

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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CLERK OF COURT OF APPEALS
OF WISCONSIN

Appeal No. 2016AP002364

State of Wisconsin,
Plaintiff-Respondent,

v.

Donald G. Verkuylen,
Defendant-Appellant

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR WAUPACA COUNTY
THE HONORABLE VICKI CLUSSMAN PRESIDING

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ISSUES PRESENTED FOR REVIEW

Do the Statutory and other Legal requirements concerning the implied consent laws in the context of Motor Vehicles apply to Intoxicated Boating, Snowmobiling and ATV cases?

The Trial Court Failed to Answer

The Appellant answers: Yes

Does the form read by the Officer regarding implied consent satisfy the statutory requirements of Wisconsin Statute §30.684?

The Trial Court Failed to Answer

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 the requirements for informing the accused in the context of Boating, snowmobiling and Atving while Intoxicated cases.

APPLICABLE STANDARD OF REVIEW

This appeal is centered on a question of law; a reviewing court will decide questions of law independently of the circuit court but benefiting from its analysis. In re Commitment of Brown, 2005 WI 29, ¶ 7, 279 Wis.

2d 102, 107–08, 693 N.W.2d 715, 717–18

STATEMENT OF CASE

On November 5th, 2015, the Appellant and his counsel were present in Waupaca County Circuit Court for hearing on the Defendants motion to Dismiss a Refusal citing noncompliance with Wis. Stat. § 343.305(4) ; § 343.305(6); §30.684 and §30.681. On April 15th, 2016 the Defendants Motion was denied. The Circuit Court in addressing the Defendants motion failed to address the issue raised. Rather than address the substance of the form and the forms compliance with the statute the Court addressed an alternative issue of substantial compliance. Subsequently, Donald Verkuyln (herein after known as “Verkuylen”) entered a plea of No Contest and was found to have refused to take a breathalyzer as a Boater in violation of §30.684. Following his adjudication of improper refusal, Verkuylen petitioned the Circuit Court for an Order Staying his judgment pending appeal. Verkuylen’s request to stay his Sentence was granted. This Appeal follows.

STATEMENT OF THE FACTS:

On June 27, 2015, the Defendant Verkuylen, was seized by Waupaca County Deputy Sheriff Steven Sullivan (“Sullivan”) for a noise violation. Following the seizure an investigation for Intoxicated Boating under Wisconsin Statute §30.681 was conducted. (R. 26)

Following the completion of some questioning, The Defendant, while secured in Sullivan’s control was read the informing the accused form and asked to submit to an evidentiary chemical test of his blood. (R. 26)

The form presented contains several omissions of the statutory required language. Based on the presentation of this information the Defendant allegedly refused the test. (R. 10)

AUTHORITY

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.”

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

BOATING CONTEXT:

WISCONSIN STATUTE §30.684: Chemical tests.

§30.684 (1) REQUIREMENT.

(a) *Samples; submission to tests.* A person shall provide one or more samples of his or her breath, blood or urine for the purpose of authorized analysis if he or she is arrested for a violation of the intoxicated boating law and if he or she is requested to provide the sample by a law enforcement officer. A person shall submit to one or more chemical tests of his or her breath, blood or urine for the purpose of authorized analysis if he or she is arrested for a violation of the intoxicated boating law and if he or she is requested to submit to the test by a law enforcement officer.

(b) *Information.* A law enforcement officer requesting a person to provide a sample or to submit to a chemical test under par. (a) shall inform the person at the time of the

request and prior to obtaining the sample or administering the test:

1. That he or she is deemed to have consented to tests under s. 30.683;
2. That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a); and
3. That in addition to the designated chemical test under sub. (2) (b), he or she may have an additional chemical test under sub. (3) (a).

1. Wisconsin Statute §30.684(5) REFUSAL. No person may refuse a lawful request to provide one or more samples of his or her breath, blood or urine or to submit to one or more chemical tests under sub. (1). A person shall not be deemed to refuse to provide a sample or to submit to a chemical test if it is shown by a preponderance of the evidence that the refusal was due to a physical inability to provide the sample or to submit to the test due to a physical disability or disease unrelated to the use of an intoxicant.

Issues in any action concerning violation of sub. (1) or this subsection are limited to: (c) Whether the law enforcement officer requested the person to provide a sample or to submit to a chemical test and provided the **information required under sub. (1) (b)** or whether the request and information was unnecessary under sub. (1) (c).

ARGUMENT

I. VERKUYLENS REFUSAL IS INVALID AS THE REQUISITE STATUTORY PROCEDURE ALONG WITH REQUIRED WARNINGS WERE NEVER GIVEN.

2. On June 27, 2015, Deputy Steven Sullivan and Warden Kaitlin Kernosky were on patrol on the Wolf River in the town of Fremont, Waupaca County. (R. 26, 5)
3. At approximately 8:31pm Warden Kernosky and Deputy Sullivan noticed a large cigarette boat with a loud exhaust. (R. 26, 6)
4. The large cigarette boat is registered to Donald Verkuylen. (R. 26, 7)
5. Having observed the loud boat, the officers activated the emergency lights on the patrol boat, and pulled up next to the boat. (R. 26, 6)
6. At that time, Deputy Sullivan indicated to Verkuylen that his exhaust was very loud and that he wanted to run a sound test on it. (R. 26, 6)
7. Verkuylen then communicated to Sullivan that he was unsure where he could safely park his boat without damaging it. Sullivan and Verkuylen discussed the available nearby areas to conduct the testing. Sullivan then instructed Verkuylen to drive his boat to the condominiums near Fremont marine.

(R. 26, 4-7)

8. Upon arrival to the area, Deputy Sullivan opted to not conduct the sound testing. (R. 26, 14)
9. At the completion of that investigation a form labeled “Informing the Accused” was read to Verkuylen. (R. 26, 15)
(R. 10) (R.15)
10. Wisconsin Boaters are taught during common operators training courses that “anyone who operates or attempts to operate a vessel is deemed to have given consent to an alcohol and or drug test.” (R. 12)
11. The Informing the Accused form read to Verkuylen does not contain 2 of the 3 statutorily required warnings that according to Statute “Shall” be read at the time of informing the accused. (R. 10) (R.15)
12. The form recited to Verkuylen did not contain information:
 1. That he or she is deemed to have consented to tests under s. 30.683;
 2. That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a). (R. 10)
13. Wisconsin Statute §30.684(1)(b) (b) *Information*. **REQUIRES**
A law enforcement officer requesting a person to provide a

sample or to submit to a chemical test under par. (a) **shall** inform the person at the time of the request and prior to obtaining the sample or administering the test:

1. That he or she is deemed to have consented to tests under s. 30.683;

2. That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a); and

3. That in addition to the designated chemical test under sub. (2) (b), he or she may have an additional chemical test under sub. (3) (a).

14. Due to the fact that incomplete and deficient implied consent warnings were read to Verkuylen , Verkuylen was not informed as required by statute. (R.10) (R.13)

15. The Form being used in enforcement today seems to actually misrepresent the law. It states “If you refuse to take any test that this agency requests, you will be subject to *other penalties*”.

16. The statutory language requires “That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and **is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a)**” (30.681(1)(a))

reads: (1) Operation. (a) Operating while under the influence of an intoxicant. No person may engage in the operation of a motorboat while under the influence of an intoxicant to a degree which renders him or her incapable of safe motorboat operation.)

17. Wisconsin Statute §30.684(5) REFUSAL. No person may refuse a lawful request to provide one or more samples of his or her breath, blood or urine or to submit to one or more chemical tests under sub. (1). A person shall not be deemed to refuse to provide a sample or to submit to a chemical test if it is shown by a preponderance of the evidence that the refusal was due to a physical inability to provide the sample or to submit to the test due to a physical disability or disease unrelated to the use of an intoxicant.

Issues in any action concerning violation of sub. (1) or this subsection are limited to: (c) Whether the law enforcement officer requested the person to provide a sample or to submit to a chemical test and provided the **information required under sub. (1) (b)** or whether the request and information was unnecessary under sub. (1) (c).

II. *VERKUYLEN DID NOT GIVE ACTUAL INFORMED CONSENT*

1. 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.

2. 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,

3. 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

III. *VERKUYLENS IMPLIED CONSENT IS INVAILD AS THE REQUIREMENTS OF THE STATUTE WERE CLEARLY NOT MET.*

4. Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. Section 343.305(2), Stats. A person may revoke consent, however, by simply refusing to take the test. *See* § 343.305(9). Thus, a driver has a “right” not to take the chemical test (although there are certain risks and consequences inherent in this choice). The legislature *278 recognized that drivers being asked to take a chemical test **should be informed of this choice and therefore requires law enforcement officers to provide drivers with certain**

information. Section 343.305(4). Cty. of Ozaukee v. Quelle, 198 Wis. 2d 269, 277–78, 542 N.W.2d 196, 199 (Ct. App. 1995) abrogated by In re Smith, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243

5. 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)
6. 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; and
 - (3) 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

7. In this case, the information presented by the Deputy conducting the chemical test is misleading and deficient. The information is misleading because it misstates the law (“If you refuse to take any test that this agency requests, you will be subject to other penalty’s” directly conflicts the actual statutory language of “ That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a)”.
8. The information is deficient in that 2 of the 3 required warnings under 30.684(b) were not provided. Specifically Verkulyn was never advised that “ he or she is deemed to have consented to tests under s. 30.683”.
9. As we described above, we find that the legislature has adequately addressed any risk of confusion by imposing a statutory duty on the police to provide accused drivers with specific information. Cty. of Ozaukee v. Quelle, 198 Wis. 2d 269, 281, 542 N.W.2d 196, 200 (Ct. App. 1995) abrogated by In re Smith, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243
10. As we have repeatedly explained, law enforcement's duty under the implied consent law is to accurately deliver information to the accused. Cty. of Ozaukee v. Quelle, 198 Wis. 2d 269, 283, 542 N.W.2d 196, 201 (Ct. App.

1995) abrogated by In re Smith, 2008 WI 23, 308 Wis. 2d
65, 746 N.W.2d 243

CONCLUSION

The Denial of Verkulyn's, motion to dismiss the refusal should be reversed and the finding of improper refusal vacated as the officers conducting the search of Verkulyn did not conform to the statutory requirements for obtaining "implied" consent. The officers failed to properly inform Verkulyn of rights he had at the time and the implications of his choices, both of which are required by the clear language of the Statutes. Therefore, the matter should be remitted to the Circuit Court with the instruction that the Refusal be dismissed.

Dated this 24th day of February, 2017.

Respectfully Submitted,

JOHN MILLER CARROLL

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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 3,816 words.

Dated this 24th day of February , 2017.

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 24th day of February, 2017.

John Miller Carroll
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