COURT OF APPEALS DECISION DATED AND FILED

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1906-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. MISCHLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

SNYDER, P.J. James J. Mischler appeals from a judgment of conviction for operating while intoxicated.[1] He contends that the arresting officer, Deputy Brett J. Bowe, violated his due process rights when Bowe offered additional information when he read the Informing the Accused form to

[1] He was also charged with the companion count of operating a motor vehicle with a prohibited blood alcohol concentration. A jury found him guilty of both counts. Pursuant to § 346.63(1)(c), STATS., he was convicted of only one count.

Mischler. As a result, Mischler argues that the results of his blood test should have been suppressed. Because we conclude that Bowe's oversupply of information did not rise to the level of a due process violation, the evidence of Mischler's blood alcohol content was properly admissible. We therefore affirm.

On December 8, 1995, Bowe observed Mischler's vehicle drifting beyond the center line and back across the fog line. As he followed Mischler's vehicle, Bowe noted that the vehicle was being driven in the middle of the two lanes. When he stopped the vehicle and made contact with Mischler, Bowe detected a strong odor of intoxicants. He also noticed that Mischler's eyes were glassy and bloodshot, his movements were "slow and lethargic" and his speech was slurred. Mischler presented Bowe with his driver's license, which revealed that Mischler was authorized to operate a commercial motor vehicle. Mischler admitted that he had been drinking alcohol, but refused to exit his vehicle to perform field sobriety tests. He was subsequently placed under arrest and transported to St. Elizabeth's Hospital.[2]

While at the hospital, Bowe issued Mischler a citation for operating while under the influence.[3] Bowe then read the Informing the Accused form, Section A, in its entirety. Because Mischler held a commercial license, Bowe then proceeded to read the opening statement of Section B of the form, which pertains to commercial license holders.[4] However, before reading the rest of the section,

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[2] Mischler was taken to the hospital in response to a complaint of severe back pain after being placed in Bowe's squad car.

[3] This was Mischler's second offense.

[4] This section provides the following information:

Section B

(continued)

Bowe told Mischler that this part would not apply to him "due to the fact he was not operating under those circumstances in this situation, and [Mischler] agreed …."[5] Mischler agreed with Bowe that he was not operating, driving or on duty time *with respect to a commercial vehicle*. Bowe then informed Mischler that if in fact he were operating, driving or on duty time, Section B would be applicable. Bowe then read Section B in its entirety to Mischler.

Mischler agreed to submit to a chemical test of his blood. The test revealed that Mischler had 0.176 grams of alcohol per 100 milliliters of blood.

> (applies to Commercial Motor Vehicle Operators/Drivers and Commercial Driver License Holders)
>
> In addition to the information in Section A, if you were driving, operating, or on duty time with respect to a Commercial Motor Vehicle, paragraphs 6, 7 and 8 below also apply:
>
> 6. If you refuse to submit to any chemical tests, and you were driving or operating or on duty time with respect to a commercial motor vehicle, you will be issued an out-of-service order for the 24 hours following your refusal in addition to other penalties which may be imposed.
>
> 7. If you were driving or operating a commercial motor vehicle or on duty time with respect to a commercial motor vehicle, you take one or more chemical tests and the result of any test indicates an alcohol concentration in excess of 0.0, you will be subject to penalties and to a 24 hour out-of-service order which disqualifies you from operating a commercial motor vehicle for the 24 hour period following the test.
>
> 8. If you were driving or operating a commercial motor vehicle, you take one or more chemical tests and the result of any test indicates an alcohol concentration of 0.04 or more, upon conviction of such offense you will be subject to penalties and disqualified from operating a commercial motor vehicle.

[5] Bowe and Mischler had already had a discussion about whether Mischler was on duty time at the time of the arrest. Mischler told Bowe that he was not.

At a pretrial motion hearing, Mischler's defense counsel argued that these test results should be suppressed because Bowe's statement to Mischler that Section B of the form was not applicable to him was a due process violation. The trial court determined that Mischler was properly informed under the implied consent law and denied the motion. Following a jury trial, Mischler was convicted of operating while intoxicated, second offense, and he now appeals.

Whether Mischler was properly advised of his rights under § 343.305(4m), STATS., concerns the construction and application of a statute. The application of a statute to undisputed facts is a question of law which we review de novo. *See* ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990). In construing any statutory section, we are to give effect to the intent of the legislature. *See* ***State v. Wilke,*** 152 Wis.2d 243, 247, 448 N.W.2d 13, 14 (Ct. App. 1989). A commercial operator who is requested to submit to a chemical test under the implied consent law must be informed of the information contained in § 343.305(4m). *See* ***id.*** at 251, 448 N.W.2d at 16.

The implied consent law is an important weapon in the battle against drunk driving. *See* ***State v. Zielke,*** 137 Wis.2d 39, 56, 403 N.W.2d 427, 434 (1987). Every driver impliedly consents to take a chemical test for blood alcohol content. *See* § 343.305(2), STATS. While a driver may choose not to take a chemical test, there are certain risks and consequences to this choice. *See* ***County of Ozaukee v. Quelle,*** 198 Wis.2d 269, 277, 542 N.W.2d 196, 199 (Ct. App. 1995). The implied consent warnings are designed to provide drivers with the rights and penalties applicable to them so they can make an informed choice. *See* ***State v. Geraldson,*** 176 Wis.2d 487, 494, 500 N.W.2d 415, 418 (Ct. App. 1993). In furtherance of this purpose, the legislature requires officers to provide all

accused drivers with certain warnings and requires additional warnings to those drivers holding commercial licenses. *See* § 343.305(4) and (4m).

The Department of Transportation has created a standard form for officers to read to accused drivers prior to making a request for a chemical test. The form is divided into two sections: Section A, which pertains to all drivers, and Section B for commercial license holders.

An officer has a duty to provide the accused with the information on the form. *See* ***Quelle,*** 198 Wis.2d at 284, 542 N.W.2d at 201. An officer need not explain all of the choices and resulting consequences embodied within the statutes. *See* ***id.*** at 285, 542 N.W.2d at 202. The officer is also not required to interpret the warnings. *See* **Geraldson,** 176 Wis.2d at 497, 500 N.W.2d at 419. Furthermore, an accused has no right to be informed of the collateral consequences that would flow from a finding of guilt on the underlying charge. *See* ***County of Eau Claire v. Resler,*** 151 Wis.2d 645, 650, 446 N.W.2d 72, 74 (Ct. App. 1989).

A commercial license holder is entitled to be informed of all of the rights and penalties relating to him or her. *See* ***Geraldson,*** 176 Wis.2d at 495, 500 N.W.2d at 418. The court refused to draw a distinction between those who were operating a commercial vehicle at the time of the temporary detention and those who were not. *See* ***id.*** Therefore, when an officer is presented with a valid commercial driver's license by the accused, the officer is required to give the warning contained in Section B of the Informing the Accused form.

Mischler argues that although he was read the information contained in Section B, Bowe's statement that this section did not apply to him was misleading and, as a result, did not properly inform him of all of the required warnings. He argues that his case is governed by ***Geraldson.*** However, in

Geraldson, the officer did not inform the accused of all of the required warnings for commercial license holders. *See* ***id.*** at 490-91, 500 N.W.2d at 416-17. In the instant case, Mischler was given all of the warnings contained in Section B of the form.

Notwithstanding the above, ***Quelle*** set forth a three-part standard to be applied when assessing the adequacy of the warning process under the implied consent law:

> (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?

Quelle, 198 Wis.2d at 280, 542 N.W.2d at 200.

A review of the record establishes that Bowe went beyond his statutory duty of merely reciting the information on the face of the Informing the Accused form. Therefore, Mischler satisfies the first prong of the test in that he was oversupplied with information. *See* ***id.*** The next step is to determine whether this additional information (that the commercial section did not apply to Mischler under the circumstances) was misleading under the implied consent law. *See* ***id.*** at 282, 542 N.W.2d at 201. After reviewing the record of what was said and by whom in context, we conclude that Mischler was not misled.

After reading Mischler the opening paragraph of Section B, *see supra* note 4, Bowe stated that the following paragraphs that he would read would not apply to Mischler because he was not driving, operating or on duty time with

respect to a commercial vehicle. Mischler agreed with this assessment. Mischler was driving his personal vehicle at the time of the stop, and he told Bowe that he was not on "duty time." Bowe was not required to examine the validity of Bowe's statement. *See* ***Geraldson,*** 176 Wis.2d at 495, 500 N.W.2d at 418-19.

Regardless of the fact that Mischler was not driving, operating or on duty time with respect to a commercial motor vehicle, Bowe recognized his duty to provide Mischler with the information contained in Section B as Mischler held a valid commercial driver's license. After reading the section in its entirety, Bowe again reiterated that *if in fact* Mischler were driving, operating or on duty time, this section would apply. Therefore, on its face, there was nothing misleading in Bowe's delivery of the warnings. Mischler fails to satisfy the second prong of the ***Quelle*** standard and we need not pursue further analysis under the third prong.

Mischler claims that Bowe's statement that this section did not apply to Mischler in these circumstances was violative of his due process rights because it "exposes the commercial license holder to subsequent arrest and prosecution if the driver reports to work within the 24 hours following arrest." This misconstrues the purpose of the informing the accused warnings. An accused driver must make two showings when challenging an officer's conduct: (1) that the officer misstated the warnings, and (2) that the officer's misconduct impacted the driver's ability *to make the choice available under the law*. *See* ***Quelle,*** 198 Wis.2d at 278, 542 N.W.2d at 199. The choice is the decision of whether or not to submit to the test. After hearing the warnings, Mischler agreed to take a chemical test and one was administered. The information on the Informing the Accused form is not intended to provide those arrested with information regarding collateral consequences that could flow from behavior subsequent to the arrest. Mischler's due process argument is without merit.

Based on our conclusion that the oversupply of information was not misleading as it related to Mischler's decision of whether to submit to a chemical test, the trial court properly exercised its discretion in admitting the results of the blood test. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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