STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2016AP002364

State of Wisconsin,
Plaintiff-Respondent,

v.

Donald G. Verkuylen,
Defendant-Appellant

REPLY BRIEF OF DEFENDANT – APPELLANT

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

JOHN MILLER CARROLL LAW OFFICE
Attorney for Defendant – Appellant

John Miller Carroll
State Bar. No. 1010478

226 S. State St.
Appleton WI 54911
(920) 734-4878

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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. Following an evidentiary hearing, Donald Verkuyln (herein after known as "Verkuylen") entered into a detailed stipulation of facts 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.

AUTHORITY

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***

(NOTE: THE FORM READ TO THE DEFENDANT FACTUALLY MISINFORMS THE DEFENDANT AS TO THESE REQUIREMENTS. "If you refuse to take any test that this agency requests, you will be subject to other penalties." *Exhibit III INFORMING THE ACCUSED READ TO THE DEFEDNANT)*

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. THE RESPONDENTS ARGUMENT CONCERNING A PLEA IS MISPLACED AND INACCURATELY PORTRAYS THE FACTS CONCERNING THE PROCEDURE THAT OCCURRED IN THE LOWER COURTS.

1. Respondent through Counsel Nicholas Boltz raised in its response a frivolous and misleading argument to this Court.

2. Factually, there was no Plea Entered. *Exhibit I Stipulation, Exhibit II Transcript from August 10th 2016.*

3. Factually, the Appellant prior to entering its stipulation for a finding of facts, with no plea present in the form, raised the appellant issue with the Court and was candid about his intent to pursue an appeal regarding the substance of the form used in the boating refusal context. *Exhibit I Stipulation entered August 14th, Exhibit II Transcript from August 10th, 2016 hearing.*

Also, your Honor, I'd like to -- as part of the record, I want the Court to make a finding of an improper refusal, based upon the testimony at the previous hearing. So I guess I want the Court to make the finding that there was an improper refusal, and then rather than entering a no contest plea. I don't think it really makes much difference from the --

Transcript from August 10th, 2016 hearing, Page 3

4. The obvious intent to factually mislead the court of appeals regarding a plea and waiver is evidenced by the States complete failure to provide the transcripts which clearly illustrate there is no issue, no plea but rather a stipulated finding of facts and, the Court as well as the prosecutor was made aware of the appellant issue and the desire of the defendant to preserve it, prior to entering into the stipulation. Therefore, any argument concerning an existence of a plea, breach of a plea agreement, waiver or that the Defendant benefitted improperly, is disingenuous and factually misleading. *Exhibit II Transcript from August 10th 2016.*

ATTORNEY MILLER CARROLL: Right. But based on -- I guess I just want the Court to make a finding. If you want me to prepare a detailed factual stipulation of the findings of fact, I will, and resubmit it.

THE COURT: Okay, why don't you do that. And then include in the stipulation that one of the sanctions would be the boater's safety course, and also the alcohol and drug assessment.

ATTORNEY MILLER CARROLL: Okay. Yeah, I'll try and get that out to you right away, your Honor.

THE COURT: All right.

ATTORNEY FASSBENDER: All right, thanks.

THE COURT: That's all for today then.

ATTORNEY MILLER CARROLL: All right.

[PROCEEDINGS CONCLUDED]

Exhibit II Transcript from August 10th 2016, Page 5

II. The States Reliance on Oakley is misplaced. Oakley is inconsistent with the facts of the instant Case.

1. The state relies on the argument that the Appellant entered into a plea and knowingly waived his right to appeal, then cites State v. Oakley as support for its factual misrepresentations.
2. This case is possibly as far from State v. Oakley as factually possible.
3. Just some of the many obvious disparities are:

State v. Oakley

- Defendant was told prior to entering a Plea he would waive his right to appeal the exact issue he sought appellant relief from.

- Defendant entered a Plea

- Defendant was told by the Court he was waiving his right to Appeal *State v. Oakley*, 2001 WI 103, 123, 245 Wis. 2d 447, 629 N.W.2d 200.

This Appeal

- Defendants Counsel notified the Court of the exact intent to pursue appellant relief and informed the Court that he would not enter a plea because of waiver, rather needed the Court to make factual findings. Which were substantiated by a stipulation entered 3 days later. *Exhibit I Stipulation entered August 14th, three days after the Adjournment of the August 10th, hearing where drafting a stipulation for a finding was discussed.*

- Defendant entered a stipulation of facts to substantiate a finding of improper refusal while notifying the Court of the appellant issue he was going to pursue

4. Simply put, the facts of State v. Oakley are inconsistent with the Facts of this case. The logic in denying the appellant relief in that case was due to a waiver that is simply not present in this case.

5. Therefore, the Court should deny the state's request and refuse to apply the Plea Waiver.

III. THE STATES ARGUMENT REGARDING SUBSTANTIAL COMPLIANCE IS MISPLACED

1. At the same time the State argues that §30.684 and §343.305 are distinct and separate statutes it argues for application of substantial compliance law established under §343.305 to justify the non-compliance with §30.684 in this case.

2. The requirements are clear from the face of the statutes.

WISCONSIN STATUTE §30.684: Chemical tests.

§30.684 (1) **REQUIREMENT.**

(b) *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***

(NOTE: THE FORM READ TO THE DEFENDANT FACTUALLY MISINFORMS THE DEFENDANT AS TO THESE REQUIREMENTS. "If you refuse to take any test that this agency requests, you will be subject to other penalties." *Exhibit III INFORMING THE ACCUSED READ TO THE DEFEDNANT)*

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).

3. Factually, the form as read to the Defendant does not contain the same language as required (shall inform) by the statute. The form is outdated and factually misrepresents the repercussions of a refusal in direct conflict of the statute. The purpose of the Informing the Accused is to inform the accused of the statutory required language. Factually that did not occur in this case.

4. The State in briefing proves the Appellants point. That substantial compliance is applicable in §343.305 cases. That §343.305 and §30.684 are "clearly distinct and separate statutes and have far different consequences". In the next sentence they erroneously request the Court to ignore the clear language of §30.684 indicating exactly what language SHALL be read to the defendant and then proceed to ask the court to apply case law established under the §343.305 line of case law for substantial compliance.

5. Simply put there is no compliance with the statutory required warnings as the form does not contain and misrepresents the information required to be represented to the Defendant under the implied consent statute. The State in its arguments asserts the position that the boating context and driving on a roadway context are "clearly distinct and separate statutes" and then asserts a position that the court should not draw a connection between the two. *Please see Brief of the Respondent, page 7, Para. 2 – 4.* In the States very next paragraph it argues for substantial compliance, a theory established and fine-tuned in the driving OWI context. Not surprisingly the State cites no law in support of its position. The clear language of §30.684 spells out what language must (shall) be read to the Defendant prior to chemical testing or a finding of a refusal. The language was not read. This is not a substantial compliance case but rather a case with no-compliance with the clear language of the statute.

6. State v. Zielke, 137 Wis.2d 39, 54, 403 N.W.2d 427, 433 (1987), holds that "when law enforcement officers fail to comply with the implied consent statute the driver's license cannot be revoked for refusing to submit to chemical tests." State v. Wilke, 152 Wis. 2d 243, 249, 448 N.W.2d 13, 15 (Ct. App. 1989)

7. The statute requires that a suspect be warned not only of the administrative suspension resulting from a BAC result of 0.10% or more, but also of the additional penalties associated with submitting to a chemical test. The officer properly advised Wilke of the former, but not the latter. This failure was partial—not substantial—compliance. Although not requiring complete

compliance, s***substantial compliance does require "actual compliance in respect to the substance essential to every reasonable objective of the statute."*** Midwest Mut. Ins. Co. v. Nicolazzi, 138 Wis.2d 192, 200, 405 N.W.2d 732, 736 (Ct.App.1987) . As noted, the warning given Wilke alerted her only as to one component of the penalties which could follow from a BAC result of 0.10% or more. This was not "compliance ... essential to every reasonable objective of the statute." Id.

State v. Wilke, 152 Wis. 2d 243, 250, 448 N.W.2d 13, 15 (Ct. App. 1989)

8. Like Wilke, Verkuylen was not read the required statutory languance. This is not compliance as he was not warned and was factually misled as to the reasonable objective of Wis. Stat. §30.684.

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. The form read to Verkuylen not only excluded statutorily required language but also factually misled the Defendant as to the law, the form must be changed. Therefore, the matter should be remanded with the instruction that the Refusal be dismissed.

Dated this ___ day of April, 2017.

Respectfully Submitted,

JOHN MILLER CARROLL
LAW OFFICE

By: _____
John Miller Carroll
State Bar # 1010478

226 S. State St.
Appleton, WI 54911
(920)734-4878

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 2,661 words.

Dated this ___ day of April , 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 ___ day of April, 2017.

_____

John Miller Carroll

State Bar #01010478