

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2003

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. 02-2023-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-91

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SPENCER S. HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Spencer Henderson appeals from a judgment of conviction for operating while intoxicated, a violation of WIS. STAT. § 346.63(1)(a) as a second offense. He asserts that the trial court erred when it

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

denied his motions to suppress the results of the blood draw taken incident to his arrest. We affirm.

¶2 Henderson was arrested on March 2, 2001, after Wisconsin State Patrol Officer Brad Bray observed him driving at night without his headlights on and drifting between the fog lines on the highway at a high rate of speed, finally crossing the right side fog line. After Henderson was stopped and failed the field sobriety tests, Officer Bray handcuffed him and took him to Gundersen/Lutheran Hospital for a blood draw. When they arrived, Officer Bray read Henderson the “Informing the Accused” form in compliance with WIS. STAT. § 343.305(4).² Henderson then submitted to the blood draw. The sample was mailed to the Laboratory of Hygiene where it was analyzed and determined that Henderson’s blood alcohol concentration was 0.276 percent. Henderson was charged with violating WIS. STAT. § 346.63(1)(a) and (b), as a second offense. After the trial court denied his motions to suppress the evidence of his intoxication, Henderson entered a no contest plea. The trial court dismissed the prohibited alcohol content charge and sentenced Henderson to forty-five days in jail.

¶3 Henderson does not challenge the probable cause for his arrest and therefore we are presented solely with questions of law regarding the constitutionality of WIS. STAT. § 343.305(2) and the analysis of Henderson’s blood sample. Accordingly, our review is de novo. *State v. Krajewski*, 2002 WI

² Under WIS. STAT. § 343.305(2), any person operating a motor vehicle is deemed to have given consent to tests to determine the presence or amount of alcohol in the person’s breath or blood when the person is arrested for a violation of WIS. STAT. § 346.63(1). Refusal to submit to the tests results in license revocation. Section 343.305(3)-(10).

97, ¶17, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, ***Krajewski v. Wisconsin***, 123 S. Ct. 704 (U.S. Wis. Dec. 16, 2002).

¶4 Henderson’s first issue, that the blood draw was a warrantless seizure in violation of the Fourth Amendment, is, as he concedes, controlled by the holdings in ***Krajewski***, and ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240. It is by now a settled point of law in Wisconsin that the exigent circumstances exception to the Fourth Amendment allows the police, following an arrest for OWI supported by probable cause, to perform a blood test for alcohol concentration, regardless of the existence of a breathalyzer or other less intrusive test. ***Krajewski***, 2002 WI 97 at ¶¶63-64; ***Thorstad***, 2000 WI App 199 at ¶¶5-6.

¶5 Next, Henderson argues that implied consent statute, WIS. STAT. § 343.305(2), is unconstitutional because it violates the Fourth Amendment’s protections against coerced consent to a search. The statute requires an individual arrested for OWI to make the Hobson’s choice of submitting to a blood draw or immediately losing his or her driving privileges. Whether the provisions of § 343.305(4) are unreasonably coercive was, as Henderson acknowledged in his brief, recently addressed in ***State v. Wintlend***, 2002 WI App 314, ___ Wis. 2d ___, 655 N.W.2d 745, *review denied* (Wis. Jan. 14, 2003) (No. 02-0965-CR). Section 343.305(2) is not unconstitutional because, even if the coercive event occurs when the officer reads the “Informing the Accused” form, as opposed to when the individual applies for a driver’s license, the limited intrusion posed by a blood draw is reasonable when weighed against the State’s interest in protecting the public from intoxicated drivers. ***Id.*** at ¶¶17-18.

¶6 Finally, Henderson’s remaining contention, that the chemical analysis of his blood after it was drawn constitutes a second warrantless search not

meeting the exigent circumstances exception to the Fourth Amendment, is unavailing. We held in *State v. Riedel*, 2003 WI App 18, ___ Wis. 2d ___, 656 N.W.2d 789, that the analysis of blood after it is drawn, even without consent, is not a second search subject to Fourth Amendment protections.³ This is because the “examination of evidence 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 judicially authorized warrant.” *Id.* at ¶16 (quoting *State v. VanLaarhoven*, 2001 WI App 275, ¶16, 248 Wis. 2d 881, 637 N.W.2d 411).

¶7 The trial court properly denied Henderson’s motions to suppress the results of his blood test and correctly concluded that the implied consent statute is constitutional.

By the Court.—Judgment affirmed.

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

³ Henderson informed the court by letter dated January 10, 2003, that, in light of the publication of *State v. Riedel*, 2003 WI App 18, ___ Wis. 2d ___, 656 N.W.2d 789, he would not be filing a reply brief.

