COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0799-CR **Cir. Ct. No. 03CT000032**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN B. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Reversed and cause remanded.*

¶1 SNYDER, J.[1] Juan B. Garcia appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). He contends that the trial court erroneously exercised its discretion when it refused to grant an adjournment

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

due to the State's failure to comply with a pretrial discovery order. We agree, and reverse and remand the case for a new trial.

¶2 The facts are undisputed. On December 14, 2002, Garcia was arrested for OWI, contrary to WIS. STAT. § 346.63(1)(a). The State formally charged Garcia and included an additional count of operating with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(b). On February 17, 2003, Garcia pled not guilty to both charges.

¶3 On February 24, the trial court granted Garcia's motion for judicial review of the Department of Transportation's (DOT) administrative suspension of his driver's license. The court also granted Garcia's request for an independent laboratory test of the blood sample he had given the night of the arrest. During the motion hearing, the trial judge instructed the State:

> THE COURT: All right. I will order that the State make arrangements with [defense counsel's] office for transfer of the blood sample, ensuring that the chain of custody be maintained. Does [lead defense counsel] have an independent lab that's doing this or do you know?
>
> [DEFENSE CO-COUNSEL]: Yes, Your Honor. I believe in his motion he indicated MedTox Labs in St. Paul, Minnesota.
>
> THE COURT: [Addressing the State], what I would say is contact the Lab of Hygiene and have them -- they must have encountered this previously, so that they can mail it.
>
> ….
>
> THE COURT: Okay, I'll sign that order.
>
> [THE STATE]: And could I just ask your clerk, I think what happened the last time is we were given a conformed copy or a certified copy. [Defense counsel] called Pat Harding at the hygiene lab, and we faxed it directly to Mr. Harding, indicating basically here is a copy of the order signed by the Court.

> ….
>
> THE COURT: [March 12 at] 8:45 a.m. for trial. Blood sample will have to be tendered to the lab forthwith. That is an absolutely firm date, make no mistake about it, number one.

¶4 On March 12, 2003, the case was called for trial. Garcia informed the court that he had not yet received the independent test of his blood sample from MedTox. Garcia objected to proceeding to trial due to the missing test results. The court told Garcia that the trial would proceed as scheduled.

¶5 During the trial, Garcia learned that the Wisconsin State Hygiene Laboratory (Wisconsin Hygiene Lab) never forwarded the blood sample to MedTox because the Wisconsin Hygiene Lab had not received authorization from the district attorney's office.

¶6 Subsequently, Garcia moved for dismissal on the grounds that he had been deprived of the independent blood analysis and further alleging that he had been deprived of the gas chromatograph printout of the original blood test. The court denied the motion and the jury found Garcia guilty on both charges. Garcia appeals, citing the State's noncompliance with the court's pretrial order and the missing gas chromatograph printout.

¶7 Garcia first argues that the trial court erroneously exercised its discretion when it refused to adjourn the trial to allow Garcia to obtain the results of a court-ordered, independent blood test. The decision of whether to grant an adjournment generally rests within the discretion of the trial court. ***Selk v. Township of Minocqua***, 143 Wis. 2d 845, 847, 422 N.W.2d 889 (Ct. App. 1988). Because the exercise of discretion is not the equivalent of unfettered decision-making, the trial court's decision must reflect a reasoned application of the

appropriate legal standard to the relevant facts of the case. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). Whether discretion was properly exercised is a question of law. *See* ***Seep v. State Pers. Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987).

¶8 The trial court had instructed the State to contact defense counsel's office, contact the Wisconsin Hygiene Lab, and do so forthwith. The court then issued the following written order:

> IT IS HEREBY ORDERED that the State of Wisconsin, plaintiff, above-named, shall transfer a sample of the defendant's blood forthwith from the Wisconsin State Hygiene Laboratory via chain of custody to MedTox Laboratories, Acct: 32131 Test Code 341, 402 W. County Road D, Saint Paul, MN 55112, forthwith for independent testing at defendant's expense.

¶9 When informed by Garcia that the independent blood test results had never been received, the trial court refused to delay the proceeding. The court reasoned that Garcia's request for a judicial review of the DOT's administrative suspension was tantamount to a request for a speedy trial; consequently, the expedited nature of the proceeding was a result of Garcia's own action. The court further decided that Garcia was not diligent in pursuing the independent blood test and, therefore, an adjournment was not required.

¶10 We find no support in the record for the trial court's ruling. The court ordered the *State* to send Garcia's blood sample to an independent lab for testing. It was therefore the State's responsibility, not Garcia's, to assure that the sample was transferred to MedTox. Simply put, the State failed to comply with the court's order.

¶11 The State argues that Garcia has no statutory entitlement to the retesting of his blood sample. We are not reviewing a question of whether Garcia had a right to the independent blood test. The court's order gave him that right. We do note, however, a troubling lack of explanation from the State addressing the issue at hand: noncompliance with the pretrial order. The State never explains why it failed to comply with the court order to allow for an independent blood test.

¶12 Because the pretrial order created an express duty on the part of the State to transfer the blood sample to MedTox, we turn to the pretrial discovery statute, WIS. STAT. § 971.23, for guidance in dealing with noncompliance. When the State fails to comply with its responsibilities under this statute, the court must determine whether the noncompliance with the pretrial order was for good cause. Section 971.23(7m)(a) provides:

> **(7m)** SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, *unless good cause is shown for failure to comply*. The court may in appropriate cases grant the opposing party a recess or a continuance. (Emphasis added.)

¶13 We have held that this statute requires investigation by the trial court. "First, the court must determine whether the noncomplying party (here, the state) has shown good cause for the failure to comply. If good cause is not shown, the statute is mandatory—the evidence *shall* be excluded." ***State v. Wild***, 146 Wis. 2d 18, 27, 429 N.W.2d 105 (Ct. App. 1988). The inquiry does not end here, however, because a finding of good cause does not preclude exclusion of the evidence as a sanction; exclusion is just no longer mandatory. ***Id***. at 28. The statute also provides that in appropriate cases the court may grant a recess or continuance. ***Id***.

¶14 We note that when Garcia informed the court that the Wisconsin Hygiene Lab never forwarded the blood sample to MedTox because authorization was never received from the district attorney's office, the court asked the State to explain. The State replied, "We don't authorize it. It's a court order, so I don't know." There was no further effort to determine whether the State's noncompliance was for good cause.

¶15 When a trial court's decision fails to demonstrate, on its face, that the judge considered the appropriate factors, an erroneous exercise of discretion has occurred. ***State v. Johnson***, 118 Wis. 2d 472, 480-81, 348 N.W.2d 196 (Ct. App. 1984). Here, the court did not attempt to determine why the State had failed to comply with the order. Rather, the court directed its inquiry at Garcia, and held Garcia accountable for the noncompliance. Because the trial court never considered whether the State's noncompliance was for good cause, we conclude that an erroneous exercise of discretion has occurred. *See* ***Wild***, 146 Wis. 2d at 28.

¶16 Because the record lacks adequate insight into the State's noncompliance, we cannot, under WIS. STAT. § 971.23(7m)(a), determine whether the State's blood analysis should have been excluded or whether a continuance would have been appropriate. We do, however, conclude that an erroneous exercise of discretion has occurred and that a new trial is warranted. We reverse for an erroneous exercise of discretion because the State failed to comply with the pretrial discovery order for an independent blood test; therefore, we need not reach the issue of whether the State should have provided a gas chromatograph printout to Garcia.

By the Court.—Judgment reversed and cause remanded.

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