

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 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. 03-0903-CR

Cir. Ct. No. 00CT000638

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN B. BEISWENGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ John B. Beiswenger appeals from a judgment of the circuit court finding him guilty of operating a motor vehicle while intoxicated (OWI), third offense, after a no contest plea. Beiswenger argues that the circuit

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

court erred in denying his motion to suppress the blood alcohol test results because the arresting officer impermissibly interfered with his right to request an alternate chemical test. We disagree and affirm the judgment.

FACTS

¶2 On December 12, 2000, Beiswenger was charged with OWI, third offense, and operating a motor vehicle with a prohibited alcohol concentration, third offense. On October 10, 2001, Beiswenger filed a motion to suppress the chemical test results, arguing he had been denied his right to an alternate test. A hearing was held on this motion on July 22, 2002.

¶3 At the hearing, Wisconsin State Patrol Trooper Chris Honish testified that after arresting Beiswenger for OWI, he asked Beiswenger to provide a chemical sample and transported him to a hospital. Honish testified that a license check of Beiswenger revealed he had two prior OWI convictions; Honish testified that when encountered with a criminal OWI, as opposed to a first offense OWI, “in conjunction with the different district attorneys’ office in the area,” his primary test is a blood test. Honish testified that after arriving at the hospital he read Beiswenger, verbatim, the Informing the Accused form asking him to supply a sample of his blood. Beiswenger checked the box “yes” indicating he was willing to provide a blood sample; Beiswenger subsequently provided a blood sample and, Honish testified, never expressed any hesitation or reluctance about providing a blood sample. Honish testified that the Informing the Accused form explains alternative tests and Honish did not recall any other conversation regarding alternative tests.

¶4 Beiswenger testified at the hearing that after his arrest, he was never told by Honish where he was being taken. Beiswenger testified that upon arrival

at the hospital, he asked Honish why they were at the hospital. Honish then informed him they were obtaining a blood test. Beiswenger testified that he asked Honish, “Why not a breathalyzer test?” but Honish did not respond. Beiswenger testified that when he was told he was at the hospital for a blood test, he did not feel like he had any choice in the matter and he just “wanted to follow orders.” Beiswenger admitted that was the only time he made any mention of a breath test rather than a blood test.

¶5 After hearing testimony, the circuit court stated:

It seems to me that what we have here is a situation in which there is a general question: Why a blood test rather than a breath test? That, I don't think, can be interpreted. As I am requesting a breath test, something that would have been very simple for Mr. Beiswenger to have said, even at that time while riding in the car is to say: I want a breath test, the State still would have been allowed to have the blood test.

And to button it up further is the reading of the Informing the Accused document which, in a paragraph, indicates if you take all the requested tests, you may, meaning Mr. Beiswenger, choose to take a further test. You may take the alternative 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. So he is given what the law in the state of Wisconsin is in the Informing the Accused and, under this set of circumstances, where he hasn't specifically made his request in clear terms, stating, “Well, I still want to take a breath test” would have been very simple for him to have said that at the time of the conclusion of the blood test and after the Informing the Accused. What he did is he created a question: Why blood rather than — than breath? And the Informing the Accused answers that question in a sense even if there was complete silence that followed after his making that request of Trooper Honish.

Beiswenger's motion to suppress was denied. On December 12, 2002, Beiswenger pled no contest to the charges. He appeals.

DISCUSSION

¶6 Beiswenger argues that his right to an alternate test was violated. We disagree.

¶7 WISCONSIN STAT. § 343.305(2) requires law enforcement to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other intoxicants in the breath, blood or urine of an OWI suspect. Specifically, § 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." *State v. Stary*, 187 Wis. 2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994).

¶8 WISCONSIN STAT. § 343.305(5)(a) provides, in relevant part:

The person who submits to the [primary] 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).

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 the circumstances as they exist in each case. *Stary*, 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).

Whether a suspect's request for an additional test was sufficient is a question of law we review de novo. *See Stary*, 187 Wis. 2d at 269. Therefore, the question we must answer is whether Beiswenger's question "Why not a breathalyzer test?" was adequate to invoke his right to a second or alternate test. We conclude that, under the totality of the circumstances, it was not. The question was asked in the squad car en route to the hospital, in response to Honish informing Beiswenger they were going to the hospital for a blood test. Beiswenger never specifically requested a breath test but merely inquired as to why a blood test was being performed instead of a breath test. We agree with the circuit court that such a question cannot be interpreted as a request for a breath test.

¶9 Furthermore, after Beiswenger was read the Informing the Accused form, which explained to him the provision for requesting an alternate test, Beiswenger made no such request. By his own admission, Beiswenger's question "Why not a breathalyzer test?" was the only time he made any mention of a breath test rather than a blood test. One reference to a breathalyzer test cannot be elevated to a request for an alternate test when, after a thorough explanation of Beiswenger's obligations under the Implied Consent Law, Beiswenger never made a request for an alternate chemical test.

CONCLUSION

¶10 We conclude that Beiswenger never made a request for an alternate chemical test. The circuit court appropriately denied his suppression motion and we affirm Beiswenger's judgment of conviction.

By the Court.—Judgment affirmed.

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

