COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1996

No. 96-1845-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY S. ERTMAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

BROWN, J. Randy S. Ertman contends that the arresting officer violated his rights under the implied consent law. Because an accused driver's license may not be suspended if he or she passes at least one blood alcohol test, Ertman contends that the arresting officer should have apprised him of the potential benefits of volunteering for a second test. However, we hold to precedent, which states that an arresting officer's only duty is to inform an accused driver that such additional testing is available, not that such testing

may later prove helpful. We affirm the trial court's order permitting the State to use Ertman's test results and his conviction for operating a motor vehicle with a prohibited blood alcohol concentration.

On May 7, 1995, Ertman was involved in a minor traffic accident near the town of Cooperstown. When the arresting officer came to the scene, he saw Ertman exhibit signs of intoxication. The arresting officer performed several field sobriety tests, which Ertman failed.

The arresting officer placed Ertman in custody and took him to a local hospital for blood alcohol testing. The officer read Ertman the Department of Transportation's standard Informing the Accused form and obtained Ertman's consent to have a blood sample taken. The sample was sent to the state laboratory. The report came back a few days later, indicating that Ertman's blood alcohol level was 0.194%. On the basis of these results, the officer issued Ertman a citation for operating a motor vehicle with a prohibited blood alcohol concentration. *See* § 346.63(1)(b), STATS.

Ertman later filed a motion to suppress the test results. Relying on ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524 N.W.2d 635 (1994), Ertman argued that the arresting officer had violated his right to seek alternative testing under the implied consent law. Ertman explained how the language of the Informing the Accused form stated that his privileges would be revoked if "any" test reports came back positive. Because the state laboratory did not report back for a few days, however, Ertman did not immediately know if he had failed his first test and thus could not assess whether it was reasonable to

take the risk that additional tests would also prove positive. Ertman thus claimed that he could not reasonably determine if he should seek another test.

Moreover, Ertman raises a related complaint that the officer did not inform him that he actually could have avoided criminal liability, without incurring any further risk, by pursuing the option for more testing. Had Ertman taken a second test, and had it come back negative, then the negative results would have been grounds for upsetting any administrative license revocation during the DOT hearing that follows an OWI arrest. *See* § 343.305(8)(b)2.d, STATS. But had this second test proved positive, he would not have risked incurring more criminal liability because additional positive tests do not increase the potential penalty.

The trial court granted Ertman's motion to suppress the blood test results. In an oral ruling, the court explained that it agreed with Ertman's analysis of ***Bryant*** and his claim that he was unable to make a reasonably informed decision about whether to pursue additional testing on the night of his arrest.

However, the trial court later granted the State's request to modify the suppression remedy and amended its earlier order. While the trial court confirmed its earlier conclusion that Ertman had not been completely informed about the full ramifications of alternative testing, the court explained that he had at least been informed that he had a right to alternative testing. Since the trial court thus perceived no problem in the method that the State used to obtain its test result evidence, the court determined that the better remedy was to

simply limit the State's use of this evidence. It thus ruled that the State was not entitled to the presumption that Ertman was intoxicated. *See* § 885.235, STATS.

Facing this modified ruling, Ertman subsequently decided to enter a no contest plea. He preserved, however, his right to appeal the trial court's evidentiary conclusions.

Ertman now contends that the trial court erred when it modified the original suppression order. Ertman urges us to enforce the accused driver's rights that he claims exist under the implied consent law as interpreted in ***Bryant***, and to hold that suppression is indeed the proper remedy.[1] This issue involves a question of law that we review independently of the trial court. *See* ***State v. Piskula***, 168 Wis.2d 135, 141-42, 483 N.W.2d 250, 252 (Ct. App. 1992).

We conclude that ***State v. Drexler***, 199 Wis.2d 128, 544 N.W.2d 903 (Ct. App. 1995), is squarely on point and dictates that we reject Ertman's claims.[2]

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[1] We treat Ertman's claim as purely related to his statutory rights under the implied consent law. In his statement of Issues Presented For Review, he writes:

> I. Does the standard "Informing the Accused" form violate an individual's statutory rights by affirmatively misleading an individual into foregoing a second BAC test, thereby preventing an individual from obtaining material and relevant evidence?

Although in later sections of the brief Ertman hints that his due process rights might have also been violated, we do not need to address the issue separately because the due process violation would be based on the violation of Ertman's implied consent rights. Since we hold that there was no violation of the implied consent law, there is no resulting due process violation.

[2] The decision in ***State v. Drexler***, 199 Wis.2d 128, 544 N.W.2d 903 (Ct. App. 1995), was

In ***Drexler***, the accused driver similarly consented to a blood alcohol test which came back positive a few days after his arrest. And on appeal, the driver also claimed that his rights under the implied consent law were violated because he was not told on the night of his arrest that additional testing might yield a negative result which would, in turn, help him during the DOT administrative proceedings that follow an OWI arrest. ***Id.*** at 139, 544 N.W.2d at 907. The court nonetheless rejected the driver's claim, reasoning that he "was given all of the information mandated by due process and the [implied consent law]." ***Id***. at 140, 544 N.W.2d at 907.

We acknowledge that ***City of Waupaca v. Javorski***, 198 Wis.2d 563, 543 N.W.2d 507 (Ct. App. 1995), appears to have reached the opposite result. There, a District IV panel faced a comparable claim by an accused driver who was given a blood test and who believed that the police violated the implied consent law because they did not inform him of the "potential advantage of submitting to an alternative test." *See* ***id***. at 571, 543 N.W.2d at 511 (emphasis removed; source omitted). The ***Javorski*** panel sided with the driver, holding that the manner in which he was informed of his implied consent rights was "misleading." ***Id.*** at 572, 543 N.W.2d at 511.

Nonetheless, the apparent rift between ***Drexler*** and ***Javorski*** over what an arresting officer must tell an accused driver does not affect our analysis of Ertman's claim.[3] For even if we applied the ***Javorski*** analysis, Ertman's claim

(..continued)
issued two months after the trial court amended its suppression order.

[3] The supreme court declined to review either ***Drexler*** or ***Javorski***. See the supreme court's orders reported at 546 N.W.2d 471 (1996).

that the trial court should have suppressed his test results would still fail. Although the ***Javorski*** panel concluded that there was a violation of the driver's implied consent rights, it also held that such a violation did not demand that his test results be suppressed. ***Id.*** at 574-75, 543 N.W.2d at 512; *see also* ***County of Dane v. Granum***, 203 Wis.2d 252, 258, 551 N.W.2d 859, 861 (Ct. App. 1996) (explaining that ***Javorski*** does not support the exclusion of blood test results). So while the reasoning of ***Javorski*** might favor Ertman, its net holding does not.[4]

In sum, we hold that ***Drexler*** controls this case and that Ertman presents no viable challenge to the procedures followed by the arresting officer. Since the arresting officer delivered Ertman all of the warnings that are mandated by the implied consent law, *see* § 343.305(4), STATS., Ertman received all of the information that was due him. *See* ***Drexler***, 199 Wis.2d at 140, 544 N.W.2d at 907. Ertman's claim that the officer somehow misled him has no legal weight. And even if ***Javorski*** is correct, that case and ***Granum*** provide no relief for Ertman inasmuch as they ruled that the remedy is not suppression.

Finally, although the holding in ***Drexler*** seemingly opposes the legal analysis that underpins the trial court's modified suppression order, we note that the State has not filed a cross-appeal to challenge this evidentiary ruling. We recognize that the State probably had little incentive to challenge the trial court's position on this evidentiary matter because of Ertman's no

[4] The ***Granum*** court also concluded that ***Drexler*** and ***Javorski*** might not be inconsistent, at least with respect to whether the accused driver's *due process* rights were violated. *See* ***County of Dane v. Granum***, 203 Wis.2d 252, 257 n.5, 551 N.W.2d 859, 861 (Ct. App. 1996).

contest plea. Still, because the State has not filed a cross-appeal, we affirm the trial court's modified order.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.