

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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, STATS.

No. 98-2612

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SAUK COUNTY,

PLAINTIFF-RESPONDENT,

v.

ROBERT M. ENGELHARDT,

DEFENDANT-APPELLANT.

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

DEININGER, J.¹ Robert Engelhardt appeals his conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), in violation of the Sauk County traffic ordinance adopting § 346.63(1)(b), STATS. Engelhardt contends that the results of the breath test that established his alcohol

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

concentration should have been suppressed because (1) Engelhardt requested, but did not receive a second, alternate test for alcohol concentration, and (2) the arresting officer interfered with his right to an alternative test by suggesting that an alternative test would not produce significantly different results. We conclude that Engelhardt did not request a second test, and that the officer's comments did not interfere with Engelhardt's right to an alternative test. Accordingly, we affirm his conviction.

BACKGROUND

A Sauk County sheriff's deputy stopped Engelhardt's vehicle after he observed Engelhardt speeding. When the deputy approached Engelhardt's vehicle, he detected the odor of intoxicants and observed that Engelhardt's eyes were bloodshot. The deputy administered field sobriety tests, and on the basis of Engelhardt's performance on these tests, he arrested Engelhardt for operating a motor vehicle while under the influence of an intoxicant (OMVWI). At the Sauk County Sheriff's Department, Engelhardt submitted to a breath test, which indicated that his alcohol concentration was .19%, substantially higher than the legal limit of .10%. Engelhardt was then also charged with operating a motor vehicle with a PAC.

At trial, the deputy testified that Engelhardt had initially expressed reservations about the accuracy of a breath test, and had inquired about the availability of a blood test. According to the deputy:

There was discussion on, one, whether or not he should give a breath sample. He wasn't sure if he wanted to or not. There was also discussion as to requesting a blood test.

....

The blood test was brought up. Initially, it was explained to him consent—or, that he would have to give breath before he could give blood. He did consent and give breath. Once that testing was done, I asked him if he still wanted his blood test and he said, no, he did not.

The deputy also testified that after Engelhardt submitted to the breath test, Engelhardt asked the deputy's opinion about the advisability of a subsequent blood test:

It was about this time that I brought up and asked if he wanted his—the blood test yet. That I would be more than willing to take him to St. Clare's [hospital] to do a blood draw. He indicated, no, he did not want to do it; it would not be worth it. He had also asked if—what I thought, and told him, honestly, based on his intoxilyzer result, that the blood test would not be much different.

Immediately after the deputy's testimony on direct, Engelhardt moved to suppress the results of the breath test. Engelhardt argued that the deputy had interfered with his right to an alternative test, as provided in § 343.305(4), STATS., by offering his opinion that the blood test would not “be much different.” The trial court denied Engelhardt's motion, explaining:

I make my ruling based upon what has come in through the Officer's testimony to this point in time. I do find that there was no interference by the Officer concerning defendant's alternative—or, defendant's right to take a second or alternative test. That he freely, knowingly and voluntarily chose not to take the test. That, at one point, he did ask an opinion of the [deputy]. The [deputy] is not required to give advice. Perhaps he should not have responded, but I don't believe that this rises to the level that's suggested in cases cited. That the defendant's right to the alternative test was in no way infringed upon, and therefore, the motion must be denied.

Engelhardt himself later testified regarding his conversation with the deputy regarding the advisability of the blood test, offering a slightly different version of the exchange:

Okay. After the breath test, I was sitting there. He asked me if he could still take me up to the hospital, if I wanted to

take the blood test and then he said, “But, I don’t think it will do any good.”

Engelhardt did not, however, renew his motion to suppress the breath test after his own testimony. We also note that Engelhardt did not testify that he requested an alternate test.

The jury convicted Engelhardt of operating with a PAC, and acquitted him of OMVWI. Engelhardt appeals, contending that the trial court wrongly admitted the results of the breath test, which was the only evidence of his PAC.

ANALYSIS

This case requires us to interpret and apply § 343.305, STATS., governing the administration of tests of drivers for intoxication. Statutory interpretation is a question of law, which we review de novo. See *Hughes v. Chrysler Motors Corp.*, 197 Wis.2d 973, 979, 543 N.W.2d 148, 149 (1996). The application of a statute to undisputed facts is also a question of law subject to our de novo review. See *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989). We defer to the facts as found by the trial court unless those facts are clearly erroneous. See *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979); § 805.17(2), STATS. Thus, we will affirm the trial court’s decision to admit the breath test unless the facts on which it based its decision are clearly erroneous, or the trial court based its decision on an incorrect view of the law.

Section 343.305(2), STATS., requires law enforcement agencies to be able to provide at least two tests to determine the presence of alcohol or other intoxicants in the breath, blood or urine of a suspected intoxicated driver. See

State v. Vincent, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). The law enforcement agency may designate one of the two offered tests as its primary test. Once a driver has submitted to the law enforcement agency's primary test, the driver is entitled to a second test at the agency's expense.² If the accused requests an alternate test, the law enforcement officer must exercise reasonable diligence in providing it. See *State v. Renard*, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985). Whether the officer has made a reasonably diligent effort to provide a requested test depends on the "totality of the circumstances as they exist in each case." See *State v. Stary*, 187 Wis.2d 266, 271, 522 N.W.2d 32, 35 (Ct. App. 1994). If the accused is denied his or her statutory right to an alternate test at police expense, the primary test result must be suppressed. See *State v. McCrossen*, 129 Wis.2d 277, 297, 385 N.W.2d 161, 170 (1986).

On appeal, Engelhardt contends that he requested an alternate test when the deputy first asked Engelhardt to submit to the breath test. This is a factual issue, but Engelhardt did not raise it in the trial court. At trial, Engelhardt objected to the admission of the breath test only on the grounds that the deputy had discouraged him from making the request. Because Engelhardt did not raise the issue of whether he had actually requested a second test in the trial court, the county did not have the opportunity to respond to it with appropriate argument and evidence, and the trial court did not make a factual finding on that issue. The trial court found only that

there was no interference by the Officer concerning
defendant's alternative—or, defendant's right to take a

² If the accused does not want the agency's secondary test, the accused may choose—and pay for—his or her own alternate test at an approved facility. See *State v. Vincent*, 171 Wis.2d 124, 128, 490 N.W.2d 761, 763 (Ct. App. 1992).

second or alternative test. That he freely, knowingly and voluntarily chose not to take the test.

Because the trial court could have resolved this factual dispute had it been properly raised, we will not consider it for the first time on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

Even if we were to consider this issue on appeal, the record before us does not support Engelhardt's contention that he actually requested an alternate test. Engelhardt's own testimony indicates only that he expressed reluctance to take the breath test before consenting to it, and that he did not specifically request a blood test after taking the breath test:

Q. Tell us, if you would, what happened. At some point, you talked to the Deputy about a blood test?

A. Yes, I did.

Q. And why?

A. I have always—people have told me from the union and stuff—because, locomotive engineering, you have to be federally certified to run an engine—and I heard through the grapevine that people in the union always said, don't ever take a breathalyzer test, they're not accurate, they're not correct.

....

Q. Were you reluctant to take the breath test at first?

A. Yes, I was.

Q. At some point after you took the breath test, did you ask the Deputy anything about a blood test?

A. I didn't ask. He said at the end, said, if I still would like to, he could take me up to the hospital and take the breath test. Or, I mean, the blood test, excuse me. But, he didn't think it would do any good.

This testimony does not establish that Engelhardt requested an alternate test. It establishes only that Engelhardt expressed reservations about the accuracy of the

breath test. Moreover, Engelhardt's testimony confirms the deputy's willingness to provide Engelhardt a blood test if he wanted it. We conclude that the deputy did not violate Engelhardt's rights under § 343.305, STATS., by refusing to provide a requested alternate test.

Because Engelhardt had expressed reservations about the department's primary test, the deputy appropriately attempted to ascertain whether Engelhardt wanted an alternate test after the breath test had been administered. *Cf. Stary*, 187 Wis.2d at 271, 522 N.W.2d at 34-35 (holding that officer's duty of reasonable diligence is satisfied once the accused has "unequivocally refused" the second test). It is undisputed that after the breath test had been administered, the deputy asked Engelhardt if he wanted a blood test, and that Engelhardt said he did not.

Engelhardt contends, however, that the deputy breached his duty of reasonable diligence by discouraging Engelhardt from requesting a blood test by telling him that it would not make a difference. Engelhardt's argument on this point is sparse, and it is not clear whether he is challenging the trial court's finding of fact or its interpretation and application of § 343.305, STATS. We reject Engelhardt's contention in either case.

The facts are, for the most part, undisputed. The only substantial difference between Engelhardt's testimony and the deputy's testimony is that the deputy testified that Engelhardt asked for his opinion about whether the blood test would be helpful. Engelhardt contends that the deputy offered his opinion without being asked. The trial court found that Engelhardt had asked the officer's opinion, and we are bound by the trial court's finding of fact unless it is clearly erroneous. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249-50, 274 N.W.2d

647, 650 (1979); § 805.17(2), STATS. We note that the trial court could not have considered Engelhardt's testimony on this issue because Engelhardt had not yet testified when he made the motion to suppress the breath test results. Engelhardt did not renew the motion after his own testimony, however, and he did not seek postconviction relief from the trial court. Because the trial court was not asked to reconsider its fact-finding in light of Engelhardt's testimony, the court's finding that Engelhardt asked the deputy's opinion about the usefulness of a blood test is not clearly erroneous.

The remaining question, then, is whether the deputy violated Engelhardt's right to an alternate test by expressing his opinion that the alternate test would not produce significantly different results in response to Engelhardt's question. After reviewing the totality of the circumstances of the case, we conclude that the deputy did not breach his duty of reasonable diligence or interfere with Engelhardt's statutory right to a second test by answering Engelhardt's question about the usefulness of a second test. Engelhardt's breath test indicated that his alcohol concentration was nearly twice the legal limit, and unless the result of the second test was lower by almost half, it would have neither helped Engelhardt nor disadvantaged the prosecution. Although it would no doubt have been better police practice to leave Engelhardt's question unanswered, nothing in the record before us suggests that the deputy's answer was misleading or that it was intended to discourage Engelhardt from the exercise of his rights. And, as we have discussed, there is no dispute that the officer expressly offered to provide the test, if Engelhardt so chose.

We emphasize again that the choice of whether to have an alternate test is best left to the accused. Nevertheless, under the circumstances of this case, the officer's good faith response to Engelhardt's question did not deprive

Engelhardt of his statutory right to request and receive a second test. Accordingly, we affirm the trial court's decision to admit the primary breath test, and we affirm Engelhardt's conviction for operating a motor vehicle with a PAC.

By the Court.—Judgment affirmed.

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

