication. Third, St. Francis Hospital drew the blood sample. There is no evidence that the procedure was unreasonable. Fourth, Rose did not object to the test during the procedure. Therefore, the warrantless blood draw was permissible under *Bohling*.

¶9 Rose also argues that testing the blood sample constituted a second search, for which there was neither consent nor exigent circumstances. We

rejected this “second search” argument in *Village of Little Chute v. Walitalo*, 2002 WI App 211, \_\_\_ Wis. 2d \_\_\_, 650 N.W.2d 891, holding “that the examination of a blood sample 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 separate judicially authorized warrant.” *Id.* at ¶1 n.2 (citing *VanLaarhoven*, 2001 WI App 275 at ¶16).

¶10 Rose attempts to distinguish *VanLaarhoven* because there we did not address whether WIS. STAT. § 343.305 is a coercive measure that invalidates consent. This distinction fails. *VanLaarhoven* relied upon the Wisconsin Implied Consent Law to justify the search; we rely upon the exigent circumstances exception to the Fourth Amendment of the United States Constitution. *See VanLaarhoven*, 2001 WI App 275 at ¶8. *VanLaarhoven* also relied on *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988), a case nearly identical to Rose’s. The *Snyder* court stated: “It seems clear, however, that *Schmerber* viewed the seizure and separate search of the blood as a single event for fourth amendment purposes.” *Snyder*, 852 F.2d at 473-74, *quoted in VanLaarhoven*, 2001 WI App 275 at ¶13. Regardless of whether the police seized the sample pursuant to a warrant or an exception to the warrant requirement, drawing and testing a blood sample constitutes a single search. *See VanLaarhoven*, 2001 WI App 275 at ¶16.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.



