COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1745-CR **Cir. Ct. No. 2005CT382**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JACOB J. PAUL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Reversed and cause remanded with directions.*

¶1 VERGERONT, J.[1] The State of Wisconsin appeals the circuit court's order suppressing the results of chemical tests performed on the blood drawn from Jacob Paul after he was arrested for operating a motor vehicle while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

under the influence of an intoxicant (OWI).[2] The circuit court determined that the additional test that a law enforcement officer must offer under WIS. STAT. § 343.305(5)(a), if the accused makes a request for an additional test, must be a different type of test than the first test. Since the law enforcement officer in this case performed a blood test as a first test and another blood test when Paul requested an additional test, the court concluded the officer did not comply with the statute. The court further concluded that under ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), Paul was entitled to suppression of the results of both blood tests because of this noncompliance with the statute.

¶2 We conclude that, even if offering the same test as an additional test did not comply with the statute, that in itself does not entitle Paul to suppression of the blood test results. Because Paul does not argue that there is any other basis for suppressing the blood test results, we reverse the circuit court's order and remand for further proceedings consistent with this opinion.

¶3 The parties stipulated to the following facts for purposes of Paul's motion to suppress the blood test results. Officer Pat Drury of the Cambria Police Department arrested Paul for OWI and took him to the hospital. He read him the Informing the Accused form[3] and Paul agreed to take the blood test as requested by the officer and that test was performed. Paul then requested the additional test

[2] The complaint charged him with OWI, fourth offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(b), fourth offense.

[3] WISCONSIN STAT. § 343.305(4) provides that when an officer requests a chemical test specimen of blood, breath, or urine, the officer must read certain information to the accused.

as the form advised him that he could do.[4] The Cambria Police Department's additional test was a blood test and the officer performed another blood test using a separate kit, approximately four minutes after the first test was performed. The Cambria Police Department and the officer would have been unable at that time to do a urine or a breath test. The blood samples were analyzed independently and the samples are currently stored at the State Laboratory of Hygiene. There is no dispute that there was reasonable suspicion for the stop and probable cause for the arrest.

¶4 Paul moved to suppress the results of the blood tests on the grounds that WIS. STAT. § 343.305(5)(a) requires the additional test to be a different test than the first test. Section 343.305(5)(a) provides:

> **(5)** ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). 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). If the person has not been requested to provide a sample for a test under sub. (3)(a), (am), or (ar), the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test specified under sub. (3)(a), (am), or (ar). The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3)(a), (am), or (ar). If a person requests the agency to

[4] Although WIS. STAT. § 343.305(4)(a)-(5)(a) use the term "alternative test," the term does not mean the accused has a right to choose a test instead of the one the officer first asks him or her to take; it means the accused has the right to a test in addition to that first test. ***State v. Schmidt***, 2004 WI App 235, ¶11, 277 Wis. 2d 561, 691 N.W.2d 379. The case law sometimes refers to this "alternative test" as the "second" test or "additional test." ***Id.*** We use the term "additional test" in this opinion.

> administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform a test under sub. (3)(a), (am), or (ar) that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

The State opposed the motion on the grounds that the statute does not require that the additional test be a different type of test and that an additional test of the same type performs the intended function, which is to make sure that the results of the first test are accurate. In the alternative, the State argued that, even if the statute requires that a urine or breath test be offered as the additional test in this case, the results of the blood tests are admissible under ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), because both blood draws were reasonable, they were done in a reasonable manner, and there were exigent circumstances. The circuit court agreed with Paul that the statute requires that the additional test be a different type than the first test. The court also concluded that ***Renard*** compelled suppression as a remedy.

¶5 On appeal, the State renews its arguments that the statute does not require that the additional test be a different type of test and that, even if the statute does, the blood tests are admissible under ***Bohling***. We asked for supplemental briefing in an order dated February 7, 2007, on the following issues:

> Assuming that there was a statutory violation in this case because the alternative or additional test was a blood test like the first, is suppression of both tests, or either tests, required? If not required is suppression permissible? We direct the parties attention to ***State v. Fahey***, 2005 WI App 171, footnote 3, 285 Wis. 2d 679, 702 N.W.2d 400, and to the cases cited in that footnote, particularly ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987) and ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528. The parties should address these cases as well as any others relevant to the issues.

The State's supplemental brief was due March 9, 2007, and Paul's brief was due March 30, 2007. The State timely filed its supplemental brief but Paul has not filed his brief. He was advised by notice on April 12, 2007 that his brief was delinquent and he should file it within five days or request an extension, and if he did neither the court could choose to summarily decide the case. We therefore proceed to decide the issues raised in our order for supplemental briefing based on the briefs the parties have filed and without the benefit of a supplement brief from Paul.

¶6 In ***Renard***, 123 Wis. 2d at 460, after a blood sample was drawn from the accused at the hospital, the officer left without providing an additional test even though the accused had requested a breathalyzer test in addition to the blood test. We affirmed the circuit court's suppression of the blood test results. ***Id.*** at 462. We stated: "Denial of an additional chemical test effectively prevented discovery of material evidence relating to the prior test. When an accused is denied a statutory right to discover evidence relating to a chemical test, the proper sanction is suppression of the test results."[5] ***Id.*** at 461 (citations omitted).

¶7 In ***State v. McCrossen***, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986), the supreme court characterized ***Renard*** as concluding that suppression of the first test was an appropriate sanction for violating the accused's statutory right to an additional test. The ***McCrossen*** court did not decide whether this was a correct conclusion because it addressed a different issue: where the circuit court had suppressed the results of the first test, did the State's failure to provide an

[5] The State argues that ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), is distinguishable from this case because the second blood test here provided evidence relating to the first test. We need not decide whether this distinction makes ***Renard*** inapplicable.

additional test violate the accused's right to due process and entitle her to dismissal of the charge. 129 Wis. 2d at 288. The court held it did not. ***Id.*** at 289.

¶8 The next relevant case is ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). There the accused consented to the officer's request for a blood sample, but the officer did not advise the accused of the statutory right to an additional test. ***Id.*** at 43-44. The supreme court held that the circuit court erred in suppressing the blood test results because of noncompliance with the statute. ***Id.*** at 41. The supreme court concluded that "noncompliance with the procedure set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle." ***Id.*** The court explained that the implied consent law was designed to

> facilitate, not impede, the gathering of chemical evidence in order to remove drunk drivers from the roads. It is not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood or urine. It does not, however, prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the constitutionally obtained evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose.

Id. The court also stated:

> [E]ven though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats. [now sec. 343.305(4)], prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.

Id. at 51.

¶9 While the constitutionality of the blood draw was not at issue in ***Zielke***, it was in ***Bohling***. There the supreme court held that the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw:

> Consequently, a warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Bohling, 173 Wis. 2d at 533-34 (footnote omitted).

¶10 Finally, in ***State v. Piddington***, 2001 WI 24, ¶1, 241 Wis. 2d 754, 623 N.W.2d 528, the supreme court concluded that the officer used reasonable means to reasonably convey the implied consent warnings to the deaf accused. The court then stated that, even if the officer did not do so, "[the accused] would not necessarily be entitled to suppression of the test results." ***Id.***, ¶34. The court followed this statement with the second paragraph from ***Zielke*** quoted *supra* at paragraph 8.

¶11 The State argues that each of the four criteria in ***Bohling*** were met and thus the officer could have taken the blood draws without regard to the requirements of the statute or the Informing the Accused form. Paul does not dispute that the criteria in ***Bohling*** are met on the facts of this case. Indeed, in his responsive brief Paul does not address the State's argument under ***Bohling***, which is why we asked for supplemental briefing. We take Paul's failure to refute the

State's argument based on ***Bohling*** as a concession that the State's argument on this point is correct. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 525 N.W.2d 99 (Ct. App. 1994).

¶12 The State also argues in its supplemental brief that, based on ***Zielke*** and ***Piddington***, because the blood tests were constitutionally obtained, they are not suppressible solely because of noncompliance with the implied consent statute. We take the absence of a response by Paul as a concession on this point as well.

¶13 In short, the State has presented a persuasive argument that supreme court decisions since ***Renard*** establish that, if the blood tests are constitutionally permissible, any failure to comply with the informed consent statute by giving an additional test that is not a blood test does not result in suppression of the tests. In the absence of opposing argument by Paul on this point, and in the absence of an argument that one or both of the tests was not constitutional under ***Bohling***, we conclude the State is entitled to reversal of the circuit court's suppression order. We therefore reverse and remand for further proceedings consistent with this decision.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.