COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 11, 1997

NOTICE

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(1), STATS.

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

No. 96-2483

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

COUNTY OF OUTAGAMIE,

Plaintiff-Respondent,

v.

DAVID L. MAASS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

LaROCQUE, J. David Maass appeals a judgment of conviction for OWI (first offense civil). He contends that the trial court should have granted his motion to suppress the results of a blood test because the police failed to honor Maass's request to administer a breath test as required by statute. Maass relies upon the holding in ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985). ***Renard*** applied the provisions of § 343.305(5), STATS., and held that the police who administered a blood alcohol test had a duty to comply with the subject's request for an additional test of his breath upon request. Because the trial court finding that Maass's request for a breath test was as an alterative to and not in addition to the blood test is not clearly erroneous, this court affirms.

The arresting officer and Maass gave conflicting testimony at the hearing to suppress the results of the blood test. Outagamie County sheriff's deputy Phillip Christenson testified that after he arrested Maass for OWI, Maass was asked to take a blood test, and also was read the following advice from the "Informing the Accused" form:

> After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.

According to Christenson, when Maass was given this advice, he indicated that he would like to take a breath test. Christenson explained that after taking the blood test, he could request a breath test. Maass indicated that he understood his rights and consented to a blood test. According to Christenson, after the blood test, Maass did not request a breath test and none was given.

In contrast to Christenson's testimony, Maass told the court that he understood his right to an alternative test and requested a breath test after the completion of the blood test. He further testified that the officer declined to administer the breath test. The trial court found that it believed the officer's version of events and not Maass's.

Maass concedes for purposes of appeal that the version of events described by the officer is accurate. He therefore contends that the application of those facts to the statutory requirements is a question of law.

This court initially rejects Maass's contention that this case is governed by ***Renard.*** In that case the circuit court found that the defendant requested an additional test, based upon the following evidence: "Renard and his wife claim that he continued to request the breathalyzer test after he consented to the blood test. The officer denies this contention." ***Id.*** at 460, 367

N.W.2d at 238. The ***Renard*** court upheld the trial court's finding because it was not contrary to the great weight and clear preponderance of the evidence. ***Id.***[1]

The officer did not interpret Maass's request for a breath test in this case as a request for an additional test. Rather, he interpreted Maass's remark as a request for a breath test as an alternative to taking a blood test. The officer advised Maass that if he wished a breath test, he could request one at the conclusion of the blood test. Maass did not contend that he misunderstood the advice. To the contrary, he advised the trial court that he understood the advice, and that he requested a breath test after the blood test was complete. This is the testimony that the trial court found not credible. Implicit in the trial court's decision to deny the motion to suppress the blood test result was the finding that Maass's statement to the officer was not a request for an additional test. Neither of these findings is clearly erroneous.

> The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon the appellate court. It is not within the province of ... any appellate court not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one.

State v. Friday, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). The motion to suppress was therefore properly denied.

By the Court.—Judgment affirmed.

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

[1] While the test is now couched in terms of "clearly erroneous" evidence rather than the "great weight and clear preponderance" of the evidence, the tests are essentially the same. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).