COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1361 **Cir. Ct. No. 2007TR304**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE REFUSAL OF JACOB JEFFREY VAN RUDEN:

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

JACOB JEFFREY VAN RUDEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Jacob Jeffrey Van Ruden appeals from an order finding his refusal to submit to a chemical test requested pursuant to WIS. STAT. § 343.305 unreasonable. Van Ruden contends that the trial court erred when it concluded that the arresting officer had complied with the implied consent law. On appeal, Van Ruden argues that the Department of Transportation violated the separation of powers doctrine by amending the Informing the Accused form to include language not authorized by § 343.305(4). Because Van Ruden did not make a separation of powers argument before the circuit court, that argument is waived. Further, we disagree that the arresting officer failed to comply with the informed consent law and we affirm the order of the circuit court.

BACKGROUND

¶2 On December 14, 2006, Mequon Police Officer Michael Brandemuehl stopped and arrested Van Ruden for operating a motor vehicle while intoxicated. Brandemuehl took Van Ruden to the police station for booking. While there, Brandemuehl read the Informing the Accused form to Van Ruden and asked him to submit to a chemical test of his breath. Van Ruden asked what would happen if he refused. In response, Brandemuehl re-read the portion of the Informing the Accused form that describes what will happen upon a refusal.[2] Van Ruden chose not to consent to the chemical breath test and Brandemuehl had him

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted

[2] Van Ruden testified that, when he asked what would happen if he refused the chemical breath test, another officer stated that he would lose his license in thirty days. Then Brandemuehl read the Informing the Accused Form in its entirety. Van Ruden repeated his question and Brandemuehl responded by reading the portion that addresses refusals. We do not read Van Ruden to invoke this exchange as grounds for his appeal. His focus is on the language in the Informing the Accused form.

mark a refusal on the form. Brandemuehl then provided Van Ruden with the Notice of Intent to Revoke Operating Privilege form based on the refusal.

¶3 Van Ruden requested a WIS. STAT. § 343.305(9) refusal hearing. There, he argued that an officer told him that he would lose his license whether he took the breath test or not. He also argued that the Informing the Accused form used by Brandemuehl contained language beyond that authorized by § 343.305(4) and therefore demonstrated an oversupply of information. The form's fifth paragraph states in part that "operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood." The court rejected Van Ruden's arguments and found that he had improperly refused to take the chemical breath test. Van Ruden appeals.

DISCUSSION

¶4 Although certain facts underlying the arrest and subsequent revocation are disputed, the facts relevant to this appeal are not. The appeal focuses on the text of the Informing the Accused form used by Brandemuehl at the station. Neither party disputes that the form in the record was read in its entirety to Van Ruden. The interpretation of WIS. STAT. § 343.305(4) and its application to undisputed facts presents a question of law for our de novo review. *See* ***State v. Schirmang***, 210 Wis. 2d 324, 329, 565 N.W.2d 225 (Ct. App. 1997), *abrogated on other grounds*, ***Washburn Co. v. Smith***, 2008 WI 23, ___ Wis. 2d ___, 746 N.W.2d 243.

¶5 Van Ruden presents one primary argument on appeal. He argues that because the Informing the Accused form contains language not included in WIS. STAT. § 343.305(4), it violates the constitutional separation of powers doctrine. He maintains that, by inserting non-statutory language into the form, the

Department of Transportation usurped the role of the legislature. Van Ruden embarks on a lengthy analysis of the separation of powers doctrine and asks, "[D]oes the power to amend a statute to include additional information, fall within the powers constitutionally granted to the Department of Transportation[?]" and offers the "obvious" answer that it does not.

¶6 The State argues that Van Ruden did not make this argument before the circuit court and therefore, cannot raise it here. We agree. Van Ruden has failed to direct us to any record evidence that he argued this issue at the refusal hearing.[3] Van Ruden makes his separation of powers argument for the first time on appeal. A party must raise and argue an issue "with some prominence" to signal to the circuit court that it is being called upon to address an issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984) (evidentiary issue must be raised sufficiently before the circuit court in order to preserve the issue for appeal). Consequently, Van Ruden has waived this argument.

¶7 Although Van Ruden does not mount the same explicit challenge here, in the circuit court he argued that the Informing the Accused form did not comply with Wisconsin's informed consent law because it provided an oversupply of information. Though a bit of a stretch, we can infer Van Ruden's intent to raise the same argument here by his framing of the sole issue presented: "Because the Informing the Accused form includes information which the legislature did not

[3] The court of appeals need not search the record for evidence that arguments were sufficiently raised so as to preserve them for appeal. *Cf.* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (the reviewing court is not required to sift the record for facts to support the appellant's claim of error).

prescribe, *the form not only fails to be in compliance with the implied consent statute*, but the Department of Transportation violated the separation of powers doctrine by revising the form without the legislature first acting." (Emphasis added.) Because the State's response brief speaks to this aspect of Van Ruden's arguments, we address it briefly here.

¶8 Every driver in Wisconsin has impliedly consented to take a chemical test for blood alcohol content. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds*, ***Smith***, 746 N.W.2d 243; WIS. STAT. § 343.305(2). Police officers have a statutory duty under § 343.305(4) to inform accused drunk drivers of certain required information when requesting a chemical test. ***Quelle***, 198 Wis. 2d at 281. Section 343.305(4) provides:

> **(4)** INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "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 suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may

> have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

The form used by Brandemuehl added a fifth paragraph, which stated: "In addition, under 2003 Wisconsin Act 97, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood." This forms the basis of Van Ruden's assertion that he was given an oversupply of information prior to refusing the chemical breath test.

¶9 Whether the officer has met his or her obligation to inform the accused as required by WIS. STAT. § 343.305(4) is determined by the application of a three-part inquiry: (1) Has the law enforcement officer not met, or exceeded his or her duty under § 343.305(4) 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? *See* ***Quelle***, 198 Wis. 2d at 280. Van Ruden's arguments to the circuit court suggest that Brandemuehl exceeded his duty by reading language outside the parameters of § 343.305(4) and that this oversupply of information violated the implied consent law.

¶10 The State argues that (1) Van Ruden did not show that an oversupply of information was given to him before he decided not to submit to a chemical breath test, (2) Van Ruden offered no evidence that any information provided to him was misleading, and (3) Van Ruden has not established a causal connection between the information provided and his decision to refuse the test. Van Ruden does not refute any of these arguments and our review of the record reveals

nothing to bolster Van Ruden's allegations of error. Van Ruden was entitled to "substantial" compliance with the implied consent procedure. *See* ***State v. Wilke***, 152 Wis. 2d 243, 250, 448 N.W.2d 13 (Ct. App. 1989). Substantial compliance with WIS. STAT. § 343.305(4) means that a driver is informed of all of the statutorily designated information that he or she needs to make an informed choice. Van Ruden received the required information, and nothing in the record indicates that an oversupply of information was misleading to him or contributed to his decision to refuse the test.

CONCLUSION

¶11 We conclude that Van Ruden has waived any separation of powers argument concerning the Informing the Accused form, specifically the language addressing restricted controlled substances. Further, because Van Ruden has not offered any evidence to support a claim under the ***Quelle*** test, we hold that no violation of the implied consent law occurred. We affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.