COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1684 **Cir. Ct. No. 2007TR752**

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

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

JOSEPH E. KASINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Joseph Kasinski was arrested for drunk driving. He contends that, following his arrest, he was improperly denied his statutory right

[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.

to an alternative chemical test at the police agency's expense, under WIS. STAT. § 343.305(5)(a). Kasinski argues that the circuit court erred when it concluded that he did not request an alternative test. We disagree. The record amply supports the circuit court's conclusion that Kasinski expressed a desire that police test his blood, rather than his breath, but did not in reasonably clear terms communicate to the officer that, if he could not have his blood tested first, he nonetheless wanted a blood test administered as an alternative second test. Accordingly, we affirm the circuit court.

¶2 In ***State v. Schmidt***, 2004 WI App 235, 277 Wis. 2d 561, 691 N.W.2d 379, we explained the legal backdrop for the issue at hand:

> WISCONSIN STAT. § 343.305(2) provides that a person operating a motor vehicle on the public highways is deemed to have given consent to one or more tests of his or her breath, blood, or urine for the purpose of determining the presence of alcohol or controlled substances, when requested by a law enforcement officer and consistent with certain statutory prerequisites. The law enforcement agency must be prepared to administer at least two of the three approved tests and may designate which of the tests shall be administered first. The test designated by the law enforcement agency as the first to be administered is sometimes referred to as the "primary test."
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> WISCONSIN STAT. § 343.305(5)(a) addresses the additional test the agency must be prepared to administer:
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> > 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).... The agency shall comply with a request made in accordance with this paragraph.

> At the time the officer asks an accused to submit to a chemical test, the officer must read to the accused a form prescribed by statute. WIS. STAT. § 343.305(4). This form is generally referred to as the "Informing the Accused" form. The form must explain, among other things, that the officer wants to take samples of the accused's breath, blood, or urine to determine the concentration of alcohol or drugs in the accused's system. The form must also state: "If you take all the requested 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." Section 343.305(4)….
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> Although WIS. STAT. § 343.305(4) and (5) use the term "alternative test," it is clear from these provisions that the accused does not have a right to choose a test *instead of* the one the officer asks him or her to take; rather, the "alternative test" is *in addition to* that test. It is for this reason that the case law sometimes refers to the "alternative test" as the "second" or "additional" test.

Id., ¶¶8-11 (citations and footnote omitted).

¶3 In addition, we note that we accept the fact finding by the circuit court, unless it is clearly erroneous. WIS. STAT. § 805.17(2). To the extent the circuit court did not engage in express fact finding, we will assume the circuit court made findings in a manner that supports its final decision. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568. Finally, whether the facts viewed under these standards show a request for an alternative test is a question of law we review *de novo*. *See* ***Schmidt***, 277 Wis. 2d 561, ¶13.

¶4 Here, Kasinski contends that the facts show he requested an alternative test. We recount the pertinent facts and then address Kasinski's more specific arguments.

¶5 Kasinski was arrested for operating a motor vehicle while intoxicated. The arresting officer took Kasinski to the police department, where

the officer read Kasinski the "Informing the Accused" form. The officer then asked Kasinski if he would take a breath test. Kasinski responded no, and the officer checked the "no" box on the Informing the Accused form. Kasinski then told the officer that he said no to the breath test because he believed the choice of the "first test" was his and he wanted a blood test. The officer told Kasinski that the officer, not Kasinski, chose the "first test." Kasinski then told the officer that he would take the breath test. The officer changed the form to indicate that Kasinski had agreed to take a breath test, writing "changed mind" and initialing the change. The officer administered the breath test and showed Kasinski the test result, which was ".18." The breath test was administered at approximately 5:50 p.m., and Kasinski was released and left the police department at 6:22 p.m. After Kasinski took the breath test, he did not indicate to the officer, in any manner, that he wanted to take a blood test.

¶6 Kasinski testified that he believed the officer checked the no box on the Informing the Accused form because, when the officer asked if Kasinski would take a breath test, Kasinski responded that he wanted a blood test. Kasinski testified that he thought, before the officer explained otherwise, that the choice of a first test was his. Kasinski testified that he assumed that the officer's reference to a "first test" meant there would be a second test. He testified that he probably requested a blood test just the one time and that "there wasn't a whole lot of discussion." Kasinski agreed that he did not say anything about the blood test after taking the breath test. When the circuit court asked Kasinski whether he considered getting a second test at his own expense, Kasinski responded that he thought that once you received the citation following the breath test "it was like a done deal …. I didn't know that it would make any difference."

¶7 Kasinski argues that these facts show that he initially believed that the selection of the primary test was his and, apart from that belief, he thought that the use of the term "first test" during his exchange with the police officer implied that there would be a second test. In Kasinski's view, because he requested a blood test as his first test, the officer should have understood that if Kasinski could not have that test first, Kasinski still wanted a blood test administered as an alternative second test. Kasinski notes that, under our ***Schmidt*** decision, he was not required to renew his request after submitting to the breathalyzer test. *See* ***Schmidt***, 277 Wis. 2d 561, ¶30.

¶8 We first point out that Kasinski's subjective thinking at the time of his exchange with the police officer is not relevant. The question is not whether Kasinski thought he requested an alternative test, but rather whether he actually requested an alternative test.

¶9 The circuit court here concluded that the officer reasonably interpreted Kasinski's statements as being *limited* to requesting that a blood test be his first test. We agree with the circuit court's analysis. The circuit court properly relied on the fact that after the officer administered the breath test, Kasinski neither asked why the officer was not taking steps to have a blood test administered nor otherwise mentioned the blood test. *See* ***id.*** ("[T]he absence of a request made after the first test is relevant to deciding as a factual matter whether the accused requested an additional test."). It is obvious that the circuit court concluded that once Kasinski learned he could not have a blood test as his first test, Kasinski's failure to say anything about still wanting a second chemical test reasonably led the officer to conclude that Kasinski was not asking for a second test.

¶10 As we observed in ***Schmidt***, there may be situations in which the absence of a request after taking a first test must be construed as a request for an alternative test, such as "where an accused clearly requests an additional test before taking the first test, takes the first test, and then is prevented by circumstances, such as the absence of law enforcement personnel, from repeating to an officer the request for an additional test." ***Id.*** Nothing like that occurred here.

By the Court.—Judgment affirmed.

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