COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1521

Cir. Ct. Nos. 2009FO422
2009FO548

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW P. RICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Matthew Rick appeals his judgment of conviction for operating a motorboat while under the influence of an intoxicant,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-2010). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

first offense, contrary to WIS. STAT. § 30.681(1)(a), and an order denying his motion to suppress evidence of intoxication obtained by a nonconsensual, warrantless blood draw. Rick argues that the blood draw was an unreasonable search because his offense was a noncriminal violation, and exigent circumstances did not exist to justify the warrantless search. We disagree and conclude that the circuit court properly denied Rick's motion to suppress. We therefore affirm.

BACKGROUND

¶2 The following facts are taken from the hearing on Rick's motion to suppress evidence. Water Patrol Deputy John Blosenski of the Waupaca County Sheriff's Department was on boat patrol on the Wolf River when he stopped two motorboats suspected of having swamped another boat. The officer observed that one of the boat operators, later identified as Matthew Rick, exhibited signs of intoxication. Rick failed three field sobriety tests and was arrested for intoxicated boating.

¶3 The deputy attempted three separate breathalyzer tests but was unable to obtain a usable sample. Water Patrol Deputy Jeremy Bonikowske transported Rick to Riverside Medical Center to conduct a blood test. In transit, Rick informed the deputy he would not consent to a blood test, at which point Rick was read the Informing the Accused statement. Rick subsequently acquiesced to the blood test at the medical center.[2] The blood test showed Rick

[2] The State does not argue that Rick's acquiescence to the blood draw after being informed he would be charged for his failure to consent to the test constitutes consent to perform the search. It is undisputed that Rick did not consent to the blood draw for purposes of the motion to suppress.

had a blood alcohol content of .254, and he was charged with first-offense operating a motorboat while under the influence of an intoxicant.[3]

¶4 Rick filed a motion to suppress the blood test results on grounds that a blood draw is an unreasonable search in an investigation for the civil violation of first-offense intoxicated boating. He also argued that exigent circumstances did not exist to justify the warrantless search. The court denied the motion, and Rick was found guilty following a trial.

DISCUSSION

¶5 On appeal, Rick renews his arguments that a warrantless blood draw is an unreasonably intrusive search in an investigation of a non-jailable, civil violation such as first-offense operating a motorboat while under the influence of an intoxicant. He also argues that exigent circumstances did not exist to justify the warrantless search. Whether a warrantless blood draw for first-offense intoxicated boating is an unreasonable search, and whether the exigent circumstances exception to the warrant requirement of the state and federal constitutions applies in these circumstances are questions of law that we review de novo. *See* ***State v. Bohling***, 173 Wis. 2d 529, 533, 494 N.W.2d 399 (1993).

¶6 The Fourth Amendment of the United States Constitution and article 1, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. There is no dispute that a compulsory blood test constitutes a search and seizure within the meaning of

[3] Rick was charged and later found guilty of operation of a boat with a prohibited alcohol concentration as well. This charge was dismissed pursuant to WIS. STAT. § 30.681(1)(c) and judgment was entered against him on the intoxicated operation charge only.

federal and state constitutions. ***Schmerber v. California***, 384 U.S. 757, 767 (1966); ***Bohling***, 173 Wis. 2d at 536-37. As a general rule, warrantless searches are unreasonable unless they are supported by probable cause to search and exigent circumstances exist to excuse the requirement of a search warrant. ***State v. Erickson***, 2003 WI App 43, ¶9, 260 Wis. 2d 279, 659 N.W.2d 407.

¶7 The dissipation of alcohol levels in the blood stream constitutes an exigency justifying in certain circumstances a warrantless blood draw of a person lawfully arrested for intoxicated operation. *See* ***Schmerber***, 384 U.S. at 770-71; ***State v. Krajewski***, 2002 WI 97, ¶37, 255 Wis. 2d 98, 648 N.W.2d 385; ***Bohling***, 173 Wis. 2d at 533; ***State v. Wodenjak***, 2001 WI App 216, ¶12, 247 Wis. 2d 554, 634 N.W.2d 867. In ***Bohling***, the Wisconsin Supreme Court held:

> 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 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.

Bohling, 173 Wis. 2d at 533-34 (footnote omitted).

¶8 Rick argues that a warrantless blood draw is an unreasonable search in an investigation of a non-jailable, civil violation such as first-offense intoxicated boating, noting that all prior published Wisconsin cases addressing the reasonableness of a warrantless blood draw have been for criminal offense intoxicated operation. *See* ***Krajewski***, 255 Wis. 2d 98, ¶8 (fifth offense); ***Bohling***, 173 Wis. 2d at 534 (third offense); ***State v. Marshall***, 2002 WI App 73, ¶1, 251 Wis. 2d 408, 642 N.W.2d 751 (fifth offense); ***State v. Wodenjak***, 247 Wis. 2d 554,

¶12 (fourth offense); ***State v. Gibson***, 2001 WI App 71, ¶1, 242 Wis. 2d 267, 626 N.W.2d 73 (eighth offense). We disagree.

¶9 The supreme court's decision in ***Bohling*** plainly addresses the constitutionality of a warrantless blood draw pursuant to a lawful arrest for a non-jailable, civil violation. ***Bohling*** holds that a warrantless blood draw is permissible "to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related *violation or crime*." ***Bohling***, 173 Wis. 2d at 534 (emphasis added). Additionally, the dissent in ***Bohling*** clarifies the scope of the majority's holding by stating the issue presented in the case as follows: "When a person is lawfully arrested without a warrant for operating a motor vehicle while intoxicated (*whether a crime or civil forfeiture*) under what circumstances may the state order that the operator's blood be drawn without a search warrant?" ***Id.*** at 548 (Abrahamson, J. dissenting) (emphasis added and footnote omitted). Although the underlying conviction in ***Bohling*** was for misdemeanor third-offense intoxicated operation of a motor vehicle, we may not treat as dicta language in ***Bohling*** deciding the issue of whether a warrantless blood draw pursuant to a lawful arrest for civil violation intoxicated operation is constitutional. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 (court of appeals may not dismiss language from a supreme court opinion as dicta). Accordingly, we conclude ***Bohling*** authorizes a blood draw pursuant to a lawful arrest for first-offense intoxicated operation, a civil violation, provided that the four requirements of ***Bohling*** have been met.

¶10 Nevertheless, Rick maintains that the governmental interest in investigating and prosecuting a non-jailable, civil violation is not sufficiently weighty to justify the forced draw of his blood. We disagree. The governmental interest at issue here is the enforcement of intoxicated operation laws, which is

necessary to protect the safety of all who use our navigable waters. Such an interest is sufficiently weighty to justify a warrantless blood draw whether the offense is the suspect's first or fifth. *Cf.* ***Bohling***, 173 Wis. 2d at 545 ("Obviously, enforcing drunk driving laws is a significant state interest. No supporting authority is necessary to identify the significant toll that drunken drivers have exacted on the American public in loss of life, limb, and property.").

¶11 Rick also cites ***Welsh v. Wisconsin***, 466 U.S. 740, 753-54 (1984), for the proposition that exigent circumstances do not exist to excuse the warrant requirement for a blood test when the underlying intoxicated operation offense is a noncriminal violation. However, ***Welsh*** addressed the legality of an intrusion into the home, not a bodily intrusion, and is therefore inapplicable here. *See* ***Schmerber***, 384 U.S. at 767-68 (noting cases addressing state interference with "houses, papers and effects" are not instructive when analyzing an intrusion into the body). In ***Welsh***, the Supreme Court concluded that dissipation of alcohol in the blood stream does not constitute exigent circumstances justifying a warrantless entry into the home to investigate a suspected case of noncriminal intoxicated operation. ***Welsh***, 466 U.S. at 753-54. ***Welsh*** did not overrule or distinguish ***Schmerber***, which, as noted, upheld a warrantless blood draw pursuant to a lawful arrest for an intoxicated operation offense.

¶12 In sum, Rick has presented no reasonable objections to the warrantless blood draw, and he does not argue that the blood draw failed to meet

the other requirements of ***Bohling***. Accordingly, we conclude that Rick's blood draw was reasonable under the Fourth Amendment.[4]

By the Court.—Judgment and order affirmed.

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

[4] Rick also suggests in a footnote that the existence of penalties for refusal to submit to an intoxication test in the Implied Consent statute, WIS. STAT. § 30.683, diminish the State's interest in obtaining a blood sample from a drunk driving suspect. This argument is inadequately developed and we therefore decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").