STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP001895

COUNTY OF DUNN,

Plaintiff-Respondent,

v.

KEVIN J. CORMICAN

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE DUNN COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. PETERSON PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

(1) Did either of law enforcement's statements to Kevin J. Cormican violate the doctrine of *County of Ozaukee v. Quelle*?[1]

The circuit court answered "no."

This Court should affirm the circuit court.

(2) Did law enforcement obtain voluntary consent from Kevin J. Cormican for the evidentiary blood test?

The circuit answered "yes."

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County does not request oral argument or publication. This case involves application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

Kevin J. Cormican appeals a judgment of conviction for first-offense operating a motor vehicle while intoxicated. Cormican first argues that the evidentiary blood test should have been suppressed because two separate statements of Deputy Chad Pollock violated the doctrine of *County of Ozuakee v. Quelle,* 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App.

[1] The County has reframed the issues to be less argumentative than as-presented by Cormican.

1995). (Cormican's Br. 6.) Cormican second argues that the blood test should have been suppressed because his consent to it was involuntary. (Cormican's Br. 13.)

Cormican is not entitled to relief because his blood test was properly obtained. Law enforcement did not violate the *Quelle* doctrine, nor did they obtain involuntary consent from Cormican. This Court should affirm the circuit court.

STATEMENT OF THE CASE

As plaintiff-respondent, the County exercises its discretion to not present a full statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

The County notes that Cormican leaves out relevant words in his purported transcript of the video. (Cormican Br. 3.) The County emphasizes those relevant words below:

> I do know that, if you refuse the test, the State will just automatically take your privileges away … [T]he bottom line is, the State, when you get your license, you kind of sign off and say that you promise that you're going to be a legal driver all the time without a substance in your system … [B]y substance, I mean alcohol. I mean, they're just saying that when you get your license, you're telling them that, "yep, I'm not going to do this." And that's what the implied consent is, is that when you get your license, you're basically implying your consent to the State, saying "yep, you can test me any time; I'm not gonna be over the limit." *But, you know, I can't really give you legal advice, it's just a yes or no. But as the form clearly states*, if you just automatically say "no," the State will just up and take [your driving privileges].

(DVD of traffic stop at 1:09:39-1:09:46 and 01:10:25-01:11:13.) (emphasis added).

The County notes that this case's Informing the Accused Form (the "Form") was introduced into evidence. (R. 30.)

The County cites to further relevant facts in the Argument section below.

STANDARD OF REVIEW

This Court applies a two-step standard of review to issues concerning the suppression of evidence. *State v. Scull*, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 862 N.W.2d 562. The circuit court's findings of fact are upheld unless clearly erroneous. *Id.* The application of constitutional principles to those facts is reviewed de novo. *Id.*

ARGUMENT

1. The circuit court properly denied Cormican's suppression motion because neither of Deputy Pollock's statements violate the *Quelle* doctrine.

A. Relevant law

Wisconsin's Implied Consent Law provides, in pertinent part:

> (2) IMPLIED CONSENT. Any person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled

> substance analogs or other drugs, or any combination of . . . when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Wis. Stat. § 343.305(2). An officer who requests this test is required to read a specific warning to the person. Wis. Stat. § 343.305(4).

In *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), the Wisconsin Court of Appeals developed a three-part test to assess the adequacy of a warning supplied under Wis. Stat. § 343.305(4). "The test asks (1) whether the officer met or exceeded his or her duty to provide the statutory information to the accused driver, (2) whether the lack or oversupply of information was misleading, and (3) whether the failure to properly inform the driver affected the driver's ability to make a choice about the evidentiary chemical test." *State v. Kliss*, 2007 WI App 13, ¶ 8, 298 Wis. 2d 275, 728 N.W.2d 9, citing *Quelle*, 198 Wis. 2d at 276-77. A Defendant must show all three prongs for each statement before he can prevail on a *Quelle* claim. *Quelle*, 198 Wis. 2d at 281-82.

Cormican argues that Deputy Pollock violated *Quelle* by providing two separate statements to him. Statement 1: that if Cormican refused the implied consent test, the state would automatically take away his driving privileges; and Statement 2: that Cormican had already given implied consent to the blood test by virtue of getting his Wisconsin's driver's license. (Cormican's Br. 7.)

However, neither Statement fulfills all three prongs of the *Quelle* doctrine.

B. Analysis of Statement 1

Pursuant to the requirements of Wis. Stat. § 343.305(4), our case's Informing the Accused Form provided the following information: "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." (R. 30.) (emphasis added). Deputy Pollock read the Form's language to Cormican, and then said that "if you refuse the [implied consent test], the state will automatically take away your driving privileges." (DVD of traffic stop at 01:09:39-01:09:46 and 01:10:25-01:11:13.)

Deputy Pollock's statement is an accurate recitation of what the Form provides, and it therefore does not meet *Quelle's* first prong. Indeed, the Form only provides that – without exception or caveat – "your operating privilege *will be* revoked." (R. 30.) (emphasis added). The Form therefore provides that the process is automatic – in other words, it "will be" done, as Deputy Pollock indicated to Cormican. *See also State v. Anagnos*, 2012 WI 64, ¶ 24, 341 Wis. 2d 576, 815 N.W.2d 675 ("If . . . the person refuses to submit to chemical testing, he is informed of the State's intent to *immediately* revoke his operating privileges."). Therefore, Statement 1 does not meet the *Quelle* prong of exceeding the duty to provide the statutory information to the driver.

Deputy Pollock's statement, moreover, is not misleading under *Quelle's* second prong. Indeed, as the circuit court noted, Wis. Stat. § 343.305(4)'s required language does not inform the defendant of their ability to request a refusal hearing. (R. 57, 7:5-12.). Deputy Pollock's statement, therefore, is not misleading because it provides what the statute itself says to provide: namely, that the revocation penalty "will be" something that occurs. Cormican's contrary

arguments overlook the very language of the Form and the statute itself.

Finally, by the above rationale, Deputy Pollock's Statement 1 properly informed the Defendant, and it therefore does not meet *Quelle's* third prong of improperly affecting Cormican's decision to consent.

Deputy Pollock's Statement 1 was properly made in view of *Quelle.*

C. Analysis of Statement 2

Pursuant to the requirements of Wis. Stat. § 343.305(4), our case's Informing the Accused Form provided the following information: "Under *Wisconsin's Implied Consent Law*, I am required to read this notice to you . . ." (R. 30.) (emphasis added). Deputy Pollock read the Form's language to Cormican, and then said that Cormican had already given implied consent to the test by way of getting his driver's license. (DVD of traffic stop at 01:09:39-01:09:46 and 01:10:25-01:11:13.)

Deputy Pollock's Statement 2 is beyond what the statute provides, and therefore meets *Quelle's* first prong. The County agrees on that point.

Deputy Pollock's Statement 2, however, is not misleading under *Quelle's* second prong in view of the case law. Wisconsin's implied consent case law, as relevant to our case, can be divided into roughly two eras: the *Scales v. State* era, and the *State. v. Prado* era. The *Scales* era was in effect during Cormican's traffic stop; the *Prado* era was in effect as of June 2021, when its decision was released. Deputy Pollock's Statement 2 is not misleading under either era.

The *Scales* era of case law directly supports what Deputy Pollock said. Indeed, in *Scales v. State,* 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974), the Wisconsin Supreme Court concluded that the implied consent law "requires that a licensed driver, by applying for an[d] receiving a license, consents to submit to chemical tests for intoxication under statutorily determined circumstances." In *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980), the Wisconsin Supreme Court further explained that by applying for a driver's license, a person has "waived whatever right he may otherwise have had to refuse to submit to chemical testing." *Id.* The Court added: "[i]t is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute." *Id.*

No case has ever explicitly overturned the *Scales* era of Wisconsin Supreme Court cases. *See, e.g., State v. Brar*, 2017 WI 73, ¶ 21, 376 Wis. 2d 685, 898 N.W.2d 499 ("The consent to which this court in *Neitzel* and the Supreme Court in *McNeely* refer is consent sufficient under the Fourth Amendment—not some amorphous, less form of consent.") (plurality opinion). *See also Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Therefore, under the *Scales* era, Deputy Pollock's Statement 2 that Cormican had already given implied consent is true, and does not meet *Quelle's* second prong.

The *Prado* era of case law – decided in June, 2021[2] – also supports what Deputy Pollock said. Indeed, in *State v. Prado,* 2021 WI 64, ___ Wis. 2d. ___, 960 N.W.2d 869, the Wisconsin Supreme Court concluded that there is a difference between "consent deemed by statute," such as implied consent, and "actual consent." *Id.*, ¶ 46. The Court concluded that "deemed" consent is not enough for a blood draw; rather, "actual" consent is needed. *Id.*

Deputy Pollock's statement recognized this distinction by noting that Cormican had only given implied consent: "And that's what implied consent is, is that when you get your license, you're basically *implying your consent* to the State." (DVD of traffic stop at 01:09:39-01:09:46 and 01:10:25-01:11:13.) Deputy Pollock never represented that Cormican had given "actual" consent; that is, Deputy Pollock never said something as, "you don't even need to answer the question I asked you, because you said yes a long time ago." Indeed, Deputy Pollock reiterated to Cormican that he still needed a "yes or no" for consent. (*Id.*)

Deputy's Pollock Statement 2 was accurate under both eras of case law, and it is therefore not misleading under *Quelle's* second prong.

Moreover, Deputy Pollock's Statement 2 also did not affect Cormican's ability to make a decision, and it therefore does not meet *Quelle's* third prong. Indeed, on cross examination, Cormican admitted that he still had a decision to make on whether to give actual consent or not:

[2] The County analyzes *State v. Prado* due to Cormican citing its earlier, Court of Appeals variant. (Corm. Br. 9.) The County does not believe that either variant of *Prado* informs this case, given that both variants were decided after our case's traffic stop and test.

> Q Near the end, Deputy Pollock explained that he needed a yes-or-no answer on the form, correct?
> A Correct.
> Q And you heard that question?
> A Yes.
> Q And you made an answer to that yes-or-no question, correct?
> A Correct.
> Q So you understood that you had a decision to make at that point?
> A Correct.

(R. 56, 35:14-24.)

Cormican, therefore, did not believe that he had already given actual consent to the test. Rather, Cormican only believed that he had given implied consent in the past; a fact that is true, under either the *Scales* or *Prado* era of case law. (R. 56, 31:13-15.)

Deputy Pollock's Statement 2 was properly made in view of *Quelle.*

II. The circuit court properly denied Cormican's suppression motion because Deputy Pollock obtained voluntary consent from Cormican for the evidentiary blood test.

Under *State v. Blackman*, voluntary consent must be "an essentially free and unconstrained choice, not the product of duress or coercion, express or implied." 2017 WI 77, ¶ 56, 377 Wis. 2d 339, 898 N.W.2d 774 (citations omitted). The test for voluntariness asks whether consent was given in the "presence or 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) (emphasis added). In making this determination, no single factor is dispositive.

State v. Hughes, 2000 WI 24, ¶ 41, 233 Wis. 2d 280, 607 N.W.2d 621. Rather, this Court must examine the totality of the circumstances and place special emphasis on the circumstances surrounding the consent and the characteristics of the defendant. *Id.*

Deputy Pollock obtained voluntary consent from Cormican, and for a number of reasons. First, as explained above, Deputy Pollock did not misrepresent the requirements of Wis. Stat. § 343.305(4) to Cormican. Second, Deputy Pollock's statements were not "designed" as a strategy to overcome the resistance of a defendant. *Clappes*, 136 Wis. 2d at 245. Indeed, Deputy Pollock explained his intent to the circuit court:

> Amongst conversation, as the form states, if your refuse the test, you'll be revoked and subject to other penalties. That's a question that comes up a lot with drivers. And it's a very -- in my opinion, a very poorly-written form and wordy, and when you're trying to explain it to somebody, especially in those circumstances, they have numerous questions, and I did the best I could to be cordial, to be friendly, to explain it to him without giving much legal advice but saying, here are your options.
>
> I did not pressure him to take the test. I said, you can or you can't, it doesn't make any difference to me. I explained the penalty that you would be revoked, you know if you refuse. The form states you'll be revoked. Yes, you can contest that in a refusal hearing, which I've dealt with, or you can submit. And I mean I explained it the best I could without being a robot and not speaking in between and, you know, giving police a bad name in general just by not being cordial in trying to explain it.

(R. 56, 23:14—24:6.)

Deputy Pollock's statements, therefore, were designed to be cordial and helpful toward Cormican. His statements, further, came in response to questions posed by Cormican in the first place. (R. 56, 33:15-20.)

The circuit court, moreover, was there to evaluate the demeanor of both Cormican and Deputy Pollock on the witness stand. And for Deputy Pollock, the circuit court remarked, "[y]ou know, the overall tenor of Deputy Pollock, it seems like he's a reasonable officer; you know, was trying to be reasonable with Mr. Cormican . . . ." (R. 57, 9:11-17.)

Cormican's contrary arguments about coerced consent are misplaced. Cormican first argues that his consent was coerced because "the deputy told [him] that he knew individuals with commercial driver's licenses who received a first OWI and it was not the end of the road for them." (Cormican's Br. 15.) Deputy Pollock's statement, however, does not promise to Cormican that his circumstances would end the same. Nor does Deputy Pollock's statement indicate that Cormican would face zero consequences for his actions – indeed, "end of the road" is a somewhat subjective phrase, where reasonable minds can perhaps differ on its meaning. Cormican interprets "end of the road" as meaning temporary employment consequences and unfortunate lawyer fees. (R. 56, 32:22—33:2; R. 10.) However, another person might reasonably interpret "end of the road" as losing one's CDL permanently – a consequence that only applies, in our context, if a driver receives two OWI convictions, not one. Wis. Stat. § 343.315(2)(c).

Cormican also argues that his consent was coerced because, "upon receiving Mr. Cormican's consent, Deputy Pollock informed Mr. Cormican that he believed Mr. Cormican had made the right choice." (Cormican's Br. 15.) Deputy Pollock's statement,

however, is irrelevant at this point as Cormican had already provided actual consent to the blood test. (DVD of traffic stop at 01:10:25-01:11:13.)

Ultimately, Deputy Pollock did not have any intent to overcome the resistance of the defendant. *Clappes*, 136 Wis. 2d at 245. As the circuit court emphasized, Deputy Pollock was a "reasonable officer" who "was trying to be reasonable with Mr. Cormican. . . ." (R. 57, 9:11-17.) Deputy Pollock obtained voluntary consent from Cormican.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and order denying Cormican's suppression motion.

Dated this 2nd day of August, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,420 words.

Dated this 2nd day of August, 2021.

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