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STATE OF WISCONSIN

11-17-2016

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Appeal No. 2016AP001002 CR

State of Wisconsin,
Plaintiff-Respondent

v.

Joseph K. Larson
Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

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, did the officers substantially comply with the Implied Consent law?

The Trial Court answered: Yes

The Respondent answers: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested.

Publication is not suggested.

STATEMENT OF CASE

On February 26th, 2016, the Appellant and his counsel were present in Iron County Circuit Court for hearing on the Defendant's motion to suppress citing noncompliance with Wis. Stat §343.305(4) and §343.305(6). On February 26th the Court, after hearing, was satisfied from the credible evidence of the officer's, the Informing the Accused, Mr. Larson's statement, and exhibits, that the motion for suppression was denied. (R.37,38) 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. Subsequently the jail portion of his sentence was served. This Appeal follows.

STATEMENT OF THE FACTS

On July 31' 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 an erratic driver. When Mr. Larson passed Deputy Snow, he appeared to be speeding and Deputy Snow began pursuit. Deputy Snow paced the Larson vehicle at about 70 MPH and noticed two lane deviations, which lead to the stop of Mr. Larson. (R.38, 5 and 11-14)

Upon stopping Mr. Larson, he admitted drinking and Deputy Snow detected the odor of intoxicants, slurred speech, and delayed reaction

time. (R.38,7) Mr. Larson was unable to complete Field Sobriety Tests and was placed under arrest. Deputy Snow arrived at the Iron County Jail at 9:35 PM (R.38,20) where he was met by Deputy Wozniak. Deputy Snow was present at the jail while Deputy Wozniak completed testing. Deputy Snow testified he was present for the 20 minute waiting period and when Deputy Wozniak read the Informing the Accused. Snow testified that Mr. Larson was offered the breathalyzer, voluntarily took the test, and did not request any other tests. (R.38,21)

After Deputy Snow arrived at 9:35 PM he was met by Deputy Wozniak to continue the process. Deputy Wozniak testified he read the Informing the Accused (R.18, Exh 1) to Mr. Larson, he indicated he was a little confused the first time, so Deputy Wozniak read it over. (R.38,23) Deputy Wozniak asked him to take a breath test, he also admitted that he marked urine on the Informing the Accused (Exhibit 1). Deputy Wozniak further testified that Mr. Larson agreed to take the breath test and did so at 10:13 to 10:22 PM. Deputy Wozniak stated he had waited for 20 minutes prior to the test, and also acknowledged the 20 minute wait on the Intox Test (R.18, Exh 2). The result of the Intox Test was .17 (R.18 Exh 2), and further that Mr. Larson did not request any other tests (R.38,25). Mr. Larson also testified on direct and admitted he was read the Informing the Accused and that he was asked to take the breathalyzer. (R.38,32-33) On cross examination Mr. Larson also admitted that he was read the Informing the Accused, was told he was giving him a breath test, and that he took the breathalyzer (R.38,34). Mr. Larson also admitted he was shown the results (.17)and that he didn't ask for any other test. (R.38, 34 and 35)

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 arrangement for that test."

This case involves an Implied Consent issue based on the actions of the officers and the consent of Mr. Larson to take the intoxilyzer. Our State Supreme Court in *State v. Piddington*, 241 Wis. 2d 754, 771 provided a recap of prior "implied consent" decisions:

"The purpose behind the implied consent law is to combat drunk driving by facilitating the gathering of evidence against drunk drivers. *State V. Neitzel*, 95 Wis. 2d 191, 203, 289 N.W. 2d 828 (1980). "With this intent in mind we proceed to an interpretation of the statute considering the ... object of the statute, mindful that the court must liberally construe the law to effectuate the legislature's intent." *Zielke*, 137 Wis. 2d at 47. The specific objective of Wis. Stat §343.305(4) within the implied consent statutory scheme is to "advise the accused about the nature of the driver's implied consent." *Reitter*, 227 Wis. 2d at 225. Section 343.305(4) warns drivers of the consequences of tests results indicating an alcohol concentration of greater than 0.08 as well as the consequences of refusing to submit to testing. *State v. Munte*, 159 Wis. 2d 279, 281-282, 464 N. W. 2d 230 (Ct. App. 1990); see also §340.01(46m)(a). In addition, §343.305(4)(d) notifies the driver of the right to request a second, alternative test to the one requested by the arresting officer." (Emphasis supplied)

The Piddington Court goes on to describe clearly what police officers need to do to comply with Wis. Stat 343.305(4)(d) The implied consent law requires only substantial compliance. "Substantial compliance will suffice if it is actual compliance in respect to the substance essential to every reasonable objective of the Statutes. Piddington at 783, State v. Munte, 159 Wis. 2d 279, 281 quoting Midwest Mut. Ins. Co. v. Nicolazzi, 138 Wis. 2d 192, 200 405 N.W.2d 732 (Ct. App. 1987). The reasonable objective of Wis Stat §343.305(4) is to inform the accused of the implied consent warnings. It follows that the essential aspect of that objective is to use those methods reasonably calculated to convey the information given the circumstances." Piddington p. 783 (emphasis supplied)

Further in Piddington, the Court spoke directly to the Statute: "We conclude that Wis. Stat §343.305(4) requires that a law enforcement officer use those reasonable methods which would reasonable convey, in consideration at the time of the arrest, the implied consent warnings herein" Piddington at 785. With regard to the above two findings the Supreme Court looked at what methods the State Trooper used to get the information required to a deaf person. They found no violation of §343.305(4). In similar fashion the Circuit Court here looked at the circumstances surrounding the arrest of Mr. Larson and the actions of the officers to give him reasonable notice of the requirements of the Implied Consent statute.

After the testimony of Deputy Snow, Deputy Wozniak, and Mr. Larson, the Circuit Court made the following finding: "The Court is satisfied from the credible evidence of the officers, and the court's own review of the Informing the Accused, that—and, also, Mr. Larson's statement that he read the Informing the Accused, which it clearly says one or more samples of breath, blood or urine, and the period—two officers testified under oath that the observation period was completed, and that the result was a .17.

There are—I can observe clearly a scrivener's error in which an officer wrote down a word. That doesn't change the scientific result of a reliable test in which the law was followed, and that this is not a situation which the tail wags the dog. There is no basis for suppressing the stop or the test, and the motions to do so are denied. R. 38: 37-38.

I. The issue in this case is whether or not there was sufficient evidence to support the Court's decision and whether or not the officers substantially complied with the implied consent statute.

The analysis of the issue must begin with the testimony of Deputy Snow. Deputy Snow received information from dispatch that an erratic driver was headed in his direction. At approximately 8:35 PM, he made contact with a vehicle that matched the description of the erratic driver. As the vehicle passed Deputy Snow, he appeared to be speeding and Deputy Snow took up pursuit. It took Deputy Snow about three and a half miles to catch up with the vehicle during which he paced him at approximately 70 m.p.h. in a 55 zone (R.38,14) Also during the pacing the vehicle crossed the center line on two occasions. (R.38, 14) For those reasons Deputy Snow activated his emergency lights and stopped the vehicle. When Deputy Snow approached Mr. Larson's vehicle, he smelled a strong odor of intoxicants, noticed the driver had slurred speech and delayed reaction time. (R.38: 15) Deputy Snow detected some failures on the SFST's and determined he would be arrested and brought to the Sheriff's Department for further testing. (R.38,20) On cross examination Deputy Snow indicated on two different occasions he arrived at the jail at 9:35 PM. (R.38,20) This fact was omitted in the Appellant's brief choosing to attempt to argue he must have gotten there around 10:00 PM using various estimates of time taken during the arrest and transportation of Mr. Larson. The direct testimony of Deputy Snow

that he arrived with Mr. Larson at 9:35 PM provides 38 minutes between arrival and the taking of the Intoxilyzer. (See R the Intox Report first listing at 10:13 PM) Deputy Snow further testifies he met Deputy Wozniak and was present for the twenty minute waiting period and the reading of the Informing the Accused by Deputy Wozniak. Deputy Snow also testified that Mr. Larson was offered the breath test and agreed to take it. (R.38,20) In addition Deputy Snow testified that Mr. Larson did not request any additional exams (R.38,20) Under the Piddington case cited above, Deputy Snow stopped what he believed to be a drunk driver and his actions and the actions of Deputy Wozniak should be liberally construed to meet the legislative intent of Informing the Accused statute.

Deputy Wozniak followed Deputy Snow and testified that he waited the required twenty minute waiting period before reading the Informing the Accused. Deputy Wozniak testified that after reading the Informing the Accused the first time, Mr. Larson appeared to be a "little confused". Upon observing the confusion, Deputy Wozniak took the extra step to read the Informing the Accused a second time before asking for the breath test. (R.38, 23,24) This extra step further establishes that Deputy Wozniak took all reasonable actions to make sure Mr. Larson understood the Informing the Accused as required by the Piddington Court. Even though Deputy Wozniak marked "urine" on the Informing the Accused, he testified that he asked for the breath test. (R.38, 24) This fact is confirmed further by Mr. Larson in his testimony that "he did ask for a breath test" and that Mr. Larson was told he was going to take a breath test. (R.38,34,35) Mr. Larson voluntarily took the breath test. (R.38, 24) The result of the breath test was .17, more than twice the legal limit. (R. 38, 34, and 24) The level of intoxication of Mr. Larson (.17) would affect his memory and support Deputy Wozniak's testimony that he appeared a "little confused" upon the first reading of the Informing the Accused. Deputy Wozniak concludes his testimony with the fact that Mr. Larson did not request any other exam either blood or

urine. (R.38,25) This fact was also confirmed by Deputy Snow, who testified he did not hear Mr. Larson ask for any other test. (R.38,21) In Mr. Larson's testimony he also admitted that he did not request any other test.

At the motion hearing, Mr. Larson also testified and provided the following information on direct:

1. Mr. Larson acknowledges the Informing the Accused form was read to him. (R.38,32)
2. That Mr. Larson also got a chance to look at the form. (R. 38,32)
3. Mr. Larson also testified he knew what Exhibit 1 Informing the Accused said. (R.38,32)
4. Mr. Larson testified that the officer asked him to take the breathalyzer. (R.38,33 and 34)
5. Mr. Larson did not ask for an alternative test after taking the Intoxilyzer. (R.38, 33)

Also on cross examination, Mr. Larson further acknowledged:

1. He (Deputy Wozniak) read me the accused (Informing the Accused). I listened to that. He turned the machine on. I took the breathalyzer. (R.38,34)
2. The results were .17 and he clearly asked for the breathalyzer. (R.38, 34 -35)
3. Mr. Larson did not ask for any additional test. (R. 38,35)

A review of even Mr. Larson's testimony provides a sufficient basis to find the Implied Consent Statute was satisfied.

CONCLUSION

A review of the transcript of the Motion Hearing (R.38 and its exhibits) provides sufficient support for the finding of the Court denying the motions. The testimony of the Deputies and the admissions of Mr. Larson indicate that all reasonable actions were taken to provide Mr. Larson with a substantial basis to support the implied consent decision. Significantly the Deputies and Mr. Larson testified he voluntarily took the breath test.

For the above reasons, the finding of the Circuit Court denying the motions should be upheld, along with the conviction.

Dated this 11th day of November, 2016.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I, Martin J. Lipske, 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
monospaced font. The length of this brief is 35
pages.

Dated this 11th day of November, 2016.



Martin J. Lipske
State Bar #1008584

ELECTRONIC BRIEF CERTIFICATION

I, Martin J. Lipske, 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 11th day of November, 2016.



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APPENDIX

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