COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 6, 1996

NOTICE

No. 95-2506-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY A. SANDERFOOT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

CANE, P.J. Troy Sanderfoot appeals his conviction for operating a motor vehicle while under the influence of an intoxicant upon his no contest plea. On appeal, Sanderfoot contends the trial court erred by denying his motion to suppress the blood test result because: (1) there was no probable cause to arrest him for OWI and obtain a blood sample, and (2) he was deprived of the right to an alternative test because of the information given to him by the arresting officer. This court rejects Sanderfoot's arguments and affirms the conviction.

At the suppression hearing, only the arresting officer, Deputy Mark Williamson of the Langlade County Sheriff's Department, testified. The

essential facts appear undisputed. Williamson arrived at the scene of a one-car accident at approximately 11:20 p.m. and observed Sanderfoot's pickup in the ditch. It appeared the pickup had rolled over several times and there were empty beer cans around the vehicle.

After detecting the smell of alcohol coming from inside the pickup, Williamson talked to Sanderfoot, who at that time was in an ambulance. Sanderfoot explained that he had lost control of his pickup when a deer ran in front of his vehicle. While talking to Sanderfoot, the deputy noticed a strong odor of alcohol coming from Sanderfoot whose eyes were glassy. Williamson observed that some of the paramedics inside the ambulance acknowledged that a strong smell of alcohol came from Sanderfoot.

Because Sanderfoot was required to remain flat on his back in the ambulance, the deputy administered only the alphabet test, Horizontal Gaze Nystagmus (HGN) test and preliminary breath test. Sanderfoot passed the alphabet test, but failed the HGN test. Sanderfoot tested .18% on the portable breath test. Williamson testified that Sanderfoot was very impaired from alcohol.

After the preliminary breath test, the ambulance took Sanderfoot to the hospital where the deputy issued Sanderfoot a citation for OWI, read him the informing the accused form and asked him if he would consent to the taking of a blood sample for testing his alcohol content. Sanderfoot consented to giving a blood sample which was later found to be at .19%.

First, this court rejects Sanderfoot's argument that the HGN test result should be rejected because the deputy did not conduct the test in strict compliance with the procedures outlined in the National Highway Traffic Safety Administration Manual. Although it could be reasonably argued that Sanderfoot's injuries from the accident would explain the test result and his glassy eyes, it is for the trial court to resolve conflicting inferences and determine the weight and credibility of witnesses. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank,*** 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). Here, the trial court was satisfied that the HGN test was conducted sufficiently and gave it appropriate weight in its determination of whether the test result was

reliable for the purpose of ascertaining probable cause. This court will not disturb the trial court's findings.

The next issue is whether the deputy had probable cause to arrest Sanderfoot and request a blood sample. The probable cause standard to arrest is defined in terms of facts and circumstances sufficient to warrant a reasonable officer in believing that the defendant committed or was committing a crime. ***State v. Koch,*** 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). Probable cause to arrest exists where the totality of the circumstances within the arresting officer's knowledge at the time of arrest would lead a reasonable officer to believe the defendant probably committed a crime. ***Id.***

This court is satisfied that the arresting officer had ample evidence to believe Sanderfoot had operated the pickup while under the influence of an intoxicant. This was a one-car accident where Sanderfoot lost control of a vehicle; there were beer cans lying about the vehicle emitting an odor of alcohol; a strong odor of alcohol was detected on Sanderfoot whose eyes were glassy; Sanderfoot failed the HGN test; Sanderfoot tested .18% on the preliminary breath test; and it was the deputy's opinion, based on eighteen years of training and experience, that Sanderfoot was under the influence of an intoxicant.

Next, Sanderfoot contends that when a blood test is first conducted as in his case, he is not immediately informed of the test results until some days later. Consequently, he reasons that because he does not know the results of the primary test until long after the time for a second test has expired, his due process rights to a second test are violated. Thus he concludes the informing the accused form with regard to an alternative test is inadequate when the blood test is administered as the primary test.[1] Notably, Sanderfoot

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[1] The relevant part of the statutorily prescribed "INFORMING THE ACCUSED" form provides:

> 1. You are deemed under Wisconsin's Implied Consent Law to have consented to chemical testing of your breath, blood or urine at this Law Enforcement Agency's expense. The purpose of testing is to determine the presence or quantity of alcohol or other drugs in your blood or breath.
>
> 2. If you refuse to submit to any such tests, your operating privilege will be

did not testify at the suppression hearing regarding any confusion he may have had concerning his right to have an alternative test.

In ***Village of Oregon v. Bryant,*** 188 Wis.2d 680, 691, 524 N.W.2d 635, 639 (1994), the supreme court held that the information given on the informing the accused form properly warns the accused drivers of the consequences of submitting to the requested test and also properly informs them of the opportunity and potential advantage of submitting to an alternative test. As stated in ***Bryant***, 188 Wis.2d at 687 n.5, 524 N.W.2d at 638 n.5:

> [W]e rely on [***State v.***] ***Piskula,*** [168 Wis.2d 135, 143, 483 N.W.2d 250, 253 (Ct. App. 1992)] for the proposition that the information provided to the defendants, which is the same today as it was when ***Piskula*** was decided, did not mislead defendants as to the merits of an alternative test and therefore, that they were properly informed of the law.

In ***Bryant,*** the supreme court concluded by rejecting the defendant's argument that there was a violation of due process because the informing the accused form misinformed him of the right to an alternative test. ***Id.*** at 692, 524 N.W.2d at 640. Similarly, Sanderfoot was not misinformed in any way of his right to take an alternative test. He was told of the absolute right to have a second alternative test, and this right did not depend upon which test was the primary test, nor should it. There is no due process requirement that

(..continued)

> revoked.
>
> 3. After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.
>
> 4. If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.

an accused driver must first know the result of the primary test before deciding whether to take an alternative second test.

This court concludes that Sanderfoot was properly informed of the law and that his due process rights were scrupulously honored. Neither the statutory process nor the statutory protections and admonitions misled Sanderfoot. He was given all of the information mandated by due process and the statute. After the blood was drawn, he retained the absolute right to have a second test; there was no appreciable risk to Sanderfoot if he had asked for the second test. After the blood was drawn he still retained his driving privileges; there was no requirement to advise him of the opportunity to challenge the suspension of his privileges or the potential evidence that would be considered relevant at such a hearing. Consequently, this court concludes that Sanderfoot was not denied any due process right to take a second test.

Additionally, the identical issue was argued and rejected in a recently published opinion, ***City of Waupaca v. Javorski,*** No. 95-1033 (Wis. Ct. App. Nov. 16, 1995, ordered published Jan. 30, 1996). In ***Javorski,*** we held that even if the officer's information to the accused driver is misleading with respect to the license suspension provisions of the implied consent law, it does not warrant suppression of an otherwise validly consented-to blood test at the trial on the substantive OWI charge. Therefore, the trial court correctly rejected Sanderfoot's motion to suppress the blood test result and the conviction is affirmed.

By the Court.—Judgment affirmed.

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