COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1654 **Cir. Ct. No. 00-CT-115**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERROLD N. TANGYE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Jerrold N. Tangye appeals his conviction for operating a motor vehicle while intoxicated (OMVWI), contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

§ 346.63(1)(a). Tangye argues that WIS. STAT. § 343.305(2), Wisconsin's "implied consent" law, is unconstitutional because it coerces consent to a chemical "search" for intoxicants of blood drawn pursuant to an arrest for drunk driving. We conclude that any pressure employed by § 343.305(2) to obtain consent is reasonable and does not violate Fourth Amendment protections. Accordingly, we affirm the circuit court's judgment of conviction.

BACKGROUND

¶2 In August 2000, deputy Bradley J. Gilbert was dispatched by the Green County Sheriff's Department to investigate a one-car rollover accident. Gilbert arrived at the accident scene and spoke with Tangye, the driver of the vehicle, who was standing in a ditch holding some personal belongings. While speaking with Tangye, Gilbert noticed a strong odor of intoxicants, that Tangye's speech was slurred and that his eyes appeared glassy and his face was flushed. Tangye agreed to submit to a preliminary breath test (PBT) and to perform field sobriety tests. The PBT indicated that Tangye had a .26% blood alcohol level and he also failed the sobriety tests. Gilbert arrested Tangye for OMVWI and transported him to Monroe Clinic Hospital for a blood test.

¶3 At the hospital, Gilbert issued Tangye an OMVWI citation and read him the Informing the Accused form, as required by WIS. STAT. § 343.305(4). Tangye agreed to submit to an evidentiary chemical test of his blood, which revealed that he had a blood alcohol level of .10%. Tangye moved to suppress the evidence contending that the blood draw was obtained without a warrant in violation of his Fourth Amendment right against unreasonable search and seizures. In the alternative, Tangye argued that § 343.305 is unconstitutional and therefore, the chemical analysis of his blood obtained without valid consent or a search

warrant was legally impermissible. Following a hearing on the issues, the circuit court denied the motion and convicted Tangye of OMVWI. Tangye appeals.[2]

DISCUSSION

Standard of Review.

¶4 Whether a statute is constitutional presents a question of law that we review *de novo*. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74, 83 (1993).

WISCONSIN STAT. § 343.305.

¶5 WISCONSIN STAT. § 343.305(2) provides in relevant part:

> IMPLIED CONSENT. 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 ….

If a person improperly refuses to submit to testing, his or her operating privileges are revoked. Section 343.305(10).

¶6 Tangye argues that WIS. STAT. § 343.305 is unconstitutional because it coerces consent to a chemical "search" for intoxicants of blood "seized"

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[2] On appeal, Tangye concedes that ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240 and ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, apply to preclude his argument that the warrantless blood draw was obtained in violation of his Fourth Amendment rights. The courts in ***Thorstad***, 2000 WI App 199 at ¶6, and ***Krajewski***, 2002 WI 97 at ¶3, held that under the exigent circumstances exception, the police may secure a blood test without a warrant when arresting an individual for drunk driving based on probable cause. Therefore, we limit our analysis to whether Wisconsin's implied consent statute, WIS. STAT. § 343.305, is constitutional.

pursuant to an arrest for drunk driving. He maintains that the threatened sanction of a loss of driving privileges for refusing to submit to a search for blood alcohol content invalidates his consent for Fourth Amendment purposes. Therefore, because his consent to the chemical analysis of the sample was coerced and because the officers did not obtain a search warrant prior to analyzing the sample, the chemical test must be suppressed. We disagree.

¶7 We addressed this issue in ***State v. Wintlend***, 2002 WI App 314, _ Wis. 2d ___, ___ N.W.2d ___. In ***Wintlend***, we considered whether WIS. STAT. § 343.305 unreasonably coerced a motorist's consent to a blood alcohol test.[3] ***Wintlend***, 2002 WI App 314 at ¶1. We held that the pressure employed by the statute to obtain a motorist's consent was not unreasonable and affirmed the constitutionality of § 343.305. ***Id.*** at ¶19. The law set forth in ***Wintlend*** is clear and we are obligated to follow it. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997) (stating that we "may not overrule, modify, or withdraw language from a previously published decision of the court of appeals.").

¶8 As we noted in ***Wintlend***, driving is a privilege, not a constitutional right. ***Wintlend***, 2002 WI App 314 at ¶9; *see also* ***Kopf v. State***, 158 Wis. 2d 208, 214, 461 N.W.2d 813, 815 (Ct. App. 1990). As a condition of obtaining a driver's license, a would-be motorist consents to submit to a chemical search for blood alcohol content if arrested for driving while intoxicated. WIS. STAT. § 343.305(2); *See also* ***State v. VanLaarhoven***, 2001 WI App 275, ¶7, 248 Wis. 2d 881, 637

[3] Although ***Wintlend*** concerned consent to the initial blood draw, its reasoning applies to the chemical analysis of the sample. *See* ***State v. VanLaarhoven***, 2001 WI App 275, ¶7, 248 Wis. 2d 881, 637 N.W.2d 411 ([U]nder [WIS. STAT. § 343.305], the consent given by all individuals who apply for a driver's license is the consent to provide a sample and the consent to the chemical analysis of the sample.").

N.W.2d 411. The pertinent time of consent is when a license is obtained. ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828, 830 (1980). And the choice is there: either obtain a license conditioned on submitting to an intoxication test or exercise the right to travel by alternative means.

¶9 Additionally, a chemical test for intoxication is not overly intrusive or unreasonable. ***Wintlend***, 2002 WI App 314 at ¶17. Both the United States Supreme Court and the Wisconsin Supreme Court have recognized that a blood test is safe, relatively painless and commonplace. ***South Dakota v. Neville***, 459 U.S. 553, 563 (1983); ***State v. Krajewski***, 2002 WI 97, ¶57, 255 Wis. 2d 98, 648 N.W.2d 385. Because the "bodily intrusion the motorist is being asked to allow … is a minimal one," the choice between retaining driving privileges and refusing to submit to an intoxication test is not unreasonable. ***Wintlend***, 2002 WI App 314 at ¶17. Accordingly, we reject Tangye's argument that WIS. STAT. § 343.305 is unconstitutional and affirm the circuit court's judgment of conviction.

CONCLUSION

¶10 We conclude that any pressure employed by WIS. STAT. § 343.305 to obtain consent is reasonable and does not violate Fourth Amendment protections. Accordingly, we affirm the circuit court's judgment of conviction.

By the Court.—Judgment affirmed.

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