STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2006
v	No. 256068 Jackson Circuit Court
CHRISTIAN EARL QUADA, Defendant-Appellant.	LC No. 03-000466-FH

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a bench trial, of operating a motor vehicle while under the influence of a controlled substance, third offense, MCL 257.625(1)(b) and (8)(c). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 15, 2003, defendant was driving in Jackson when the police stopped him for speeding. After defendant failed field sobriety tests, the police administered a breath test, then arrested defendant. The police then arranged for a chemical test of defendant's blood, which revealed a blood alcohol content of 0.11%.[1]

The district court heard testimony that defendant communicated to his arresting officers that he wished to have his own blood test, and was later allowed to call his mother-in-law, a physician practicing in the Kalamazoo area, who came to the jail but discovered that it had no equipment for her to use for that purpose. A local hospital offered to provide the necessary equipment. The police initially offered to drive her to the hospital, but after a forty-five-minute delay informed her that they would not do so. As she drove herself to and from the hospital, there was a shift change at the jail. Upon her return, the police informed her that she could not draw defendant's blood without a court order. She was then directed to the 12th District Court, where the clerk directed her back to the jail. She then met with the sheriff, who, after a further

[1] At the time in question, MCL 257.625(1)(b) prohibited operation of a motor vehicle with "an alcohol content of 0.10 grams or more per 100 milliliters of blood . . . ." The Legislature has since reduced this limit to 0.08%. 2003 PA 61.

delay of thirty to forty-five minutes, told her that it was too late to draw the blood. Defendant never received an independent blood test.

The district court dismissed the charges against defendant on the ground that the police improperly denied him the opportunity to have a test administered by the person of his choosing. The circuit court reversed that decision, reinstated the charge, and conducted the trial.

Defendant's sole issue on appeal is whether the circuit court erred in reversing the district court's dismissal. "This Court's review of the circuit court's analysis of the bindover process is de novo." *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). Factual findings are reviewed for clear error. MCR 2.613(C). See also *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

MCL 257.625a(6)(d) provides that "[a] person who takes a chemical test administered at a peace officer's request . . . shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests . . . within a reasonable time after his or her detention." The purpose of this legislation is "to protect the motorist by ensuring that scientific evidence is not gathered by, and at the sole disposal of, only one party . . . ." *People v Green*, 260 Mich App 392, 407; 677 NW2d 363 (2004). Where the police administer a chemical test to a suspect, but wholly fail to allow the suspect to obtain his or her own independent chemical test, dismissal of the attendant charges is the appropriate remedy. *Id.*; *People v Hurn*, 205 Mich App 618, 620; 518 NW2d 502 (1994). See also *People v Koval*, 371 Mich 453, 459; 124 NW2d 274 (1963).

In this case, the district court specifically found that defendant was arrested at 1:56 a.m., had his blood drawn at approximately 3:00 a.m., then was booked at the jail at 3:10 a.m. At the time defendant agreed to allow the police to test him, he requested a test of his own, but neither arresting officer responded to that request. At approximately 4:00 a.m., defendant restated his request for an independent test, and was allowed to telephone his mother-in-law. The latter departed from Kalamazoo at 4:15 a.m. and arrived at the jail at 5:45 a.m. She was prohibited from drawing defendant's blood between 7:00 a.m. and 9:00 a.m. that day.

The district court further recited that both police witnesses testified that their department had no policy to cover an arrestee insisting on his statutory right to an independent test. The district court also summarized testimony from a toxicologist, who opined that in a situation such as the instant one, the suspect might still have had a detectable blood alcohol level at 7:00 a.m.

The district court concluded that the police had no authority to decide whether it was too late for defendant to have his own physician draw his blood, and that had defendant's mother-in-law "met with a modicum of cooperation, rather than a stonewall on every front, she could have taken a sample of the defendant's blood which could have had evidentiary value to either side." Concluding that these facts constituted a denial of defendant's right to an independent test, the district court dismissed the charges against him.

The prosecutor appealed to the circuit court, which reversed the district court's decision on the ground that so much time had passed by the time defendant's mother-in-law was finally prepared to draw defendant's blood, that the request to allow her to proceed was not reasonable.

Our Supreme Court has declared that the legislative determination that chemical analysis to show the amount of alcohol in a driver's blood is competent evidence has no time element, and thus that none may be imposed. *People v Wager*, 460 Mich 118, 121; 594 NW2d 487 (1999), citing MCL 257.625a(6)(a). The Court *Wager* further stated that MCL 257.625a(6)(d), the statutory provision here at issue, includes no time element. *Id.* at 121 n 5. The reference to "reasonable time after his or her detention" therein, then, does not authorize the police to refuse to cooperate after certain time has passed, but instead obligates the police to cooperate with reasonable requests for independent tests in timely fashion. The rule that emerges from *Wager*, *supra*, is that "[t]o the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact." *Id.* at 126. This pronouncement militates against recognizing some right of the police to deny a suspect a requested independent chemical test because the police feel that too much time has elapsed.

In this case, the circuit court did not find clear error in the district court's conclusions that defendant in fact expressed his wish for an independent test when he first consented to having the police arrange for their own test, that the police did not then respond to defendant's request, or that defendant reiterated his request an hour later. Although defendant could not reasonably have expected his mother-in-law to appear less than an hour after she was called, had the police scrupulously cooperated with defendant's expressed request for his own test, she might then have appeared only about that much later than when the police administered their test.

The circuit court also expressed no disagreement with the district court's conclusion that defendant's mother-in-law arrived at the jail at 5:45 a.m., then was finally prohibited from drawing defendant's blood between 7:00 a.m. and 9:00 a.m. that day. Nor did the circuit court comment on the uncontroverted evidence that the sheriff's department had no protocol for respecting a suspect's statutory right to an independent test. The delay of at least seventy-five minutes between defendant's mother-in-law's arrival and the time that the police specifically prohibited her from drawing defendant's blood resulted substantially from the department's lack of established procedures for accommodating suspects' requests for independent tests. Indeed, most of the delay between defendant's initial request for his own test and the time when his mother-in-law stood prepared to draw his blood is attributable to the police, not to defendant.

Further, any challenge to a defendant's independent test on the basis of time lapse should be resolved in court, not by jail officials. *Wager, supra* at 126. MCL 257.625a(6)(d) demands that the police make reasonable efforts to accommodate reasonable requests. The police ultimately prohibited defendant's mother-in-law from drawing his blood not because allowing her to proceed would have caused them some excessive expense or exertion, but because they decided that too much time had passed. What defendant asked for from the time he agreed to allow the police to draw his blood onward was reasonable; their lack of cooperation was unreasonable. Because the police refused to cooperate with defendant's reasonable request for an independent chemical test, the case against defendant should have been dismissed. *Koval*, *supra*; *Green*, *supra*; *Hurn*, *supra*. For these reasons, we hereby vacate defendant's conviction, and remand this case to the circuit court with instructions to dismiss it.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood