COURT OF APPEALS
DECISION
DATED AND RELEASED

November 1, 1995

No. 95-0748

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS LOIS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

SNYDER, J. Douglas Lois appeals from an order finding that he refused to submit to a chemical test in violation of § 343.305(9), STATS. Lois raises three issues on appeal: (1) whether the officer's request for a blood test, after Lois was deemed to have refused a breath test, was still under the implied consent statute, § 343.305; (2) whether the officer substantially complied with the requirements of the implied consent statute; and (3) whether the denial of his request to consult with an attorney before consenting to the blood test

violated his constitutional right to counsel. Because we conclude that both chemical tests fell within the purview of the implied consent statute, that the statute was substantially complied with, and that there was no right to counsel under these facts, we affirm.

Lois was stopped by Officer Bret Maus of the Burlington police department after Maus observed Lois' car cross the center line at least five times. Lois agreed to perform field sobriety tests and, after failing to successfully complete the first three, was placed under arrest for operating a motor vehicle while intoxicated.

Lois was transported to the Burlington police department, where the Informing the Accused form was read to him. Maus requested that Lois submit to a breath test, and Lois agreed. Another officer, John Fisher, administered the test. After explaining the procedure to Lois, Fisher attempted to administer the breath test. Although on one occasion a tone was emitted for a few seconds,[1] Lois was unable to provide an adequate sample. After five attempts, Fisher entered Lois' test as a refusal.

After informing Lois that his inability to produce an adequate sample was deemed a refusal, Maus asked him if he would consent to a blood test. The offer of an alternate test was mandated by departmental policy as a courtesy and was made available to anyone who was unable or unwilling to perform the breath test. Lois stated that he would not consent to a blood test

[1] The Intoxilyzer machine emits a tone when it begins to receive an adequate sample. In order to complete the test, the tone must be sustained for fifteen seconds.

without his lawyer present. After asking Lois a second time to submit to a blood test, Maus considered the failure to submit to a blood test a refusal. At that point, he filled out the intent to revoke form and issued it to Lois.

Lois requested a refusal hearing, as allowed by § 343.305(9), STATS. At the refusal hearing, Lois' physician testified. He had examined Lois two days after his arrest, at which time Lois was suffering from a respiratory disorder. The physician further opined that Lois had had this condition for more than a couple of days and may have had it for a week to six months.

At the conclusion of the refusal hearing, the trial court found that while Lois' failure to provide an adequate breath sample may have been reasonable based on his physician's testimony, Lois was given a second opportunity to comply with the implied consent statute. The court concluded that the failure to consent to the blood test was an unreasonable refusal under § 343.305(9), STATS., and imposed the statutory penalties. This appeal followed.

Lois contends that Maus' request that he submit to a blood test was not a request for a chemical test under the implied consent statute, but an attempt to obtain chemical evidence by other constitutional means. *See* ***State v. Zielke,*** 137 Wis.2d 39, 52, 403 N.W.2d 427, 432-33 (1987). He argues that the characterization of his failure to provide an adequate breath sample as a refusal meant that the second request was no longer within the implied consent statute. We disagree.

A determination of whether Maus was proceeding under the implied consent statute is a question of statutory interpretation. It involves the application of a statute to an undisputed set of facts. *See* ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990). It presents a question of law which we review de novo. ***Id.***

> Section 343.305(3)(a), STATS., provides in relevant part:
> [A] law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

Lois asserts that there is nothing ambiguous about the language of subsec. (3)(a) as applied to these facts. We agree. Law enforcement agencies may request an individual to provide *one or more* samples of breath, blood or urine for testing. Here, the Burlington police initially requested that Lois submit to a breath test.

When Lois was unable to give an adequate breath sample, the testing officer deemed it a refusal. This was according to statute. Section 343.305(6)(c)3, STATS., clearly states that the "[f]ailure of a person to provide 2 separate, adequate breath samples in the proper sequence constitutes a refusal." When Maus informed Lois that his failure was a refusal, he was following the statute. Because Maus had not obtained an evidentiary sample, he then attempted to get a sample through different means—a blood test. He made this request, consistent with the statutory guidelines which allow law enforcement agencies to request *one or more* tests for evidentiary purposes.

The purpose of the implied consent statute provides additional support for this analysis. Its intent is to facilitate the taking of tests for intoxication and to further the State's interest in removing drunken drivers from the highway. *See* ***Scales v. State,*** 64 Wis.2d 485, 494, 219 N.W.2d 286, 291-92 (1974). In light of this purpose, the implied consent statute is to be liberally construed. ***Id.*** at 485, 219 N.W.2d at 292.

The statute allows for the possibility that a law enforcement agency may request more than one type of test. If the evidentiary result of one test is suspect, for example, another test may be requested. Even if the individual has complied with an officer's first request and a satisfactory result is obtained, this does not bar a request for a different test. *See* § 343.305(3)(a), STATS. It would be absurd to read § 343.305(3)(a) to mean that law enforcement cannot request a different type of sample after a contrived refusal, but could do so if there was compliance. The supreme court has stated that statutes must be interpreted to avoid absurd or unreasonable results. ***Zielke,*** 137 Wis.2d at 51, 403 N.W.2d at 432. Provisions of statutes must be harmonized to give reasonable effect. ***Id.***

We find further support for this position in ***State v. Pawlow,*** 98 Wis.2d 703, 298 N.W.2d 220 (Ct. App. 1980). Pawlow was arrested for driving while intoxicated and requested to take a breath test. He consented, but just prior to taking the test he vomited.[2] The police officer then requested a urine

[2] The test is improperly performed if the person vomits within twenty minutes before the test is administered. *See* ***State v. Pawlow,*** 98 Wis.2d 703, 704 n.1, 298 N.W.2d 220, 221 (Ct. App. 1980).

test, and Pawlow refused. Pawlow argued that because he had consented to the breath test, it was not unreasonable to refuse a substituted test. ***Id.*** at 703-04, 298 N.W.2d at 221. This court disagreed, stating that the initial designation of a particular test does not prevent an officer from requesting an additional test or a different test. ***Id.*** at 705, 298 N.W.2d at 222.

Here, as in ***Pawlow***, Lois consented to a primary breath test and was unable to comply for a physical reason. The officer requested an alternate test, and it was refused. In both cases, the failure to comply with the initial test was deemed a refusal. Lois' physical inability to comply was a defense to his refusal to take the breath test. The trial court then found that his refusal to submit to Maus' request for an alternate test, a blood test, was unwarranted. We conclude that this was a proper application of the statutory guidelines of the implied consent statute.

Lois also contends that Maus' failure to reread the Informing the Accused form, after the breath test was deemed a refusal, did not constitute substantial compliance. When officials fail to comply with the implied consent statute, an individual's license cannot be revoked. ***Zielke***, 137 Wis.2d at 54, 403 N.W.2d at 433. Complete compliance is not required, but only "actual compliance in respect to the substance essential to every reasonable objective of the statute." ***State v. Muente,*** 159 Wis.2d 279, 281, 464 N.W.2d 230, 231 (Ct. App. 1990) (quoted source omitted).

Lois argues that because his inability to produce an adequate breath sample was deemed a refusal, Maus' failure to reread the Informing the

Accused form prejudiced Lois by increasing the likelihood that he would refuse to provide any additional evidence sought. We disagree. In the first reading of the form, Lois was informed that "[h]e ... is deemed to have consented to *tests* under sub. (2)." *See* § 343.305(4)(a), STATS. (emphasis added). The legislature has decided what persons must be told when they are requested to submit to chemical testing. ***State v. Crandall,*** 133 Wis.2d 251, 259-60, 394 N.W.2d 905, 908 (1986). The Informing the Accused form made it clear that refusing a test was not a "'safe harbor,' free of adverse consequences." *See* ***id.*** at 255, 394 N.W.2d at 906.

If Lois were uncertain as to the consequences of his refusal to take the blood test, he could have asked. His claim that he believed he had already suffered the penalty of his earlier refusal is disingenuous; Maus had not yet presented Lois with the intent to revoke form which outlines the penalties of a refusal. We conclude that because Lois had already consented to *tests* the first time Maus read the Informing the Accused form, it was not necessary to reread the form before requesting the second test. The request by Maus for a blood test, made immediately after Lois was unable to provide an adequate breath sample, was a request for "one or more samples of his ... breath, blood or urine." *See* § 343.305(3)(a), STATS. Lois' "narrow reading of the statute ignores the language and policy of the statute as a whole." *See* ***Pawlow***, 98 Wis.2d at 705, 298 N.W.2d at 222.

Lois finally argues that he was denied his constitutional right to counsel when he requested an attorney before he would decide whether to

consent to a blood test. Because we conclude that Maus' requests for breath and blood samples were within the purview of the implied consent statute, Lois had no right to counsel. *See* ***State v. Neitzel,*** 95 Wis.2d 191, 200, 289 N.W.2d 828, 833 (1980). The legislature has elected not to allow a statutory right to counsel prior to testing for intoxication. *See* ***id.***

For all of the foregoing reasons, we affirm.

By the Court.—Order affirmed.

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