STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2023AP838

In the Matter of the Refusal of Bryson Keith Williams:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BRYSON KEITH WILLIAMS,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH II, THE HONORABLE JENNIFER R. DOROW PRESIDING, TRIAL COURT CASE NO. 22-TR-2766

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 MISLEADING STATEMENT MADE BY THE ARRESTING OFFICER TO MR. WILLIAMS **PRIOR TO** HIS RECITATION OF THE INFORMING THE ACCUSED FORM THAT "NOT EVERYTHING IN THE FORM WOULD APPLY TO HIM" ROSE TO THE LEVEL OF A SANCTIONABLE VIOLATION OF THE IMPLIED CONSENT LAW DESPITE THE OFFICER'S SUBSEQUENT ACCURATE RECITATION OF THE FORM?

> Trial Court Answered: NO. The circuit court concluded that, pursuant to *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), *inter alia*, Mr. Williams was obligated to establish that he was actually harmed by the misleading information. R48 at p.50; D-App. at 104.

STATEMENT ON ORAL ARGUMENT

Mr. Williams does NOT REQUEST oral argument as this appeal presents a question of law based upon a set of uncontroverted facts and upon authority which is well established. Oral argument would neither further illuminate the facts nor enhance what is the settled interpretation of the law.

STATEMENT ON PUBLICATION

Mr. Williams does NOT REQUEST publication of this Court's decision as the law relating to the issue he raises is manifest and not in need of further clarification or qualification.

STATEMENT OF THE CASE

On April 27, 2022, Mr. Williams, was stopped and detained in the City of Waukesha, Waukesha County, by Officer Mark Pavlik of the Waukesha Police Department for allegedly obstructing traffic by parking his motor vehicle in a designated lane of travel. R48 at 5:23 to 6:18.

As a result of his contact with law enforcement, Mr. Williams was ultimately arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R48 at 14:5-16. Because Mr. Williams also allegedly refused to consent to an implied consent test, he was additionally charged with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). R1; R48 at 14:17 to 15:13.

Mr. Williams timely requested a hearing on the lawfulness of his alleged refusal, however, for reasons unknown, the circuit court believed it had not received his request and ordered that his driver's license be revoked. R16. Upon being advised that Mr. Williams' operating privilege had been revoked for the refusal, his counsel filed a written request moving the court to set aside the erroneously entered Conviction Status Report and provided proof to the Court that a request for a refusal hearing had, in fact, timely been made. R19. Upon receipt of counsel's letter, the circuit court rescinded its order revoking Mr. Williams' operating privilege for the alleged refusal. R21 & R22.

Thereafter, Mr. Williams filed two motions regarding (1) the constitutionality of Wis. Stat. § 343.305 and (2) whether he was misled by information the arresting officer provided him immediately prior to the recitation of the Informing the Accused form. R22 & R23, respectively. The latter motion was premised upon the fact that, before he read the Informing the Accused form, Officer Pavlik told Mr. Williams that "not everything on the form would apply to him." R48 at 35:9-13.

An evidentiary hearing was held on Mr. Williams' motions on May 10, 2023. R48. At the hearing, the State offered the testimony of a single witness, Officer Mark Pavlik of the Waukesha Police Department. R48 at pp. 4-43. At the conclusion of the hearing, the circuit court entertained extensive oral argument by the parties regarding the pretrial motion issues raised by Mr. Williams. R48 at pp. 44:12 to 57:16.

At the conclusion of the argument, with respect to his challenge premised upon the misleading information he received prior to the recitation of the Informing the Accused form, the court held that *Quelle*, 198 Wis. 2d 269, and *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), controlled over *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, and therefore, Mr. Williams was required to establish that he was *actually* harmed by the unexplained and unqualified information with which he was provided prior to the recitation of the form. R48 at 50:6-22; D-App. at 104. Thereafter, the clerk docketed the court's judgment against Mr. Williams on May 10, 2023, and the court rendered a formal order in accordance with its judgment. R47.

It is from the adverse decision of the circuit court that Mr. Williams appeals to this Court by Notice of Appeal filed on May 11, 2023. R38.

STATEMENT OF FACTS

On April 27, 2022, Officer Mark Pavlik of the Waukesha Police Department observed a vehicle stopped in the middle of traffic in a no parking zone. R48 at 5:23-25. Officer Pavlik noticed that it appeared the driver was asleep, so he activated his emergency lights and approached the driver. R48:6-3-12.

After approaching Mr. Williams, Officer Pavlik ostensibly observed that he had an odor of intoxicants emanating from his person and that he had bloodshot eyes. R48 at 8:18-23. Based upon these observations, Officer Pavlik asked Mr. Williams to submit to a battery of field sobriety tests. R48 at 9:12-14. Mr. Williams performed the requested tests, apparently displaying sufficient indicia of impairment such that he was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant. R48 at 14:5-16.

After securing Mr. Williams in the rear of his squad and transporting him to the hospital, Officer Pavlik read the Informing the Accused form to him. R48 at 14:20-22. Officer Pavlik read the contents of the form verbatim to Mr. Williams, however, immediately prior to reciting the information, he told Mr. Williams that "not everything on the form would apply to him." R48 at 14:20-24; 35:9-13. When asked whether he would consent to an evidentiary chemical test of his blood, Mr. Williams allegedly refused to submit to the test and he was charged with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). R1.

STANDARD OF REVIEW

The issue presented in this appeal is a question of law premised upon an undisputed set of facts. As a result, this Court reviews the question of law *de novo*. *State v. Lee*, 175 Wis. 2d 348, 354, 499 N.W.2d 250 (Ct. App. 1993).

ARGUMENT

II. FAILING TO PROPERLY ADVISE THE ACCUSED OF WHICH PARTS OF THE INFORMING THE ACCUSED FORM "DO NOT APPLY" TO HIM IMPERMISSIBLY INTERFERES WITH THE DUE PROCESS RIGHTS OF THE ACCUSED.

A. The Implied Consent Law Conveys Information to an Accused Which Implicates Several Due Process Rights.

Under Wisconsin's Implied Consent Law, an individual is deemed to have given their implied consent to a blood, breath, or urine test when requested by a law enforcement officer after having been arrested on suspicion of committing an impaired driving related offense. Wis. Stat. § 343.305(3)(a) (2021-22). Before a law enforcement officer may request a test under § 343.305(3)(a), however, the officer is first obligated to provide the suspect with certain information. Wis. Stat. § 343.305(4) (2021-22). This statutory information is set forth in the Informing the Accused form.

It cannot be gainsaid that the Informing the Accused form relates a significant amount of information to a suspected drunk driver regarding their rights and responsibilities. Much of this information is not merely "procedural" in nature, but relates to certain due process rights the accused possesses.

For example, it is well-settled in Wisconsin that "a driver has a 'right' not to take the chemical test designated by the officer." *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995); *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). The Informing the Accused form plainly provides information in this regard by expressly advising the suspect of their choice to refuse testing and accept the consequences of that decision or to submit to the requested test.

Additionally, the Informing the Accused advises the suspect of their statutory due process right to an alternate test and their constitutional due process right to an additional test. Under Wisconsin's Implied Consent Law, after submitting to the

primary test requested by law enforcement, a suspected drunk driver is entitled either to request an alternative chemical test the arresting agency is prepared to administer or obtain an additional test for which the suspect may make his or her own arrangements. Wis. Stat. § 343.305(5)(a) (2021-22). A long-standing litany of common law decisions of both the Wisconsin Court of Appeals and Supreme Court has held that the accused's right to alternative testing is a guarantee of statutory due process. *See, e.g.*, *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986); *accord*, *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984); *State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985).

For example, in *McCrossen*, 129 Wis. 2d 277, the supreme court addressed the defendant's contention that the charges against her had to be dismissed because her constitutional right to access potentially exculpatory evidence was violated due to the arresting agency's failure to provide him with an alternate chemical test. *Id*. at 286. The *McCrossen* court took great pains to emphasize that it was examining the defendant's claim on that very narrow ground, *i.e.*, whether her *constitutional* rights were violated and therefore warranted *dismissal* of the charges against her. *Id*. In concluding that dismissal was not warranted because access to alternative testing was not constitutionally mandated, the court held that the right to an alternate test was nevertheless a guarantee of *statutory* due process and that suppression of the primary test, rather than dismissal of the underlying charges, was the appropriate remedy for violating this right. *Id*. at 287.

In *Walstad*, a predecessor case to *McCrossen*, the Wisconsin Supreme Court examined whether the destruction of a breath ampoule violated a defendant's due process right to access potentially exculpatory evidence. *Id*. at 483-84. The court found that the destruction of the ampoule did not violate Walstad's rights as he framed them on appeal because an accused's right to alternative testing afforded him the necessary due process protections. The *Walstad* court stated:

> In Wisconsin, the right to a second test is protected by statutory law, and it is, we believe, an assurance of constitutional due process. The second test affords the defendant the opportunity to scrutinize and verify or impeach the results of the breathalyzer test administered by enforcement authorities. Additionally, the legislation requires that an apprehended driver be advised of the absolute right to

> a second test. **This is a legislatively conferred right which we will strictly protect.**

Walstad, 119 Wis. 2d at 527 (emphasis added).

The foregoing concept that the right to access alternative testing is a measure of due process was likewise no stranger to the court of appeals in *Renard*. In *Renard*, the defendant was taken to a hospital after an accident, and while there, he was placed under arrest for operating while intoxicated. *Id.* at 459. Renard asked whether he could take a breath test instead, but the arresting officer persuaded him to submit to a blood test since they were already at the hospital. *Id*. After submitting to the blood test, the arresting officer left the hospital without making further inquiry of Renard as to whether he still desired to have a breath test. *Id*. The court of appeals found that the arresting officer "had a *duty* before leaving to make an inquiry" of Renard regarding whether he wanted the alternate test. *Id*. at 461. The *Renard* court premised this duty upon the fact that the right to access the alternate test was a measure of statutory due process, and that the violation of this right warranted suppression of the State's primary test result. *Id.*

In other cases, such as *Ehlen* and *Disch*, the Wisconsin Supreme Court repeatedly emphasized that the right to an alternative test is an "internal safeguard of due process." *Ehlen*, 119 Wis. 2d at 457; *Disch*, 119 Wis. 2d at 479-80.

Further, in a fashion akin to the *Miranda* warnings, the ITAF also advises a person who chooses to refuse chemical testing that the fact of refusal can be used against them in court, although this use of the refusal evidence is now somewhat limited under cases like *State v. Forrett*, 2021 WI App 31, 398 Wis. 2d 371, 961 N.W.2d 132, *aff'd* 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422, *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, and *State v. Banks*, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526.

Finally, the form also satisfies a due process "notice" component by advising the accused that if they have a chemical test result above the legal limit, their operating privilege will be subject to administrative suspension. *See generally*, *Thomas v. Fiedler*, 884 F.2d 990 (7th Cir. 1989).

In summary, a broad brush may not be swept across the information contained within the four corners of the Informing the Accused form, painting all

of it the same color. It is this notion, that the Informing the Accused implicates certain due process rights, which is at issue in Mr. Williams' case because if an officer tells a suspect, prior to reading the form, that "not all of this will apply," the person is at a loss to distinguish between merely procedural information versus due process information when attempting to figure out precisely what it is the officer means.

B. Remedy for Interfering with a Suspect's Due Process Rights.

The Informing the Accused form was deliberately designed to keep the Implied Consent Law in strict line with all aspects of the requirements of due process. *See generally*, *Fiedler*, 884 F.2d 990. This is where the problem lies for the State: when a law enforcement officer informs a suspect *immediately prior to reading the Informing the Accused form* that not all of the information is going to apply to him, the absence of any further direction makes it impossible for the lay person to know which parts in particular of the form "do not apply." Because aspects of the information concern due process rights, as described above, the officer is impermissibly interfering with the accused's statutory and constitutional due process rights. How or why should the suspect believe that information concerning the use of a refusal against him in court is or is not one of the things which does "not apply"? How should the accused determine whether the information relating to exercising the right to refuse will or will not result in the refusal being used against him in court, or that "other penalties" will be imposed? Should the accused be expected to know that the officer may have meant that the individual was entitled to the alternate test but that the right to the additional constitutional test was not applicable?

Simply put, there is no reasonable method by which this Court can divine what portions of a *highly technical form* a lay suspect can reasonably conclude would (versus would not) apply to him—and it should not have to. The far easier and fairer standard to administer in situations where an officer provides erroneous or confusing information which affects a suspect's due process rights is to send a clear message to law enforcement: Do *not* provide information to the suspect above and beyond the Informing the Accused form or any alleged refusal on the part of the accused will be dismissed. It is only through the vehicle of dismissal that: (1) law enforcement officers will curtail future conduct which is not prescribed by statute or common law; (2) will adequately safeguard the due process rights of the

accused; and (3) will be compliant with the prevailing standard set forth in *Washburn County v. Smith*.

After all, it is not unprecedent for courts of supervisory jurisdiction to impose penalties against the government under the Implied Consent Law when there has been an impermissible interference with the accused's right to be provided with accurate information. The erroneous iteration of the law is often sufficient to invoke sanctions. *See, e.g., State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989)(sanctions imposed even though "there was no apparent link between" the misinformation and the decision to refuse); *County of Eau Claire v. Resler*, 151 Wis. 2d 645, 446 N.W.2d 72 (Ct. App. 1989)(loss of presumptions applied when "information concerning penalties" is not properly given); *Schirmang*, 210 Wis. 2d 324 (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); *see also, State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774 (suppression is the remedy for erroneously advising suspect regarding consequences of refusing to submit to chemical test regardless of actual effect on accused's decision).

Suppression of the State's test result has been sanctioned in those cases in which the accused has demonstrated that his due process right to access additional test evidence has impermissibly been fettered. *See McCrossen*, 129 Wis. 2d 277; *Walstad*, 119 Wis. 2d 483; *Ehlen*, 119 Wis. 2d 451; *Disch*, 119 Wis. 2d 461; *Renard*, 123 Wis. 2d 458. If suppression of a test result is merited when the accused submits to the requested test, then surely, dismissal of the refusal charge is warranted when the accused does not. *See* Section II.B. & C., *infra*.

II. THE CIRCUIT COURT'S ERROR.

In its ruling, the lower court held that even though Officer Pavlik told Mr. Williams that not all the information on the Informing the Accused form would apply to him, no sanctionable violation of the implied consent statute occurred since the officer had been substantially compliant with the law by subsequently reading the form verbatim. R48 at 50:6-22; D-App. at 104. The court concluded that the burden was on Mr. Williams to establish that he was actually harmed by the officer's unqualified assertion. *Id*. More specifically, the circuit court ruled:

> I don't say agree wholeheartedly. *Quelle* is directly on point based upon the *Washburn County v. Smith*. The only factual difference is that the information given that you claim to be erroneous happened prior to the reading of the Informing the Accused form and not after.
>
> But this officer read, verbatim, the Informing the Accused form, and therefore, met the duty under 343.305(4).
>
> Therefore, according to this case that you rely upon, the rule articulated in *Wilke* is not applicable to the facts. And they cite to *Ludwigson*, or in the instant case.
>
> This is not a situation where the officer omitted. This is additional information that was provided. It just happened to have been provided prior, which you now concede was not erroneous by the sheer fact that this was not a fatal accident. And so you concede the information isn't even erroneous.

R48 at 50:6-22; D-App. at 104. There are numerous problems with the circuit court's implied and expressed interpretation of the applicable law in its ruling, and Mr. Williams will address each one of these in turn below.

A. Quelle *Is Not "Directly on Point."*

The circuit court clearly concluded that "*Quelle* is directly on point" with Mr. Williams' case. It is not. While it is true that the *Quelle* court developed a three-pronged test to determine when an officer's oversupply of information to a suspected drunk driver is sanctionable, it is likewise true that later, in *Washburn County v. Smith*, the Wisconsin Supreme Court significantly qualified the *Quelle* holding.

Quelle involved a circumstance in which the defendant "assert[ed] that she was subjectively confused by the officer's conduct" when he provided information to her which was "in essence inconsistent with what the law is . . . ." *Quelle*, 198 Wis. 2d at 273-75. She contended that under *Village of Oregon v. Bryant*, 188 Wis. 2d 680, 525 N.W.2d 635 (1994), Wisconsin formally recognized a "subjective confusion" defense. *Quelle*, 198 Wis. 2d at 273. On this question, the *Quelle* court rejected the defendant's "subjective confusion" approach. *Id*. at 280.

After rejecting a "subjective confusion" analysis, the *Quelle* court nevertheless recognized that there will be circumstances in which there are "alleged deficiencies in the officer's delivery of the warnings." *Id*. at 278. In these situations, the *Quelle* court concluded that a more appropriate test to determine whether there has been a procedural violation of the implied consent statute would consist of three prongs which would need to be found, namely:

> (1) The officer either did not meet or exceeded his or her duty under § 343.305(4);
>
> (2) The lack or oversupply of information was misleading; and
>
> (3) The failure to comply with the statute affected the driver's ability to make a choice about chemical testing.

Id. at 280.

There are two specific problems with the circuit court's assertion that *Quelle* is "directly on point" with Mr. Williams' case. The first of these is that no prejudicial information was delivered to Quelle ***prior to*** the officer's recitation of the form (as is the case here), and more importantly, the misinformation came in response to questions *which Quelle herself was asking*, *i.e.*, its genesis was not in actions taken by the officer, but rather, was the result of Quelle's own confusion about the information provided to her.

The second problem is that *Quelle* does not exist in a vacuum. That is, *Washburn County v. Smith*, a Wisconsin **Supreme Court** decision issued **subsequent** to the *Quelle* decision, **expressly** modified the *Quelle* test. *See* Section II.B., *infra*.

B. Washburn County v. Smith *Is Applicable.*

In its analysis, the circuit court failed to recognize that its heavy reliance on *Quelle* was misplaced. *Smith* involved a circumstance in which the defendant's license was revoked for allegedly refusing to submit to an implied consent test. *Smith*, 2008 WI 23, ¶ 1. Smith argued he did not improperly refuse to submit to a chemical test because the arresting officer made two misstatements to him regarding the penalties he would incur for refusing to submit to a chemical test. *Id*. ¶ 38.

Like *Quelle*, but unlike the instant case, no misinformation was provided to Smith prior to the recitation of the Informing the Accused form, but rather, came after Smith expressed concerns to the officer about the penalties he would be facing. *Id*. ¶ 40.

In analyzing the facts before it, the *Smith* court acknowledged that the officer "complied fully with Wis. Stat. § 343.305(4)" when he read the Informing the Accused form. *Id*. ¶ 53. The court did not, however, end its analysis there, but rather, examined the appropriateness of applying the three-pronged *Quelle* test to the facts before it. *Id*. ¶¶ 56-58. Smith urged the court to adopt the approach suggested by the court in *Schirmang*, 210 Wis. 2d 324, while the State relied upon *Ludwigson*, 212 Wis. 2d 871, for its recommended approach. *Id*. ¶ 58.

In approaching Smith's contention that the *Schirmang* holding should control in his case, the Wisconsin Supreme Court observed:

> 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. *Schirmang'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**.

Smith, 2008 WI 23, ¶ 63 (emphasis added). The *Smith* court continued that the "*Schirmang* court of appeals was correct . . . to rely upon *Wilke*," however, it was not correct because the *Quelle* test had been satisfied, rather, it was correct because the officer failed to give the defendant the statutorily required information. *Smith*, 2008 WI 23, ¶ 64. Based upon this understanding, the *Smith* court withdrew that portion of the *Quelle* test requiring "actual harm" to be established by a defendant in a circumstance where the defendant has not been given the statutorily required information. *Id*.

The *Smith* court then continued by explaining how the holding in *Ludwigson* squared with its decision to withdraw the "actual harm" prong of the *Quelle* test. *Smith*, 2008 WI 23, ¶¶ 67-71. The *Smith* court noted that in *Ludwigson*, the officer accurately provided the information contained in § 343.305(4), and Ludwigson failed to carry the day by establishing that the misinformation he received from the officer *after* the correct recitation of the form affected his ability to make an informed choice about submitting to testing. *Id*. ¶ 71.

Ultimately, the *Smith* court held that when law enforcement officers fail to provide statutorily required information to the accused, the person's operating privilege may not be revoked. *Id*. ¶ 71. If, however, accurate information is provided which is subsequently tainted by officer-induced misinformation, then the *Quelle* test remains "good law," and the accused must demonstrate actual harm. *Id*.

It is Mr. Williams' contention that applying the *Smith* court's logic to the circumstances of his case yields but one result, namely: the *Wilke* "no nexus" standard applies rather than the *Liudwigson* test. Mr. Williams bases his contention on the fact that the misleading, unqualified information provided to him by Officer Pavlik immediately prior to the reading of the form makes his case far more akin to a circumstance in which there has been a failure on the part of the officer to provide the statutorily required information than it does to one in which the information is accurately provided, but then subsequently tainted by misinformation.

It is fair to inquire how it is that Mr. Williams comes to this conclusion. The answer to this question is straightforward, to wit: by telling Mr. Williams *prior to* the recitation of the Informing the Accused form that some of the *statutorily mandated* information will "not apply" to him, Officer Pavlik is effectively misreading the form, *i.e.*, misadvising him in the *Smith*-*Wilke* sense. After all, the statute does not contemplate an officer offering their own proviso regarding the statutorily required information they are about to convey. More particularly, Officer Pavlik's unqualified statement is the functional equivalent of his leaving out a clause, sentence, or even an entire paragraph of the Informing the Accused form during its recitation. Just as there is no mechanism by which the accused can ascertain whether all of the information has been provided to him if a portion of the form is "skipped" by the officer during its reading,[1] so too there is no mechanism

[1]The State cannot protest that a defendant can just read the form themselves to determine whether any information has been omitted by the officer because (1) accused drivers are rarely provided with a copy of

by which an accused can determine which parts of the form are supposed "to apply" to him versus those which were not intended "to apply." There is no distinction in this difference.

C. Common Sense Dictates a Different Outcome.

Contrary to the lower court's belief that an antiseptic recitation of the Informing the Accused form somehow magically acts to disinfect any misleading or unqualified statements which may have preceded it, common sense dictates otherwise, and Mr. Williams' point in this regard is best made by analogy.

Assume, *arguendo*, prior to reading a suspect his *Miranda* rights, a law enforcement officer informs them that "I'm going to read you some information, but you should know that in most cases, even if you have an attorney, the defendant is found guilty, so asking for a lawyer probably won't do you much good anyway." If the officer thereafter recites the accused's rights verbatim, the prefatory information—while wholly accurate because the vast majority of defendants are, in fact, convicted even if represented by counsel—is clearly going to make the accused second guess whether it is "worth it" to remain silent or request the assistance of counsel. There is no reasonable universe in which any court, acting in accordance with the common law, is going to find that the officer's initial, unadorned qualification satisfies the rigors imposed by *Miranda*, even if the *Miranda* warnings are thereafter delivered flawlessly. It is no stretch to liken the recitation of the Informing the Accused form to the *Miranda* warnings either since this Court has already done so. *See Quelle*, 198 Wis. 2d at 276 ("[w]e first observe that the warnings provided drivers under the implied consent law are analogous to those employed in *Miranda*-type cases").

Tellingly, the Wisconsin Supreme Court also made a related observation in *Bryant*, 188 Wis. 2d 680, when it sagely observed:

> While in the retrospection of a judicial setting, the provisions of the Implied Consent Law are clear, it must be remembered that the accused, who is the recipient of the information, has been determined, to a degree of probable cause, to be under the influence of alcohol. **Hence, reasonableness under the**

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the form prior to their decision to refuse or submit to a test (the form is typically provided at the end of the encounter either at the time of the person's release or booking); and (2) whether Mr. Williams received a copy of the form before his decision to refuse was made is not a fact in the record before this Court.

> **circumstances dictates that the directions and warnings to the accused be as simple and straightforward as possible**.

Id. at 693 (emphasis added).

The point of the foregoing is simple: without clarifying for a lay person which portions of the information he is about to be read "do" or "do not" apply to him leaves the individual awash in a sea of confusion because there is no basis upon which to reasonably believe he has sufficient legal acumen to determine precisely what the officer meant. This is, in two words, "common sense."

Mr. Williams can foresee a likely rebuttal from the State in the following form: "Common sense dictates that a person is going to know whether they were involved in a fatal accident"—just as the court below opined. R48 at 50:19-22; D-App. at 104. Here, however, is what the State and the lower court are missing in their rebuttal: the Informing the Accused form contains *far more* information than that relating to accidents and injuries. For example, it relates information about two alternative forms of testing apart from the officer's primary test, *i.e.*, an alternate test the accused can obtain from the arresting agency at its expense and an additional test the accused can seek on their own accord. How, precisely, is it that the State can confidently—or correctly—assert that every person arrested for an impaired driving offense is going to understand or appreciate that, in the face of just being told that "not all of the information is going to apply to them," they still enjoy the right to exercise both of these rights and that this is not one of the things which "doesn't apply?"

Every individual being requested to submit to an implied consent test is unique. They have different levels of education. They have different experiences with the law. They are, as the *Bryant* court noted, impaired to different degrees. They have varying degrees of English comprehension. They are nervous to varying degrees. *Etc.* These, and other factors, combine in almost innumerable ways when it comes to the accused's ability to *read the mind* of the law enforcement officer to discern what he or she meant by "not all" of the information applying—and that is the correct characterization, namely "read the mind" of the officer. Clearly, the officer has an understanding or impression of what he or she believes will apply to the accused, but why should that individual be left guessing as to what is in the officer's mind when being provided with the complex and detailed information in

the Informing the Accused form, especially when faced with what is arguably the *most* impactful decision they are going to make regarding their case?

CONCLUSION

Because Officer Pavlik provided misleading and unqualified information to Mr. Williams prior to the recitation of the Informing the Accused form, the lower court was obligated, pursuant to *Washburn County v. Smith*, to dismiss the charge of Unlawfully Refusing to Submit to an Implied Consent Test pending against Mr. Williams. Mr. Williams now moves this Court to reverse the judgment of the court below and remand this matter with directions to dismiss the refusal charge.

Dated this 22nd day of July, 2023.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Bryson K. Williams
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 6,337 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 26th day of July, 2023.

MELOWSKI & SINGH, LLC

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