COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0012-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PETER D. GREFSHEIM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

DEININGER, J.[1] Peter Grefsheim appeals a conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI), as a fourth offense. Grefsheim contends that the results of the blood test that established his alcohol concentration should have been suppressed because he

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

requested, but did not receive, a second successful test for the presence of alcohol. We conclude that the law enforcement agency met its obligation to make two tests available to Grefsheim, and that the agency provided Grefsheim a reasonable opportunity to receive another test at his own expense. Thus, Grefsheim was not denied any test to which he was entitled. Accordingly, we affirm his conviction.

BACKGROUND

Section 343.305, STATS., provides that any person who drives or operates a motor vehicle on the public highways of the state is deemed to have given consent to one or more tests for the presence of alcohol in his or her breath, blood, or urine. The refusal to submit to a test is, in itself, grounds for penalties under § 343.305(9), including revocation of the person's operating privilege. Under 343.305(9)(a)5c, however, a failure to submit to a test is not considered a refusal if it is due to a physical inability to provide a sample because of a physical disability or disease.

A driver who submits to a requested test is entitled to an opportunity to obtain additional tests. Under § 343.305(2), STATS., the law enforcement agency must "be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests [of breath, blood or urine] and may designate which of the tests shall be administered first." *See also* ***State v. Vincent***, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). Under § 343.305(5)(a),

> [t]he 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 purpose of the additional tests is to afford the accused the opportunity to verify or challenge the results of the first test. *See* ***State v. McCrossen***, 129 Wis.2d 277, 288, 385 N.W.2d 161, 166 (1986). 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, 460-61, 367 N.W.2d 237, 238 (Ct. App. 1985). If the accused is denied his or her statutory right to an additional test, the primary test result must be suppressed. *See* ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170.

The facts in this case are undisputed and straightforward. A McFarland police officer stopped Grefsheim's vehicle after he observed Grefsheim make a rolling stop at a red light. When the officer approached Grefsheim's vehicle, he detected the odor of intoxicants, and the officer observed that Grefsheim's eyes were bloodshot and that his speech was slurred. The officer administered field sobriety tests and a preliminary breath test. On the basis of Grefsheim's performance on these tests and his observations of Grefsheim's behavior, he arrested Grefsheim for OMVWI.

At the McFarland Police Department, the officer read Grefsheim the "Informing the Accused" form as required by § 343.305(4), STATS.,[2] and asked Grefsheim to submit to a breath test. Grefsheim's response, as noted by the officer on the Informing the Accused form, was "OK"—"only if I can get another test."

[2] The "Informing the Accused" form in use at the time of Grefsheim's arrest, provided, in relevant part:

> After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.

Grefsheim was unable to blow sufficient air into the Intoxilyzer tube to provide a sample. Grefsheim told the officer the he suffered from chronic obstructive pulmonary disease and that he had "bad lungs." At the officer's request, Grefsheim then agreed to submit to a blood test, and Grefsheim was taken to a hospital where a blood sample was drawn. After the blood draw, the officer did not ask Grefsheim if he wanted another test, and Grefsheim did not ask for another test. Grefsheim was released to an acquaintance approximately two hours after the initial traffic stop.

The results of the blood test indicated that Grefsheim's blood alcohol concentration was .139%, significantly in excess of the legal limit of .10%. Before trial, Grefsheim moved to suppress the results of the blood test. Grefsheim contended that because he had submitted to the two tests requested by the officer, and he had requested an alternate test, under § 343.305, STATS., he was entitled to yet another test, which he did not receive.

The trial court denied Grefsheim's motion on two grounds. First, the trial court concluded that the police department had met its obligations under § 343.305, STATS., because it was prepared to administer two tests, and it offered two tests, to Grefsheim. Second, the trial court also concluded that under ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524 N.W.2d 635 (1994), the accused must request the alternate test *after* submitting to the test requested by the officer. The trial court reasoned that because Grefsheim had made his request before submitting to any tests, the officer had no further obligation to provide or to offer Grefsheim an alternate test after he submitted to the blood draw.

After the court denied his motion to suppress the blood test, Grefsheim pled no contest to the OMVWI charge. He now appeals.

ANALYSIS

Grefsheim raises two issues on appeal, both of which involve the interpretation of § 343.305, STATS., and are subject to our de novo review. *See* ***Hughes v. Chrysler Motors Corp***., 197 Wis.2d 973, 979, 543 N.W.2d 148, 149 (1996).

We conclude that the controlling issue on the facts before us concerns the extent of a law enforcement agency's obligation to provide alternate tests, once an alternate test is requested. Grefsheim contends that when an accused is physically unable to provide a sample for one of the agency's offered tests, and the person submits to a second agency-requested test which is successfully performed, the accused is entitled to yet another successful test for the presence of alcohol at agency expense. Thus, in this case, because Grefsheim was physically unable to provide an adequate sample of breath, once he submitted to the officer's requested blood test, he contends that the agency had to provide him with yet another test for the presence of alcohol.

We reject Grefsheim's interpretation of § 343.305, STATS. We conclude that the McFarland Police Department complied with its obligation to provide alternate tests under § 343.305(2) and (5), STATS. Because we conclude that the police department satisfied its obligation to provide Grefsheim two alternate tests for the presence of alcohol, we need not decide the second issue

raised in this appeal, which is whether Grefsheim's request for an alternate test was properly timed.[3] Accordingly, we affirm his conviction.

Section 343.305, STATS., does not expressly indicate what opportunities for additional tests must be provided to an accused who is physically unable to provide a sample for a requested test. When read as a whole, however, the statute is not ambiguous regarding the extent of the law enforcement agency's obligation to provide additional tests. *Cf.* ***State ex rel. Sielen v. Circuit Court***, 176 Wis.2d 101, 109-10, 499 N.W.2d 657, 660 (1993) (requiring courts to interpret statutes as a whole and to harmonize individual parts); ***J.A.L. v. State***, 162 Wis.2d 940, 962, 471 N.W.2d 493, 502 (1991) (holding that courts must apply plain language of the statute). The agency's obligation under § 343.305(2) is to "be prepared to administer" two of the three listed tests. Under § 343.305(5)(a), if

---

[3] We do not reach the issue of whether an accused must again request the alternate test after submitting to a requested test, even when a request for the alternate test was clearly made prior to the first test. The supreme court suggested in ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 691, 524 N.W.2d 635, 639 (1994), that the request for the alternate test may be made "only after compliance with the test requested by the officer." The "Informing the Accused" statement in ***Bryant*** contained language similar to that in the present case, *see* n.2, above, in that it stated "after submitting to these [law enforcement-requested] tests, you may request the alternative test the law enforcement agency is prepared to administer." ***Id.*** at 684, 524 N.W.2d at 636.

We note that the current version of the "Informing the Accused" statement required by § 343.305(4), STATS., no longer states that the accused must request the alternate test "after" submitting to the requested test. The "Informing the Accused" statement now reads, in relevant part:

> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

Section 343.305(4), STATS. The recent amendment of § 343.305(4), *see* 1997 Wis. Act 107, § 1, calls into question the continuing validity of the supreme court's suggestion in ***Bryant*** regarding the required timing of a request for an alternate test.

the accused submits to the tests requested by the agency, the accused "is permitted, upon his or her request, *the alternative test* provided by the agency under sub. (2)" (emphasis added). Under § 343.305(5)(a), the accused must also be provided "a reasonable opportunity" to have a qualified person of his or her own choosing administer a test at the accused's own expense.

The express terms of § 343.305(2), STATS., do not require that the law enforcement agency successfully administer two tests, only that it "be prepared to administer" two of the three listed tests. The McFarland Police Department met this obligation because it was prepared to administer, at its expense, tests of Grefsheim's breath and blood. As for § 343.305(5), it requires only that the accused "be permitted" the alternate test provided by the agency. Grefsheim was permitted both of the McFarland Police Department's tests; no action by the arresting officer denied him the opportunity to take the agency's alternative test. It was only Grefsheim's inability to provide an adequate breath sample that prevented successful completion of both of the agency-provided tests.

Under § 343.305(5), STATS., Grefsheim was also entitled to a reasonable opportunity to obtain a test of his own choice at his own expense, and this right is particularly significant on the present facts because of Grefsheim's inability to obtain results from each of the agency-provided tests. Grefsheim had ample opportunity to obtain his own test in order to verify the accuracy of the agency-requested blood test. His prompt release, approximately two hours after he was initially stopped by the officer, provided him with ample opportunity to obtain such a test within the prescribed three-hour period. *Cf.* § 885.235, STATS. (providing that chemical tests for intoxication are presumptively admissible when performed on samples taken within three hours of the event to be proved). We therefore conclude that there was no interference with his ability to challenge the

police test, if he had chosen to do so. *See* ***Vincent***, 171 Wis.2d at 129, 490 N.W.2d at 763 (holding that the agency's duty not to frustrate the accused's request for his or her own test merely requires the agency to make the accused available to seek and obtain his or her own test within three hours).

In sum, when the accused submits to a request for a test under § 343.305, STATS., subsections (2) and (5) of the statute require the law enforcement agency to provide the accused with certain opportunities for additional tests, but nothing in the statute requires a certain number of successful tests. We conclude that in this case, the McFarland Police Department met its obligation under the statute by providing Grefsheim with the opportunity to take two tests at police expense, and by releasing him with ample time to obtain another test at his own expense, if he so chose.

By the Court.—Judgment affirmed.

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