COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2930-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER R. HANSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Reversed and cause remanded with directions*.

DEININGER, J.[1] Christopher Hansen appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), as a third offense, contrary to § 346.63(1)(a), STATS. He

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

contends the trial court erroneously denied his motion to suppress the results of a blood test performed after his arrest. Hansen argues that the police officer denied him his statutory right to have an alternative test performed and that this failure also deprived him of due process. We conclude that Hansen's statutory right to an alternative test was violated and that, therefore, the blood test result should have been suppressed. Accordingly, we reverse.

BACKGROUND

On April 25, 1996, Hansen was driving a van in the Town of Columbus at 2:00 a.m. when a Columbia County Sheriff's Deputy stopped him for speeding. The deputy subsequently arrested Hansen for OMVWI. Hansen moved to suppress the results of a blood test which was performed after his arrest. At the suppression hearing, he stipulated to the reasonableness of the stop and to the existence of probable cause for his arrest. The only issue in dispute was whether Hansen was afforded his statutory right to an alternative test for alcohol concentration under § 343.305(5)(a), STATS.[2]

The deputy testified at the hearing that he transported Hansen to the City of Columbus Police Station, read Hansen the Informing the Accused form and requested that he submit to a chemical test of his breath. Hansen responded that he wanted a blood test done and was then told "that he had to do our primary test [the breath test] before he could have a blood test done." Hansen then consented to the breath test. The deputy did not understand Hansen's request for a

[2] Section 343.305(5)(a), STATS., provides, in relevant part: "The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency … or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified …."

blood test to be for the statutory "alternative test" because "[i]t's quite common for people to say that they want a blood test. They don't trust any other test." A test of Hansen's breath was not possible, however, because the Intoxilyzer operator had been called away from the building. The deputy then decided to "[g]o for another primary test" since the nearest neighboring agency with an Intoxilyzer was Portage, and "it was for [the deputy's] convenience and [Hansen's], both, that we would just go to the hospital for the blood test."

At the hospital, the deputy read a new Informing the Accused form to Hansen identifying the blood test as the primary test. Hansen then consented to a blood test. The deputy did not recall any inquiry from Hansen about a possible breath test after the blood sample was drawn. The deputy testified that "[i]f [Hansen] would have asked for an alternative test, we would have probably went back for the breath test, because by then the Columbus officer had cleared from the call he'd been on." Hansen was subsequently released, prior to 3:23 a.m., without any further tests.

Hansen confirmed at the suppression hearing that he had originally requested a blood test, that he had consented to the breath test, and that due to the Intoxilyzer operating officer being absent, the deputy took him to the hospital for a blood test. Hansen also testified, however, that before leaving for the hospital he asked whether he and the deputy would be returning to the Columbus Police Station to do the breath test and that the deputy responded "no, because the officer was gone." Additionally, Hansen claimed that, while at the hospital and after he had been read the second Informing the Accused form, he asked "can we still go over to the police station and ... do the breath test" and stated that "I would like to still take the other test," to which the deputy responded "no." Hansen testified that it was therefore his "understanding that [he] couldn't take the [breath] test."

The trial court noted that, since much of the testimony as to what was said at the hospital was in conflict, "[t]he issue of credibility does come in; also the issue of selective memory." The court went on to find "that there was no request by Mr. Hansen for an alternative test. There was no request for a breath test after the blood test was given." The court denied the motion to suppress and Hansen subsequently entered a no contest plea to the OMVWI charge. His sentence of forty-five days in jail, a fine and costs totaling $1,241, a twenty-four month revocation of his operating privileges, and the installation of an ignition interlock device for eighteen months, was stayed pending this appeal.

ANALYSIS

Section 343.305(2), STATS., requires a law enforcement agency to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other substances in the breath, blood or urine of a suspected intoxicated driver. ***State v. Stary,*** 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994). An agency may designate one of those two as its primary test. ***Id.*** "*Once a person consents to the primary test requested by law enforcement, he or she is permitted, at his or her request, an alternate test the agency chooses* or, alternatively, a reasonable opportunity to a test of his or her choice [at his or her own expense]." ***Id.*** at 270, 522 N.W.2d at 34 (emphasis added); § 343.305(5)(a).

The trial court's determination that Hansen did not make a request for the alternative test includes both findings of fact and conclusions of law. The trial court made a factual finding that Hansen did not request an alternative test "after the blood test was given." Under § 805.17(2), STATS., a trial court's finding of fact will not be set aside unless it is "clearly erroneous"; that is, unless the finding is contrary to the great weight and clear preponderance of the evidence.

See ***Figliuzzi v. Carcajou Shooting Club,*** 184 Wis.2d 572, 589 n.7, 516 N.W.2d 410, 417 (1994). This court defers to the trial court's assessment of the weight and credibility of the evidence. *See* § 805.17(2). The interpretation of § 343.305, STATS., in relation to a given set of facts, however, is a question of law which we review de novo. ***Stary,*** 187 Wis.2d at 269, 522 N.W.2d at 34. Thus, we review de novo whether, on the undisputed facts and those found by the trial court, Hansen was denied "an alternate test the agency chooses" once he had "consent[ed] to the primary test" designated by the deputy who arrested him. ***Id.*** at 270, 522 N.W.2d at 34.

Hansen emphasizes in his reply brief that the issue in this appeal is "whether the appellant's demand *before* the State's blood test constituted a request for an alternate test." (Emphasis in original.) We accept this statement as a tacit concession that the trial court's factual finding that Hansen did not request an alternative test after he submitted to the blood test at the hospital was not clearly erroneous. We thus focus our attention on the interchange between Hansen and the deputy when Hansen was first informed of the requirements of § 343.305, STATS., after which he consented to first a breath test and, subsequently, to a blood test.

The State, in turn, concedes that Hansen "did request a blood test when originally requested to take an [I]ntoxilyzer test as the primary test." The State, however, views Hansen's request as merely giving "input into the designation of the primary test and not credibly requesting 'an alternative test.'" It claims that the deputy took "Hansen's original request for a blood test into consideration" when he opted to give the blood test as the primary test in the absence of the Intoxilyzer operator. In the State's view, Hansen carries the burden of establishing that he clearly communicated his intent to request an alternative

test by asking the deputy for an additional test after the blood test was administered. We disagree.

Before addressing Hansen's arguments for suppression of the blood test result, we believe it important to set forth precisely what the record reveals concerning the initial dialogue between Hansen and the deputy regarding chemical tests. Because the trial court accepted the deputy's version of the events in question as the more credible, we accept the following account by the deputy as the facts on which we must base our analysis:

> [Questioning by Hansen's counsel:]
>
> Q At the Columbus Police Department you issued Mr. Hansen a [sic] operating a motor vehicle while intoxicated offense; correct?
>
> A That's correct.
>
> Q And, you read him an Informing the Accused form, is that correct?
>
> A That is correct.
>
> ….
>
> Q Okay. At the time that you asked Mr. Hansen to submit to a chemical test of his breath, did he consent to do so?
>
> A He stated he wanted a blood test done.
>
> Q Okay. Did he consent to giving a breath test?
>
> A After I explained to him that he had to do our primary test before he could have a blood test done, he did then; he did then consent to the breath test.
>
> Q …[T]he end result is he did consent to a chemical test of his breath; right?
>
> A Yes, he did.
>
> ….
>
> Q I was asking you if it was your position that Mr. Hansen only wanted a blood test?

A That's the test he stated he wanted to take, was a blood test.

….

Q In asking Mr. Hansen for a breath test, you were asking him to take a primary -- that would be your primary test, is that correct?

A That's correct.

Q At that point in time, what would have been your alternative test?

….

A Okay. Blood test is our normal alternative test.

Q Isn't it true that if you first offer a blood test to an individual, that it's your normal procedure then to give a breath test as an alternative test?

A If they request it.

Q Okay. So, at the time that you asked for the breath test, Mr. Hansen specifically asked you for, you're saying, a blood test; is that correct?

A Yes.

Q Didn't you understand that to mean that he was asking for an alternative test then?

A No. It's quite common for people to say that they want a blood test. They don't trust any other test.

Q Did Mr. Hansen say to you he didn't trust any other kind of test?

A Not to my recollection; no.

Q So, it's pretty much common sense, wouldn't you say, that if he asked for a blood test he was asking for an alternative test?

A Not necessarily. It could be just not wanting to do a breath test.

Q The reason you were not able to provide a breath test is because the officer who was designated to perform that test was unable to perform it; correct?

A That's correct. He got called away.

Q At that point in time you decided that you had to take a different test; correct?

A Go for another primary test.

Q My question to you is why didn't you take Mr. Hansen to a neighboring agency to have a breath test done?

A Convenience. The nearest neighboring agency is Portage that has an Intoxilyzer. He's from the area down by Columbus. We'd -- he believed at the time he could not get som[e]one to pick him up, and it was for my convenience and his, both, that we would just go to the hospital for the blood test.

Q Did you think that -- if you had a blood test then taken, what would have been your alternative test, if the breath test was unavailable?

A If he would have asked for an alternative test, we would have probably went back for the breath test, because by then the Columbus officer had cleared from the call he'd been on.

….

Q Mr. Hansen agreed and consented to the blood test. That wasn't a problem, either; correct?

A That wasn't a problem.

….

[Questioning by the prosecutor:]

Q …[D]id the defendant ever request an Intoxilyzer test at all?

A No.

Q After the second designation of the blood test, did the defendant request any additional test?

A No, he did not.

Q Did he request any alternative test?

A No, he did not.

Hansen cites ***State v. McCrossen,*** 129 Wis.2d 277, 385 N.W.2d 161 (1986), and ***State v. Renard,*** 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), in

support of his argument for suppression of the blood test result. In ***McCrossen,*** there was no dispute as to the defendant's request for an alternative test and the officer's failure to provide it. The supreme court concluded that suppression of the primary test result is the appropriate remedy when a defendant is denied his or her statutory right to have an alternate test performed at police expense. ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170. In the instant case, the issue is whether, given the foregoing account of what occurred, Hansen requested and was denied the opportunity to have an alternative test performed. Thus, ***McCrossen*** is of little assistance to our analysis.

In ***Renard,*** an officer arrested Renard for OMVWI at a hospital where he was being treated for injuries from an automobile accident. The following ensued after the arrest:

> The officer requested Renard to permit a blood sample to be drawn for a blood alcohol test. Renard requested that a breathalyzer test be performed instead. The officer persuaded Renard to consent to the blood test because the blood sample could be drawn at the hospital. A breathalyzer test apparently could not be performed at the hospital, and Renard's doctor was unsure whether Renard would be hospitalized overnight. 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. After the blood sample was drawn, the officer left the hospital without inquiring again whether Renard would be hospitalized overnight. The hospital released Renard shortly after the officer left. The release occurred less than two hours after Renard's accident.

Renard, 123 Wis.2d at 460, 367 N.W.2d at 238. We upheld the trial court's finding that Renard had requested a breathalyzer test in addition to the blood test, and concluded that "[t]he police therefore had a duty to perform an additional test because he consented to the blood test." ***Id.*** We affirmed the order suppressing the blood test result because the "duty to perform the requested additional test became mandatory after Renard submitted to a blood test." ***Id***. at 461, 367

N.W.2d at 238-39. We noted further that since Renard was released from the hospital within three hours of the accident, "the police could have timely performed a second test," and should have done so because Renard's request for an additional test required the officer to make a "diligent effort" to comply. ***Id.*** at 460-61, 367 N.W.2d at 238.

We conclude that ***Renard*** is controlling on the present facts, and that Hansen's conviction must be reversed and the result of his blood test ordered suppressed. We acknowledge that in ***Renard***, unlike here, the trial court had made a factual finding that a request was made for an alternative test. In its decision from the bench, the trial court here stated the correct law and reviewed what it considered to be the relevant facts, but then focused exclusively on "[t]he question of what happened after the blood was drawn," which the court concluded was "the subject of this hearing." The court's determination "that there was no request by Mr. Hansen for an alternative test" clearly rests on its factual finding that "[t]here was no request for a breath test after the blood test was given." The trial court did not consider, however, whether Hansen's initial consent to a breath test, after he was told that he could also then have a blood test, constituted a request that both the primary and alternative tests be administered. This issue was specifically raised by Hansen's counsel, and acknowledged by the prosecutor, at the beginning of the hearing, and Hansen's counsel argued the point at the conclusion of the testimony.

In ***Renard***, the accused's initial response to the request for a blood test was that he wanted a breath test instead. This court characterized the officer as having then "persuaded" the accused to consent to a blood test because a blood sample could be drawn at the hospital but a breath test could not be administered there. Here, the deputy persuaded Hansen to submit to a breath test by assuring

him that a blood test would be available to him as an alternative test after he had complied with the breath test request. Under the somewhat peculiar facts of this case,[3] we conclude that once Hansen had consented to submit to both tests, the "diligent effort" called for in ***Renard*** requires that the deputy, at a minimum, should have inquired of Hansen following the taking of the blood sample whether he then wanted to return to the police station (or to another law enforcement agency) for a breath test. As in ***Renard***, sufficient time remained after completion of the blood test to obtain an alternative breath test that would be probative of Hansen's alcohol concentration at the time he was driving.[4] *See* § 885.235(1), STATS.; *and* ***Renard***, 123 Wis.2d at 460, 367 N.W.2d at 238.

Had the deputy made this inquiry, Hansen may well have declined, thereby confirming the deputy's surmise that Hansen's initial request for a blood test was that it be given in lieu of a breath test, rather than in addition to it. The State would then be in a position to rely on our conclusion in ***Stary***, 187 Wis.2d at 271, 522 N.W.2d at 34-35, that a "diligent effort" is satisfied once a "suspect has *unequivocally* refused the second test" (emphasis added). In ***Stary***, we held that "[w]hether the officer made a reasonably diligent effort to comply with his statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case," and on the facts of that case, "because the officer diligently offered Stary an alternate test that Stary unequivocally refused, law

[3] The trial court was clearly troubled by the deputy's inability to administer a breath test to Hansen after he had consented to it. The court noted that Hansen was given the blood test "somewhat in an unusual fashion," and commented that it "certainly would like to know what happened sometime [regarding the sudden unavailability of the Intoxilyzer operator] so it doesn't happen again."

[4] The record indicates that Hansen was stopped for speeding at 2:00 a.m. and was released from custody prior to 3:23 a.m.

enforcement was under no further obligation to provide or pay for Stary's blood test." ***Id.*** at 271-72, 522 N.W.2d at 34-35. Here, unlike in ***Stary***, we have only the deputy's speculation as to what Hansen intended when he consented to a breath test after being told that he could also then obtain a blood test.

We emphasize that we do not attribute evasion or bad faith to the deputy's testimony that he concluded Hansen had not requested an alternative test. Hansen's request for a blood test, followed by his consent to a breath test as the primary test, created at least an ambiguity as to whether Hansen desired that both tests be given. The "diligent effort" by law enforcement to provide an accused with an alternative test when one is requested, as specified in ***Renard*** and ***Stary***, requires that an arresting officer must resolve any ambiguity regarding a person's request for an alternative test prior to the person's release from custody.

Because the record fails to show that the arresting office made a diligent effort to provide Hansen with an opportunity to obtain both a breath test and a blood test after he had consented to each, the results of his blood test must be suppressed on remand. The State may then elect whether to proceed with its prosecution of Hansen for OMVWI on the basis of other evidence it may have that he was guilty of the violation. Since we have concluded that Hansen's statutory right to obtain an alternative test was violated, and we have ordered the appropriate remedy for that violation, we do not address his separate argument that the blood test result should be suppressed in this case because Hansen was deprived of his right to due process.

By the Court.—Judgment reversed and cause remanded with directions.

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