COURT OF APPEALS
DECISION
DATED AND FILED

AUGUST 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0508

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

VILLAGE OF MENOMONEE FALLS,

PLAINTIFF-RESPONDENT,

v.

GREGORY A. PRELLWITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, Jr., Judge. *Reversed.*

ANDERSON, J. Gregory A. Prellwitz appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration (PAC) contrary to § 346.63(1)(b), STATS., and an order denying his motion to suppress his breath test result. Prellwitz argues that the results of the breath test should have been suppressed because he requested, but did not receive, an alternate test for the presence of alcohol as permitted by

§ 343.305(5)(a), STATS. We conclude that the arresting officer failed to use reasonable diligence to provide Prellwitz with his requested alternate test. Because Prellwitz was unreasonably denied a test to which he was statutorily entitled, we reverse his conviction.

At 2:31 a.m. on November 8, 1997, Village of Menomonee Falls Police Officer Christopher J. Cybell stopped Prellwitz for speeding. Cybell arrested Prellwitz for PAC and conveyed him to the Village's police station. At the police station, Cybell read the informing the accused form to Prellwitz in accordance with § 343.305(4), STATS. Cybell read each section of the form, and Prellwitz indicated that he understood it. Cybell signed the form at 3:10 a.m. and then administered a breath test to Prellwitz.

After the breath test, Cybell read to Prellwitz another form, the alcohol influence report. Finished with the necessary paperwork and ready for release from custody, Prellwitz was permitted to telephone someone to pick him up from the police station. Prellwitz made three phone calls; the first phone call was made at 3:25 a.m. and the last at 3:55 a.m. He tried the same phone number with each call, but there was no answer with each attempt. He did not want to try telephoning anyone else. Because he was unable to find someone to pick him up, Prellwitz was transported to the Waukesha county jail for a twelve-hour hold to ensure he was no longer intoxicated when released on his own. *See* § 345.24, STATS.

Cybell drove Prellwitz to the county jail, arriving at 4:30 a.m. At the motion hearing, Cybell testified that "upon pulling into the parking lot at the complex of the courthouse [Prellwitz] then requested … a blood test." Approximately an hour and one-half after being read the informing the accused

form and instructed about his right to request a second test, Prellwitz declared his request for a blood test when entering the county jail parking lot after a twenty-minute drive from the Village's police station. Cybell responded that the "request needed to be made at a more reasonable time and that [he] felt [Prellwitz] was making this request merely to avoid going to jail." Cybell felt it would be "impractical" to perform the blood test because the Village's police department uses Community Memorial Hospital for blood tests, which was located back in the Village, a twenty-minute drive away. No blood test was performed, and Prellwitz was admitted to the county jail at 4:37 a.m.

At a July 14, 1998 motion hearing, Prellwitz argued that the breath test evidence should be suppressed because he was denied the blood test he requested. The trial court denied his motion and found him guilty of PAC. Prellwitz appeals.

Ordinarily, a trial court's decision to admit or exclude evidence is a discretionary determination which will be upheld on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *See* ***State v. Johnson***, 181 Wis.2d 470, 484, 510 N.W.2d 811, 815 (Ct. App. 1993). However, in this case, the fundamental issue is whether the trial court admitted evidence of Prellwitz's breath test in accord with the implied consent law. Thus, the inquiry is whether the court properly construed and applied the implied consent law to the facts of this case. This presents a question of law for our independent review. *See* ***State v. Vincent***, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992).

The implied consent law, § 343.305, STATS., provides that an officer may ask the suspected intoxicated driver to provide a blood, urine or breath

sample after an arrest for intoxicated driving. *See* § 343.305(3)(a). The law enforcement agency of the arresting officer must be prepared to administer at least two of the three types of tests, either at its own agency or some other facility, but it may designate which test it will provide first and which is an alternate. *See* § 343.305(2). Section 343.305(5)(a) further provides that:

> The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) 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 under sub. (2).... The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3)(a) or (am).... The agency shall comply with a request made in accordance with this paragraph.

This last provision imposes three duties on an arresting officer: (1) to provide a primary test at no cost to the defendant; (2) to use reasonable diligence to provide the alternate test of the agency; and (3) to give the accused driver a reasonable opportunity to get his own alternate test at his own expense. *See* ***State v. Stary***, 187 Wis.2d 266, 270, 522 N.W.2d 32, 34 (Ct. App. 1994). Because § 885.235(1g), STATS., provides automatic admissibility for chemical tests completed by a qualified agency and administered within three hours of driving, the law enforcement agency must provide a reasonable opportunity for the accused to obtain a requested alternate test within this three-hour time frame. *See* ***Vincent***, 171 Wis.2d at 129, 490 N.W.2d at 763.

In ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), a police officer arrested Renard at a hospital that was treating him for injuries sustained in an automobile accident. The officer persuaded Renard to submit to a blood test because the sample could be drawn at the hospital. Renard

requested a breath test, but it could not be performed at the hospital. The trial court found that Renard continued to request the breath test although he consented to the blood test. After the blood sample was drawn, the officer left the hospital without inquiring as to the length of Renard's stay. Renard was released shortly after the officer left, which was within two hours of the accident, and the requested breath test was not performed. *See* ***id.*** at 460, 367 N.W.2d at 238.

In ***Renard***, we sustained the suppression of the initial blood test results and held that the officer failed to comply with § 343.305(5), STATS., because he failed to make a reasonable inquiry concerning the expected time of Renard's release. Because three hours did not elapse between the time of Renard's accident and the release from the hospital, the police could have timely performed the requested second breath test. *See* ***Renard***, 123 Wis.2d at 460, 367 N.W.2d at 238. Because Renard requested a secondary test, we held that the officer was required to make a diligent effort to comply. *See* ***id.*** at 461, 367 N.W.2d at 238.

Prellwitz contends that he was denied his statutory right to have an alternate test for blood alcohol content. Specifically, he argues that he made the alternate blood test request within three hours of his arrest and that the arresting officer failed to use reasonable diligence to assist him in obtaining his requested test. This court agrees. Whether a police officer has "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." ***Stary***, 187 Wis.2d at 271, 522 N.W.2d at 35.

In this case, the arresting officer failed to make reasonably diligent efforts to comply with § 343.305(5), STATS. It is undisputed that within three

hours of his arrest Prellwitz stated, "I want a blood test." It is also undisputed that after the request was made the officer made no further inquiries about the type of test being requested. The officer did not ask if Prellwitz meant he wanted a second test provided by the agency or an alternate test at his own expense. The officer simply denied his request because it was "impractical." If indeed Prellwitz was requesting a second agency test, we agree that transporting Prellwitz back to the Village to the designated hospital for the police department's blood tests may have been burdensome, but once Prellwitz invoked his statutory right to another test, the officer was obligated, at a minimum, to attempt to comply with the statute. As we have noted, the statute requires that an officer make a diligent effort to comply with its provisions. We do not see the officer's actions in this case as reasonably diligent efforts.

We emphasize that each case turns on its own circumstances. Here, the facts are that the alternate test request was made, the officer made no inquiry about the request and he refused to transport the accused. Whether the accused's request would have required a significant expenditure of time or agency funds we will never know because the officer never questioned the accused about the type of test he desired. Under such a situation, we conclude that the officer did not make reasonably diligent efforts to comply with § 343.305(5), STATS. The trial court should have suppressed the initial breath test results. That being the case, there is no evidence to support Prellwitz's conviction for PAC, and, accordingly, we reverse his conviction.

By the Court.—Judgment and order reversed.

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