COURT OF APPEALS DECISION DATED AND FILED

October 24, 2007

David R. Schanker
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. 2007AP1185-CR

Cir. Ct. No. 2006CT287

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY J. NOWAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Gregory J. Nowak appeals from a judgment of conviction for a third offense of operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a). He further appeals from the court's denial of his postconviction motion. He first argues that the circuit court erred by conducting the voir dire examination itself and not asking all of the questions he submitted. Next, Nowak argues that the circuit court erred when it admitted evidence of a blood test result when he was not given an alternative second test pursuant to WIS. STAT. § 343.305(4). Finally, Nowak argues that the circuit court erred when it admitted blood test evidence because the arresting officer exceeded his duty and gave misleading information contrary to the implied consent law. We disagree and affirm the judgment and order of the circuit court.

BACKGROUND

¶2 On February 10, 2006, Muskego Police Officer Jason Ondricka pulled Nowak over after observing his motor vehicle making slow and steady weaving within its lane and crossing the centerline at least twice. Nowak was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), each as a third offense.

¶3 When Nowak was taken to Waukesha Memorial Hospital for blood alcohol testing, Officer Ondricka read the Informing the Accused form to Nowak,

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

which advises an accused driver of the right to request a second test. Officer Ondricka testified, at a motion to suppress physical evidence hearing on October 18, 2006, and at trial, that Nowak did not request a second test. Officer Ondricka also testified, but only at the motion to suppress physical evidence hearing, that he informed Nowak that an additional test was “an option at his own expense.” The circuit court denied the motion to suppress the evidence of the blood test result. At trial, Nowak testified that after he had submitted to a blood test, and while still at Waukesha Memorial Hospital, he said to the officer, “What about my test” and that this was his way of asking for a second test.

¶4 During voir dire only the court asked questions. Neither the State nor Nowak personally asked questions, but both parties were permitted to submit proposed questions to the court. The court asked several of its own questions, and a few questions from both the State’s list and Nowak’s list. After the court concluded questioning, the State requested that no further questions be asked, while Nowak objected to the fact that several of his questions were not asked. The court decided that many of Nowak’s questions were inappropriate and were not necessary for jury selection.

¶5 At trial, the jury returned a guilty verdict on both charges. The court entered a conviction for Nowak’s third offense of OWI. Nowak appeals from the judgment, arguing that the circuit court erred in directing voir dire examination and in admitting the blood test result as evidence.

DISCUSSION

Voir Dire Examination

¶6 In Wisconsin, defendants are entitled to an impartial jury. WIS. CONST. art. I, § 7. The selection of an impartial jury is in the discretion and control of the circuit court. ***Hammill v. State,*** 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979); ***State v. Van Straten,*** 140 Wis. 2d 306, 314, 409 N.W.2d 448 (Ct. App. 1987). The court has broad discretion as to the questions asked. ***Aldridge v. United States***, 283 U.S. 308, 310 (1931). The court's exercise of this discretion is subject to the "essential demands of fairness." ***Id.***; *see also* ***Hammill,*** 89 Wis. 2d at 408. An appellate court will uphold the circuit court's discretionary act if it finds that the trial court (1) examined the relevant facts; (2) applied the proper standard of law; and (3) used a rational process to reach a conclusion that a reasonable judge could reach. ***State v. Hunt,*** 2003 WI 81, ¶34, 263 Wis. 2d 1, 25, 666 N.W.2d 771.

¶7 The proper standard of law for the circuit court's direction of voir dire is found in WIS. STAT. § 805.08(1). The court shall examine all jurors to discover whether the juror has any opinions on the case or any bias or prejudice toward the case. *See* ***id.*** "This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions." ***Id.***

¶8 Neither the State nor Nowak were permitted to personally ask voir dire questions of potential jurors; however, the court asked several questions submitted by both parties. The court asked the following questions submitted by Nowak: Does anyone drink alcohol? Does anyone not drink alcohol? Is anyone a

member of MADD or SADD? Does anyone have a commercial driver's license? Does anyone work for Coakley Brothers or United Van Lines or have family who works for them?

¶9 The circuit court did not ask all of Nowak's submitted questions because it found many inappropriate for determining juror bias. For example, the court refused to ask the following questions: Can anyone think of a situation in which the police and the DA think that Mr. Nowak committed a crime but that Mr. Nowak is actually innocent? Can anyone think of a situation in which there would be two different perspectives on the same situation? The court specifically decided that these questions attempted "to integrate concepts and ideas that are favorable to the defense, and I don't believe are necessary or appropriate for jury selection."

¶10 We conclude that this determination was well within the court's discretion and satisfied constitutional demands of fairness in selecting an impartial jury. A review of the record shows that the court sufficiently examined the potential jurors for prejudice and bias as required under WIS. STAT. § 805.08(1). The court allowed Nowak to supplement its examination, but the court is not required to ask the jury panel submitted questions it deems repetitive or hypothetical. *See* ***id.*** If the court had asked all of Nowak's questions, there would have been unnecessary repetition and possible misleading of the jurors.

Suppression of the Blood Test Result: Request for a Second Test

¶11 The circuit court's determination of the admissibility of evidence is a discretionary act. ***State v. Hinz***, 121 Wis. 2d 282, 285, 360 N.W.2d 56 (Ct. App. 1984). An appellate court will uphold the trial court's discretionary act if it finds that the trial court: (1) examined the relevant facts; (2) applied the proper standard

of law; and (3) used a rational process to reach a conclusion that a reasonable judge could reach. ***Hunt***, 263 Wis. 2d 1, ¶34. Generally, any relevant evidence, meaning any evidence that has a tendency to make the existence of a fact more or less probable, is admissible. WIS. STAT. §§ 904.01, 904.02.

¶12 Under the implied consent law, a person who submits to a test may request an alternative test provided by the agency and the agency shall comply with this request. WIS. STAT. § 343.305(5). A failure to comply with § 343.305(5) can result in a suppression of the test results at trial. ***State v. Renard***, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985). Nowak argues that he was deprived of his opportunity to have a second test and that the court's factual finding to the contrary was error. A circuit court's findings of fact should not be overturned unless clearly erroneous. WIS. STAT. § 805.17(2). Due regard should be given to the trial court's opportunity to judge the credibility of witnesses. ***Id.***

¶13 There was conflicting testimony at the motion hearing about whether Nowak requested an alternative second test. Officer Ondricka testified that Nowak did not request a second test from him. Nowak testified that after submitting to the blood test he said, "What about my test," and that this meant he was requesting a second test.

¶14 The circuit court found the officer's testimony more credible. The court explained that it weighed Nowak's testimony and the officer's testimony and that the officer's presentation of testimony in answering questions appropriately and without hesitation made it more credible. Therefore, the court found that Nowak did not request a second test in the presence of Officer Ondricka and that there was not evidence that he requested a second test in the presence of any other law enforcement person.

¶15 Nowak argues that, under ***Renard***, failure to administer a second test when the accused requests one requires the suppression of the blood test result. Nowak correctly cites the holding of ***Renard***, but incorrectly applies it to his case. The circuit court found that Nowak never requested a second test; therefore, there cannot be an error requiring suppression by not administering a second test for Nowak. Nowak fails to present any additional evidence on appeal to support his contention that "What about my test" was a request for a second test. We conclude that the circuit court's finding of fact was not clearly erroneous. Therefore, we uphold the circuit court's denial of the motion to suppress physical evidence because there were no findings of fact to support Nowak's argument that he requested a second test.

Suppression of the Blood Test Result: Informing the Accused

¶16 When requesting a blood alcohol test, law enforcement officers shall inform the accused of the following:

> If you take all the required tests, you may choose to take further tests. You may take the alternative test that 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.

WIS. STAT. § 343.305(4).

¶17 We have previously held that the following three-part test is the proper analysis to use when determining whether an officer's conduct during informing the accused was proper: (1) Has the officer not met, or exceeded his/her duty under the statute to provide information to the accused; (2) is the lack or oversupply misleading; and (3) has the failure to properly inform the driver

affected his/her ability to make the choice about testing. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995).

¶18 In ***Quelle***, we also held that an officer does not have a duty to explain the Informing the Accused form. ***Id.*** at 280-81. The officer's only duty under the implied consent law is to accurately inform the accused. ***Id.*** at 283. Accordingly, we must determine whether Officer Ondricka either did not meet his duty, or exceeded his duty under WIS. STAT. §§ 343.305(4). After arriving at Waukesha Memorial Hospital for a blood alcohol test, Officer Ondricka read the Informing the Accused form to Nowak and received Nowak's initials as validation, thus meeting his duty. However, the Officer also explained to Nowak that a second test is "an option at his own expense." Officer Ondricka exceeded his duty by making this additional statement because it "went beyond a statutory duty of reading the information on the face of the form." *See* ***Quelle***, 198 Wis. 2d at 282. Though Ondricka repeated information that was contained in the form, we will accept Nowak's characterization of that statement as exceeding his duty under the implied consent law.

¶19 Having accepted that the first ***Quelle*** factor was met, we must next decide whether Officer Ondricka's statement was false or misleading. ***Quelle***, 198 Wis. 2d at 280, 285. WISCONSIN STAT. § 343.305(4) provides two options for an alternative second test: one that is free of charge if performed by law enforcement and one at Nowak's expense when provided by an alternative qualified test provider. Officer Ondricka's statement was not false, because if Nowak chose a second test by an alternative agency it would be "at his own expense." However, his statement may be misleading because it emphasizes only one of the two options for a second test and therefore, taken out of context, may suggest that the only option after the first test was one at Nowak's expense. For the limited

purpose of our analysis here, we will accept that the statement about the cost of the second test was misleading.

¶20 Under ***Quelle***, the determinative question in this case is whether Officer Ondricka's statement affected Nowak's ability to choose an alternative second test. *See* ***Quelle***, 198 Wis. 2d. at 280. There is no evidence that Nowak's choice was affected by Ondricka's statement. Nowak never asked for further clarification or indicated that he did not understand his rights to a second test. Applying the ***Quelle*** test under an objective standard, we conclude that Ondricka's statement would not have affected a reasonable person's ability to make an informed choice about pursuing an alternative second test.

CONCLUSION

¶21 Voir dire examination is in the court's discretion as to scope and form of questions. ***Hammill,*** 89 Wis. 2d at 408. There is no error when, as here, the court refuses to ask questions submitted by the parties that are repetitive, hypothetical, or inappropriate for determining jury bias. *See* WIS. STAT. § 805.08(1). Furthermore, we conclude that when the accused fails to request an alternative second test, the failure to provide one does not result in suppression of the blood test result. Therefore, Nowak's blood test results were properly admitted. Finally, under WIS. STAT. §§ 343.305(4), law enforcement has a duty to read the Informing the Accused form to the accused, not to further explain the form. ***Quelle,*** 198 Wis. 2d at 280. Although Officer Ondricka exceeded that duty and made an arguably misleading statement, we conclude this did not affect Nowak's ability to make a choice about taking the test. The circuit court's holdings are in accordance with the implied consent law and we therefore affirm.

By the Court.—Judgment and order affirmed.

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