

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2011

A. John Voelker
Acting 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. 2010AP2607

Cir. Ct. No. 2010CV4170

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF SUN PRAIRIE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL H. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Michael Smith appeals the order denying his motion to suppress evidence and the judgment of conviction for operating a motor

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), in violation of WIS. STAT. § 346.63(1)(a) and (b). Smith contends that the results of his chemical breath test should have been suppressed because police violated § 343.305(5)(a) by failing to give him a blood test after the breath test, despite his request that he be given a blood test. We conclude the circuit court properly denied Smith's motion because Smith did not request an additional test. Accordingly, we affirm.

BACKGROUND

¶2 Smith was arrested for OWI and PAC as a result of evidence obtained after City of Sun Prairie Police Officer Ryan Cox stopped his vehicle. The parties do not appear to dispute the relevant facts.

¶3 At approximately 1:50 a.m. on July 25, 2009, Officer Cox stopped Smith's vehicle for speeding and traveling too close to another vehicle. He noticed a strong odor of intoxicants coming from Smith and requested that Smith take field sobriety tests. Smith initially said no and stated that he would rather take a blood test, but then agreed to do the tests. After conducting these tests and determining that Smith was impaired, Officer Cox asked Smith if he would be willing to provide a preliminary breath test sample. Smith stated that he would take a blood test, but would not take the preliminary breath test. Officer Cox then arrested Smith and transported him to the Sun Prairie Police Department.

¶4 While at the police department, Officer Cox read the Informing the Accused form verbatim to Smith. In relevant part, this form provides:

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 may also have a test conducted by a qualified person of your choice

at your expense. You, however, will have to make your own arrangements for that test.

Officer Cox informed Smith that an evidentiary chemical test of his breath was the Sun Prairie Police Department's primary test. Smith consented to a breath test and Officer Cox began the twenty-minute observation period. During this period, Smith asked if a blood test was a secondary test and Officer Cox advised Smith that it was. Smith asked, "so is that not an option?" Officer Cox informed him that it was an option, but that the breath test had to be performed first. Smith then said either "so I get to do both" or "so I got to do both." Officer Cox answered affirmatively. Smith then asked some questions about the breath test and Officer Cox told him that it was "ridiculously accurate." Shortly thereafter, Smith performed the breath test. Officer Cox then spent a minimum of ten to fifteen minutes filling out and discussing the relevant forms with Smith. After Smith completed the breath test, neither he nor Officer Cox mentioned the blood test again.

¶5 Smith filed a motion to suppress evidence obtained from the breath test due to the police violating WIS. STAT. § 343.305(5)(a). After a trial to the court, the Sun Prairie municipal court found that Officer Cox had probable cause to arrest Smith for OWI, and concluded that, for this reason, it was not necessary to rule on Smith's motion to suppress. The municipal court found Smith guilty of both charges.

¶6 Smith appealed to the circuit court for a transcript review of the municipal court trial. As a part of this review, the circuit court considered the trial transcript and the exhibits, including the squad car video and the Intoximeter room video. The circuit court concluded that Smith's questions regarding blood tests were attempts to determine whether he could have a blood test rather than a breath

test as his primary test. Because the court concluded that Smith did not request a blood test as an additional test, it denied Smith's motion to suppress evidence and affirmed the judgment of the municipal court. Smith appeals.

DISCUSSION

¶7 On appeal, Smith contends that he requested an additional test pursuant to WIS. STAT. § 343.305(5)(a), and, because the police failed to provide him with this test, evidence obtained from the primary test must be suppressed.

¶8 Determining whether Smith made a request for an additional test pursuant to WIS. STAT. § 343.305(5)(a) requires us to interpret this provision and apply it to the facts of the case. We accept the circuit court's factual findings unless clearly erroneous. § 805.17(2). Construction of a statute and its application to the court's findings and to the undisputed facts presents a question of law that we review de novo. *State v. Stary*, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994).

¶9 WISCONSIN STAT. § 343.305(5)(a) imposes the following obligations on law enforcement: "(1) to provide a primary test at no charge to the suspect; (2) to use reasonable diligence in offering and providing a second alternate test of its choice at no charge to the suspect; and (3) to afford the suspect a reasonable opportunity to obtain a third test, at the suspect's expense." *Stary*, 187 Wis. 2d at 270.² If a defendant requests an additional test and the officer fails to make a diligent effort to comply, the appropriate sanction is suppression of the results of

² Because the "alternative test" available is in addition to the primary test, rather than instead of this test, we use the term "additional test" in this opinion. See *State v. Schmidt*, 2004 WI App 235, ¶11, 277 Wis. 2d 561, 691 N.W.2d 379.

the primary test. *State v. Renard*, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985). This request must clearly be a request for an *additional* test, and a request for a certain test *instead of* the primary test is insufficient. *State v. Schmidt*, 2004 WI App 235, ¶31, 277 Wis. 2d 561, 691 N.W.2d 379. While this request need not be made after the primary test is administered, the timing of the request may be relevant. *Id.*, ¶30.

¶10 Smith contends that his repeated references to a blood test constitute a request for an additional test. Smith first expressed his desire to have a blood test when Officer Cox asked if he would be willing to perform field sobriety tests. At this point, Smith stated that he would rather take a blood test. He similarly stated that he would rather take a blood test when Officer Cox asked him whether he would be willing to provide a sample for a preliminary breath test. Though Smith eventually agreed to perform field sobriety tests, he did not agree to a preliminary breath test. Based on these undisputed facts, we conclude that these statements do not constitute requests for a blood test in addition to the primary test.

¶11 Smith next contends that he requested a blood test during the twenty-minute observation period prior to the breath test. Specifically, Smith argues that he requested a blood test during the following discussion. Shortly before performing the breath test, Smith asked Officer Cox whether the blood test was a secondary test, and asked whether this test was still an option. Officer Cox responded that it was a secondary test and was an option, but would have to be

performed after the breath test.³ Smith then said either “so I get to do both” or “so I got to do both.” The circuit court was unable to make a finding regarding whether Smith said “get” or “got,” but concluded that, either way, this statement was not a request for an additional test. Smith did not mention the blood test again. Based on these undisputed facts, the court determined that Smith was trying to establish whether he could have a blood test instead of the City’s primary test. We agree.

¶12 It is not reasonable to construe Smith’s statement “so I get to do both” or “so I got to do both” as a request for a blood test in addition to a breath test. Rather, in the context of the conversation, the only reasonable inference is that Smith was indicating that he would rather have a blood test, but that he understood that in order to have a blood test, he would be required to “do both” of the tests. He did not indicate that he would like to have a blood test in addition to the breath test at any time, nor did he mention the blood test after performing the breath test despite ample opportunity to do so. We conclude as a matter of law that Smith did not request an additional test.

¶13 Smith argues that, if we conclude that his statements do not constitute a request for an additional test, we are setting an “unrealistically high threshold” for proper requests. We do not agree. Rather, our conclusion requires suspects to follow the procedures set forth in WIS. STAT. § 343.305(5)(a).

³ Smith may be challenging the circuit court’s finding that Officer Cox answered this question. However, neither the transcript nor the Intoximeter room video supports Smith’s contention that the officer did not answer this question.

¶14 Because Smith did not request a blood test in addition to the breath test, the officer did not violate WIS. STAT. § 343.305(5)(a) by not giving him a blood test after the breath test. Therefore, we affirm the circuit court's denial of Smith's motion to suppress the results of the breath test.

By the Court.—Judgment affirmed.

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

