FILED
07-07-2021
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2021AP452

In the Matter of the Refusal of Roman C. Ozimek:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROMAN C. OZIMEK,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, BRANCH IV, THE HONORABLE KENDALL M. KELLEY PRESIDING, TRIAL COURT CASE NO. 17-TR-768

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES…………………………………………………3-5

STATEMENT OF THE ISSUE..6

STATEMENT ON ORAL ARGUMENT…………………………………6

STATEMENT ON PUBLICATION………………………………………6

STATEMENT OF THE CASE……………………………………………6-7

STATEMENT OF FACTS…………………………………………........8-9

STATEMENT OF REVIEW ON APPEAL………………………………9

ARGUMENT………………………………………………………….…10

I. EVEN IF AN INDIVIDUAL HAS ALLEGEDLY REFUSED TO SUBMIT TO AN IMPLIED CONSENT TEST, IT REMAINS RELEVANT TO INQUIRE WHETHER INFORMATION PROVIDED TO THE ACCUSED MISREPRESENTED THE LAW WHEN DETERMINING WHETHER THERE HAS BEEN COMPLIANCE WITH THE IMPLIED CONSENT STATUTE…………………………………………..……..10

A. Framing the Issue Raised Herein..…………………………..……..10

B. The Constitutional Right at Issue…….…………………………….11

C. Dismissal Is the Remedy for Violating the Constitutional Right to Additional Testing……….……………………………………………12

D. Application of the Law to the Facts……………………………………13

E. The Lower Court Should Have Considered the Entire Context of the Encounter Between Officer Walvort and Mr. Ozimek……………….14

CONCLUSION 17

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend. XIV 11

Wisconsin Statutes

Wisconsin Statute § 343.305(2) 10

Wisconsin Statute § 343.305(3)(a) 10

Wisconsin Statute § 343.305(4) 6

Wisconsin Statute § 343.305(5)(a) 12

Wisconsin Statute § 343.305(9) 10

Wisconsin Statute § 343.305(9)(a) 6, 10

Wisconsin Statute § 343.305(9)(am)5.b. 7, 10-11

Wisconsin Statute § 346.63(1)(a) 6

United States Supreme Court Cases

Chambers v. Mississippi, 410 U.S. 284 (1973); 12

Miranda v. Arizona 384 U.S. 436 (1966) 15-16

Rock v. Arkansa¸483 U.S. 44 (1987) 12

Taylor v. Illinois, 484 U.S. 400 (1988) 11

United States v. Scheffer, 523 U.S. 303 (1998) 12

Washington v. Texas, 388 U.S. 14 (1967)..11

<u>Wisconsin Supreme Court Cases</u>

Barrera v. State, 99 Wis. 2d 269, 298 N.W.2d 820 (1980) *cert. denied*, 452 U.S. 972 (1981) 15-17

State v. Blackman, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774 11

State v. McCrossen, 129 Wis. 2d 277, 385 N.W.2d 161 (1986).............................12

State v. Walstad, 119 Wis. 2d 483, 351 N.W.2d 469 (1984)............................ 12-13

State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457 11

State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987) 14

Washburn County v. Smith, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 11

<u>Wisconsin Court of Appeals Cases</u>

County of Eau Claire v. Resler, 151 Wis. 2d 645, 446 N.W.2d 72 (Ct. App. 1989).. 10
County of Ozaukee v. Quelle, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995) 10, 15-16

Lands' End, Inc. v. City of Dodgeville, 2014 WI App 71, 354 Wis. 2d 623, 848 N.W.2d 904 10

State v. Renard, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985) 12

State v. Schirmang, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997) *overruled on other grounds, Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 ....10, 17

State v. Sutton, 177 Wis. 2d 709, 503 N.W.2d 526 (Ct. App. 1993) 10, 14-15

State v. Wilke, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989) 11, 17

Other Authority

W. LAFAVE & J. ISRAEL, *Criminal Procedure* (1984) 15

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT SHOULD HAVE CONSIDERED CONVERSATIONS WHICH OCCURRED BETWEEN MR. OZIMEK AND THE ARRESTING OFFICER AFTER MR. OZIMEK'S REFUSAL TO SUBMIT TO AN IMPLIED CONSENT TEST WHEN DETERMINING WHETHER THE OFFICER COMPLIED WITH WIS. STAT. § 343.305(4)?

> Trial Court Answered: NO. The circuit court concluded that "once the refusal has occurred, it has . . . created a legal liability for a defendant. What happened . . . subsequent to that time . . . [d]oesn't cause the prior conduct to somehow not have been affected." R42 at 15:25 to 16:5; D-App. at 102-03.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law. The issue presented herein is of a nature that can be addressed by the application of legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue herein rarely complicates any case involving impaired driving. It is of such an esoteric and uncommon occurrence that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Ozimek was charged in Brown County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on January 8, 2017. R2.

Mr. Ozimek retained private counsel and subsequently filed a request for a refusal hearing. R1. A bifurcated hearing on the lawfulness of Mr. Ozimek's refusal

was held on November 26, 2018, and January 22, 2021, before the Circuit Court for Brown County, the Honorable Kendall M. Kelley presiding. R41 & R42, respectively.

The State offered the testimony of two law enforcement officers at the November 26 hearing, namely Officer Tyler Dawson of the De Pere Police Department and Officer Nicholas Walvort of the Green Bay Police Department. R41 at pp. 4-26 & pp. 26-44, respectively. No testimony was offered at the January 22 hearing as only oral argument was heard.

At the hearings in this matter, counsel for Mr. Ozimek argued that Mr. Ozimek was misinformed by the arresting officer that he would only be permitted to access chemical test evidence on his own accord if he first submitted to the State's primary test, thereby impermissibly interfering with his constitutional right to present a defense. R42 at 8:19 to 12:6. The State countered that since any misinformation which might have been provided by Officer Walvort to Mr. Ozimek occurred after Mr. Ozimek's refusal, it was outside of the scope of the Court's responsibility under § 343.305(9)(am)5.b. to determine whether the arresting officer complied with § 343.305(4). R42 at 13:3-14.

The circuit court rejected Mr. Ozimek's argument that the misinformation provided by Officer Walvort to Mr. Ozimek was a relevant consideration given that it was imparted after Mr. Ozimek's refusal. R42 at 15:24 to 16:6; D-App. at 102-03. More specifically, the court stated:

> The fourth version of all of this is that, as the State has argued, once the refusal has occurred, it has in fact occurred and it's, therefore, created a legal liability for a defendant. What happened at—subsequent to that time doesn't un-ring the bell. Doesn't cause the prior conduct to somehow not have been affected. The mechanics of the statute were followed and the defendant did refuse.

R41 at 14:22 to 15:5; D-App. at 102-03.

By Conviction Status Report entered January 22, 2021, the circuit court ordered Mr. Ozimek's operating privilege revoked for a period of one year. R29; D-App. at 101. It is from that adverse judgment that Mr. Ozimek appeals to this Court by Notice of Appeal filed March 8, 2021. R37.

STATEMENT OF FACTS

On January 8, 2017, the Appellant, Roman Ozimek, was operating his motor vehicle in Brown County when Officer Tyler Dawson of the De Pere Police Department observed a vehicle turn from Fourth Street onto Main Avenue, a one-way street in that location, and operate against the restricted direction of traffic. R41 at 5:19-23. Upon making this observation, Officer Dawson effectuated a traffic stop of the Ozimek vehicle. R41 at 6:24 to 7:4.

After making contact with Mr. Ozimek, Officer Dawson observed that he had bloodshot eyes, slurred speech, and an odor of intoxicants emanating from his person. R41 at 8:18-20; 29:11-16. Shortly thereafter, Officer Nicholas Walvort of the Green Bay Police Department arrived on the scene and assumed control over the investigatory detention of Mr. Ozimek. R41 at 9:10-13.

Based upon the observations made by the officers, Officer Walvort asked Mr. Ozimek to perform field sobriety tests. R41 at 29:14-16. Mr. Ozimek declined to perform the standardized battery of field sobriety tests. R41 at 30:9-12.

Officer Walvort placed Mr. Ozimek under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R41 at 31:7-8. Mr. Ozimek was then transported to St. Vincent's Hospital in Green Bay by a third officer because Officer Walvort's squad was not equipped with a "cage" which separated the front seat from the rear seat. R41 at 31:10-17.

Upon arriving at the hospital, Officer Walvort read the Informing the Accused form [hereinafter "ITAF"] to Mr. Ozimek and asked him whether he would be willing to submit to an evidentiary chemical test of his blood. R41 at 32:5-9; 33:1-4. Mr. Ozimek responded "No" to the officer's question. R41 at 33:5-6.

Mr. Ozimek requested a hearing on the lawfulness of his refusal and, on cross examination at the November 26, 2018 hearing, counsel for Mr. Ozimek questioned Officer Walvort regarding the information Officer Walvort provided to Mr. Ozimek immediately after the Informing the Accused form had been read to him. R41 at 33:1-12; 43:20-23; 44:4-13; D-App. at 104-06. During the course of this examination, Officer Walvort admitted the following, to wit:

(A) Mr. Ozimek asked him what "further tests were" (R41 at 33:8-9; D-App. at 104);

(B) He told Mr. Ozimek "that he would have to consent to the initial test to be allowed those other tests, . . ." (R41 at 33:9-10; D-App. at 104); and

(C) He acknowledged that he read the Informing the Accused form language which "tells the person that they can have the qualified person of their own choice conduct a test at their own expense, . . . " but then "told [Mr. Ozimek] he wasn't eligible for [that] . . . test[] because he said no to the first test; . . ." (R41 at 44:7-13; D-App. at 106).

Lengthy discussions and interpositions were had among the attorneys and the circuit court. R41 at pp. 44-57. Ultimately, the circuit court concluded that because there was a possibility that the arresting officer erroneously informed Mr. Ozimek that he could not obtain a chemical test on his own regardless of whether he submitted to the officer's test, the officer may have "made some mistakes doing that . . . ." R41 at 54:23. The Court, however, was concerned whether an inquiry into what occurred after Mr. Ozimek's alleged refusal was relevant at a refusal hearing. R41 at 54:25. Ultimately, Mr. Ozimek's case was set over to another date for further argument. R42. At this second hearing, the circuit court ultimately denied Mr. Ozimek's motion on the ground set forth above. R41 at 14:22 to 15:5; D-App. at 102-03.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court concerns whether the lower court erred by failing to consider evidence that Mr. Ozimek was misinformed regarding his constitutional right to access evidence in his defense when determining whether there was compliance with the implied consent statute even though the misinformation was provided after Mr. Ozimek's refusal to submit to an evidentiary chemical test of his blood. When based upon an uncontroverted set of facts, questions of this nature are exclusively questions of law and are, therefore, reviewed by this Court *de novo*. *Lands' End, Inc. v. City of Dodgeville*, 2014 WI App 71, ¶ 52, 354 Wis. 2d 623, 848 N.W.2d 904; *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

ARGUMENT

I. EVEN IF AN INDIVIDUAL HAS ALLEGEDLY REFUSED TO SUBMIT TO AN IMPLIED CONSENT TEST, IT REMAINS RELEVANT TO INQUIRE WHETHER INFORMATION PROVIDED TO THE ACCUSED MISREPRESENTED THE LAW WHEN DETERMINING WHETHER THERE HAS BEEN COMPLIANCE WITH THE IMPLIED CONSENT STATUTE.

A. Framing the Issue: The Relevant Inquiry.

Wisconsin Statute § 343.305 provides that any person who drives or operates a motor vehicle on a public roadway in this State is deemed to have given their implied consent to chemical testing of a sample of their blood, breath, or urine if they are arrested for a violation of Wisconsin's operating while intoxicated law. Wis. Stat. § 343.305(2) & (3)(a) (2021-22).

The individual, however, has a "right" to refuse to submit to an implied consent test. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995)("a driver has a 'right' not to take the chemical test designated by the officer"); *accord, State v. Schirmang*, 210 Wis. 2d 325, 565 N.W.2d 225 (Ct. App. 1997); *State v. Sutton*, 177 Wis. 2d 709, 714-15, 503 N.W.2d 326 (Ct. App. 1993)(accused entitled to make an informed choice about submitting to chemical testing).

If an individual exercises their right to refuse an implied consent test, they are entitled to have a hearing on the reasonableness of their refusal. Wis. Stat. § 343.305(9) (2021-22). At this hearing, the legislature has prescribed that several issues must be addressed. Wis. Stat. § 343.305(9)(a)1. to (9)(a)3. (2021-22). Among these issues is whether the law enforcement officer complied with § 343.305(4) of the implied consent statute. Wis. Stat. § 343.305(9)(am)5.b. (2021-22). An examination of this question involves an inquiry into whether the law enforcement officer read the Informing the Accused form to the individual and further determining whether, in so doing, any misinformation was provided to the accused either by omission or by overstatement. *See*, *e.g.*, *County of Eau Claire v. Resler*, 151 Wis. 2d 645, 446 N.W.2d 72 (Ct. App. 1989); *State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989); *Quelle*, 198 Wis. 2d 269; *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243; *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.

If it is determined that there has been a misstatement of the law, then the accused's operating privilege may not be revoked for allegedly refusing to submit to an implied consent test regardless of whether the erroneous information has caused "actual harm" to the accused if the information related to a misstatement of penalties or affected a constitutional right. *See generally*, *Wilke*, 152 Wis. 2d at 254 (understatement of penalties precluded the revocation of the defendant's operating privilege); *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997)(defendant not required to demonstrate how misstatement of applicable penalties affected his decision regarding taking the test), *overruled on other grounds, Smith*, 2008 WI 23 (*Wilke* "no nexus" analysis applies when statutorily required information not provided); *Blackman*, 2017 WI 77 (suppression of a blood test is the remedy for erroneously advising suspect regarding consequences of refusing to submit to chemical test regardless of actual effect on accused's decision).

For the reasons set forth below, Mr. Ozimek proffers that under § 343.305(9)(am)5.b. the lower court should have inquired into whether the misinformation he received after his refusal to submit to an implied consent test precluded the State from revoking his operating privilege for the alleged refusal.

B. The Constitutional Right at Issue.

Before an examination of the foregoing subject can be undertaken, it is first necessary to emphasize that the misinformation at issue in this case impacted upon a fundamental constitutional right.

To that end, it is a well-settled and long-standing principle of Fourteenth Amendment jurisprudence that an accused enjoys the right to gather evidence on his or her behalf. *Accord, State v. Schaefer*, 2008 WI 25, ¶ 63, 308 Wis. 2d 279, 746 N.W.2d 457, citing *Washington v. Texas*, 388 U.S. 14, 16-17 (1967). Access to such evidence is both an integral and critical part of an accused being able to present a defense on his or her behalf.

The right of one to present a defense is so fundamental that its expression is rife throughout United States Supreme Court jurisprudence. For example, in *Taylor v. Illinois*, 484 U.S. 400 (1988), the High Court unequivocally stated that an accused has the right to present evidence on his or her behalf. *Id.* at 410. This same principle also found expression in other Supreme Court cases which addressed the extent of the accused's right to present a defense. *See, e.g.*, *Rock v. Arkansa*¸483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *United States v. Scheffer*, 523 U.S. 303 (1998). Ultimately, there can be no doubt that due process compels

the government to allow an accused to access evidence in order to best prepare his or her defense.

This right, as explained below, is not contingent upon submitting to any test, let alone an implied consent test as Officer Walvort misinformed Mr. Ozimek.

C. Dismissal Is the Remedy for Violating the Constitutional Right to Additional Testing.

Since the right to gather one's own test, unlike the "alternate" *statutory* test provided for in § 343.305(5)(a), is of *constitutional* magnitude, dismissal of the refusal charge is the only appropriate remedy in a case in which the government has interfered with the accused's right to access this additional evidence. The Wisconsin Supreme Court seemingly acknowledged as much in *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986), when it forged a remedy for the statutory violation. *Accord, McCrossen*, 129 Wis. 2d at 286. All of the courts which have examined the related "*statutory* due process right" to access alternate chemical test evidence have put great emphasis on preserving the accused's right to obtain evidence in his or her defense. *See State v. Walstad,* 119 Wis. 2d 483, 527, 351 N.W.2d 469 (1984)("This is a right which we will strictly protect."); *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985)(officers must make a "diligent effort" to comply with alternate testing or the primary test must be suppressed). Thus, when a law enforcement officer informs an accused that they may not access evidence on their own unless they first submit to all the implied consent tests—which is precisely what transpired here—the only appropriate remedy is dismissal of the charges as the court in *Walstad* recognized when it initially held that the right to access another test was of *constitutional* magnitude. *Walstad*, 119 Wis. 2d at 527.

Time and time again, the right to "alternative" testing, which is a close cousin of the accused's constitutional right to gather their own test, has been held to be sacrosanct because it is one of the few ways by which an accused citizen may impeach the principal evidence the prosecution has gathered against the accused. Its value in this regard—because it is potentially exculpatory—cannot be overstated. Mr. Ozimek's right to access his own evidence in this case, however, is not merely of statutory magnitude, but rather, is of constitutional magnitude, and as such, merits the remedy of dismissal.

It is important to re-emphasize the *Walstad* court's direction that law enforcement officers are under an obligation to advise "an apprehended driver . . .

of the **absolute right** to a second test." *Walstad*, 119 Wis. 2d at 527 (emphasis added). The implication of this statement is that it contains an inherent recognition of the accused's right to defend themselves by gathering evidence in their own defense. This is a concept arising from both notions of statutory due process and of *constitutional* due process. Therefore, any interference with these statutory and constitutional rights to gather evidence is impermissibly infringed, it undermines the accused's right to present a defense.

D. Application of the Law to the Facts.

Now that it is established that a suspected drunk driver has the constitutional right to access chemical test evidence on their own accord, regardless of whether the person has submitted to, or refused, an implied consent test, the next question to examine is whether Officer Walvort interfered with this right by conditioning it upon Mr. Ozimek first submitting to the primary test the officer was requesting.

The factual record in this regard could not be more clear. Officer Walvort admitted on cross-examination that:

(A) Mr. Ozimek asked him what "further tests were" (R41 at 33:8-9; D-App. at 104);

(B) He told Mr. Ozimek "that he would have to consent to the initial test to be allowed those other tests, . . ." (R41 at 33:9-10; D-App. at 104); and

(C) He acknowledged that he read the Informing the Accused form language which "tells the person that they can have the qualified person of their own choice conduct a test at their own expense, . . . " but then "told [Mr. Ozimek] he wasn't eligible for [that] . . . test[] because he said no to the first test; . . ." (R41 at 44:7-13; D-App. at 106).

Any person, acting reasonably in light of the foregoing misleading information, would believe that they could *not* gather chemical test evidence on their own accord. What could be more demonstrative of erroneous and misleading information than a law enforcement officer answering an inquiring suspect's question "[what] further tests were" with the flawed, inaccurate, and mistaken assertion that the individual "wasn't eligible" for further tests? The foregoing admissions made by Officer Walvort are a *res ipsa loquitur* when it comes to establishing that he misled Mr. Ozimek with respect to his constitutional right to gather evidence in his defense.

Having thus established the constitutional right to gather evidence in one's defense, and further, having demonstrated that Officer Walvort interfered with this

right, there is but one question remaining for Mr. Ozimek to address: Given that the misleading information came *after* Mr. Ozimek's refusal to submit to an implied consent test, does it remain relevant to the lower court's obligation to determine whether the officer has complied with the implied consent statute?

E. The Lower Court Should Have Considered the Entire Context of the Encounter Between Officer Walvort and Mr. Ozimek.

To characterize the litigation which has surrounded Wisconsin's Implied Consent Law since *State v. Zielke,* 137 Wis. 2d 39, 403 N.W.2d 427 (1987), was first decided as robust is a gross understatement. Given this abundance of common law decisions, it is possible to sample a number of cases in which a defendant is alleged to have refused an implied consent test and determine whether supervisory courts have ever considered information provided to the accused *after* his or her alleged refusal to be relevant or whether these courts simply ended their inquiries at the point at which the accused refused to submit to testing and went no further.

A case in which a court examined whether information provided to a suspected drunk driver after his alleged refusal complied with the implied consent law is *State v. Sutton*, 177 Wis. 2d 709, 503 N.W.2d 526 (Ct. App. 1993). In its recitation of the facts of *Sutton*, the court of appeals noted that, upon reading the ITAF to Mr. Sutton, the defendant repeatedly refused to submit to a test. *Id*. at 713. The law enforcement officer, however, during Mr. Sutton's repeated refusals to submit to testing kept attempting to inform Mr. Sutton of the penalties associated with refusing a test. *Id.* At the hearing regarding Sutton's refusal, the arresting officer admitted that he misinformed Sutton that one of the penalties for refusing a test included a jail sentence. *Id.*

In reaching its holding that there had been substantial compliance with the implied consent law, the *Sutton* court ***examined the misinformation given to the defendant after the form had been read*** and concluded that "if the penalties are overstated, such overstatement is still substantial compliance unless the overstatement prejudices the defendant. In this case, the officer overstated, rather than understated, the penalties for refusing to submit to chemical testing." *Id*. at 714. Had the *Sutton* court believed that the mere fact of Sutton's refusal was sufficient to end the inquiry, it could very easily have so held. This is not, however, the course the *Sutton* court chose. Instead, the *Sutton* court acknowledged and accepted that the information given to Sutton after he declined to submit to a test

did not "prejudice the defendant."[1] The plain language of this holding includes an express review of information given to a suspect after his refusal and is, therefore, relevant in order to determine whether the suspect has been "prejudiced."

Even common law decisions which did not address refusal issues directly still found it relevant to inquire as to whether information given to the accused *after* agreeing to submit to a test affected the accused's implied consent rights. Tellingly, in *Quelle*, 198 Wis. 2d 269, the court noted:

> We first observe that the warnings provided drivers under the implied consent law are analogous to those employed in *Miranda*-type cases. The *Miranda* warnings themselves are not confusing such that understanding the warnings affects a person's unconstrained will to confess to a crime. *See* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 6.9(b) (1984). The police, however, may create confusion for the accused by misstating the warnings or using other coercive and manipulative means to procure information. *See, e.g., Barrera v. State*, 99 Wis. 2d 269, 291, 298 N.W.2d 820, 830 (1980), *cert. denied,* 451 U.S. 972 (1981). There are similar problems that may occur when police deliver the implied consent warnings.

Quelle, 198 Wis. 2d at 276-77. If the foregoing statement is accurate, then examining what transpires *after* an accused allegedly refuses a test *is* relevant at a Refusal Hearing because inquiry into what happens after a *Miranda* waiver is regularly made. The *Quelle* court's reliance on *Barrera v. State*, 99 Wis. 2d 269, 298 N.W.2d 820 (1980) *cert. denied*, 452 U.S. 972 (1981), is instructive on this point.

In *Barrera*, the defendant executed a valid, written waiver of his *Miranda* rights which were accurately provided to him; in fact, his attorney, who was present at the time, signed the *Miranda* waiver as well. *Id*. at 289-90. Despite the valid waiver, Barrera claimed that *after* his rights had been validly waived, the polygrapher badgered him into a confession by playing upon his "love of God." *Id*. at 290-91. The *Barrera* court did not simply end its inquiry into the question of the admissibility of Barrera's confession by holding that Barrera validly waived his rights and therefore it needed to go no further. Instead, the court examined what transpired *after* the waiver. If, as the *Quelle* court observed, the application of implied consent warnings is a "functional equivalent" of the *Miranda* Rule, then

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[1]As established in Section I.D., *supra*, the information provided to Mr. Ozimek by Officer Walvort was clearly misleading and prejudicial.

there is nothing irrelevant about examining that which occurs *after* the Informing the Accused form has been read. *Quelle*, 198 Wis. Wd at 278.

Any of the foregoing courts could easily have ended their respective inquiries into whether there had been compliance with the Implied Consent Law or the *Miranda* Rule by very simply stating in their respective analyses that "the form was properly read" and not have gone one step further, ending their inquiries there. These were not the outcomes, however, and therefore the lower court should have taken note that it is *relevant* to examine what transpired after the Informing the Accused was read.

One must ask why the *Quelle* court would favorably rely upon *Berrera* as exemplary of the problem it was addressing if not to identify that it is the *entire* context of the circumstances which must be examined when determining compliance with the implied consent law? If the assertion that the *Quelle* court's reliance on *Berrera* and its observation that "similar problems that may occur when police deliver the implied consent warnings" is not given its due credit, then this language is rendered mere chaff and its reliance on *Berrera* a needless digression. The *Quelle* court decided that *Berrera*-type inquiries were relevant in implied consent cases, and therefore, they must be. They cannot simply be "wished away."

Similarly, if this Court adopts a "no inquiry" approach, then so long as the suspect responds with an unequivocal "No" in reply to the question "Will you submit to an evidentiary chemical test of your blood," a reviewing court could never examine the appropriateness of an officer's further telling a suspect that if he does not submit to a test, he will be strapped down to a table and have his blood forcibly withdrawn; or that he will go directly to jail for the next thirty days for refusing; or that he will have his operating privilege revoked for the rest of his life; *etc.* All of this information is coercive and erroneous, but under the "no look" approach, none of it is relevant given that the accused initially refused. Any "change of heart" by the suspect under the foregoing circumstances is not relevant given the "finality" of the accused's initial reply to the question about submitting to a chemical test of his or her blood. This not only ignores the *Quelle* court's reliance on *Berrera*, but leads to absurd results.

Finally, it cannot be emphasized enough that the erroneous information subsequently provided to Mr. Ozimek impermissibly interferes with a *constitutional* right, *i.e.*, the right of the defendant to gather his own chemical test evidence apart from the government. Analysis of whether there has been compliance with the

implied consent law cannot simply end with the first syllables to cross a defendant's lips when subsequent information provided to the suspect impermissibly interferes with that individual's constitutional rights lest there be no remedy for such interference. In other words, if a suspect refuses a test and the officer then informs the suspect that upon the refusal, the suspect has no due process right to a hearing and must plead "guilty" to the alleged refusal, in the "no further inquiry" universe, the obviously erroneous information could never form the basis of a motion to reopen and dismiss the refusal conviction because it was information provided *after* the suspect allegedly refused. Even though the individual in this hypothetical has been denied due process of law, s/he has no remedy under such an approach. This is a patently absurd result which neither the legislature, the implied consent law, nor the Federal or State Constitutions could have intended.

CONCLUSION

Because Mr. Ozimek was misled with respect to his right to gather chemical test evidence on his own accord, and further, because the lower court should have taken this misinformation into consideration when determining whether the officer in this case complied with the implied consent law, Mr. Ozimek respectfully requests that this Court remand his case to the lower court with directions to enter an order finding that he did not improperly refuse to submit to an implied consent test, and further order that his operating privilege not be revoked for the alleged refusal.

Dated this 6th day of July, 2021.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,595 words.

Dated this 6th day of July, 2021.

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 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 6th day of July, 2021.

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2021AP452

In the Matter of the Refusal of Roman C. Ozimek:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

ROMAN C. OZIMEK,

Defendant-Appellant.

APPENDIX

Table of Contents

Conviction Status Report (R29). 101

Decision of the Circuit Court (R42) 102-03

Partial Transcript of November 27, 2018 Hearing (R42) 104-06