

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1226-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT J. MYERS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

VERGERONT, J.¹ Robert Myers appeals from a judgment convicting him of operating a vehicle while under the influence of an intoxicant, contrary to § 346.63(1), STATS. He contends the trial court erroneously denied his motion to suppress the results of the analyses of samples of his breath performed after his arrest. He argues that the police officer denied him his statutory right to have an alternative test performed and his statutory right to have an additional test. We reject both arguments and affirm.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Myers was stopped by City of Madison Police Officer Mary Schauf after she observed his vehicle crossing an intersection against a red light. He was arrested for driving while under the influence of an intoxicant and taken to the police station. Schauf read him the "Informing the Accused" form² and he agreed to take a breathalyzer test. After that test was administered, he requested a urine test. Schauf answered that the alternate test that the department administered was the blood test. Myers asked for the blood test and Schauf said okay. The testimony of Myers and Schauf as to what happened next is conflicting.

Myers testified that he never wavered from his request for a blood test and that he requested one several times. Schauf told him he could not have a blood test because he had taken too much time and was stalling. He acknowledged that he mentioned having the blood test done by his family physician in Missouri, but that was said jokingly. He denied debating with himself about whether to have a blood test. After he was told he could not have the test, he was taken to a holding cell and, while there, he asked Schauf again for a blood test but she did not respond; she was reading other forms to him.

² The form provides in part:

When a Law Enforcement Officer requests that you submit to a chemical test, pursuant to Wisconsin's Implied Consent Law, the officer is required to inform you of the following:

1. You are deemed under Wisconsin's Implied Consent Law to have consented to chemical testing of your breath, blood or urine at this Law Enforcement Agency's expense. The purpose of testing is to determine the presence or quantity of alcohol or other drugs in your blood or breath.
2. If you refuse to submit to any such tests, your operating privilege will be revoked.
3. After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.

He had had between four to six beers over a two-and-a-half-hour period that evening, but he did not feel that he was inebriated or had lost control.

Officer Schauf testified that when she stopped him Myers had slurred speech, smelled of intoxicants and walked in a staggering manner. She had difficulty administering a field sobriety test because he did not follow instructions. When she read him the Informing the Accused form at the station, he asked her a number of questions and she told him she could not interpret the form for him. He asked the same questions of another officer before Schauf intervened because, she told Myers, she felt he was stalling for time. At the station he asked for a drink of water before taking the breathalyzer test. Schauf said he could not have water. He then asked to go to the restroom and was taken by a male officer and, after using the facilities, began to drink from the sink. She had to tell him several times that he could not drink any more water before he stopped. During the observation time in the intoxilyzer room he made several requests for water and the bathroom. Those requests were denied but as soon as the testing was done he was allowed to go to the restroom a second time.

Officer Schauf testified that after the breathalyzer test she discussed with Myers who would pick him up. He wanted to call his boss in Milwaukee to pick him up. She told him that because of the time that would take, she would then have to take him to the jail where they would place the call and he would wait.

After Myers requested the blood test the first time, he was taken from the holding cell. While walking to the elevator to leave the building there was discussion about where the test would be taken. Myers said he wanted to have it done at a Milwaukee hospital but Schauf told him they were not equipped to take someone to Milwaukee and the test had to be taken at a Madison hospital. On the way out of the building, Myers said he did not want to have a blood test. Schauf testified:

A. We stopped again. Then we started back toward the holding cell. Then he said yes I do want a blood test, so we stopped again, and I said yes or no, do you want a

blood test. Then he had this kind of debate with himself whether or not, yes or no, I want a blood test.

....

At that point I said you need to make a decision now whether or not you want a blood test, yes or no. If you can't decide, I will consider that you don't want a blood test.

Q. What did he do?

A. He made no other statements. He didn't make a decision.

Q. So what did you do?

A. I returned him to the holding cell.

Schauf testified that they stood in the hallway not more than a minute or two and then she returned him to the holding cell. After she returned him to the cell she still had contact with him concerning various forms. According to Schauf, had he requested a test while he was in the holding cell, she would have taken him for the test. However, he did not request a test while in the holding cell or at any future time.

Schauf explained that she took the first request for a blood test to be a clear request for a blood test. She took his subsequent statement that he did not want a blood test as a clear indication he did not want one. When he then said he did want the test, she did not take it as a clear indication that he wanted a test because she did not know what he wanted. That is why she asked him to tell her yes or no whether he wanted the test.

It is undisputed that after Myers's request for a urine test and Schauf's response that the alternate test offered was a blood test, there was no further reference by either to a urine test.

The trial court found that because of Myers's vacillation "both in this context and the preceding context" the officers were entitled to ask him for a

clarification as to whether he really wanted to take the blood test. Because he did not clarify this, the court found that there was no actual request for an alternate test.

Section 343.305(2), STATS., requires law enforcement to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other substances in the breath, blood or urine of a suspected intoxicated driver. *State v. Stary*, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994).³ Law enforcement may designate one of those two as its primary test. *Id.* Once a person consents to the primary test, the person is permitted, at his or her request, an alternate test the agency chooses or, alternatively, a reasonable opportunity to a test of the person's choice at his or her expense. *Id.* at 270, 522 N.W.2d at 34; § 343.305(5)(a), STATS.

³ Section 343.305(5), STATS., provides in part:

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). If the person has not been requested to provide a sample for a test under sub. (3)(a) or (am), the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test specified under sub. (3)(a) or (am). The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3)(a) or (am). If a person requests the agency to administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform a test under sub. (3)(a) or (am) that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

The trial court's determination that Myers did not make a request for the alternate test includes both findings of fact and conclusions of law. We will not overturn the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. However, the construction of a statute in relation to a given set of facts is a question of law that we review *de novo*. *Tahtinen v. MSI Ins. Co.*, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

The trial court's finding that Myers had vacillated "both in this context and in the preceding context" implies that it is crediting Schauf's testimony concerning Myers's behavior both before and after the breathalyzer test and rejecting Myers's testimony that he never wavered from his request for an alternate test. The trial court is the ultimate arbiter of the credibility of the witnesses. *Bank of Sun Prairie v. Opstein*, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). We agree with the trial court that, given Myers's earlier behavior in connection with the breathalyzer test and his request, retraction of the request and then second request for the blood test, it was reasonable for Schauf to ask Myers to state whether he did or did not want a blood test.

The trial court found that Myers refused to clarify whether he did or did not want a blood test. Implicit in this finding is an acceptance of Schauf's testimony that Myers did not again state that he wanted a blood test after Schauf asked him to decide whether he did or did not want one, and a rejection of Myers's testimony that he asked again for a blood test when he was in the cell going over papers with Schauf. Based on these findings, which are not clearly erroneous, we conclude that Myers did not request an alternate test.

Under § 343.305(5)(a), STATS., the officer must provide the suspect with an alternate test only "upon his or her request." Myers effectively withdrew his first request for a blood test when he said he did not want one. When he made the second request within minutes of saying he did not want one, Schauf was entitled to ask him to decide whether he did or did not want one, in view of his vacillation. His failure to say anything, after being told by Schauf that if he could not decide she would take that as a "no," cannot reasonably be construed as a request.

Myers refers to the "one or two minutes" Schauf was in the hall with Myers after asking him to make up his mind, before taking him back to the cell. Myers argues that it was unreasonable for Schauf to impose such a short

deadline on his time to make the decision and not to tell him how long he had. But, according to Schauf, after she took Myers back to the cell, she remained with him, going over forms, and he did not in that time, or any time after, request a blood test. She testified that, had he done so, she would have taken him for the test. On the facts as found by the trial court, Myers was not denied a blood test because he did not ask for one within a specified period of time. He was denied one because he never said that he wanted one after being asked to state whether he did or did not.

Myers also cites *State v. Stary*, 187 Wis.2d 266, 522 N.W.2d 32 (Ct. App. 1994), for the proposition that there must be an unequivocal refusal to take the alternate test before an officer can decline to give the test. But Myers's proposition is the converse of the holding in *Stary*. *Stary* had been offered the alternate test at least four times and refused. Approximately thirty-five minutes after he posted bond and was released from custody, a nurse from a hospital called stating that *Stary* was requesting a blood test and asking if the police department would pay for it. The police officer said the department would not pay. We held that because *Stary* had unequivocally refused the alternate test, the officer was not obligated to remain available to accommodate future requests. *Id.* at 271, 522 N.W.2d at 35. We did not hold in *Stary* that until there is an unequivocal refusal, the officer must remain available to give the alternate test. In any case, on the facts as found by the trial court, Schauf did remain available but Myers never requested the alternate test after being asked to decide if he wanted one or not.

Myers also argues that he was denied his right to a test at his own expense in addition to the two offered by the department. According to Myers, his request for a urine test was such a request, and Schauf's response to that request violated the statutory requirement that he be given a "reasonable opportunity" to have a test performed by a qualified person at his own expense.

The trial court did not decide this issue. The State argues that Myers did not raise it below and we should not address it on appeal. It is not clear from the motion whether this issue was raised in the motion. However, both parties testified concerning Myers's request for a urine test, and Myers's counsel did argue that the officer should have given Myers a reasonable opportunity to get a urine test since he was not given a blood test. Therefore, we will address this issue.

Although the trial court made no findings with respect to the request for a urine test, Myers's and Schauf's testimony on this point is consistent: Myers requested a urine test after he had his breathalyzer test; Schauf told him that the alternate test the department administered was a blood test; and neither again mentioned a urine test. We conclude as a matter of law that this does not constitute a request that a third party perform the urine test at Myers's expense.

Once Schauf explained that the department offered a blood test as its alternate test, Myers did not again state he wanted a urine test. Instead, the discussion from that point on concerned the blood test offered and paid for by the department--where it would be performed and whether he wanted it. The form he signed explained his right to request the alternate test offered by the department at its expense or to request a reasonable opportunity to have a qualified person of his choice administer a chemical test at his expense. If he wanted a urine test at his own expense instead of the blood test offered and paid for by the department, it was incumbent on him to say that after Schauf explained what the department offered.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.