COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-2060-CR

Cir. Ct. No. 03-CT-000001

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

ROBERT N. KROEPLIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Reversed*.

¶1 HOOVER, P.J.[1] The State appeals an order suppressing the results of Robert Kroeplin's blood test after he was arrested for operating a motor vehicle while under the influence of intoxicants (OWI). The trial court found that after

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[1] This case is decided by one judge pursuant to WIS. STAT. § 751.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

submitting to the arresting officer's request for a blood draw, Kroeplin requested an additional breath test, which was improperly denied under the Implied Consent law. The court further held that the appropriate remedy for this violation was to suppress the blood test results. This court holds the trial court's finding that Kroeplin requested an additional test was clearly erroneous. The order suppressing the blood test result is therefore reversed.

FACTS

¶2 Kroeplin was arrested for third offense OWI, contrary to WIS. STAT. § 346.63(1)(a). The arresting officer, Adam Kuechenmeister, informed Kroeplin that he was going to be taken to a medical facility to have blood drawn. Kroeplin responded by stating, "how about a breath test …." Kroeplin testified that he inquired about a breath test because he thought the breath test process would be completed faster and therefore would not reflect the last alcohol he had ingested.

¶3 It is undisputed that Kuechenmeister read an Informing the Accused form to Kroeplin. This document advises an accused that if he or she takes all tests that the arresting agency requests, the accused may choose to take further tests. It is also undisputed that Kroeplin's reference to a breath test was made before Kuechenmeister read the Informing the Accused. Kroeplin never indicated that he did not understand the form. Kroeplin consented to the blood test.

¶4 Kroeplin testified and the court found that after his blood sample was drawn and he and Kuechenmeister walked to the squad car, Kuechenmeister handed Kroeplin a preliminary breath test device and asked if he wanted "to see what your breath test would have been?" Kroeplin blew into the PBT.

¶5 At no point after initially suggesting a breath test in response to Kuechenmeister's statement that there would be a blood draw did Kroeplin ever ask to have an additional test performed. The trial court found that when Kroeplin was told he was going to be taken to have blood drawn, Kroeplin's words were, "How about a breath test?" The trial court concluded that this, combined with Kroeplin's post-blood draw acceptance of Kuechenmeister's offer of a PBT, "meant a request." The court concluded that "the two conversations, one on either side of the blood draw," constituted a request for a second test that was denied. The court then addressed the appropriate remedy. It reasoned that failure to administer a second test meant Kroeplin was "denied the opportunity to obtain evidence that may have allowed him to contest or to challenge the blood test," which is a right otherwise afforded to an accused. The trial court thus concluded that the only adequate remedy available to address the denial was suppression of the blood test results.

¶6 Kroeplin's argument supporting the trial court's decision overstates the record. Kroeplin repeatedly characterizes the circumstances surrounding the PBT as a renewed request for "the breath test."[2] Kroeplin did not renew his

[2] Kroeplin's brief states: "On their way out to the squad car, the police officer stated to Robert, 'Now do you want to see what your breath test would have been?' Robert Kroeplin told the officer that, yes, he did still want the breath test." However, nowhere in the record cites Kroeplin supplies does he state, in words or substance that "yes, he *still* did want *the* breath test." (Emphasis added.) Similarly, Kroeplin states that:

> After the defendant submitted to the blood test, but before the defendant had an opportunity to restate his request for the breath test that he had previously asked for, the police officer brought up the subject and asked the defendant whether he still wanted the breath test. The defendant informed him that, yes, he did still want a breath test. Thereupon the officer gave him a PBT test instead of a breath test.

(continued)

request for a breath test. Contrary to Kroeplin's suggestion, the trial court did not find as fact that during the PBT scenario Kuechenmeister asked "whether he *still* wanted *the* breath test" (emphasis added), and Kroeplin replied, "yes, he did still want the breath test." Also, contrary to Kroeplin's contention, the trial court did not find that Kroeplin agreeing to take the PBT "was a clear request for the alternative test." Nevertheless, Kroeplin is correct that the trial court found that considering the pre- and post-blood draw conversations together, Kroeplin "was asking for a second test." With due and considerable respect to and for the learned trial court, this finding was clearly erroneous.

DISCUSSION

¶7 When reviewing a trial court's order on a suppression motion, the findings of fact will be sustained unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see* also ***State v. Secrist***, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). However, where the evidence that supports a finding contrary to the trial court's constitutes the great weight and clear preponderance of the evidence, the trial court's findings will be upset on appeal. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). While appellate courts now apply the "clearly erroneous" test, cases that apply the "great weight

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This simply overstates the true and only import of the testimony, supplying nuances that the record does not bear but that are necessary to Kroeplin's position. First, there is no hint of evidence in the record that Kroeplin did not have an opportunity to restate his request for a breath test after the blood draw. More importantly, it is plain from the record cites Kroeplin supplies that Kroeplin did nothing more than act on Kuechenmeister's offer of a PBT test.

Finally, the above are just two references to the same hyperbole Kroeplin indulges in defending the trial court's decision. Having said this, it is understandable why Kroeplin presents the evidence in the manner that he does. While in this court's view it is not an accurate characterization of the evidence, it is consistent with the trial court's ultimate finding that Kroeplin asked for an additional test.

and clear preponderance" test may be referred to for an explanation of this standard of review, the two tests being essentially the same. ***State v. Martwick***, 2000 WI 5, ¶18 n.8, 231 Wis. 2d 801, 604 N.W.2d 552. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***Anderson v. City of Bessemer City***, 470 U.S. 564, 573 (1985) (citation omitted).

¶8 Under these parallel standards, the evidence unequivocally demonstrates that Kroeplin initially was suggesting a breath test as an alternative to the blood test, not as an additional test. Kroeplin desired what he thought would be an expedited testing procedure for the admitted reason that he believed it would demonstrate a favorably inaccurate blood alcohol content. Once the suggestion was rebuffed, the scheme was moot and Kroeplin consented to the blood draw.

¶9 At no time after the blood draw did Kroeplin expressly initiate a request for an additional test. Kuechenmeister, not Kroeplin, brought the PBT into play. Even under Kroeplin's version, he gave Kuechenmeister no reason to believe he wanted anything more than to learn what his breath alcohol content was according to the PBT.[3] Nothing Kroeplin said or did upon being afforded the opportunity to take the PBT would support an inference that he was in fact asking for an additional evidentiary breath test. By his own testimony, he was taking

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[3] The record does not reflect the PBT result. Kuechenmeister testified that he did not view it because the test was only to inform Kroeplin. Kroeplin did not testify as to the reading. However, Kroeplin, a third time offender, indicated to Kuechenmeister that he understood the Informing the Accused and presumably then his right to request an additional test. From these facts one might reasonably infer that the PBT result ended any thought of pursuing that right.

Kuechenmeister up on his offer to "see what your breath test would have been." There was nothing in what either Kuechenmeister or Kroeplin stated to remotely imply a reference to Kroeplin's original suggestion that he submit to a breath rather than a blood test. What occurred after the blood draw simply cannot be transformed into an affirmative request for an additional test.

¶10 The trial court's suppression order was predicated on its erroneous finding that Kroeplin requested an additional evidentiary breath test after cooperating with the required blood draw. The suppression order must therefore be reversed. Because the order is reversed, this court need not consider the parties' arguments concerning the proper remedy for noncompliance with the Implied Consent law.

By the Court.—Order reversed.

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