COURT OF APPEALS
DECISION
DATED AND RELEASED

February 5, 1997

No. 96-1914-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALEXANDER E. GROSSMANN,

Defendant-Appellant.

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

NETTESHEIM, J. Alexander E. Grossmann appeals from a judgment of conviction (second offense) for operating a motor vehicle with a prohibited alcohol concentration (OWI), contrary to § 346.63(1)(b), STATS. On appeal, Grossmann contends that he was misinformed under the implied consent law regarding his right to an alternative chemical test. As a consequence, Grossmann argues that his constitutional right to present a

defense was adversely affected. We reject Grossmann's argument and affirm the judgment.

The relevant facts are brief and undisputed.[1] On October 23, 1993, Grossmann was involved in a three-vehicle accident. Officer Scott Smith, who investigated the accident, determined that Grossmann had rear ended two other vehicles which were stopped in the roadway. Smith also concluded that Grossmann was intoxicated. Smith arrested Grossmann and transported him to Elmbrook Memorial Hospital for processing under the implied consent law.

At the hospital, Smith issued Grossmann a citation for causing injury by intoxicated use of a motor vehicle. Smith then completed the Informing the Accused form and read the contents of the form to Grossmann. This recital included the challenged language at paragraph four which advises the suspect that if any test indicates a prohibited blood alcohol concentration (BAC), the suspect's operating privileges will be administratively suspended. Grossmann appeared to understand the information read by Smith and he agreed to submit to a blood test. When Grossmann's blood sample was later analyzed, it yielded a prohibited BAC. Therefore, on November 19, 1993, Smith issued Grossmann a further citation for causing injury by the operation of a motor vehicle with a prohibited BAC.

The State charged Grossmann with OWI and operation of a motor vehicle with a prohibited BAC.[2] Grossmann responded with a motion to

[1] In the trial court, the parties stipulated to the relevant facts.

[2] Unlike the citations, the complaint did not allege any injury in conjunction with the two

suppress the results of the chemical test based on a his claim that paragraph 4 of the Informing the Accused form misinformed him regarding his right to an alternate test. This language states, "If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed." Specifically, Grossmann contended that the use of the word "any" functionally tells a suspect that an alternative test is pointless if the department's designated test produces a test over the legal limit.

The trial court denied Grossmann's motion, relying on the supreme court's holding in ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524 N.W.2d 635 (1994). There, the supreme court rejected a similar challenge to the same language in the Informing the Accused form. *See* ***id***. at 688-92, 524 N.W.2d at 638-40. Grossmann than pled guilty to the BAC charge and the State dismissed the OWI charge.

On appeal, Grossmann renews his trial court argument. He contends that the supreme court's ruling in ***Bryant*** is inapplicable to this case because, unlike the defendants in ***Bryant***, he was not given any additional information on the night of his arrest which corrected the challenged language. Grossmann also challenges the correctness of the ***Bryant*** decision itself, arguing that the supreme court "mistakenly identified the right to an alternate test as having relevance solely in the context of an administrative suspension hearing …." Instead, Grossmann argues that the failure to provide accurate information

(..continued)
charges.

in blood test cases also implicates the suspect's constitutional due process right to present a defense at trial. We reject Grossmann's arguments and affirm the judgment.

As a threshold matter, we address Grossmann's contention that ***Bryant*** was wrongly decided because the supreme court "failed to recognize [] that an alternate test has value to the accused beyond the point of an administrative suspension hearing." Here, Grossmann seems to assume that ***Bryant*** directly governs this case. As our ensuing discussion will reveal, we disagree. However, even if ***Bryant*** did apply and we agreed with Grossmann that the case was wrongly decided, we would still be duty bound to reject Grossmann's challenge since we are obligated to follow the decisions of our supreme court. *See* ***State v. Clark***, 179 Wis.2d 484, 493, 507 N.W.2d 172, 175 (Ct. App. 1993).

However, we disagree with Grossmann's premise that ***Bryant*** directly governs this case. True, the supreme court did not speak to the effect of the challenged language on the constitutional right to present a defense. But it does not appear from the text of the decision that this argument was made to the supreme court. Rather, the claim in ***Bryant*** was that the information at paragraph 4, *which addresses the prospect of an administrative suspension* if any test reveals a prohibited BAC, improperly deterred the suspect from seeking an alternative test. *See* ***Bryant***, 188 Wis.2d at 685, 524 N.W.2d at 637. Given that context, it is not remarkable that the supreme court did not speak to any

broader implications of its decision beyond the administrative suspension procedures of the implied consent law.

Here, Grossmann registers the same challenge to the language at paragraph 4 of the Informing the Accused form as the suspect in ***Bryant***. However, Grossmann argues a different consequence from that in ***Bryant***. Instead of claiming that the language adversely affected his rights under the administrative suspension procedures of the implied consent law, Grossmann argues that language constituted a "violation of his statutory due process right to gather chemical test evidence in support of his due process right to present a defense at trial."

We reject Grossmann's argument because he focuses solely on the language of paragraph 4, to the exclusion of the other information conveyed in the Informing the Accused form. We now address the relevant portions of the entire form.

In the very first paragraph, the suspect is advised that he or she is deemed to have consented to a chemical test and that the purpose of the test is to determine the presence or quantity of alcohol in the suspect's blood or breath. It is important to note that prior to receiving this information, the suspect has already been arrested and issued a citation for OWI. *See* § 343.305(9)(a)1, STATS. Against that backdrop, the reasonable suspect would understand from this information that he or she is deemed to have consented to a chemical test and that the results may be used in any ensuing prosecution of the charge stated in

the citation. It is important to note that this information does not speak of, nor is it linked to, any administrative suspension.

Next, in paragraph 3, the suspect is advised of the right to the alternative test offered by the law enforcement agency or arranged by the suspect.[3] Read in conjunction with paragraph 1, the suspect now understands that if he or she takes the test which the department is prepared to administer, the suspect has the option of asking the department to administer an alternative test or the suspect may arrange his or her own alternative test. Although the information does not expressly so state, a reasonable suspect would understand from this information that the alternative test process serves as a check against the accuracy of the department's primary test. Thus, the suspect understands that the alternative test represents an opportunity to garner evidence to counter the department's primary test. As with paragraph 1, the information provided in paragraph 3 does not speak of, nor is it linked to, an administrative suspension.

Only after the foregoing information has been delivered is the suspect told of the prospect for an administrative suspension via the information in paragraph 4. Given the information already provided, a reasonable suspect would understand that the information in paragraph 4 pertains only to the administrative suspension scenario. Thus, we disagree with

[3] Actually, this information is preceded by paragraph 2 which advises of the consequences of a refusal to submit to the test. That is of no consequence here since Grossman took the test.

Grossmann that the challenged language impermissibly deters the suspect from seeking an alternative test.

Although ***Bryant*** is not directly controlling, our analysis is in keeping with that performed by the supreme court under the facts of that case. There, the supreme court also looked to the entirety of the implied consent warnings in determining whether the suspect was improperly deterred from seeking the alternative test for purposes of the adminsitrative suspension. The court observed:

> An examination of the statutes and the forms issued pursuant thereto that were given to each defendant demonstrates that such notice was given. Prior to submitting to any test, the accused is told that, after submitting to the requested test, the accused may request that an alternative test be administered at the government's expense.
>
> It is clear from the "Informing" document read to the accused that the alternate test may be asked for only after compliance with the test requested by the officer under the Implied Consent Law. It is after the accused has been told and knows that he has tested in excess of a permitted BAC that he has the opportunity to have another test.

Bryant, 188 Wis.2d at 691, 524 N.W.2d at 639. The court then concluded, "[W]e hold that the entire process, when viewed as it must be as a continuum, is not contradictory or confusing." ***Id***. at 693, 524 N.W.2d at 640.

We conclude that the information in paragraph 4 of the Informing the Accused form, read in the proper context and construed in the proper

context of the entire form, does not deter the suspect from seeking the alternative test.

Grossmann argues, however, that the ***Bryant*** decision rests on the further fact that, following the failed breathalyzer test, the suspect was given an Administrative Review Request form which advised that the administrative suspension can be reviewed and included the issues which are addressed at such a review proceeding.[4] Specifically, Grossmann notes the following language from ***Bryant***: "Moreover, [the accused] is then given the form titled, 'Administrative Review Request.' This form in par. (5) points out that one of the issues on review is '[w]hether each of the test results indicates that the person had a blood alcohol concentration of 0.1% or more.'" ***Id***. at 691, 524 N.W.2d at 639.

Grossmann notes that in this case, unlike ***Bryant***, he submitted to a blood test, not an Intoxilyzer test. Grossmann correctly observes the Intoxilyzer test results are immediately known, whereas the results of a blood test are not known for days. Because there can be no administrative suspension until the blood test results are known, Grossmann correctly observes that he could not be provided the Administrative Review Request form until it was too late to obtain a second test. Thus, he reasons that ***Bryant*** does not apply.

[4] The Administrative Review Request form is given following the suspension of the operator's license by the officer after the person has failed a chemical test. *See* § 343.305(4)(c), STATS. (when the results of any test indicate a prohibited BAC, the person's operating privilege will be suspended); *see also* § 343.305(8)(a) (requiring notice of suspension and the right to administrative review). When a breathalyzer test is given, the results are known immediately and, if the test is failed, the officer suspends the person's license and provides him or her with the Administrative Review Request form.

We addressed, and rejected, this argument in ***State v. Drexler***, 199 Wis.2d 128, 544 N.W.2d 903 (Ct. App. 1995). There, as in this case, Drexler filed a motion to suppress the results of a chemical blood test based on the language in paragraph 4. Drexler argued that because he was not given the Administrative Review Request form he lacked the "corrective" information which was afforded the defendants in ***Bryant***. Nevertheless, we rejected Drexler's arguments and concluded that "Drexler was properly informed of the law and that his due process rights were scrupulously honored. Neither the statutory process nor the statutory protections and admonitions misled Drexler. Drexler was given all of the information mandated by due process and the statute."[5] ***Drexler***, 199 Wis.2d at 140, 544 N.W.2d at 907. Applying the same logic to the strikingly similar facts in this case, we conclude that Grossmann's statutory due process rights were not violated.

Grossmann contends that ***Drexler*** is inapplicable because Drexler's claim was not based on the "violation of his statutory due process right to

[5] We recognize that in ***City of Waupaca v. Javorski***, 198 Wis.2d 563, 574, 543 N.W.2d 507, 512 (Ct. App. 1995), the court reached the opposite conclusion in finding that the defendant —who had submitted to a blood test and thus was not given the corrective information in the Administrative Review Request form—was "neither timely nor properly advised of his right to have the results of a second BAC test, if favorable to him, considered in administrative proceedings to review his license suspension …." Nevertheless, we agree with ***Drexler*** that the lack of "corrective" information does not result in a violation of the accused's statutory rights. *See* ***State v. Kuehl***, 199 Wis.2d 143, 149, 545 N.W.2d 840, 842 (Ct. App. 1995) (when there are two court of appeals decisions in conflict, we are free to follow the decision which we conclude is correct). In spite of its conclusion on the procedural issue, the ***Javorski*** court found that the "procedural failure does not entitle [the accused] to suppression of the initial blood test results in the OWI case." *See* ***Javorski***, 198 Wis.2d at 574-75, 543 N.W.2d at 512. Therefore, the results of ***Drexler*** and ***Javorski*** are the same. The fact that a defendant was not given the Administrative Review Request form following a chemical test does not warrant suppression.

gather chemical test evidence in support of his due process right to present a defense at trial." However, Grossmann's constitutional argument is premised squarely on his statutory due process claim that the statutory implied consent warnings were defective. Since we have held that the implied consent warnings comported with the statute, Grossmann's claimed due process violation, whether stated in statutory or constitutional terms, necessarily fails.

We conclude with an observation similar to that made by the supreme court in ***Bryant***. Because of repeated legislative and administrative tinkering to the implied consent law, the forms supplied by the Department of Transportation to the police departments of this state have often been outdated. These repeated changes have also converted a once understandable and straightforward law into a legal maze which has confounded trial and appellate judges and other legal experts. Yet, we pretend that the intricacies of this law can be understood by ordinary lay persons, many of whom are probably intoxicated. The result has been a glut of litigation in the trial and appellate courts of this state. *See* ***Bryant***, 188 Wis.2d at 692-93, 524 N.W.2d at 640.

The implied consent law originally envisioned that the suspect would be given simple, direct and concise information regarding the law's obligations and consequences. We agree with the supreme court's observation in ***Bryant*** that all concerned would be better served if the Department of Transportation devised informational forms which conveyed this information to the suspect in the simplest terms possible.

By the Court.—Judgment affirmed.

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