COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP986-CR **Cir. Ct. No. 2004CT85**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. PLUEMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Timothy Pluemer appeals the judgment of conviction for operating under the influence of an intoxicant (OWI), third offense, in violation of WIS. STAT. § 346.63(1)(a). He contends the circuit court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

denying his motion to suppress the chemical test results of his blood sample because the law enforcement officer failed to obtain either breath or urine samples for an alternative test and failed to release him within three hours of his arrest so that he could obtain a test at his own expense. We conclude the circuit court properly denied the motion and therefore affirm.

BACKGROUND

¶2 Pluemer's vehicle was stopped by Iowa County Deputy Sheriff Eric Hartwig at approximately 12:53 a.m. on August 1, 2004. Deputy Hartwig placed Pluemer under arrest for OWI about ten minutes later and took him to Upland Hills in Dodgeville. There Deputy Hartwig read Pluemer the informing the accused form for a chemical test of Pluemer's blood and Pluemer provided a blood sample for that test.

¶3 The criminal complaint charged Pluemer with OWI, third offense, and operating a motor vehicle with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(b), third offense; Pluemer moved to suppress the results of the blood test on the ground that he was not permitted to take the alternative test provided by the law enforcement agency under WIS. STAT. § 343.305(5) and was not given a reasonable opportunity to have a chemical test administered by a person of his own choosing at his own expense as required by § 343.305(5).

¶4 Pluemer and the State submitted a stipulation of facts, which included the following facts. Under the Iowa County Sheriff Department's Operation Manual, the primary test administered by that agency is normally the blood test and the alternative test is a breath test. While still at Upland Hills, Pluemer told Deputy Hartwig that he would like to take the alternative test and Deputy Hartwig then transported him to the Iowa County jail, where he read

Pluemer an informing the accused form for the breath test. However, Deputy Hartwig then noticed that the intoximeter was not working. He transported Pluemer back to Upland Hills, where he read him an informing the accused form for a urine test. Pluemer "provided two urine samples that were allegedly insufficient in amount and of an inaccurate temperature for testing." Deputy Hartwig took Pluemer back to the Iowa County jail and gave him a citation for OWI, third offence. Pluemer was allowed to use the telephone to arrange for his release at about 4:00 a.m. and he was released to a responsible party at about 4:45 a.m. No further samples of Pluemer's blood, breath, or urine were taken. There are intoximeters located at the Wisconsin State Patrol offices in Mt. Horeb, Platteville, and Darlington.

¶5 Pluemer's affidavit averred that while he was waiting to take the breath test at the Iowa County jail, he asked Deputy Hartwig how he could obtain a chemical test at his own expense given that he was under arrest, could not leave, and was not permitted to use the telephone, and Deputy Hartwig answered "'that's not our problem' or words to that effect." Pluemer was not permitted to use the telephone until about 4:00 a.m.

¶6 Deputy Hartwig's affidavit averred that, after he read the informing the accused form for the blood test to Pluemer, Pluemer asked "'How can I get that test?'" Deputy Hartwig was unsure if Pluemer was referring to the alternative test or the test an accused can obtain at his or her own expense. He explained to Pluemer that Pluemer could have an alternative test free of charge or could obtain one on his own time at his own expense. When Pluemer asked how he could arrange that, Deputy Hartwig responded that he would be given telephone privileges at the jail. Pluemer said he wanted to have the alternative test. Deputy Hartwig did not recall Pluemer ever asking to obtain a test at his own expense.

¶7 The stipulation stated "a true and correct copy of [Deputy Hartwig's] [r]eport … regarding [this] matter" was attached. The report stated that while at the jail for the breath test, Pluemer stated he had to urinate badly. After being taken to Upland Hills for the urine test, he was instructed on the proper etiquette for collecting a sample. Pluemer went into the bathroom and said he could not urinate. He was in the restroom for about eight-to-ten minutes. Deputy Hartwig started running water in a sink outside the restroom to facilitate Pluemer's ability to urinate. Pluemer came out of the restroom with an inadequate supply of urine and the temperature was inaccurate for testing. He was instructed to go back into the restroom to make another attempt to obtain an adequate amount of urine for testing, and the deputy again ran water outside the restroom. After three-to-four minutes, Plummer came out of the restroom with an amount of urine that was not sufficient and the temperature was again not correct for testing. Deputy Hartwig then took Pluemer back to the jail to give him the citation.

¶8 Although Pluemer's motion to suppress contains a hearing date, there is no minute sheet showing a hearing, no transcript of a hearing, and nothing else in the record indicating that a hearing was held on the motion. The court issued a written decision that appears to be based on the stipulation of facts, exhibits, and affidavits submitted by the parties. The court rejected Pluemer's argument that he was entitled to suppression because the deputy did not take him to another station for a breath test and because he was unable to provide an adequate urine sample. The court concluded that the law enforcement officer exercised reasonable diligence in providing Pluemer an opportunity for an alternative test. The court referred to Pluemer's statement in Deputy Hartwig's report that he had to urinate and the court stated that Pluemer "controlled his

behavior in the opportunity for a urinalysis [sic]. The State was not shown to have frustrated his desire for an 'alternate' test."

DISCUSSION

¶9 On appeal, Pluemer advances two arguments in support of his position that the circuit court erred in denying his motion to suppress the results of the test of his blood. First, because he requested an alternative test, law enforcement personnel were obligated to obtain a sample of either his breath or his urine that was adequate for testing and they did neither. Second, because he expressed an interest in obtaining an alternative test at his own expense and because the State did not obtain an adequate sample of either his breath or urine for an alternative test at his expense, Deputy Hartwig was obligated to release him within three hours of his arrest, and he did not.

¶10 The issues on this appeal require that we construe WIS. STAT. § 343.305, the implied consent law, and apply it to the facts in this case. We accept the factual findings of a circuit court unless they are clearly erroneous, as well as the credibility determinations made by the circuit court. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Of course, generally when there are disputed issues of fact, there is an evidentiary hearing and the court makes findings of fact based on the testimony presented at the hearing. *See* ***id.*** In this case, the parties apparently agreed to have the circuit court find facts based on the affidavits, the stipulated facts, and the attached exhibits including the police report. When parties invite fact-finding based on affidavits in this way, thereby waiving their right to present live testimony at an evidentiary hearing, we accord deference to those findings. ***State v. Leitner***, 2001 WI App 172, ¶36, 247 Wis. 2d 195, 633 N.W.2d 207. Thus, we will apply the same standard of review to the

court's findings of fact in this case that we would apply if an evidentiary hearing had been held. To the extent the circuit court chose to believe Deputy Hartwig's report[2] or affidavit on matters to which Pluemer did not stipulate or which his affidavit disputes, we will accept those credibility determinations. Similarly, we will accept the inferences the circuit court drew as long as they are reasonable, even if there are competing inferences that are also reasonable. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). The construction of the statute and its application to the facts as found by the circuit court present a question of law, which we review de novo. ***Schmidt***, 277 Wis. 2d 570, ¶13.

¶11 Before addressing Pluemer's arguments, we provide some background on the relevant portions of WIS. STAT. § 343.305. WISCONSIN STAT. § 343.305(2) provides that a person operating a motor vehicle on the public highways is deemed to have given consent to one or more tests of his or her breath, blood, or urine for the purpose of determining the presence of alcohol or controlled substances, when requested by a law enforcement officer and consistent with certain statutory prerequisites. Upon a person's arrest, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for those tests. Section 343.305(3). Under § 343.305(2):

> Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to

[2] A stipulation that the exhibit attached is a true and correct copy of Deputy Hartwig's report is not a stipulation that the facts he relates in the report are true. Therefore, we view the report in the same manner as we view Deputy Hartwig's affidavit and Pluemer's affidavit—containing evidence to which the parties have not stipulated but which the parties have agreed the court may base its factual findings on even if there are conflicts in the evidence or the reasonable inferences from the evidence.

> administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a) or (am), and may designate which of the tests shall be administered first.

Section 343.305(5)(a) addresses the alternative test the agency must be prepared to administer:

> ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). 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 agency shall comply with a request made in accordance with this paragraph.

(Emphasis added.)

¶12 As we explained in ***Schmidt***:

> At the time the officer asks an accused to submit to a chemical test, the officer must read to the accused a form prescribed by statute. Wis. Stat. § 343.305(4). This form is generally referred to as the "Informing the Accused" form. The form must explain, among other things, that the officer wants to take samples of the accused's breath, blood, or urine to determine the concentration of alcohol or drugs in the accused's system. The form must also state: "If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense."

Schmidt, 277 Wis. 2d 561, ¶10. Each of the three informing the accused forms read to Pluemer contained the language required by the statute.

¶13 We address first Pluemer's argument that Deputy Hartwig did not fulfill the statutory obligation to provide an alternative test, that is, a second test in

addition to the blood test. Pluemer contends that, because the agency had designated the breath test as its alternative test and because there were intoximeters at other locations not too far away, Deputy Hartwig could not choose to provide a urine test as the alternative test. There is no support in the text of the statute or the case law for this argument. WISCONSIN STAT. § 343.305(2) requires only that the agency "be prepared to administer … 2 of the 3 tests …." The agency "*may* designate which of the tests shall be administered first," but it need not do so. (Emphasis added.) Nothing in the statute suggests that by having an agency policy designating a primary test and an alternative test, the agency is bound to adhere to those designations. Indeed, this proposition has already been rejected in ***State v. Pawlow***, 98 Wis. 2d 703, 705, 298 N.W.2d 220 (1980). There the court held:

> The provision allowing the arresting agency to designate which test shall be first administered operates to dispel any notion that the arrested driver may choose which test he or she must take. It does not create an irrevocable election binding the agency, and does not prohibit the request of additional or different tests. (Citations omitted.)

¶14 Pluemer distinguishes ***Pawlow*** based on the reasons for not providing the test initially designated. In ***Pawlow***, the officer originally asked the accused to take a breath test, but after the accused vomited, the officer asked him to take a urine test. ***Id.*** at 703-04. In this case, Pawlow argues, there was no "good cause" for not administering the breath test at another station. However, nothing in ***Pawlow*** or the statute suggests that the reason the officer decides to give a test other than the one designated by the agency is relevant.

¶15 Pluemer also argues that, even if the agency could properly administer a urine test as the alternative test, it did not administer the test because Deputy Hartwig did not obtain an adequate sample on which to perform the test.

The factual premise of Pluemer's argument is that he was physically unable to produce an adequate sample of his urine. Because of that fact, according to Pluemer, the agency had an obligation to administer a breath test or provide medical or other assistance to enable him to produce an adequate urine sample. However, the circuit court's decision makes it clear that the court credited the statements in Deputy Hartwig's report and inferred from them that Pluemer was deliberately not providing an adequate urine sample. We conclude that is a reasonable inference from Deputy Hartwig's report. Nothing in Pluemer's affidavit provides a basis for finding that Pluemer was unable to produce an adequate sample, and, even if it did, for the reasons we have explained in paragraph 10, we would accept the circuit court's decision to credit Deputy Hartwig's report and the reasonable inferences the court drew from it.

¶16 Pluemer does not argue that, if he deliberately did not provide an adequate urine sample, there was still a violation of WIS. STAT. § 343.305(2) and (5). We perhaps state the obvious when we say that such an argument would have no merit.

¶17 We next consider Pluemer's argument that, because he expressed an interest in obtaining an alternative test at his own expense and because the law enforcement agency did not obtain an adequate sample of either his breath or urine for an alternative test at its expense, Deputy Hartwig was obligated to release him within three hours of his arrest.[3] The factual premise of this argument is that

[3] Pluemer derives the three hours from WIS. STAT. § 885.235(1g), which provides for admissibility without expert testimony of the results of a chemical analysis of a sample of a person's breath, blood, or urine "if the sample was taken within 3 hours after the event to be proved."

Pluemer requested the opportunity to have a qualified person of his own choosing perform a chemical test at his own expense. However, a reasonable reading of Deputy Hartwig's affidavit is that, after he explained the difference between the agency's alternative test and a test that Pluemer could arrange at his own expense, Pluemer chose the agency's alternative test and did not request the opportunity to arrange a test on his own. As we have already explained, given the procedure the parties agreed to, the circuit court was entitled to credit Deputy Hartwig's affidavit and not Pluemer's.

¶18 We conclude that, based on the circuit court's view of the submissions before it, the court correctly concluded that Deputy Hartwig did not violate the requirements in WIS. STAT. § 343.305(2) and (5) regarding an alternative test at the agency's expense or a test of the accused's own choosing at his or her expense.[4] The circuit court therefore properly denied Pluemer's motion.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

[4] Because of this conclusion, we do not address the State's argument that Pluemer was not entitled to suppression of the blood test results even if these were a violation of WIS. STAT. § 343.305.