COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3187

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

IN THE MATTER OF THE REFUSAL OF STEVEN E. BENZ:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STEVEN E. BENZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded with directions.*

VERGERONT, J.[1] The State appeals from an order concluding that Steven Benz properly refused to submit to a blood test under § 343.305(3)(a),

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

STATS. The State contends that the trial court erred in its interpretation of § 343.305(2),[2] which governs the obligations of drivers and law enforcement personnel with respect to chemical testing of breath, blood or urine for the purposes of determining the alcoholic content of the driver's blood. We conclude that the court erred in interpreting the statute when it decided that Benz's refusal of the blood test was proper because the law enforcement agency could have provided the urine test, which Benz agreed to take. We reverse and remand for further proceedings as explained in this opinion.

The hearing on the refusal was combined with a hearing on Benz's motion to suppress evidence because of lack of probable cause for his arrest for operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. The prosecutor called Shane Heiser of the Westfield Police Department to testify on both issues. Because probable cause is not an issue in this appeal, we summarize only Officer Heiser's testimony relating to the refusal issue.

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[2] Section 343.305(2), STATS., provides in part:

> (2) IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a) or (am), and may designate which of the tests shall be administered first.

Officer Heiser testified that he arrested Benz and took him to Divine Savior Hospital. He took Benz there because dispatch informed him that a certified toxicologist operator was unable to come to the department and run the intoxilizer machine that evening. Ordinarily the Westfield Police Department asked drivers to submit to a breath test as its primary test. At the hospital, Officer Heiser issued Benz a citation and read him the "Informing the Accused Form." He asked Benz to submit to a blood test, but Benz refused. Officer Heiser testified that he did not recall whether Benz told him at the hospital that he was under a doctor's care, but after they left the hospital and were at the sheriff's department, he believes Benz told him that he had kidney stone problems and that is why he was under a doctor's care.

On cross-examination, Benz's attorney asked Officer Heiser whether Benz had told him he was afraid to submit to a blood test because he was afraid of needles. The prosecutor objected on the ground that fear of needles was not a sufficient basis under the statute to justify a refusal.[3] Benz's counsel then stated that he would withdraw the question and would recall the officer after Benz testified and the foundation was laid. The court and the two attorneys had a discussion about whether Benz's fear of needles affected his physical abilities to

[3] Section 343.305(9)(a)5c, STATS., provides in part:

> (9) REFUSALS; NOTICE AND COURT HEARING.
> ….
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> 5. That the issues of the [refusal] hearing are limited to:
> ….
>
> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

submit to a test or was a mental or medical disorder that was sufficient to justify a refusal under the statute. The court, however, did not make a ruling on that issue and the cross-examination of Officer Heiser continued.

Officer Heiser testified that Benz told him he would submit to a breath or a urine test when they were at the sheriff's department. Officer Heiser did not recall whether Benz told him at the scene of the accident or at the hospital that he would submit to a breath or urine test.

After redirect of Officer Heiser was completed, the court stated it was ready to make its ruling. Benz's attorney told the court he wished to call Benz on both the probable cause and the refusal issue. As to probable cause, the court stated that there was probable cause but that it found that the refusal was reasonable and proper because Benz "still could have taken a urine test when the objection was known, or the hospital could have done the same thing." At that point, Benz's attorney said that they had no further testimony.

On appeal, the State argues that under § 343.305(2), STATS., as interpreted by ***City of Madison v. Bardwell***, 83 Wis.2d 891, 266 N.W.2d 618 (1978), it is solely the law enforcement agency's decision about which test to designate as the test to administer first of the three alternate tests—chemical, breath or blood—and the driver does not have the right to turn down the first test offered by the agency and choose one of the other two. In ***Bardwell***, the court held that § 343.305(1) (now § 343.305(2)) when read together with § 343.305(4) (now § 343.305(5)[4]) permitted the agency to designate one of the three tests as

[4] Section 343.305(5), STATS., provides in part:

> (5) ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section,

(continued)

primary, and the driver had to submit to that test before having the right to request an alternate test. ***Id.*** at 896, 266 N.W.2d at 620.

The State also cites ***State v. Pawlow***, 98 Wis.2d 703, 298 N.W.2d 220 (Ct. App. 1980), which held that even though an agency has designated one test as the primary test, that is not an irrevocable election and does not prohibit the request of a different test. The court held that the purpose of the statutory provision that the law enforcement officer "may designate which of the tests shall be administered first," § 343.305(2), STATS., was to "dispel any notion that the arrested driver may choose which test he or she must take," not to prevent the law enforcement agency from changing the test it designated as primary. ***Id.*** at 705, 298 N.W.2d at 222.

We agree with the State that ***Bardwell*** and ***Pawlow*** are controlling and require reversal. The respondent argues that ***Bardwell*** is distinguishable on the facts in three respects: First, in ***Bardwell*** all three tests were available to the driver whereas in this case, the State could not provide the intoxilizer test and therefore must have been prepared to provide both the blood and urine tests, one as a primary test and the other as the alternate test required on the statute. Second, the arresting officer in ***Bardwell*** would have had to transport the driver to another

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> the officer shall direct the administering of the test. A blood test is subject to par. (b). The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2). If the person has not been requested to provide a sample for a test under sub. (3) (a) or (am), the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test specified under sub. (3) (a) or (am).

facility and engage other personnel, whereas in this case the State had already transported Benz to the hospital and the hospital could have given the urine test. Third, the driver in ***Bardwell*** insisted on a blood test because he erroneously believed the blood test to be more reliable than the breath test, but all three are deemed reliable under the case law, whereas in this case Benz did not object to the reliability of either test. We do not consider any of these factual distinctions significant since none bear on the court's reasoning or conclusion in ***Bardwell***.

Essentially Benz's argument is that Officer Heiser's designation of a blood test rather than the urine test as the primary test was arbitrary and he could have just as easily have designated the urine test as the primary test to accommodate Benz's preference. Neither the statute nor the relevant case law, however, imposes an obligation on the law enforcement agency to justify the choice of the primary test or to accommodate the driver in selecting one test as the required test.

Benz also argues that if we conclude that the trial court erred in its view of the law enforcement agency's obligation, there is still an issue as to whether his fear of needles was a disability or a disease unrelated to the use of alcohol within the meaning of § 343.305(9)(a)5c, STATS. Benz asks that the matter be remanded for further proceedings on this issue so that he may present his defense. He points out that because the trial court made its ruling before he testified, he did not present the factual basis for this defense.

The State does not appear to oppose this request for remand on this issue. In its first brief, the State addresses this defense on the merits, asserting there is no evidence to support this defense; but it also asserts that "… at a minimum this case needs to be remanded for a hearing to determine this issue."

Benz requests a remand on this issue in his responsive brief, and the State in its reply is silent on this point. We take this as a concession that remand on this issue is proper. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994) (proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted).

We therefore remand to permit Benz to present his defense on the issue of whether his refusal was due to a physical inability to submit to the test due to a physical disability or a disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs. Section 343.305(9)(a)5c, STATS.

By the Court.—Order reversed and cause remanded with directions.

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