STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000146-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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Officer Gave Mr. Madland Incorrect Information About His Rights Under the Implied Consent Law And The Evidence of His Blood Draw Should Be Suppressed.

The state's sole argument is that the circuit court "properly found that Madland requested a different test rather than a primary test." (State's Br. At 4). The state's brief does not, however, respond to Mr. Madland's argument that Deputy Shields inaccurately advised Mr. Madland that blood is "the only test we do," (67:16), which ultimately mislead him and affected his ability to make an informed choice about chemical testing, *see* (Opening Br. at 7–13).

Despite the applicability of *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995) to Mr. Madland's case and his reliance on it throughout his opening brief, *see* (Opening Br. at 9–10), the state did not address *Quelle*—or any subsequent cases applying the test set forth in it—or try to distinguish it. The state's failure to address *Quelle* should be dispositive. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute").

Nonetheless, it is useful to briefly distinguish the two unpublished cases cited by the state as persuasive authority because neither of those cases address the *Quelle* factors. In *State v. Tollaksen*, No. 2012AP778-CR, unpublished slip op. (Ct. App. Jan. 10, 2013),[1] Mr. Tollaksen argued, for the first time on appeal, that the officer deviated from the "informing the accused form" ("ITAF"), and the court of appeals therefore rejected that argument because he was "asking [the appellate court] to resolve a factual dispute in the testimony." (App. 102). Furthermore, in *Village of Pleasant Prairie v. Brunello*, No. 2010AP1124-FT, unpublished slip op. (Ct. App. Sept. 29, 2010),[2] the only argument presented to the circuit court was that Mr. Brunello requested an alternative test, and the officer failed to comply with that request. (App. 103).

Unlike the appellants in *Tollaksen* and *Brunello*, Mr. Madland asserted in the circuit court and on appeal that Deputy Shields misled Mr. Madland with regard to his rights under the implied consent law, and the record in this case supports that argument. After the ITAF was read to Mr. Madland and he expressed interest in an alternative test, he was twice informed by Deputy Shields that the only test they did was a blood test. (67:6, 16). After Mr. Madland received this

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[1] Authored, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. *See* Wis. Stat. § 809.23(3)(b).

[2] *Supra* note 1.

information from the deputy, he did not ask additional questions about his right to alternative testing.

The circuit court acknowledged during its oral ruling that it was "problematic" that Deputy Shields responded the way he did to Mr. Madland's inquiries. (69:7). But the circuit court nonetheless concluded that the deputy complied with the implied consent statute because he previously read the ITAF verbatim prior to giving those inaccurate statements. (69: 5–7). This conclusion was erroneous, and this court should reverse the circuit court's order denying suppression. *See State v. Vincent*, 171 Wis. 2d 124, 127, 490 N.W.2d 761 (Ct. App. 1992) (stating that whether the court properly construed and applied the implied consent law to the facts of the case is a question of law which the appellate court reviews independently); *see also State v. McCrossen*, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986) (stating that when there is a violation of one's rights under the implied consent law, the remedy is suppression of the primary test).

II. Mr. Madland's Case is Distinguishable from *Tollaksen* and *Brunello* Because Deputy Shields's Testimony Belies the Court's Conclusion that Mr. Madland Did Not Request an Alternate Test.

The state argues that the circuit court "properly found that Madland requested a different test rather than a primary test." (State's Br. At 4).

But whether the facts show that a request for an alternative test pursuant to Wis. Stat. § 343.305 was made is a question of law, which is reviewed de novo. *State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Accordingly, whether Mr. Madland requested an alternative test is subject to independent appellate review. *See id.*

The two unpublished cases upon which the state relies to support its argument are distinguishable from Mr. Madland's case. In *Tollaksen*, Mr. Tollaksen explained to the officer that he wanted to have a different test because he "did not like needles." (App. 102). Although that fact is similar to Mr. Madland asking if there was a way to not have a needle stuck in his arm, (67:6), this case is distinguishable because Mr. Madland expressed interest in an alternative test more than once, (67:6, 13). Furthermore, Deputy Shields, whose testimony was deemed credible by the circuit court, asked about an alternative test after completing the blood test because he interpreted Mr. Madland's comments as a request for an alternative test. *See* (68:9). Thus, unlike the facts of *Tollaksen*, the officer in this case interpreted Mr. Madland's request as one for a second or alternative test, rather than a different one altogether.

In *Brunello*, Mr. Brunello said, after he was read the ITAF, that he "wanted a blood test." (App. 103). The officer responded that the Village of Pleasant Prairie's primary test was a breath test, and Mr. Brunello never renewed his request for a blood

test. (App. 103). Here, the deputy did not explain that blood was the *primary* test his department offered—he said it was the *only* test they offered. (67:6). Then, the deputy later followed up on Mr. Madland's comments as if he had requested a second, alternative test. (68:9). Under the totality of the circumstances test applied in *Brunello*, the facts of this case evince that: (1) Mr. Madland was read the ITAF, (2) requested an alternative test, (3) was misinformed by the officer about the availability of alternative testing and therefore ceased asking questions about an alternative test, and (4) was later asked by the officer if he wanted an alternative test.

CONCLUSION

For the reasons stated above and in the opening brief, Mr. Madland respectfully asks that this court vacate Mr. Madland's conviction and remand this case to the circuit court with direction to suppress the results of Mr. Madland's blood draw due to a violation of his rights under the implied consent statute.

Dated this 12th day of July, 2019.

Respectfully submitted,

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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 1,091 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 12th day of July, 2019.

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 12th day of July, 2019.

Signed:

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APPENDIX

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