

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 1, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 2005AP217**

**Cir. Ct. No. 2004TR5586**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JO ANN LESZCZYNSKI,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Douglas County:  
MICHAEL T. LUCCI, Judge. *Reversed.*

¶1 PETERSON, J.<sup>1</sup> The State of Wisconsin appeals an order that Jo Ann Leszcynski's refusal to submit to a blood test after being arrested for operating while under the influence of an intoxicant (OWI) was reasonable. We

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

conclude that Leszcynski was required by Wisconsin's implied consent law to submit to the testing. We therefore reverse the order.

### BACKGROUND

¶2 Leszcynski was arrested for OWI on August 12, 2004. She was transported to the Douglas County Sheriff's department, where she consented to a breath test. The machine read .079% but also gave an error message stating "High blank—test aborted, check ambient conditions." The arresting officer then read her a second Informing the Accused form and requested a blood test. However, Leszcynski refused.

¶3 After refusing to submit to the blood test, Leszcynski was served with a Notice of Intent to Revoke Operating Privileges and she requested a refusal hearing. At the hearing, the circuit court took judicial notice of the testimony of Tara Lynn Scribbins, a chemical test coordinator from the Wisconsin Department of Transportation, in a different case, *City of Superior v. Curran*, Douglas County, WI, Case No. 04-TR-2490-92. In that case, Scribbins testified that when the check ambient conditions error appears, the machine is testing the air in the room and inside the machine for alcohol that might interfere with the breath test result. Scribbins stated that the operator should administer a second breath test to see if the error appears again.

¶4 Based on this testimony, the circuit court determined the officer in this case should have given Leszcynski a second breath test rather than immediately requesting a blood test. The court determined that "the second test of her breath would not have resulted in any higher of a blood alcohol level than what she just previously registered at .079%, which is below the prima facie level for a prohibited blood alcohol concentration offense." Thus, the court concluded

that, since Leszcynski had cooperated with the breath test and would have provided a second sample of her breath, “it would be fundamentally unfair to conclude that she had either refused to take the test or that her refusal to take a blood test was unreasonable.”

## DISCUSSION

¶5 The application of the implied consent statute to found facts is a question of law we review independently. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). To the extent the circuit court’s decision involves findings of evidentiary facts, those findings will not be overturned unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

¶6 WISCONSIN STAT. § 343.305(2) provides that “[a]ny person who operated a motor vehicle upon the public highways of this state ... is deemed to have given consent to one *or more* tests of his or her breath, blood or urine.” (Emphasis added). Furthermore, § 343.305(3)(a) provides that upon arrest for OWI:

a law enforcement officer may request the person to provide one or more samples of his breath, blood or urine for the purpose specified under sub. (2). *Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.* (Emphasis added.)

These sections stand for two principles: (1) a law enforcement officer may request more than one sample of a person’s breath, blood or urine, and (2) even though a person consents to and performs one test, an officer may request another and different test.

¶7 The circuit court focused on the fact that Leszcynski was not given the opportunity to take a second breath test, and that if she had, the result would likely have been under the legal limit. However, a result below the legal limit on a second breath test would not have precluded the officer from requesting a blood test. We addressed this issue in *State v. Donner*, 192 Wis. 2d 305, 531 N.W.2d 369 (Ct. App. 1995). There, Donner’s initial breath test provided a blood alcohol reading below the legal limit. The arresting officer then asked Donner to submit to a blood test, which he refused. *Id.* at 311. He argued he was not obligated to submit to a blood test because he had already submitted to a breath test. *Id.* at 312. We concluded that the implied consent law permitted the officer to request Donner to submit to a blood test even after he had submitted to a breath test. *Id.*

¶8 Similarly, here the arresting officer was permitted to request Leszcynski to submit to a blood test after the breath test resulted in an error. Indeed, as in *Donner*, the officer could have asked for a blood test even if the initial or a subsequent breath test had produced a definitive result. We therefore conclude that Leszcynski’s refusal to submit to the blood test was unreasonable.<sup>2</sup>

*By the Court.*—Order reversed.

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

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<sup>2</sup> At the refusal hearing, the arresting officer testified that Leszcynski refused the blood test because “we weren’t sticking her with any needles.” We note that our supreme court has determined that a fear of needles is not a reasonable basis for refusing to submit to a blood test. See *State v. Krajewski*, 2002 WI 97, ¶62, 255 Wis. 2d 98, 648 N.W.2d 385.



