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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2021AP452

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROMAN C. OZIMEK,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from an Order of Judgment Entered in the Brown
County Circuit Court, Branch IV, Case No. 2017TR1237,
The Honorable Kendall M. Kelley, Presiding

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ISSUES PRESENTED

Whether the trial court correctly disregarded conversations that occurred between Ozimek and the arresting officer after Ozimek's refusal to submit to an implied consent test when determining whether the officer complied with Wis. Stat. § 343.305(4).

STATEMENT ON ORAL ARGUMENT

The issue on appeal derives from a well-developed record. Oral argument is unnecessary because the record and briefs on appeal will present the issue and develop the legal theories and authorities, making oral argument unlikely to aid the Court's analysis. *See* Wis. Stat. § 809.22(2)(b). Notwithstanding the foregoing, the State is prepared to participate in argument if the Court believes it will prove beneficial to resolving the case.

STATEMENT ON PUBLICATION

Pursuant to Wis. Stat. § 809.23(1)(a)1, the State requests a published decision by the Court as the resolution to the issue herein would clarify the existing rule of what is considered compliance with Wis. Stat. § 343.305(4).

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This appeal comes from an order of judgment entered January 22, 2021, in the circuit court for Brown County,

Branch IV, the Honorable Kendall M. Kelley, presiding. The circuit court granted an order of judgment to the State, ruling that the information given to Ozimek after he refused to submit to an evidentiary chemical blood test to determine blood-alcohol concentration was not relevant to whether the officer complied with Wis. Stat. § 343.305(4), Informing the Accused.

The circuit court concluded that the officer complied with the Informing the Accused, and Ozimek's refusal was not affected by the comments by the officer after the refusal. Jan. 22, 2021 Hr'ng 16:2-6. Ultimately, the circuit court ordered Mr. Ozimek's operating privileges revoked for a period of one year. Jan. 22, 2021 Hr'ng 17:8-9.

B. Statement of Facts

On January 8, 2017, around 2 a.m., Ozimek turned the wrong way onto a one-way street. Refusal Hr'ng 5:19-23. Officer Tyler Dawson was in his patrol vehicle behind Ozimek's car when it turned the wrong way on the one-way street. Refusal Hr'ng 5:25. Officer Dawson activated his lights and pulled the vehicle over. Refusal Hr'ng 6:19-23. Ozimek was identified by his driver's license. Refusal Hr'ng 7:15. Ozimek admitted he came from a bar. Refusal Hr'ng 16:24-25. Ozimek had glossy, red, bloodshot eyes, was slurring his words, and Officer Dawson detected a strong odor of intoxicants coming from the vehicle. Refusal Hr'ng 8:18-20.

Officer Nick Walvort was working an OWI task force on January 8, 2017 and arrived on scene. Refusal Hr'ng 27:5, 21-25. Officer Walvort noted a strong odor of intoxicants emanating from the vehicle and observed Ozimek to have extremely bloodshot and glossy eyes, as well as slow, thick, and slurred speech. Refusal Hr'ng 29:11-14. Officer Walvort

asked Ozimek to perform standardized field sobriety tests. Refusal Hr'ng 29:14-15.

When Ozimek exited the vehicle, Officer Walvort requested to take Ozimek to an indoor location since it was a cold night, and Officer Walvort wanted to give him the best opportunity to perform the test in a warm environment. Refusal Hr'ng 29:19-30:4. At this point, Ozimek refused to perform the tests. Refusal Hr'ng 30:9-12. Officer Walvort placed Ozimek under arrest and Ozimek was transported to St. Vincent's Hospital. Refusal Hr'ng 31:7-17.

At St. Vincent's Hospital, Officer Walvort activated his audio recorder and read Ozimek the Informing the Accused form. Refusal Hr'ng 32:5-6. After every paragraph Officer Walvort read, he initialed next to it, indicating that he read the paragraph. Refusal Hr'ng 32:21-23. Officer Walvort read the text verbatim to Ozimek. Refusal Hr'ng 32:24-25. Officer Walvort requested that Ozimek submit to an evidentiary chemical test of his blood, and Ozimek refused by saying, "No." Refusal Hr'ng 33:3-6.

After refusing to submit to a blood draw, Ozimek asked what the further tests were that were referenced in the Informing the Accused form, and Officer Walvort explained he would have to consent to the initial test to be allowed to perform the other tests. Refusal Hr'ng 8-10. When Ozimek asked Officer Walvort what he should do, Officer Walvort informed Ozimek he was not allowed to give any legal advice. Refusal Hr'ng 33:10-12.

ARGUMENT

I. THE ADDITIONAL INFORMATION GIVEN TO OZIMEK BY OFFICER WALVORT AFTER COMPLYING WITH WIS. STAT. § 343.305(4) DID NOT AFFECT HIS DECISION TO REFUSE THE TEST.

There is no disagreement to two fundamental events in this case: (1) Officer Walvort read the Informing the Accused form verbatim in compliance with Wis. Stat. § 343.305(4), and (2) Ozimek refused to take the chemical test requested by Officer Walvort. Officer Walvort's verbatim recitation of the Informing the Accused form is in strict compliance with Wis. Stat. § 343.305(4). As the court stated, "It's very clear that the witness read the Informing the Accused as it's written." Jan. 22, 2021 Hr'ng 14:22-24. Counsel for Ozimek stated in regard to discussions between the officer and Ozimek after the Informing the Accused form was read, "had the officer literally ignored my client, we wouldn't be having this conversation." Refusal Hr'ng 52:11-12. There also is no dispute that when requested to submit to a chemical test, Ozimek refused.

Contrary to Ozimek's claim that *State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989) is the governing case for this issue, *In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 makes clear that because there is excess information provided, *Wilke* is *not* the governing case for this issue. When more information is provided in addition to the information required by Wis. Stat. § 343.305(4), the case is governed by *State v. Ludwigson*, 212 Wis. 2d 871 (Ct. App. 1997). *In re Smith*, 2008 WI 23, ¶ 78. When an officer exceeds his duty and gives extra information that is erroneous, "it is the defendant's burden to prove by a preponderance of the

evidence that the erroneous information *caused* the defendant to refuse to take the test.” *Ludwigson*, 212 Wis. 2d at 873 (emphasis added).

The three-part standard applied in *Cty. Of Ozaukee v. Quelle* and interpreted in *Ludwigson* to assess the adequacy of a warning process under the implied consent law governs here:

- 1) Has the officer not met, or exceeded his duty under § 343.305(4) to provide information to the accused driver;
- 2) Is the lack or excess of information misleading or erroneous; and
- 3) Has the failure to properly inform the driver affected his ability to make the choice about the testing?

Cty. of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995), *abrogated on other grounds by In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243.

As to the first part of the *Quelle* test, the State agrees that Officer Walvort exceeded his duty by providing extra information when Ozimek asked what the other tests were, and Officer Walvort informed him he needed to consent to the first test to receive any others. However, to the second part of the test, the excess information is not necessarily erroneous nor misleading. The text of the statute reads: “*If you take all the requested tests, you may choose to take further tests.*” Wis. Stat. § 343.305(4) (emphasis added). According to the statute’s text itself, the option of taking further tests is predicated upon taking the requested tests.

The last part of the *Quelle* test leaves the question of whether the alleged erroneous information supplied by Officer Walvort contributed to Ozimek's decision to refuse the chemical testing. *In re Smith*, 2008 WI 23, ¶ 85. As repeatedly pointed out in the record, Ozimek refused the test before he questioned what the other test options were. Officer Walvort's response could not have possibly been a factor in Ozimek's decision to refuse because the additional information was given *after Ozimek refused*. As the circuit court stated, "What happened . . . subsequent to that time doesn't un-ring the bell." Jan. 22, 2021 Hr'ng 16:2-3. The triggering event was Ozimek's "no," and, just as the circuit court offered the hypothetical of "[w]hether or not he then read the form backwards after," Ozimek's refusal happened at the moment he said "no." Jan. 22, 2021 Hr'ng 51:10-11.

Therefore, because the second and third parts of the *Quelle* test are not satisfied, Ozimek fails to meet his burden of proof as a matter of law.

II. THERE IS NO VIOLATION OF A CONSTITUTIONAL RIGHT.

Ozimek argues that the additional information given by Officer Walvort was a *constitutional* violation. Defendant-Appellant's Brief 11-12. Despite what Ozimek alleges, there is no constitutional right to "gather one's own test." In the state of Wisconsin, the right to a *second test*¹ is protected by statutory law as *an assurance* of constitutional due process. *State v. Walstad*, 119 Wis. 2d 483, 527, 351 N.W.2d 469, 491 (1984). This does not turn the right to a *second test* into a

¹ *Second test* is emphasized because it implies that there was a first test that occurred. Here, Ozimek refused to take the requested test, so there was no first test.

constitutional right. The right is “legislatively conferred.” *Walstad*, 119 Wis. 2d at 537.

Ozimek states in his brief that this right is a *constitutional right* without providing any actual evidence that the right to “gather one’s own test” is constitutional. *See, generally*, Defendant-Appellant Brief. This is a logical leap that is not supported with any relevant case law or compelling argument. Simply stating what one desires to be a constitutional right does not make it so.

CONCLUSION

This court should affirm the circuit court’s order that the statements made by Officer Walvort after Ozimek’s refusal are not relevant to determining whether Officer Walvort complied with Wis. Stat. § 343.305(4).

Dated this 30 day of September, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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 1,981 words.

**CERTIFICATE OF COMPLIANCE WITH WIS. STAT.
§ 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Dated this 30 day of September, 2021.

Electronically Signed By:
MERANDA HILLMANN
Assistant District Attorney