COURT OF APPEALS DECISION DATED AND FILED

March 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2005AP2652

Cir. Ct. No. 2005CT132

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MYLEA WIRKUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Following the denial of her motion to suppress evidence of her breathalyzer test result, Mylea Wirkus pled no contest to a charge of operating a motor vehicle with a prohibited alcohol concentration (PAC) contrary to WIS. STAT. § 346.63(1)(b). Wirkus appeals from the ensuing judgment of conviction, renewing her challenge to the admissibility of the breathalyzer test result. We uphold the trial court's denial of Wirkus' motion to suppress. We affirm the judgment of conviction.

BACKGROUND

¶2 The relevant facts are not in dispute. On February 3, 2005, City of Fond du Lac police officer Joel Gudex arrested Wirkus for operating a motor vehicle while intoxicated (OWI) and transported her to the city police department. There Gudex issued Wirkus a citation for OWI and further advised her under the Implied Consent Law, WIS. STAT. § 343.305(3), by reading the standard Informing the Accused form.

¶3 Gudex then asked Wirkus to submit to a breath test. Wirkus responded that she wanted a blood test instead. Gudex replied that the breath test was the department's primary test and if Gudex renewed her request "afterwards," she could be transported to a local hospital for a blood test. Wirkus did not respond to Gudex's request that she take a breath test, but instead referred to a prior arrest for OWI, complaining that the officer in that case had made her wait for approximately an hour before administering a breath test. This, according to Wirkus, resulted in a higher breathalyzer reading. Gudex explained that any delay

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

would produce a lower, not a higher result, but Wirkus disagreed. At the end of this debate, Gudex again told Wirkus that if she reminded him "afterwards," she could be transported to the hospital for a blood test.

¶4 Still not responding to Gudex's pending request that she submit to a breath test, Wirkus next stated that she did not want to be transported to the hospital in a patrol car. Gudex explained that this was not an option because Wirkus would still be in police custody during any transport and that any blood sample would be evidence in the case. Wirkus then proposed that she have her friend transport her to the hospital and the police could follow. Gudex responded that this also was not an option under the department's procedures.[2] Finally, Wirkus asked if she could be transported without handcuffs. Gudex replied that they would talk about this later "after … all the other paper work was done."

¶5 Wirkus then submitted to the breath test, and Gudex prepared and completed the necessary paperwork. This included Gudex issuing additional citations for PAC and operating a motor vehicle at an unreasonable and imprudent speed. In addition, Gudex reviewed with Wirkus the notice of intent to suspend, the alcoholic influence report, and a preinterrogation warning and waiver of rights. Wirkus declined to answer any further questions and stated that she "just wanted to go." This process took approximately twenty minutes. At the conclusion, Gudex asked Wirkus if she had any questions and Wirkus replied that she did not. Gudex then turned Wirkus over to a friend who was waiting in the lobby, and the two left the department.

[2] Wirkus was eventually released to a friend who apparently had been summoned to the police department.

¶6 The State charged Wirkus with OWI and PAC.[3] Wirkus filed a motion to suppress contending that Gudex had failed to honor Wirkus' request for an alternate test. However, at the hearing on the motion, Wirkus broadened her challenge to contend that Gudex had also confused Wirkus as to the circumstances under which she could obtain her own independent test. In a written decision, the trial court denied the motion to suppress. The court held that Gudex had properly advised Wirkus under the implied consent law. The court further held that the conversation between Gudex and Wirkus about a possible blood test related to the alternative test offered by the department, not to the independent test that Wirkus was entitled to pursue at her own expense. Finally, the court held that, while Wirkus and Gudex had discussed the prospect of the alternative test, Wirkus had not pursued this option.

¶7 Wirkus appeals.

DISCUSSION

¶8 The Implied Consent Law, WIS. STAT. § 343.305(3), requires that an OWI suspect who is asked to submit to a chemical test must be advised of the right to the department's alternative test at the department's expense and of the further right to obtain an independent test at the suspect's expense. The trial court correctly determined that Gudex had fully and accurately advised Wirkus of these provisions by reading the Informing the Accused form, and Wirkus does not contend otherwise.

[3] The complaint charged Wirkus as a repeat offender. The OWI charge was later dismissed.

¶9 Rather, Wirkus contends that her ensuing discussions with Gudex reveal a request by her for either the alternative test or her own independent test, and that Gudex failed to accord her a reasonable opportunity to exercise these options or otherwise frustrated her ability to do so.

¶10 Wirkus correctly states that a law enforcement officer must exercise "reasonable diligence" in offering and providing a suspect the alternative test and additionally must provide the suspect a "reasonable opportunity" to obtain the independent test. ***State v. Stary***, 187 Wis. 2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994). However, both of these obligations presume that the suspect has made a request for either or both of these additional tests.

¶11 Here, after Gudex had properly advised Wirkus under the implied consent law and asked her to submit to a breath test, Wirkus stated that she wanted a blood test instead. However, a suspect is not entitled to an alternate test or an independent test unless the suspect has first consented to the primary test, and Wirkus had been so informed of this via the Informing the Accused form. In keeping with this procedure, Gudex responded that the breath test was the department's primary test and only after that test could Wirkus be transported to the hospital for a blood test.

¶12 Wirkus then diverted the conversation into a discussion about her prior OWI experience and her belief that a delay in administering the breath test would produce a higher breathalyzer reading. Gudex explained the illogic of that reasoning and concluded by telling Wirkus that she should remind him of her request "afterwards."

¶13 Wirkus then began negotiating with Gudex about the conditions under which she could be transported to the hospital. First, she proposed that she

not be transported in a patrol car. Gudex explained that this could not occur because Wirkus was in custody. Next, Wirkus proposed that her friend be permitted to transport her. Again Gudex explained that department procedure did not permit this. Finally, Wirkus asked that she not be handcuffed during any transport. Gudex responded that they would talk about this later after Wirkus had been processed and the paperwork had been completed.

¶14 None of this history reflects an unconditional and unequivocal request by Wirkus for the alternative test. Instead, Wirkus was attempting to bargain the particulars of such test on terms contrary to the department's policies. Gudex properly declined to accept those terms. If, after all of that, Wirkus wanted to obtain the alternative test on the department's terms, it was her obligation, not Gudex's, to so state. She did not. Instead, after the breath test and the attendant paperwork were completed, Wirkus never again revisited the subject, and she left the police department with her friend. As noted earlier, a claim that the police failed to exercise reasonable diligence in providing a suspect the right to an alternative test presupposes a request for the test in the first instance. Wirkus' claim that Gudex did not exercise reasonable diligence fails on this threshold basis.

¶15 Nor does this history allow us to conclude that Wirkus was seeking her own independent test at her own expense. In its written decision, the trial court noted that Gudex's written police report stated, "I advised Wirkus that if she wants us to pay for the blood test, that we have to physically take her out there in a squad car, because she is still under our custody, and that the blood is still

evidence at that time."[4] Thus, the court correctly concluded that the discussion about a possible blood test was within the context of the alternative test as explained to Wirkus via the Informing the Accused form—not within the context of Wirkus' right to obtain an independent test at her own expense.

¶16 Finally, to the extent that Wirkus may be arguing that she was subjectively confused in all of this, we held in ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), that such claimed confusion did not provide a basis for suppression of a chemical test result. ***Id***. at 280. Instead, based on prior case law, the ***Quelle*** court discerned a "stringent three-part standard" that is applied to assess the adequacy of the warning process under the implied consent law:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under [the implied consent law] to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading; *and*
>
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

Id.

¶17 Here, Gudex's advice to Wirkus via the Informing the Accused form was in full compliance with the Implied Consent Law. As such, the information

[4] Our examination of the suppression hearing transcript reveals that the police report was not received into evidence. However, the report was attached to Wirkus' motion to suppress. Moreover, after receipt of the trial court's decision, Wirkus never asked the court to reconsider the decision based on the fact that the report had not been formally received into evidence. Nor does Wirkus raise this as an issue on appeal.

imparted to Wirkus was not less or more than the law required. From that it follows that the information was not legally misleading and did not affect Wirkus' ability to make her choices. Any subjective confusion on Wirkus' part was not the fault of Gudex.

CONCLUSION

¶18 We uphold the trial court's ruling that Wirkus was properly advised under the implied consent law.

By the Court.—Judgment affirmed.

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