COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2188 **Cir. Ct. Nos. 02TR000506**
02TR000507

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

CITY OF CHILTON,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. DESSART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

¶1 BROWN, J.[1] While this is perfunctorily a review of a judgment convicting Michael D. Dessart of operating a motor vehicle while intoxicated, it is at bottom an examination of the trial court's motion to suppress the breath test. Dessart observes that the deputy misinformed him during the Informing the

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

Accused stage and, therefore, the resultant breath test was not administered in accordance with the law. Dessart claims that, as a result, the test is inadmissible, or, alternatively, that the presumption of admissibility is lost. We agree with the City of Chilton, however, that the law clearly allows the admissibility of the test even if the deputy has misinformed the accused. We further hold that the loss of presumption argument is waived. We affirm.

¶2 It is undisputed that the deputy misinformed Dessart by understating the penalties he was facing if he took the test and obtained an inappropriate result. The deputy told Dessart that if he were found guilty, his license would be suspended for about six months. In reality, Dessart was facing between a six and nine month revocation. WIS. STAT. § 343.30(1q)(b)(2).

¶3 Based on the misinformation presented, Dessart asserts that the breath test was not administered in accordance with the implied consent law and is therefore inadmissible. He cites WIS. STAT. § 343.305(5)(d) which states, in pertinent part, that "the results of a test administered in accordance with this section are admissible …." Dessart reasons that, since the result was not administered in accordance with the law, it is inadmissible. Alternatively, he argues that the presumption of admissibility should have been ordered to be unavailable, thus forcing the City to prove test accuracy.

¶4 With regard to whether the test result is inadmissible, the law is otherwise. In ***State v. Zielke***, 137 Wis. 2d 39, 40-41, 52, 403 N.W. 2d 427 (1987), the supreme court held that failure to comply with the implied consent provisions does not render the test inadmissible. Rather, the remedy is that the governmental entity loses the statutory presumption of admissibility and there are also possible

ramifications regarding whether the accused's license may be revoked if the misinformation resulted in a refusal to take the test. ***Id.*** at 54.

¶5 As to Dessart's alternative argument that the court should at least have decided not to allow the City the presumption of the test's validity, we hold that the issue is waived. Dessart's motion to suppress requested only that the test be suppressed; he never requested the alternative remedy of loss of the presumption. His brief in support of the motion never argued that an alternative remedy would be the loss of the presumption; he only argued that the test should be suppressed. And while it appears that there was a jury trial and the test was admitted, because no transcript of the jury trial is in the record, we have no way of knowing whether Dessart even moved for the loss of the presumption at that time.

By the Court.—Judgment affirmed.

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