COURT OF APPEALS DECISION DATED AND FILED

April 29, 2010

David R. Schanker
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. 2009AP2737-CR **Cir. Ct. No. 2008CT143**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. SPORLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] A jury found Michael Sporle guilty of operating a motor vehicle with a prohibited alcohol concentration (second offense).[2] He appeals, claiming that the circuit court erred when it admitted blood test results. He asserts that the blood test should have been suppressed because of flaws in the implied consent procedures. For the reasons that follow, I affirm.

Background

¶2 On October 17, 2008, at approximately 11 p.m., a police officer observed a truck driven by Michael Sporle crossing a road's center line multiple times. The officer stopped the vehicle and noted that Sporle smelled of alcohol and had bloodshot eyes. After Sporle failed a standard field sobriety test, the officer placed him under arrest.

¶3 On the way to a nearby hospital for a blood draw, Sporle requested that the officer instead take him to the sheriff's department for a breath test. The officer was not certified to conduct a breath test, and she called the sheriff's department and learned that no certified officer was available there either. After informing Sporle that no breath test was available, the officer proceeded to take him to the hospital.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Sporle was charged with and convicted of both operating while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a), and operating with a prohibited alcohol concentration, contrary to § 346.63(1)(b). Those two convictions are treated as one, however. *See* § 346.63(1)(c). For convenience, I will refer to the convictions as one for operating with a prohibited alcohol concentration.

¶4 At the hospital, the officer read Sporle an "Informing the Accused" form in its entirety. Thus, the officer informed Sporle that, if he took the requested test, he could have an alternative test free of charge. The officer then informed Sporle that he was entitled to a urine test as the alternative test mentioned in the form.

¶5 After consenting to a blood test, Sporle renewed his request for a breath test, and he also requested to be taken to a different hospital for a second blood draw. The officer denied both requests, stating that Sporle could pay for a second blood test from the same technician or seek out a different technician after making bail. Sporle repeatedly refused to consider any additional test, blood or urine, if it was to be administered by the same lab technician. This lab technician was the only person available at the hospital to perform these tests, and no further tests were administered.

¶6 Sporle moved to suppress the blood test, alleging that the officer had improperly denied him alternative tests and otherwise made mistakes when informing him of his rights under WIS. STAT. § 343.305. The circuit court denied the motion prior to trial, and denied a renewed motion at trial.

Discussion

¶7 I begin by observing that much of Sporle's argument is based on the notion that we may choose to credit Sporle's version of what occurred. However, it is apparent that the circuit court believed the police officer and, in any event, this court assumes that factual disputes were resolved in a manner that supports the circuit court's ultimate decision. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 (when an express finding is not made, appellate courts normally assume the circuit court made findings in a manner that supports

its final decision). Accordingly, I assume that the officer's testimony is true for purposes of my review.

¶8 Sporle's arguments are all directed at whether he was given accurate information regarding his option to take an alternative test free and an additional test at his own expense. He seems to suggest that he had a right to a free second blood draw at a different hospital, or at least by a different lab technician. He also seems to believe that the officer was obliged to attempt to provide him with a breath test because he expressed a preference for that test. Sporle's assumptions are wrong.

¶9 We previously have explained the statutory framework underlying Sporle's claims as follows:

> WISCONSIN STAT. § 343.305(2) provides that a person operating a motor vehicle on the public highways 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 of alcohol or controlled substances, when requested by a law enforcement officer and consistent with certain statutory prerequisites. *The law enforcement agency must be prepared to administer at least two of the three approved tests and may designate which of the tests shall be administered first. The test designated by the law enforcement agency as the first to be administered is sometimes referred to as the "primary test."*
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> WISCONSIN STAT. § 343.305(5)(a) addresses the additional test the agency must be prepared to administer:
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>> ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section, 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) .... The agency shall comply with a request made in accordance with this paragraph.
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> At the time the officer asks an accused to submit to a chemical test, the officer must read to the accused a form prescribed by statute. WIS. STAT. § 343.305(4). This form is generally referred to as the "Informing the Accused" form. The form must explain, among other things, that the officer wants to take samples of the accused's breath, blood, or urine to determine the concentration of alcohol or drugs in the accused's system. *The form must also state: "If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge.* You also may have a test conducted by a qualified person of your choice at your expense." Section 343.305(4)....
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> Although WIS. STAT. § 343.305(4) and (5) use the term "alternative test," it is clear from these provisions that the accused does not have a right to choose a test *instead of* the one the officer asks him or her to take; rather, the "alternative test" is *in addition to* that test.

State v. Schmidt, 2004 WI App 235, ¶¶8-11, 277 Wis. 2d 561, 691 N.W.2d 379 (emphasis added in first and third paragraphs; citations and footnote omitted).

¶10 Sporle makes several specific arguments. First, he says that he was misled when told that a second blood test would be at his expense. Second, he asserts that it was improper for the officer to refuse to take him to a different medical facility or to a different technician for a second blood draw. Third, he argues that he was improperly denied a breath test as an alternative test.[3]

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[3] This listing does not include some arguments that Sporle makes for the first time in his reply brief. We generally do not address arguments first raised in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (it is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief).

¶11 All of these arguments are based on the erroneous assumption that Sporle had a say not only as to *which* alternative free test he should be offered, but also as to the location and the person taking the sample. This is wrong. The arresting agency was required "to provide at its expense only the test it has chosen to make available as a second test; if the accused wishes either a third test or a second test that is not made available by the agency, the accused must pay for that and make those arrangements." ***Id.***, ¶27.

¶12 The officer complied with her obligations to provide the "Informing the Accused" information and to make an alternative test available. The officer informed Sporle that, if he took the requested test, he could have an alternative test free of charge, and she further informed him that the free test would be a urine test. The officer also informed Sporle of his right to further testing at his own expense. Again, the officer was not required to provide the test of Sporle's choosing. *See* ***id.*** Further, although Sporle alleges that he was misled, this allegation goes nowhere because the information given to Sporle was accurate. *See* ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997) (stating that additional information must be erroneous to render the informing the accused process inadequate).

¶13 In sum, the circuit court did not err in admitting Sporle's blood test. Accordingly, I affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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