STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP146-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY J. MADLAND,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in Dunn County Circuit Court,
the Honorable James M. Peterson, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

CASES CITED

WISCONSIN STATUTES CITED

ISSUES PRESENTED

> Anthony J. Madland was arrested on suspicion of driving while impaired. The arresting deputy read Mr. Madland the Informing the Accused Form and, in accordance with the implied consent law, Mr. Madland requested an alternative chemical test to measure intoxication. The deputy told Mr. Madland that blood was the only test they administered, and never provided Mr. Madland with an alternative test after he submitted to a blood draw. Should the results of his blood draw be suppressed due to the deputy misleading Mr. Madland and failing to comply with Wisconsin's implied consent law?

The circuit court answered no, and denied Mr. Madland's motion to suppress the results of his blood draw.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Briefing should be adequate to present the issue for this court's decision, but Mr. Madland would welcome oral argument should the court deem it desirable. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stat. §§ 809.23(1)(b)4 & 751.31(2)(f).

STATEMENT OF THE CASE AND FACTS

On July 31, 2016 at approximately 12:57 a.m., Deputy Shields stopped a motorcycle driven by Anthony J. Madland for speeding in Dunn County. (2:1). Deputy Shields and Deputy Blum conducted a traffic stop, and subsequently arrested Mr. Madland for operating while intoxicated. (67:5; App. 107).

After Mr. Madland was arrested and placed in the squad car, Deputy Shields read him the "Informing the Accused" form verbatim. (67:5–6; App. 107–08). Deputy Shields asked Mr. Madland if he would submit to a blood test, (67:6; App. 108), and Mr. Madland responded that he wanted a test of his own. (67:13; 68:11–12, 15, 20[1]; App. 115, 137–38). Deputy Shields informed Mr. Madland that they only administered the blood test, but he could request another test after the blood test. (67:13; 20; App. 115). Mr. Madland did not agree to submit to a blood test, but instead asked about how long it would take to process him in jail, and Deputy Blum explained the process for obtaining a warrant if Mr. Madland refused to submit to a blood test. (67:14, 15; 20; App. 116, 117).

---

[1] At the hearing held on February 20, 2017, portions of a DVD recording of the deputy's squad cam—specifically from the 35:00 mark until the 42:21 minute mark—were admitted as exhibit 2. (67:22; App. 124). A copy of the Informing the Accused form was admitted as exhibit 1 (67:5–6; App. 107–08). Both exhibits are listed as item 20 in the appeals document index.

After the deputies discussed the warrant application procedure, Mr. Madland asked the officers if there was a way to not have a needle stuck in his arm. (67:6, 20; App. 108). Deputy Shields responded that blood was "the only test we do." (67:16, 20; App. 118). He further explained that Mr. Madland could request an "alternative test if [he] did the blood draw," and reiterated that "the test we do is blood." (67:16, 20; App. 118). The deputy did not mention a breath test again at this point in the conversation. (67:16; App. 118).

Mr. Madland did not expressly respond to the deputy's request to submit to a blood test, and Deputy Shields treated Mr. Madland's silence as a refusal. (67:6; App. 108). Deputy Shields then transported Mr. Madland to the hospital, and the deputy began the paperwork for a warrant. (68:8–9; App. 134–35).

While at the hospital, Deputy Shields read Mr. Madland the Informing the Accused Form again. (68:8, 9; App. 134, 135). Mr. Madland consented to a blood draw, (68:24, 25; App. 150, 151), and afterward the deputy inquired about alternative or additional chemical test because earlier Mr. Madland made reference to wanting another test. (68:9–10; App. 135–36). Mr. Madland asked the deputy "what's the point?" (68:17; App. 143). No additional testing was ever performed.

Mr. Madland was charged with: Count 1 - operating a motor vehicle, third offense, contrary to Wis. Stat. § 346.63(1)(a); and Count 2 - operating with a prohibited alcohol concentration, third offense, contrary to Wis. Stat. § 346.63(1)(b). (6:1–2).

Mr. Madland moved the circuit court to suppress the results of the blood draw performed following his arrest on the basis that (1) the deputy denied Mr. Madland the right to an alternative chemical test under Wis. Stat. § 343.305(5)(a), and (2) the deputy misinformed Mr. Madland about his rights, in violation of *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995). (18). Mr. Madland further moved the court to suppress on the grounds that Wis. Stat. § 343.305 violated due process. (19).

The circuit court held hearings on Mr. Madland's motions. (67; 68; App. 103–26, 127–54). At a subsequent oral ruling, the circuit court denied Mr. Madland's motions to suppress. (69:5–15; App. 159–68).

The circuit court found that Deputy Shields was credible, and that he complied with Wis. Stat. §343.305(4) by reading the Informing the Accused form to Mr. Madland. (69:5–7; App. 159–61). It concluded that Mr. Madland was not deprived of his right to a second test because he neither renewed his request following the blood draw, nor did he indicate he wanted to take a second test to "compare the numbers." (69:6; App. 160).

With respect to Mr. Madland's claims that the deputy misled him, the court again concluded that reading the Informing the Accused form was sufficient. (69:10; App. 164). The court noted that it was "a little problematic" that Deputy Shields responded to Mr. Madland's requests as he did, (69:7; App. 161), and acknowledged that the deputy could have been "a little bit more careful" and explained that blood was the primary test they performed rather than the only test they performed. (69:9; App. 163). The court also denied Mr. Madland's due process claims. (69:11–14; App. 165–68).

Mr. Madland subsequently pleaded no contest to Count 2. (72:13). The circuit court accepted Mr. Madland's plea and entered a judgment of conviction on Count 2. (38;). The court subsequently ordered that Mr. Madland's sentence be stayed pending appeal. (42; 60; App. 101).

Mr. Madland filed a timely notice of intent to pursue postconviction relief. (35). This appeal followed.

ARGUMENT

I. The Officer Gave Mr. Madland Incorrect Information about His Rights Under the Implied Consent Law and Ultimately Deprived Him of His Right to an Alternative Test. The Evidence of the Blood Draw Should Therefore Be Suppressed.

A. Introduction and standard of review

After his arrest, Mr. Madland asserted his rights under Wisconsin's implied consent law by requesting an alternative chemical test. In response to those requests, Deputy Shields misinformed Mr. Madland, thereby violating the requirements of Wis. Stat. § 343.305(4). The deputy's misinformation ultimately affected Mr. Madland's ability to make a choice about his chemical testing rights under the implied consent statute and further limited his access to his statutory right to a second test. The results of his blood draw should therefore be suppressed.

Appellate courts analyze an order denying a suppression motion under a two-part standard of review. A circuit court's findings of fact are reviewed under the clearly erroneous standard. *State v. Conner*, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. Appellate courts will uphold a circuit court's findings of fact unless they are against the "great weight and clear preponderance of the evidence." *State v. Turner*, 136 Wis. 2d 333, 343–44, 401 N.W.2d 827 (1987). Application of the implied

consent statute to a set of facts is a question of law, which this court reviews de novo. *State v. Reitter*, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). Thus, the ultimate question of "whether the facts as found by the [circuit] court meet the constitutional standard" is reviewed de novo. *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

B. The deputy did not comply with Mr. Madland's request for an alternative test, and misinformed Mr. Madland about his right to an alternative test, thereby violating the deputy's duties under the implied consent statute.

Wis. Stat. § 343.305 provides the requirements for law enforcement agents administering tests for intoxication. The statute provides that law enforcement agencies "shall be prepared to administer . . . 2 of the 3 tests," referring to chemical alcohol tests for blood, breath, or urine. Wis. Stat. § 343.305(2). Law enforcement may "designate which of the tests shall be administered first" (the "primary test") when a driver is arrested on suspicion of driving while intoxicated. Wis. Stat. § 343.305(2) & (3).

An accused who submits to the primary test is permitted, upon request, to (1) take the second test offered by the law enforcement agency free of charge, or (2) a reasonable opportunity to have an additional test of his choice at his expense. Wis. Stat. §§ 343.305(4), (5)(a). The purpose of providing for an

alternative or additional test is to afford the accused the opportunity to verify or challenge the results of the primary test administered by law enforcement. *State v. McCrossen*, 129 Wis. 2d 277, 288, 385 N.W.2d 161 (1986).

The implied consent statute mandates that law enforcement convey the information provided in Wis. Stat. § 343.305 at the time a chemical test is requested from the accused. Wis. Stat. § 343.305(4). The Informing the Accused Form fulfills this statutory mandate by alerting the accused of the implied consent law and his rights under it. *See State v. Reitter*, 227 Wis. 2d 213, ¶15, 595 N.W.2d 646. A law enforcement officer complies with Wis. Stat. § 343.305(4) when he reads the Informing the Accused Form verbatim. *See In re Smith*, 2008 WI 23, ¶53, 308 Wis. 2d 65, 746 N.W.2d 243 (2008).

If the accused makes a request for an alternative test, then law enforcement has a duty to exercise reasonable diligence in accommodating that request. *State v. Renard*, 123 Wis. 2d 458, 460–61, 367 N.W.2d 237 (Ct. App. 1985). The request for an alternative or additional test may be made before the primary test is administered, and the accused is not required to reiterate his request for an alternative test after submitting to the primary test. *See State v. Schmidt*, 277 Wis. 2d 561, ¶30, 691 N.W.2d 379 (Ct. App. 2004).

Mr. Madland made an express request for alternative testing, and he was not required to reiterate that request after he submitted to the blood

draw. *Schmidt*, 277 Wis. 2d 561, ¶30. The fact that he did not renew his request following Deputy Shields' statement that blood is "only test we do" evinces the effect of Deputy Shields's misleading advisory. The officer in this case therefore violated the implied consent statute by failing to honor such a Mr. Madland's request for an alternative test.

In addition to diligently providing alternative testing following a request, law enforcement cannot mislead or misinform the accused about his rights under the implied consent law. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by Smith*, 308 Wis. 2d 65 (upholding *Quelle* in instances where an officer provides "more information than required by Wis. Stat. § 343.305(4)"). In *Smith*, the Wisconsin Supreme Court applied a three-part test to determine whether an officer misleads a defendant when he first read him the Informing the Accused Form verbatim and then provided additional information about the defendant's rights:

> (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 a choice about chemical testing?

Smith, 308 Wis. 2d 65, ¶56 (adopting the test from *Quelle*, 198 Wis. 2d 269, as interpreted by *State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997)).

If an officer gives additional information, the defendant bears the burden of showing that the information was misleading, and that it affected his ability to make a choice about chemical testing. *Ludwigson*, 212 Wis. 2d at 876. "[M]isleading," as used in the second prong of the test "was meant . . . to be synonymous with the term 'erroneous.'" *Smith*, 308 Wis. 2d 65, ¶56, n.43. Further, the inquiry under the third prong considers whether the misinformation "affected" the driver's ability to make a choice—and not the driver's subjective confusion. *See Quelle*, 198 Wis. 2d at 280 (concluding that it was inappropriate to assess the driver's perception of the information provided to him by law enforcement).

Here, Deputy Shields violated his statutory duty by providing additional information. There is no dispute that Officer Shields read Mr. Madland the Informing the Accused Form verbatim. (67:5–6; App. 107–08). However, Officer Shields furnished additional information to Mr. Madland—most notably, and on more than one occasion, that a blood test was the "only" test his agency was performed, and that Mr. Madland could only request an alternative test following submission to a blood test. (67:13, 16; 20; App. 115, 118). This information is not consistent with the implied consent law, which requires that law enforcement be prepared to

administer two of the three chemical tests to measure intoxication. Wis. Stat. § 343.305(2).

Neither the implied consent law nor the Informing the Accused form provide that the accused may only request additional testing *after* submitting to the agency's primary test. *See* Wis. Stat. § 343.305(4), (5)(a); (20:1). Furthermore, the court in *Schmidt*, 277 Wis. 2d 561, ¶30, expressly held that an accused may make a valid request for alternative testing *before* submitting to a primary test, and the extra information furnished by the deputy conflicts with that holding.

The extra information provided by Deputy Shields was misleading. As explained in the preceding paragraph, Deputy Shields's explanations that a blood test was the "only" test they performed, and that Mr. Madland could only request alternative testing *after* he submitted to the primary test contradict the implied consent statute and the Informing the Accused form. Deputy Shields effectively told Mr. Madland that there was no alternative test, and even if there was, he could not request it until after the blood draw—both of which conflict with the requirements of Wis. Stat. § 343.305, and have a high potential to mislead the accused. This information was therefore erroneous, and ultimately misleading. *Smith*, 308 Wis. 2d 65, ¶56, n.43.

The misleading information provided by Deputy Shields affected Mr. Madland's ability to make a choice about his chemical testing rights. As

explained in *Quelle*, 198 Wis. 2d at 280, this inquiry focuses on whether or not the officer's information affected the accused's ability to make a choice—not the accused's perception of the information. After he was read the Informing the Accused form, Mr. Madland promptly responded that he wanted an alternative test. The deputy responded that he could only perform a blood test. Based on these misrepresentations, Mr. Madland ceased his requests for an alternative test, as no reasonable person would continue to insist upon a test that he has been told does not exist. Furthermore, it is notable that the deputy understood Mr. Madland's statements as requests for alternate tests, as he followed up about each test following the blood draw. Mr. Madland's response of "what's the point?" following that inquiry, (68:17; App. 143), further suggests that he relied upon the deputy's misinformation that neither breath nor urine tests were performed by his agency, and that misinformation factored into his choice about chemical testing.

The circuit court acknowledged that the deputy's explanations following the reading of the Informing the Accused form were "problematic," but nonetheless concluded that reading the Informing the Accused Form was sufficient enough to inform Mr. Madland of his rights. Law enforcement can meet their statutory duties under the implied consent law by reading the Informing the Accused form verbatim, *Smith*, 308 Wis. 2d 65, ¶53, but that does not end the inquiry when an officer provides supplemental information. The ultimate question is whether the

deputy furnished information in addition to the Informing the Accused form which was misleading, and whether that information affected the accused's ability to make an informed decision about chemical testing. The information provided by the deputy in this case did both.

Regardless of what Deputy Shields meant to convey when he supplemented the Informing the Accused advisory to Mr. Madland, his statements plainly contradicted the information he was required to convey by statute. Deputy Shields could have simply re-read the form to Mr. Madland, but instead created confusion with regard to: (1) whether the agency offered a second test; (2) whether Mr. Madland would receive any alternative testing; and (3) when Mr. Madland could make a valid request for testing. This conduct did not comport with the requirements of Wis. Stat. § 343.305, and thereby violated Mr. Madland's statutory right to request and receive an alternative chemical test.

C. Suppression is the appropriate remedy for failing to honor a request for alternative testing.

Although the right to alternative chemical testing is statutory rather than constitutional, the Wisconsin Supreme Court noted that the right to alternative testing "help[s] assure fairness." *McCrossen*, 129 Wis. 2d at 297. Accordingly, the court in *McCrossen* "refuse[d] to limit the right to a second test" to circumstances in which the primary test is inconclusive or shows blood alcohol levels below the

legal limit, and instead "strictly enforce[d] the right to a second test." *Id.* When the accused requests an alternative test, submits to primary testing, and law enforcement does not honor the request for additional testing, suppression of the primary test result is the appropriate remedy. *Schmidt*, 277 Wis. 2d at 572; *see also McCrossen*, 129 N.W.2d at 297.

Mr. Madland expressly requested alternative testing at the beginning of his encounter with Deputy Shields, and he was misinformed about available testing and the timing in which he could request an alternative test. Mr. Madland later discussed the requested blood test, and Deputy Shields told him that blood is the "only test" that we do." (67:16; 20; App. 118). Because this information contradicts the advisory regarding additional testing provided in the Informing the Accused form, and because Mr. Madland relied on that misleading information—as evidenced by the fact that he ceased requests for additional testing and responded "what's the point?" when later asked about additional testing—he was deprived of his statutory right to a second test. In accordance with *McCrossen*, 129 N.W.2d at 297 the results of his blood draw should be suppressed.

CONCLUSION

Based on the foregoing arguments, Mr. Madland respectfully asks this court to reverse the circuit court's denial of his suppression motion. If this court reverses the circuit court's suppression ruling, Mr. Madland asks this court to remand his case to the circuit court with instructions to permit Mr. Madland to withdraw his pleas.

Dated this 22nd day of May, 2019.

Respectfully submitted,

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of May, 2018.

Signed:

MARK R. THOMPSON
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of May, 2019.

Signed:

_____

MARK R. THOMPSON
Assistant State Public Defender

A P P E N D I X

INDE X
TO
APPENDIX

Page