COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1914

Cir. Ct. Nos. 01-TR-6905
01-TR-7302

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

V.

JAMES I. KRAUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] James I. Krause appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while under the influence of

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

an intoxicant as a first offense. Krause argues that his conviction should be overturned because (1) the result of his blood test should have been suppressed because the arresting officer did not comply with his request for an alternative test, and (2) the trial court erroneously exercised its discretion in excluding the result of his preliminary breath test (PBT). We disagree with both arguments and affirm.

Background

¶2 Krause was arrested for drunk driving at 3:05 a.m. on September 16, 2001. Preceding his arrest, Krause was administered a PBT in the field. Pursuant to the informed consent law, Krause consented to a test of his blood for alcohol content. After his blood was drawn, Krause requested an alternative test. The officer began preparations to provide Krause with an alternative Intoxilyzer breath test, which included waiting for twenty minutes before administering the test. During the twenty-minute waiting period, Krause asked if he could "have the second test," referring to the one he had taken "on the road." For clarification, an officer showed Krause a PBT device, and Krause agreed that he was requesting a PBT. Krause took the PBT, and was shown the result: .14%. Krause then said that "he did not want any other test and that he would wait for the blood [test] results." In response, the officer asked Krause if Krause was sure he did not want the "alternative" test, and Krause agreed that he "didn't want no further test." At no time did the officer explain the difference between a PBT and a breath test administered via the Intoxilyzer. It is undisputed that an Intoxilyzer result has greater evidentiary value than a PBT result. Krause's blood test revealed an alcohol level of .202%.

¶3 Krause moved to exclude the result of the blood test on the grounds that he was denied his right to an alternative chemical test. Krause also filed a

motion in limine to admit the .14 PBT result into evidence.[2] At the hearing on the motion in limine, Krause called a chemist from the Wisconsin Department of Transportation to testify as an expert about the differences between a blood test, a breath test taken with an Intoxilyzer, and a breath test taken with a PBT.

¶4 Krause's expert's testimony included the following. A blood test and an Intoxilyzer test are equivalent in reliability. A PBT result is less reliable than an Intoxilyzer test or a blood test because a PBT lacks a safeguard to ensure that the subject provides a sufficient breath sample, and because a PBT is not tested for accuracy immediately before and immediately after the test. Under ideal conditions, a PBT device would perform the same as the Intoxilyzer. Ideal conditions include (1) maintaining the PBT device at a normal room temperature, (2) a subject who is properly coached, willing, and able to provide a full breath sample, and (3) testing the PBT device for accuracy immediately preceding and immediately following the test. The expert testified that a breath test administered under ideal conditions yields a result 10% lower than a blood test, and thus she would expect a blood test result of .20 to have a corresponding breath test result of about .18. When the expert was asked a hypothetical question—in which a PBT yields a .14 result and a blood test produces a .20 result from the same subject—the expert answered that the blood test result would be more reliable, and that the PBT result would not put the accuracy of the blood test in doubt. Moreover, the expert said it is not unusual to receive a blood test result of .20 and a PBT result of .14 from the same subject.

[2] The motion in limine also requested that the prosecution not mark or identify police reports without proper foundation and that witnesses be sequestered during trial. These requests are not at issue in this case.

¶5 The trial court denied both the motion for admissibility of the second PBT result and suppression of the blood test result. Following a jury trial, Krause was convicted of operating a motor vehicle while under the influence of an intoxicant as a first offense.

Discussion

¶6 Krause argues that the officer's failure to provide him with an Intoxilyzer test denied him his statutory right to an alternative test, and therefore his motion to exclude the result of his blood test was erroneously denied. A person who consents to a chemical test under WIS. STAT. § 343.305 is entitled to an alternative test upon request. *See* WIS. STAT. § 343.305(5)(a).[3] Once a request has been made, officers have a duty to make "a diligent effort … to comply with the demand." ***State v. Renard***, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985). When a defendant challenges an officer's performance of his or her duties under the implied consent law, the defendant must make two showings: "[O]ne, that the officer misstated the warnings, or otherwise misinformed the driver, and two, that the officer's misconduct impacted his or her ability to make the choice available under the law." ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 278, 542 N.W.2d 196 (Ct. App. 1995).

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[3] WISCONSIN STAT. § 343.305(5)(a) reads, in relevant part:

> 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).… The agency shall comply with a request made in accordance with this paragraph.

¶7 The application of WIS. STAT. § 343.305(5) to the undisputed facts is a question of law which we review de novo. ***Trustees of Ind. Univ. v. Town of Rhine***, 170 Wis. 2d 293, 298-99, 488 N.W.2d 128 (Ct. App. 1992). "Whether the officer made a reasonably diligent effort to comply with his statutory obligations is an inquiry that must consider the totality of circumstances as they exist in each case." ***State v. Stary***, 187 Wis. 2d 266, 271, 522 N.W.2d 32 (Ct. App. 1994).

¶8 Krause argues that "[o]nce [he] requested an alternate test of his breath, the officer had a mandatory obligation to provide an alternative test." Krause contends that the officer's failure to explain the difference between the PBT and the Intoxilyzer test "discourage[d] Krause from following through on his request" for an alternative test and, thus, effectively denied him his right to an alternative test. We disagree.

¶9 Krause does not argue that the officer misstated any information. Rather, Krause complains that the failure to clarify the legal distinction between PBT and Intoxilyzer tests is akin to misinformation. However, "an officer's only duty under the implied consent law is to accurately deliver the information to the driver; an officer need not explain all of the choices (and resulting consequences) embodied within these statutes." ***Quelle***, 198 Wis. 2d at 285. Here, the officer complied with Krause's request to take a PBT. The officer continued to offer Krause the alternative test, and there is no allegation that the officer was not ready and willing to provide the Intoxilyzer test. In fact, after administering the PBT, the officer asked Krause if he wanted the "alternative" test, emphasizing that Krause had not yet taken the alternative test. Krause chose to refuse the alternative test. While the officer may not actively discourage a driver from taking an alternative test, the officer has no duty to encourage a driver to take a particular test or explain the difference between tests.

¶10 Moreover, it is not clear that the officer's conduct negatively affected Krause's ability to choose whether to take the alternative test. To the extent the PBT provided Krause with additional information about the likely result of an Intoxilyzer test if Krause chose to take the Intoxilyzer, the officer was merely complying with a reasonable request. Had the result of the PBT been below .10, the PBT might have encouraged Krause to pursue the alternative test. Ultimately, Krause chose to refuse the alternative test, and we conclude that his choice was neither caused by an officer's misstatement or misinformation nor affected by the officer's conduct.

¶11 Krause also challenges the trial court's decision to exclude evidence of the second PBT result. Assuming, without deciding, that the trial court erred in excluding this evidence, Krause's argument fails because any error in this respect was harmless.

¶12 "An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. An error affects the substantial rights of the party where "'there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction.'" ***State v. Moore***, 2002 WI App 245, ¶16, __ Wis. 2d __, 653 N.W.2d 276 (quoting ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919). When determining whether error is harmless, the reviewing court considers the entire record. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶13 We conclude that the exclusion of the second PBT result does not undermine our confidence in Krause's conviction. Krause argues that the .14 PBT result casts doubt on the accuracy of the .202 blood test result because a breath test should have yielded a result closer to .18. However, the expert testimony strongly suggests otherwise. Even if the second PBT result had been admitted, Krause's expert would have testified that a blood test is more reliable than a PBT. The expert would not have questioned the accuracy of a blood test result of .20 even though the PBT provided a .14 result. The expert would have explained the PBT device's many limitations, set forth in detail in the factual summary above.

¶14 Accordingly, we conclude that the exclusion of the result of the second PBT, even if error, was harmless error.

By the Court.—Judgment affirmed.

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