

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2713-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. LEEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

MYSE, P.J. Michael J. Leeman appeals an order denying his motion to suppress evidence of a chemical blood test and from a judgment of conviction for operating a motor vehicle while intoxicated. Leeman claims the trial court erred by finding that he had unlawfully refused to submit to a chemical blood test. Leeman alleges that he was denied his statutory right to an alternate test under the implied consent law when the arresting officer, while indicating a

refusal after Leeman refused to submit to a blood test, failed to invoke the administrative penalties for refusal after Leeman subsequently voluntarily submitted to the required blood test. Because this court concludes that Leeman refused to take the required blood test and that his refusal eliminated his right to an alternate test, Leeman was not denied his right to an alternative test. This court also concludes that Leeman's failure to request an alternative test waives his claim of denial of such right. Accordingly, the order denying suppression of the test results and the judgment of conviction are affirmed.

Leeman was arrested for operating a motor vehicle while intoxicated and was transported to St. Elizabeth's Hospital for an evidentiary blood test. The arresting officer read Leeman all five paragraphs of Section A of the Implied Consent Form and requested that Leeman submit to a blood test. Leeman asked the officer to explain the form to him and the officer refused. Because the officer refused to explain the consequences of the rights reflected in the given warning, Leeman declined to submit to the blood test. Leeman again asked the officer to explain the consequences of the rights in the warning. The officer again declined. The officer then advised Leeman that as a result of his prior indication that he would not submit, the officer had indicated a refusal on the Informing the Accused form. He also asked if Leeman was going to be combative. Leeman stated he would not fight but that he was not going to submit. The officer then proceeded to direct the taking of the evidentiary blood sample. Leeman fully cooperated with the blood sample draw, which indicated a blood alcohol level of .261%. Because of Leeman's ultimate cooperation in taking the evidentiary blood sample, the officer did not initiate the administrative refusal hearing, notwithstanding Leeman's initial refusal to consent. Instead, the officer issued a Notice of Intent to

Suspend which indicates that Leeman submitted to chemical testing in accordance with the implied consent law.

Leeman claims he was denied his statutory right to an alternative blood test. Section 343.305(5)(a), STATS., only accords the right to an alternative blood test when a person submits to a primary test under the implied consent law.¹ Whether Leeman was denied the right to an alternative test, therefore, depends on whether he refused to submit to the request for a chemical blood test. The determination whether an individual refused to submit to a chemical test requires the court to apply the implied consent statute, § 343.305, to the facts of the particular case. This is a question of law this court reviews de novo. *Olen v. Phelps*, 200 Wis.2d 155, 160, 546 N.W.2d 176, 180 (Ct. App. 1996).

The premise of Leeman's claim is that because the officer did not initiate administrative refusal proceedings, but instead initiated administrative suspension proceedings under the implied consent law, Leeman in fact consented to giving the required sample. The fallacy of this assertion is that Leeman's ultimate cooperation did not change the fact that he initially refused to take the required test. When the officer declined to explain the Informing the Accused form, Leeman expressly refused to submit. The officer properly noted the refusal on the Informing the Accused form. Later, when the officer asked Leeman if he

¹ Section 343.305(5)(a), STATS., states, in part:

The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her choosing administer a chemical test for the purpose specified under sub. (2).

was going to be combative, Leeman said no and again verbally indicated that he would not submit to a blood test.

Once a person has been properly informed of the implied consent law, that person must promptly submit or refuse to submit to the required test. *State v. Rydeski*, 214 Wis.2d 101, 109, 571 N.W.2d 417, 420 (Ct. App. 1997). Any failure to submit to the test, other than because of physical inability, is an improper refusal that invokes the statute's penalties. *Id.* at 108-09, 571 N.W.2d at 419-20. Leeman's ultimate cooperation with the involuntary administration of a blood test does not change the fact of his initial refusal. Likewise, the officer's failure to invoke the administrative penalties for a refusal does not affect the ultimate fact of refusal. "A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a 'reasonable time'" *Id.* at 109, 571 N.W.2d at 420. Therefore, neither Leeman's willingness to submit to the test subsequent to his earlier refusal nor the officer's failure to invoke the administrative refusal penalties cures the initial refusal. Leeman's contention that he was entitled to an alternate test depends on his claim that he did not refuse. The record, however, belies this contention. Because Leeman refused to submit to a test to determine his blood alcohol content, he was not entitled to an alternative test.

This court notes that Leeman never requested an alternative test, even though this right was explained as part of the implied consent information the officer furnished when the initial test was requested.² Therefore, even if Leeman's

² Paragraph three of Section A of the Informing the Accused form states: "After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense."

initial assumption that he voluntarily gave the test was correct, his failure to request the alternative test waives his claim of denial. The test is required only if the defendant specifically requests the administration of an alternative test. Section 343.305(5)(a), STATS.

This court concludes the trial court properly determined that Leeman refused to submit to the required blood alcohol test and therefore was not entitled to demand an alternative test. The order denying suppression and judgment of conviction are affirmed. Even if it could be determined that Leeman's subsequent cooperation abrogated his initial refusal, his failure to request the alternative test waives any claim that he was denied his right to access to a subsequent test. In either case, because Leeman was not denied his statutory rights under the implied consent statutes, the order denying the motion to suppress and the judgment of conviction must be affirmed.

By the Court.— Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

