COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1003

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

IN THE MATTER OF THE REFUSAL OF STEVEN D. EDIDIN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN D. EDIDIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Steven Edidin appeals an order revoking his operating privilege for failing to submit to chemical testing as required under WIS. STAT. § 343.305. Edidin contends that because the arresting officer did not comply with Wisconsin's Implied Consent Law, the circuit court erred in finding that he unlawfully refused to submit to the test. Specifically, Edidin argues that the officer should have administered a breath test, the agency's "primary" test, instead of requesting him to submit to a blood test. We conclude that, under § 343.305(3)(a), the arresting officer was authorized to request Edidin to provide a sample of his blood for testing, notwithstanding the fact that the State Patrol may have designated the breath test as its "primary" test under § 343.305(2).

BACKGROUND

¶2 A Wisconsin State Patrol officer stopped Edidin's vehicle after observing it being driven erratically and having a defective registration plate lamp. The officer administered field sobriety tests and arrested Edidin for operating a motor vehicle while under the influence of an intoxicant (OMVWI). The officer transported Edidin to a hospital for a blood draw, read him the information required under WIS. STAT. § 343.305(4), and asked him to submit to an evidentiary chemical test of his blood. Edidin refused and was issued a "notice of intent to revoke" for unlawfully refusing to submit to chemical testing.

¶3 Edidin requested a refusal hearing pursuant to WIS. STAT. § 343.305(9). At the hearing, Edidin maintained that the State Trooper violated

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

§ 343.305(2) by failing to administer a breath test, which the officer testified is the Wisconsin State Patrol's "primary" test. The circuit court found that Edidin unlawfully refused to submit to a chemical test of his blood, concluding that § 343.305(3)(a) vests in the arresting officer the discretion to choose which test to administer. Edidin appeals the subsequent order which revoked his operating privilege as a sanction for refusing the test.

ANALYSIS

¶4 Edidin asserts that the officer should have administered a breath test, the agency's "primary" test, instead of requesting him to submit to a blood test. Specifically, he argues that "[t]he language of WIS. STAT. § 343.305 is clear and unambiguous" in granting a law enforcement *agency*, as opposed to an arresting officer, the authority to designate which test (breath, blood or urine) is to be administered first. Edidin relies on the following language to support his contention:

> Any person who … drives or operates a motor vehicle … is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer …. Any such tests shall be administered upon the request of a law enforcement officer. *The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests … and may designate which of the tests shall be administered first.*

Section 343.305(2) (emphasis added).

¶5 The interpretation of WIS. STAT. § 343.305 is a question of law which we decide de novo. ***State v. Stary***, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). Our goal when interpreting a statute is to determine and give

effect to the intent of the legislature. ***DeMars v. LaPour***, 123 Wis. 2d 366, 370, 366 N.W.2d 891 (1985). When interpreting statutes, we do not read them out of context: "the entire section of a statute and related sections are to be considered in its construction or interpretation." ***State v. Barnes***, 127 Wis. 2d 34, 37, 377 N.W.2d 624 (Ct. App. 1985). Finally, if a statute clearly sets forth the legislative intent, we simply apply the statute to the facts presented. ***Cox v. DHSS***, 184 Wis. 2d 309, 316, 517 N.W.2d 526 (Ct. App. 1994).

¶6 Applying these principles, we conclude that WIS. STAT. § 343.305 clearly sets forth the legislative intent that an arresting officer may request an OMVWI arrestee to submit to any of the three tests for alcohol concentration specified in the statute.

¶7 We note first that WIS. STAT. § 343.305(2) does not require that an agency designate which test is to be administered first. The statute simply says that "[t]he law enforcement agency … *may* designate which of the tests shall be administered first." (Emphasis added.) Neither does this subsection prohibit an arresting officer from requesting a driver to perform a test other than one so designated. In fact, the sentence preceding the agency designation provision implies just the opposite: "*Any such tests* [of breath, blood or urine] shall be administered *upon the request of a law enforcement officer*." (Emphasis added.) Moreover, the next subsection of the statute also authorizes an arresting officer to request any of the three tests, without expressing a limitation or preference for an agency's designated test: "Upon arrest of a person [for OMVWI] … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified …." Section 343.305(3)(a).

¶8 We considered an argument similar to Edidin's some twenty years ago. The defendant in ***State v. Pawlow***, 98 Wis. 2d 703, 298 N.W.2d 220 (Ct. App. 1980), contended that although the agency designation language in WIS. STAT. § 343.305 "does not require the agency to make such a designation, once it has done so, it has made an irrevocable election and, absent good cause, cannot subsequently designate a different first test." ***Id***. at 704. We summarily rejected the argument then, and do so again now:

> Wisconsin's implied consent statute must be construed as a whole in light of its policy, "to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway."…
>
> Section 343.305, STATS., states that any driver in Wisconsin is deemed to have given consent to tests of his or her "breath, blood or urine," and that "[a]ny such test shall be administered upon the request of a law enforcement officer." Appellant's narrow reading of the statute ignores the language and policy of the statute as a whole. The provision allowing the arresting agency to designate which test shall be first administered operates to dispel any notion that the arrested driver may choose which test he or she must take. It does not create an irrevocable election binding on the agency, and does not prohibit the request of additional or different tests.

Id. at 704-05 (citations omitted).

CONCLUSION

¶9 For the reasons discussed above, we affirm the order of the circuit court revoking Edidin's driving privilege.

By the Court.—Order affirmed.

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