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DISTRICT II

December 11, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1937-CR

State of Wisconsin v. Paul R. Wickard (L.C. #2017CF135)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Paul R. Wickard appeals from a judgment convicting him of operating with a prohibited alcohol concentration as a sixth offense. He contends that the circuit court should have suppressed evidence obtained as a result of a warrantless blood draw. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

At approximately 11:00 p.m. on October 12, 2016, Green Lake County Sheriff's Deputy Tyler Hoerig observed a parked car at a gas station. Running the license plate, he learned that the car's owner, Wickard, had a revoked license.

Hoerig watched Wickard exit the gas station and get into the car. Hoerig knocked on the car's window, and Wickard rolled it down. Hoerig asked Wickard how he got there, and Wickard replied that he drove. Hoerig arrested Wickard for operating while revoked.

In his interaction with Wickard, Hoerig noticed that Wickard's eyes were glassy and bloodshot. He also smelled a light odor of alcohol where Wickard was seated and from Wickard himself. Wickard admitted that he had been drinking. He explained that he had four beers throughout the day, with the last beer approximately 30 to 45 minutes before he got to the gas station.

Hoerig knew from dispatch that Wickard's license had been revoked for operating while intoxicated (OWI) and that he was subject to a 0.02 blood alcohol driving restriction. After his interaction with Wickard, Hoerig asked him to perform field sobriety tests or submit to a preliminary breath test. When Wickard declined to do so, Hoerig arrested him for violating his blood alcohol driving restriction. Wickard refused to submit to a blood test.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

Hoerig contemplated getting a search warrant for Wickard's blood; however, he concluded that exigent circumstances justified a warrantless blood draw. He later explained that it would have taken almost two hours to have obtained Wickard's blood had he applied for a search warrant. This was due to the location of the hospital, the time needed to draft the warrant application, the time needed to find a notary, and the time needed to transmit the warrant application to the judge and then back to the hospital. Based on the rate at which alcohol dissipates from blood,² Hoerig was concerned that evidence that Wickard violated his blood alcohol driving restriction would be lost.

Wickard filed a motion to suppress, arguing that exigent circumstances did not support the warrantless blood draw. Following a hearing on the matter, the circuit court denied the motion. The court agreed with Hoerig that exigent circumstances were present.

Wickard subsequently pled no contest to operating with a prohibited alcohol concentration as a sixth offense. The circuit court imposed a sentence of two years of initial confinement and three years of extended supervision. This appeal follows.

Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." A warrantless search is presumptively unreasonable and is constitutional only if it falls under one of the recognized exceptions to the warrant requirement. *State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

² Hoerig explained that alcohol dissipates from blood in the average person at a rate of 0.015 percent per hour.

One recognized exception to the warrant requirement is a search based on exigent circumstances. *State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. Exigent circumstances exist where there is a threat that evidence will be lost if time is taken to obtain a warrant. *Id.*

A warrantless blood draw is reasonable when exigent circumstances are present and if the following additional requirements are met:

- (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.

State v. Howes, 2017 WI 18, ¶25, 373 Wis. 2d 468, 893 N.W.2d 812 (citation omitted).

In reviewing a circuit court's decision on a motion to suppress, we apply the clearly erroneous standard to the court's findings of fact. *State v. Guard*, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718. However, we review de novo the court's application of constitutional principles to those findings. *Id.*

On appeal, Wickard renews his challenge to the warrantless blood draw. He maintains that the circuit court should have granted his motion to suppress, as exigent circumstances were not present.³ We disagree.

³ Wickard concedes that the other four requirements needed to justify a warrantless blood draw on exigent circumstances were present.

Here, the record supports a determination of exigent circumstances. As noted above, Hoerig knew that Wickard was subject to a lower blood alcohol driving restriction due to a prior OWI. Likewise, he knew that Wickard had been drinking on the night in question, though he was uncertain of the degree of intoxication due to Wickard's refusal to perform any tests. Based on these facts, the rate at which alcohol dissipates from blood, and the length of time it would have taken to get a warrant in this case, Hoerig reasonably feared that evidence of a crime would be lost absent a prompt, warrantless blood draw. Accordingly, we are satisfied that the circuit court properly denied Wickard's motion to suppress.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals