COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1631-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID W. PENDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

MYSE, J. David Pender appeals a judgment of conviction for operating a motor vehicle while intoxicated, § 346.63(1)(b), STATS. Pender argues that the trial court erred by admitting evidence of the primary evidentiary test used to establish his blood alcohol level because he was not given a meaningful chance to have a second evidentiary test. Because this court concludes that Pender was given a meaningful opportunity to have a second test, the judgment is affirmed.

Pender was stopped by Officer Donald Kramer after Pender drove his car across the center line of the road and failed to dim his car's lights when Kramer's car approached. Pender was given field sobriety tests and a blood test, and offered the opportunity to have a second evidentiary test. Pender consented to take the second test, and a breath test was performed by Sergeant Lance Willson.

The facts surrounding the breath test were disputed at the suppression hearing. Pender claimed that he was not given a sufficient opportunity to take the test because his first attempt failed due to congested lungs, and his second attempt failed when the machine aborted the attempt after registering "residual alcohol present." Pender stated he then requested another attempt, but was refused. Kramer and Willson both testified that Pender had been given several opportunities to breathe into the machine, and that all the tests failed because Pender was being uncooperative. Both officers also stated that Pender never asked to retake the test.

The trial court resolved this factual dispute in favor of the State. The court relied on the testimony of the officers and concluded that Pender was "playing a game" and not cooperating with the procedure. Given these circumstances, the court concluded that the officers did not have to make additional attempts to obtain another sample, and denied the motion to suppress. Pender appeals.

Pender argues that he was denied his right to a second evidentiary test because "due diligence" was not exercised in performing the second test. As a result, Pender claims, the first evidentiary test—the blood test—must be suppressed. *See* ***State v. McCrossen***, 129 Wis.2d 277, 297, 385 N.W.2d 161, 170 (1986) (where defendant's statutory right to an alternative test is violated,

suppression of the first test is the appropriate remedy). The State argues that Pender was uncooperative, and that under ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis.2d 185, 192, 366 N.W.2d 506, 509 (Ct. App. 1985), his conduct therefore constitutes a refusal to take the second test.

This court will not overturn the trial court's factual finding that Pender was being uncooperative unless it concludes that it is against the great weight and clear preponderance of the evidence. ***State v. Turner***, 114 Wis.2d 544, 547-48, 339 N.W.2d 134, 137 (Ct. App. 1983). This court concludes that the finding is not against the great weight and clear preponderance of the evidence. Both officers testified that Pender was being uncooperative and that he refused to exhale into the Intoxilyzer for the required length of time despite appearing physically able to do so. While Pender's own testimony does contradict that of the officers, this is insufficient to establish that the finding is against the great weight and clear preponderance of the evidence. At issue was a credibility determination, and these are more appropriately left to the trial court. ***State v. Simpson***, 200 Wis.2d 798, 803, 548 N.W.2d 105, 107 (Ct. App. 1996).

Pender contends that the officers did not use due diligence because he was only effectively given one attempt to take the test. Even assuming, however, that Pender is correct and that he had been given only one attempt—a question disputed at the hearing and decided against him by the trial judge—this fact does not contradict the finding that Pender was being uncooperative. Given Pender's conduct, due diligence did not require the officers to continue to offer the test. ***Village of Elkhart Lake***, 123 Wis.2d at 192, 366 N.W.2d at 509.

Pender next argues that ***Village of Elkhart Lake*** does not apply because the defendant there was given numerous attempts to take the breath test.

Pender's distinction is unpersuasive. In ***Village of Elkhart Lake***, the court held that uncooperative conduct in taking a breath test is treated as a refusal to take the test. ***Id***. The fact that the police in ***Village of Elkhart Lake*** appeared more willing to tolerate that defendant's uncooperative behavior is irrelevant to the outcome of this case.

By the Court.—Judgment affirmed.

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