COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2897-CR **Cir. Ct. No. 2010CT58**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOE R. HECHIMOVICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Following his conviction for operating while intoxicated, second offense, Joe Hechimovich appeals the circuit court's order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

denying his motion to suppress the results of his blood alcohol test, on the grounds that police violated WIS. STAT. § 343.305(5)(a), and the judgment of conviction. Hechimovich contends that he was entitled to suppression of the results of the blood test because he was not given a breathalyzer test after the blood draw, even though he asked the arresting deputy for a breath test as an additional chemical test.

¶2 It is undisputed that (1) the deputy asked Hechimovich to tell the deputy after the blood draw at the hospital if Hechimovich still wanted to travel to the jail to submit to the breath test, (2) the deputy gave Hechimovich ample opportunity at the hospital, after the blood test, to make a renewed request for a breath test, and (3) Hechimovich did not make that renewed request. Under these circumstances, the deputy was entitled to conclude that Hechimovich had decided against the breath test by the time the blood draw was completed, and the deputy did not have an affirmative legal duty to question Hechimovich about his implied choice not to travel from the hospital to the jail for the additional test following his release. Accordingly, the circuit court is affirmed.

BACKGROUND

¶3 The sole witness at the suppression hearing was the sheriff's deputy, although the court also had the benefit of listening to an audio recording of discussion between the deputy and Hechimovich following the traffic stop that led to Hechimovich's arrest.

¶4 The deputy arrested Hechimovich on a charge of operating while intoxicated. The deputy read to Hechimovich the "Informing the Accused" information, and asked him if he would submit to an evidentiary chemical test of

his blood. Hechimovich responded yes, but later asked if he could have a breath test instead of blood test.

¶5 The deputy explained to Hechimovich, as he testified at the suppression hearing, that "we do have a primary test of blood in Dodge County, and if he wanted a breath test after we are done at the hospital, at that point if he wished to do so he could request that and I would take him to the jail to do that." Hechimovich accepted the offer of a blood test at 10:22 p.m.

¶6 The deputy took Hechimovich to a hospital, where the blood draw occurred at about 11:20 p.m. Ten minutes later, the deputy released Hechimovich to a responsible party, Nicole Fleming, whom the deputy believed to be Hechimovich's fiancé.

¶7 During the approximately ten minutes between completion of the blood draw and Hechimovich's release, the deputy and Hechimovich "went over the OWI question and answer form" in the hospital emergency room. "I explained the citations. I explained what I would do with the blood and that he would receive a copy of the results. I explained what would happen if the results were over a certain level, and we just discussed the process." In the presence of Hechimovich, the deputy also went over a "responsible party" form with Fleming.

¶8 Throughout this ten minute period, neither Hechimovich nor the deputy made reference to the breath test that Hechimovich had requested earlier. Hechimovich did not bring the topic up during the drive to the hospital or while at the hospital at any time. The deputy did not follow up on this topic, either, concluding that when Hechimovich did not bring it up following his blood test, he had decided against it.

¶9 Hechimovich told the deputy that he had previously submitted to a breath test in Michigan, following an impaired driving arrest in that state.

¶10 The court's factual findings following the suppression hearing included the following, crediting the testimony of the deputy. The deputy told Hechimovich, after he requested a breath test, "when we are done with the blood test if you are still—still interested in that breath test give me the word, and I'll take you over, and we'll go to the Sheriff's Department and do a breath test." Hechimovich does not assert that this finding was clearly erroneous, and so it is accepted as proven for purposes of this appeal. *See* WIS. STAT. § 805.17(2); ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990) (trial courts, not appellate courts, resolve factual disputes).

DISCUSSION

¶11 Whether an officer complies with his or her obligations under the implied consent law, WIS. STAT. § 343.305, is a question of law that is reviewed de novo. ***State v. Baratka***, 2002 WI App 288, ¶7, 258 Wis. 2d 342, 654 N.W.2d 875 ("[a]pplication of the implied consent statute to an undisputed set of facts is a question of law" that this court reviews independently). This is a fact-intensive evaluation. *See* ***State v. Stary***, 187 Wis. 2d 266, 271, 522 N.W.2d 32 (Ct. App. 1994) (court in this context to "consider the totality of circumstances as they exist in each case").

¶12 Both parties demonstrate sound familiarity with, and little disagreement about, the meanings of and the relationships among relevant provisions in the implied consent law. Instead, what is at issue in this appeal is the application of judicial interpretations of the statutory language to this case. Moreover, the ordinary operation of the implied consent law has been extensively

and repeatedly described by the courts, including in contexts that resemble this case in major respects. *See*, *e.g.*, ***State v. Schmidt***, 2004 WI App 235, 277 Wis. 2d 561, 691 N.W.2d 379; ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). Therefore, it is appropriate to move directly to the heart of the dispute in this appeal, which involves application of court opinions interpreting the right of arrestees, created by WIS. STAT. § 343.305(5)(a), to obtain an additional chemical test, at the police agency's expense, after submitting to the police agency's primary chemical test.

¶13 Hechimovich contends that the deputy did not make a diligent effort to comply with the deputy's statutory obligation to follow up, after Hechimovich's initial request for a breath test, to see if he still wanted that additional chemical test after completing the primary chemical test. More specifically, Hechimovich argues that the circuit court erred in failing to apply the following two legal propositions: (1) there is no requirement in the implied consent law that an arrestee must make *more than one* request for an additional chemical test, and (2) an arrestee is not required to make a request only *after* submitting to a primary test, but may make a binding request before the primary test. Both of these legal propositions are correct; depending on all facts, one request may be sufficient, and that request may be made before the primary test is completed. *See* ***Schmidt***, 277 Wis. 2d 561, ¶30.

¶14 However, two uncontested facts, when considered together, render these two legal propositions irrelevant.

¶15 The first uncontested fact is that when Hechimovich requested the additional test, the deputy suggested to Hechimovich that if he was still interested in the additional test, after taking the primary test, Hechimovich should "give me

the word," and the deputy would take him to the jail for the breath test. There is no suggestion in the record, and the circuit court did not find, that Hechimovich disagreed with or was confused by this approach. To the contrary, the record suggests that he went along with it.

¶16 The second significant uncontested fact is that the deputy made himself available to Hechimovich after the primary test, communicating directly and extensively with Hechimovich. The record reflects sustained dialog between Hechimovich and the deputy at the hospital after the blood draw, discussion that also included Fleming in the presence of Hechimovich. This provided Hechimovich with a full opportunity to follow up on an additional test, which is what the deputy had proposed that he do if he remained interested in an additional test.

¶17 One additional relevant fact, while not a major consideration, is that the deputy was aware that Hechimovich was already familiar with the process of giving a sample of his breath, having done so at least once before. Having been in this situation before, it was at least slightly more likely that Hechimovich was deciding to forego a test that he was familiar with.

¶18 For these reasons, the deputy acted with reasonable diligence in response to the initial request for an additional test, based on his assumption that Hechimovich's post-blood draw silence on the topic stood for a decision against a trip to the jail for the breath test. On these facts, there was no "burden on the deputy to clarify," as Hechimovich argues.

¶19 Under the approach proposed by Hechimovich, an officer could never rely on a clear, consented agreement with an arrestee that the arrestee should tell the officer after the primary test whether the defendant wanted an additional

test. The implied consent law does not appear to require such micro-management of the ways in which police may communicate with arrestees in attempting to accomplish the goals of the law, and Hechimovich does not cite authority supporting such a rule.

¶20 Hechimovich asserts that ***Schmidt*** and ***Renard*** undermine this conclusion, but neither opinion sufficiently supports his position.

¶21 As referenced above, Hechimovich cites ***Schmidt*** primarily for the proposition that a request for an additional test may be adequate if made *before* the primary test is completed. *See* ***Schmidt***, 277 Wis. 2d 561, ¶30. However, in ***Schmidt*** there was not an understanding, as in this case, between the officer and the arrestee that the arrestee would let the officer know after the primary test what he wanted to do. This court in ***Schmidt*** noted that an arrestee who requests an additional test before submitting to the primary test "and still wants an additional test after the first test is completed *will likely* repeat the request after the first test to make sure an additional test is administered." ***Id.*** (emphasis added). This assumption, that an arrestee's continued interest in an additional test would likely result in renewal of the request, applies with special force in this case, because of the prior agreement between the deputy and Hechimovich about the need to renew the topic.

¶22 Hechimovich cites ***Renard*** primarily for the proposition that, once an arrestee requests an additional test and submits to the primary test, this requires "a diligent effort by the officer to comply with the demand" for the additional test. *See* ***Renard***, 123 Wis. 2d at 461. Hechimovich asserts that the deputy was not diligent in failing to "ask a single, simple question before ending his contact with

Hechimovich." However, the facts of ***Renard*** were starkly different from the facts of this case.

¶23 In ***Renard***, the officer who arrested Renard at a hospital "persuaded Renard to consent to the blood test because the blood sample could be drawn at the hospital." ***Id.*** at 460. At the hospital, Renard requested a breath test, but that form of chemical test could not be conducted at the hospital. ***Id.*** Renard continued to request the breath test. ***Id.*** After the blood draw, the officer left the hospital without taking the basic step of asking how long Renard would be hospitalized. ***Id.*** Renard was released shortly after the officer left, and the requested breath test was not performed. ***Id.*** This court sustained suppression of the blood results because the officer failed to make a reasonable inquiry concerning the expected time of Renard's release. ***Id.*** at 460-61. As in the instant case, because three hours had not passed between the time of Renard's accident and his release from the hospital, police could have timely performed the requested second breath test. ***Id.*** at 460.

¶24 In the case at bar, if the deputy had left the hospital without giving Hechimovich a reasonable opportunity to say that he wanted the additional test, then the deputy's conduct would have amounted to less than a diligent effort, under the logic of ***Renard***. This would have been contrary to the understanding between the deputy and Hechimovich that Hechimovich could take the deputy up on the offer of the additional test after the blood draw.

¶25 However, the deputy in this case communicated extensively with Hechimovich after the blood draw, at which time Hechimovich failed to renew the request, as the deputy had made clear he expected to hear if Hechimovich still wanted the breath test. Under the prior agreement with the deputy, there was

simply no request for the deputy to accommodate after the blood draw. From the deputy's point of view, as the record reflects it, Hechimovich's apparent decision to take a pass on his right to travel from the hospital to the jail for an additional test would not have been a peculiar or surprising decision for Hechimovich to have made.

¶26 Further supporting the circuit court's legal conclusion, there is no basis to conclude from the record of the suppression hearing or the factual findings of the court that the deputy sought to frustrate Hechimovich's request for an additional test, as for example by suggesting in their initial conversation on the topic that Hechimovich had to do *more* than simply renew his request after the blood draw in order to obtain it, or by suggesting that his agency was in some manner unprepared to administer a breath test.

¶27 Hechimovich's arguments to the circuit court and to this court are not insubstantial, and small facts could make a difference in such circumstances. For instance, "diligent effort" could not include bullying or intentionally confusing an arrestee on this topic. Thus, an officer could fall short of the officer's obligation where there is less than clear agreement between an arrestee and an officer that the arrestee should renew the request if still interested after the primary test. It might be deficient if an officer were to instruct an arrestee—over an arrestee's objection, or in another circumstance that failed to achieve a consensual understanding—that the arrestee's request for an additional test would be operative only if the arrestee renewed the request later. In such cases, depending on all relevant facts, treating an arrestee's post-primary test silence as a decision against the additional test might fall short of the "diligent effort" standard.

¶28 However, the record in this case does not reflect game playing or obfuscation. It is uncontested that the deputy explicitly and straightforwardly proposed a let-me-know approach, and that Hechimovich went along with that approach, without objecting or expressing confusion.

CONCLUSION

¶29 For these reasons, the circuit court's findings are not clearly erroneous and its legal conclusion is correct. Accordingly, the order denying suppression and the resulting judgment of conviction are affirmed.

By the Court.—Judgment and order affirmed.

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