

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2010

A. John Voelker
Acting 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. 2010AP1124-FT

Cir. Ct. Nos. 2009TR9724
2009TR9725

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF PLEASANT PRAIRIE,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. BRUNELLO, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
WILBUR W. WARREN III, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Robert J. Brunello, Jr., appeals from an order denying his motion to suppress chemical test results. The trial court denied his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

suppression motion after determining Brunello's early request for a blood test expressed his preference for the primary test rather than a demand for a blood test as the alternative test permitted by WIS. STAT. § 343.305(5). We conclude that the trial court was correct; Brunello's statutory right to an alternative test was not violated. We uphold the trial court's denial of Brunello's motion to suppress and affirm the judgment of conviction.

¶2 After Brunello was arrested on August 22, 2009, for operating a motor vehicle while intoxicated (OWI), he was taken to the Village of Pleasant Prairie police station to be booked and to be offered a breath test. Brunello was in the booking room, along with Officer Aaron Schaffer and Sergeant Peter Jung, when Schaffer read the Informing the Accused form to Brunello as required by WIS. STAT. § 343.305(4). This form is required to be read when an accused is requested to submit to a chemical test. *Id.* The form explains, among other things, that the officer wants to take samples of the accused's breath, blood or urine to determine the concentration of alcohol in the accused's system. *Id.* The form also states: "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."

¶3 After the form was read to Brunello, he was asked if he would submit to a breath test and he stated that he wanted a blood test. Schaffer told him that the Village's primary test was the breath test. Brunello ultimately submitted to a breath test and never renewed his request for a blood test.

¶4 Brunello moved the court to suppress the chemical breath test results because he was denied his right to an alternative test under WIS. STAT.

§ 343.305(5). Schaffer, Jung and Brunello all testified at the hearing. The police officers testified that while Brunello demanded a blood test after having the Informing the Accused form read to him, he did not renew that request following the breath test. Brunello testified, “I just said I wanted a blood test, that I would rather have a blood test.” The court found the officers’ testimony to be more credible than Brunello’s and concluded that Brunello’s request for a blood test was done “as a preference and not as a request to call into question the results of any first test which as of that point had not yet been given.” Brunello appeals.

¶5 Ordinarily, a trial court’s decision to admit or exclude evidence is a discretionary determination which will be upheld on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *State v. Johnson*, 181 Wis. 2d 470, 484, 510 N.W.2d 811 (Ct. App. 1993). However, in this case, the fundamental issue is whether the trial court admitted evidence of Brunello’s breath test in accord with the implied consent law. Thus, the inquiry is whether the court properly construed and applied the implied consent law to the facts of this case. This presents a question of law for our independent review. *See State v. Vincent*, 171 Wis. 2d 124, 127, 490 N.W.2d 761 (Ct. App. 1992).

¶6 The trial court had to resolve conflicting testimony and it held:

I think it would be inconsistent with the procedures of the department with their history in dealing with this to totally discount the officers’ testimony who at that point were sober and unimpaired presumably so that they could make these judgments with respect to how the case should be handled and whether a sufficient request for additional testing had been made.

We are bound by the court’s assignment of credibility to the conflicting testimony, *see State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985), and

accept the court's conclusion that Brunello did not renew his request for a blood test after completing the primary test.

¶7 Brunello contends that Schaffer was required to use reasonable diligence to honor his request for a blood test and, because he did not, the court erred in not suppressing the results. He also argues that the court erroneously concluded that he was stating a preference for the initial test and not making a demand for an alternative test.

¶8 WISCONSIN STAT. § 343.305(2) requires a law enforcement agency to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other substances in the breath, blood or urine of a suspected intoxicated driver. *State v. Sary*, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). A police department may designate one of those two as its primary test. *Id.* “Once a person consents to the primary test requested by law enforcement, he or she is permitted, at his or her request, an alternate test the agency chooses or, alternatively, a reasonable opportunity to a test of his or her choice [at his or her own expense].” *Id.* at 270; *see also* § 343.305(5)(a).

¶9 Whether a police officer has made a reasonably diligent effort to comply with the statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case. *Sary*, 187 Wis. 2d at 271. If the suspect is denied the statutory right to an additional test, the primary test must be suppressed. *State v. McCrossen*, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986). The question we must answer is whether Brunello's request for a blood test made before he submitted to the breath test was adequate to invoke his right to a second or alternate test.

¶10 An OWI suspect's request for an alternate test must be evaluated under a reasonableness standard and in light of the totality of the circumstances. This is already the law when we assess a police officer's response to a suspect's request for an alternate test. *See* WIS. STAT. § 343.305(5)(a). "Whether the officer made a reasonably diligent effort to comply with his [or her] statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case." *Stary*, 187 Wis. 2d at 271. We see no reason why the same standard should not apply when we assess the actions of an OWI suspect in an implied consent setting. That approach assures that the judicial application of the implied consent law is uniform whether we are gauging the conduct of the police or the suspect. Moreover, it recognizes that the implied consent law is applied and interpreted in very fluid, real-life situations by both police officers and OWI suspects, neither of whom is a legal technician. Under this approach, we avoid artificial and strained results that an overly rigid interpretation would sometimes produce.

¶11 Under the totality of the circumstances, we conclude that Brunello's statement—that he wanted a blood test—was not a request for an alternate test but a statement of his preference for the first test. The inquiry was made when Schaffer was explaining Brunello's obligation to submit to a chemical test under the implied consent law. Schaffer responded to Brunello's request by explaining that the Pleasant Prairie police department had designated the breath test as the primary test and the blood test as the alternate test. When it appeared that Brunello was adamant about wanting the blood test first, Schaffer took the time to explain to him that the blood test was not offered as the first test. After this explanation, Brunello consented to the breath test. The trial court drew the reasonable inference that Brunello was attempting to designate the primary test

that he would submit to; this is an inference we are bound by. A reference to a blood test when the officer is reading the Informing the Accused form cannot be elevated to a request for an alternate test when, after completing the breath test, Brunello never made a request for an alternate chemical test.

By the Court.—Judgment affirmed.

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

