COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 24, 1996

No. 95-2279-FT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARAN K. ZASTROW,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed*.

ANDERSON, P.J. Caran K. Zastrow maintains that the trial court erred when it found that her demand for a breath test was not a request for an alternative chemical test. We affirm because the factual findings of the trial court are not clearly erroneous.

Zastrow was taken to Sheboygan Memorial Hospital's emergency room after an accident in which she suffered head injuries. After she was x-

rayed, State Trooper Roger Jones entered the treatment room, gave her a citation for operating while intoxicated and read her the Informing the Accused form required by the implied consent law. Jones then asked Zastrow if "she would submit to an evidentiary chemical test of her blood," and she responded that before she would submit to the blood test she wanted to have a breathalyzer test. Jones explained to Zastrow that usually a breath test is the primary test but because she had suffered head injuries in an accident, his department's policy was to designate a blood test as the primary test.

After Zastrow again requested the breath test, Jones began to explain "the refusal system" to her and she responded that she was not refusing but wanted to take the breath test. In the course of again explaining that the blood test was the primary test because of the head injuries she had suffered, Jones told Zastrow that while she did have the option of taking a secondary test, "in this case it could not be breath because of the injuries that she had sustained."[1] After this second complete explanation, Zastrow submitted to a blood test. Jones then asked Zastrow if she had any questions, she answered no, and Jones left the hospital.

Zastrow brought a motion to suppress the results of the blood test challenging the failure of Jones to fulfill her repeated requests for a breath test.

[1] Inexplicably, Zastrow does not challenge the correctness of Jones's advice that the alternate test his agency would give would be another blood test. Jones testified that his agency does not take urine tests and that breath tests are not an option when there is an accident. On the surface this advice conflicts with § 343.305(2), STATS., which states that a "law enforcement agency … shall be prepared to administer … 2 of the 3 tests … and may designate which of the tests shall be administered first." These tests include breath, blood or urine. Section 343.305(3)(a).

After an evidentiary hearing, the trial court denied her motion finding that "she didn't request any additional tests, alternative by the agency or by anyone else. That her request was simply one straightforward, that she wanted not the blood test but she wanted the breath test instead. She didn't get that, she didn't request an alternative test."

On appeal, Zastrow insists that this case is closely on point with the facts of ***State v. Renard,*** 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985). She argues that the trial court erred in not holding, as we did in ***Renard***, that the requested additional test was mandatory after she submitted to the blood test and in not strictly enforcing her right to the test she requested.

Zastrow's attempt to fit the facts of this case within the decision in ***Renard*** overlooks the standard of review that is employed. Under § 805.17(2), STATS., a trial court's findings of fact will not be set aside unless they are clearly erroneous. *See* ***State v. Coerper,*** 192 Wis.2d 566, 571, 531 N.W.2d 614, 617 (Ct. App. 1995). In ***Renard***, the trial court found that "Renard requested a breathalyzer test in addition to the blood test," and we held that the finding was "not contrary to the great weight and clear preponderance of the evidence."[2] ***Renard***, 123 Wis.2d at 460, 367 N.W.2d at 238. However, in this case, the trial court found that Zastrow "didn't request any additional tests" and we must affirm this finding if it is not clearly erroneous.

[2] This standard is essentially identical to the "clearly erroneous" standard described in § 805.17(2), STATS. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

Our own independent review of the record confirms the correctness of the trial court's findings. The trial court determined that the reason Zastrow asked for the breath test, instead of the blood test, was that "she thought if she took this breath test the results would come back instantaneously … that Jones would see the results, be convinced that there was no level of intoxication and be dissuaded from writing the ticket." This conclusion emanates from Zastrow's testimony that from her experience of having lived in Texas and being in the medical field that if she "would have a breath test that it would show that I was not under the influence of alcohol, … whereas with the blood test I know that takes a couple of days …."

We reach the same conclusion the trial court reached. Zastrow's request was for a primary test because she knew that if the results were below the legal blood-alcohol level she would not be arrested and that it was only with the breath test that there would be immediate results. Therefore, the trial court's finding that Zastrow did not request the breath test as the alternate test is not clearly erroneous and we affirm.

By the Court.—Judgment affirmed.

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