

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 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. 02-2061-CR

Cir. Ct. No. 01 CT 366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARCIA J. WITTIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
DALE T. PASELL, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Marcia Wittig appeals the judgment of conviction for driving while intoxicated in violation of WIS. STAT. § 346.63(1)(a), second offense. We reject her challenges to the admissibility of the results of the chemical test performed on her blood and affirm the judgment.

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

¶2 For purposes of Wittig’s motions to suppress the results of the chemical test, the parties stipulated to the following. Wittig was lawfully arrested based on probable cause to believe she had violated WIS. STAT. § 346.63(1)(a) or a conforming local ordinance. The officer read her the “Informing the Accused” form in compliance with WIS. STAT. § 343.305(4) and asked if she would submit to an evidentiary chemical test of her blood. She answered yes and submitted to the blood draw, which was conducted in conformity with § 343.305. An analysis of her blood disclosed an alcohol concentration of .186 grams per 100 millimeters of blood. Wittig moved to suppress those results, raising a number of constitutional issues, and the trial court denied the motions.

¶3 Since the facts are undisputed, the application of constitutional principles to those facts presents questions of law, which we review de novo. *State v. VanLaarhoven*, 2001 WI App. 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411. Challenges to the constitutionality of a statute also present a question of law. *State v. Smith*, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997).

¶4 Wittig concedes that under *State v. Thorstad*, 238 Wis. 2d 666, 618 N.W.2d 240 (Ct. App. 2000), and *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, the warrantless seizure of her blood did not violate the Fourth Amendment because it comes within the exception for exigent circumstances.² However, she contends, the analysis of her blood is a separate search that requires a justification under the Fourth Amendment separate from that for the seizure of her blood, and exigent circumstances do not justify the analysis of her blood once

² Wittig explains that she raised this issue in spite of the binding precedent resolving it in order to preserve it for possible review by the United States Supreme Court.

it has been drawn. Her consent does not make that search constitutional, she asserts, because her consent was not voluntary, and the implied consent statute is unconstitutional because it forces a person to choose between abandoning the Fourth Amendment protection against unreasonable searches and seizures, on the one hand, and suffering the sanctions of lost driving privileges on the other.³

¶5 We do not agree with Wittig's premise that the analysis of her blood constitutes a separate search for constitutional purposes; rather, it is an examination of evidence already seized. *VanLaarhoven*, 2001 WI App. 275, ¶16; *State v. Petrone*, 161 Wis. 2d 530, 544-45, 468 N.W.2d 676 (1991). In addition, we have recently rejected the argument that the implied consent is unconstitutional and that consent given by a driver in Wittig's situation is constitutionally invalid. *State v. Wintlend*, 2002 WI App. 314, ___, ___ Wis. 2d ___, ___ N.W.2d ___, ordered published on Nov. 6, 2002. We therefore conclude the trial court properly denied Wittig's motion to suppress the results of the chemical test of her blood.

By the Court.—Judgment affirmed.

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

³ 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 quantity of alcohol in the person's breath or blood when the person is arrested for a violation of WIS. STAT. § 346.63(1); license revocation is the penalty if a person refuses to submit to the tests after certain statutory conditions and procedures are complied with. Section 343.305(3)-(10).

