COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 22, 1997

No. 95-2281-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD W. FOELKER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed*.

ANDERSON, J. Richard W. Foelker appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant or drug (OWI), contrary to § 346.63(1)(a), STATS., and an order denying his postconviction motion for a new trial.[1] Foelker was convicted after

[1] This appeal has been on hold pending the release of the supreme court's decision in ***State v. Wideman***, No. 95-0852-CR (Wis. Dec. 20, 1996). That decision has been released and provides the key answers to Foelker's third issue.

a jury trial of OWI and was sentenced as a second-time OWI offender. In postconviction motions, the trial court denied Foelker's motions for a new trial concluding that the arresting officer acted reasonably and within the mandate of § 343.305(5)(a), STATS., in obtaining Foelker's alcohol test results; that the alcohol concentration chart (the chart) is admissible into evidence without supporting documentation or expertise; and that the trial counsel's acknowledgment of Foelker's prior OWI conviction was sufficient to establish him as a repeat offender under § 346.65(2), STATS. We agree, and therefore, we affirm.

For purposes of this appeal the facts are not in dispute. Foelker was charged with OWI.[2] After field tests suggested the presence of an intoxicant or drug, Foelker was arrested and transported to a hospital for a blood test to determine his blood alcohol concentration (BAC).

At the suppression hearing, testimony was heard from Officer David Hammett, the arresting officer. He testified to the following facts. After placing handcuffs on Foelker, Hammett patted him down and felt an inhaler in his pocket. While in transport, initially to the Neenah police department, for a breath test, Hammett verified that Foelker was in fact asthmatic and might have difficulty blowing into the Intoxilyzer machine. Hammett then decided to change the primary test to blood and brought Foelker to a local hospital.

[2] The original complaint charged Foelker with unlawfully operating a motor vehicle while under the influence of an intoxicant or a controlled substance. The complaint was subsequently amended to unlawful operation of a motor vehicle while under the influence of an intoxicant or a drug. The jury found Foelker guilty of the amended charge.

At the hospital, Hammett read and Foelker signed the Informing the Accused form. Prior to actually taking the initial test, Foelker asked for an alternate test, "[he] was adamant that he wanted a urine sample." After consulting with his shift supervisor, Hammett informed Foelker that the urine test would be the alternative test. At that time, Foelker stated that "he didn't want urine, he wanted breath." Hammett informed him that because of his asthmatic condition the breath test was out of the question, but that the urine test was available as an alternative.[3] Foelker submitted to the primary blood test, but insisted that Hammett document that "[Hammett] was refusing [Foelker] his alternative test of breath." Foelker's BAC result was 0.096%.

Foelker sought to suppress the result of the primary blood alcohol test, arguing that "the agency had been prepared to administer alternate tests of either defendant's breath or urine, and that the officer had denied defendant's prompt request for an alternate breath test."[4] The trial court denied the motion, finding that it was sufficient for the State to offer "two tests, one was the blood test, one was the urine test; and I found that the Defendant asked for a breath test and was denied a breath test and the officer stated his reasons for denying it

[3] Foelker testified that he was having difficulty breathing all day. Hammett also testified that Foelker was wheezing at the hospital and in the examination room prior to taking the test. Hammett explained that because the suspect must blow for ten seconds, in his experience, asthmatics have a difficult time keeping the tone of the Intoxilyzer machine to get a proper analysis. For these reasons, he did not feel the breath test was a viable option for Foelker.

[4] Foelker filed four motions to suppress with the trial court. He challenged the "illegal stop of the vehicle," "the illegal arrest of the Defendant," the "illegal, warrantless search of the vehicle" and suppression of the chemical test on the grounds that Foelker requested an alternate test and no alternate test was provided. Only the motion to suppress the chemical test is before this court on appeal.

and his alternative." Foelker was convicted by a jury after entering a not guilty plea. He appeals.

Foelker makes three arguments on appeal. He first contends that the trial court erred in denying his pretrial motion to suppress the blood test evidence under § 343.305, STATS.[5] Foelker argues that "it is the prerogative of

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[5] Section 343.305, STATS., provides in relevant part:

> (2) IMPLIED CONSENT. Any person who … drives or operates a motor vehicle upon the public highways of this state, … is deemed to have given consent to one or more tests of his or her breath, blood or urine …. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first.
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> (3) REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.
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> (4) INFORMATION. At the time a chemical test specimen is requested under sub. (3)(a) or (am), the person shall be orally informed by the law enforcement officer that:
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> ….
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> (d) After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.
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> (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. … 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

the accused, and not that of the police officer, to choose between the two alternate chemical tests for intoxication when the accused submits to the officer's requested primary test and both alternate tests are available from the law enforcement agency." As a result, Foelker maintains that the trial court erred in denying his motion to suppress the results of the primary blood test. This argument is not even facially appealing.

The application of the implied consent law to an undisputed set of facts is a question of law that we review de novo. ***State v. Stary***, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994). The implied consent law, § 343.305(2), STATS., allows intoxication to be tested by three means: breath, urine and blood. An arresting agency must provide two of the three tests at its own cost and of the two may designate which is the primary and which is the alternate. *See* ***id.***; *see also* ***Stary***, 187 Wis.2d at 269, 522 N.W.2d at 34.

After submitting to the agency's primary test, the accused may then ask to take the agency's secondary test. The accused may also choose and pay for his or her own test at an approved facility. Section 343.305(5)(a), STATS.; *see also* ***State v. Vincent***, 171 Wis.2d 124, 128, 490 N.W.2d 761, 763 (Ct. App. 1992). In such a case, law enforcement must afford the suspect a reasonable opportunity to obtain his or her alternate test, within the three-hour time limit from the time of the stop. *See* §§ 343.305(5)(a) and 885.235(1), STATS.

(..continued)

> person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).

In this case the officer complied with the mandates of the implied consent law. Hammett read Foelker the Informing the Accused form. Because of Foelker's asthmatic condition, Hammett refused to perform the breath test, instead designating the blood test as primary. Foelker then requested an alternate test of his urine. Hammett agreed and designated the urine test as the alternate test to be paid for by the department. Then Foelker changed his mind and insisted on testing his breath.

However, the suspect does not have the right to choose or change his or her mind as to the alternate test. "Though nothing in the implied consent law prohibits the agency from designating both tests and giving the driver the choice of either one, the statute *does not* require it to do so." ***City of Madison v. Bardwell***, 83 Wis.2d 891, 896, 266 N.W.2d 618, 620-21 (1978). In fact, requiring the agency to designate two alternate tests so that the driver can select which of the two to take is contrary to the language of the statute taken as a whole. ***Id.*** at 895, 266 N.W.2d at 620. And once the suspect has unequivocally refused the second test, the officer is not under a continuing obligation to remain available to accommodate future requests. ***Stary***, 187 Wis.2d at 271, 522 N.W.2d at 35.

Here, it is undisputed that Foelker repeatedly refused the offer of the second test; rather, "he wanted [it] documented that [Hammett] was refusing him *his* alternative test …." The law is clear: "If for any reason the accused does not want the agency's secondary test, the accused may choose and pay for his or her own test at an approved facility." ***Id.*** at 270, 522 N.W.2d at 34. The record supports the trial court's finding that the officer acted with

reasonable diligence in offering the secondary test under § 343.305(5), STATS.; the blood test results need not be suppressed.[6]

Next, Foelker contends that the trial court erred in admitting the alcohol concentration chart into evidence at the trial. Foelker maintains that the State failed to introduce any evidence to establish the time at which Foelker commenced consuming alcohol, and therefore, the trial record was insufficient to permit a reasonable jury to find that the chart was relevant. We disagree.

A trial court possesses wide discretion in determining whether to admit or exclude evidence, and we will reverse such determinations only upon an erroneous exercise of that discretion. ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts in the record. ***Id.***

The trial court admitted the chart into evidence based on ***State v. Hinz***, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984). The trial court questioned, however, "how [the chart] is going to relate to this Defendant because we're not going to know how many drinks he had or his size until or unless he testifies. Of course, then you might find out some of that information,

[6] We note that Foelker wanted it documented that Hammett was refusing him his alternative test. This is incorrect. Rather, Hammett stood by his selection of the blood as the primary and urine as the secondary tests. After submitting to the blood test, Foelker was permitted to leave with his ride. Hammett did not prevent him from obtaining a breath test, if he really wanted one. Under these circumstances, Hammett's refusal to pay for Foelker's breath test was reasonable and not a frustration of Foelker's attempt to obtain an alternate test.

if he does testify." Accordingly, the trial court limited its use to "let the witness identify what the chart is, and you can mark it and I'll receive it in evidence. As for the witness to use any of the calculations here without knowing when and where the time of any drinks, obviously you can't do that," but "each counsel can use it if they can in their final arguments." Since it is clear that the trial court articulated its reasons for admitting the evidence, the question then before us is whether there was a reasonable basis for this decision. It is not a question of "whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979).

First, the chart is admissible without expert testimony describing its relevance to the jury. ***Hinz***, 121 Wis.2d at 286, 360 N.W.2d at 59. In addition, the trial court withheld its final decision on admitting the chart into evidence until the end of the case. The chart was marked as evidence and the trial court allowed the parties to refer to it in closing arguments, but it was not submitted for jury deliberations. The trial court also included the limiting instruction relating to the chart. *See* WIS J I—CRIMINAL 237. We conclude that the trial court's decision was in accordance with accepted legal standards.

Moreover, the evidence supports the trial court's decision. At trial, Foelker testified that he weighs 260 pounds. He also stated that he obtained his 0.096% BAC reading by drinking only Nyquil, not beer or hard liquor. He

further testified that throughout the day and during his drive from Madison to Appleton he had "between one and one-and-a-third bottle" of Nyquil, with his last drink "shortly before [he] was pulled over." The Nyquil was taken in combination with his morning dose of prescription drugs, including Zoloft, Verapamil and Ativan. There was additional testimony that both Hammett, the arresting officer, and Officer Richard Smith, the assisting officer, smelled an odor of alcohol on Foelker's breath. However, neither officer found Nyquil during the search of Foelker's vehicle.

Because this additional testimony provided insight as to the unknown elements on the chart, it was relevant. The chart allowed the jury to discern how much Nyquil a 260 pound person would have to drink to obtain a 0.096% BAC. And because Foelker maintained that the only alcohol he consumed was from the Nyquil, giving him a 0.096% BAC, the chart also assisted the jury in judging Foelker's credibility. Accordingly, we conclude that the trial court properly exercised its discretion in admitting the chart as evidence.

Finally, Foelker argues that his "sentence as a repeat offender under § 346.65(2), STATS., is void because the trial record failed to establish either defendant's personal admission or other proof of a prior conviction." ***State v. Wideman***, No. 95-0852-CR, slip op. at 13-15 (Wis. Dec. 20, 1996), disposes of this claim. In ***Wideman***, the supreme court held that "defense counsel may, on behalf of the defendant, admit a prior offense for purposes of § 346.65(2)." ***Wideman,*** slip op. at 15. Here, defense counsel stipulated, with

Foelker present, that "[Foelker] has a first offense." This is satisfactory. We conclude that the trial record is sufficient to establish the prior offense under § 346.65(2). Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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