COURT OF APPEALS DECISION DATED AND FILED

August 1, 2002

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. 01-2715 **Cir. Ct. No. 00-TR-16751**

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

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

SHERMAN C. SPORLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Sherman Sporle appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

[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 unless otherwise noted.

(OMVWI), as a first offense. He claims the trial court erred in denying his motion to suppress evidence of the results of two post-arrest tests for alcohol concentration. Specifically, Sporle argues that the arresting officer failed to comply with the Implied Consent Law because the officer did not clarify whether he had requested a blood test as the agency's "alternate test" under WIS. STAT. § 343.305(5)(a), or was seeking a test from a "qualified person of his … own choosing" at "his … own expense," as also authorized by that paragraph.

¶2 We conclude that the authority Sporle cites creates no "duty to clarify" that was breached by the arresting officer in this case. Sporle gave no indication that he wanted to pay for an independent test of any kind, and we agree with the trial court that the officer reasonably interpreted Sporle's request as being for the department's "alternate test." We also conclude that the officer fulfilled his obligation to "inform the accused," and did nothing to frustrate a request on Sporle's part to obtain a third test at his own expense. We therefore affirm the judgment of conviction.

BACKGROUND

¶3 A Dane County Deputy Sheriff arrested Sporle for OMVWI and transported him to the Public Safety Building for a breath test. The deputy read Sporle the "Informing the Accused" form, which includes, among other information, the following:

> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

WIS. STAT. § 343.305(4).

¶4 After reading the form to Sporle, the deputy asked him if he would submit to an evidentiary chemical test of his breath but Sporle did not respond. At the hearing on Sporle's motions to suppress, the officer testified that the following colloquy ensued:

> Q: What happened after that?
>
> A: He requested a blood test.
>
> Q: And did you respond to that?
>
> A: I explained to him that my primary test I was requesting was that he take a breath test and again he requested that he have a blood test drawn.
>
> ….
>
> Q: Can you estimate during this period of time how many times Mr. Sporle requested a blood test?
>
> A: He requested a blood test approximately three times.
>
> Q: And each time your response was what?
>
> A: Each time I informed him that I was requesting my primary test as breath and if he submitted to the breath test, I would be happy to take him for a blood test.
>
> Q: Now, during this interchange that you were having with Mr. Sporle, did he request a urine test at any time[?]
>
> A: Yes, he did.
>
> Q: Do you recall when he requested the urine test?
>
> A: After a couple requests for blood, he then requested to have a urine test.
>
> Q: And what was your response to the request for a urine test?
>
> A: I informed him that my primary test again was breath and that if he submitted to the breath test, I would take him for a blood test and that if he wanted a urine test, that again, like the Informing the Accused says, that would be his responsibility.

> Q: …How many times did he request a urine test during this exchange?
>
> A: I believe only twice.
>
> Q: …And after he requested the urine test, did he again request a blood test?
>
> A: Yes, he did.

¶5 Sporle then submitted to a breath test which produced a result of .18 g/210L. The deputy asked Sporle "if he still wanted to go for a blood test," to which Sporle responded affirmatively. The deputy transported Sporle to a hospital where he was cooperative in submitting to a blood draw and did not again "indicate that he wanted a urine test." The deputy took the blood sample and later forwarded it for analysis, which produced a result of .234 g/100mL blood ethanol concentration.

¶6 Sporle filed several motions to suppress the results of the blood and breath tests. The court conducted an evidentiary hearing on the motions and denied them. The parties agreed to a court trial on stipulated evidence and the court convicted Sporle of OMVWI, first offense, in violation of the Dane County traffic ordinance. Sporle appeals the judgment of conviction.

ANALYSIS

¶7 Although Sporle moved to suppress the test results on several grounds, he raises only one issue on appeal. Sporle contends the arresting deputy was obligated to clarify the alleged ambiguity in his request for a blood test in order to ascertain whether he wanted the agency's "alternate test," or what Sporle labels the "additional test," i.e., a test conducted by a qualified person of his own

choosing, at his own expense.[2] *See* WIS. STAT. § 343.305(5)(a). To the extent this appeal involves an issue as to what obligations § 343.305 and case law place on an arresting officer relating to the provision of "alternate" and "additional" tests, our review is de novo. ***State v. Vincent***, 171 Wis. 2d 124, 127, 490 N.W.2d 761 (Ct. App. 1992). However, a trial court's finding of fact will only be set aside if it is "contrary to the great weight and clear preponderance of the evidence." ***State v. Walstad***, 119 Wis. 2d 483, 514, 351 N.W.2d 469 (1984).

¶8 We concluded in ***State v. Stary***, 187 Wis. 2d 266, 522 N.W.2d 32 (Ct. App. 1994), that WIS. STAT. § 343.305(5) "imposes three obligations on law enforcement":

> (1) to provide a primary test at no charge to the suspect; (2) to use reasonable diligence in offering and providing a second alternate test of its 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.

Id. at 270. Sporle cites ***Stary*** and ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985) for the proposition that, when an arrestee makes a request for

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[2] In his brief, Sporle is highly critical of the deputy for not knowing the difference between an "alternate" and an "additional" test. We note first that the use of the term "additional test" to refer to the test performed by a person of the arrestee's choosing, at his or her own expense, originates with Sporle, not with the statute. *See* WIS. STAT. § 343.305(5). The statute employs the word "additional" only in the subsection heading: "ADMINISTERING THE TEST; ADDITIONAL TESTS." ***Id***. (emphasis added). And, by referring to "additional tests," the heading seemingly refers to *both* the "alternative" agency test and a test administered by a qualified person of the arrestee's choosing, at the arrestee's expense. We thus do not believe the deputy should be faulted for being unfamiliar with Sporle's terminology.

Moreover, we agree with the trial court's finding that the deputy clearly understood that Sporle was entitled to both the agency's alternate test and one administered by a person of his choosing at his expense. The deputy testified that in response to Sporle's request for a urine test, he told him "that if he submitted to the breath test, I would take him for a blood test and that if he wanted a urine test, that again, like the Informing the Accused says, that would be his responsibility."

a test beyond the agency's "primary" test, the arresting officer is under a duty to resolve any ambiguity regarding what is being requested: the agency's "alternate test," or one conducted by a person of the arrestee's choosing, at the arrestee's expense. We are unable to divine such a rule from the cited cases, however, and neither case is helpful to Sporle on the present facts.

¶9 After the arresting officer in ***Stary*** administered the agency's primary test (breath) to the defendant, the officer offered several times to take the defendant to a hospital to obtain a blood test at the police department's expense, but Stary declined the offer. ***Stary***, 187 Wis. 2d at 268. After the officer released Stary from custody, a nurse telephoned the officer explaining that Stary was at a medical center requesting a blood test. ***Id***. The nurse wanted to know if the police department would pay for the test, and the officer replied that it would not. ***Id***. The trial court accepted Stary's argument that he was denied his statutory right to the department's alternate test and ordered the breath test result suppressed. ***Id***. at 267.

¶10 We reversed the order, however, concluding that "because the officer diligently offered Stary an alternate test that Stary unequivocally refused, law enforcement was under no further obligation to provide or pay for Stary's blood test." ***Id***. at 272. We concluded further that after Stary refused the agency's alternate test, the officer "was only required not to frustrate Stary's attempts to obtain and pay for his own alternate test." ***Id***. There is no discussion in ***Stary*** of ambiguity regarding the type of test requested, and unlike the defendant in ***Stary***, Sporle *was* provided the arresting department's alternate test at its expense. The case is of no assistance to us on the present facts.

¶11 The defendant in ***Renard*** was arrested for OMVWI at a hospital while he was being treated for injuries sustained in a car accident. ***Renard***, 123 Wis. 2d at 460. Because Renard was already at the hospital, the officer requested that he submit to a blood test. ***Id***. Renard requested that a breathalyzer test be performed but was eventually persuaded by the officer to consent to a blood test. ***Id***. Even after consenting, however, Renard continued to request a breath test. ***Id***. After the blood sample was drawn, the officer left the hospital without arranging for a breath test, and without inquiring as to when Renard would be discharged so that a breath test might be administered. ***Id***. The hospital released Renard shortly after the officer left and within two hours of the accident. ***Id***. We concluded that the "duty to perform the requested additional test became mandatory after Renard submitted to a blood test," and we affirmed the trial court's suppression of the blood test result. ***Id***. at 461. Again, however, there is no discussion in ***Renard*** regarding ambiguous requests, and unlike Renard, Sporle obtained the second test he requested.

¶12 Sporle seems to be arguing that getting a second test, provided and paid for by the department, is not enough because what he really wanted was to have a test administered by a person of his choosing, at his own expense, and that it was the officer's duty to ascertain that that is what he really wanted. The record belies Sporle's claim, however. He did not testify at the suppression hearing, and the deputy's account of their colloquy regarding available tests is thus undisputed. As the trial court noted, nowhere in the record is there any indication that Sporle expressed a desire for a test performed by a qualified person of his choosing, or "that he offered to pay for the test or asked to have the blood samples taken to a lab of his choosing for testing."

¶13 In short, we conclude that the record does not demonstrate any ambiguity in what Sporle said he wanted. He wanted a blood test, and he got one. Sporle's request for a urine test, made prior to his taking either the breath or blood tests and not thereafter renewed, appears to have been an attempt to avoid the breath test, which was plainly a test Sporle did not want to perform. Once the deputy convinced Sporle that he could have a blood test after submitting to the breath test (and told him that he could also have a third test at his own expense), Sporle acquiesced to the breath test, obtained his desired blood test, and made no requests for further testing. We agree with the trial court that the deputy's perception of what Sporle requested was reasonable.

¶14 We note in closing that we have previously explained that an officer is obligated under the Implied Consent Law to provide only the information on the "Informing the Accused" form, and has no duty to go beyond it by giving additional explanations or attempting to assess a driver's perception of the information she or he has been given. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 284-85, 542 N.W.2d 196 (Ct. App. 1995). The deputy in this case fulfilled his obligation by properly informing Sporle of his statutory right to additional testing beyond the agency's primary test. Moreover, with respect to the right to obtain a test at one's own expense from a qualified person of one's own choosing, we have held that a law enforcement agency's responsibility "is limited to *not frustrating* the accused's request for his or her own test." ***Vincent***, 171 Wis. 2d at 128. On the present record, there is no basis to conclude the deputy frustrated a

request for testing beyond the primary and alternative test Sporle was given. He requested nothing more than what he received.[3]

CONCLUSION

¶15 For the above stated reasons, 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.

[3] The trial court expressed the point well in the conclusion of its written decision on Sporle's motion: "By not indicating any different understanding and by cooperating with the proposed blood testing procedure, Mr. Sporle was accepting the interpretation being offered [by the deputy]…. No facts, other than perhaps the defendant's own continued misunderstanding of what he was requesting, show any agency action that *frustrated* this defendant's request, if any, for an additional test."