

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**MARCH 1, 2000**

**Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin**

**NOTICE**

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

**No. 99-2416-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**STEVEN W. BIEVER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Calumet County:  
DONALD A. POPPY, Judge. *Affirmed.*

¶1 ANDERSON, J.<sup>1</sup> The State appeals from an order suppressing Steven W. Biever's chemical breath test results. The trial court granted the suppression order after determining that Biever was denied his statutory right to an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

alternative test. We also conclude that Biever's statutory right to an alternative test was violated and that, therefore, the blood test result should have been suppressed. Accordingly, we affirm.

¶2 On August 13, 1998, Biever was arrested for operating a motor vehicle while intoxicated (OMVWI), third offense, and operating a motor vehicle with a prohibited alcohol concentration contrary to WIS. STAT. § 346.63(1)(a) and (b). He was handcuffed and placed in the officer's squad car for transport to the sheriff's department where a chemical breath test would be administered.

¶3 While en route to the sheriff's department, Biever asked for a blood test. The officer explained to him that the primary test performed by the department was the Intoxilyzer chemical breath test. After arriving at the sheriff's department, Biever was given a citation and read the Informing the Accused form. Biever submitted to the chemical breath test and did not repeat his request for the blood test.<sup>2</sup>

¶4 Biever moved the court to suppress the chemical breath test results because he was denied his right to an alternative test under WIS. STAT. § 343.305.<sup>3</sup> The arresting officer testified at the suppression hearing that Biever did request a

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<sup>2</sup> At the suppression hearing, Biever testified that he did repeat his request for an alternative test after consenting to the chemical breath test. The officer offered contradictory testimony. Determining that the officer was more credible, the court found that Biever did not repeat his request for an alternative test after consenting to the chemical breath test. Biever does not contest the court's finding on appeal.

<sup>3</sup> WISCONSIN STAT. § 343.305(5)(a) provides in relevant part:

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

blood test during the drive to the sheriff's department but that he did not request a blood test after he submitted to the chemical breath test. The court found that Biever made a request for an alternative blood test during the drive to the sheriff's department. The issue in contention at the hearing was whether § 343.305(2) required Biever to repeat this request after being administered the primary test. The court determined that "there was [not] some magic formula as to when the defendant had to request the additional test" and that even though the request was made prior to the chemical breath test, it was never withdrawn. In granting the suppression motion, the court reasoned that the law enforcement agency should have fulfilled the spirit of the law by doing the simple task of inquiring whether the defendant still wanted the alternative test. The State appeals.

¶5 WISCONSIN STAT. § 343.305(2) requires a law enforcement agency to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other substances in the breath, blood or urine of a suspected intoxicated driver. *See State v. Stary*, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). An agency may designate one of those two as its primary test. *See id.* "Once a person consents to the primary test requested by law enforcement, he or she is permitted, *at his or her request*, an alternative test the agency chooses or, alternatively, a reasonable opportunity to a test of his or her choice [at his or her own expense]." *Id.* at 270 (emphasis added); § 343.305(5)(a).

¶6 The trial court's determination that Biever made a request for the alternative test includes both findings of fact and conclusions of law. The trial court made a factual finding that Biever requested an alternative test and never withdrew that request. Under WIS. STAT. § 805.17(2), a trial court's finding of fact will not be set aside unless it is "clearly erroneous"; that is, unless the finding is contrary to the great weight and clear preponderance of the evidence. *See State*

*v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). In this instance, the court’s factual finding was undisputed at the suppression hearing. The interpretation of WIS. STAT. § 343.305 in relation to a given set of facts, however, is a question of law which we review de novo. See *Stary*, 187 Wis. 2d at 269. Thus, we review de novo whether, on the undisputed facts and those found by the trial court, Biever was denied “an alternative test the agency chooses” once he had “consent[ed] to the primary test” designated by the officer who arrested him. *Id.* at 270.

¶7 On appeal, the State posits that the accused may not request the alternative test at *any* time. It argues that WIS. STAT. § 343.305(5)(a) only permits the accused to make the request for an alternative test after submitting to the agency’s primary test. We disagree.

¶8 The State relies primarily on the following language from *State v. Vincent*, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992), discussing WIS. STAT. § 343.305(5), “After being required to take the agency’s primary test, the accused may then ask to take the agency’s secondary test.” We agree that this is a correct summarization of the statute, but we do not find it dispositive on the issue presented today. The *Vincent* court addressed an agency’s obligation to provide the accused a reasonable opportunity to obtain an alternative test. When the court made the statement quoted above, it was not concerned with the issue of when the alternative test request must be made as we are here. Section 343.305(5)(a) states: “The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency ....” The statute’s language does not articulate when the request must be made. The *Vincent* language describes a permissible, and the most likely, scenario for when the accused may make the alternative test request. Our review of the statute’s language indicates that other

scenarios could be permissible. Accordingly, we will review the case law on this issue.

¶9 In *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), an officer arrested Renard for OMVWI at a hospital where he was being treated for injuries from an automobile accident. The following ensued after the arrest:

The officer requested Renard to permit a blood sample to be drawn for a blood alcohol test. Renard requested that a breathalyzer test be performed instead. The officer persuaded Renard to consent to the blood test because the blood sample could be drawn at the hospital. A breathalyzer test apparently could not be performed at the hospital, and Renard's doctor was unsure whether Renard would be hospitalized overnight. Renard and his wife claim that he continued to request the breathalyzer test after he consented to the blood test. The officer denies this contention. After the blood sample was drawn, the officer left the hospital without inquiring again whether Renard would be hospitalized overnight. The hospital released Renard shortly after the officer left. The release occurred less than two hours after Renard's accident.

*Id.* at 460. We upheld the trial court's finding that Renard had requested a breathalyzer test in addition to the blood test, and concluded that "[t]he police therefore had a duty to perform an additional test because [Renard] consented to the blood test." *Id.* We affirmed the order suppressing the blood test result because the "duty to perform the requested additional test became mandatory after Renard submitted to a blood test." *Id.* at 461. We further noted that since Renard was released from the hospital within three hours of the accident, "the police could have timely performed a second test," and should have done so because Renard's request for an additional test required the officer to make a "diligent effort" to comply. *See id.* at 460-61.

¶10 We conclude that *Renard* is controlling on the present facts. In *Renard*, the accused's initial response to the request for a blood test was that he wanted a breath test instead. Renard's request for a breath test was made *before* he submitted to the agency's primary test. We held there that the officer should have made a diligent effort to comply with Renard's request for the alternative test. In the present case, we conclude that once Biever consented to submit to the chemical breath test, the "diligent effort" called for in *Renard* required that the officer, at a minimum, should have inquired of Biever whether he then wanted to go to the hospital for a blood test. As in *Renard*, sufficient time remained after completion of the chemical breath test to obtain an alternative blood test that would have been probative of Biever's alcohol concentration at the time he was driving.<sup>4</sup> See *id.* at 460.

¶11 If the officer had made this inquiry, Biever may well have declined, thereby confirming the officer's surmise that Biever had withdrawn his initial request for a blood test. The State would then be in a position to rely on our conclusion in *Stary*, 187 Wis. 2d at 271, that a "diligent effort" is satisfied once a "suspect has unequivocally refused the second test." In *Stary*, we held that "[w]hether the officer made a reasonably diligent effort to comply with his statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case," and on the facts of that case, "because the officer diligently offered Stary an alternative test that Stary unequivocally refused, law enforcement was under no further obligation to provide or pay for Stary's blood

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<sup>4</sup> The record indicates that Biever was stopped for speeding at 4:37 a.m., was given the chemical breath test at the sheriff's department at 5:50 a.m. and was released from custody at 6:40 a.m. Under the three-hour rule, adequate time remained from Biever's stop for an admissible alternative test to be taken. See WIS. STAT. §§ 885.235(3); 343.305(5)(a).

test.” *Id.* at 271-72. Biever’s request for a blood test, followed by his consent to a chemical breath test as the primary test, created at least an ambiguity as to whether Biever desired that both tests be given. The “diligent effort” by law enforcement to provide an accused with an alternative test when one is requested, as specified in *Renard* and *Stary*, requires that an arresting officer must resolve any ambiguity regarding a person’s request for an alternative test prior to the person’s release from custody.

¶12 Because we agree with the trial court that Biever’s statutory right to obtain an alternative test was violated, we conclude that the chemical breath test results were properly suppressed in this case.

*By the Court.*—Order affirmed.

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

