COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2880-CR **Cir. Ct. No. 02CF000403**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHEILA K. LAFORTUNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Sheila LaFortune appeals a judgment of conviction for homicide by use of a motor vehicle, with a prohibited alcohol concentration,

contrary to WIS. STAT. § 940.09(1)(b).[1] LaFortune also appeals the order denying her motion to suppress the results of a warrantless blood draw. We affirm the judgment and order.

Background

¶2 The facts are undisputed. At approximately 12:15 a.m. on January 11, 2002, the Brown County Sheriff's Department was dispatched to an accident involving LaFortune. She had failed to negotiate a sharp turn, resulting in her vehicle rolling at least once and ending in a ditch about fifty feet from the road. Both LaFortune and her passenger, Benjamin Garot, were ejected from the vehicle. Garot died at the scene.

¶3 Deputy George Gulczynski arrived first, followed shortly by deputy Bryan Cleven. Both deputies noticed beer bottles at the accident scene; one bottle was in the vehicle and one was approximately three feet from the crash site. Both deputies also noticed an odor of intoxicants from LaFortune.

¶4 LaFortune sustained a broken bone in her foot, which was protruding through the skin. She was transported by ambulance to the hospital. Cleven followed, completing the paperwork for a warrantless blood draw at the hospital. After arriving at the hospital, Cleven again noticed the odor of intoxicants. While LaFortune was waiting to be taken for X-rays, Cleven asked her a few questions and LaFortune admitted both that she had been driving the vehicle and had been drinking.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 Cleven informed LaFortune that he planned to have her blood drawn pursuant to the implied consent statute, WIS. STAT. § 343.305(9)(a)5.c. LaFortune requested the blood not be drawn "until the pain stops," but the blood was taken anyway. Shortly thereafter, LaFortune was taken in for a CAT scan, at which point Cleven arrested her. The blood test later revealed a blood alcohol concentration of .216%.

¶6 LaFortune was charged with two counts of homicide by intoxicated use of a motor vehicle contrary to WIS. STAT. § 940.09(1)(a) and (b).[2] LaFortune filed a motion to suppress the results of the blood test claiming (1) a warrantless blood draw can only be done when there is a formal arrest; (2) there was no probable cause to arrest her; and (3) her request that the blood draw wait until she was not in pain was reasonable.

¶7 The trial court denied the motion, concluding that under ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), probable cause to arrest substitutes for the actual arrest necessary to justify a warrantless draw and that there was probable cause in this case. In addition, the court concluded that LaFortune's request to wait on the draw was unreasonable.

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[2] WISCONSIN STAT. § 940.09 provides in relevant part:

> (1) Any person who does any of the following may be penalized as provided in sub. (1c):
>
> ….
>
> (a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.
>
> (b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01 (46m).

¶8 LaFortune then pled no contest to the homicide by intoxicated use charge issued under WIS. STAT. § 940.09(1)(b) for her prohibited alcohol concentration. The court sentenced her to thirty months' initial confinement and six years' extended supervision. LaFortune appeals.

Discussion

¶9 Because the facts are undisputed, all that remains is the question of the constitutional reasonableness of the blood draw. This is a question of law we review de novo. ***State v. Erickson***, 2003 WI App 43, ¶4, 260 Wis. 2d 279, 659 N.W.2d 407.

Whether a Formal Arrest is Required for a Warrantless Blood Draw

¶10 In ***Bohling***, 173 Wis. 2d at 533-34, the supreme court stated:

> [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.

¶11 By way of a footnote, the court added a caveat to the first prong: that probable cause to arrest substitutes for the predicate act of lawful arrest. ***Id.*** at 534 n.1 (citing ***State v. Bentley***, 92 Wis. 2d 860, 863-64, 286 N.W.2d 153 (Ct. App. 1979)).

¶12 LaFortune debates whether omission of this footnote in the discussion of ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, means the court no longer meant to allow probable cause to substitute for lawful

arrest. The debate is academic because this court has subsequently affirmatively held that, irrespective of the footnote, "probable cause to believe blood currently contains evidence of a drunk-driving-related violation or crime satisfies the first prong of ***Bohling***."[3] ***Erickson***, 260 Wis. 2d 279, ¶12, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 101.

Whether Probable Cause to Search Existed

¶13 When analyzing probable cause to conduct a search, the proper inquiry is whether there is a "fair probability" that evidence of a crime will be found in a particular place. ***Id.***, ¶14 (citation omitted). Whether probable cause exists is based on the totality of the circumstances. ***Id.*** The test is objective: what a reasonable officer would reasonably believe under the circumstances. ***Id.*** Probable cause is based on the practical considerations on which reasonable people—not legal technicians—would act. ***Id.*** Probable cause is not the same as "more likely than not." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). It is only necessary for the information to support a reasonable belief that guilt is more than a possibility. ***Id.***

¶14 Upon arrival at the scene, officers discovered at least probable cause to believe LaFortune had committed homicide by negligent operation of a motor vehicle, a violation of WIS. STAT. § 940.10. During early morning hours, LaFortune had failed to negotiate a sharp curve in the road, resulting in a crash of the vehicle. The crash was of sufficient force to cause the vehicle to roll over and

[3] LaFortune complains that the court's "rationale seems inadequate … in particular given the heightened precautions that have historically attached to warrantless blood draws." However, even if we agreed, we are bound by our previous decisions and cannot modify them. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

eject both passengers. One of LaFortune's shoes was still located on the driver's side of the vehicle. Both deputies on the scene noticed an odor of alcohol and beer bottles near the scene. At the hospital, before initiating the blood draw, LaFortune admitted she had been drinking.

¶15 Evidence of alcohol does not necessarily implicate a PAC charge or even an intoxication charge. However, whether alcohol was a contributing factor goes at least to the question of negligence and, in this case, sufficiently implicates the crime as a drunk driving related crime, even without evidence of homicide by *intoxicated* use of a motor vehicle. Thus, there was sufficient probable cause to believe LaFortune's blood would contain evidence and justify a warrantless blood draw.[4]

Whether LaFortune's Refusal Was Reasonable

¶16 The trial court concluded, and we agree, that LaFortune's refusal to have her blood drawn when requested was unreasonable. In general, Wisconsin's implied consent law requires submission to chemical testing of one's blood, breath, or urine, with penalties for refusing the testing. However, an individual will not be penalized for refusal if "it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol …." WIS. STAT. § 343.305(9)(a)5.c.

[4] The same evidence fulfills the second prong: whether there is "a clear indication that the blood draw [would] produce evidence of intoxication." ***State v. Bohling***, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993).

¶17 Here, LaFortune asked not to be subjected to additional pain from a blood draw until the pain from her injured foot subsided. Assuming without deciding that we could possibly classify her injury as a "physical disability," it is not one *unrelated* to the use of alcohol. Moreover, "for most people the [blood draw] procedure involves virtually no risk, trauma, or pain." ***Schmerber v. California***, 384 U.S. 757, 771 (1966). LaFortune apparently already had received an intravenous set-up for the administration of pain medication, or the IV *and* injected pain medication. Both of those procedures would have involved pain of a needle on top of the pain from her foot, but there is no indication LaFortune asked for those treatments to be delayed.

¶18 LaFortune's refusal is also akin to the fear of needles argument, rejected by ***Krajewski*** as it "could have been offered by any driver arrested for operating under the influence. Acceptance … would undercut the implied consent statute and create chaotic consequences for enforcement of the law." ***Krajewski***, 255 Wis. 2d 98, ¶62.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.