

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2002

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. 02-1080-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-409

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANCE L. REED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Lance L. Reed appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

concentration and from an order denying his motion to suppress blood test evidence. Reed argues that the trial court erroneously denied his motion to suppress the blood test evidence, and argues that this court should reverse the trial court and order a new trial. We disagree with this contention and affirm the judgment and order.

FACTS

¶2 On June 2, 2001, at approximately 11:43 p.m., Sheboygan County Deputy Sheriff Nathan Hatch observed a vehicle fishtailing as it turned. Hatch stopped the vehicle and made contact with the driver, identified as Reed. While talking with Reed, Hatch observed a strong odor of intoxicants coming from the passenger compartment of the vehicle; Hatch also noticed that Reed's eyes were bloodshot and glassy and his speech was slurred. Hatch administered three field sobriety tests, after which Reed was arrested for operating while intoxicated; Reed was also later cited for operating a motor vehicle with a prohibited blood alcohol concentration.

¶3 Hatch informed Reed that he was taking him to the hospital to obtain a blood sample and Reed was then taken to Sheboygan Memorial Medical Center for a blood draw. While en route to the hospital, Reed asked Hatch several times what his blood test results were and if he could get his blood test results. Hatch mentioned a preliminary breath test but one was never administered. Reed asked Hatch why a blood test was used instead of a breath test because in a previous OWI arrest, Reed received a breath test. Hatch informed Reed that blood tests were "quicker, easier and more accurate." Reed assumed that Hatch understood from this line of questioning that Reed preferred a breath test.

¶4 Once at the hospital, Hatch read Reed the Informing the Accused form; Reed consented and a blood sample was taken.² There was no further discussion about taking any additional test.

¶5 Reed moved to suppress his blood test results on the grounds of denial of an alternative test pursuant to WIS. STAT. § 343.305(5)(a). The trial court denied the motion. The trial court found that Reed was informed of his right to an alternative test via the Informing the Accused form and did not request such a test. The trial court concluded that while there had been some conversation about blood tests versus breath tests, Reed never asked for a breath test but merely assumed he would get a breath test because of his past experience. After a March 7, 2002 bench trial, the trial court dismissed the OWI charge and found Reed guilty of operating a motor vehicle with a prohibited blood alcohol concentration. Reed appeals.

DISCUSSION

¶6 Reed argues that the trial court erred in failing to suppress the blood test results because he was denied an alternative test. On appeal, the trial court's findings of fact on a motion to suppress evidence will be upheld unless those findings are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the appellate court will review de novo the trial court's application of the relevant statute to these facts. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

² Reed's blood test results indicated a 0.212% blood alcohol concentration.

¶7 Persons who are stopped for suspected OWI and who submit to a test for intoxication have the right, upon request, to an alternative test. WIS. STAT. § 343.305(5).³ Reed argues that he was denied his right to a second test. He claims that his questions about a breath test during transport to the hospital should have been interpreted as a request for an alternative test. We disagree.

¶8 Wisconsin's implied consent law does not grant drivers a statutory right to choose which test will be administered. *State v. Krajewski*, 2002 WI 97, ¶¶36 n.15, 225 Wis. 2d 98, 648 N.W.2d 385. Sheboygan county's primary method of test for alcohol levels is via a blood sample and thus Hatch appropriately transported Reed to the hospital for a blood draw.

¶9 WISCONSIN STAT. § 343.305 simply requires that arrested persons be advised of their right to an alternative test. *State v. Piddington*, 2001 WI 24, ¶17, 241 Wis. 2d 754, 623 N.W.2d 528, *cert. denied*, *Piddington v. Wisconsin*, 122 S. Ct. 65 (U.S. Oct. 1, 2001) (No. 00-1904). The purpose of an alternative test is to check on the reliability of the first test. *State v. McCrossen*, 129 Wis. 2d 277, 297, 385 N.W.2d 161 (1986). However, the right to a second test, when a reliable

³ WISCONSIN STAT. § 343.305(5)(a) reads, in relevant part, as follows:

The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency 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 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.

first test is performed, is not required by due process. *Id.* If a defendant is informed of his or her right to request a second test and does not request a test after he or she submits to the initial test, he or she may not have the right to a second test. *Piddington*, 2001 WI 24 at ¶52. Here, it is undisputed that Reed did not ask for a second test, a breath test, after the first blood test was administered.

¶10 Furthermore, during the transport to the hospital prior to the administration of the first test, Reed asked some rather imprecise questions about timing and receipt of blood test versus breath test results and informed Hatch that in his previous arrest a breath test was used. He also preferred to receive the results immediately. By his own admission, Reed never specifically requested a breath test but simply assumed, from the tenor of the conversation, that Hatch understood he wanted a breath test. We agree with the trial court that Hatch is not a mind reader and Reed's vague questions about breath versus blood tests cannot be construed as a request for an alternative test. The suppression motion was therefore appropriately denied and we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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

