COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2464 **Cir. Ct. No. 2005TR5798**

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

COUNTY OF SAUK,

PLAINTIFF-RESPONDENT,

V.

SANDRA B. ROEMER-RUTTER,

DEFENDANT-APPELLANT.

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

¶1 HIGGINBOTHAM, P.J.[1] Sandra Roemer-Rutter appeals pro se a judgment of conviction for operating while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

(OWI) contrary to WIS. STAT. § 346.63(1)(b), and an order denying her motion to suppress evidence. We affirm.

¶2 On June 23, 2005, Sauk County Sherriff Deputy Shawn Finnegan initiated a traffic stop of Roemer-Rutter for a vehicle registration violation. Finnegan suspected Roemer-Rutter had been drinking, and, after conducting field sobriety tests, arrested her for OWI. Finnegan read Roemer-Rutter the information regarding blood alcohol testing required by WIS. STAT. § 343.305(4), and asked her to submit a blood sample to determine her blood alcohol concentration (BAC). Roemer-Rutter gave a blood sample, which showed a BAC of .092. Finnegan issued Roemer-Rutter a citation for first-offense OWI, and, because passengers under the age of sixteen were in the vehicle at the time, doubled the applicable penalties pursuant to WIS. STAT. § 346.65(2)(f).

¶3 Roemer-Rutter moved to suppress the results of the blood alcohol test on grounds that Finnegan misled her regarding the availability of alternate BAC tests. At the suppression hearing, Roemer-Rutter testified that Finnegan read the informed consent message regarding blood alcohol testing to her in the field, and that, after he read the portion of the message regarding her right to an alternate BAC test, she said to Finnegan:

> [Roemer-Rutter]: "[W]ell, what is that test[?]" and he responded that "[T]his is the alternative test."
>
> Q: This, being what?
>
> [R.R.]: The blood test that was being administered.
>
> Q: Alternative to what test?
>
> [R.R.]: Alternative I suppose to the tests that were done in the field.
>
> ….

R.R.: But he said that there weren't any others.

¶4 Finnegan testified that he read the informed consent message to Roemer-Rutter in the hospital before the blood draw, not in the field as Roemer-Rutter had testified, and that she did not ask for an alternate test. He denied telling Roemer-Rutter that no alternate test was available. On cross-examination, Finnegan restated this denial:

> Q: Isn't it true that Ms. Roemer-Rutter questioned you about this alternate test?
>
> [Finnegan]: Not that I can remember, no.
>
> Q: You have no recollection of any discussion about it or --
>
> [F]: No, I don't remember asking at all.
>
> Q: If it's her recollection that she did have a discussion with you, are you saying that that did not occur or you just might not recall?
>
> [F]: I'm saying if someone asked me about a second test, I'd remember that because I've never been asked for another test by anybody.
>
> Q: In [the] six years [that you have been a deputy]?
>
> [F]: In six years.

¶5 The court denied Roemer-Rutter's motion in a written decision, which stated as follows:

> Upon consideration of all of the testimony, the motion to suppress the blood test results is denied. The testimony of defendant came across as somewhat equivocal. There is a distinction between requesting an alternative test and discussing an alternative test. The testimony of defendant does not satisfy the court that the request was actually made either for an alternative test or a test of her own choosing.
>
> While the defendant's recollection of event would certainly be significant to her, the officer also had a

> recollection as the issue deals with something he has not encountered in several years of road patrol. Such a request would be a new and different experience for him.

¶6 Roemer-Rutter moved for reconsideration of the circuit court's decision denying the suppression motion. The court denied the motion in a written decision. The court subsequently convicted Roemer-Rutter of operating a motor vehicle with an expired registration, and of first-offense OWI with a penalty enhancer for carrying minor passengers under the age of sixteen. Roemer-Rutter only appeals her OWI conviction.

¶7 WISCONSIN STAT. § 343.305(3)(a) states that an officer arresting a person for OWI may request one or more samples of the person's breath, blood or urine to determine the person's BAC. Section 343.305(2) requires that law enforcement agencies be prepared to administer at their own expense two of the three tests to a person accused of OWI. Section 343.305(5) imposes three obligations on a law enforcement agency: "(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). The law enforcement agency must provide a "reasonable opportunity" for the accused to obtain the alternate test of her choosing within the three-hour time limit provided in WIS. STAT. §§ 343.305(5)(a) and 885.235(1). ***State v. Vincent***, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992). The agency's responsibility to provide a "reasonable opportunity" is limited to not frustrating the accused's request for her own test. ***Id***.

¶8 On appeal, we consider the totality of the circumstances of the instant case to determine whether a law enforcement officer made a reasonably diligent effort to comply with the obligations set forth in WIS. STAT. § 343.305(5). ***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 an accused's request for an additional test was sufficient is a question of law we review de novo. *See* ***Stary***, 187 Wis. 2d at 269.

¶9 Roemer-Rutter, proceeding pro se, asserts that the circuit court's decision denying suppression of the blood test result "relies solely on its finding that Roemer-Rutter did not request an alternative test." She argues that her testimony established that Finnegan misled her about the availability of additional tests, and that his misstatements denied her the opportunity to request an alternate test guaranteed by WIS. STAT. § 343.305 and ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). These arguments are not persuasive.

¶10 "The circuit court's findings of fact, that is, the underlying findings of what happened, will be upheld unless they are clearly erroneous." ***State v. Mayo***, 2007 WI 78, ¶32, __ Wis. 2d __, 734 N.W.2d 115 (citation omitted). Despite Roemer-Rutter's claims to the contrary, her arguments challenge the circuit court's factual findings about what happened. As Roemer-Rutter acknowledges, the circuit court's decision relied heavily on its determination that she did not request an alternate test. This determination is a finding of fact that we must uphold if it has any support in the record. Because it is supported by Finnegan's testimony that he did not recall Roemer-Rutter asking for an alternate

test, and that he would have remembered such a request because it had never happened in his six years with the department, we may not overturn this finding.[2]

¶11 The circuit court based this finding in part on an evaluation of Roemer-Rutter's credibility, determining that her "testimony … came across as somewhat equivocal." Credibility determinations, even more than factual findings, are the province of the circuit court. *See, e.g.* ***Cogswell v. Robertshaw Controls Co***., 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (a trial judge sitting as fact finder is the ultimate arbiter of the credibility of the witnesses).[3] The court obviously believed Finnegan's testimony about whether Roemer-Rutter requested an alternate test and did not otherwise believe Roemer-Rutter's testimony.

¶12 We conclude the circuit court's finding that Roemer-Rutter did not request an alternate test was not clearly erroneous. Consequently, we also conclude that, based on the court's findings, Roemer-Rutter's right to an alternate test under WIS. STAT. § 343.305(5)(a) was not violated. Accordingly, we affirm the circuit court's order denying the motion to suppress, and the judgment convicting Roemer-Rutter of first-offense OWI.

By the Court.—Judgment and order affirmed.

[2] Moreover, Roemer-Rutter did not assert in her testimony that she requested an alternate test, or that she would have requested an alternate test had Finnegan not allegedly made statements that led her to believe that no other test was available.

[3] Roemer-Rutter asserts that the circuit court found her to be the more credible witness because its decision focuses on her testimony and not Finnegan's. However, the circuit court expressly questioned the credibility of Roemer-Rutter's testimony, as noted. The fact that the circuit court discussed her testimony does not prove the court found it to be credible.

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