

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2824-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS C. GANDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

¶1 BROWN, P.J.¹ The issue in this case is whether Dennis C. Gandy, who was cited for operating while intoxicated contrary to WIS. STAT. § 346.63(1)(a) and was asked to take a blood test pursuant to WIS. STAT. §

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

343.305(2), requested and was denied an additional alternative test. If a request for an additional alternative test is denied, the results of the primary test must be suppressed. The trial court found that Gandy may have requested that a *different primary* test be used by the police, but no testimony indicated that Gandy requested an *additional* test to follow the primary one. After examining the record, we hold that the trial court's findings of fact are not clearly erroneous. We affirm the trial court's ruling denying Gandy's motion to suppress.

¶2 The facts of this case are as follows. On January 11, 1999, Officers Todd Terry and John Hetland stopped Gandy after observing him lose control of his vehicle and drive into a snowbank. Gandy admitted he had been drinking, and he was transported to the hospital to perform sobriety tests. After Gandy attempted the first sobriety test and refused to take any more of the tests, Hetland placed him under arrest for operating while intoxicated and informed him that pursuant to WIS. STAT. § 343.305(2) Gandy had consented to taking a breath, blood or urine test. Hetland then requested that Gandy take a blood test. Gandy initially refused, but he later voluntarily consented.

¶3 Gandy testified that he is afraid of needles, and before the blood test was administered, he asked Hetland if he could take a urine test or a breath test instead of the blood test. Gandy also testified that he could not remember whether he requested a urine or breath test after the blood test was taken. Hetland testified that he could not recall if Gandy requested a urine or breath test before the blood test was administered. Terry testified that Gandy did not request a urine or breath test.

¶4 The court found that Gandy may have requested a different test other than the blood test be administered. The trial court also found that no testimony

indicated that Gandy requested an additional alternative test. The trial court stated that the officers could choose the blood test as the primary test and could reject a request for a different test. Since no alternative test was requested, the trial court dismissed the motion to suppress.

¶5 The relevant law regarding consenting to alcohol and controlled substance tests is as follows. Drivers in Wisconsin automatically consent to taking one or more breath, blood or urine tests to determine alcohol or controlled substance consumption. *See* WIS. STAT. § 343.305(2). Such persons have no statutory right to choose which test they prefer to take. Rather, law enforcement officers may choose which of the three tests to administer. “Any such tests shall be administered upon the request of a law enforcement officer.” *Id.* (emphasis added).

¶6 However, a person to whom one of the above tests is administered may request an additional alternative test. *See* WIS. STAT. § 343.305(5). The purpose of administering such a test is to verify or challenge the results of the primary test. *See State v. McCrossen*, 129 Wis. 2d 277, 288, 385 N.W.2d 161 (1986). If a request for an additional alternative test is denied, the results of the primary test must be suppressed. *See State v. Renard*, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985).

¶7 Findings of fact made by the trial court are upheld by the appeals court unless clearly erroneous. *See* WIS. STAT. § 805.17(2); *Gerth v. Gerth*, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990). In this case, the trial court’s finding that Gandy did not request an additional alternative test is not clearly erroneous. The trial court’s finding that Gandy may have requested a different test, other than a blood test, is supported by Gandy’s testimony that he is afraid of

needles. Likewise, a review of the motion hearing record indicates there was no testimony that Gandy requested that a breath or urine test be taken in addition to the blood test.

¶8 Gandy's request for a different test is not the same as a request for an additional alternative test and does not justify granting the motion to suppress. Gandy did not request an additional alternative test to verify the results of the primary test. Rather, he requested a different test to avoid taking the designated primary test because he does not like needles. However, Gandy has no statutory right to request the primary test that he finds most comfortable or convenient. Police may administer the primary test of their choice. *See* WIS. STAT. § 343.305(2). Therefore, Gandy's request for a different test does not affect the outcome of this case.

By the Court.—Judgment affirmed.

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

