COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP778-CR **Cir. Ct. No. 2010CT645**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN R. TOLLAKSEN, JR.,

DEFENDANT-APPELLANT.

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

¶1 LUNDSTEN, P.J.[1] Stephen Tollaksen appeals a judgment of the circuit court finding him guilty of operating a motor vehicle with a prohibited

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

alcohol concentration, as a third offense. Tollaksen argues that the circuit court erred when it denied his motion to suppress evidence of his blood test results. Tollaksen contends that he was denied the opportunity to take an additional test to determine the presence of alcohol in his system, in violation of WIS. STAT. § 343.305. The circuit court found that Tollaksen had not requested an additional test, and thus denied the motion to suppress. I affirm the circuit court.

Background

¶2 At about 2:00 a.m. on August 27, 2010, Tollaksen's vehicle was stopped for invalid registration. While the investigating officer was speaking with Tollaksen, the officer noticed that Tollaksen's eyes were glassy and bloodshot and that his speech was slurred. The officer also smelled an odor of intoxicants on Tollaksen. The officer asked Tollaksen to perform field sobriety tests. Based on Tollaksen's performance on the field sobriety tests and the officer's other observations, the officer administered a preliminary breath test, which indicated a blood alcohol concentration of .14. The officer then placed Tollaksen under arrest for operating a motor vehicle while under the influence.

¶3 The officer transported Tollaksen to the Sauk County Jail. Upon their arrival at the jail, the officer read the informing the accused form to Tollaksen. Tollaksen initially consented to a blood draw test, and was escorted into the jail for its administration. The testimony is in conflict as to what happened next. It is sufficient here to say that Tollaksen challenges the circuit court's finding that Tollaksen did not request a test in addition to the blood draw test.

¶4 Tollaksen moved to suppress the evidence of his intoxication, alleging that he requested an additional test and that the officer failed to provide it. The circuit court denied the motion to suppress.

Discussion

¶5 Tollaksen makes two arguments in support of his assertion that he was entitled to suppression of the blood draw test. First, Tollaksen argues that the officer deviated from the standard informing the accused form, thereby confusing Tollaksen and interfering with his right to request an alternative test. Second, Tollaksen contends, as a factual matter, that he did request an alternative test and was improperly denied the test. I reject both arguments.

¶6 WISCONSIN STAT. § 343.305 establishes requirements for law enforcement agents regarding the administration of tests for intoxication. If a person is arrested on suspicion of operating a vehicle while intoxicated, law enforcement officials may request that the person submit to a primary test to determine the presence of an intoxicant. WIS. STAT. § 343.305(3). If the person submits to the primary test, he or she must be permitted upon request to take an alternative test provided by the agency or must be allowed a reasonable opportunity to get a test of his or her own choice, at his or her own expense. WIS. STAT. § 343.305(5)(a).

¶7 Law enforcement agents are required to inform the person subject to the test of his or her options by reading to him or her a form prescribed by statute. WIS. STAT. § 343.305(4). In practice, this form is referred to as the "Informing the Accused" document.

¶8 The request for an alternative test may be made before or after the primary test is administered. ***State v. Schmidt***, 2004 WI App 235, ¶31, 277 Wis. 2d 561, 691 N.W.2d 379. However, this request must be clearly a request for an *additional* test, not a different test *instead of* the primary test. ***Id.***, ¶11. A request for a specific type of test instead of the primary test is insufficient to establish a request for an additional test. ***Id.***

¶9 Both of Tollaksen's arguments involve challenges to express or implicit fact finding by the circuit court. A circuit court's findings of fact will be upheld unless those findings are clearly erroneous. ***Id.***, ¶13. Whether the facts show that a request for an alternative test pursuant to WIS. STAT. § 343.305 was made is a question of law reviewed de novo. ***Id***.

¶10 Tollaksen first asserts that the officer deviated from the standard informing the accused form and that, as a result, Tollaksen was confused by the officer's deviation. Tollaksen contends that this confusion "frustrated [Tollaksen's] request to invoke his statutory right for an alternative test." Pointing to his own testimony, Tollaksen asserts that, when the officer was reading from the form that the accused has the right to a test done at his or her own expense, the officer added that "it wasn't like they were going to let [Tollaksen] out of there to go do that."

¶11 I reject this argument because it is made for the first time on appeal. In effect, Tollaksen is asking me to resolve a factual dispute in the testimony. Tollaksen did not ask the circuit court to resolve this dispute. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must first raise them before the circuit court).

¶12 Moreover, it appears that the circuit court would have resolved this dispute against Tollaksen. The record reveals that, in general, the circuit court found the officer's testimony more credible than Tollaksen's testimony. And, on this topic, the officer testified that he did not deviate in any way from the standard informing the accused form.

¶13 Tollaksen's second argument is also factual. He asserts that he requested, but was not given, an additional test. Essentially, Tollaksen argues that the circuit court should have rejected the officer's testimony that Tollaksen did not request an additional test because the officer did not recall other specific facts about Tollaksen's arrest and the administration of the primary test. This argument fails because the circuit court resolved this factual dispute in favor of the officer.

¶14 Even assuming Tollaksen did request a different test, the circuit court made a reasonable determination that Tollaksen requested a different test *instead of*, and not *in addition to*, the blood draw. Tollaksen testified that he asked the officer if he "could have a urinalysis instead of a blood draw" because he did not like needles. Based on this testimony, the circuit court determined that Tollaksen did not make a definitive request for an additional test. This finding is plainly supported by the record.

By the Court.—Judgment affirmed.

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