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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE APPLIES THE WRONG STANDARD TO THE CIRCUMSTANCES OF THE INSTANT MATTER.

The entire premise of the State's rebuttal is its assertion that the appropriate test to apply in the instant case is that set forth in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995). State's Response Brief, at pp. 11-12 [hereinafter "SRB"]. According to the State, the foundation for its argument is the circuit court's finding that "Mr. Wheaton was clearly and well aware of what was taking place." SRB, at p.9. It is Mr. Wheaton's position, however, that both the lower court's finding and the State's application of *Quelle* are misguided for the reasons set forth below.

After the procedural violation test set forth in *Quelle* was first described, it was subsequently abrogated in part by *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. In *Smith*, the Wisconsin Supreme Court stated:

> The *Schirmang* court of appeals interpreted *Wilke* as holding that an officer necessarily fails to substantially comply with Wis. Stat. § 343.305(4) whenever the officer misstates penalties that would actually affect the driver given the driver's record. *Shirmang's* characterization of *Wilke* is not an accurate statement of the *Wilke* holding. The *Wilke* case involved a law enforcement officer's failure to give the defendant one component of the statutorily required information (relating to penalties), and the *Wilke* court of appeals rested its decision on this fact. According to *Wilke*, if the circuit court determines that the officer failed to inform the accused in compliance with the statute, the circuit court "'shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question.' Sec. 343.305(9)(d)." **The *Wilke* opinion says nothing about misstatements of penalties that would actually affect the driver**.
>
> The *Schirmang* court of appeals was correct, however, to rely upon *Wilke* in reaching its decision. *Schirmang*, like *Wilke*, involved a law enforcement officer's failure to give the defendant the statutorily required information. Thus, the *Wilke* and *Schirmang* cases present the same fact situation. If the *Schirmang* court of appeals was to adhere to *Wilke*, the *Schirmang* court of appeals was required to reverse the circuit court's order revoking Schirmang's operating privileges. **Language in *Quelle* (and any subsequent cases applying *Quelle*) stating that the *Quelle* three-prong inquiry, including prejudice, applies when a law enforcement officer fails to provide the statutorily required information is withdrawn**.

Washburn v. Smith, 2008 WI 23, ¶¶ 63-64 (emphasis added). The foregoing holding, which withdraws that portion of the *Quelle* test requiring "actual harm" to be established by a defendant in a circumstance where there has been a misstatement of the information on the Informing the Accused form applies to the facts of this case.

It is worth emphasizing that portion of the foregoing language which holds that "**[t]he *Wilke* opinion says nothing about misstatements of penalties that would actually affect the driver**." *Smith*, 2008 WI 23, ¶ 63 (emphasis added). If this Court adopted an approach in which it required actual harm to Mr. Wheaton, as the State suggests, based upon the misinformation he was given regarding the nature of the offense for which blood test evidence was being sought from him, the language in both *Smith* and *Wilke* which expressly states that there need not be misstatements "that would *actually* affect the driver" would be rendered mere surplusage.

Based upon the foregoing, it is Mr. Wheaton's assertion that the "actual harm" analysis undertaken by the State in its brief, and the lower court's finding regarding what Mr. Wheaton understood "was taking place," are not germane to the issue before this Court. *Smith* simplified the required analysis when there has been an erroneous statement of the statutorily required information provided to a suspected drunk driver by a law enforcement officer during the recitation of the information contained in Wis. Stat. § 343.305(4). His point regarding the due-process aspect of how this misinformation could affect his decision-making process was *not* to address an "actual harm" element—because he believes this is not required—but rather was to point out just how serious a problem the misinformation creates *and how that problem can impact upon a person's decision whether to exercise their **due process** right to an alternate test*. Perhaps this is why the *Quelle* test was abrogated in part by the *Smith* court, *i.e.*, it recognized how misinformation can have serious consequences.

In fact, in *Smith*, the Wisconsin Supreme Court described an inconsistency in the testimony of the arresting officer in which he apparently told the defendant that if he refused to submit to an implied consent test, he could "get a hearing [on his refusal within ten days," when in actuality, the *request* for the hearing must be made within ten days and a defendant does not "get a hearing" within that time period. *Smith*, 2008 WI 23, ¶¶ 42-43. Additionally, when the officer informed Smith that his license would be revoked for a period of one year if he refused, he

did so without knowing what the penalties in Smith's home state of Louisiana would actually be. *Id*. ¶ 49.

Despite taking note of the deficiencies alleged by Smith, when the court disposed of the "actual harm" element of the *Quelle* test for future cases, it did not do so by directly linking the abandonment of this element to the fact that Smith could have been misled by the erroneous information he received from the officer. To the contrary, the *Smith* court found that the officer had complied with the implied consent law by *correctly* reciting the information on the Informing the Accused form. *Id*. ¶ 65. What the *Smith* court instead did, after analyzing the *Quelle* test and two other decisions—namely *State v. Wilke*, 152 Wis. 2d 243, 251, 448 N.W.2d 13 (Ct. App. 1989), and *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997)—was to craft a new rule which no longer required proof that "actual harm" was a necessary element when a law enforcement officer erroneously recites the Informing the Accused form itself. *Id*. ¶ 72. According to the *Smith* court, harm need only be established when there is an oversupply of information after the Informing the Accused form has been properly recited. *Id*.

In this fashion, the *Smith* court preserved the test set forth in *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), which involved *additional* information being provided to the suspect *apart from* the Informing the Accused form—and *not* a circumstance in which the actual law itself was misstated. "Extra" information has always been understood to mean information which does not appear on the form itself, but which the officer has provided *beyond* what the legislature has mandated. "Extra" information would include such things as discussing specific penalties with a suspect, occupational license issues, court procedures, *etc*.. The question in these circumstances is whether the "extra" information has misled the accused with respect to his or her rights and responsibilities under the implied consent law. Legislatively-mandated information, *i.e.*, information which the legislature has expressly written into the language of § 343.305(4), can ***never*** be viewed as "extra" information. When this information is provided in error, a sanction *must* lie.

In Mr. Wheaton's case, erroneous information had been provided to him by the arresting officer *during* the recitation of the form, thus sanctions must lie. Mr. Wheaton's circumstance is not akin to that described in *Ludwigson* in which there had been a correct recitation of information followed by an *oversupply* of additional information. Given that this is the case, the lower court's exploration of what Mr. Wheaton understood and the State's reliance on *Quelle* is misplaced because Deputy

Elliot's failure did not constitute an "oversupply" of information. When approaching the question before this Court from the *Smith* perspective, it is clear that, *during* the recitation of the Informing the Accused form itself, Deputy Elliot erroneously told Mr. Wheaton that he was being arrested for "drinking" and driving which clearly implies what Mr. Wheaton has maintained all along, *i.e.*, the mere act of drinking any alcoholic beverage and operating a motor vehicle is sanctionable. It is not necessary to get lost in an analysis of whether this information would have "actually affected" Mr. Wheaton's decision to refuse a chemical test. It is enough that it is highly inaccurate and untrue.

In the end, if this Court adopts the *Quelle* approach suggested by the State in which "actual harm" to Mr. Wheaton must be proved, the language in both *Smith* and *Wilke* which expressly states that there need not be misstatements "that would *actually* affect the driver" would be rendered mere surplusage. There is no authority which would permit this Court to "read these sentences out of" those opinions. They must be given their plain and unambiguous effect which, in the instant case, means that Deputy Elliot's misstatement *during the recitation* of the ITAF forms a sufficient basis for sanctioning the State by suppressing the blood test result.

Based upon the above and foregoing arguments and authority, and further, based upon Mr. Wheaton's initial brief, Mr. Wheaton respectfully requests that this Court remand his case to the lower court with directions to suppress the chemical test result in this matter.

Dated this 12th day of May, 2023.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
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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 1,631 words.

I also 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 12th day of May, 2023.

MELOWSKI & SINGH, LLC

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