STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2016AP001002 CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Joseph K. Larson,
Defendant-Appellant

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR IRON COUNTY
THE HONORABLE PATRICK J. MADDEN PRESIDING

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ISSUE PRESENTED FOR REVIEW

Under Wisconsin law, is an officer required to adhere to protocols of properly informing the accused?

The Trial Court answered: No

The Appellant answers: Yes

Under Wisconsin law, is an officer required to adhere to the protocol of a 20 minute waiting period prior to administering a breath test?

The Trial Court answered: No

The Appellant answers: Yes

Under Wisconsin Law, if consent to conduct Chemical Testing is not obtained prior to the testing is the Test Lawful?

The Trial Court answers: Yes

The Appellant answers: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give further guidance to the bench and bar as to whether or not compliance with reliability protocols are required in conducting breath tests and whether or not improperly informing the accused as to the test to be performed invalidates consent.

STATEMENT OF CASE

On February 26th, 2016, the Appellant and his counsel were present in Iron County County Circuit Court for hearing on the Defendants motion to suppress citing noncompliance with Wis. Stat. § 343.305(4) and § 343.305(6). On February 26th the Defendants motion for suppression was denied. Subsequently, on that same day, Joseph K. Larson (herein after known as "Larson") entered a plea of No Contest and was adjudicated guilty of OWI 3rd contrary to § 346.63(1)(a). Having filed and argued a motion before the Circuit Court citing as an issue failure to comply with the statutory requirements for chemical testing and informing the accused. Following his conviction, Larson petitioned the Circuit Court for an Order Staying his sentence pending appeal. Larson's request to stay his Sentence was denied. (R. 38 45-46) Subsequently the jail portion of his sentence was served. This Appeal follows.

STATEMENT OF THE FACTS:

On July 31st 2015, shortly after 8:36 p.m. Deputy Eric Snow of the Iron County Sheriff's Department was on a routine traffic stop when a call was issued to him from dispatch reporting a speeding driver. Deputy Snow completed the stop he was on and sped for 3.5 miles to catch the speeding driver. Deputy Snow seized the vehicle of Larson citing as grounds for the stop speeding and two lane deviations. (R. 38, 5, 7)

After conducting standard Field Sobriety Testing Deputy Snow placed Larson under arrest for Operating While Intoxicated 3rd offense. (R. 38, 8) Following his arrest Mr. Larson was transported to the Iron County jail where he arrived between 9:45 and 10:10 p.m. Upon arriving at the Iron County Jail Larson was moved to the area where chemical testing could occur. Larson had a brief conversation with the Officer conducting the test. R. 38, 34) At 10:13 p.m. Officer Snow turned on the breathalyzer machine . (R. 38, 29) At 10:13 p.m. Officer Snow began his observation period. (R. 38, 29) At 10:16 the first sample of Larson's breath was collected. (R. 38, 29) After providing the first sample Larson is presented with a form entitled "informing the accused". The form is completed requesting a test of Larson's urine and is signed by Deputy Snow. (R 18) The form indicates the time that consent was obtained was 10:17 pm. (R. 18) The chemical test of Larson's breath was conducted from 10:13 p.m. until 10:22 p.m. (R.18) Consent for a test of Larson's "urine" was obtained at 10:17p.m. (R. 18) (R.38, 29)

ARGUMENT

WIS STAT. § 343.305 (4) STATES:

> "INFORMATION. At the time that a chemical test specimen ***is requested*** under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> 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. You, however, will have to make your own arrangements for that test."

WIS STAT. § 343.305 (6) STATES:

> **(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. The department of health services shall approve laboratories for the purpose of performing chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs and shall develop and administer a program for regular monitoring of the laboratories. A list of approved laboratories shall be provided to all law

enforcement agencies in the state. Urine specimens are to be collected by methods specified by the laboratory of hygiene. The laboratory of hygiene shall furnish an ample supply of urine and blood specimen containers to permit all law enforcement officers to comply with the requirements of this section.

It is incorrect to say that a driver who consents to a blood draw after receiving the advisement contained in the "Informing the Accused" form has given "implied consent." If a driver consents under that circumstance, that consent is actual consent, not implied consent. If the driver refuses to consent, he or she thereby withdraws "implied consent" and accepts the consequences of that choice. *See, e.g., McNeely,* 133 S.Ct. at 1566 (Implied consent laws "impose significant consequences when a motorist withdraws consent."); *State v. Neitzel,* 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980) State v. Padley, 2014 WI App 65, ¶ 38, 354 Wis. 2d 545, 570–71, 849 N.W.2d 867, 879, review denied, 2014 WI 122, ¶ 38, 855 N.W.2d 695

In order for consent to constitute a valid exception to the warrant requirement of the Fourth Amendment, it must be freely and voluntarily given. *Bumper v. North Carolina,* 391 U.S. 543, 548–49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *State v. Phillips,* 218 Wis.2d 180, 196, 577 N.W.2d 794 (1998) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

Consent is voluntary if it is given in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant." *State v. Clappes,* 136 Wis.2d 222, 245, 401 N.W.2d 759 (1987).

In making a determination regarding the voluntariness of consent, this court examines the totality of the circumstances, including the circumstances surrounding consent and the characteristics of the defendant. *State v. Artic,* 2010 WI 83, ¶¶ 32–33, 327 Wis.2d 392, 786 N.W.2d 430. State v. Padley, 2014 WI App 65, ¶ 64, 354 Wis. 2d 545, 582, 849 N.W.2d 867, 884–85, review denied, 2014 WI 122, ¶ 64, 855 N.W.2d 695

The State "bears 'the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.' " **885 *State v. Johnson,* 177 Wis.2d 224, 233, 501 N.W.2d 876 (Ct.App.1993) (quoting *Gautreaux v. State,* 52 Wis.2d 489, 492, 190 N.W.2d 542 (1971)); *accord Artic,* 327 Wis.2d 392, ¶ 32, 786 N.W.2d 430. State v. Padley, 2014

WI App 65, ¶ 64, 354 Wis. 2d 545, 582, 849 N.W.2d 867, 884–85, review denied, 2014 WI 122, ¶ 64, 855 N.W.2d 695

I. Larson's consent to a chemical test of his breath was not obtained prior to taking part in the chemical testing in Accordance with WIS STAT. § 343.305 (4)

1. On July 31st 2015, shortly after 8:36 p.m. Deputy Eric Snow of the Iron County Sheriff's Department was on a routine traffic stop when a call was issued to him from dispatch reporting a speeding driver. (R. 38, 11)

2. Deputy Snow completed the stop he was on and sped for 3.5 miles to catch the reported speeding driver. (R. 38, 7)

3. Deputy Snow seized the vehicle of Larson citing as grounds for the stop speeding. (R. 38, 7)

4. After conducting standard Field Sobriety Testing Deputy Snow placed Larson under arrest for Operating While Intoxicated 3rd offense. (R. 38, 8)

5. Field Sobriety tests in this case took 35 minutes. (R.38, 8)

6. Following his arrest Larson and Deputy Snow remained on the side of the highway for a wrecker to arrive. This wait was approximately 25 minutes. (R. 38, 9)

7. It took an additional 25 minutes to transport Larson to the Jail (R. 38, 9)

8. If the time of the stop was shortly after 8:35, the Standard field tests took 35 minutes (R.38, 8), waiting for the wrecker took 25 minutes (R.38, 8) and transport to jail took an additional 25 (R. 38, 9) minutes the soonest the Defendant could have arrived at the jail would have been 10:00 p.m.

9. Following arrest Larson was transported to the Iron County jail where the soonest he could have arrived would be between 10:00 and 10:10 p.m.

10. After arriving at the Iron County Jail Larson was moved to the area where chemical testing could occur.

11. Larson had a brief conversation with the Officer conducting the test. (R. 38, 34)

12. At 10:13 p.m. Officer Snow began his observation period. (R. 38, 29)

13. Similarly at 10:16 the first sample of Larson's breath was collected. (R. 38, 29)(R. 18)

14. While this is occurring Larson is presented with a form entitled "informing the accused". (R.18) (R. 38, 34-35)

15. The form presented to Larson was completed requesting a test of Larson's "Urine" and is signed by Deputy Snow. (R.18)

16. The form also indicates the time that consent was obtained was 10:17 pm. (R. 38, 20)

17. The chemical test of Larson's breath was conducted from 10:13p.m. Until 10:22 p.m. (R. 18)

18. "Consent" for a test of Larson's "urine" was obtained at 10:17 pm. (R.18). At 10:13 the observation period was started. At 10:16 the first sample of breath was taken. At 10:17 the defendant was presented with the Informing the Accused for requesting a urine sample.

19. The officers conducting the Chemical tests of Larson failed to properly obtain consent prior to administering their chemical tests in violation of WISC STAT. § 343.305 (4): "AT THE TIME THAT A CHEMICAL TEST SPECIMEN IS REQUESTED UNDER SUB. (3) (A), (AM), OR (AR), THE LAW ENFORCEMENT OFFICER **SHALL** READ THE FOLLOWING TO THE PERSON FROM WHOM THE TEST SPECIMEN IS REQUESTED:…"

"…our cases recognize that consent to search can follow *earlier* illegal police activity; if that happens, the consent is invalid unless the effect of the earlier illegal police

activity has been attenuated. *Id.,* 221 Wis.2d at 352, 585 N.W.2d at 634. There are three factors that apply in an analysis of whether the earlier illegal police activity has sufficiently attenuated by the time consent to search is given, and analysis of them in light of the circumstances of this case underscores why the officers' search pursuant to Munroe's "consent" was unlawful." State v. Munroe, 2001 WI App 104, ¶ 12, 244 Wis. 2d 1, 12–13, 630 N.W.2d 223, 228

20. The three factors that help to determine whether the taint of earlier illegal police activity has been attenuated by the time consent to search is granted are: "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Phillips,* 218 Wis.2d at 205, 577 N.W.2d at 805. State v. Munroe, 2001 WI App 104, ¶ 13, 244 Wis. 2d 1, 13, 630 N.W.2d 223, 228

21. The official misconduct in this case is the failure to adhere to the requirements of § 343.305 (4) and (6) prior to conducting a search.

22. The temporal proximity of the invalid search (breathalyzer without consent) occurs at the same time of the seizure of evidence in this case.

23. There are zero intervening circumstances in this case between the misconduct of conducting a warrantless search and obtaining results of an unlawful test.

24. The warrantless search occurs imminently before the form requesting a "urine" sample is presented (R.18) (R. 38, 34)

25. The misconduct in this case was executing the search without valid consent. The Wisc. Statutes are very clear in that an officer shall read the form and obtain valid consent prior to executing his search. In this case that did not happen. Rather the consent was obtained for a urine sample after another test had already begun. The forms were presented for the defendant to read during the testing. (R. 38, 35) The forms themselves contain

inaccurate information as to the type of test the officers were seeking consent to. (R. 18) All of these factors under the totality of the circumstances invalidate any alleged consent the Deputy obtained.

26. Because the form was not read to Larson prior to conducting the tests his consent was not obtained in accordance with the statute.

27. Consent for a breath test was never obtained. (R. 38, 29)

II. Larson's Did not Give Actual Voluntary Consent

28. The Wisconsin Court of Appeals in *Padley* discusses at length the implications of the implied consent statute as well as the consent that is given in these scenarios. In that Opinion the court of Appeals clearly indicates that under the implied consent statute a driver has not already implicitly consented to Chemical Testing. Rather that the implied consent statute governs the protocols and repercussions that surround attaining consent for Chemical Testing.

29. The Court of Appeals states in that Opinion: "The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized. This penalty scenario for "refusals" created by the implied consent law sets the scene for the second consent issue." State v. Padley, 2014 WI App 65, ¶¶ 26-27, 354 Wis. 2d 545, 564–65, 849 N.W.2d 867, 876,

30. Further at ¶ 27 the Court clearly indicates that valid consent need be obtained prior to chemical testing they state: "The State's power to penalize a refusal via the implied consent law, under circumstances specified by the legislature, gives law enforcement the right to force a driver to make what is for many drivers a difficult choice. The officer offers the following choices: (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law. When this choice is offered under statutorily specified circumstances that pass constitutional muster, ***choosing the first option is voluntary consent***. The fact that the driver is forced to make a difficult choice does not render the consent involuntary. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." *McGautha v. California,* 402 U.S. 183, 213, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) (quoting *McMann v. Richardson,* 397 U.S. 759, 769, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)), *vacated on other grounds by Crampton v. Ohio,* 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). State v. Padley, 2014 WI App 65, ¶¶ 26-27, 354 Wis. 2d 545, 564–65, 849 N.W.2d 867, 876, review denied, 2014 WI 122, ¶¶ 26-27, 855 N.W.2d 695

31. In the case now at issue Larson never consented to any testing prior to being subjected to a Chemical Test of his breath.

32. Further, the only consent properly obtained by the State in this case was consent for a chemical test of Larsons Urine. (R. 38, 29)

33. The Chemical Testing of Larsons breath commenced at 10:13 pm. (R. 38, 29) (R. 18)

34. At 10:17 p.m., during the course of the chemical testing of Larson's breath he is presented a form entitled informing the accused. (R .18)

35. The form presented to Larson, after the beginning of chemical testing of his breath, requested consent for a chemical test of his urine. (R.18) (R. 38, 29)

36. The officers conducting the chemical testing of Larson never obtained actual voluntary consent of Larson to conduct a chemical test of his breath. (R. 38, 29) Further, no consent for any testing was obtained prior to the Chemical test of Larson's Breath. (R. 18) Because the Officers failed to obtain consent to search, this search is a clear violation of Larson's 4th amendment rights against warrantless non-consensual searches. Further, no exception has been proven by the State.

III. If the Court Construes the Implied Consent Statute to Find Implicit Consent then, Larson's implied consent is invalid as the requirements of the statute are not met.

37. In 1997 the Wisconsin Court of Appeals in *Rydeski* stated: "Section 343.305(1), Stats., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content." *Village of Elkhart Lake v. Borzyskowski,* 123

Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct.App.1985)."State v. Rydeski, 214 Wis. 2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997)

38. The principal case is *County of Ozaukee v. Quelle,* 198 Wis.2d 269, 542 N.W.2d 196 (Ct.App.1995), in which the court of appeals set forth a three-pronged inquiry for assessing the information process mandated by Wis. Stat. § 343.305(4).[42] The *Quelle* court held that a circuit court must answer the following three questions in the affirmative before determining that the information imparted by the law enforcement officer is inadequate:

    (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) ... to provide information to the accused driver;

    (2) Is the lack or oversupply of information misleading;[43] and

    (2) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing? In re Smith, 2008 WI 23, ¶ 56, 308 Wis. 2d 65, 89–90, 746 N.W.2d 243, 255

39. In this case, the information presented by the Deputy conducting the chemical test is misleading and deficient. The information is misleading because the type of test requested was clearly substantially different from the one actually administered. The form presented to Larson that he read during the commission of the Chemical Testing of his Breath contained the Material Term "Urine", as to the type of test requested.

40. Larson believed that he was being asked for consent for the chemical testing of his urine. (R.38, 35)

41. The information is deficient in that it was not presented prior to the test being administered.

42. Because the issue is consent to search and the consent was not obtained prior to the search it must be invalid.

43. WIS STAT. § 343.305 (4) STATES: "INFORMATION. At the time that a chemical test specimen ***is requested*** under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

44. At 10:13 P.M. the Chemical Test of Larson's breath began. (R. 38, 29) The first sample of Larson's breath was given prior to reading the informing the accused. The informing the accused was read and presented to Larson at 10:17, after he was subjected to a Breath Test.

IV. The chemical test of Larson's breath was invalid due to a failure to conduct a 20 minute waiting period in conformity with Wisc. Stat. § 343.305 (6)

45. On July 31st 2015, shortly after 8:36 p.m. Deputy Eric Snow of the Iron County Sheriff's Department was on a routine traffic stop when a call was issued to him from dispatch reporting a speeding driver. (R. 38, 5,7)

46. Deputy Snow completed the stop he was on and sped for 3.5 miles to catch the speeding driver. (R. 38, 7)

47. Deputy Snow seized the vehicle of Larson citing as grounds for the stop speeding. (R. 38, 7)

48. After conducting standard Field Sobriety Testing Deputy Snow placed Larson under arrest for Operating While Intoxicated 3rd offense. (R. 38,8)

49. Field Sobriety tests in this case took 35 minutes. (R.38, 8)

50. Following his arrest Mr. Larson and Deputy Snow remained on the side of the highway for a wrecker to arrive. This wait was approximately 25 minutes. (R. 38, 9)

51. It took an additional 25 minutes to transport Larson to the Jail (R. 38, 9)

52. If the time of the stop was shortly after 8:35, the Standard field tests took 35 minutes (R.38, 8), waiting for the wrecker took 25 minutes (R.38, 8) and transport to jail took an additional 25 (R. 38, 9) minutes the soonest the Defendant could have arrived at the jail would have been 10:00 p.m.

53. After arriving at the Iron County Jail Larson was moved to the area where chemical testing could occur.

54. Larson had a brief conversation with the Officer conducting the test. (R. 38, 34)

55. At 10:13 p.m. Officer Snow began his observation period. (R.18)

56. Similarly at 10:16 the first sample was collected. (R. 18)

57. While this is occurring Larson is presented with a form entitled “informing the accused”. The form is completed requesting a test of Larson’s Urine and is signed by Deputy Snow. (R. 18)

58. The form indicates the time that consent was obtained was 10:17 p.m. (R.18)

59. The chemical test of Larson’s breath was conducted from 10:13p.m. Until 10:22 p.m. (R. 38,29)

60. Consent for a test of Larsons “urine” was obtained at 10:17 pm. (R.18)

61. WIS STAT. § 343.305 (6) STATES:

> **(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. The department of health services shall approve laboratories for the purpose of performing chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs and shall develop and administer a program for regular monitoring of the laboratories. A list of approved laboratories shall be provided to all law enforcement agencies in the state. Urine specimens are to be collected by methods specified by the laboratory of hygiene. The laboratory of hygiene shall furnish an ample supply of urine and blood specimen containers to permit all law

enforcement officers to comply with the requirements of this section.

62. Protocol for breath tests in the State of Wisconsin require a 20 minute observation period. This observation period is taught to the officers and directly impacts the reliability of such a test. In this case there was no observation period. Therefore the chemical testing did not follow the "performed substantially according to methods approved by the laboratory of hygiene" requirement of Wis. Stat. § 343.305 (6)

CONCLUSION

the Denial of the Larson's, suppression motion should be reversed and his Judgment of conviction vacated as the officers conducting the search of Larson's breath did not adequately conform to the statutory requirements for obtaining consent. Further, the officers failed to properly administer the chemical test that Larson was subjected to without consent. The matter should be remitted to the Circuit Court with the instruction that the Chemical Test of Larson be excluded from trial.

Dated this 5th day of August, 2016.

Respectfully Submitted,

JOHN MILLER CARROLL
LAW OFFICE

By: _____

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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,621 words.

Dated this 5th day of August, 2016.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 5th day of August, 2016.

_____

John Miller Carroll
State Bar #01010478