COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1364-CR **Cir. Ct. No. 00-CT-57**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KATHERINE E. HEPLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Katherine Hepler appeals from a judgment of conviction for 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)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(OMVWI), second offense. Hepler contends the circuit court erred in denying her motions to suppress evidence. She argues that Wisconsin's Implied Consent Law, WIS. STAT. § 343.305, coerces consent to search and violates the Fourth Amendment to the United States Constitution. Hepler also argues that the police may not analyze a blood sample seized from an intoxicated driver without obtaining a warrant.[2] We affirm.

¶2 On February 13, 2000, an officer arrested Hepler for OMVWI. The officer reported Hepler's eyes were red and glossy, she smelled of intoxicants, and admitted that she had been drinking. Hepler failed four sobriety field tests, including a breath test that indicated a blood alcohol concentration of 0.18. The officer read the "Informing the Accused" form to Hepler in compliance with WIS. STAT. § 343.305(4). Hepler submitted to a blood draw at Divine Savior Hospital in Portage, Wisconsin.

¶3 Hepler 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 Hepler first claims the arresting officer had a duty to administer a breathalyzer test in lieu of a blood test. Hepler's briefs concede that this case is controlled by ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d

[2] 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).

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 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 Hepler requested an alternate test or objected to the blood draw. We need not explore this issue further.

¶5 Hepler next argues that Wisconsin's Implied Consent Law coerces consent to search and violates 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 under 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 address whether the Wisconsin Implied Consent Law constitutes a coercive measure that invalidates consent for Fourth Amendment purposes.

¶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 Hepler has failed to address whether the blood draw meets all of the ***Bohling*** requirements. The State contends it does, and we agree. First, the State seized the blood sample after the officer arrested Hepler for operating a moving vehicle while intoxicated. Hepler does not claim the police used the sample for any purpose other than to obtain evidence of her intoxication. Second, Hepler told the officer she had been drinking, smelled of alcohol, and failed three sobriety tests, including a breath test showing a blood alcohol concentration of 0.18. There was a clear indication that the blood draw would produce evidence of intoxication. Third, Divine Savior Hospital drew the blood sample. There is no evidence that the procedure used was unreasonable. Fourth, Hepler did not object to the test during the procedure. Therefore, the warrantless blood draw was permissible under ***Bohling***.

¶9 Hepler also argues that testing the blood sample constituted a second search, for which there was neither consent nor exigent circumstances. We rejected the "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 Hepler 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 a search; we rely upon the exigent circumstances exception to the Fourth Amendment of the United States Constitution. ***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 Hepler'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.