STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP2082-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

DANIAL C. WHEATON,

Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUSHARA COUNTY, THE HONORABLE GUY D. DUTCHER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Matthew R. Leusink
District Attorney
Attorney for Plaintiff-Respondent
State Bar No 1091526
209 S. Saint Marie Street
Wautoma, WI 54982

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STATEMENT OF THE ISSUE

Did Officer Elliott's reading of the Informing the Accused constitute either a due process violation requiring suppression of the subsequent blood result, or in the alternative, a violation of 343.305(4) requiring the loss of automatic admissibility?

Circuit Court Answer: No.

STATEMENT ON ORAL ARGUMENT

The State does not request oral argument in this appeal as the argument can be addressed through briefing.

STATEMENT ON PUBLICATION

The State does not request publication as the case can be decided based on the application of existing case law to the facts in the case, and the case is a one-judge appeal.

STATEMENT OF FACTS

On January 5, 2021, Deputy Matthew Elliott, a Deputy with the Waushara County Sheriff's Department conducted a traffic stop for an equipment violation at S. County Road A and State Highway 49 within Waushara County, Wisconsin. R33:5. Accompanying Deputy Elliott was Sergeant Scott Eagan. *Id*. In making contact with the driver, who was identified as Danial Wheaton, the Deputy noticed signs of intoxication. R33:6. Deputy Elliott administered field sobriety exercises on Wheaton, after

which Sergeant Eagan administered a preliminary breath test, which displayed a result of 0.133. R: 7-9. While Sergeant Eagan was administering the preliminary breath test, Wheaton was asked what the legal limit to drink while driving was, to which Wheaton replied ".08." R33:9.

After the result of the preliminary breath test, Wheaton was told that he was being placed under arrest for OWI. *Id*. Deputy Elliott then began the process of obtaining a sample of Wheaton's blood. R33:10. Deputy Elliott read the Informing the Accused form to Wheaton. R33:10-11. By Deputy Elliott's admission, while reading the Informing the Accused form, he inadvertently said the word "drinking" in place of the word "driving." R33:11. Deputy Elliott later testified that he "realized [he] made the mistake and reread the sentence," and proceeded to read the rest of the form verbatim. *Id*.[1] At the conclusion of reading the form, Wheaton agreed to provide a sample of his blood for testing. *Id.*

Wheaton, by his attorney, later filed multiple motions to suppress. R24,25,26. One of those motions requested that the blood result be either suppressed or the State be precluded from relying on automatic admissibility of that blood result. R26. Wheaton asserted that Deputy Elliott's inadvertently saying the word "drinking" created the impression for the

[1] The squad video shows Deputy Elliott stating "You have either been arrested for an offense that involves drinking," then correcting himself and saying "that involves driving or operating a motor vehicle while under the influence…" and proceeding with reading the rest of the form. Squad video at 36:30-40.

defendant that he was subject to Wisconsin's absolute sobriety law and in doing so violated Wheaton's right to gather evidence in his defense, did not provide Wheaton notice of what he was charged with, and violated the standard set by *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995).[2] R26.

The motions were heard by the Court on September 13, 2021, where testimony was taken from Deputy Elliott and Sergeant Eagan. R33. In addition, the squad video was played for the court and entered into evidence. *Id*. at 12-15. Deputy Elliott testified that at no point did the phrase "absolute sobriety" come up in discussions with Wheaton that night, and also didn't tell Wheaton that he was being arrested for anything other than OWI. R11-12.

The circuit court denied the various motions to suppress. R33:68-78. Specific to the motion related to the Informing the Accused form, the court stated,

> "The court recognizes that Officer [Elliott] had misspoken when using the phrase drinking, when very clearly he had intended to use the phrase driving.
>
> Could that have been more appropriately corrected? I suppose you arguably could say that it could have been. What matters though is that he did correct it. He corrected it in a manner that is entirely consistent with what it is before us here.

[2] Wheaton filed additional motions to suppress which were also denied by the court. He does not renew those motions on appeal.

I don't embrace the notion that that linguistic misstep, the articulation leaving a matter that needed to be resolved and was corrected, creates a degree of infirmity that would, under 343.305, necessitate the Court suppressing what was otherwise a very clear and consensual provision of a blood specimen by Mr. Wheaton.

The facts in this case unequivocally indicate that Mr. Wheaton was clearly and well aware of what it was taking place. There was nothing to suggest to him in any way, shape or form that he was addressing an absolute sobriety situation, as the briefing would indicate and the argument would indicate that he may have believed that he was.

Frankly, the Court, if I were to embrace this argument, would basically be—would be finding that unless the Informing the Accused form is read in a manner that is absolutely, positively without question precise and without he officer misstating anything or misspeaking any way, then that throws out any subsequent test result.

That's not what 343.305 is about. The linguistic issue that was presented, if it was any, and I don't even think that it rises to that level. There's no doubt that this is about drinking and it's about driving and about the belief that Mr. Wheaton was under the influence of an intoxicant."

R33:76-78.

Wheaton subsequently entered a plea to the Operating With a Prohibited Alcohol Concentration Count, and now appeals. R54, 55.

ARGUMENT

This court's review of a circuit court's order denying a motion to suppress presents "a question of constitutional fact." *State v. Dearborn*, 2010 WI 84 ¶13, 327 Wis. 2d 252, 786 N.W. 2d 97. A circuit court's findings of fact should be sustained unless they are clearly erroneous, but the court reviews the application of those facts to the law de novo. *State v. Truax*, 2009 WI App 60, ¶18, 318 Wis. 2d 113, 767 N.W. 2d 369.

I. DEPUTY ELLIOT'S READING OF THE INFORMING THE ACCUSED DID NOT ADVERSELY AFFECT WHEATON'S DUE PROCESS RIGHTS

The confrontation and compulsory process clauses, along with the Wisconsin Constitution, provide defendants with the right to present evidence in their own defense. *State v. St. George*, 2002 WI 50, ¶14, 252 Wis. 2d. 499, 643 N.W. 2d 777. The court has noted, however, that this right is not unfettered. *Id*. at ¶15.

Wheaton contends that Deputy Elliot's use of the word "drinking" when reading the first sentence of the informing the accused misinformed Wheaton, a commercial driver's license holder, that he was being arrested "merely for 'drinking' and driving." App. Brief at 11. As such, Wheaton claims that he had the impression that he was subject to an absolute sobriety

law and was deprived of his right to gather evidence in his own defense and request an alternative test. *Id*.

The problem with this argument stems from the factual findings that the court made in this case which are amply supported by the facts in the record. The court found that "[t]he facts in this case unequivocally indicate that Mr. Wheaton was clearly and well aware of what it was taking place. There was nothing to suggest to him in any way, shape or form that he was addressing an absolute sobriety situation…" R33:77.

This is borne out by the testimony of law enforcement and the video that was admitted into evidence. Wheaton's PBT result was 0.13, and Wheaton responded when asked what the legal limit was, he said ".08". R33:9. This would indicate that Mr. Wheaton knew that this was not an absolute sobriety situation. Law enforcement specifically told Wheaton that he was being arrested for OWI. *Id*. Furthermore, that offense was recited by Deputy Elliott while reading the Informing the Accused. There was no sort of mention of absolute sobriety during the investigative portion of the arrest or the post-arrest collection of blood. R33:11-12. In addition, the second portion of the first paragraph of the informing the accused, which Deputy Elliott read, contained the phrase "or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an alcoholic beverage." Wis. Stat. Sec 343.305(4); R33:11.

That would have plainly told Wheaton that any sort of absolute sobriety regulations would have only applied to a commercial motor vehicle.

The court further found that Deputy Elliott corrected himself, noting that while one could argue he could have done it in a manner more appropriate, "what matters thought is that he did correct it." R33:77. The assertion by Wheaton that "it is irrefutable that Mr. Wheaton was misinformed by Deputy Elliott" is contradicted by these findings by the circuit court, which are not clearly erroneous. Because of these findings by the circuit court, clearly supported by the evidence, Wheaton cannot convincingly claim that he was deprived either of the right to present a defense or the right to request an alternative test.

Wheaton does not cite, in his brief, any case law that is precisely on point, but argues the sample should be suppressed pursuant to *State v. McCrossen*, 129 Wis. 2d 277, 385 NW 2d 161 (1986). This case is distinguishable. *McCrossen* involved a situation where the defendant had actually requested an alternative test, which was not provided, and was incorrectly told that she was have to pay for an alternative test. *Id*. at 280. This is not comparable with the present case as the court found that the defendant wasn't misinformed but in fact knew what he was being arrested for.

II. THE THREE-PRONGED TEST IN STATE V. QUELLE DO NOT SUPPORT EITHER SUPPRESSION OF THE EVIDENCE OR REMOVING AUTOMATIC ADMISSIBILITY

Wis. Stat. Sec. 343.305(4) provides the requirements for information that an officer must give to a subject under implied consent before requesting a sample of their blood be given. This is the information given in the Informing the Accused form read to Wheaton. The implied consent statute is meant to help facilitate the collection of evidentiary samples of breath or blood to aid in the prosecution of drunk drivers, not hinder it. *State v. Zielke*, 137 Wis. 2d 39, 46, 403 N.W. 2d 427 (1987) (quoting *State v. Brooks*, 113 Wis. 2d 347, 355-6, 335 N.W. 2d 354, 1983)). Non-compliance with implied consent law would result in a forfeiture of the right to revoke for refusal and the loss of automatic admissibility. *See Zielke* at 49.

The Court of Appeals articulated a three-prong test for assessing the adequacy of the warnings given under the implied consent law in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W. 2d 196 (Ct. App. 1995). The three questions are: "1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver; (2) Is the lack or oversupply of information misleading; *and* (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?" *Id*. at 280. The

court further clarified matters in *Washburn County v. Smith,* 2008 WI 23, 308 Wis. 2d 65, 746 N.W. 243, stating that the *Quelle* inquiry did not apply when the officer failed to convey all the required information in the informing the accused but rather when additional information was provided. *Id*. at ¶ 64.

This is not a situation where Deputy Elliott failed to convey the information in the informing the accused to the defendant. The record reflects that he did read the informing the accused to Wheaton, and the accidental insertion of the word "drinking" before correcting himself and proceeding to read the remainder of the form verbatim, does not vitiate that. So the correct analysis would be under *Quelle*.

In the present matter, the State would dispute that any of the three *Quelle* prongs have been met. As to the first, the State would argue that word "drinking" in the context in which it was stated by Deputy Elliott did not mean that he was exceeding his duty to provide information to Wheaton, given the court's findings that Deputy Elliott corrected himself.

Even if the Court of Appeals were to find that the first prong was met, the second and third prongs of *Quelle* cannot be met. In the context of the arrest, the use of the word "drinking" was not misleading given that Wheaton was properly informed what he was being arrested for. Because Wheaton was properly informed as to what he was arrested for, Deputy Elliott's reading of the Informing the Accused did not affect his ability to make the choice about chemical testing.

CONCLUSION

The Circuit Court properly found that the Deputy's reading of the Informing the Accused did not constitute either a Due Process violation requiring suppression or a violation of 343.305(4) requiring loss of automatic admissibility. Therefore, the Court's order denying the motion should be affirmed.

Respectfully submitted,

Dated this 5th Day of May, 2023

Electronically signed by Matthew R. Leusink

Matthew R. Leusink

District Attorney

State Bar No. 1091526

WAUSHARA COUNTY DISTRICT ATTORNEY'S OFFICE

209 S. Saint Marie Street

PO Box 430

Wautoma, WI 54982

Attorney for Plaintiff-Respondent

RULE 809.19(8)d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b),(bm), and (c) for a brief. The length of this brief is 2514 words.

Electronically signed by Matthew R. Leusink

Matthew R. Leusink

District Attorney

State Bar No. 1091526

WAUSHARA COUNTY DISTRICT ATTORNEY'S OFFICE

209 S. Saint Marie Street

PO 430

Wautoma, WI 54982

Attorney for Plaintiff-Respondent