STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2022AP2082-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DANIAL C. WHEATON,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WAUSHARA COUNTY, THE HONORABLE GUY D. DUTCHER PRESIDING, TRIAL COURT CASE NO. 2021-CT-3

BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

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STATEMENT OF THE ISSUE

WHETHER THE MISINFORMATION PROVIDED TO MR. WHEATON WHEN DEPUTY ELLIOT READ THE INFORMING THE ACCUSED FORM TO HIM AFFECTED HIS DUE PROCESS RIGHT TO AN ALTERNATE TEST THEREBY MERITING SUPPRESSION OF THE STATE'S PRIMARY TEST RESULT OR, IN THE ALTERNATIVE, WHETHER THE MISINFORMATION SHOULD HAVE RESULTED IN THE BLOOD TEST RESULT BEING STRIPPED OF ITS PRESUMPTIONS OF AUTOMATIC ADMISSIBILITY UNDER WIS. STAT. § 885.235(1g)?

> Trial Court Answered: NO. The circuit court found that "Officer Elliot had misspoken when using the phrase 'drinking,'" however, it concluded that "the linguistic issue that was presented . . . [did not] rise[] to the level" of "addressing an absolute sobriety issue" which affected Mr. Wheaton's consent to a blood test. R33 at 76:24 to 75:1, 77:16 to 78:10; D-App. at 104-07.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon an undisputed set of facts. 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. Wheaton was charged in Waushara County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol

Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b), arising out of an incident which occurred on January 6, 2021. R11 at p.1.

Mr. Wheaton retained private counsel and subsequently filed several pretrial motions including, *inter alia*, a motion alleging that the arresting officer's misreading of the Informing the Accused [hereinafter "ITAF"] adversely affected his due process right to seek alternate testing and, therefore, should have resulted in suppression of the State's primary test. R26. In the alternative, Mr. Wheaton moved the circuit court to preclude the State from benefitting from the presumptions of automatic admissibility otherwise attendant to an implied consent test under Wis. Stat. §§ 343.305(5)(d) and 885.235(1g). *Id*.

An evidentiary hearing on Mr. Wheaton's motions was held on September 13, 2021, before the Circuit Court for Waushara County, the Honorable Guy D. Dutcher presiding. R33.

The State offered the testimony of two witnesses, Deputy Matthew Elliot and Sergeant Scott Eagan of the Waushara County Sheriff's Office. R33 at pp. 4-55. At the hearing in this matter, Deputy Elliot testified that when he read the information on the Informing the Accused form [hereinafter "ITAF"] to Mr. Wheaton, he "said the word 'drinking' instead of driving and realized [he] made the mistake and then reread that sentence." R33 at 11:8-11.

Based upon the aforesaid error, counsel for Mr. Wheaton proffered that the State's primary blood rest result should be suppressed because the misinformation made it appear to Mr. Wheaton that he was subject to an arrest for an absolute sobriety-related violation. R26; R33 at 65:18 to 68:1. Alternatively, counsel argued that if suppression was not an appropriate remedy, the blood test result ought to be stripped of the presumptions of automatic admissibility otherwise associated with implied consent tests under Wis. Stat. §§ 343.305(5)(d) and 885.235(1g). R26.

The circuit court rejected Mr. Wheaton's arguments on the ground that "the linguistic issue that was presented . . . [did not] rise[] to the level" of "addressing an absolute sobriety issue" which affected Mr. Wheaton's consent to a blood test. R33 at 76:24 to 75:1, 77:16 to 78:10; D-App. at 104-07.

Based upon the court's adverse judgment, Mr. Wheaton changed his plea to one of no contest on November 28, 2022. R54; D-App. at 101. By Judgment of Conviction entered on November 30, 2022, the circuit court ordered Mr. Wheaton's operating privilege revoked for a period of twenty-six months and sentenced him to seventy-five days confinement in jail. R54; D-App. at 102. It is from that adverse judgment that Mr. Wheaton appeals to this Court by Notice of Appeal filed December 5, 2022. R57.

STATEMENT OF FACTS

On January 6, 2021, Mr. Wheaton was stopped and detained in Waushara County by Deputy Matthew Elliot of the Waushara County Sheriff's Office for allegedly operating a motor vehicle with only one functioning headlamp. R33 at 5:4-19.

Upon making contact with Mr. Wheaton, Deputy Elliot observed that he had an odor of intoxicants coming from him, had glossy eyes, and had slurred speech. R33 at 6:13-19. Based upon these observations, Deputy Elliot had Mr. Wheaton submit to a battery of field sobriety tests. R33 at 7:6-8.

Mr. Wheaton allegedly failed the field tests and thereafter was placed under arrest for operating while intoxicated. R33 at 9:16-18. After being taken into custody, Mr. Wheaton was secured in the rear seat of the officer's squad whereupon Deputy Elliot read the information contained within the Informing the Accused form [hereinafter "ITAF"] to him. R33 at 10:14-23.

At the time Deputy Elliot read the ITAF to Mr. Wheaton, however, he did not initially recite the information to him accurately. R33 at 11:3-6. Instead, the deputy testified that he misspoke and told Mr. Wheaton he had been arrested for "drinking" instead of "driving." R33 at 11:8-12. The deputy further claimed that he "*believe[d* he] restarted the sentence and corrected [him]self." R33 at 15:14-16. Despite this claim, the deputy admitted that he never "identif[ied] to Mr. Wheaton which portion of the sentence [he] misspoke about." R33 at 15:20-22. Ultimately, when Mr. Wheaton was asked to consent to an evidentiary chemical test of his blood, he consented and a blood specimen was obtained. R11 at p.3.

STANDARD OF REVIEW ON APPEAL

The issue presented to this Court for review concerns whether the lower court erred when it found as a matter of fact that a misreading of the ITAF had occurred, but concluded as a matter of law that the misinformation provided to Mr. Wheaton did not rise to a sanctionable level. Because the question before the Court is of a purely legal nature and is based upon an uncontroverted set of facts, it is reviewed *de novo*. *Lands' End, Inc. v. City of Dodgeville*, 2014 WI App 71, ¶ 52, 354 Wis. 2d 623, 848 N.W.2d 904.

ARGUMENT

I. DEPUTY ELLIOT'S FAILURE TO COMPLY WITH § 343.305(4) OF THE IMPLIED CONSENT STATUTE ADVERSELY AFFECTED MR. WHEATON'S DUE PROCESS RIGHTS.

A. Framing the Issue Presented.

It is Mr. Wheaton's contention that by informing a person that they have been arrested for an offense that involves "*drinking*, driving, or operating a motor vehicle while under the influence," it appears that the person is subject to Wisconsin's absolute sobriety law because any "drinking" is prohibited regardless of whether the person was "under the influence." This problem is particularly acute when the individual has a commercial driver's license as does Mr. Wheaton. R33 at 16:4-6. The reason that the problem is especially sensitive with respect to commercial license holders is because Wis. Stat. § 346.63(7)(a)1. prohibits individuals from driving or operating commercial motor vehicles with an alcohol concentration above 0.00. Wis. Stat. § 346.63(7)(a)1. (2021-22).

Moreover, language on the ITAF only a few sentences later further aggravates the problem when it apprises the accused that if they have a test result which shows that they are operating in excess of the prohibited limit—in this instance, that limit is *absolute sobriety* because the offense need only involve "drinking" according to the officer's misrepresentation—their operating privilege will be administratively suspended. Under these circumstances, a suspect lay person can easily be misled to believe that *any drinking* will result in administrative suspension of the person's operating privilege.

For the reasons set forth below, it is Mr. Wheaton's position that the circuit court's treatment of this error as nothing more than an innocuous misstep misses the mark when it comes to the breadth and depth of its impact upon Mr. Wheaton's due process rights.

B. The Statutory Provisions at Issue.

Before an examination of the issue presented by Mr. Wheaton for review can properly be undertaken, it is first necessary to understand the statutory context from which it is derived. To that end, § 343.305 provides that any person who drives or operates a motor vehicle on a public roadway in Wisconsin 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 an operating while intoxicated violation. Wis. Stat. § 343.305(2) & (3)(a) (2021-22).

A law enforcement officer who seeks an implied consent test from a suspected impaired driver is obligated to provide the accused with certain information regarding their rights and responsibilities under the implied consent law. Wis. Stat. § 343.305(4) (2021-22). The information set forth in subsec. (4) of the implied consent statute is transcribed verbatim onto a State-issued form entitled "Informing the Accused." It is this form which the officer is obligated to read aloud to the accused prior to requesting a sample of their blood, breath, or urine.

The individual who agrees to submit to an implied consent test is entitled to exercise their statutory right to an alternate test or, as always, may independently exercise their constitutional right to gather additional test evidence on their own accord. Wis. Stat. § 343.305(5)(d) (2021-22); *see generally*, *Washington v. Texas*, 388 U.S. 14, 16-17 (1967).

C. Examining the Facts in the Context of the Law.

1. The Rights Impacted by the Misinformation.

In the instant matter, it is uncontested that Deputy Elliot did not comply with the mandate set forth in § 343.305(4) because when he recited the information set forth on the ITAF, instead of reading "you have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, . . ." as the ITAF dictates, Deputy Elliot instead told Mr. Wheaton that he had "either been arrested for an offense that involved ***drinking***, driving or operating a motor vehicle while under the influence of alcohol or drugs, ..." This misinformation impacted upon a fundamental constitutional right.

It is a well-settled and long-standing principle of Fourteenth Amendment jurisprudence that an accused enjoys the right to gather evidence in his or her defense. *See generally, State v. Schaefer*, 2008 WI 25, ¶ 63, 308 Wis. 2d 279, 746 N.W.2d 457, citing *Washington*, 388 U.S. at 16-17. Access to such self-actualized evidence is both an integral and critical part of an accused's constitutional due process rights. It 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).

In *Chambers*, the High Court admonished that the most fundamental of all constitutional rights is the right of an accused to have "an opportunity to be heard in his defense. . . . " *Id.* at 294, quoting *In re Oliver*, 333 U.S. 257, 273 (1948). In a later decision, the Court observed that an accused enjoys a "right to present his own version of events in his own words." *Rock*, 483 U.S. at 52.

The foregoing federal ruminations were also echoed by the Wisconsin Supreme Court. In *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, the paramount importance afforded the right to present a defense was described as independently emanating from the Wisconsin Constitution as well. The *St. George* court stated that Article I, § 7 of the Wisconsin Constitution "'grant[s] defendants a constitutional right to present evidence.'" *St. George*, 2002 WI 50, ¶ 14, citing *State v. Pulizzano*, 145 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Ultimately, there can be no doubt that constitutional due process compels the government to allow an accused to access evidence in order to best prepare his or her defense.

Apart from constitutional due process, the misleading information provided by Deputy Elliot to Mr. Wheaton also adversely impacted upon his statutory due process rights. Time and time again, the statutory 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. *See State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986). Its value in this regard—because it is potentially exculpatory—cannot be overstated.

All of the courts which have examined the *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).

2. The Mechanism of Interference.

Now that it is established that a suspected drunk driver has both a statutory and a constitutional due process right to access chemical test evidence on their own accord, the next question to examine is whether Deputy Elliot interfered with this right by misinforming Mr. Wheaton that he was being arrested merely for "drinking" and driving.

The factual record in this regard could not be more clear. Deputy Elliot admitted that he not only misread the ITAF by erroneously inserting the word "drinking" into the paragraph which informs the accused of the offense for which they have been arrested, but he further conceded that when he "believed" he corrected his error, he *never* explained to Mr. Wheaton what he had done wrong. Clearly, this would still leave Mr. Wheaton with an impression that *any* "drinking" and driving could be prosecuted, *especially* because he holds a commercial driver's license and therefore may conclude that the commercial rules relating to absolute sobriety were applicable to him.

An individual, particularly a commercial license holder, acting reasonably in light of the foregoing misleading information would believe that *any* consumption of an alcoholic beverage prior to operating a motor vehicle was illegal because the express identification of "drinking" as something ***separate***, ***distinct***, and ***apart from*** "driving or operating a motor vehicle while under the influence of alcohol or drugs, . . ." sends no other message otherwise why would it be mentioned separately? If it was not reasonably inferred to be a distinct offense, then the accused would have to *assume* that the ITAF was being redundant. It makes no sense for a person to conclude that the information with which they are being provided was intended to be *redundant*. It is a much farther leap to reach this conclusion than it is to reach the conclusion that "drinking" and driving is an offense distinct from operating "under the influence."

The aforesaid problem can be understood by example. If Mr. Wheaton believes that he is facing a prosecution for *any* "drinking" in which he might have engaged on the evening of his arrest, he might be led to believe it is "not worth it" to seek additional chemical test evidence because even if the result was well below the legal limit, let us presume a .04 for example, it is still evidence of "drinking" and therefore is inculpating in that regard *even though* it would be exculpating in reality. As a result, the individual laboring under the misapprehension that any "drinking" will result in prosecution or administrative suspension may decide that it is not worth it to go through the time and expense of seeking either an alternate or additional test. In the context of the misinformation provided by Deputy Elliott, who in their right mind would bother to seek an alternate test when they knew they had consumed *some amount* of alcohol prior to driving? The misinformation has thus impermissibly interfered with Mr. Wheaton's right to access evidence on his own accord both as a component of the statutory due process right under *McCrossen*, *Walstad*, and *Renard*, and as a component of the constitutionally guaranteed right to gather evidence on his own behalf under *Taylor*, *Chambers*, and *In re Oliver*.

Either way, no matter how one "slices this pie," the individual who finds themselves in Mr. Wheaton's position must decide what is accurate versus what is not. Surely the legislature, in drafting § 343.305(4), could not have intended such an absurd result. The whole purpose underlying the information set forth in § 343.305(4) was to allow the accused to make an ***informed choice*** about whether to submit to an implied consent test and whether to exercise their due process right to alternative testing. *See generally*, *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). On the night of his arrest, an accused should not be left "flailing in the wind" to decide on his own what portions of the information with which he has just been provided have been accurately relayed versus those which have not.

3. Remedies.

Given that it is irrefutable that Mr. Wheaton was misinformed by Deputy Elliot, the question now becomes what remedy lies. Since the right to gather one's own test is cut from both a constitutional and statutory fabric, suppression of the State's test result 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 acknowledged as much in *McCrossen* when it forged a remedy for the statutory violation. *McCrossen*, 129 Wis. 2d at 286. Thus, when a

law enforcement officer informs an accused that they are being arrested for an offense which involved any "drinking"—which is precisely what transpired here—the only appropriate remedy is suppression.

Alternatively, if this Court does not reach the same conclusion, then at a minimum, the State's test should be stripped of the presumptions of automatic admissibility set forth in §§ 343.305(5)(d) and 885.235(1g). Over three decades ago, the Wisconsin Supreme Court stated that "if the procedures of sec. 343.305, Stats., are not followed the State cannot rely on the favorable statutory presumptions concerning the admissibility of chemical-test results set forth in [§§ 343.305(5)(d) and 885.235(1g)]." *State v. Zeilke*, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (1987). According to the court in *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, "if the circuit court determines that the officer failed to inform the accused in compliance with the statute," a remedy must lie regardless of whether the misinformation "would *actually* affect the driver." *Smith*, 2008 WI 23, ¶ 63.

CONCLUSION

Because Mr. Wheaton was misled with respect to the conduct for which he was being arrested, this misinformation adversely impacted upon his right to make an intelligent and informed choice about whether to exercise his due process right to an alternate test, and therefore, the State's primary blood test result should have been suppressed pursuant to *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986). Alternatively, the test result should, at a minimum, have been stripped of the presumptions of automatic admissibility set forth in Wis. Stat. § 343.305(5)(d) and 885.235(1g) under *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. Mr. Wheaton respectfully requests that this Court remand his case to the lower court with directions to enter an order not inconsistent therewith.

Dated this 5th day of March, 2023.

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 4,201 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 5th day of March, 2023.

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 5th day of March, 2023.

MELOWSKI & SINGH, LLC

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