COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1365-CR **Cir. Ct. No. 99-CT-325**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAROL S. SWANSBY,

DEFENDANT-APPELLANT.

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

¶1 DEININGER, J.[1] Carol Swansby appeals a judgment convicting her of operating a motor vehicle under the influence of an intoxicant (OMVWI).

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[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.

She claims the trial court erred in denying her motions to suppress evidence of the result of a blood test administered following her arrest. Specifically, Swansby argues that (1) police may not constitutionally request a blood sample from an OMVWI arrestee when a breath test of "equal evidentiary value" was readily available, and (2) Wisconsin's "implied consent" law is unconstitutional because it is impermissibly coercive. Because the issues Swansby raises have been conclusively decided adversely to her in precedents that are binding on this court, we reject her arguments and affirm the appealed judgment.

BACKGROUND

¶2 The parties stipulated to the following facts for purposes of Swansby's motions to suppress the blood test result. Swansby was arrested for OMVWI and was thereafter requested to submit to a blood test for alcohol concentration. The requirements under WIS. STAT. § 343.305(4) for "informing the accused" were complied with, and Swansby submitted to the drawing of a blood sample. The sample was subsequently sent to the Wisconsin State Laboratory of Hygiene for analysis, which was performed "several days after collection" of the sample. No warrants were issued for either the drawing of the blood or its analysis.

¶3 After the court denied her suppression motions, Swansby pleaded no contest and the court entered a judgment convicting her of second-offense OMVWI, a traffic crime. She appeals, citing as error the denial of her motions to suppress the blood test result.[2]

[2] A defendant convicted of a crime may appeal the denial of a motion to suppress evidence notwithstanding a plea of guilty or no contest. *See* WIS. STAT. § 971.31(10).

ANALYSIS

¶4 Swansby's first claim of error is easily disposed of. She acknowledges that the supreme court in ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, 123 S. Ct. 704 (2002), and this court in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *cert. denied*, 531 U.S. 1153 (2001), have concluded that an officer may constitutionally request an OMVWI arrestee to submit to a blood test without regard to the availability of a breath test. Swansby asserts that, knowing we are bound by these precedents, she has raised the issue only in order to preserve the possibility of obtaining review in the U.S. Supreme Court.[3] We accept Swansby's concession that her first claim of error lacks merit under the present state of the law in Wisconsin.

¶5 The same is true with respect to Swansby's second contention.

¶6 She argues in her opening brief that even if the arresting officer could constitutionally obtain a sample of her blood without a warrant, the sample should not have been analyzed without a warrant. Swansby contends that our holding in ***State v. VanLaarhoven***, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, to the contrary is distinguishable because it rests on the defendant's "implied consent" under WIS. STAT. § 343.305(2) to the testing of his or her blood for alcohol concentration. Here, Swansby challenges the constitutionality of the allegedly "coercive" implied consent statute, and thus, in her view, ***VanLaarhoven*** is not controlling.

[3] We note that the U.S. Supreme Court has denied certiorari of both ***State v. Krajewski*** (*see* 123 S. Ct. 704 (2002)) and ***State v. Thorstad*** (*see* 531 U.S. 1153 (2001)).

¶7 Neither, according to Swansby, is ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶11, 256 Wis. 2d 1032, 650 N.W.2d 891**,** *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 892 (Wis. Sep. 26, 2002) (No. 01-3060), where we concluded that reading a defendant the "informing the accused" form, which threatens the loss of driving privileges if a test is refused, is not "coercion" that invalidates consent under the Fourth Amendment. Walitalo is not applicable, according to Swansby, because we did not address in ***Walitalo*** the constitutionality of the implied consent and refusal sanction provisions of WIS. STAT. § 343.305, an issue she squarely raises in this appeal.

¶8 We have since addressed, however, the very constitutional challenge Swansby raises here. We concluded in ***State v. Wintlend***, 2002 WI App 314, No. 02-0965-CR, that the provisions of WIS. STAT. § 343.305 which condition a driver's privilege to operate a motor vehicle on Wisconsin highways on the surrender of his or her right to refuse a chemical test for alcohol concentration do not violate the Fourth Amendment. We relied in part on the supreme court's observation in ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980), that one who applies for and accepts a license to drive does so on "'the condition that a failure to submit to the chemical tests will result in the ... revocation of his license unless the refusal was reasonable.'" ***Wintlend***, 2002 WI App 314 at ¶12. We concluded that, to the extent that this condition constitutes "coercion," it is nonetheless not unreasonable under the Fourth Amendment, given the minimal intrusion at issue balanced against the State's compelling interest in detecting and deterring drunk driving. ***Id***. at ¶18.

¶9 We conclude that our analysis and holding in ***Wintlend*** disposes of the remaining arguments Swansby makes in this appeal, and there is thus no need for us to discuss them again at length here. Although Swansby does not expressly

concede the foregoing, she impliedly does so in her letter to the court informing us that, in light of the "anticipated publication" of ***Wintlend***, she would not be filing a reply brief. ***Wintlend*** has been ordered published, it is thus binding on us, and we must apply it here. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

CONCLUSION

¶10 For the reasons discussed above, we affirm the appealed order.

By the Court.—Judgment affirmed.

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