

FILED
09-16-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2025AP661-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

SAM M. SHAREEF,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN
THE CIRCUIT COURT FOR RACINE COUNTY, BRANCH III,
THE HONORABLE SCOTT P. CRAIG PRESIDING,
TRIAL COURT CASE NO. 21-CT-866

REPLY 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

ARGUMENT

I. PUBLIC POLICY CONSIDERATIONS DO NOT WIN OUT OVER DUE PROCESS CONCERNS.

The State's opening volley in response to Mr. Shareef's claim on appeal is to protest that the arresting officer's prefatory statement that "some of this stuff I'm going to read to you is not going to apply to you" . . . in no way changed the statutorily required language of the Informing the Accused form." State's Response Brief, at pp. 7-8¹ [hereinafter "SRB"]. This argument holds no water because it is utterly nonsensical. To Mr. Shareef's point in this regard, one might ask how the reading of the Informing the Accused form [hereinafter "ITAF"] *after* that unqualified statement was made cures what it implies?

Clearly, there is no dispute between the parties that the officer's statement *preceded* the recitation of the ITAF. Similarly, there can be no reasonable dispute that the officer was referring to the information which he was about to provide to Mr. Shareef. Finally, based upon the facts of this case, it cannot be argued that the officer made any effort to clarify, qualify, or explain which portions of what was about to be read to Mr. Shareef was "not going to apply." Mr. Shareef was left to discern that for himself. In the common vernacular, he was left "twisting in the wind."

So what should a lay person in Mr. Shareef's position conclude? There are 311 words on the ITAF, organized into seven paragraphs, covering topics ranging from the nature of the underlying charge, to the consequences associated with submitting to a test versus refusing one, to the types of testing which may be sought, to the statutory right to seek an alternative test the law enforcement agency is

¹ Mr. Shareef will refer to specific pages of the State's brief as though it had been properly paginated pursuant to Wis. Stat. § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover.**" Wis. Stat. § 809.19(8)(bm) (2025-26). The State begins numbering the pages of its response brief with no number on the cover page and then continues with the Roman notation "ii" on its page two. It then continues sequentially therefrom using lower case **Roman** numerals until it reaches its *actual* page six which it leaves unnumbered. Thereafter, it begins its Arabic sequence with "2" on its actual page seven (7). Apart from being confusing, the State's numbering format is contrary to the statutory rule. Given this discrepancy, Mr. Shareef 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 an Arabic numbered page one (1) as it should have been.

prepared to administer, to the constitutional right to gather evidence in one's own defense, to the use of refusal evidence at trial, *etc.* Regarding all this information, Mr. Shareef was told that “**some**” of it was not going to apply to him. Undoubtedly, this does not just imply, but rather *expresses*, that there will be more than “just one thing” that is not applicable to him, but how is he to know *which* things are not applicable? If no yardstick by which to measure an answer to this question is provided by the officer, how is Mr. Shareef not to assume that he was entitled to the agency's alternative test, but not one of his own? Alternatively, how is Mr. Shareef not to assume that the chemical test will be used against him in court but not any alleged refusal? Likewise, how is Mr. Shareef not to assume that he will only be subject to a blood test and not additional tests if the officer elects to pursue blood over breath or urine? The list could go on, but the point is made, to wit: the officer's unqualified statement tainted the well, and it simply does not matter that the ITAF was read verbatim thereafter *since the damage was already done*. Put another way, the State is arguing that the recitation of the ITAF cures any misdirection inherent in the officer's initial statement, but it misses the point that it was the officer's initial statement that spoliated the recitation of the ITAF from the first instance. The State's argument is like the Ouroboros eating its own tail, *i.e.*, its logic is circuitous.

The State's response brief next focuses on what can be summarized as a “public policy” argument. SRB at pp. 8-9. More particularly, the State injects a tired rebuttal which has too often been the refrain it employs to excuse misleading information provided by law enforcement officers to suspected impaired drivers, namely that the “public policy” underlying the law was intended to remove drunk drivers from Wisconsin roadways and there is no requirement that the accused understand the warnings given *vis a vis* the ITAF. *Id.* This argument is a bald attempt to shift the focus of the Court's attention away from what is at issue in this case because it gives rise to a *non sequitur*. That is, at some level, there must be a valid reason for providing the accused with the information contained within the four corners of the ITAF, and as part-and-parcel of that reason, it *is* to act as an advisement, reminding the person that they are deemed to have given their implied consent to evidentiary testing simply by operating a motor vehicle on Wisconsin roadways. Wis. Stat. § 343.305(2) (2025-26). The State unwittingly recognized as much when it quoted *State v. Piddington*, 241 Wis. 2d 754, 623 N.W. 2d 528 (2001), because the State noted in its brief that “the implied consent statutory scheme is **to ‘advise the accused about the nature of the driver's implied consent.’**” SRB at p.8 (emphasis added), quoting *Piddington*, 241 Wis. 2d 754, ¶ 17. To allow that

advisement to be muddled by unqualified statements from a law enforcement officer defeats the very purpose recognized by the *Piddington* court.

As the State acknowledged in its brief, “the determination of whether the law enforcement officer **reasonably conveyed the implied consent warnings** is based upon **the objective conduct of that officer, . . .**” SRB at p.9 (emphasis added), quoting *Piddington*, 241 Wis. 2d 754, ¶¶ 20-21. Give that this is the rule, the officer in this case *objectively* misled Mr. Shareef with his unqualified conditional statement prior to the recitation of the ITAF. The officer’s conduct is not in dispute, thus, the only question remaining is whether the officer’s statement merits sanction.

The State additionally claims that there has been “substantial compliance” with the statute, and therefore, Mr. Shareef has nothing of which to complain. SRB at p.9. This argument too is fallacious because it betrays a misunderstanding of implied consent jurisprudence. In other words, common law authority which examines mere *procedural* violations of the law holds that there need not be “perfect compliance” with the implied consent statute since “substantial compliance” will suffice. *See State v. Muentz*, 159 Wis. 2d 279, 280-81, 464 N.W.2d 230 (Ct. App. 1990). That is certainly true when a defendant raises a *procedural* challenge to the implied consent statute. However, the type of challenge Mr. Shareef raises is a *due process* one not premised upon whether there has been “procedural” compliance with the law. *See generally, State v. Zielke*, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (1987). In fact, the only body of common law which comes even remotely close to addressing the type of challenge raised by Mr. Shareef are those decisions regarding due process violations of the implied consent statute. *See, e.g., State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986); *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); and *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). It is evident from the divergent and distinct line of cases that the same analysis (or test) is not applied across all implied consent claims. Regrettably for the State, the “due process” body of the common law sanctions suppression as the appropriate remedy.

Even if Mr. Shareef was to concede that the procedural violation line of authority was the appropriate paradigm to apply—something which he does not concede except for the purpose of the instant argument—he would still win the day

because Wisconsin case law is well-settled that law enforcement officers must “substantially comply” with the implied consent statute if they wish to reap its benefits. *State v. Muenta*, 159 Wis. 2d 279, 281, 464 N.W.2d 230 (Ct. App. 1990). Substantial compliance with the implied consent statute requires “**actual compliance** with respect to the **substance essential** to every reasonable objective of the statute.” *State v. Wilke*, 152 Wis. 2d 243, 249, 448 N.W.2d 13 (Ct. App. 1989)(emphasis added), citing *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 200, 405 N.W.2d 732 (Ct. App. 1987). Since one of the objectives of the implied consent statute is, as acknowledged by the State and noted above, to “reasonably convey[] the implied consent warnings,” that was *not* accomplished in the instant matter because the officer’s unqualified statements were misleading.

Finally, the State rounds out its rebuttal by contending that there is “no harm, no foul” in this case because a specimen of Mr. Shareef’s blood was seized pursuant to a warrant, and therefore, any misleading information provided by the officer has no effect on that seizure. SRB at pp.10-11. The State misses the fact that there is a *direct* and *unbroken* link between the warrant obtained in this case and the misleading information provided by Deputy Schmaling. That is, the only reason that a warrant was sought was because of Mr. Shareef’s refusal to submit to an implied consent test, but that refusal is infected by the initial unqualified information provided by the officer in the first instance. In this sense, the chain is unbroken, and under the fruit of the poisonous tree doctrine, when there is a direct nexus between the illegality and the evidence gathered downstream, suppression is a warranted remedy. *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

Since Deputy Schmaling provided ambiguous and unqualified information to Mr. Shareef prior to the recitation of the Informing the Accused form, this Court should reverse the decision of the court below.

Dated this 15th day of September, 2025.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Sam M. Shareef

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 1,929 words.

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 15th day of September, 2025.

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Sam M. Shareef

Defendant-Appellant