

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP001002 CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Joseph K. Larson,
Defendant-Appellant

REPLY 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 Larson entered his plea. 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)(R. 22) 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) Deputy snow did not have a radar reading on Larson's vehicle.

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) The observation period was less than 20 minutes. (R. 38, 34) At 10:16 the first sample of Larson's breath was collected. (R. 38, 29) (R. 18) 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 for a urine test 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) (R. 38, 29) Consent for a test of Larson's "urine" was obtained at 10:17p.m. (R. 18) (R.38,29) During the course of testing Larson's breath he was presented with a form requesting a urine test. (R. 38, 34-35) (R 18) (R. 38, 29)

ARGUMENT

The state in its response to the appellants brief has put great emphasis on the testimony of the reporting deputy. The record, complete with the inconsistent officer testimony, exhibits and the consistent testimony of the Defendant clearly shows under the totality of the

circumstances that the chemical testing of the Defendant was not conducted in a manner consistent with the requirements of WIS STAT. § 343.305 (4).

The consent of Joseph Larson to conduct a chemical test of his blood was not properly obtained in accordance with the statute. Worse yet, the officers conducting the testing failed to comply with the mandatory 20 minute observation period. The 20 minute observation period is critical to obtaining accurate results during an intoxilizer, for those reasons and those stated in Appellants brief, the Appellant requests this court reverse the finding of the circuit court and order the result of the chemical testing of Larson inadmissible for the deputy's failure to comply with the statutory requirements.

III. The Record clearly shows error in the Trial Courts decision.

In rendering its decision the Trial court stated:

"This Court is satisfied from the credible evidence of the officers, and the Courts own review of the Informing the Accused, that - - and, also, Mr. Larsons statement that he read the informing the accused, which it clearly says one or more samples of breath, blood or urine, uhm, and the officer testified that the observation period- - two officers testified under oath that the observation period was completed, and that the result was .17.

There are - - I can observe clearly a scriveners 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 motion to do so are denied." (R. 38, 38)

In making this statement the Court makes two clear errors. It weighed the inconsistent testimony of the officer as credible and failed entirely to consider a critical exhibit that was inconsistent with the officer's testimony. The exhibit not mentioned by the Court in its decision was the Intoxilizer

printout that the officer authenticated and provided testimony regarding. (R.18)(R. 38, 29)

This exhibit that was apparently excluded from the decision of the court is critical to a proper analysis of the evidence. The printout shows the actual times the waiting period was commenced and the subject tests were collected. The officer confirmed these times in his own testimony (R. 38, 29)

Further, when combining the Deputies testimony with the intoxilizer printout and the Informing the Accused form, the evidence clearly shows that the mandatory 20 minute waiting period was not observed and that the informing the accused warning was not presented prior to beginning the test.

In comparing the officers testimony of when he started the machine and when the observation period began along with the intoxilizer printout and the informing the accused it is clear that: 1. the observation period was not 20 minutes, 2. The informing the accused was not presented until after the first sample of the defendants breath was taken, 3. The informing the accused form read and presented to the defendant requested a “urine test”. 4. Larson thought the form was for the urine test.

a. The Officers Testimony as to the timing of events is Inconsistent with his own Testimony

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 speeding as grounds for the stop. (R. 38, 7)
4. Deputy Snow did not use radar to verify any speeds (R. 38,12)
5. Subsequent to seizing the vehicle and after conducting standard Field Sobriety Testing, Deputy Snow placed Larson under arrest for Operating While Intoxicated 3rd offense. (R. 38, 8)
6. Field Sobriety tests in this case took 35 minutes. (R.38, 8)
7. Larson first refused to take a PBT but did eventually submit to the officer's commands. (R. 38, 20)
8. 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)
9. It took an additional 25 minutes to transport Larson to the Jail (R. 38, 9)
10. 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 right around 10:00 p.m. This time is consistent with the informing the accused the intoxilizer printout and the testimony of Larson.
11. Following arrest Larson was transported to the Iron County jail.
12. After arriving at the Iron County Jail Larson was moved to the area where chemical testing could occur.
13. Larson had a brief conversation with the Officer conducting the test. (R. 38, 34)

14. Officer snow is not certified to administer chemical testing (R. 38, 11)

15. At 10:13 p.m. Officer Snow began his observation period. (R. 38, 29)(R. 18)

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

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

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

19. The alternative test for Deputy Snow's agency was blood. (R. 38, 27)

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

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

22. "Consent" for a test of Larson's "urine" was obtained at 10:17 pm. (R.18).

Q. Okay. So in any event, this form was read. You wrote down that you were going to administer a urine test, and he checked yes- - or you checked yes when he responded, I'll take the test, and where you wrote urine.

A. Yeah. I didn't mean to write urine. (R.38, 28)

23. There was never an informing the accused with the word "breath" as indicated for the subject test.

"Q. All right. Was there ever another Informing the Accused filled out properly that had the breath test listed as the primary test?

A. No. " (R 38, 29)

24. At 10:13 the observation period was started. (R. 18) (R.38,29)

“Q. And so the observation period began when you turned the machine on at 10:13?

A. Yes.

Q. Okay. And so the first test was administered at 10:16

A. Yes.

Q. And the second subject test was administered at 10:21.

A. Yes

Q. Okay. And so there's the proper variance between a .177 and .178?

A. Yes

Q. All right. So when did the 20 minute observation - - if the observation period began when the machine was turned on, how can you explain that there only three minutes between turning the machine on and the first test?

A. I guess I'm not sure, other than I must have wrote the wrong time down on the informing the Accused.” (R.38, 30)

25. At 10:16 the first sample of breath was taken. (R. 18) (R. 38, 29)

26. At 10:17 the defendant was presented with the Informing the Accused for requesting urine sample. (R. 18)(R. 38)

b. The Officers Testimony contradicts Exhibits

27. Exhibit 1 to the Defendants motion was the informing the accused. It is signed, dated and has a time recorded on it. According to Exhibit I the time the form was read was 10:17 p.m. (R.18)

28. Exhibit II to Defendants motion was the Intox EC/IR-II Subject test printout (R.18)

29. Exhibit II shows the test being conducted from 22:13-22:22. (R.18)

30. The timing of the informing the accused and the Intox. EC/IR II printout clearly show that the In toximeter was turned on at 10:13(R.18)

31. Officer Snow himself testified to the print out. When questioned Snow, indicated that:

The first subject test was taken at 10:16 pm

The second subject test was taken at 10:21 pm.

32. Exhibit II at the hearing was the informing the accused containing the word Urine. (R.18)

33. The form indicates it was read at 10:17 pm, a minute after the intoxilizer machine recorded its first subject test. (R. 18) (R. 38, 27) Four minutes after the observation period began (R. 18) (R. 38, 29)

c. Larson's Testimony is consistent with the record.

34. Larson testified that he was arrested and then transported to the police station where he sat for a few minutes during the observation time. Larson testified it was not twenty minutes. (R.38, 34) He also, testified he was told about a urine test was administered a breath test. (R. 38, 32) Larson testified during the breathalyzer that the officer was going to mark him as a refusal (R. 38,33)

35. When comparing the testimony of Larson to the exhibits in the record his statements are collaborated.

36. When comparing the testimony of Deputy Snow to the testimony of Larson, his own subsequent testimony, and the exhibits, it is clear that his recollection conflicts with the evidence.

II. *The Chemical Testing of Larson was unlawful*

37. 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.

38. 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 20 minute observation period. Rather the record shows that the informing the accused was completed seeking consent for a urine test during the course of the breath testing.

39. Therefore the chemical testing of Larson did not follow the “performed substantially according to methods approved by the laboratory of hygiene” requirement of Wis. Stat. § 343.305 (6)

40. Further misconduct in this case occurred when executing a search without valid consent or a warrant, to obtain a chemical test of the defendant’s breath. The Wisc. Statutes are very clear in that an officer **shall** read the form and obtain **valid** consent **prior** to executing his search. This is to comply with the warrant requirement exception carved out of the fourth amendment, under the implied consent statute. 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 material information as to the type of test the officers were seeking consent to. (R. 18) Larson never factually received the statutorily required warning prior to being administered a Chemical test of his *breath*. All of these factors under the totality of the circumstances are indicative of a lack of valid consent obtained prior to testing as required by the statute.

41. The *Wilke* court of appeals concluded that failure to advise a person of a component of the penalties was not

substantial compliance and reversed the circuit court's order revoking Wilke's operating privileges without discussing prejudice. *State v. Wilke*, 152 Wis.2d 243, 246–47, 448 N.W.2d 13 (Ct.App.1989).

42. Worse than the facts presented in *Wilke* where part of the statutory language was not read prior to testing, here the statutorily required language was not read at all until after the test had already been partially completed.
43. Failure to recognize the inconsistency's in the record and critical exhibits constitutes clear error.
44. The informing the accused form was not read to Larson prior to conducting the tests therefore, his consent was not obtained in accordance with the statute. WIS STAT. § 343.305 (4)
45. The form presented during the course of testing requested the wrong test therefore; consent for breath testing was not valid.
46. Consent to a search “must be freely and voluntarily given.” *Herrmann*, 2000 WI App 38, ¶ 19, 233 Wis.2d at 148, 608 N.W.2d at 412. “If consent is granted only in acquiescence to an unlawful assertion of authority, the consent is invalid.” *Bermudez*, 221 Wis.2d at 348, 585 N.W.2d at 633. Moreover, an initial refusal to permit a search when asked “also militates against a finding of voluntariness.” *State v. Kiekhefer*, 212 Wis.2d 460, 472, 569 N.W.2d 316, 324 (Ct.App.1997). *State v. Munroe*, 2001 WI App 104, ¶ 10, 244 Wis. 2d 1, 11, 630 N.W.2d 223, 227

CONCLUSION

the Denial of the Larson's, suppression motion should be reversed and his Judgment of conviction vacated as the record clearly shows, 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 22nd day of November, 2016.

Respectfully Submitted,
JOHN MILLER CARROLL
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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 2,963 words.

Dated this 22nd day of November, 2016.

John Miller Carroll
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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 22nd day of November, 2016.

John Miller Carroll
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