COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1407-CR **Cir. Ct. No. 03CT000345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARDELLE E. TRIGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Mardelle Triggs appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, second offense, in violation of WIS. STAT. § 346.63(1)(b). She challenges the circuit court's order denying her motion to suppress the results of a blood test for

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

alcohol, contending she was entitled to suppression because she requested an alternative test but was not given one as required by WIS. STAT. § 343.05(5)(a). For the reasons we explain below, we disagree. We affirm the judgment.

¶2 After Wisconsin State Patrol Tropper C.A. Splinter arrested Triggs for operating a motor vehicle while intoxicated, he transported her to a local hospital. He read her an Informing the Accused form after which Triggs consented to a blood draw. The form advised Triggs, among other things, that

> if you take all the requested tests, you may choose to take further tests. You may take the alternative test which 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.

¶3 Triggs contends on appeal, as she did in the trial court, that a question she asked while the officer was reading the above quoted language was a request for the alternative test she was advised of, but the officer never gave her an alternative test. She contends this is a violation of WIS. STAT. § 343.305(5)(a) which provides:

> **(5)** ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) 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).

Although § 343.305(5)(a) uses the term "alternative test," it is clear from this provision that the accused does not have a right to choose a test *instead of* the one the officer asks him or her to take; rather the "alternative test" is in *addition to* that

test. ***State v. Schmidt***, 2004 WI App 235, ¶11, No. 04-0904-CR. In this opinion, we use the terms "alternative," "alternate," and "additional" interchangeably.

¶4 At the hearing on Triggs's motion to suppress, the State submitted a video tape taken of Triggs's arrest, including the time at the hospital. The circuit court found that Triggs did not request an alternative test. The court stated that there was "some discussion during the reading of the informing the accused, [but] once that was completed there was no evidence [of a] request [for] an alternative test."

¶5 When we review a circuit court's decision that an accused did not request an alternative test under WIS. STAT. § 343.305(5)(a), we accept the trial court's findings of fact unless they are clearly erroneous. ***Schmidt***, 2004 WI App 235, ¶13. However, to the extent the challenge is to the circuit court's construction of the statute or the statute's application to the facts as found by the circuit court, our review is de novo. ***Id.***

¶6 The video tape shows that Triggs made a number of comments and asked a number of questions throughout the officer's reading of the Informing the Accused form. While the officer was reading the portion of the Informing the Accused form quoted in paragraph 2 of WIS. STAT. § 343.305(4), after the second sentence Triggs asked "what is my alternate?" The officer continued reading, and Triggs did not again refer to an alternate or alternative test. When the officer read the question "Will you submit to an evidentiary chemical test of your blood, yes or no?", Triggs asked the officer twice what that question meant "in lay terms." He repeated the question, telling her to listen and that "this is about as simple as it can be put." After more questions, she said "I submit to it," then said "I said submit to it, what does that mean?"

¶7 We recently held in ***Schmidt*** that, while WIS. STAT. § 343.305(5)(a) required as a condition of being provided an alternative test that the accused must submit to the test initially requested by the officer, the statute does not require that the accused's request for an alternative test be made after the first test is completed. ***Id.***, ¶30. However, we recognized that the timing of the request was relevant because "an accused who requests an additional test before submitting to the first 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.*** In ***Schmidt***, we upheld the circuit court's finding that the accused made a request for a breathalyzer test rather than a blood test before taking the blood test and did not request a breathalyzer test after he took the blood test. Based on those factual findings, which we stated were supported by the record, we concluded as a matter of law that Schmidt did not request a test in addition to the blood test. ***Id.***, ¶¶14, 31.

¶8 To the extent Triggs is challenging the circuit court's finding that she did not request an alternative test, we conclude the court's finding is supported by the record. Her question asked what the alternative test was and she never stated at that time or after taking the blood test that she wished to take the alternative test. To the extent that Triggs is arguing that, as a matter of law, her inquiry about the alternative test constitutes a request to take that test, we disagree. The statute plainly permits an accused to take an alternative test provided by the agency "upon his or her request." WIS. STAT. § 343.305(5)(a). Triggs's question was not a request.

¶9 It may be that Triggs is arguing that, even though she did not request an alternative test as required by WIS. STAT. § 343.305(5)(a), the officer was obligated to answer her question on what the alternative test was, and his failure to

do so violated § 343.305(4). This section requires that the officer read the accused the information set forth in the statute when the officer requests that the accused take a chemical test. The Informing the Accused form the officer read to Triggs conforms to § 343.305(4). The State argues in its brief that under ***State v. Piddington***, 2001 WI 24, ¶1, 241 Wis. 2d 754, 623 N.W.2d 528, an officer is not required to ensure that the accused understands the form read to him or her. Therefore, the State asserts, the officer's reading aloud of the form to Triggs as he did fully complied with § 343.305(4). Triggs did not file a reply brief and thus did not dispute the State's position. We treat that as an implicit concession of the correctness of the State's position. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). In view of this implicit concession and the lack of any authority to the contrary in the brief Triggs did file, we conclude the officer did not violate § 343.305(4).

By the Court.—Judgment affirmed.

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