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D I S T R I C T I I

Appeal Case No. 2023AP838

In the Matter of the Refusal of Bryson Keith Williams:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRYSON KEITH WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF JUDGEMENT
ENTERED IN THE CIRCUIT COURT FOR WAUKESHA
COUNTY, THE HONORABLE JENNIFER R. DOROW
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

WAS THE CIRCUIT COURT CORRECT WHEN IT RULED THAT THE STATEMENT MADE BY THE ARRESTING OFFICER TO THE DEFENDANT THAT “NOT EVERYTHING IN THE [INFORMING THE ACCUSED] FORM WOULD APPLY TO HIM” JUST PRIOR TO ACCURATELY READING THE FORM WAS NOT A VIOLATION OF THE DEFENDANT’S DUE PROCESS RIGHTS?

Answer: YES

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On April 27th, 2022 the defendant was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant as a 2nd offense contrary to Wis. Stat. §346.63(1)(a). R48 at 14:12-16. After the arrest City of Waukesha officer Mark Pavlik read the defendant the informing the accused form verbatim. R48 at 14: 22-24. After the reading of the informing the accused form the defendant refused to submit to an evidentiary blood draw. R48 at 15: 11-13. Subsequently, a search warrant was obtained and two vials of the defendant's blood were withdrawn and taken as evidence. R48 at 15: 21-23. As a result, the defendant was also charged with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. §343.509(9)(a). R48 at 15:13.

The defendant requested a refusal hearing pursuant to Wis. Stat. §343.305(9). Prior to that hearing the defendant filed two motions. The first motion challenged the constitutionality of Wis. Stat. §343.305. *see* R18. The second argued that the defendant was misled by officer Pavlik's statement about parts of the informing the accused form not applying to the defendant immediately prior to reading the form. *See* R20. The decision regarding second motion filed in the circuit court is subject of the appeal before to this Court today.

In regards to the second motion, the Honorable Jennifer Dorow ruled that officer Pavlik's statement immediately prior to reading the informing the accused form constituted additional information rather than a failure to provide the statutorily required information as suggested by the defendant. R48 at 50:11-13. Judge Dorow further ruled that by reading the informing the accused form verbatim, officer Pavlik met his

duty under Wis. Stat. §343.305(4). R48 at 50:18 As such, Judge Dorow found that *County of Ozaukee v. Quelle*, 198 Wis.2d 269, 446 N.W.2d 72 (Ct. App. 1989) and *State v. Ludwigson*, 212 Wis.2d 871, 569 N.W.2d 762 (Ct. App. 1997) were the controlling law. R48 at 66 and 67. In making these findings, Judge Dorow rejected the defendant's argument that the circuit court should apply the standard set forth in *State v. Wilke*, 152 Wis.2d 243, 448 N.W.2d 13 (Ct. App. 1989), which is further discussed in *Washburn County v. Smith*, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243. R48 at 68:17-20. Based on that determination, the circuit court found that in order to prevail the defendant would need to prove that the additional information provided by Officer Pavlik was misleading or erroneous, which the defendant failed to do. R48 at 66: 11-19. Further, the defendant would need to prove he was actually harmed by the additional information provided by officer Pavlik, which again the defendant could not do. R48 at 67: 1-11.

STATEMENT OF THE FACTS

On April 27th, 2022, at 3:34 A.M. Officer Pavlik of the City of Waukesha Police Department observed a white pickup truck with its brake lights illuminated stopped on White Rock Avenue. R48 at 5:23-25. Office Pavlik observed that the driver had his head slumped down and it appeared that the driver was passed out behind the wheel. R48 at 6:1-8. Officer Pavlik approached the vehicle and made contact with the driver who was later identified as Bryson Williams. R48 at 6:23. Officer Pavlik had to knock loudly on the driver's side window to wake Mr. Williams. R48 at 7:16-25 In speaking with Mr. Williams, Officer Pavlik noticed that his eyes were blood shot and glassy among other indicators of possible impairment. R48 at 8-10:17. Mr. Williams was asked to submit to field sobriety tests and as a result of his performance on those tests he was arrested for OWI. R48 at 10:17-14:7.

Following his arrest, Mr. Williams was transported to Waukesha Memorial Hospital. R48 at 14:8-9. While in officer Pavlik's squad car, Mr. Williams was read the informing the accused form verbatim pursuant to Wisconsin Statute Section 343.305(4). R48 at 14:17-24. Just prior to reading the form Officer Pavlik notified Mr. Williams that not every part of the

form would apply to him but that he was required to read it in its entirety. R48 at 35:5-23. The defendant was then asked if he would submit to an evidentiary blood draw and he refused. R48 at 15: 11-13. After the defendant's refusal, a search warrant was obtained for the defendant's blood and two vials of the defendant's blood were subsequently taken as evidence. R48 at 15: 21-23.

STANDARD OF REVIEW

This appeal deals with a question of law rather than a question of fact. Therefore, 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. THE CIRCUIT COURT APPLIED THE CORRECT LEGAL STANDARD WHEN IT FOUND THAT OFFICER PAVLIK DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS BECAUSE HE PROVIDED THE STATUTORILY REQUIRED INFORMATION UNDER WIS. STAT. §343.305(4).

a. *Officer Pavlik provided additional information prior to reading the informing the accused form and therefore Quelle and Ludwigson control.*

The defendant argues that officer Pavlik interfered with the defendant's due process rights when he told the defendant that not all of the information contained in the informing the accused form would apply to him. (Appellant's Br. 8-11). This, the defendant argues, was the "functional equivalent to leaving out a clause, sentence, or even an entire paragraph of the Informing the Accused form during its recitation." (Appellant's Br. 16). Given this position the defendant urged the circuit court, unsuccessfully, and urges this Court to rely on the standard set forth in *State v. Wilke* and *Washburn County v. Smith. Id.* As a result of this perceived violation, the defendant

asks this Court to dismiss the refusal charge in Waukesha County Case 2022TR002766 (Appellant's Br. 19).

However, the circuit court correctly found that the proper legal framework to analyze the facts in this case are laid out in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995). In *Quelle*, the Court dealt with an the issue of a defendant moving to suppress the results of an evidentiary chemical test citing confusion over information supplied by the officer in addition to the officer reading the Informing the Accused form verbatim. *Quelle*, 198 Wis. 2d at 273-74. In her argument, Quelle cited to a comment in *Village of Oregon v. Bryant*, 188 Wis. 2d 680, 524 N.W.2d 635 (1994), regarding "subjective confusion." *Quelle*, 198 Wis. 2d at 273. In its decision, the *Quelle* Court held that the Supreme Court in *Bryant* was not creating a defense around "subjective confusion" in terms of the law surrounding Wis. Stat. § 343.305 (Information that must be given to a suspect which has all been memorialized within the Informing the Accused Form). *Quelle* 198 Wis. 2d at 280. Rather, the *Quelle* Court found that the Supreme Court was merely commenting in *Bryant* that such a claim had not been made in that case. *Quelle*, 198 Wis. 2d at 280.

The *Quelle* Court made clear no fewer than five times in its decision that an officer's only duty in such cases is to inform a suspect of what the law is, not to perceive whether the suspect understands those laws or how those laws might affect him or her. (emphasis added) ([The *Bryant* case] did not in any way suggest that officers should be required to provide a reasonable explanation of the law to a driver who remains confused after being given the standard warnings. *Quelle*, 198 Wis. 2d at 281.) (Assigning any weight to "subjective confusion" would contradict the legislature's conclusion that the oral delivery of information through § 343.305 provides appropriate protection for the accused drunk driver. *Id.*) (Judicial enactment of such a duty to explain the law beyond the Informing the Accused form would open Pandora's Box. The decision of whether the officer should have aided a confused driver could be litigated *in absurdum*. *Id.*) (As we have emphasized, an officer only has a duty to provide the information on the form regardless of a suspected drunk driver's ability to understand or interpret that information. *Quelle*, 198 Wis. 2d at 284.) (As we have repeatedly stated, an officer's only duty under the implied consent law is to accurately deliver the information to the

driver; an officer need not explain all of the choices and consequences embodied within these statutes. *Quelle*, 198 Wis. 2d at 285.)

At the same time, however, the *Quelle* Court acknowledged that there are times where officers do try to explain or add information beyond the verbatim language from the Informing the Accused Form and instances where an officer does not read the Form verbatim and thus does not completely inform the suspected drunk driver of all the information required in § 343.305. *Quelle*, 198 Wis. 2d at 279. In such cases, the *Quelle* Court stated the legal standard in determining whether suppression of a blood result is appropriate. *Id.* at 280. That test is a “stringent three-part standard that is applied to assess the adequacy of [the] warning process under the implied consent law.” *Id.*

- 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.*

Id. at 280.

The *Quelle* case was later abrogated, in part, in *Washburn County v. Smith*, ¶ 64. The *Smith* Court, in abrogating *Quelle* in part, held that the three-part standard would no longer apply in cases where an officer fails to supply the statutorily required information but did still apply in cases where an officer reads the Informing the Accused Form verbatim but also added information. *Id.*

The Wisconsin Court of Appeals used the *Quelle* framework when deciding the issue presented in *State v. Ludwigson*, 212 Wis.2d 817. Similar to the instant case, the officer in *Ludwigson* provided information in addition to the Information the Accused form. *Id.* at 874. However, unlike the instant case, the information provided in *Ludwigson* was erroneous. *Id.* The court in that case found that the first two prongs of the *Quelle* test had been satisfied and moved on to the third prong. *Id.* at 875. In deciding whether the erroneous excess information affected the defendant’s ability to make a choice about chemical testing the court found that the burden was on the defendant to make a prima facie showing of a causal

connection between the erroneous information and the decision to refuse testing. *Id* at 876. In *Ludwigson*, like the present case, the defendant had not presented any evidence to support such a claim and therefore the court ruled she had failed to meet her burden under the third prong in *Quelle*. *Id*.

Through his arguments, the defendant is asking this Court to draw a line in the sand for situations when additional information is provided *prior* to reading the informing the accused rather than *after* the reading of the form as in *Quelle*. The defendant fails to provide any case law or statutory authority that would suggest such a demarcation is necessary or appropriate. Additional Information provided regarding the Informing the Accused Form qualifies as additional information regardless of when it is provided by the officer. It is quite a leap to suggest that informing an individual that certain parts of the Informing the Accused Form wouldn't apply to him somehow negates the subsequent verbatim reading of the form. Because this case is dealing with an officer providing information in excess of the requirements in Wis. Stat. §343.305(4), the circuit court correctly applied the standard set forth in *Quelle* and *Ludwigson*. This Court should apply the same standard.

If this Court agrees that the proper legal standard is the one discussed above then the court can look to the record in search of any evidence provided by the defendant that the additional information provided by officer Pavlik influenced his decision in choosing not to take a chemical test. The Court will find the record completely devoid of that evidence and the analysis can stop there like in *Ludwigson*. However, for sake of argument the State will go through the *Quelle* analysis below as the circuit court did.

b. The circuit court in applying the legal standard from Quelle and Ludwigson correctly found that Officer Pavlik did not violate any of the defendant's due process rights.

In looking at the defendant's case under the *Quelle* standard, Officer Pavlik's preface to the reading of the Informing the Accused Form could be argued was merely a reference to the defendant that the form he was about to hear contained clauses that would not pertain to him such as, "You

have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.” In that clause alone, there are at least three distinct and separate scenarios, at least one of which has various subsections, for which the driver could be subjected to hearing these warnings.

The State will concede that Officer Pavlik’s preface pertaining to the Informing the Accused Form was outside of the statutorily required warnings and could be reasonably construed as information in excess of the requirements and the Court should find the first prong of the *Quelle* standard in the affirmative; that is to say Officer Pavlik did exceed his duty under §§ 343.305(4).

However, in analyzing the second prong of the *Quelle* standard, this Court should find in the negative as the circuit court did. At the motion hearing, the circuit court stated “Looking at the second prong in *Quelle* , that looked at, does – did the officer furnish the defendant with misleading – that is, erroneous—information? I am finding that he did not....[t]he statement about some information here not applicable is absolutely accurate.” R66:11-16.

Nothing Officer Pavlik stated in his preface was misleading to the defendant. As mentioned in the previous paragraph, what Officer Pavlik told the defendant was completely accurate. In creating the Informing the Accused Form in compliance with the legislature’s requirements described in § 343.305, law enforcement officers are required to read the form in a number of situations, any one of which might apply to the driver. In some fact patterns, multiple scenarios may apply to the driver. To inform a suspect that not all the scenarios mentioned will apply to him is not misleading, it is accurate. For this reason, this Court should find that Officer Pavlik’s added information was not misleading under the second prong of the *Quelle* standard and affirm the circuit court..

Even if this Court disagrees with the circuit court and finds that the added information was misleading, the Court should still find, under the third prong, that the defendant did

not present any evidence to suggest that the information had any impact on the defendant's ability to make his choice regarding whether he would submit to the evidentiary sample of his blood or if he would refuse.

There is evidence directly to the contrary in Officer Pavlik's squad camera video. The defendant engages in a back and forth conversation with Officer Pavlik after the Informing the Accused Form was read. He asked specifically about the parts of the form that applied to him. For example, the defendant asked about the possibility of alternative testing, which was a part of the form that applied to him. He did not, however ask any questions about the parts of the form that mention being in a commercial motor vehicle or being involved in a crash that resulted in the death of another human being. *See* Wis. Stat. § 343.305. One could surmise that the defendant did not ask about those parts of the form as he was able to discern for himself that those parts did not apply to him.

In sum, there is no evidence to suggest the defendant was at all confused about what was in the form and there certainly is not a credible argument that Officer Pavlik's additional information made an impact on the defendant's understanding of the form. If this Court believes that the defendant's argument even reaches the third prong of the *Quelle* standard, it should find that Officer Pavlik's preface did not affect defendant's ability to choose whether to consent or refuse.

CONCLUSION

Because officer Pavlik provided information in addition to the required language in the Informing the Accused Form the circuit court correctly applied the standard set forth in *County of Ozaukee v. Quelle* and *State v. Ludwigson*. In applying that standard the circuit court correctly concluded that officer Pavlik did not violate any of the defendant's due process rights. This Court should affirm the circuit court's ruling and dismiss the defendant's appeal.

Dated this 11th day of August, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3445.

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