COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1996

No. 96-1351-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ZAMITALO,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed*.

SNYDER, J. James Zamitalo was charged with operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b), STATS.[1] Zamitalo first brought a motion to suppress the Intoxilyzer result, claiming that his request for an alternative test was denied. After his motion to suppress was denied, Zamitalo pled guilty. He now renews his

[1] The companion charge of operating a motor vehicle while under the influence of intoxicants was dismissed.

suppression argument, claiming that: (1) the trial court erred when it ruled that he had the burden of going forward with evidence to establish his defense; and (2) the error was not harmless. Because we conclude that the trial court did not find that Zamitalo had the burden of proof, we affirm.

Zamitalo was arrested by Officer Robert J. Kuspa for operating a motor vehicle while under the influence of intoxicants and taken to the City of Muskego Police Department. Zamitalo was asked to submit to an Intoxilyzer test. He asked to speak to his attorney before deciding whether he would agree to the test, and subsequently called Attorney John Carroll. After that conversation, Zamitalo agreed to take the test. Carroll testified that he told Zamitalo during this telephone call to take the test.

Approximately ten minutes later, Carroll received a second telephone call from Zamitalo. While Carroll could not specifically recall what was discussed, he stated that he advised Zamitalo that he had the right to take a blood test. Carroll also testified that he told a police officer, who came on the line, that he had advised Zamitalo to take another test.

Zamitalo testified that he requested a blood test or a urine test. He directed this request to the officer who had administered the Intoxilyzer test but stated that the officer did not respond to him in any way. Zamitalo admitted on cross-examination that the officer never denied his request for an alternative test, but "I know he heard me." Zamitalo explained that he never renewed his request for another test because "at that point I guess I was just kind of like fed up with the whole situation that happened there and I just kind of blew it off."

Zamitalo brought a motion to suppress based on his claim that he had requested an alternative test from the officers, and their denial of that request "failed to fully comply with the Implied Consent Law ... [therefore] 'statutory consent' does not exist and the remedy is suppression."[2] He now appeals from the trial court's denial of the suppression motion and argues that "the trial court erred in ruling that [he] had the burden of going forward." Zamitalo states that the trial court "indicat[ed] that it was the court's belief that Zamitalo had the burden of going forward with evidence and that he also had the burden of persuasion on the motion." Zamitalo fails to cite to that part of the record which contains the "court's belief." Based upon our review of the record, the following exchange among Jeffrey Jensen (defense counsel),[3] Ted Szczupakiewicz (assistant district attorney) and the court is the only discussion relating to a burden of proof:

JENSEN: I believe the State has the burden of establishing the circumstances of the arrest, whether the implied consent law was followed.

THE COURT: Are you contesting the arrest here?

JENSEN: Basis of the motions is that Mr. Zamitalo was under arrest. He submitted to a breath test and requested that an additional test be done, was denied the opportunity. I believe in a criminal case the State has

[2] Zamitalo's argument for suppression is based on ***State v. McCrossen,*** 129 Wis.2d 277, 385 N.W.2d 161, *cert. denied*, 479 U.S. 841 (1986). In ***McCrossen***, there was no dispute as to the defendant's request for an alternative test and the officer's failure to provide it. In the instant case, the issue is whether Zamitalo was denied an opportunity to have an alternative test performed. Thus, ***McCrossen*** is not controlling.

[3] Zamitalo was initially represented by Carroll. Jensen was substituted in as counsel by order of the court.

had [sic] burden of negativing every defense that the defendant may raise, so they have the burden of proceeding on this motion.

SZCZUPAKIEWICZ: I don't agree with that at all. I think a motion of this nature the defendant has some burden showing some prima facie basis for his motion here. ...

JENSEN: Well, Judge, it's a criminal case, the burden never shifts to the defendant in a criminal case, even on affirmative defense. If the court rules I do have a burden then I object on that. I am prepared to proceed. I believe the burden rests with the State at all times in a criminal case.

THE COURT: This is your motion to suppress a breath test based on the fact that you believe that the defendant was not given the opportunity to have an alternate test taken, is that correct?

JENSEN: Yes.

THE COURT: I will let you proceed.

Zamitalo then called two witnesses (himself and Carroll), and the State presented the testimony of the two officers.

In its decision, the court noted that "the defendant's testimony was confusing ... [and] even Mr. Carroll's testimony was unclear at times." In addition to noting several other inconsistencies in Zamitalo's testimony, the trial court stated that both officers indicated very positively that Zamitalo never

asked for an alternative test. The trial court then denied the motion to suppress. In its ruling, the trial court never referred to a burden of proof.[4]

Based upon our review of the record, there is no evidence that the trial court ever found that Zamitalo had the burden on this issue. While the court did require Zamitalo to present some evidence that he had requested an alternative test, it is not a violation of due process to assign a burden of production in this way. ***State v. Pettit,*** 171 Wis.2d 627, 640, 492 N.W.2d 633, 639 (Ct. App. 1992). A judge controls the mode and order of the presentation of evidence. Section 906.11(1), STATS.

In addition, Zamitalo's argument fails to advise us in what respect he claims the trial court's findings support his conclusion that the burden was incorrectly placed. As a reviewing court, we need not sift the record for facts which will support Zamitalo's contention. *See* ***Keplin v. Hardware Mut. Casualty Co.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964).

As to his second issue, Zamitalo argues that the claimed error of incorrectly assigning the burden of proof to him is not harmless "because it is not possible for the Court of Appeals to review the cold record and to determine that ... the evidence was sufficient." Based on our determination that Zamitalo has not presented any evidence in support of his claim that the trial court found that he had the burden of proof, a subsequent argument based on the

[4] In closing arguments, Jensen stated, "I don't agree that the defendant has the burden of proof, but we have already been through that." However, the record shows no response from the court that addresses the assignment of a burden of proof.

disallowed claim is also unsupported. As there is no legal basis for it on this record, we decline to address it. *See* ***Racine v. J-T Enters. of Am.,*** 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974) (court will not decide abstract legal principles).

We conclude that the record of the suppression hearing provides no factual predicate for Zamitalo's claim that the trial court incorrectly assigned the burden of proof. Having held that there is no support for the claim of error, Zamitalo's argument that the error is not harmless must also fail.

By the Court. – Judgment affirmed.

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