COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0011-CR **Cir. Ct. No. 02-CT-000009**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANE A. SLIWINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Jane Sliwinski appeals an order denying suppression of a blood test taken after she was arrested for operating while intoxicated as well as her judgment of conviction. Sliwinski contends that the

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

blood draw was unreasonable because the Florence County Sheriff's Department had no written policy regarding a blood draw procedure. Sliwinski also argues that the registered nurse practitioner who drew her blood is not a professional authorized by statute to complete a draw, making it invalid. Because there is no rule requiring law enforcement agencies to have a written policy for conducting blood draws, and because a nurse practitioner is authorized to do a draw under the statute, the judgment and order are affirmed.

Background

¶2 The facts are undisputed. On February 24, 2002, at approximately 4:18 p.m., state trooper Jason Babich observed a car turn a corner at a high rate of speed and initiated a traffic stop. When he approached the vehicle, driven by Sliwinski, he noticed a strong odor of intoxicants coming from the vehicle. Babich asked Sliwinski to perform field sobriety tests, which she failed. Babich arrested her and transported her to the Florence County Sheriff's Department for a blood draw.

¶3 At the sheriff's department, Sliwinski was read the "Informing the Accused" form and was asked to submit to a chemical test of her blood. She agreed, and the blood was drawn by Karen Steber, a registered nurse practitioner, using a kit provided by the State Laboratory of Hygiene. The test revealed a blood-alcohol concentration of .234%, and Sliwinski was charged with operating while intoxicated and operating with a prohibited alcohol concentration, both as second offenses.

¶4 Sliwinski initially pled not guilty to the charges. She filed an open records request with the sheriff's department seeking a copy of its written policy regarding blood draws. When informed that the department had no such written

policy, Sliwinski filed a motion to suppress the test results, challenging the reasonableness of the blood draw. The trial court denied the motion, and Sliwinski changed her plea to no contest.[2] She was convicted of OWI-second, and now appeals.

Standard of Review

¶5 The reasonableness of a blood draw, which is a search, is a question of constitutional law that we review de novo. ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546. A warrantless blood sample taken at the direction of a law enforcement officer is permissible if

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation 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., ¶6.

Discussion

¶6 Sliwinski's sole challenge to the reasonableness of the draw is best characterized as a challenge to factor three, the method of obtaining the sample. She complains that "the absence of any written policy relating to blood

[2] Sliwinski's plea questionnaire/waiver of rights form shows she entered a plea of no contest. The judgment of conviction shows that she pled guilty. The discrepancy is of no import to this appeal.

withdrawals, under the auspices of cases like ***Krause***, ***Schmerber***, ***Harper***, and ***Skinner*** is fatal to the constitutional reasonableness of the withdrawal."[3]

¶7 Sliwinski never really explains this complaint. In the trial transcript, however, she states the issue is that "there is no policy in place for what to do if complications [from the draw] were to occur in the jail." The complications she worries about include a hematoma, cardiac arrest, and seizures. Sliwinski offers no explanation how a lack of such a policy makes the draw unreasonable. Ostensibly, this is why she cites the several cases she includes in her brief, but the cases are unavailing and say nothing about law enforcement reducing its blood draw policies to writing.

¶8 In ***Schmerber v. California***, 384 U.S. 757 (1966), a sample of the defendant's blood was drawn without his consent.[4] The Supreme Court concluded that the blood draw in that case was constitutionally reasonable. Specifically, the Court held that Schmerber's refusal was not reasonable, alcohol's rapid dissipation in the bloodstream created exigent circumstances,[5] and the test was performed in a reasonable manner in a medical environment according to accepted medical

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[3] ***Washington v. Harper***, 494 U.S. 210 (1990); ***Schmerber v. California***, 384 U.S. 757 (1966); ***Skinner v. Railway Labor Execs. Ass'n***, 489 U.S. 602 (1989); ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d 347 (Ct. App. 1992).

[4] We question whether an analysis under the ***Schmerber*** line of cases is appropriate here. Those cases typically apply to blood draws to which the defendant did not consent. It appears undisputed that Sliwinski consented to the blood draw. "A consent search is reasonable to the extent that the search remains within the bounds of the actual consent." ***State v. Douglas***, 123 Wis. 2d 13, 22, 365 N.W.2d 580 (Ct. App. 1985). Thus, Sliwinski's consent to a blood test would seem dispositive. However, we address the arguments Sliwinski advances because the parties did not discuss the consent issue.

[5] *See* ***State v. Bohling***, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993), interpreting ***Schmerber*** to hold that alcohol's rapid dissipation in the bloodstream is the exigent circumstance rendering reasonable a blood draw over the suspect's objection.

practices. ***Id.*** at 770-71. ***Schmerber*** did not hint at a requirement that the law enforcement agency have a written policy regarding blood draws.

¶9 ***Skinner v. Railway Labor Execs. Ass'n***, 489 U.S. 602 (1989), addressed a Fourth Amendment challenge to regulations allowing private railways to test employees' blood and urine to screen for operators impaired by drugs or alcohol, particularly during investigation of railway accidents. ***Id.*** at 606. The only "written regulations" were not promulgated by a law enforcement agency but rather the Federal Railroad Administration. ***Id.*** In any event, the Supreme Court concluded that "the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, [because] the Government's compelling interests outweigh privacy concerns." ***Id.*** at 633. Sliwinski raises no privacy issues, nor does this case deal with federal regulatory mandates.

¶10 Sliwinski herself distinguishes ***Washington v. Harper***, 494 U.S. 210 (1990). That case dealt with the involuntary administration of anti-psychotic medications to a person in custody. There was no blood draw.

¶11 Sliwinski cites ***State v. Krause***, 168 Wis. 2d 578, 589, 484 N.W.2d 347 (Ct. App. 1992), for the proposition that a test must be administered by medical personnel, in the proper setting and according to accepted medical procedures "all … to pass constitutional muster." Yet ***Krause*** mentions nothing about a written policy requirement. Moreover, ***Daggett*** suggests the ***Krause*** factors are to be considered on a spectrum of reasonableness, not as absolutes. ***Daggett***, 250 Wis. 2d 112, ¶¶14-16.

¶12 Sliwinski also relies on ***Winston v. Lee***, 470 U.S. 753 (1985), to argue that a compelled surgical intrusion implicates expectations of privacy of

such magnitude that the intrusion may be unreasonable even if likely to produce evidence of a crime. ***Id.*** at 759. The proposed search in ***Winston*** involved surgery under general anesthesia to remove a bullet lodged in a suspect's chest. ***Id.*** at 753. The intrusion of a blood draw is not comparable. ***State v. Krajewski***, 2002 WI 97, ¶60, 255 Wis. 2d 98, 648 N.W.2d 385. The intrusion in the usual blood draw is slight and does not constitute an unreasonable law enforcement practice. ***Id.*** Thus, nothing Sliwinski cites suggests that lack of a written contingency plan for medical reaction to a blood draw renders the draw unreasonable.[6]

¶13 Sliwinski's challenge to using a registered nurse practitioner to draw her blood raises a question of statutory interpretation that we review de novo.[7] *See* ***City of Muskego v. Godec***, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

¶14 WISCONSIN STAT. § 343.305(5)(b) provides that blood may be withdrawn "only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." Karen Steber, who drew the blood, was a registered nurse practitioner. Sliwinski contends that

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[6] To the extent Sliwinski implies that the draw here was unreasonable because it was done in the station and not a medical facility, we have rejected the notion that a draw must always be performed in a hospital. ***State v. Daggett***, 2002 WI App 32, ¶14, 250 Wis. 2d 112, 640 N.W.2d 546. Here, the draw was performed by a trained professional in a room set aside specifically for medical procedures using a kit provided by the State Laboratory of Hygiene. This is adequate.

To the extent Sliwinski argues that there was no written policy on how to prepare an individual for a blood draw, including sterilization of the arm, the sheriff's department does not need such a written policy. WISCONSIN STAT. § 343.305(5)(b) authorizes only certain medical personnel to complete a blood draw. They would receive proper training before licensing and would not need to rely on the sheriff's department's instructions.

[7] It also appears this issue is being raised for the first time on appeal. This normally waives the argument. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

because nurse practitioners are not enumerated in § 343.305(5)(b), Steber was not authorized to draw the blood.

¶15 A nurse practitioner is a registered nurse. WIS. STAT. §§ 255.06(1)(d) and 632.895(8)(a)3. The administrative code for the Board of Nursing also recognizes this. *See* WIS. ADMIN. CODE § N 8.02(1). In other words, all nurse practitioners are registered nurses even if not all registered nurses are nurse practitioners. Thus, nurse practitioners are registered nurses for purposes of WIS. STAT. § 343.305(5)(b). Steber was authorized to draw Sliwinski's blood.

By the Court.—Judgment and order affirmed.

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