

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0726-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD W. FOELKER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

LaROCQUE, J. Richard Foelker appeals an OWI judgment (second offense-criminal) and a postconviction order denying relief. Foelker contends that the results of breath and blood tests should have been suppressed on grounds that he was denied his statutory right to a urine test. This court concludes that the physician who refused to conduct the urine test was not acting as an agent of the State and Foelker's contention is therefore rejected. The judgment and order are affirmed.

Foelker was arrested for OWI by the Door County Sheriff's Department and taken to the Safety Building where he agreed to take a breath test but asked for an alternative second test, a urine test. He took the breath test,

but the arresting officer informed him that the only alternative test the State was prepared to offer and pay for was a blood test. He was taken to the hospital where the officer again informed him that the State's alternative test was a blood test while Foelker insisted on a urine test. Foelker and the physician on duty spoke. According to the officer, Foelker "somewhat forcefully asked the doctor if he could have a urine test for alcohol," whereupon the physician reportedly stated: "There is no value to a urine test for alcohol, since ... alcohol does not show up in the urine ...". When Foelker heard this, "he was even more demanding that this test be performed," but the doctor refused. The physician also reportedly advised: "Once the lab got [a urine specimen] they would just throw it away." Foelker demanded and received a written statement from the doctor stating that the doctor had refused to give a urine test. He then consented to take a blood test. The officer testified that he did not participate in the discussion between Foelker and the physician and did nothing to cause the physician to deny the urine test. There was evidence that no other known facility or source for a urine test was available in Door County at the time.

Prior to trial, Foelker moved to suppress the results of the breath and blood tests on grounds that he was illegally denied his statutory right to a urine test. He offered to prove through expert testimony that a properly administered urine test is a scientifically valid measure of BAC. The trial court denied the motion and a postconviction motion seeking relief on the same grounds.

The parties agree that § 343.305, STATS.,¹ provides that when a person submits to an OWI breath test, he or she may request an alternative test

¹ Section 343.305(5)(1)(a), STATS., provides:

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) 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). The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3) (a) or (am). If a person requests the agency to administer a breath test and if the agency is unable to

other than the alternative offered by the police agency. Foelker requested a urine test. The statute provides that the person must "be given a reasonable opportunity to have any qualified person of his or her own choosing administer" the test at the requester's own expense.²

Foelker contends that the physician's refusal to conduct a urine test was the act of a government agent, and concludes that the breath and blood tests should therefore be suppressed. Because this court rejects Foelker's agency premise, it is unnecessary to address his conclusion. Foelker relies upon *State v. Lee*, 122 Wis.2d 266, 276-77, 362 N.W.2d 149, 153 (1985), outlining the factors to determine whether a civilian is acting as an agent of the police:

- (1) Whether it was the citizen or the police who initiated the first contact with the police;
- (2) whether it was the citizen or the police who suggested the course of action that was to be taken;
- (3) whether it was the citizen or the police who suggested what was to be said to the suspect; in other words, was the citizen, in essence, a message carrier for the police, and
- (4) whether it was the citizen or the police who controlled the circumstances under which the citizen and the suspect met; whether the control was extensive or incidental.

(..continued)

perform that test, the person may request the agency to perform a test under sub. (3) (a) or (am) that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

² Although the statute also provides that "The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered" by the police agency, the State does not rely upon this provision as grounds for admission of the breath and blood tests. Presumably the State is tacitly conceding that if the reason for the failure to obtain the alternative test were the result of government interference, the statute does not apply.

Foelker argues that each of the factors except (3) favors a finding of agency. The trial court noted that it was having a "very, very difficult time finding those standards applicable to the situation of agency that you are alleging," and denied the agency argument without further application of them to the case.

This court agrees that the *Lee* factors do not neatly fit the circumstances here. In *Lee*, the court was dealing with an attempt to suppress a statement given to Lee's mother after the police suggested she visit the jail and talk to him even though Lee had invoked his right to counsel. The context here is quite different. *Lee* points out that there is no bright-line test, and qualified the use of the aforescribed factors with the caveat that "each case must be decided on the basis of the totality of circumstances present The importance to be attached to each must be considered in light of all the facts present." *Id.* at 276, 362 N.W.2d at 153.

It may be helpful to keep in mind the nature and definition of an agency relationship. An agency relationship results from the manifestation of control by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 1 at 7 (1958).

In this case, while it is true that the police contacted the physician at the hospital to administer a blood test as the police agency's alternative test, this does not end the inquiry. The officer allowed Foelker and the physician and allowed the two men to discuss a urine test unimpeded. There were no words or conduct on the officer's part that caused the physician to reject Foelker's request for a urine test. The physician's comment concerning the value of a urine test and his comment that "Once the lab got it they would just throw it away" was an expression of a medical opinion that Foelker has failed to connect with the police. The trial court's finding that the physician acted independently is not clearly erroneous. Thus, the police did not suggest the course of action to be taken, did not suggest what was to be said to Foelker and did not control the circumstances by which the urine test was denied. While the physician may have been unreasonable or mistaken in his scientific judgment, his decision was not the result of police conduct.

The judgment and order of the circuit court denying Foelker's motion to suppress and for postconviction relief were properly denied.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.