

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2015

Diane M. Fremgen
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. 2014AP1746-CR

Cir. Ct. No. 2011CF2902

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY ALLEN JACOBI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jeffrey Allen Jacobi appeals a judgment convicting him of operating a vehicle while intoxicated, as a sixth offense. He argues that the circuit court should have suppressed the results of his blood alcohol test because the police did not give him an alternate test when he asked for it. We affirm.

¶2 Jacobi was arrested by Police Officer Brian Olson for driving while intoxicated. Police Officer Craig Bultman arrived at the scene to assist Olson. The officers took Jacobi to the hospital for a blood alcohol test. The test showed that Jacobi had a blood alcohol concentration of .22. Jacobi moved to suppress the test results on the grounds that he requested an alternate test after submitting to the blood test, but was not given one. The circuit court denied the motion after a hearing, concluding that the police officers' testimony that Jacobi did not request an alternate test was more credible than Jacobi's testimony to the contrary.

¶3 A person who submits to chemical testing requested by police on suspicion of driving while intoxicated may choose to take additional tests. WIS. STAT. § 343.305(4) (2013-14).¹ The police are required to honor a person's request for an alternate test. § 343.305(5)(a). If the police fail to honor a person's request for alternate testing, the results from the first test performed by police should be suppressed as a sanction. *State v. Renard*, 123 Wis. 2d 458, 461, 367 N.W.2d 237 (Ct. App. 1985).

¶4 We will uphold the circuit court's factual finding that Jacobi did not request an alternate test unless that finding is clearly erroneous. See *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *Id.* (citation omitted). As fact-finder, the circuit court resolves "questions as to the weight of testimony and the credibility of witnesses." *State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. This is because

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the circuit court has the ability “to assess each witness’s demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot.” *Id.*

¶5 At the suppression hearing, Olson testified that he and Bultman escorted Jacobi into the room where his blood was drawn. Olson testified that he read Jacobi the form entitled “Informing the Accused,” and that the phlebotomist then collected the blood sample. Olson testified that Jacobi did not request an alternate test but, if he had, Olson would have given him a breath test. Olson testified that the equipment for performing the breath test was in the same room where Jacobi was taken at the police station to complete paperwork after going to the hospital. On cross-examination, Olson testified that although he did not have a clear recollection of being in the hospital room when Jacobi’s blood was drawn, he said that Jacobi did not ask him for an alternate test because no suspect has ever asked him for an alternate test.

¶6 Bultman testified that he arrived on the scene after Jacobi had been arrested and transported Jacobi to the hospital because Olson was a canine officer who did not have space to transport people in his vehicle. Bultman testified that he was in the room with Olson when Jacobi had his blood drawn, and that Jacobi never requested an alternate test. Bultman also testified that while he did not specifically recall everything that happened at the hospital, the reason he testified that Jacobi did not ask him for an alternate test is that he has never had an arrested person ask for a secondary test.

¶7 Jacobi testified that Olson was the only police officer in the room with him when his blood was drawn and he was not read any information before the phlebotomist came to take the blood sample. When asked whether he

remembered Olson reading him the “Informing the Accused” form, he answered, “vaguely.” Jacobi testified that he told Olson that he would like an alternate test performed as they were leaving the hospital room. Jacobi testified that Olson told him he would have to pay for it, and he responded that he had insurance. He testified that he was never given an alternate test and he did not raise the issue again with any other police officer, including when he got back to the police station.

¶8 The circuit court concluded that the police officers’ testimony was more credible than Jacobi’s testimony. The circuit court reasoned that both officers credibly testified that no person has ever asked them for an alternate test during or after a blood draw, which would have made it notable to them if Jacobi had asked. The circuit court reasoned that Jacobi was less credible than the officers because his memory was hazy as to parts of the night, yet he had a “remarkably clear recollection” of asking for the alternate test, even though he could not remember other things, like whether he was in a cell or a booking room, or both, back at the police station. The circuit court also reasoned that the machine for taking a breath test was in the booking room where Jacobi was taken after the hospital, and it would have been very easy for the officers to give Jacobi a breath test if he had asked for one. Finally, the circuit court noted that, while Jacobi was under no obligation to repeat his request, he did not bring up alternate testing again during the three-hour period during which he was booked and in police custody at the station.

¶9 Based on its credibility assessments, the circuit court resolved the key factual issue—whether Jacobi asked for an alternate test—in favor of the police officers’ versions of events. We sustain the circuit court’s factual finding because it is not against the great weight and clear preponderance of the evidence.

See Arias, 311 Wis. 2d 358, ¶12. Therefore, we conclude that the circuit court properly denied the motion to suppress the blood alcohol test results.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

