COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3073 **Cir. Ct. Nos. 2003TR1538**
2003TR1539

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

COUNTY OF MARATHON,

PLAINTIFF-RESPONDENT,

V.

TODD P. HANDRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREG HUBER and RAYMOND THUMS, Judges. *Reversed.*

¶1 PETERSON, J.[1] Todd Handrick appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary

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

to WIS. STAT. § 346.63(1)(a). He also appeals an order denying his motion to suppress the results of a breath test. Because we conclude the breath test should have been suppressed, we reverse the judgment and the order.

FACTS

¶2 On January 12, 2003, Deputy Dale Ruechel of the Marathon County Sheriff's Department stopped Handrick's vehicle after estimating his speed at seventy miles per hour in a forty-five zone. Ruechel testified that Handrick had an odor of intoxicants, bloodshot eyes, and slurred speech. Ruechel asked Handrick to perform field sobriety tests. Handrick performed one of the tests but then refused to continue. He repeatedly stated that he wanted a blood test.

¶3 Handrick was transported to the jail to perform the department's primary chemical test, which was a breath test. Handrick was given the Informing the Accused form, but initially refused to take the breath test. He again asked for a blood test. Ruechel told Handrick that a blood test was the department's secondary test and that if he took the breath test, Ruechel would provide him with a blood test. Handrick agreed and submitted to the breath test. However, Ruechel never provided Handrick with a blood test.

¶4 The breath test revealed a blood alcohol concentration of .21%. Handrick moved to suppress the results of the test, arguing he was denied his right to an additional test. The court denied the motion, after which Handrick pled no contest and was convicted of operating while intoxicated, first offense. Handrick appeals.

DISCUSSION

¶5 Handrick raises two claims on appeal. He first claims that Ruechel did not have reasonable suspicion to stop him. A traffic stop is reasonable if the officer has probable cause to believe a traffic violation has occurred or has grounds to reasonably suspect a violation has been or will be committed. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). A reasonable suspicion exists where the suspicion is premised on specific, articulable facts and reasonable inferences from those facts. ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279.

¶6 Handrick contends that he "convincingly disputed" Ruechel's testimony that he squealed his car's tires when turning at an intersection. Regardless of this testimony, Ruechel estimated Handrick's speed at seventy miles per hour, and Handrick testified that he was going no more than fifty miles per hour. Either way, the speed limit was forty-five, and Ruechel therefore had reasonable suspicion to believe that Handrick was violating the law. Moreover, resolving this conflicting testimony involved weighing the credibility of witnesses, which this court will not disturb unless the factfinder "relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with nature or with fully established or conceded facts." ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). The court did not rely on such inherently or patently incredible evidence here.

¶7 Handrick's second claim is that the court erred when it denied his suppression motion because he invoked his right to an additional test under WIS. STAT. § 343.305(4) and (5). A person operating a motor vehicle on public highways is deemed to have given consent to one or more tests of his or her

breath, blood, or urine under certain circumstances. *See* WIS. STAT. § 343.305(2). A law enforcement agency may designate which test will be administered first as the "primary test." ***Id.*** However, an accused may also choose to take what WIS. STAT. § 343.305(4) refers to as an "alternative test." Because an accused does not have the right to take the alternative test *in place* of the primary test, we will refer to it as an "additional test," as it is referred to elsewhere in the statute. *See* WIS. STAT. § 343.305(5)(a).

¶8 A request for an additional test may be made before or after the accused submits to the primary test. ***State v. Schmidt***, 2004 WI App 235, ¶¶26-28, 277 Wis. 2d 561, 691 N.W.2d 379. Thus, when an accused asks for a test other than the primary test before submitting to the primary test, the question becomes whether he or she was asking for that test *in place* of the primary test or as an additional test under WIS. STAT. § 343.305(5)(a). ***Id.***, ¶31. Where law enforcement fails to accommodate an accused's request for an additional test, suppression of the primary test's results is an appropriate remedy. *See* ***State v. Renard***, 123 Wis. 2d 458, 459-60, 367 N.W.2d 237 (Ct. App. 1985).

¶9 In this case, the court found that Handrick's requests for a blood test were not requests for an additional test because it mistakenly believed that such a request must be made after the primary test is administered.[2] Because the court based its decision on this incorrect understanding of the law, we must reverse the order denying Handrick's suppression motion.

[2] The circuit court did not have the benefit of the analysis in ***State v. Schmidt***, 2004 WI App 235, 277 Wis. 2d 561, 691 N.W.2d 379, which was decided after the court denied Handrick's suppression motion.

¶10 We must next decide whether to remand this case to the circuit court for a determination of whether Handrick requested an additional test in light of the correct standard of law. This depends on whether we can determine that Handrick's requests for blood tests were, or were not, requests for additional tests as a matter of law, given the circuit court's findings of historical fact. ***Schmidt***, 277 Wis. 2d 561, ¶¶13, 31-32. We conclude that, given the facts of this case, Handrick invoked his right to an additional test as a matter of law.[3]

¶11 Handrick's repeated requests for a blood test, viewed in isolation, could reasonably be construed as either requests for a blood test in place of the primary breath test or as requests for an additional test. The circuit court found that Handrick did not request a blood test after submitting to the primary test. While not dispositive, this fact is relevant to whether he did in fact request an additional test. ***Id.***, ¶30. As we noted in ***Schmidt***, "[a]n accused who requests an additional test before submitting to the first test and still wants an additional test after the first test is completed will likely repeat the request after the first test to make sure an additional test is administered." ***Id.***

¶12 Complicating the analysis here is that Handrick submitted to the breath test on the condition that he would receive a blood test[4] and that Ruechel offered Handrick an additional test, which he accepted. From these facts, it is clear that by the time Handrick submitted to the primary test, his otherwise

[3] The court found Ruechel's testimony to be credible and Handrick's to lack credibility to the extent it conflicted with Ruechel's. The facts, as outlined earlier in this opinion, are based on Ruechel's version of events.

[4] Of course, Ruechel had no obligation to bargain with Handrick. An ultimate refusal by Handrick would itself have been the basis for penalties under WIS. STAT. § 343.305(9).

ambiguous requests for a blood test had evolved into an agreement between himself and Ruechel to conduct both tests. At that point, with both tests on the agenda, it is difficult to conclude that the blood test was sought *in place* of the breath test.

¶13 Furthermore, the fact that Ruechel offered the additional test, which Handrick accepted, presents its own obstacle to a conclusion that Handrick failed to request an additional test. While one could argue that accepting an offer of an additional test is not equivalent to affirmatively requesting the test, such a conclusion would not serve the purposes of WIS. STAT. § 343.305(4) and (5). In ***Schmidt***, we stated that the scheme whereby a law enforcement agency may select the primary test and the accused may take an additional test serves to facilitate the gathering of evidence for law enforcement and makes an additional test available to verify or challenge the results of the first test. ***Schmidt***, 277 Wis. 2d 561, ¶28. Permitting law enforcement officers to preempt and supplant an accused's request for an additional test by simply offering one first would serve neither of these purposes. Moreover, once an accused has been promised an additional test, there is less incentive to ask for the test later. The accused has a justifiable expectation that he or she will receive, or at least have the opportunity to take, the additional test promised.

By the Court.—Judgment and order reversed.

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