

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0379

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF FORT ATKINSON,

PLAINTIFF-RESPONDENT,

V.

TRISH A. JONAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Trish A. Jonas appeals her conviction for operating a motor vehicle with a prohibited alcohol content (PAC) contrary to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

WIS. STAT. § 346.63(1)(b). She contends that the circuit court erred in refusing to suppress the results of her breath test because (1) the police interfered with her right to request an alternative test and (2) the Intoxilyzer 5000 used to test her breath was not entitled to a presumption of accuracy and reliability pursuant to WIS. STAT. § 343.305(6)(b) because it used new software that affected the analytical process. The circuit court denied the motion to suppress, and we affirm.

BACKGROUND

¶2 Jonas was stopped and arrested by Fort Atkinson police officer Jeffrey Hottman on October 7, 1999, for operating a motor vehicle while intoxicated (OMVWI) and with a PAC. At the police station, Jonas submitted to a breath test that showed an alcohol concentration higher than the legal limit for intoxication. Hottman then informed her that she had a right to an alternative test. Jonas asked him, “Will it be beneficial for me to do so?” and Hottman repeated that she had the right to an alternative test. Jonas testified that she asked another police officer who was walking past, Officer Harker, whether she should take an alternative test, and the officer shook his head to indicate that she should not.

¶3 Before trial, Jonas moved to suppress the results of the breath test on the grounds that (1) the police interfered with her right to request an alternative test and (2) the Intoxilyzer 5000 used to test her breath was not entitled to a presumption of accuracy and reliability because of changes to the instrument’s software that allegedly affected its analytical processing. At the suppression hearing, George Menart, a senior electronics technician for the Chemical Test Section of the Wisconsin State Patrol, testified that the software modifications to the Intoxilyzer 5000 did not affect the machine’s analytical process. The circuit court denied the motion to suppress. Jonas proceeded to trial and was acquitted of

OMVWI, but she was convicted of operating with a PAC in a trial to the court. She appeals the denial of her suppression motion.

DISCUSSION

Standard of Review.

¶4 The admission or exclusion of evidence is a discretionary determination that we will not reverse if there is a reasonable factual basis in the record for the circuit court's determination and the evidentiary decision was based on a correct application of the law. *State v. Oberlander*, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580, 583 (1989).

Right to Alternative Test.

¶5 Jonas argues that her right to an alternative test was violated because the police officer asked her whether she wanted an alternative test before he read her the supplemental forms explaining her right to an alternative test, but did not ask her again after he finished reading the forms.²

¶6 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. WIS. STAT. § 343.305(2). However, a driver who submits to a test requested by a law enforcement officer

² Jonas also argues that the results of her breath test should be suppressed because her right to an alternative test was violated based on her testimony that she asked Harker whether she should request an alternative test and Harker nodded to indicate that she should not. Harker did not testify at the suppression hearing, but Hottman testified that he did not observe the exchange between Jonas and Harker. The circuit court found that the alleged exchange between Jonas and Harker did not occur, a factual finding that is not clearly erroneous. Therefore, the circuit court acted within its discretion when it refused to suppress the results of Jonas's breath test on this basis.

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.” Section 343.305(2); *see also State v. Vincent*, 171 Wis. 2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). Section 343.305(5)(a) provides that:

[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).

¶7 The purpose of the additional test is to afford the accused the opportunity to verify or challenge the results of the first test. *State v. McCrossen*, 129 Wis. 2d 277, 288, 385 N.W.2d 161, 166 (1986). If the accused requests an alternative test, the law enforcement officer must exercise reasonable diligence in providing it. *State v. Renard*, 123 Wis. 2d 458, 460-61, 367 N.W.2d 237, 238 (Ct. App. 1985).

¶8 If the accused is denied his or her statutory right to an alternative test, the primary test result must be suppressed. *McCrossen*, 129 Wis. 2d at 297, 385 N.W.2d at 170. The right to an alternative test includes the right to be “properly and timely informed of the opportunity and potential advantage of submitting to an alternative test.” *Village of Oregon v. Bryant*, 188 Wis. 2d 680, 693, 524 N.W.2d 635, 640 (1994). *Bryant* held that the combination of the “Informing the Accused” and the “Administrative Review Request” forms sufficiently informed the accused of the right to an alternative test. *Id.* at 691-92, 524 N.W.2d at 639-40. However, *Bryant* did not prescribe a specific formula for the police to follow. Instead, it simply requires that “the directions and warnings

to the accused be as simple and straightforward as possible.” *Id.* at 693, 524 N.W.2d at 640.

¶9 At the suppression hearing, Hottman testified that he read the “Informing the Accused” form to Jonas. The form contains the following language:

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

Hottman testified that Jonas also completed the “Notice of Intent to Suspend Operating Privilege” and “Administrative Review Request” forms. As a result, we conclude that Jonas was properly and timely informed of the opportunity and potential advantage of taking an alternative test.

Presumption of Accuracy and Reliability.

¶10 Jonas also argues that the circuit court erred in applying the presumption of accuracy and reliability to the breath analysis obtained from the Intoxilyzer 5000. Use of the Intoxilyzer 5000 is an approved method of testing pursuant to WIS. STAT. § 343.305(6)(b)³ and WIS. ADM. CODE § Trans 311.04.⁴ It

³ WISCONSIN STAT. § 343.305(6)(b) states, in relevant part:

The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

...

3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person’s breath ... before regular use of the equipment and periodically thereafter at intervals of not more than 120 days;

is generally afforded a presumption of accuracy and reliability. See *State v. Disch*, 119 Wis. 2d 461, 475, 351 N.W.2d 492, 499 (1984); *State v. Busch*, 217 Wis. 2d 429, 442-43, 576 N.W.2d 904, 909 (1998). However, Jonas contends that the presumption does not apply to this particular Intoxilyzer 5000 because of software changes made to the instrument after its initial certification.

¶11 In *Busch*, the supreme court concluded that an Intoxilyzer 5000 was entitled to the presumption of accuracy and reliability if the instrument retained its analytical process, despite alterations made to the machine following its initial certification. *Busch*, 217 Wis. 2d at 435, 576 N.W.2d at 906. Because hardware changes to the Intoxilyzer 5000 did not change the analytical processing, the court concluded that the instrument was entitled to the presumption of accuracy and reliability. *Id.* at 438, 576 N.W.2d at 907.

¶12 Jonas contends that software changes made to the Intoxilyzer 5000 preclude the presumption of accuracy and reliability because they affected the machine's analytical process. Menart, the same Department of Transportation (DOT) representative who testified in *Busch*, testified that the last formal DOT certification of the Intoxilyzer 5000 occurred in July 1997 and that changes in the software of the Intoxilyzer 5000 used to test Jonas in 1999 did not affect the

⁴ WIS. ADMIN. CODE § **Trans 311.04 Approval of breath alcohol test instruments.**
(1) Only instruments and ancillary equipment approved by the chief of the chemical test section may be used for the qualitative or quantitative analysis of alcohol in the breath.

(2) (a) All models of breath testing instruments and ancillary equipment used shall be evaluated by the chief of the chemical test section.

(b) The procedure for evaluation shall be determined by the chief of the chemical test section.

(3) Each type or category of instrument shall be approved by the chief of the chemical test section prior to use in this state.

analytical system of the machine.⁵ Based on Menart's uncontradicted testimony,⁶ the circuit court apparently found that the software changes had not altered the instrument's analytical process. Because the circuit court's finding of fact on this issue is not clearly erroneous, *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714-15 (1985); WIS. STAT. § 805.17(2), and its conclusion is consistent with the supreme court's holding in *Busch*, we conclude that it did not err by applying the presumption of accuracy and reliability to the Intoxilyzer 5000 used to analyze Jonas's breath sample.

CONCLUSION

¶13 Because the police did not interfere with Jonas's right to request an alternative test and the Intoxilyzer 5000 used to test her breath was entitled to a presumption of accuracy and reliability pursuant to WIS. STAT. § 343.305(6)(b) notwithstanding the new software, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

⁵ Jonas also contends that the July 1997 certification testing established that the Intoxilyzer 5000 was incapable of consistently distinguishing between alcohol and other substances with similar chemical structures. However, Menart testified that the July 1997 testing established that the machine was "precise and accurate and had the necessary qualities to insure specificity."

⁶ Jonas argues that Menart testified that the software was part of the analytical process because "it is the software that produces a useable analytical result." However, Menart stated only that the software provides the user interface, which is not part of the analytical process.

