COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3171 **Cir. Ct. No. 2004TR4929**

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

CITY OF APPLETON,

PLAINTIFF-RESPONDENT,

V.

DAVID D. STOUT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] David D. Stout appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). He contends the arresting officer impermissibly

[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.

interfered with his right to make a free choice about whether to request an alternate chemical test. He also contends the jury delivered inconsistent verdicts. Because we conclude the arresting officer complied with the informed consent law and the jury verdicts were not inconsistent, we affirm the judgment.

BACKGROUND

¶2 On April 16, 2004, officer Alex Vang pulled Stout over for speeding. While speaking with Stout, Vang smelled intoxicants. Vang then asked Stout if he had been drinking and Stout replied that he had. After having Stout perform a series of field sobriety tests, Vang placed Stout under arrest for operating a motor vehicle while intoxicated. Vang testified that he read the "Informing the Accused" form to Stout twice and that after the second reading, Stout agreed to take the test. Vang further testified that on the way to the hospital, Stout had additional questions about the test so Vang gave him the form to read. After reading the form, Stout had a question about the alternate test. Vang testified that he explained to Stout that the City of Appleton first does a blood test and then if Stout wanted to, Stout could arrange for an alternate test or he could do a Breathalyzer test which would be provided by the City. However, Stout testified that after reading the form he asked about the alternate test and Vang then replied that "we pretty much do blood here in Appleton." Stout testified that he then said, "so are you really telling me that I don't have a choice." Stout further testified that in response to his statement, Vang gave him a blank stare and no verbal response. Stout testified that he felt he did not have any options other than the blood test.

¶3 On September 14, 2004, Stout brought a motion to suppress the blood result based on the denial of his right to an alternate test. The court found

that Vang answered all of Stout's questions and did not provide any incorrect information. Therefore, the court denied Stout's motion. The matter then proceeded to a jury trial on September 23, 2005. The jury found Stout not guilty of operating a motor vehicle while intoxicated and guilty of operating a motor vehicle with a prohibited alcohol concentration.

DISCUSSION

¶4 In reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Williamson***, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). We then independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. ***Id.*** When there are inconsistencies "between witnesses' testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony." ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). An appellate court should only substitute its judgment for that of the fact finder when the fact finder relied upon evidence that was inherently or patently incredible. ***Id.***

¶5 Stout argues that since he asked about the possibility of an alternate test and Vang did not ensure that Stout understood his right, this court should suppress the blood test. At the motion hearing, Vang testified that he read Stout the Informing the Accused form twice. Stout testified that in addition to Vang reading the form to him, he had a chance to read it himself. Vang further testified that he told Stout that after he took the blood test he could arrange for his own test or he could take a Breathalyzer offered by the City. Although Stout insists that Vang did not explain the possibility of alternate testing, we will not substitute our judgment for the finder of fact's. *See* ***id.*** The court heard both Stout and Vang's

testimony and chose to believe Vang. The court could have reasonably believed Vang's testimony was more credible. Stout had ample opportunity to read and understand the "Informing the Accused" form.

¶6 Stout further argues that since he asked about the possibility of an alternate blood test, Vang had an obligation to ask him if he wanted to take an alternate test. Both Vang and Stout testified that Stout asked questions about the alternate test. The application of a statute, here WIS. STAT. § 343.305(5)(a), to a set of facts presents a question of law that we review without deference. ***Kamps v. DOR***, 2003 WI App 106, ¶11, 264 Wis. 2d 794, 663 N.W.2d 306.

¶7 An officer only has a duty to accurately provide the information on the Informing the Accused form. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 285, 542 N.W.2d 196 (Ct. App. 1995). The officer does not need to explain all of the choices on the form. ***Id.*** Whether the information has been reasonably conveyed is based on the officer's conduct and not on the subjective comprehension of the accused. ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528. An officer has a duty to provide a suspect with an alternate test only "upon his or her request." WIS. STAT. § 343.305(5)(a).

¶8 Vang provided Stout with the proper information. Vang read the form to Stout twice and even gave the form to Stout to read himself. Stout did not request an alternate test. Nothing in the statute or the case law requires that an officer ask the accused if he or she would like an alternate test. To the contrary, ***Quelle*** clearly states that an officer does not need to explain all of the choices on the Informing the Accused form. ***Id.*** at 285. Therefore, the court properly declined to suppress the results of the blood test.

¶9 Stout next contends that we must reverse the jury's verdict. Stout believes the jury's verdict is inconsistent because the jury found him guilty of operating a motor vehicle with a prohibited alcohol concentration, but not guilty of operating a motor vehicle while under the influence of an intoxicant. However, each count is regarded as a separate offense under WIS. STAT. § 346.63(1). WIS. STAT. § 346.63(1)(a) states that a person may not operate a motor vehicle while:

> Under the influence of an intoxicant … under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving[.]

Section 346.63(1)(b) only states that a person may not operate a motor vehicle while "[t]he person has a prohibited alcohol concentration." Section 346.63(1)(c) states that "[paragraphs] (a), (am), and (b) each require proof of a fact for conviction which the others do not require." Indeed, § 346.63(1)(a) requires proof that the defendant was "under the influence" while § 346.63(1)(b) merely requires proof that the defendant drove with a prohibited alcohol concentration.

¶11 The Wisconsin Supreme Court has recognized that a person may have an alcohol concentration about the legal limit and yet not be "under the influence." ***State v. Bohacheff***, 114 Wis. 2d 402, 415-16, 338 N.W.2d 466 (1983). While there is a statutory presumption that someone is "under the influence" when their blood alcohol level is above the legal limit, this presumption is permissive, not mandatory. ***State v. Raddeman***, 2000 WI App 190, ¶10, 238 Wis. 2d 628, 618 N.W.2d 258. Nothing in the statutes or the case law supports Stout's assertion that the jury's verdict is inconsistent merely because it found him guilty of driving with a prohibited alcohol concentration but not guilty of operating while under the influence. A reasonable jury could have found Stout

guilty of operating a motor vehicle with a prohibited alcohol concentration and yet not guilty of being under the influence.

By the Court.—Judgment affirmed.

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