COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0816-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID G. ADLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

ROGGENSACK, J.[1] The State appeals an order suppressing the results of a breath test which it had planned to use in its prosecution of David Adler for operating a motor vehicle while under the influence (OMVWI) and with a prohibited alcohol concentration (PAC). The circuit court suppressed the breath

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

test results because it concluded that Adler had not been given a reasonable opportunity to obtain his own alternate chemical alcohol test as required under § 343.305, STATS. The State contends that its release of Adler from custody about an hour after his arrest, in and of itself, provided Adler with the opportunity to which he was entitled under the statute. However, we conclude that under the facts of this case, the arresting officer prevented Adler from exercising a reasonable opportunity to obtain the alternate test of his choice, by refusing to make a phone call which the administering agency believed was necessary prior to its complying with Adler's request to perform a second breath test.

BACKGROUND

Waunakee Police Officer Denise Steinhauer stopped Adler's vehicle at approximately 7:00 p.m. on the evening of August 25, 1996, for driving too close to another vehicle. Shortly thereafter she arrested Adler for OMVWI[2] and transported him to the Waunakee Police Department. There she read him the Informing the Accused Form, and asked him to take a breath test, which he agreed to do. Sergeant Plendl administered the test at 7:45 p.m., and informed Adler of the results. Adler responded that he did not think the breath intoxilyzer was working properly, and he demanded to be taken to another police department for another breath test.

Steinhauer refused to take Adler to another police department, but twice informed him that she would take him to a hospital for a blood test at the department's expense. Adler refused to take a blood test. Steinhauer released Adler into his girlfriend, Linda Miller's custody, at approximately 8:05 p.m.

[2] The legality of the stop and the arrest are not being challenged on this appeal.

After making other unsuccessful contacts to obtain a second breath test, Miller called the Cross Plains Police Department. She was told that the agency could perform a breath test, but that they would first need permission from the arresting officer. Miller then called the Waunakee Police Department and spoke with Steinhauer. She asked the officer to call the Cross Plains Police Department to authorize the test. However, Steinhauer refused, saying that Cross Plains did not need her permission to do the test.

The trial court concluded that the Waunakee Police Department had properly obtained a breath sample from Adler and offered him its alternate, a blood test. However, it also found that it would not have been onerous, given the facts of this case, for Steinhauer to call the Cross Plains Police Department, as Adler requested. Accordingly, the court held that the officer's refusal had prevented Adler from exercising his "reasonable opportunity" option under the statute. Therefore, it suppressed the breath test results.

DISCUSSION

Standard of Review.

The trial court's findings of fact will not be set aside unless they are clearly erroneous. ***Olen v. Phelps***, 200 Wis.2d 155, 160, 546 N.W.2d 176, 179 (Ct. App. 1996). However, the application of a statute to properly found facts presents a question of law which this court will review *de novo.* ***Id***. Therefore, we will independently determine whether the officer's actions frustrated the defendant's request for an alternate chemical test in violation of § 343.305(5), STATS., without deference to the trial court. ***State v. Stary***, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994).

Reasonable Opportunity.

After an arrest for OMVWI, an officer may ask the driver to provide a blood, urine or breath sample. Section 343.305(3)(a), STATS. The law enforcement agency of the arresting officer must be prepared to administer at least two of the three types of tests, either at its own agency or some other facility, but it may designate which test it will provide first and which is an alternate. Section 343.305(2). Section 343.305(5)(a) further provides that:

> 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). ... The agency shall comply with a request made in accordance with this paragraph.

This last provision imposes three duties on an arresting officer: (1) to provide a primary test at no cost to the defendant; (2) to use reasonable diligence to provide the alternate test of the agency; and (3) to give the accused driver a reasonable opportunity to get his own alternate test at his own expense. ***Stary***, 187 Wis.2d at 270, 522 N.W.2d at 34. Since § 885.235(1), STATS., provides automatic admissibility for chemical tests completed by a qualified agency and administered within three hours of driving, whether a suspect has been released within this three-hour time frame is a substantial factor in determining whether he or she has been afforded a reasonable opportunity to obtain his or her own test. ***State v. Vincent***, 171 Wis.2d 124, 129, 490 N.W.2d 761, 763 (Ct. App. 1992).

An "agency's responsibility to provide a 'reasonable opportunity' is limited to *not frustrating* the accused's request for his or her own test." ***Id***. at 128,

490 N.W.2d at 763 (emphasis in original). Thus, in ***Vincent***, the arresting officer was not required to transport the accused driver to a nearby hospital for a blood test, even though the request was a reasonable one. The court reasoned that the statute imposed no duty on the officer other than prompt processing, so the driver would have an opportunity to take his or her own test within three hours, if possible. ***Id***. at 129, 490 N.W.2d at 763.

The State contends that Steinhauer provided Adler with a reasonable opportunity to obtain his own alternate test when she processed and released him just one hour after the arrest, and that she was not required, under ***Stary*** or ***Vincent,*** to do anything more. This court disagrees. Whether a police officer has "made a reasonably diligent effort to comply with his statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case." ***Stary***, 187 Wis.2d at 271, 522 N.W.2d at 35. Thus, while the length of time that the accused driver is given to obtain his own test is certainly an important factor to consider, it is not the *only* factor relevant to a determination of whether the opportunity afforded the driver was a reasonable one.

In the case at bar, Adler's opportunity to obtain his own test was frustrated by the arresting officer's refusal to call the Cross Plains Police Department so Cross Plains would give the test. Unlike the situation in ***Vincent***, where the defendant was free to find his own transportation to the hospital, here there was apparently no one other than the arresting officer whose authorization would have been acceptable to Cross Plains. Steinhauer had been provided with that information and yet she refused to make the call, even though she was not otherwise occupied at the time.

The State suggests that affirming the circuit court's decision will place an obligation on an arresting officer to sit around by the phone for three hours after every drunk driving arrest, waiting to see if the accused driver might need assistance in obtaining an alternate test. That is not the case. We emphasize that each case turns on its own circumstances, and nothing in our decision today suggests that it would be reasonable to require an officer to make herself available to an accused driver if she were otherwise occupied, or if the driver's request would require any significant expenditure of time or agency funds. However, we simply are not confronted with such a situation here.

CONCLUSION

Where the facility of the accused driver's choice required authorization or permission from the arresting officer prior to performing a second breath test, and such authorization would have posed a negligible burden on the officer, her refusal to give her permission for the test frustrated the accused driver's opportunity to obtain an alternate chemical test of his own choosing. The results of the initial breath test were properly suppressed. ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985).

By the Court.—Order affirmed.

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