COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2482

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

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY J. GOBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge and FREDERICK P. KESSLER, Reserve Judge. *Affirmed.*

NETTESHEIM, J. Timothy J. Goba appeals from a forfeiture judgment resulting from a jury verdict finding him guilty of operating while intoxicated (OWI).[1] On appeal, he contends that the trial court improperly

[1] The jury also found Goba guilty of operating with a prohibited blood alcohol concentration (BAC). The trial court entered judgment against Goba on the OWI finding and dismissed the BAC charge.

admitted evidence of his BAC test result. He bases this on two arguments: (1) he was denied his right to an alternate test, and (2) the test of the simulator solution used in the intoxilyzer test had been conducted more than 120 days prior to the administration of the intoxilyzer test. Goba also contends that the trial court improperly restricted his cross-examination of the arresting officer.

We hold that Goba was not denied his right to an alternate test. We further hold that Goba's other two issues are waived. We will discuss the relevant facts and procedure as we discuss the issues.

Goba was arrest for OWI by an officer of the City of New Berlin Police Department. He submitted to an intoxilyzer test and was charged with both OWI and operating with a prohibited BAC.

Goba first claims that he was denied his right to an alternate test. He raised this issue in a pretrial motion in limine proceeding conducted by Judge J. Mac Davis. In a well-reasoned bench decision, Judge Davis correctly observed that Goba was properly advised pursuant to the implied consent law that the primary test which the police department required was the intoxilyzer test and the alternate test which the department offered was the urine test. Goba, however, requested a blood test.

Goba's appellate argument is that the police department should have construed his blood test request as a request for the department's alternate urine test. That, however, flies in the face of the information which the department provided to Goba. A police department is not required to offer an accused two alternative tests. Rather, it was Goba's responsibility to obtain a blood test on his own. *See* ***State v. Stary***, 187 Wis.2d 266, 270, 522 N.W.2d 32, 34 (Ct. App. 1994). The only obligation placed on a police department regarding the suspect's

choice to obtain his or her own test is to not interfere with that effort. *See* ***id***. at 272, 522 N.W.2d at 35. Goba, however, makes no such claim. We affirm Judge Davis's decision rejecting Goba's motion to suppress the intoxilyzer result.

The other evidentiary issues arose at the jury trial conducted by Reserve Judge Frederick P. Kessler. In each instance, we hold that Goba did not make an adequate record as to the grounds for objecting to Judge Kessler's evidentiary rulings.

Goba first claims that Judge Kessler erred by admitting the BAC result because the test report on the simulator solution indicated that the solution had not been tested within the 120-day time period set out in § 343.305(6)(b)3, STATS. When the prosecutor asked the intoxilyzer operator to identify Exhibit 6, which was the assay report regarding the simulator solution, Goba objected stating, "I believe there is a defect with that particular report." Judge Kessler overruled the objection but additionally stated, "We'll hear that outside the presence of this jury ...."

However, the appellate record does not show any further proceeding regarding Goba's objection. The statement, "I believe there is a defect with that particular report" does not recite an evidentiary basis for excluding the witness's answer. If Goba had a specific basis for excluding the evidence (as he claims in this appeal), he was duty bound to assert this basis before Judge Kessler.[2] He did not. The appellate basis for excluding the evidence was not explained to Judge

[2] If Goba did make such a record, he has failed to include that proceeding in the appellate record. *See* RULE 809.15(1), STATS.; ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (an appellate court's review is limited to the record made available to it).

Kessler. *See* ***State v. Hartman***, 145 Wis.2d 1, 9, 426 N.W.2d 320, 323 (1988), Goba has therefore waived this issue for purposes of appeal.

The same defect exists with regard to Goba's claim that Judge Kessler improperly restricted his cross-examination of the arresting officer. Goba asked the officer if she knew Goba's BAC at the time Goba was operating the motor vehicle. The prosecutor objected, and Judge Kessler sustained the objection. Goba then responded that he wanted to make a record regarding the matter, and Judge Kessler stated, "We'll do that at the break." However, the appellate record again shows no such further proceeding. Now, on appeal, Goba claims that Judge Kessler violated his confrontation rights by limiting the cross-examination of the arresting officer. But Goba never made this argument to Judge Kessler.[3] In fact, he never recited any evidentiary basis in opposition to the prosecutor's objection or Judge Kessler's ruling. We deem this further issue waived. *See* ***id.***

By the Court.–Judgment affirmed.

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

[3] *See* footnote 2, supra.