**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

August 29, 2001

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**No. 01-0578-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEROY A. YENCH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Leroy A. Yench appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense, pursuant to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b). Yench pled guilty to the

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

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, Yench 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 disagree and therefore affirm.

¶2 The State charged Yench with OWI. Yench responded with a motion to suppress, contending that the arresting officer did not accommodate his request for an alternate test. The trial court denied Yench's motion. On appeal, Yench challenges the trial court's findings of fact that he was confused as to his obligations under the Implied Consent Law and simply mentioned a urine test and the court's conclusion that police officers made a reasonable effort to have an alternate test administered to Yench.

¶3 We will not set aside the trial court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). It is not within our province to reject an inference drawn by a fact finder when the inference drawn is reasonable. ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). We will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not make. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶4 With the above standard of review well in mind, we will examine the record of the hearing on Yench's motion. We begin that examination by acknowledging that the trial court found the testimony of the police officer to be more credible than the testimony of Yench.

¶5 The arresting officer was Kirsten Larson of the City of Port Washington Police Department. Larson testified that the arrest of Yench was her first OWI arrest.[2] After Larson transported Yench to the police department, she asked him if he would like to retake the field sobriety tests; he replied that he was drunk and that he would "just take the test." Larson then read the Informing the Accused form to Yench. Larson and the prosecutor had the following exchange about Yench's understanding of what had been read to him:

> Q. [State]: And ultimately did he appear to understand the information you read him?
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> A. [Larson]: He understood it. However, at first he asked if we would submit—if he could submit to a chemical test of his urine. He was then explained that our primary test is breath and our second alternative test is blood, and we don't condone to an evidentiary chemical test of his urine. That he was more than welcome to have that test, but it would be done at his own expense.
>
> Q.: Okay. So what happened after that?
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> A.: I tried to explain to Mr. Yench, however he did not understand my explanation. Officer Erickson explained this form to Mr. Yench. He then stated he understood. I reread the part where it says, "Will you submit to an evidentiary chemical test of your breath?" He then at that time stated "Yes."

[2] Larson holds a bachelor's degree in criminal justice and has completed the mandated 400-hour law enforcement training—that training included OWI arrests. She joined the City of Port Washington Police Department on November 30, 1999. In March 2000, she completed a three-day "field sobriety school."

¶6 At a second evidentiary hearing, Larson elaborated upon what she explained to Yench after he requested a urine test:

> At the time, there was a lot of confusion. At the time, we were asking him if he would submit to a test, our test, the breath, and then the second test would be blood. He kept stating he wanted a urine test. After explaining—after reading the form to him, we explained to him that we don't provide a urine test, we provide a breath or blood test, that he would need to say yes or no to those tests, and then according to the form he could take the urine test. He stated he would submit to an evidentiary chemical test of his breath. There wasn't—he had no further questions. We assumed the urinary test was—we were asking in reference to that Informing the Accused form.

Larson also testified that after Yench completed the breath test, he did not request either a blood test or a urine test.

¶7 As can be expected, Yench's recollection is different from Larson's testimony. Yench testified, consistent with Larson's testimony, that his first request for a urine test triggered an explanation of his choices from Larson and Erickson and his acquiescence to take a breath test. During cross-examination, Yench stated that when he made his initial request for a urine test, he was trying to specify what primary test he would submit to. Yench testified that after he completed the breath test he requested a urine test, and the officers responded that the police department did not offer a urine test and that he would have to make his own arrangements for a urine test. Yench was released too late from the Ozaukee County Jail to obtain a urine test.

¶8 The trial court made several findings of historical fact: (1) The officer's testimony was more credible than Yench's; (2) Yench was confused about submitting to the primary test; (3) the officer explained that Yench did not have a right to a urine test and had to submit to the breath test; and,

(4) after a second explanation of his obligations by a second officer, Yench consented to a breath test. The court then wrapped up its ruling:

> In my view, and I will find as a matter of historical fact that Mr. Yench was simply confused about what his obligation was. And I don't think the state of the law is if you simply mention another test, that unless you are given it, it automatically invalidates the results of the primary test that was consented to. The context here is that Mr. Yench wasn't understanding what his obligation was. It was explained to him first by Officer Larson and then by the other officer. He came to an understanding of what his obligation was under the implied consent law, to take the primary test or the alternate test that was being offered. Neither was the test that he was saying he would prefer to have.
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> And I couldn't tell you what page it was on, but my recollection of the testimony is that Mr. Yench was saying, "I would rather have a urine test." They simply weren't prepared to offer that as their primary test. He was given the explanation; he consented to it. And no further mention was made of it. And I simply can't construe that his confusion about what his obligation was in terms of taking the test that was being offered constitutes a demand for an alternate test under these circumstances. It doesn't, in my view, under this particular set of facts. It simply shows a state of confusion on Mr. Yench's part as to what his obligation was. I am going to deny the motion to suppress.

¶9 Yench asserts that the trial court's findings of fact that he simply mentioned a urine test and was confused are erroneous. When we review the trial court's findings of fact, we do so through the same credibility filter the trial court

used.[3] In this case, the trial court made a specific finding that the police officer's testimony was more credible. When the same credibility filter is used, we must separate out Yench's testimony, including his insistence that he asked for a urine test after completing the breath test. Therefore, we only have credible evidence that Yench asked if he could submit to a urine test while Larson read the Informing the Accused form. And, after his obligation under the Implied Consent Law was explained separately by Larson and Erickson, he never renewed his request for a urine test. It is from this evidence only that we will determine if Yench was denied his second chemical test.

¶10 WISCONSIN STAT. § 343.305(2) requires a law enforcement agency to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other substances in the breath, blood or urine of a suspected intoxicated driver. ***State v. Stary***, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). An agency may designate one of those two as its primary test. ***Id.*** "Once a person consents to the primary test requested by law enforcement, he or she is permitted, at his or her request, an alternate test the agency chooses or, alternatively, a reasonable opportunity to a test of his or her choice [at his or her own expense]." ***Id.*** at 270; § 343.305(5)(a).

[3] Contesting a trial court's credibility determinations is a desperate appellate argument, the success of which is so rare as to be almost nonexistent. This is because it is hornbook law that when there is conflicting testimony, the trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). This is especially true because the trial court has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994).

¶11 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. ***Stary***, 187 Wis. 2d at 271. If the suspect is denied the statutory right to an additional test, the primary test must be suppressed. ***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. ***Stary***, 187 Wis. 2d at 269. Therefore, the question we must answer is whether Yench's request for a urine test before he submitted to the breath test was adequate to invoke his right to a second or alternate test.

¶12 An OWI 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 [or her] statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case." ***Id.*** 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.

¶13 Under the totality of the circumstances, we conclude that Yench's inquiry—if he could submit to a urine test—was not a request for an alternate test. The inquiry was made when Larson was explaining Yench's obligation to submit

to a chemical test under the Implied Consent Law. Larson responded to Yench's inquiry by explaining that the Port Washington police department had designated the breath test as the primary test and the blood test as the alternate test. When it appeared that Yench was still confused, the breath-testing machine operator, Erickson, stepped in and explained Yench's obligation. After this explanation, Larson asked Yench if he would consent to a chemical test of his breath, and he responded, "Yes." The trial court drew the reasonable inference that Yench was attempting to designate the primary test that he would submit to;[4] this is an inference we are bound by.[5] One reference to a urine test cannot be elevated to a request for an alternate test when, after a thorough explanation of Yench's obligations under the Implied Consent Law, Yench never made a request for an alternate chemical test.

*By the Court.*—Judgment and order affirmed.

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

[4] The trial court specifically held, "[M]y recollection of the testimony is that Mr. Yench was saying, 'I would rather have a urine test.' They simply weren't prepared to offer that as their primary test."

[5] In ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 896, 266 N.W.2d 618 (1978), the supreme court concluded that it is solely the law enforcement agency's decision which test to designate as the first of three alternate tests, and the driver does not have the right to refuse the first test offered and select one of the other two.