

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 16, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

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.

**No. 98-0434-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD W. FOELKER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

MYSE, J. Richard W. Foelker appeals a judgment of conviction for operating a motor vehicle while intoxicated, fourth offense, and an order refusing to suppress the results of a blood test taken to determine his blood alcohol level. Foelker contends that the trial court erred by refusing to suppress the results of the blood test because his request for a secondary test was denied and because the law enforcement officials failed to use reasonable diligence in offering and

providing the secondary test. Because this court concludes that Foelker did not request a secondary test and the law enforcement officials were reasonably diligent, the judgment and order are affirmed.

Foelker initially was stopped by deputy sheriff David Kuehl for speeding. During the stop, Foelker indicated that he was suffering from medical problems, and Kuehl arranged for transportation to a hospital. During the initial confrontation, Foelker became abusive toward Kuehl, and Kuehl noticed a smell of intoxicants on Foelker's breath. Foelker was ultimately taken to the hospital emergency room, where he was arrested for operating a motor vehicle while intoxicated.

In the emergency room, Kuehl read the Informing the Accused form to Foelker and requested a blood test. Foelker indicated that he would rather take a urine or breath test. Kuehl responded that Foelker could not select the initial test, but after the blood test he could have a second test if he wished. Foelker then submitted to the blood test. Thereafter, Kuehl remained for a short period of time and Foelker did not request a second test from him. Some time later, after Kuehl had left, Foelker requested a secondary test from medical personnel. There were no law enforcement officials present at that time, and the medical personnel did not follow through with the request.<sup>1</sup>

Foelker contends that his conversation with Kuehl was sufficient to invoke his right to a secondary test and that Kuehl was not reasonably diligent in providing the requested second test. Under § 343.305(5), STATS., a "person who

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<sup>1</sup> Foelker does not argue that the hospital's refusal to perform the requested test violated his right under § 343.305(5), STATS., to have an additional test at his own expense.

submits to the [primary] test is permitted, upon his or her request, the alternative test provided by the agency.” This statute imposes an obligation on law enforcement “to use reasonable diligence in offering and providing a second alternate test of its choice at no charge to the suspect.” *State v. Stary*, 187 Wis.2d 266, 270, 522 N.W.2d 32, 34 (Ct. App. 1994).

This court reviews Foelker’s contention as a mixed question of fact and law. The trial court’s findings of fact concerning the events surrounding Foelker’s alleged request will be upheld unless clearly erroneous. *See* § 805.17(2), STATS. Applying these facts to § 343.305(5), STATS., in determining whether Foelker invoked his right to a secondary test is a question of law that is subject to de novo review. *Stary*, 187 Wis.2d at 269, 522 N.W.2d at 34.

The trial court found that Foelker’s multiple requests that he be given a urine or breath test in lieu of a blood test did not amount to a request for an alternate test. This factual determination is not clearly erroneous. All the witnesses who testified concluded Foelker wanted a breath or urine test in lieu of a blood test, not in addition to one. Kuehl testified that Foelker told him “he would rather take a urine test or an Intoxilyzer test.” Another state trooper present at the time testified that Foelker “didn’t request an alternate test; he demanded a urine test or Intoxilyzer test instead of the blood test that we wanted.” Finally, a physician’s assistant present at the time also testified that Foelker demanded a urine test in lieu of the blood test. This evidence is sufficient to support the finding that Foelker did not request a secondary test, but instead requested a different primary test.

Whether Foelker’s request was sufficient to invoke his right to a second test is a question of law this court reviews de novo. *Id.* Section

343.305(5), STATS., provides that a defendant has a right to a second test to be administered by the law enforcement agency “upon his request.” An attempt to persuade law enforcement officials to use some other test as the primary test, however, does not invoke the defendant’s right to a secondary test. The facts are clear that Foelker never requested an alternative test from law enforcement officials. Foelker’s failure to do so defeats his assertion that his statutory rights to a secondary test were violated.

Foelker also contends that Kuehl was not reasonably diligent in facilitating the administration of the second test. *See Stary*, 187 Wis.2d at 270, 522 N.W.2d at 34. Foelker argues that his earlier requests placed an affirmative duty on the officers to ask him if he wanted a secondary test after the primary test was given. This court disagrees.

In support of his claim Foelker cites *State v. Renard*, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985). In *Renard*, the defendant requested a breath test in lieu of the blood alcohol test offered by the officer. *Id.* at 460, 367 N.W.2d at 238. The defendant and his wife both testified that he continued to request the breath test after his consent to the blood test, a claim the officer denied. *Id.* The trial court suppressed the results of the first test, concluding that the officer did not perform the breath test as requested by the defendant. *Id.* This court affirmed, upholding the trial court’s finding and therefore recognizing a duty on the officer to make a diligent effort to perform the requested additional test. *Id.* at 460-61, 367 N.W.2d at 238.

As is readily apparent, the facts of this case are the opposite of those in *Renard*. Here, the trial court found that the defendant did not request an

additional test. Because the test was not requested, there was no duty on the officers to perform the additional test.

This court also rejects the claim that the police officers did not use reasonable diligence in offering the alternative test. Foelker was read the Informing the Accused form, which provides in part that “After submitting to chemical testing, you *may request* the alternative test that this law enforcement agency is prepared to administer at its expense.” (Emphasis added.) After having been read this, Foelker made another request for a test other than the blood test. Once more, Kuehl responded by stating that Foelker could have an alternate test after the primary blood test was administered. By providing this information to the defendant, the officers were reasonably diligent. They were not required to further obtain an explicit rejection of the secondary test.

Although the record reflects that Foelker requested an additional test after the officers left, this was ineffective to invoke his rights to a secondary test paid for by law enforcement because the request was not made to the law enforcement agency. *See* §§ 343.305(2) and (5), STATS. Further, there is no contention that the officers left too quickly to effectively permit Foelker to make his request for a secondary test. This court therefore concludes that the trial court properly refused to suppress the results of the primary test.

*By the Court.*—Judgment and order affirmed.

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

