

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2003

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. 02-2547-CR

Cir. Ct. No. 01-CT-2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID L. CORTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed.*

¶1 CANE, C.J.¹ David Corty appeals a judgment entered on a jury's verdict convicting him of one count of second offense operating a motor vehicle with a prohibited blood alcohol concentration. Corty argues the trial court erred

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

when it refused to suppress the results of his blood test because he requested, but was not given, an alternative test. The court found that Corty had not requested an alternative test. The trial court's conclusion was not clearly erroneous and we therefore affirm the judgment.

BACKGROUND

¶2 In December 2000, Corty was arrested in Grantsburg for drunk driving. Grantsburg police officer David Lien took Corty to the Burnett Medical Center for chemical testing. At the center, Lien read Corty the Informing the Accused form and requested Corty submit to a blood draw. Corty said he would submit if he had to, and Lien told him he needed to answer yes or no.

¶3 Corty then said he would submit to a breath test. Lien replied he could get a breath test after the blood test if he wanted, but that he was asking Corty to submit to a blood draw. After some back-and-forth discussion between Corty and Lien, Corty submitted to the blood test. Corty did not request a breath test after the draw and Lien did not give him one.

¶4 Subsequently, Corty moved to suppress the blood test results because he had been denied his right to an alternative test under WIS. STAT. § 343.305(2). Lien testified at the suppression hearing. The trial court denied the motion, finding that Corty's request for a breath test was not a request for an alternative test, but rather a request for a different initial test. A jury subsequently convicted him of second offense operating with a prohibited blood alcohol concentration. Corty appeals.

DISCUSSION

¶5 The trial court's determination that Corty did not request an alternative test is a finding of fact we do not overturn unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also State v. Renard*, 123 Wis. 2d 458, 460, 367 N.W.2d 237 (Ct. App. 1985). Corty suggests that the court erred because it should have construed his initial request for a breath test as a request for an alternative test. He contends nothing in the statute specifically requires the request to be made after the first test and that the obligation to provide the alternative test rests solely on the law enforcement officer. We disagree.

¶6 The record supports the trial court's conclusion that Corty did not request an alternative test. Lien testified that Corty repeatedly requested a breath test before the blood draw but did not make this request afterward. The court could properly conclude that Corty's requests were an attempt to persuade Lien to give him a breath test as his initial test and not a request for a second test.

¶7 Corty is correct that nothing in the statute requires a request to be made after the initial test. This did not, however, require the court to construe his request for a breath test as a request for an alternative test. Instead, the court's conclusion was consistent with both the statute's language and its purpose. WISCONSIN STAT. § 343.305(5)(a) grants the right to an alternative test to a "person who submits to the test." In addition, the Informing the Accused form tells the suspect "if you take all the required tests, you may choose to take further tests." The right to a second test does not arise until the person has completed the first test. Further, the purpose of § 343.305(5)(a) is to afford the accused the opportunity to verify or challenge the results of the first test. *See State v.*

McCrossen, 129 Wis. 2d 277, 287-88, 385 N.W.2d 161 (1986). There is nothing to challenge or verify until the first test is completed.

¶8 Certy is also correct that the obligation to provide an alternative test rests with the law enforcement officer. This obligation, however, does not arise until the person requests the alternative test. Here, Certy requested a breath test instead of the blood test that Lien said he wanted to conduct. After submitting to the blood draw, Certy did not request another test. Based on these facts, the court's conclusion that Certy only requested a different initial test and not an alternative test is not clearly erroneous.

By the Court.—Judgment affirmed.

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

