STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP579-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH A. WIEDMEYER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION TO EXCLUDE EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE ANDREW T. GONRING, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

CASES

Page

STATUTES

Page

OTHER AUTHORITY

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP579-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH A. WIEDMEYER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION, ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE ANDREW T. GONRING, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication will likely be warranted because this case provides this court an opportunity to clarify the

meaning of Wis. Stat. § 343.305(6)(a), part of Wisconsin's implied consent law.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant, Keith A. Wiedmeyer, has been charged with operating a motor vehicle while under the influence of an intoxicant, as a 5th or 6th offense, and operating a motor vehicle while revoked (1; 13). He appeals a non-final order of the circuit court denying his motion in limine in which he sought to exclude evidence of the results of a test of his blood for controlled substances. (43; *see* 46).

Wiedmeyer was charged after a vehicle he was driving collided with a vehicle driven by SJH (1:2; 9:7-11). Village of Kewaskum police officer Luke Wilhelm testified at the preliminary hearing that when he arrived on the scene, SJH told him that she was driving on a street when Wiedmeyer rear-ended her vehicle twice with his vehicle (9:9-10). Officer Wilhelm said that Wiedmeyer admitted that his vehicle had struck SJH's vehicle (9:11). Officer Wilhelm said that Wiedmeyer told him he had sneezed twice, and when he looked up, the other vehicle was directly in front of his vehicle (9:11). Officer Wilhelm testified that a witness told him that she had seen Wiedmeyer "wobbling around the area," and observed "that he had almost fallen over" (9:12).

Officer Wilhelm testified that when he made contact with Wiedmeyer, he did smell "the odor of marijuana emanating from his vehicle and also him later throughout our interaction" (9:12). He said that another officer searched Wiedmeyer's car, and found a small amount of marijuana (9:13). After conducting field sobriety tests, Officer Wilhelm determined that Wiedmeyer's ability to drive safely was impaired (9:17).

The circuit court, the Honorable Andrew T. Gonring, found probable cause that Wiedmeyer had committed a felony, and bound him over for trial (9:31-33).

Before trial, Wiedmeyer filed a motion in limine seeking to exclude evidence of "all chemical analyses of Mr. Wiedmeyer's blood for substances other than alcohol, and all testimony related to those analyses" (35:1). He asserted that under Wis. Stat. § 343.305(6)(a), chemical analysis of blood can be considered valid only if performed by an analyst with a permit to conduct the testing issued by the Department of Health Services, and that the State of Wisconsin Crime Laboratory analyst who tested his blood for controlled substances did not have a permit to test for controlled substances (35:1-3).

The court held a hearing on the motion (38), and heard testimony from the analyst, about the drug testing procedures and her qualifications to test for drugs (38:5-21). The analyst acknowledged that she had not applied for a permit to test for controlled substances (38:14).

After briefing (39; 40), the circuit court denied Wiedmeyer's motion in an oral ruling (41). The court then issued a written order denying the motion (43). Wiedmeyer petitioned for leave to appeal, the State did not oppose, and this court granted the petition.

ARGUMENT

THE CIRCUIT COURT CORRECTLY DENIED WIEDMEYER'S MOTION TO EXCLUDE EVIDENCE BECAUSE WIS. STAT. § 343.305(6)(a) DOES NOT DEEM INADMISSIBLE EVIDENCE GATHERED IN TESTS NOT CONDUCTED IN ACCORDANCE WITH THE STATUTE.

A. Introduction.

The issue in this case concerns the meaning of Wis. Stat. § 343.305(6)(a), which provides in relevant part as follows:

> (6) Requirements for tests.
> (a) Chemical analyses of blood or urine to be considered valid under this section shall have been performed

> substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services.

It is undisputed that the analyst who tested Wiedmeyer's blood for controlled substances did not have a valid permit to test blood for controlled substances. The issue is whether the analyst's lack of a permit renders the chemical analysis is inadmissible at Wiedmeyer's OWI trial.

The circuit court denied Wiedmeyer's motion to exclude evidence for a number of reasons. It first noted that "[s]ection 343.305(6)(a) specifically applies to Section 343.305," and that "[t]his case is not a prosecution under 343.305," but a prosecution for OWI under Wis. Stat. 346.63(1)(a) (41:6-7).[1] The court concluded that the only relevancy § 343.305(6)(a) might have is to the weight given to chemical analysis evidence at an OWI trial, not to the admissibility of the evidence. The court concluded that "[s]ection 343.305(6)(a) is irrelevant to the issue before the Court" (41:8).

The court then concluded that construing Wis. Stat. § 343.305(6)(a) as requiring exclusion of evidence at a criminal trial because the analyst does not have a valid permit would be contrary to Wis. Stat. § 967.055, "in which the legislature encourages the vigorous prosecution of offenses involving the operation of a motor vehicle by one under the influence of controlled substances" (41:8-9). The court also concluded that Wiedmeyer's interpretation of the statute is inapplicable for want of a subject (41:10-11), and that it would lead to absurd results (41:10).

---

[1] The transcript indicates that the court said that this is a prosecution under "343.305(1)(a)," but there is no paragraph (a) in subsection (1), and Wiedmeyer is not being prosecuted for an implied consent violation. In context, the court was unquestionably referring to Wis. Stat. § 346.63(1)(a).

As the State will explain, the circuit court correctly denied Wiedmeyer's motion to exclude evidence because Wis. Stat. § 343.305(6)(a) provides only that results of tests not conducted in accordance with the requirements of § 343.305(6) are invalid under the implied consent law. Such test results will not be sufficient to sustain an administrative suspension under § 343.305(7), and are not automatically admissible at a trial pursuant to § 343.305(5)(d). But the results are not inadmissible at trial if the party seeking to admit them otherwise lays a foundation. Accordingly, the circuit court correctly denied Wiedmeyer's motion in limine seeking to exclude the test results.

B. Applicable legal principles and standard of review.

The State is aware of no dispute of material fact. Resolution of the issue in this case requires interpretation of the implied consent law. Interpretation of a statute and application of a statute to undisputed facts present a question of law that a reviewing court determines independently. *State v. Carter*, 2010 WI 77, ¶ 12, 327 Wis. 2d 1, 785 N.W.2d 516.

C. The circuit court properly concluded that Wis. Stat. § 343.305(6)(a) provides that a permit requirement is required for analysis to be valid "under this section," and Wiedmeyer is not being prosecuted under Wis. Stat. § 343.305.

The primary basis for the circuit court's decision denying Wiedmeyer's motion to exclude the results of chemical analysis and testimony about the analysis, is that § 343.305(6)(a) applies to actions "under this section" and an OWI prosecution is not an action under § 343.305 (41:6-8, 11).

On appeal, Wiedmeyer argues that the court was incorrect in concluding that the words "valid under this section" in § 343.305(6)(a) mean valid under § 343.305. He

argues that implied consent is not the "sole focus" of § 343.305, and that "[s]ection 343.305(6)(a) has nothing to do with implied consent" (Wiedmeyer's Br. at 6-7). He asserts that "the results of chemical analyses of blood are wholly irrelevant in a refusal prosecution," and that "[t]he *only* time the results of a chemical analysis of a defendant's blood, breath, or urine are relevant is in a civil or criminal prosecution for an intoxication-related offense" (Wiedmeyer's Br. at 7).

Wiedmeyer is incorrect. Wisconsin Stat. § 343.305 is the implied consent law. *See e.g.*, *State v. Reitter*, 227 Wis. 2d 213, 217, 595 N.W.2d 646 (1999) ("The issue is whether a police officer is required to advise a custodial defendant, charged with operating a motor vehicle while intoxicated, that the right to counsel does not apply to the administration of a chemical test under Wisconsin's implied consent statute, Wis. Stat. § 343.305."); *State v. Zielke*, 137 Wis. 2d 39, 40, 403 N.W.2d 427 (1987) ("Does sec. 343.305, Stats., (the implied consent law) provide the exclusive means by which police may obtain chemical test evidence of driver intoxication thereby requiring suppression upon noncompliance with the law?").

The sole focus of the law is implied consent, beginning with giving implied consent, § 343.305(2); the procedure for requesting or requiring samples under § 343.305(3); the Informing the Accused information under § 343.305(4); administering tests under § 343.305(5); analysis of tests under § 343.305(6); administrative suspensions resulting from tests showing a prohibited alcohol concentration or detectable presence of illegal drugs under § 343.305(7); review of administrative suspensions under § 343.305(8); refusals under § 343.305(9); and revocations for refusals under § 343.305(10).

Wiedmeyer is correct in asserting that the results of chemical testing are irrelevant to refusal proceedings, because the person has refused chemical testing. If a sample is taken after a refusal, on the basis of a search warrant or a

different exception to the warrant requirement, the result of testing that sample is not at issue at a refusal hearing. Wis. Stat. § 343.305(9)(a)5.

But the result of a test conducted under § 343.305(6)(a) is the focus of a hearing on an administrative suspension that is imposed under § 343.305(7),[2] if chemical testing shows a detectible amount of a controlled substance, or a prohibited alcohol concentration.

The administrative suspension provision applies only "[i]f a person submits to chemical testing administered in accordance with this section." Wis. Stat. § 343.305(7)(a) and (b). In other words, the provision applies only if a person submits to testing under the implied consent law, and the

---

[2] Wis. Stat. § 343.305(7), "CHEMICAL TEST; ADMINISTRATIVE SUSPENSION," provides:

> **(a)** If a person submits to chemical testing administered in accordance with this section and any test results indicate the presence of a detectable amount of a restricted controlled substance in the person's blood or a prohibited alcohol concentration, the law enforcement officer shall report the results to the department. The person's operating privilege is administratively suspended for 6 months.
>
> **(b)** If a person who was driving or operating or on duty time with respect to a commercial motor vehicle submits to chemical testing administered in accordance with this section and any test results indicate an alcohol concentration above 0.0, the law enforcement officer shall issue a citation for violation of s. 346.63 (7) (a) 1., issue citations for such other violations as may apply and issue an out-of-service order to the person for the 24 hours after the testing, and report both the out-of-service order and the test results to the department in the manner prescribed by the department. If the person is a nonresident, the department shall report issuance of the out-of-service order to the driver licensing agency in the person's home jurisdiction.

testing shows a detectible amount of a controlled substance, or a prohibited alcohol concentration.

A person whose operating privilege is suspended under § 343.305(7) has the right to administrative review of the suspension if he or she requests a hearing within ten days. Wis. Stat. § 343.305(8)(b). At the hearing, one of the issues is "whether one or more tests were administered in accordance with this section." Wis. Stat. § 343.305(8)(b)2.c.

After the hearing, "the examiner shall order that the suspension of the person's operating privilege be rescinded" if it finds that "the criteria for administrative suspension have not been satisfied." Wis. Stat. §343.305(8)(b)5.a.

By its plain language § 343.305(6)(a) applies under "this section," meaning section 343.305. By stating "to be considered valid under this section," a chemical analysis must have been conducted in accordance with § 343.305(6), the legislature simply provided the standards required to uphold an administrative suspension under § 343.305(7). If the testing was not done in accordance with § 343.305, it is insufficient to sustain an administrative suspension. But as the State will next explain, § 343.305(6)(a) does not provide that evidence gathered in a test not conducted in accordance with § 343.305 is inadmissible in a trial for an OWI-related offense.

D. Wisconsin Stat. §§ 343.305 (5)(d) and (6)(a) do not provide that the results of testing not in accordance with §343.305(6) are inadmissible in criminal or civil OWI proceedings.

Wiedmeyer asserts that the circuit court erred in concluding that Wis. Stat. § 343.305(6)(a) does not apply to his prosecution for OWI, and in stating that it "is irrelevant to the issue before the Court" (41:8; Wiedmeyer's Br. at 5). He argues that § 343.305 "is not wholly divorced from a criminal OWI prosecution" (Wiedmeyer's Br. at 5). He

points to § 343.305(5)(d), which provides in relevant part that:

> (d) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of . . . a controlled substance . . . the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of . . . a controlled substance . . . to a degree which renders him or her incapable of safely driving . . . . Test results shall be given the effect required under s. 885.235.

(Wiedmeyer's Br. at 5-6.)

The State agrees that the part of § 343.305 at issue in this case, § 343.305(6)(a), can be relevant to OWI prosecutions. Under § 343.305(5)(d), "results of a test administered in accordance with this section are admissible." This section provides that if a test is conducted in accordance with § 343.305(6), the result of the test is automatically admissible in an OWI trial. *State v. Piddington*, 2001 WI 24, ¶ 34, 241 Wis. 2d 754, 623 N.W.2d 528; *Zielke*, 137 Wis. 2d at 51.

But § 343.305(5)(d) does not provide that results of a test not administered in accordance with this section are inadmissible. It provides only that they are not automatically admissible.

The Wisconsin Supreme Court has recognized that failure to comply with the implied consent law generally does not mean that blood test results are automatically inadmissible, or are automatically suppressed:

> [E]ven though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats. [now

> § 343.305(4)], prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.

Piddington, 241 Wis. 2d 754, ¶ 34 (quoting *Zielke*, 137 Wis. 2d at 51).

In an unpublished opinion, *Winnebago Cnty. v. Christenson*, No. 2012AP1189 (WI App Oct. 31, 2012),[3] this court explicitly rejected the argument that § 343.305(5)(d) is an exception to the general rule that failure to comply with the implied consent law does not result in automatic inadmissibility of test results at trial. In *Christenson*, the defendant argued that "because subsection (d) affirmatively states that blood test results 'are admissible' if the related blood samples are procured 'in accordance with this section,' which includes subsection (b), blood test results are per se inadmissible if the sample was not procured in compliance with subsection (b)." *Id.* ¶ 17. This court rejected the defendant's argument, as "mistaken." *Id.* The court explained:

> To begin, nothing in WIS. STAT. § 343.305(5)(d) states that a blood test procured in a manner which does not comport with subsection (b) is inadmissible. Indeed, in subsection (d), the sentence immediately following the one which states "the results of a test administered in accordance with this section are admissible," provides that "[t]est results shall be given the effect required under [WIS. STAT. §] 885.235." Section 885.235 addresses the prima facie effect of the blood test evidence if a sample is taken in compliance with the statutory procedures. Nothing in these statutes suggests that blood test evidence which does not satisfy the statutory procedures cannot otherwise be admitted.

Id. ¶ 18.

---

[3] Wiedmeyer cites *Christenson* and has appended a copy of the opinion to his brief.

Wiedmeyer is not arguing that his blood was illegally obtained. He is arguing only that because the analyst who tested it does not have a permit to test for controlled substances, the results of the test must be suppressed. This is contrary to the words of the statute, which make clear that the results of tests not conducted in accordance with § 343.305(6) are invalid "under this section," and to *Zielke*, *Piddington*, and *Christenson*.

Wiedmeyer cites *State v. Peotter*, 108 Wis. 2d 359, 321 N.W.2d 265 (1982), asserting that it is "[t]he only case to squarely address the admissibility of test results as related to what is now Section 343.305(6)(a)" (Wiedmeyer's Br. at 8). In *Peotter*, a lab analyst testified at the defendant's bench trial about the results of a test of the defendant's blood for alcohol. *Peotter*, 108 Wis. 2d at 364. The analyst did not testify that he had a permit to test for alcohol. *Id.* at 364. The defendant did not object to the analyst's testimony. *Id.* at 366. On appeal, the defendant claimed that the trial court should not have considered the test results because the analyst did not testify that he had a permit as required under § 343.305(10)(a), which has since been renumbered as § 343.305(6)(a). *Id.*

The supreme court held that "the dispute regarding the validity of the technician's permit in this case focuses on the foundational nature rather than the admissibility of his testimony." *Id.* at 366-67. The court rejected the defendant's claim, stating, "We adhere to the well-established principle that '[a] rule of Evidence not invoked is *waived*." *Id.* at 367 (citation omitted).

Wiedmeyer asserts that the supreme court's decision in *Peotter* means that to establish the foundation for test results to be admissible at trial, the State must establish all the criteria contained in § 343.305(6)(a) (Wiedmeyer's Br. at 11-12).

In *Peotter*, the court recognized that if a party establishes that the criteria in § 343.305(6)(a) are satisfied,

the foundation is laid, and the test results are automatically admissible. But *Peotter* did not say that if a party does not establish that the criteria in § 343.305(6)(a) are satisfied, the test results are automatically inadmissible. Peotter did not say that a party cannot otherwise lay the foundation to admit test results.

Wiedmeyer cites *State v. Felton*, 2012 WI App 114, ¶ 12, 344 Wis. 2d 483, 824 N.W.2d 871, as "holding that Section 343.305(6)(a) provides the assurances of accuracy necessary for blood test results to be received as evidence at trial" (Wiedmeyer's Br. at 13).

But that is not the holding of *Felton*. This court merely pointed out that the defendant argued that the preliminary breath test (PBT), is a "'quantitative' test that requires the same or similar assurances of accuracy that is needed before the results of blood-alcohol tests may be received as evidence at trial." *Felton*, 344 Wis. 2d 483, ¶ 12 (citing Wis. Stat. § 343.305(6)(a). This court correctly noted that § 343.305(6) "sets out lengthy criteria that must be met before the analyses may 'be considered valid' under § 343.305(6))." *Id.* This court then noted that the circuit court had recognized that "no statute similarly preconditions the use of the preliminary-breath test when it is used by a law-enforcement officer 'for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1).'" *Id.* (citing Wis. Stat. § 343.303).

This court did not conclude that the defendant's interpretation of § 343.305(6)(a) was correct, or even address the merits of that interpretation. It only concluded that the circuit court correctly concluded that the PBT statute does not require that similar criteria be satisfied before PBT results may be used to show probable cause to arrest for an OWI-related offense.

In rejecting the defendant's argument, this court had no need to point out that while the defendant argued that § 343.305(6)(a) concerns whether evidence "may be received

at trial," the statute concerns only the validity of test results "under this section," including whether test results are automatically admissible at a trial on an OWI-related offense.

Wiedmeyer also cites *Christenson*, stating that the case referred to "violations of Section 343.305(6)(a) as rendering test results 'automatically inadmissible'" (Wiedmeyer's Br. at 13).

This court stated in *Christenson* that if the legislature had intended that test results be "automatically inadmissible" if not conducted in accordance with § 343.305, "we would expect it to have used language more akin to that of § 343.305(6)(a)," specifically "to be considered valid." *Christenson*, unpublished slip op. ¶ 20. The court concluded that "[t]he language employed in this subsection-'to be considered valid'-necessarily means that analyses which are not performed substantially according to the approved methods are invalid." *Id.*

The State does not dispute that what this court said in *Christenson* is correct. If § 343.305(5)(d) said that for test results "to be considered valid" at trial, the tests must have been conducted in accordance with this section, then the results would be automatically inadmissible at trial unless conducted in accordance with § 343.305(6). But that does not mean that when § 343.305(6)(a) says that "to be considered valid *under this section*," analyses must be conducted in accordance with the approved methods, it means that results of tests not conducted in accordance with § 343.305(6) are automatically inadmissible in a trial under § 343.63.

Finally, Wiedmeyer argues that under *Piddington*, if the State cannot rely on the automatic admissibility of test results under § 343.305(5)(d), it "'would have to establish the admissibility of the blood test, *including establishing a foundation*'" (Wiedmeyer's Br. at 14) (quoting *Piddington*, 241 Wis. 2d 754, ¶ 34). He argues that "[t]he *Peotter* Court

specifically held that Section 343.305(6)(a) is the foundation that must be laid for test results to be admissible" (Wiedmeyer's Br. at 14).

But the court in *Peotter* did not imply, much less hold that evidence of test results are admissible only if the State lays a foundation by showing the testing was conducted in accordance with § 343.305(6). It merely recognized that the requirements of § 343.305(6) provide the foundation for automatic admissibility under § 343.305(5)(d). *Peotter* does prohibit the State from otherwise laying a foundation for admission of test results.

In this case, the lab analyst testified to her qualifications and the procedures she follows in testing samples for controlled substances, and Wiedmeyer did not dispute that the analysis "was done in accordance with all existing and appropriate protocols" (41:4). The State provided a foundation for admission of the test results, and the court properly denied Wiedmeyer's motion to suppress those results.

E. The circuit court correctly concluded that Wiedmeyer's interpretation of Wis. Stat. § 343.305(6)(a) is contrary to public policy, and would lead to absurd results.

The circuit court made clear that it was denying Wiedmeyer's motion to suppress because § 343.305(6)(a) makes test results not conducted in accordance with the statute invalid under § 343.305, but it does not make them invalid in regard to OWI trials (41:11). The court also concluded that Wiedmeyer's interpretation of § 343.305(6)(a) would be contrary to the public policy behind Wisconsin's laws prohibiting operating under the influence of an intoxicant (41:8-10). The court noted that in Wis. Stat. § 967.055, "the legislature encourages the vigorous prosecution of offenses involving the operation of a motor vehicle by one under the influence of controlled substances," but that Wiedmeyer's interpretation of § 343.305(6)(a) as

applying "to anything other than [implied] consent situations leads to an absurd result when an analysis of blood would otherwise be admissible" (41:9-10).

On appeal, Wiedmeyer argues that § 343.305(6)(a) is "not preempted" by § 967.055, and that "[s]ection 967.055 has no effect on Section 343.305(6)(a)" (Wiedmeyer's Br. at 16). He cites *State v. Brooks*, 113 Wis. 2d 347, 358-59, 335 N.W.2d 354, for the proposition that § 967.055 "places no restrictions on trial courts whatsoever" (Wiedmeyer's Br. at 17).

The State maintains that the circuit court correctly recognized that Wiedmeyer's interpretation of § 343.305(6)(a) is contrary to public policy. The court cited § 967.055, but not for subsection (2) of the statute, which was at issue in *Brooks*. The court was referring to subsection (1)(a), which sets forth the intent of the statute, as follows: "The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog. . . ." Wis. Stat. § 967.055.

The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. *State v. Reitter*, 227 Wis. 2d at 223-25 (1999) (citing *Zielke*, 137 Wis. 2d at 46). The law was not created to enhance the rights of drunk drivers, but "to facilitate the collection of evidence." *Reitter*, 227 Wis. 2d at 224 (citing *Zielke*, 137 Wis. 2d at 46; *State v. Neitzel*, 95 Wis. 2d 191, 203-04, 289 N.W.2d 828 (1980)). The purpose of the law "is to obtain the blood alcohol content in order to obtain evidence to prosecute drunk drivers." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986) (citing *Brooks*, 113 Wis. 2d at 355 (additional citation omitted)). Courts construe the implied consent law liberally in order to effectuate the legislative purpose behind the

statute. *Reitter*, 227 Wis. 2d at 224-25, citing *Zielke*, 137 Wis. 2d at 47.

In enacting an implied consent law, the legislature obviously did not intend to make it more difficult to prosecute OWI-related offenses. Instead, the legislature has encouraged drivers to comply with the implied consent law, and has provided that if a person does comply, and if a test result shows a prohibited alcohol concentration or a detectable presence of illegal drugs, the person's operating privilege will be administratively suspended, and the test result is automatically admissible at trial. But if the testing is not in accordance with § 343.305(6), the person will prevail at an administrative suspension hearing (if he or she timely requests a hearing), and the test results are not automatically admissible at trial.

Wiedmeyer's interpretation of § 343.305(6)(a) is contrary to the policy behind Wisconsin's per se drug law, Wis. Stat. § 346.63(1)(am), which prohibits operating a motor vehicle with a detectable presence of a restricted controlled substance. Wis. Stat. § 346.63(1)(am). The legislature enacted the law, in 2003 Wis. Act. 97, because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance." Legislative Council Act Memo for 2003 Wis. Act. 97 (Dec. 16, 2003). The statute provides that "if one has a detectable amount of a restricted controlled substance in his or her bloodstream while operating a vehicle or going armed with a firearm there is no requirement that the person was 'under the influence' of that restricted controlled substance. Evidence of a detectable amount is sufficient." *Id.*

The legislature recognized that proving drugged driving generally requires a test result. The legislature obviously did not intend that a test result of a sample that is constitutionally drawn, and tested by a qualified individual, be excluded at trial because of an issue with a permit.

Wiedmeyer asserts that § 343.305(6)(a) "pertains solely to regulating the analyses of samples once they have been taken – whether consent was given or not" (Wiedmeyer's Br. at 7). He seems to be arguing that samples taken pursuant to a search warrant, under exigent circumstances and probable cause, or under express consent, would be inadmissible if not tested in accordance with § 343.305(6).

That result would be contrary to the words of the statute, and public policy, and is absurd. Wiedmeyer's interpretation of § 343.305(6)(a) would enhance the rights of drunk drivers, precisely what the implied consent law is not intended to do. *Nordness*, 128 Wis. 2d at 33.

If Wiedmeyer's interpretation were correct, samples tested by qualified individuals outside of Wisconsin would seemingly be inadmissible in OWI-related trials, if the individual did not have a permit issued by the Wisconsin Department of Transportation. And tests of samples not taken under the implied consent law would be inadmissible at an OWI trial simply because they were not conducted in accordance with rules that are specifically applicable to samples under the implied consent law.

Wiedmeyer's interpretation of § 343.305(6)(a) would also lead to the absurd result of defendants at their OWI trials being unable to present evidence of the result of their own tests, unless those tests were conducted in accordance with § 343.305.

The implied consent law provides that if a person submits to a test, the person has the right to the alternative test provided by law enforcement, "or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test." Wis. Stat. § 343.305(5)(a).

If § 343.305(6)(a) means that any test not conducted according to the criteria in § 343.305(6) is automatically

inadmissible at trial, the results of a test that a defendant has administered at his or her own expense would also be inadmissible unless conducted in accordance with § 343.305(6). This would mean that unless the "qualified person of the defendant's choice" is employed at a laboratory approved by the department of health services, and has a permit issued by the department of health services, the results of a test that a defendant has the right to have conducted, and that the defendant pays for, is inadmissible.

The statute cannot reasonably be read in this manner. The legislature could not have intended to provide defendants with a statutory right to have a test conducted by "any qualified person of his or her own choosing," but not allow evidence of the results of that test unless the analyst had a valid permit issued by the State.

Instead, the statute provides only that results of a test conducted by any qualified person of the person's own choosing, are not automatically admitted at trial if the test is not conducted in accordance with § 343.305(6). The statute does not prohibit a defendant from otherwise laying the foundation for admission of the test results, and admitting the results.

Wiedmeyer's interpretation of the statute is also contrary to Wis. Stat. § 885.235, which provides that in any action or proceeding in which it is material to prove that a person was under the influence of alcohol, evidence of a chemical analysis of the person's blood or urine "is admissible." Wis. Stat. § 885.235(1g). If a test on a sample is conducted within three hours of the operation of a motor vehicle, the results showing a prohibited alcohol concentration are prima facie evidence of a prohibited alcohol concentration. Wis. Stat. § 343.305(1)(c). If a test on a sample shows a detectable presence of a restricted controlled substance, the results are prima facie evidence that the person had a detectable presence of a controlled substance in his or her blood. Wis. Stat. § 885.235(1)(k).

Wiedmeyer's interpretation of the implied consent law would make § 885.235 meaningless in any case in which a test was not conducted in accordance with § 343.305(6), even if the sample was not taken under the implied consent law. This is obviously not what the legislature intended in enacting § 343.305 or § 885.235.

The circuit court understood the purpose of the implied consent law, and understood that § 343.305(6)(a) is not intended to limit the State's ability to prosecute OWI-related offenses. Its decision denying Wiedmeyer's motion to suppress evidence was correct, and this court should affirm.

CONCLUSION

For the reasons explained above, this court should affirm the circuit court's non-final order denying the motion to suppress evidence filed by the defendant-appellant, Keith A. Wiedmeyer.

Dated this 13th day of November, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,280 words.

_____
Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of November, 2015.

_____
Michael C. Sanders
Assistant Attorney General