COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2087-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

ROBERT A. CAIRNS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DANIEL L. LAROCQUE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] The State appeals from an order suppressing the results of a blood test taken after Robert Cairns had been arrested for operating a motor vehicle while intoxicated (OMVWI) and operating a motor vehicle with a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

prohibited blood alcohol concentration (PBAC), contrary to WIS. STAT. § 346.63(1)(a) and (b) (1997-98).[2] The State asserts that Cairns did not ask the arresting officer for a second or alternative blood alcohol test after the first or primary test was taken, therefore, the officer was under no obligation to administer an alternative blood alcohol test. *See* WIS. STAT. § 343.305(5). We conclude that our interpretations of § 343.305(5) found in ***State v. Renard***, 123 Wis. 2d 458, 460-61, 367 N.W.2d 237 (Ct. App. 1985), and ***State v. Stary***, 187 Wis. 2d 266, 269-72, 522 N.W.2d 32 (Ct. App. 1994) require only that a person arrested for OMVWI or PBAC make a request for an alternative blood alcohol test at some time after consenting to the primary test. Once this occurs, the police must provide an alternative blood alcohol test. Failure to do so requires suppression of the primary test results. We also conclude that the record supports the trial court's finding that Cairns made a timely request for an alternative test. Therefore, we affirm its order suppressing the blood alcohol test results obtained from Cairns' primary test.

FACTS

¶2 The facts relevant to this case are uncomplicated. Trooper Johnson of the state patrol arrested Cairns for OMVWI and PBAC. On the way to the state patrol headquarters, Cairns talked "non-stop" to Johnson. Upon reaching headquarters, Johnson discovered that the state patrol's Intoximeter was not operating correctly. Accordingly, he decided to take Cairns to a hospital for a blood test. On cross-examination, Johnson was asked: "And didn't Mr. Cairns indicate to you that he wanted a breath test anyway?" to which Johnson replied:

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

"Yeah, I believe—I could safely say that, yes." The record of Johnson's testimony is not clear as to when Cairns indicated his desire for a breath test. Later on cross-examination, Johnson was asked: "[W]hen you say that's what you recall, it could be that Mr. Cairns asked you for a breath test after he gave a blood sample and you simply don't recall that at this point, is that right?" Johnson replied: "That could be. I don't recall any mention of a breath test made at the hospital or after." Cairns testified that he asked for a breath test while at state patrol headquarters and again after he provided a blood sample at the hospital.

STANDARD OF REVIEW

¶3 The State and Cairns differ as to the standard of review we are to use. The State asserts that this case involves an interpretation of WIS. STAT. § 343.305, which presents a question of law. *See* ***State v. Wilke***, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989). We agree, but that is not the whole story. Cairns argues that the issue is not the meaning of the statute, but whether he asked for an alternative blood alcohol test, a question of fact, governed by the "clearly erroneous" test. ***State v. Lindell***, 2000 WI App 180, ¶7, 238 Wis. 2d 422, 617 N.W.2d 500, *review granted*, 2000 WI 121, 239 Wis. 2d 308, 619 N.W.2d 91. Again, we agree, but there is more to this case than that. We conclude that this case requires us to interpret § 343.305(5) and then to apply the facts found by the trial court to our interpretation of the statute, as that interpretation is guided by the published cases which have already interpreted § 343.305(5). We will apply the appropriate standard of review to each of our tasks.

DECISION

¶4 The first answer to this appeal may be overly simplistic, given the extensive arguments the State and Cairns make. The trial court's order reads in

pertinent part: "Because [Cairns] requested a breath test after he took a blood test …." We accept this as a finding which is supported by Cairns' testimony that he had a clear recollection of asking Johnson for a breath test after he provided a blood sample. WISCONSIN STAT. § 343.305(5) provides a person arrested for OMVWI or PBAC the opportunity of having a second blood alcohol test given to him or her by the police:

> 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) ….

Common sense tells us that a person requesting a breath test after having just taken a blood test must be requesting the alternative test permitted by § 343.305(5). That would seem to be dispositive of this appeal.

¶5 The State does not view this case in this way, for it argues in its response brief: "[Cairns] testified that at some point Trooper Johnson requested that [Cairns] submit to a blood test, he agreed, and he also requested a breath test…. Even this self-serving statement fails to establish that the request was *after* the blood test." Of course, that is not true because Cairns testified that he asked for a breath test after providing a blood sample, and the trial court accepted his testimony.

¶6 The State also questions the trial court's assessment of Johnson's and Cairns' credibility, arguing: "It would seem ludicrous to weigh the police officer's sober recollection of his sober and counseled perceptions of that night versus [Cairn]'s sober recollections of his drunken perceptions of that night." But contesting a trial judge's credibility determinations is a desperate appellate

argument, the success of which is so rare as to be almost non-existent. The trial court is the ultimate arbiter of witness credibility. ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds*, ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). We will follow ***Marty***.

¶7 The State next argues that the trial court erred in finding that Johnson failed to accommodate Cairns' request for an alternative test. The State's assertion is that prior to the time that Cairns took the blood test, Cairns was demanding that Johnson give him a breath test instead of a blood test and not a breath test in addition to a blood test. But this is really a disguised attack on witness credibility. The trial court decided that Cairns made a request for an additional test:

> I understand the argument Mr. Humphry makes about that merely being a request for a primary breath test and if that were all that was involved here, I would agree he hadn't made the request …. I think it was pretty plain that the defendant did make a request to take a breath test, that he was told that one was not available because the machine wasn't working, he didn't believe it, and, in effect, he kept repeating himself….

This is a finding of fact that Cairns made a request for a breath test. We accept a trial judge's findings of fact unless they are clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. The trial court heard Cairns' explanation of the facts and Johnson's explanation of those facts. It accepted Cairns' version. Insofar as that is a determination of witness credibility, we will not overturn it. Insofar as it is a finding of fact, it is not clearly erroneous. But that does not end the State's disagreement with the trial court's decision because the State concludes: "If it [Cairns' request for a breath test] had been done *after*

the primary test or was clear, ***Stary*** and ***Renard*** might require it."[3] Whether a request for an alternative blood alcohol test must be made after the primary test is completed is a question of law that we review without deference to the trial court. *See* ***State v. Sutton***, 177 Wis. 2d 709, 713, 503 N.W.2d 326 (Ct. App. 1993).

¶8 We will address the State's contention that a demand for an alternative breath test must be made subsequent to the primary test. In doing so after we have accepted the trial court's finding that Cairns made his request after the blood test was taken, we are reminded of another court's observation that an appellate court is not a performing bear, required to dance to each and every tune the appellant plays. *See* ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Nonetheless, the State's tune is interesting, though it ultimately fades past *pianissimo*. In addressing the State's contention, we must assume that Cairns did not make a request for an alternate blood alcohol test after submitting to the blood test despite our earlier conclusion that we will not upset the trial court's finding that he did so.

¶9 The State reads WIS. STAT. § 343.305(5) as a temporal requirement, requiring a person to first submit to the primary test before being permitted to request an alternative test. While this is one possible interpretation of § 343.305(5), it is not the only interpretation. Another is that the statute can be reasonably interpreted as referring to a person, not a time. Thus, "The person who submits to the test" could simply mean that only the person who submits to the test may request an alternative test, not that person's attorney, spouse, or friend. Put another way, § 343.305(5) is an identity requirement, not a temporal requirement.

[3] This is a curious concession, given the trial court's finding that Cairns did request a breath test after taking a blood test.

Based on the applicable case law, we conclude that the latter interpretation is the better one. We will explain why recent case law leads to that result.

¶10 The first step is the easiest. ***State v. McCrossen***, 129 Wis. 2d 277, 297, 385 N.W.2d 161 (1986), holds that suppression of the primary chemical test results is the appropriate remedy where the State fails to give an alternative blood alcohol test after the defendant timely requests one. The State does not argue otherwise.

¶11 ***Renard***, 123 Wis. 2d at 460, considers the timing of a request for an alternative test. The facts in ***Renard*** are critical. In that case, police arrested Renard for OMVWI at a hospital where he was being treated for injuries sustained in an automobile accident. ***Id.*** The arresting officer asked Renard to provide a blood sample for a blood alcohol test. ***Id.*** Renard requested a breathalyzer test, but submitted to the blood test. ***Id.*** After a sample of Renard's blood was taken, the officer left the hospital without inquiring whether Renard would be hospitalized overnight. ***Id.*** Renard was released shortly after the officer left. ***Id.***

¶12 ***Renard*** is important because Renard made a request for a breathalyzer test before his blood for the primary blood test was taken. Nonetheless, we affirmed the trial court's order suppressing the results of the primary blood test. ***Renard***, 123 Wis. 2d at 459-60. ***Renard*** therefore necessarily concluded that WIS. STAT. § 343.305(5) was not a temporal requirement but an identity requirement. We noted:

> While we do not hold that the officer had a duty to remain indefinitely at the hospital until Renard's release, the officer did have a duty before leaving [the hospital] to make a final inquiry concerning the expected time of Renard's release. This duty existed because Renard

> requested an additional test, thereby requiring a diligent effort by the officer to comply with the demand.

Id. at 461.

¶13 We interpreted WIS. STAT. § 343.305(5) again in ***Stary***, 187 Wis. 2d at 270-72. With the benefit of ***Renard***, and ***State v. Vincent***, 171 Wis. 2d 124, 490 N.W.2d 761 (Ct. App. 1992), we concluded:

> Section 343.305(5), STATS., therefore, 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 alternative 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 expense.

Stary, 187 Wis. 2d at 270.

¶14 It is the second ***Stary*** requirement which dooms this appeal. The evidence supports the trial court's finding that Cairns made a request for a breath test. Trooper Johnson's testimony, which the trial court found credible, was that after Cairns had submitted to the blood test, Johnson said, "that's it, let's go" and took Cairns to his residence. At this point, there is only one conclusion: Johnson should have taken Cairns to a police station where he could have been given a breath test, or at least, he should have used reasonable diligence in attempting to do so. This is not a criticism of Johnson—he believed that Cairns was required to make his request for an alternative test after submitting to the primary test. Nonetheless ***Renard*** and ***Stary*** hold otherwise. The trial court, a member of the panel that decided ***Renard*** and ***Stary***, correctly concluded that, given its findings, Cairns was deprived of his right to an alternative blood alcohol test, and therefore the primary test results must be suppressed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).