

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1999

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. 99-1100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF PORTAGE,

PLAINTIFF-RESPONDENT,

v.

BOYD A. TRACHSEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

ROGGENSACK, J.¹ Boyd A. Trachsel appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(b), STATS. Trachsel claims that the circuit court should have suppressed the results of a chemical breath test because he requested,

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

and was improperly denied, an alternative chemical test. The circuit court found that Trachsel did not make a request for an alternative test, and thus denied Trachsel's motion to suppress. We conclude that this finding was not clearly erroneous. Therefore, the results from Trachsel's breath test were admissible. Accordingly, we affirm.

BACKGROUND

Boyd Trachsel was stopped and arrested by Deputy Robert Wanta for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, contrary to §§ 346.63(1)(a) and (b), STATS. After the arrest, Wanta transported Trachsel to the Portage County Jail to obtain a chemical breath test. Wanta read Trachsel the "Informing the Accused" form as required by § 343.305(4), STATS., and asked Trachsel to submit to a breath test. Trachsel did not respond "yes" or "no," but asked about the possibility of a blood test. Deputy Daniel Kontos, the intoxilyzer operator, told Trachsel that he needed to take the breath test first and then the officers would arrange for a blood test, if Trachsel decided he wanted it. Trachsel took the breath test. However, neither officer discussed additional tests with him after that initial exchange, and Trachsel did not bring up the subject again.

Trachsel moved to suppress the chemical breath test on the grounds that he was denied his right to an alternate test under § 343.305, STATS. At the motion hearing, both Wanta and Kontos testified that they had no recollection of Trachsel asking about a blood test after he agreed to take the breath test. Both officers also testified that the policy of the Portage County Sheriff's Department is for the secondary test to be a urine test, not a blood test. Trachsel, testifying after

the officers, claimed that he requested a blood or a urine test after taking the breath test.

The circuit court found that Trachsel did not make a request for an alternative chemical test. The court stated that the officers' testimony that Trachsel asked about a blood test only before he agreed to take the breath test was more credible than Trachsel's testimony. The circuit court also stated that the records the officers kept of the occurrence, and the normal and ordinary course of practice of the officers in PAC cases supported its finding that an alternative test was not requested. The circuit court then denied Trachsel's motion to suppress. After a trial to the court, Trachsel was found guilty of operating with a prohibited blood alcohol concentration.² Trachsel appeals.

DISCUSSION

Standard of Review.

Whether Trachsel requested an alternative chemical test, a secondary test, is a question of fact. We will not reverse the circuit court's findings of fact unless they are clearly erroneous. *See State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS.

Request For an Alternative Test.

Section 343.305(2), STATS., states that any person who drives or operates a motor vehicle on the public highways of the state is deemed to have given consent to one or more tests for the presence of alcohol in his or her breath,

² The OMVWI charge was dismissed.

blood, or urine. However, a driver who submits to a requested test of law enforcement is entitled to obtain an additional test. Under § 343.305(2), the law enforcement agency must “be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests [of breath, blood or urine], and may designate which of the tests shall be administered first.” *See* § 343.305(2); *see also State v. Vincent*, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). Under § 343.305(5)(a),

[t]he 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 purpose of the additional test is to afford the accused the opportunity to verify or challenge the results of the first test. *See State v. McCrossen*, 129 Wis.2d 277, 288, 385 N.W.2d 161, 166 (1986). If the accused requests an alternate test, the law enforcement officer must exercise reasonable diligence in providing it. *See State v. Renard*, 123 Wis.2d 458, 460-61, 367 N.W.2d 237, 238 (Ct. App. 1985). If the accused is denied his or her statutory right to an additional test, the primary test result must be suppressed. *See McCrossen*, 129 Wis.2d at 297, 385 N.W.2d at 170.

Trachsel argues that he requested, and was improperly denied, an alternative test. The circuit court found that Trachsel did not request an alternative test, and accordingly, denied Trachsel’s motion to suppress the results of the breath test.

Both Wanta and Kontos testified that any discussion of a blood test occurred when they asked Trachsel to consent to the primary test. In fact, Kontos specifically testified:

I remember Deputy Wanta asking Mr. Trachsel if he would submit to a test of his breath. The defendant then asked if he could have a blood test instead of a breath test as his primary test. ... I remember explaining to him that the breath test was our primary test and that he would have to either answer yes or no whether or not he was going to submit to the breath test.

Kontos also testified that Trachsel did not mention an alternative test or a blood test after he consented to the breath test. Wanta testified that if Trachsel had requested an alternative test, he would have noted the request in his report as he does in the normal and ordinary course of processing one who is suspected of operating a vehicle with a prohibited alcohol concentration.

At the motion hearing, the circuit court stated that it found the testimony of Wanta and Kontos more credible than Trachsel's testimony. It stated that it based its decision, in part, on the fact that there was no record of a request of an alternative test. Further, it found the officers' testimony consistent with the officers' usual practice in PAC cases. The circuit court's finding of fact, that Trachsel did not request an alternative test, was not clearly erroneous. Because Trachsel did not request an alternative test, the circuit court properly denied his motion to suppress. Therefore, we affirm the judgment of conviction.

CONCLUSION

The circuit court's finding that Trachsel did not request an alternative chemical test was not clearly erroneous. Therefore, the results from

Trachsel's breath test were admissible. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

