COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2667-CR **Cir. Ct. No. 00-CT-535**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE L. CARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Bruce L. Carson appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b). Carson pled no

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

contest to the charge following the trial court's denial of his motion to suppress evidence of his blood test results obtained pursuant to the Implied Consent Law, WIS. STAT. § 343.305. On appeal, Carson challenges the trial court's denial of his motion to suppress on three grounds: (1) he was improperly denied an alternate test as mandated by § 343.305; (2) the testimony of a defense witness should have been allowed under the excited utterance exception to the hearsay rule, pursuant to WIS. STAT. § 908.03(2); and (3) the evidence of the blood test results should not have been admitted in evidence because the "chain of custody" of the blood vials was inadequate. We reject Carson's arguments and affirm the judgment.[2]

FACTS

¶2 We take the facts from the evidence presented at the motion to suppress hearing. At approximately 10:11 p.m. on July 2, 2000, Deputy Chris Peck of the Kenosha County Sheriff's Department was dispatched to an accident in the vicinity of Highway 142 and County Highway X in Kenosha county. Upon arrival at the scene, Peck observed that a vehicle had struck a telephone pole. Peck made contact with Carson, the driver, and observed that his "eyes were red and glassy," his "breath smelled of intoxicants," and his "speech was slurred." According to Peck, Carson also claimed injury to his right forearm. Carson

[2] Carson brings this appeal under WIS. STAT. § 971.31(10), which allows for appellate review of an order denying a motion to suppress despite a defendant's plea of guilty. Relying on the concurring opinion in ***State v. Gil***, 208 Wis. 2d 531, 547, 561 N.W.2d 760 (Ct. App. 1997), the State argues that the statute applies only to suppression motions based on constitutional grounds or governmental misconduct. Because Carson's challenge is based solely on an alleged statutory violation of WIS. STAT. § 343.305, the State reasons that Carson lacks standing to obtain appellate review. We need not address this procedural issue since we reject Carson's substantive issues on the merits.

admitted that he had been drinking and complied with Peck's request that he recite the alphabet. He failed the test, and Peck arrested him.

¶3 Deputies David Beth and Michael Whetstone also responded to the scene. Peck advised these deputies that Carson was intoxicated and should receive a blood test. Carson was transported to Aurora Hospital to receive medical treatment for his injuries. Whetstone and Beth followed. After conversing with Carson for a few minutes at the hospital, Whetstone issued Carson a citation for OWI and read him the Informing the Accused form. Whetstone testified that Carson "uttered" that he would like a breath test when Whetstone recited that part of the form referring to a sample of breath, blood or urine.

¶4 Whetstone completed reading the form and then asked Carson if he would submit to an evidentiary sample of his blood. Carson stated again that he wanted a breath test. Beth informed Carson that the blood test was the primary test and if Carson wanted to do a breath test later on, he could invoke that right after submitting to the blood test. Carson consented to the blood test.

¶5 As a nurse took the kit out of the packing, the seal strips that are to be placed over the top of the vials to protect against tampering were torn. Therefore, after the samples were taken, the nurse placed the label where the seal strip would have been placed. The nurse then put the blood samples in the kit's plastic bag and handed it to Whetstone. Whetstone placed the samples in the styrofoam container in which the vials originally came and logged them into evidence when he arrived back at the jail.

¶6 According to Peck and Whetstone, Carson never asked for a breath test after submitting to the blood test. Carson, however, testified that he did. In addition, he stated that while riding from the hospital to the jail with Beth and

Whetstone, he again requested a breath test. According to Carson, the deputies told him the blood test was all they needed. Carson explained at the suppression hearing that he wanted a breath test because he wanted to see what the results would have been "then and there," rather than waiting to get the results of the blood test.

¶7 Carson also presented Don Row as a witness at the suppression hearing. Row arrived at the jail to pick up Carson. Row testified that Carson was still upset about not receiving a breath test when he encountered Carson at the jail about four hours after the accident. The State objected to Row's testimony on hearsay grounds. Carson responded that Row's testimony was admissible under the excited utterance exception to the hearsay rule, WIS. STAT. § 908.03(2). The court sustained the State's objection. At the close of the evidence, the court denied Carson's motion to suppress the blood test results. Carson later entered a no contest plea, and he takes this appeal.

DISCUSSION

The Alternate Test and Row's Testimony

The Alternate Test

¶8 The Implied Consent Law was designed to facilitate the collection of evidence against drunk drivers in order to remove them from the state's highways by securing convictions, not to enhance the rights of alleged drunk drivers. ***State v. Gibson***, 2001 WI App 71, ¶7, 242 Wis. 2d 267, 626 N.W.2d 73, *review denied*, 2001 WI 88, 246 Wis. 2d 168, 630 N.W.2d 221 (Wis. May 8, 2001) (No. 00-2399-CR). This law imposes three obligations on law enforcement: (1) to provide a primary test at no charge to the suspect to determine the presence of alcohol or

other intoxicants in his or her breath, blood or urine; (2) to use reasonable diligence in offering and providing a second alternate test of its own choice at no charge to the suspect; and (3) to afford the suspect a reasonable opportunity to obtain a third test, at the suspect's expense. ***State v. Stary***, 187 Wis. 2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994). The suspect has no statutory right to choose what test he or she would prefer to take; rather, law enforcement may designate which of the three tests to administer as its primary test. *See* ***id***. at 269-70. However, once a suspect consents to the primary test, he or she is permitted to take an alternate test upon request. ***Id***. at 270. The purpose of the alternate test is to give the suspect an opportunity to verify or challenge the results of the primary test. ***State v. McCrossen***, 129 Wis. 2d 277, 288, 385 N.W.2d 161 (1986). Suppression of a blood test is an appropriate sanction for failure to comply with the requirements of WIS. STAT. § 343.305(5). ***State v. Renard***, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985).

¶9 The only evidence that Carson requested a breath test after submitting to the blood test was his own testimony. Carson's testimony conflicted with the testimony of Beth and Whetstone, who both testified that Carson began asking for the breath test before being advised of his right to an alternate test. In response, Carson was advised that the blood test was the primary test and that if he still wanted a breath test after submitting to the blood test, he could invoke that right. According to the deputies, Carson never asked for the breath test again.

¶10 This conflict in the evidence required the trial court, in its role as the fact finder, to assess the credibility of the witnesses. The credibility of the witnesses and the weight to be attached to that evidence is a matter uniquely within the discretion of the finder of fact. ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). We uphold a trial court's findings of fact unless

they are clearly erroneous. WIS. STAT. § 805.17(2). Given the trial court's unique advantage over us in assessing the credibility of the witnesses, and given that there is nothing in the record to indicate that the trial court's preference of the deputies' testimony over Carson's is clearly erroneous, we readily uphold the trial court's rejection of Carson's testimony.

Row's Testimony

¶11 Carson argues that the trial court erred in refusing to admit the testimony of Row as an "excited utterance" under WIS. STAT. § 908.03(2). The excited utterance exception to the hearsay rule has three requirements:

> First, there must be a "startling event or condition." Second, the declarant must make an out-of-court statement that relates to the startling event or condition. Finally, the related statement must be made while the declarant is still "under the stress of excitement caused by the event or condition."

State v. Huntington, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998) (citations omitted).

¶12 The decision whether to admit an out-of-court statement under a hearsay exception is within the trial court's discretion. ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). The trial court's determination will not be disturbed "unless the record shows that the ruling was manifestly wrong and an abuse of discretion." ***Id.*** (Citing ***Muller v. State***, 94 Wis. 2d 450, 289 N.W.2d 570 (1980)). Where error is claimed as a result of the exclusion of evidence, an offer of proof must be made in the trial court as a condition precedent to the review of any alleged error. ***State v. Haynes***, 118 Wis. 2d 21, 28, 345 N.W.2d 892 (Ct. App. 1984).

¶13 In this case, Row testified that Carson was angry and upset because he had not been given the breath test. The State objected to this testimony on hearsay grounds. Carson responded that the testimony was admissible under the excited utterance exception to the hearsay rule. The trial court sustained the State's objection. Carson then presented additional testimony from Row attempting to establish an evidentiary predicate for the excited utterance exception. Despite this added evidence, the trial court confirmed its initial ruling. Faced with this adverse ruling, Carson did not offer any further testimony from Row.

¶14 We will assume, without deciding, that the trial court's ruling was error. However, any error was of no consequence because there is nothing in Row's limited testimony which supported Carson's claim that he asked for the breath test *after* he submitted to the blood test. More importantly, Carson did not make any offer of proof indicating that Row was prepared to address this critical question.[3] An offer of proof serves two purposes: first, it provides the trial court with a more adequate basis for an evidentiary ruling; and second, it establishes a meaningful record for appellate review. ***State v. Dodson***, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998). All the record reveals is that Row was prepared to testify that Carson was upset and angry about not receiving a breath test. But that putative testimony did not contradict the deputies' testimony that Carson never reasserted a request for a breath test *after* he had submitted to the blood test. Any error in the

[3] In response to the trial court's ruling, Carson did attempt to lay a foundation for the excited utterance exception to the hearsay rule. But he never made an offer of proof as to the substance of Row's testimony.

trial court's ruling was harmless and of no consequence to the key issue at the suppression hearing.[4]

Chain of Custody of the Blood Vials

¶15 Carson also challenges the admissibility of the blood test results on the basis of lack of authentication of the blood samples. Specifically, Carson claims a break in the chain of custody of the samples. Carson bases this argument on the fact that the seal strips were not placed on the blood vials, allegedly compromising the integrity of the samples.

¶16 In reviewing a trial court's evidentiary rulings, we do not consider whether we initially would have admitted the evidence; rather, we determine whether the court exercised its discretion according to accepted legal standards and the facts of the record. ***State v. Doerr***, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). The admission of evidence is a discretionary trial court decision; therefore, the ruling will not be overturned on appeal absent an erroneous exercise of that discretion. ***Id.***

¶17 An implied consent blood sample is authorized by statute, WIS. STAT. § 343.305(1), and it carries a prima facie presumption of accuracy and is statutorily admissible. ***State v. Disch***, 119 Wis. 2d 461, 476, 351 N.W.2d 492 (1984). "Any contentions that the [blood] test result is unreliable or inaccurate goes only to the weight of the evidence as a matter of defense, not to its admissibility." ***Id***. Here, the trial court ruled that the evidence demonstrated a

[4] WISCONSIN STAT. § 901.03(1) provides, in part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …."

reasonable explanation for the labels being used rather than the seal strips to protect the vials. As a result, the court determined that the handling of the samples traveled to the weight of the blood test result, not its admissibility. This ruling was eminently reasonable in light of the evidence explaining why the label was used to seal the vials. We refuse to disturb the trial court's exercise of discretion.

CONCLUSION

¶18 We uphold the trial court's credibility determination that Carson did not request an alternate test within the meaning of the Implied Consent Law. We further hold that the exclusion of Row's limited testimony was of no consequence to the matter at issue. Finally, we uphold the trial court's ruling that the integrity of the blood test samples went to the weight, not the admissibility, of the blood test results. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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