COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1658-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONDA K. MCQUINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Tonda K. McQuinn appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OMVWI).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

McQuinn claims that the circuit court should have suppressed the results of a breath test because she requested and was improperly denied an alternative chemical test. The circuit court found that McQuinn had not asked for an alternative test after taking the breath test, and it denied the motion. We conclude that the circuit court's finding that McQuinn did not ask for an alternative test is not clearly erroneous. Therefore, the results from her breath test were admissible, and we affirm the decision of the circuit court.

BACKGROUND

¶2 Both parties stipulated to the accuracy of the report of Madison police officer Steve Chvala. According to Officer Chvala's report, he stopped and arrested McQuinn for OMVWI. Chvala read McQuinn the Informing the Accused form pursuant to Wisconsin's Implied Consent law.[2] He twice asked McQuinn

[2] The Informing the Accused form reads, in part, as follows:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> 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

(continued)

whether she would submit to a chemical breath test; both times, McQuinn answered that she wanted a blood test. Both times, Chvala told McQuinn that she could have a blood test only after submitting to the breath test. After a few minutes, he asked her a third time whether she would submit to a chemical breath test. She agreed, but requested that Chvala note on the Informing the Accused form that she had asked for a blood test as the primary means for determining the concentration of alcohol in her body. Chvala did so. Her breath test revealed a blood-alcohol content of 0.19. However, after the breath test was completed, McQuinn did not request a blood test as an alternate, and no blood test was done.

¶3 McQuinn subsequently moved to suppress the results of the chemical breath test on the grounds that she was denied her right to an alternate test under WIS. STAT. § 343.305. The circuit court denied the motion because it found that McQuinn had not asked for a blood test as an alternate test after taking the breath test. McQuinn then pled no contest to OMVWI as a second offender. She appeals the circuit court's denial of the suppression motion.

DISCUSSION

Standard of Review.

¶4 Whether McQuinn requested a secondary test is a question of fact. We will not reverse a circuit court's findings of fact unless they are clearly

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> expense. You, however, will have to make your own arrangements for that test.

Below the last paragraph, Chvala noted, "*Consented on 3rd request, asked for blood test as primary on first 2 requests."

erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714-15 (1985); WIS. STAT. § 805.17(2).

Alternative Test Request.

¶5 McQuinn argues that she requested and was improperly denied an alternative test. 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, blood, or urine. *See* WIS. STAT. § 343.305(2). However, a driver who submits to a test requested by a law enforcement officer may 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." § 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).

¶6 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.

¶7 Here, the record supports the circuit court's finding that McQuinn never requested an alternative test. Both parties stipulated to Chvala's report, which states:

> I read the Informing the Accused form to McQuinn and asked McQuinn if she would submit to a chemical test of her breath. She replied that she wanted a blood test. I once again asked McQuinn if she would submit to a chemical test of her breath and once again she said she wanted a blood test. I then conferred with Lt. Strasburg who informed me that if McQuinn wanted a blood test, she first had to submit to the breath test. I then re-contacted McQuinn informing her of Lt. Strasburg's decision. She said she wished to go to the restroom and if she was able to do this, she may decide to submit to the breath test. … [When she returned], I asked McQuinn a third time if she would submit to a chemical test of her breath. She replied, "Yes." McQuinn requested that I do note on the Informing the Accused that she did ask for a blood test as a primary means as determining BAC on her first two requests, of which I did so.

Based on Chvala's report, McQuinn requested a blood test only as a primary test. Had she wanted a blood test as an alternative test, she would have requested it in addition to the breath test, not instead of the breath test. Furthermore, she specifically asked Chvala to note on the Informing the Accused form that she had asked for a blood test as the primary means of determining her blood-alcohol content, which he did. Finally, she did not request a blood test after the breath test was administered. Therefore, the circuit court's finding that McQuinn never requested an alternate test is not clearly erroneous.

CONCLUSION

¶8 We conclude that circuit court's finding that McQuinn never asked for an alternative test is not clearly erroneous. Therefore, the results from her

breath test were properly admitted, and we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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