STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2023AP838

In the Matter of 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE MISAPPLIES *QUELLE* AND *LUDWIGSON*.

In a not unexpected rebuttal, the State proffers that this Court should review the issue presented by Mr. Williams from the perspective of *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), and the test developed thereunder. State's Response Brief at pp. 7-9 [hereinafter "SRB"].[1] After making its *Quelle*-based argument, the State then relies upon *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), for the same proposition. SRB at pp. 9-10.

The State fails to note, however, that both *Quelle* and *Ludwigson* were dealing with factual scenarios altogether distinguishable from Mr. Williams'. More specifically, the *Quelle* court examined a circumstance in which the law enforcement officer "attempt[ed] to explain the form" to the defendant after it was read, while the *Ludwigson* court addressed a situation in which the officer "attempted to explain the [Informing the Accused] form to Ludwigson in 'lay terms'" after it was read. *Quelle*, 198 Wis. 2d at 274, *Ludwigson*, 212 Wis. 2d at 874, respectively. Ironically, there is a point in the State's argument in which it unwittingly stumbles into this important distinction by observing "that there are times where officers do try to explain or add information beyond the verbatim language from the Informing the Accused Form . . . ," but it never goes so far as to recognize that these are instances in which the officer has already provided accurate information and does *not* leave the accused to struggle on their own to decide which portions of the information "applied" to him. SRB at p.9.

[1]The State begins numbering the pages of its brief with the notation that its actual page two is page "i," and then continues sequentially therefrom using lower case Roman numbers until it reaches its actual page four where it begins its Arabic sequence (although the number "1" does not even appear on this page). The State left its cover page unnumbered. The State's numbering format is contrary to § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover**." Wis. Stat. § 809.19(8)(bm) (2021-22). Given this discrepancy, Mr. Williams will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

The *Quelle* and *Ludwigson* circumstances are distinguishable because correct information had first been provided to each defendant and neither defendant was left to decide ***on their own*** which portions of the information provided to them "applied" versus which did not. In this case, from the first instance, Mr. Williams was only given a vague, nebulous, and wholly unqualified statement which left him to his own devices about what was supposed to be relevant to him. At least in *Ludwigson* all the officer did was to use "lay terms" to elucidate what some of the more complex legal concepts on the Informing the Accused form meant—which is also what the officer in *Quelle* did by "attempt[ing] to explain the form." Officer Pavlik offered Mr. Williams no such explanation in the instant matter. Rather, he nakedly asserted that "not all of the information" he was about to read to Mr. Williams "applied to him," without further explanation, in lay terms or otherwise.

Frankly, the only part of the *Quelle* decision which bears any relevance to Mr. Williams' case is when the court discusses how the decision in *State v. Geraldson*, 176 Wis. 2d 487, 500 N.W.2d 415 (Ct. App. 1993), was *appropriately* reached. *Quelle*, 198 Wis. 2d at 278. *Geraldson* is far more akin to Mr. Williams' circumstances because Geraldson had "not [been] fully informed of the respective consequences" **relative to him**. *Quelle*, 198 Wis. 2d at 278. The officer's actions in this case were far more egregious than those in *Geraldson* because Mr. Williams was left to flounder on his own with respect to trying to decide which information provided to him "applied" versus which information did not. All Mr. Williams knew *before* the Informing the Accused form was read was that some things the officer was about to tell him were *not* applicable to him while other things would be. As a lay person, thrust into a stressful set of circumstances, there is no mechanism by which any court can be certain that Mr. Williams could accurately divine which information was applicable to him versus which was not.

The problem created by the officer in this case is far more egregious than the manner in which it presents in *Quelle* and *Ludwigson*. That is, every human being is different. Individuals do not share the same mind. The populous has not shared the same experiences nor do they possess equivalent levels of education. Given that each person is unique, if the officer's gratuitous prefatory comment is condoned, who can say that the next person, the next dozen or hundred people, who are told "some of this will apply to you, some of it will not," will interpret the Informing the Accused form in the same way each time, recognizing with legal perfection what they *should* take away from the form versus what they *should not*. The only way to

preserve uniformity in the law is for this Court to sanction Officer Pavlik's conduct—and that of all of the law enforcement officers throughout Wisconsin who have adopted the same behavior. Frankly, if this Court puts its seal of approval on Officer Pavlik's self-fashioned prefatory comment immediately prior to recitation of the form, one has to wonder what other similar statements might be condoned. Would an officer be permitted to opine that "some of the information on this form is important and some of it isn't"? Or consider an officer who is aware that a portion of the form has been invalidated by *State v. Blackman*, 2017 WI 77, but is unsure as to which part of the form precisely. In an effort to impart this limited knowledge, the officer states "I'm not sure how legally accurate all this is anymore, but I still have to read this form to you." Would that be permitted?

In answering these questions, perhaps now is the perfect time to harken back to what the Wisconsin Supreme Court sagely admonished in *Village of Oregon v. Bryant*, 188 Wis. 2d 680:

> 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, the be under the influence of alcohol. Hence, reasonableness under the circumstances dictates that the directions and warnings to the accused be as simple and straightforward as possible.

Id. at 693.

When a police officer fashions his or her own unexplained caveat immediately prior to reading the statutorily required information of the Implied Consent Law, are they really making the subsequent directives and warnings "as simple and straightforward as possible"? Or are they unnecessarily inviting confusion where it absolutely should not be? The answer to that question is clear.

In its closing volley on *Quelle*, the State mischaracterizes Mr. Williams' argument by attempting to circumscribe it in a way Mr. Williams does *not* in his initial brief. More particularly, the State confines and reformulates Mr. Williams' argument thusly: "[T]he defendant is asking this Court to draw a line in the sand for situations when additional information is provided *prior* to reading the [I]nforming the [A]ccused rather than *after* the reading of the form . . . ." SRB at p.10 (emphasis in original). If the State was charged with the responsibility of regurgitating *half* of

Mr. Williams' argument, then mission accomplished. Unfortunately, the State's misleading characterization does not tell the whole story. It is, of course, relevant that Officer Pavlik provided the misleading information prior to his recitation of the form, but that is not the whole of Mr. Williams' argument. It is just as important to acknowledge *what* information was provided, namely that he left Mr. Williams to guess as to which portions of the information were going to "apply" to him and which were not. This is a distinction with a significant difference and *that* is the accurate whole of Mr. Williams' argument. The timing of Officer Pavlik's statement *cannot* be divorced from its content.

On a final note, in addition to misstating Mr. Williams' argument, the State also mischaracterizes the record. On the final page of its argument, the State claims that after the Informing the Accused was read, Mr. Williams' engaged the officer in a discussion about "alternative testing." SRB at p.12. A review of the record will reveal that Mr. Williams was not engaging Officer Pavlik in a discussion about "alternative testing" as the State implies, rather, when examined *in context*, Mr. Williams was inquiring about a *different* form of *primary* testing when asked whether he would submit to a blood test—this is a far cry from discussing the alternative testing afforded an accused as a statutory due process right. R34 at Elapsed Time 01:17:37. (Tellingly, the State never offered this Court a pinpoint citation to the record for its liberal "interpretation" of Mr. Williams' single sentence comment about an "alternative" test.) Mr. Williams' also disputes that this single comment about a different *primary* test can be so broadly characterized as "[t]he defendant engag[ing] in a back and forth conversation with Officer Pavlik after the Informing the Accused Form was read." SRB at p.12. The State's overzealously painted picture sharply contrasts with the truth of the matter and is quite revelatory regarding the strength of its argument. This Court need only review Record Item 34 (Exhibit No.1 from the hearing) to deduce that for itself.

CONCLUSION

Because Officer Pavlik's self-fashioned commentary left Mr. Williams to speculate upon which portions of the form were applicable to him and which were not, this Court should reverse the decision of the Court below, if for no other reason, than to prevent such problems from recurring in the future as they undoubtedly will.

Dated this 18th day of August, 2023.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
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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 1,885 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 18th day of August, 2023.

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