COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1345-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES HELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.[1] James Held appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

STAT. § 346.63(1)(a). Held pled guilty to the charge following the trial court's denial of his motion to suppress evidence of a blood test obtained pursuant to the implied consent law. On appeal, Held contends that the arresting officer did not exercise "reasonable diligence" to accommodate his request for the police department's alternate test under the implied consent law as required by ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). We agree. We reverse and remand for further proceedings.

FACTS

¶2 The State charged Held with OWI. Held responded with a motion to suppress, contending that the arresting officer did not accommodate his request for the department's alternate breath test with "reasonable diligence" as required by ***Renard***.

¶3 The evidence at the motion to suppress hearing revealed the following. On March 28, 1999, at 5:21 a.m., Officer Walter Friedl of the Village of Jackson Police Department arrested Held for OWI. Friedl transported Held to Hartford Memorial Hospital for a blood test. At the hospital, Friedl read Held the Informing the Accused form. Although Friedl could not specifically recall whether he told Held that the department's primary test was a blood test and that its secondary test was a breath test, he testified that he routinely gives such advice to OWI suspects. Following this information, Held agreed to a blood test and a blood sample was drawn at 6:15 a.m.

¶4 At 6:30 a.m., after the blood draw, Friedl questioned Held, but Held declined to answer any questions. Friedl then made contact with a responsible adult to pick up Held, and he escorted Held to the hospital waiting room. About twenty minutes later, while Friedl was filling out reports related to the incident,

Held approached Friedl and stated he wanted another test. Friedl responded that Held should have made this request when Friedl provided him the informing the accused information. Held then asked for a urine test. Friedl responded that Held would have to make his own arrangements for that test. In addition, a doctor standing nearby told Held that a urine test would be of no benefit to him because such a test would not detect the presence of alcohol. At 6:56 a.m., Held was released to a responsible adult.

¶5 Acknowledging that the case was a "close call," the trial court ruled that Friedl had complied with the "reasonable diligence" requirement of ***Renard*** and denied Held's motion to suppress. Held then pled guilty to OWI. He appeals from the judgment of conviction.

DISCUSSION

¶6 While the parties do not dispute the facts, they sharply dispute the legal result produced by those facts. The issues are whether Held requested the alternate breath test offered by the police department, and, if so, whether Friedl exercised "reasonable diligence" to accommodate that request as required by ***Renard***.

¶7 WISCONSIN STAT. § 343.305(2) requires law enforcement to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other intoxicants in the breath, blood or urine of an OWI suspect. Specifically, § 343.305(5) imposes three obligations on law enforcement: "(1) to provide a primary test at no charge to the suspect; (2) to use reasonable diligence in offering and providing a second alternate test of its choice at no charge to the suspect; and (3) to afford the suspect a reasonable opportunity to obtain a third

test, at the suspect's expenses." ***State v. Stary***, 187 Wis. 2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994).

¶8 WISCONSIN STAT. § 343.305(5)(a) provides, in relevant part:

> The person who submits to the [primary] 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).

¶9 Whether a police officer has made a reasonably diligent effort to comply with the statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case. *See* ***Stary***, 187 Wis. 2d at 271. If the suspect is denied the statutory right to an additional test, the primary test must be suppressed. *See* ***State v. McCrossen***, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986). Whether a suspect's request for an additional test was sufficient is a question of law that we review de novo. *See* ***Stary***, 187 Wis. 2d at 269.

¶10 Under the facts of this case, the primary test offered by the police department was the blood test, and Held submitted to Friedl's request that he take that test. The informing the accused information provided to Held did not expressly state which of the remaining tests (breath or urine) was the department's alternate test. However, we will assume for purposes of this decision that Friedl conveyed that information to Held based on his testimony that he routinely provides this information to all OWI suspects.

¶11 The first issue is whether Held actually requested the department's alternate test.[2] Friedl testified that when Held came out of the hospital waiting room, he stated that he wanted "another test."[3] Friedl responded that the time for Held to have requested this test was when Friedl had read him the informing the accused information. Held then asked for a urine test. Friedl responded that it was Held's responsibility to obtain this test.[4]

¶12 The State argues that Held's request was ambiguous because he did not specify that he was requesting the police department's alternate breath test when he first spoke to Friedl and because his ensuing request was for a urine test. The State also points to the trial court's finding that Held requested a urine test and argues that this finding is not clearly erroneous. As discussed in footnote two, we agree with the trial court's finding that Held requested a urine test. But, as the State concedes, the trial court did not expressly determine whether Held also asked for the alternate breath test offered by the department.

¶13 While Held's statement to Friedl did not expressly refer to the breath test, we know of no law, and the State cites to none, which holds that an OWI suspect's request for an alternate test must be couched in *specific* words of art.

[2] The State acknowledges that the trial court did not expressly answer this question. Rather, the court's bench decision focused more on Held's statements about wanting a urine test. The court reasoned that the urine test was not the alternate test offered by the police department and that Friedl did nothing to frustrate Held's opportunity to obtain that test. We agree with this portion of the trial court's ruling.

[3] Later in his testimony, Friedl said Held asked for a "second test."

[4] As an alternative basis for suppression of the blood test results, Held argues that Friedl should have corrected the doctor's statement to Held that a urine test would be of no help since such a test would not detect alcohol. Like the trial court, we reject this argument. Friedl's duties under the implied consent law did not extend to engaging in a debate with the doctor or to correct any information conveyed by the doctor to Held. The trial court properly limited its consideration of Friedl's duties to those required by the implied consent law. So do we.

Rather, we hold that a suspect's request for an alternate test must be evaluated under a reasonableness standard and in light of the totality of the circumstances. This is already the law when we assess a police officer's response to a suspect's request for an alternate test. "Whether the officer made a reasonably diligent effort to comply with his statutory obligations is an inquiry that must consider the totality of the circumstances as they exist in each case." ***Stary***, 187 Wis. 2d at 271. We see no reason why the same standard should not apply when we assess the actions of an OWI suspect in an implied consent setting. That approach assures that the judicial application of the implied consent law is uniform whether we are gauging the conduct of the police or the suspect. Moreover, it recognizes that the implied consent law is applied and interpreted in very fluid, real-life situations by both police officers and OWI suspects, neither of whom is a legal technician. Under this approach, we avoid artificial and strained results that an overly rigid interpretation would sometimes produce.

¶14 We now apply this standard to the facts of this case. Friedl advised Held that the department's primary test was the blood test and its alternate test was the breath test. In response, Held complied with Friedl's request that he submit to the primary blood test. Twenty minutes later Held requested "another" or a "second" test. The dialogue that followed between Friedl and Held is very instructive as to the kind of test Held was requesting. When Held requested the additional test, Friedl responded that Held should have made that request at the time of the informing the accused procedure. But when Held made his later request for a urine test, Friedl stated that this test was Held's responsibility and that he should make arrangements with a doctor. While the State sees ambiguity in this situation, it is apparent to us that Friedl did not. Nor do we. Friedl's different responses to Held's different requests reflect that Friedl drew a

distinction between the two requests. Viewed reasonably under all of the circumstances, we conclude that Held's statement to Friedl was a request for the department's alternate test.

¶15 That brings us to the next question: did Friedl act with "reasonable diligence" to accommodate Held's request under the ***Renard*** standard? In ***Renard***, the suspect asked for the department's alternate breath test after he had submitted to the department's primary blood test. But the officer left the hospital without addressing the suspect's alternate test request. *See* ***Renard***, 123 Wis. 2d at 460. The court of appeals held that the officer had failed to comply with WIS. STAT. § 343.305(5) because "he failed to make a reasonable inquiry concerning the expected time of Renard's release." ***Stary***, 187 Wis. 2d at 271. The court stated, "Because three hours did not lapse between the time of Renard's accident and his release from the hospital, the police could have timely performed [the requested second breath] test." ***Renard***, 123 Wis. 2d at 460.

¶16 Although ***Renard*** does not recite a detailed statement of the facts, it appears that the suspect did not delay the request for the alternate test. So we cannot say that ***Renard*** expressly controls this case. But ***Renard*** is nonetheless instructive because it establishes that the ability of the police to administer the alternate test within the three-hour time limit set out in WIS. STAT. § 885.235(1g) is at least a relevant consideration on the question of reasonable diligence.

¶17 Here, Held was arrested at 5:21 a.m. He took the blood test at 6:15 a.m. Friedl questioned him at 6:30 a.m. and Held declined to answer any questions. Twenty minutes later, at 6:50 a.m., Held made his request for the department's alternate test. According to Friedl's testimony, the police station was approximately five to ten minutes from the hospital. Allowing for an

additional twenty-minute visual observation of Held before a breath test could be administered pursuant to the department's policy, Held's request for the department's alternate test came within a time frame that would have satisfied the three-hour statutory time limit of WIS. STAT. § 885.235(1g). The State makes no argument to the contrary.

¶18 Rather, the State argues that ***Renard*** was satisfied because Held did not ask for the department's alternate test at the time Friedl advised him pursuant to the informing the accused information, and because Held additionally told Friedl that he had no further questions or requests at the conclusion of that procedure. Reduced to its basics, the State's argument is that an OWI suspect is not entitled to a change of mind about the department's alternate test once the suspect has initially declined the test. We think that approach represents too rigid an interpretation of the implied consent law. Instead, for the same reasons expressed earlier, we conclude that a reasonableness standard under the totality of the circumstances is the proper approach.

¶19 We see nothing unreasonable about Held's change of heart and his decision to rethink his initial failure to ask for the department's alternate test. The decisions that an OWI suspect must make under the implied consent law are of no small moment. In most situations, including this one, the suspect is a nonlawyer who is required to digest complex legal instructions. *See* ***State v. Reitter***, 227 Wis. 2d 213, 230, 595 N.W.2d 646 (1999). Moreover, the delay in this case was not prolonged. Thus, this case is unlike ***Stary*** where the defendant expressly declined an offer of the alternate blood test at least four times, was then released, and then later recontacted the police and asked for the alternate test. *See* ***Stary***, 187 Wis. 2d at 268. Under those circumstances, the court held that "the officer is not under a continuing obligation to remain available to accommodate future requests." ***Id***. at

271. But here the facts are markedly different. Held was still at the hospital, as was Friedl, who was still processing paperwork related to Held's case.

¶20 While ***Stary*** holds that at some point finality must set in under the implied consent law, we cannot say, under a reasonable interpretation of all the circumstances in this case, that finality occurred at the completion of the informing the accused process. Fairness requires that the suspect be given an adequate opportunity to reflect on the important decision of whether to request the alternate test.

¶21 The State also argues that Held's arrest was "effectively over," apparently suggesting that Friedl had lost authority to administer the test.[5] While it may be debatable whether Held was still under formal arrest as he awaited the arrival of the responsible adult in the hospital waiting room, we do not conclude that the propriety of a suspect's alternate test request should hinge on the technicalities of formal arrest. Rather, the question is whether Held's request for the alternate test was reasonable under all of the surrounding circumstances such that Friedl had a corresponding duty under ***Renard*** to reasonably accommodate that request.

¶22 The State also argues that we are to interpret the implied consent law liberally, thereby facilitating the ability of the State to obtain chemical tests that will remove drunk drivers from the roadways. *See* ***Reitter***, 227 Wis. 2d at 224-25.

[5] While Held may not have been under the absolute dominion and control of Friedl in the sense of formal arrest, neither was his right to leave the hospital unconditional. WISCONSIN STAT. § 345.24 provides that a person arrested for OWI may not be released until twelve hours from the time of arrest unless a chemical test demonstrates an alcohol concentration under a prescribed level. However, the suspect may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

We, of course, have no quarrel with this proposition. But it has no application under the facts of this case. Here, Held had submitted to Friedl's request for the department's primary test. Thus, the goal of the implied consent law was served. The purpose of the "liberal interpretation" rule is to assure that the courts do not improperly "impede the police in obtaining evidence against those drivers who are under the influence of intoxicants." ***State v. Neitzel***, 95 Wis. 2d 191, 204, 289 N.W.2d 828 (1980). Nothing urged by Held, and nothing in our holding, impedes that process. Moreover, the State's argument overlooks an important countervailing rule. The alternate test provision of the implied consent law serves as an "internal safeguard[] of due process." ***State v. Ehlen***, 119 Wis. 2d 451, 457, 351 N.W.2d 503 (1984). And ***Renard*** instructs that we are to "strictly enforce" these provisions.

¶23 In summary, we hold that Friedl did not exercise reasonable diligence in addressing Held's request for the department's alternate test. Friedl was still processing the paperwork on Held's case when Held made his request. Held was still on the hospital premises and available for the alternate test procedure. Even allowing for travel time to the police department and for the twenty-minute observation period, sufficient time remained under the three-hour limitation for the alternate test to be administered. The admitted inconvenience to Friedl did not trump Held's due process right to the alternate test.[6]

[6] Although we have ruled for Held, we reject his argument that his delayed request was proper because the implied consent law does not countenance a request for an alternate test until after the department's primary test has been completed. Like some of the State's arguments, this also is an overly rigid interpretation of the implied consent law. If a suspect is cogent enough to demand an alternate test immediately upon receiving the advice provided by the informing the accused process, we see no sound reason why that request should not be honored provided the suspect first takes the primary test.

CONCLUSION

¶24 We hold that Held requested the department's alternate breath test. We further hold that Friedl did not exercise reasonable diligence in accommodating this request. We reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

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