

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 27, 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. 2006AP2229-FT**

**Cir. Ct. No. 2004TR1075**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**COUNTY OF BURNETT,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRANDON L. AYD,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Burnett County:  
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Brandon Ayd appeals a judgment of conviction for operating with a prohibited alcohol concentration, first offense. He challenges the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). Furthermore, this is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

circuit court's denial of his motion to suppress the results of the blood and breath tests. Ayd argues the test results should be suppressed because the sheriff's department did not provide him a reasonable opportunity to take a third requested test. We conclude that because the sheriff's department provided Ayd a second test, his right to an alternative test was not violated. We therefore affirm.

### **BACKGROUND**

¶2 On June 12, 2004, deputy Travis Thiex arrested Ayd for operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol concentration. Thiex advised Ayd of his informed consent rights and transported him to the Burnett County jail for processing. Ayd was permitted to call his attorney. Ayd consented to a breath test, which was performed. Ayd also requested a secondary test. Thiex and Ayd's recollection of events differ regarding what type of additional test Ayd requested. The circuit court concluded Ayd requested both a blood and a urine test. A blood test was performed. Both the blood and breath tests confirmed a blood alcohol concentration in excess of the legal limit. The circuit court concluded suppression is not required where law enforcement fails to provide a third test. After Ayd's motion to suppress and his motion for reconsideration were denied, Ayd pled no contest to operating with a prohibited blood alcohol concentration.

## DISCUSSION

¶3 Ayd argues WIS. STAT. § 343.305(5)<sup>2</sup> requires suppression of the results of his blood and breath tests because the sheriff’s department did not provide him a reasonable opportunity to take a third requested test. Construction of a statute and its application to the facts the circuit court found presents a question of law we review without deference. *State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. “When we construe a statute, we begin with the language of the statute and give it the common, ordinary, and accepted meaning....” *Id.*, ¶15. Section 343.305(5)(a) states:

The 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). (Emphasis added.)

The plain, unambiguous language of this statute requires a law enforcement agency to allow a person the opportunity to take the agency’s alternative test *or* the reasonable opportunity to take an alternative test of the person’s own choosing. In this case Ayd was given the agency’s alternative test, a blood test. Nothing in the statute requires the law enforcement agency to then provide an opportunity for a third test.

¶4 Ayd nonetheless argues that case law supports his right to a reasonable opportunity to obtain a third test. Ayd relies on *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), and *State v. Vincent*, 171 Wis. 2d

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<sup>2</sup> Ayd actually cites WIS. STAT. § 343.305(4) in his brief. However, the statute which governs administering additional tests is § 343.305(5). This is the statute analyzed in the cases Ayd cites and which Ayd cited in his motion for reconsideration.

124, 490 N.W.2d 761 (Ct. App. 1992), to support his argument. Both cases are factually distinct from Ayd's case.

¶5 In *Renard*, 123 Wis. 2d at 459-60, police performed a blood test but did not perform a Breathalyzer test which Renard requested. The court concluded:

The duty to perform *the* requested additional test became mandatory after Renard submitted to a blood test. The circuit court must strictly enforce the statutory right to *an* additional test....

... Here the legislature requires the opportunity for *an* alternative test, which our supreme court has said is an assurance of due process.... [W]e will enforce compliance with the requirement by excluding blood test results when *an* alternative test is not provided.

*Id.* at 461-62 (emphasis added). *Renard* did not address a defendant's right to a third test. Rather, it addressed the statutory right under WIS. STAT. § 343.305(5)(a) to a single alternative test.

¶6 Like *Renard*, *Vincent* involved an individual who consented to the agency's primary test and then requested an additional test. *Vincent*, 171 Wis. 2d at 126. The court interpreted WIS. STAT. § 343.305(2) as requiring a law enforcement agency to "be prepared to perform two of the three tests at its own cost." *Vincent*, 171 Wis. 2d at 127. The court then addressed § 343.305(5)(a) stating: "After being required to take the agency's primary test, the accused may then ask to take the agency's secondary test. If for any reason the accused does not want the agency's secondary test, the accused may choose and pay for his or her own test at an approved facility." *Id.* at 128. Thus, Vincent established the defendant was entitled to the agency's secondary test or a test he would pay for himself. It did not hold a defendant was entitled to both alternatives. Here, Ayd was given the agency's secondary test.

¶7 Ayd provides no cases in support of his proposition that he had a right to a third test and, because he was not afforded a third test, the results of the first two tests must be suppressed. This court has found one case with language that upon first viewing seems to support Ayd's contention that he had a right to a third test. The case does not however reach the issue of suppression. In *Schmidt*, 277 Wis. 2d 561, ¶27, the court stated:

The purpose of permitting an accused to take additional tests ... is ... to afford the accused the opportunity to verify or challenge the results of the first test....

The legislature has also chosen to lessen the burden of additional tests on law enforcement agencies by requiring an agency to provide at its expense only the test it has chosen to make available as a second test; if the accused wishes either a *third* test or a second test that is not made available by the agency, the accused must pay for that and make those arrangements. (Emphasis added.)

However, *Schmidt* involved an individual's request for a second test, not a third test. Therefore, the court's statement referencing a right to a third test went beyond the facts of the case and is nonbinding dictum. See *State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996) ("Dicta is a statement ... in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it.").

¶8 By providing Ayd with a second test, law enforcement afforded him the right to challenge the results of the first test and complied with WIS. STAT. § 343.305(5)(a). The blood and breath test results were therefore properly admitted.

*By the Court.*—Judgment affirmed.

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

