COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2681-CR **Cir. Ct. No. 01-CT-532**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT H. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MARK GEMPELER, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Robert H. Miller appeals from a judgment of the trial court denying a motion to suppress the results of the analysis of a blood sample. Miller argues that the arresting officer used unreasonable force to secure

[1] This opinion 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.

the blood draw and that a forcible blood draw over religious objections is unconstitutional. Because we find that the amount of force was not unreasonable under the circumstances and that Miller has not shown an honestly held religious conviction, we affirm.

¶2 The parties stipulate that there was probable cause to arrest the defendant for drunk driving. When Deputy Ty Dick informed Miller that he would be taken to Waukesha Memorial Hospital to have blood drawn for testing, Miller refused the test. When Dick said that since it was Miller's second offense, the blood would be taken by force, Miller said he would "resist or fight ... all the way."

¶3 Miller then objected to the blood test on the grounds of being a Jehovah's Witness. Dick asked if Miller had any proof of that. Members of the Jehovah's Witness sect are known to object to blood transfusions and many carry church-supplied cards to that effect, lest in the event of an accident or illness they be given medical treatment incompatible with their beliefs.[2] Miller said he had no card and offered no other evidence of membership in the church.

¶4 On the way to the hospital, Dick notified his dispatch center that Miller was going to resist the forced blood draw. The dispatcher contacted the City of Waukesha Police Department and when Miller and Dick arrived at the hospital's police escort room, they were met by two officers and a sergeant from the police department and by Deputy Carini from the sheriff's department. Dick

[2] *Medical Malpractice Case of the Month* (May 1998), *at* http://www.hookman.com/mp9805.htm; *see* Lee Elder, *Where is the WTS Headed With Their Blood Policy?, at* www.watchtowerinformationservice.org/bloodcard.htm.

instructed Miller to sit down. Miller said that he would stand; the deputy repeated his instructions, and one of the officers from the city escorted Miller to the chair.

¶5 Dick issued citations to Miller, read him the Implied Consent form, and asked if he would submit to the blood test. Miller refused. When the phlebotomist arrived to take the blood sample, Sergeant Engel advised Miller that either he could submit or the officers would remove the equipment from the room, immobilize him on the floor, and take the blood sample. Miller repeated that it was against his religion to give a blood sample.

¶6 Dick then removed the tables and chairs from the room and the other officers placed Miller face down on the floor with one officer holding each limb. As the phlebotomist attempted unsuccessfully to draw blood from Miller's left arm, he began to move his arm. The phlebotomist decided she needed a smaller needle, and while she was getting one, Miller said that he would cooperate if he were allowed to sit up. Dick told him that he had been given an opportunity to cooperate and "this is the route that we were taking and that this is what we were going to do."

¶7 When the phlebotomist tried again with a smaller needle, Miller again began to move. At that point, Carini took hold of Miller's head to hold him still. Miller objected that what was happening was "not natural" based on his experience of giving blood six years ago. The phlebotomist was finally able to draw two vials of blood from Miller.

¶8 In reviewing a motion to suppress, we will uphold the trial court's findings of historical facts unless they are clearly erroneous. However, the reasonableness of a warrantless blood draw is a legal question that we decide de

novo. In ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), the Wisconsin Supreme Court held that

> a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related offense 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 performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 534. Miller argues that the blood draw in this case violates the third and fourth prongs of the ***Bohling*** test: the method was unreasonable and he made a reasonable objection.

¶9 This court has held that law enforcement officers may use reasonable force to withdraw blood from a noncompliant subject. ***State v. Marshall***, 2002 WI App 73, ¶15, 251 Wis. 2d 408, 642 N.W.2d 571, *review denied*, 2002 WI 109, 254 Wis. 2d 262, 648 N.W.2d 477 (Wis. May 21, 2002) (No. 01-1403-CR). Miller argues that in his case, the officers used excessive force since he was placed on the floor even though he was not actively resisting and officers refused his request midway through the process to sit up and comply. He also notes that he was never offered an option to have his breath or urine tested instead of blood.

¶10 In ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d 347 (Ct. App. 1992), this court outlined six factors to be considered in determining a reasonable use of force in the taking of blood: (1) the environment of the test, (2) the severity of the crime at issue, (3) whether the subject posed an immediate threat to the safety of officers or others, (4) whether the subject was actively resisting,

(5) whether the police refused a reasonable request for alternate testing, and finally (6) the degree of the State's need for the sample. ***Id.*** at 589.

¶11 The test in this case was done at a hospital, by a medically qualified person, and thus the first factor favors the State. Miller, like Krause, was suspected of driving drunk as a repeat offender. This court has found that drunk driving is pervasively antisocial and that the "statute's escalating penalty scheme reflects a recognition that repeat drunk driving is even more intolerable." ***Id.*** at 590. Thus, the second factor also favors the State. The third factor, whether the defendant posed an immediate danger or threat to the safety of others, is less clear cut. Miller refused to obey instructions and repeatedly announced his intention to resist but, unlike Krause, he had not actually attacked officers before he was restrained.

¶12 The fourth factor is whether the subject was actively resisting. Miller argues that his resistance did not become active until he was on the floor and in pain and that his resistance was caused by the procedure to which he was subjected, rather than the other way around. He finds it unreasonable that officers did not first attempt a blood draw with him in a seated position rather than placing him on the floor. However, the officers informed him of what they were going to do before they did it, and he refused to cooperate. Later, halfway through the process, he offered to cooperate if they would let him sit up. The trial court found this offer to be "a whimsical change of mind" which was not credible under the facts and circumstances. We do not find this determination clearly erroneous, and therefore this factor also favors the State.

¶13 The fifth factor is whether the officers refused a reasonable request for an alternate test. This factor favors the State because Miller never made such a

request, reasonable or otherwise. The defense suggests that it was up to the officers to offer an alternate test, but the law does not even require officers to be guided by the defendant's preference for a test should he or she express one. ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 901, 266 N.W.2d. 618 (1978). In ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, 123 S. Ct. 704 (2002), the Supreme Court of Wisconsin declared:

> This court will not vest drivers who have been arrested for operating under the influence with the authority to veto constitutional searches to vindicate their personal choice in police procedure.

Id., ¶43.

¶14 Finally, the factor of the need for the evidence is the same in this case as in ***Krause***: "[S]cientific evidence of [blood alcohol content] is needed to secure [operating while intoxicated] convictions so that those who drive while intoxicated will be punished and others will be deterred from doing so" even if the defendant exhibits other indicia of intoxication. ***Krause***, 168 Wis. 2d at 592. We therefore hold that under the totality of the circumstances, the force used in the blood draw was not unreasonable.

¶15 Miller next argues that a forcible blood draw over religious objections is unconstitutional. In ***Schmerber v. California***, 384 U.S. 757 (1966), the United States Supreme Court acknowledged that there might be a "few who on the grounds of fear, concern for health, or religious scruple" would prefer some other test rather than having blood drawn. ***Id.*** at 771. Miller argues that by claiming to be a Jehovah's Witness, he put himself in this category. The question of whether Jehovah's Witnesses actually have any doctrinal objection to blood draws as opposed to transfusions is not dispositive since heretics have the same

right to religious freedom as orthodox members of their church. As the Court of Appeals of Ohio noted in ***State v. Biddings***, 550 N.E.2d 975 (Ohio Ct. App. 1988):

> The case law supports the proposition that an honestly held religious belief, even one at odds with the majority or all members of the religious organization to which the person belongs, is entitled to constitutional protection .... [I]f the defendant proved that he had an honestly held religious belief that prohibited the taking of blood samples from him, that belief is entitled to constitutional protection without inquiry into the truth or falsity of his view or whether he has correctly interpreted the Bible.

Id. at 979.

¶16 However, just as the defendant in ***Krause*** did not establish a reasonable objection under ***Bohling*** by saying he "didn't believe in needles," a defendant must do more than use the word "religion" to establish a religious objection. *See* ***Krause***, 168 Wis. 2d at 588. In ***Biddings***, the court concluded that the defendant failed to show that he had an honestly held religious objection. He offered no evidence, did not testify, and the court found that counsel's assertions of the defendant's beliefs were insufficient to carry the burden of proof.

> Defendant's claimed beliefs are suspect since they appear to be at complete variance with the religious order to which he claims to belong and he has a cogent, self-serving motivation to prevent the state from obtaining what might be the strongest possible evidence to convict him.

Biddings, 550 N.E.2d at 979.

¶17 Miller reminds this court that faith is beyond human reason and logic and urges us not to "get involved in determining the legitimacy or illegitimacy of a professed belief." But his actions have already involved the court. In ***People v. Sukram***, 539 N.Y.S.2d 275 (N.Y. Dist. Ct. 1989), the defendant in a drunk driving case claimed that because he had a religious motive for refusing a blood test, the

revocation of his driver's license and the use of his refusal as evidence in a criminal trial violated his right to the free exercise of religion. ***Id.*** at 276. The court was clearly dubious about his religious claim. The defendant said he was a Jehovah's Witness and offered his mother's testimony as confirmation, yet admitted to having drunk beer in violation of the church's prohibition of alcohol use. ***Id.*** at 278. The court noted that given the discrepancy between the defendant's professed beliefs and admitted actions, it was actually being asked to honor religious tenets violated by the defendant himself. ***Id.*** Nevertheless, the court considered his professed beliefs sincere for the purpose of analysis and found:

> [T]he defendant in the type of case at the bar has the clear option not to drive, or drive, knowing that refusal to submit to a chemical or blood test will result in the mandatory revocation and use of such refusal as evidence in a subsequent criminal proceeding, as it would for anyone else. The Jehovah's Witnesses in medical refusal cases risk death; the defendant, in the case before the court, may waive driving privileges by strict adherence.

Id. at 278-79.

¶18 The fourth prong of ***Bohling*** requires a *reasonable* objection. This court holds that Miller did not make one, not because we consider his professed theology unsound but because he has furnished absolutely no support for his claims of church membership or church doctrine. Because the methods used to obtain the blood draw in this case were reasonable under the circumstances and the arrestee made no reasonable objection to the procedure, the judgment denying the motion to suppress the results of the blood sample analysis is affirmed.

By the Court.—Judgment affirmed.

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