COURT OF APPEALS DECISION DATED AND FILED

December 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0672

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY J. KLOSS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

¶1 NETTESHEIM, J. Kelly J. Kloss appeals from an order revoking his driving privileges pursuant to the Implied Consent Law, § 343.305(10), STATS. The order followed a hearing at which the trial court determined that Kloss had

improperly refused to submit to a chemical test following his arrest for operating a motor vehicle while intoxicated.[1]

¶2 On appeal, Kloss argues that the information provided to him by the arresting officer via the Informing the Accused form understated the consequences of a refusal because the information did not advise that the police would take a blood sample even if Kloss refused the test. Kloss argues that this failure resulted in a violation of his due process rights.

¶3 We decline to address Kloss's argument on the merits because it is not the argument that he made in the trial court. We deem the issue waived and we affirm the revocation order.

¶4 Kloss was arrested for operating a motor vehicle while intoxicated. He was read the requisite implied consent information recited in § 343.305(4), STATS. This information does not allude to the possibility that the police might obtain a blood sample even if the suspect refuses to submit to a chemical test. Kloss refused the test. The police then issued him a notice of intent to revoke his operating privileges pursuant to § 343.305(9)(a). Despite Kloss's refusal to

[1] The trial court ruled that Kloss's refusal was unreasonable. The reasonableness of a defendant's refusal to submit to a chemical test was once one of the issues to be litigated in a refusal hearing. *See, e.g.,* § 343.305(2)(b)5, STATS., 1975. However, that is no longer the law. Under current law, the issues at a refusal hearing are limited to: (1) whether probable cause existed to arrest the defendant, (2) whether the defendant was properly advised pursuant to § 343.305(4), and (3) whether the defendant refused the test. *See* § 343.305(9)(a)5. Thus, the proper terminology is whether the defendant's refusal was "proper." *See* § 343.305(10)(a). ("If the court determines under sub. (9)(d) that a person *improperly* refused to take a test … the court shall proceed under this subsection.") (emphasis added).

submit to a chemical test, the police transported him to a medical center where a blood sample was obtained without his consent.[2]

¶5 Kloss requested a refusal hearing. Prior to the hearing, Kloss filed a motion seeking dismissal of the refusal proceedings, challenging the implied consent law on constitutional due process grounds. Specifically, Kloss's motion contended that information conveyed via the Informing the Accused form both understated and overstated the penalties envisioned by the implied consent law.

¶6 Kloss's motion first set out the relevant facts, relating the fact of his arrest, the information given to him via the Informing the Accused form, and his refusal to submit to the test. However, the motion did not refer to the fact that the police had obtained a blood sample from Kloss without his consent following his refusal. Nor does the motion recite this fact as the basis for the motion.

¶7 Kloss's motion next stated his argument. The motion contended that the information conveyed via the Informing the Accused form both understated and overstated the penalties envisioned by the implied consent law. The motion stated in relevant part:

> First, subsection (4) states that if an individual refuses to submit to a chemical test, the person will not only be subject to license revocation, but "other penalties" will befall the individual as well. *This assertion is patently false as the only "penalty" for refusing to submit to a chemical test is license revocation.* No demerit points, no jail, and no fine are ever imposed for refusing a chemical test. All other sanctions which are imposed for refusing to submit are *remedial* in nature, and are *not* "penalties." *See e.g.,* ***State v. Killebrew***, 115 Wis.2d 243, 251, 340 N.W.2d 470 (1983).

[2] The appellate record does not document this event. However, the State does not dispute it.

> Second, the foregoing incorrect assertions are made in the context of the accused having been informed by the immediately preceding sentence that a chemical test above the legal limit will only result in license "suspension," whereas, in fact, a multitude of punishments, including potentially criminal sanctions will befall the defendant.

¶8 The balance of Kloss's motion recited relevant case law establishing a defendant's right to be fairly informed of the consequences of choices imposed by law which affect a person's driving privileges. *See generally* ***South Dakota v. Neville***, 459 U.S. 553 (1983), and ***Bell v. Burson***, 402 U.S. 535 (1971). Relying on this line of authority, Kloss's motion argued that a "due process analysis is inescapable when examining whether the state misleads accused drivers regarding their decision to submit to chemical testing by emphasizing non-existent penalties associated with refusing to submit and grossly understating penalties associated with submitting to a chemical test." As with the factual portion of the motion, nowhere does this legal portion allude to the blood sample obtained from Kloss without his consent.

¶9 Next, we turn to the refusal hearing. The refusal hearing and the hearing on Kloss's motion were conducted in a single proceeding. The arresting officer testified regarding the circumstances surrounding Kloss's refusal. But he was never asked any questions about the later blood sample obtained without Kloss's consent. Thus, the evidentiary record is devoid of any reference to the taking of Kloss's blood sample. Following the close of the evidence, Kloss's counsel made his argument in support of the motion to dismiss. We set out the relevant portions:

> The challenge to the constitutionality of the statute is set forth on page 2 of the motion. The statutes provide certain information that the officer is required to inform a person of prior to requesting a chemical test, and, basically, the information that the officer is required to give the driver understates the penalties if the person takes the test and

> overstates the penalties if the person refuses. There are additional penalties that a person faces by taking the test other than suspension of a driver's license. Yet, the statute requires the officer to tell the person that, if the person takes the test and tests over the limit, they're going to face a suspension of their license. But if they refuse, they face revocation of driver's license and additional penalties. It's actually, in reality, it's actually flip-flopped…. You lose your license and face other penalties if you take the test, but if you refuse to take the test, you face revocation of your driver's license and no other penalties.
>
> So the statute understates the penalties if I take the test, overstates the penalties if you refuse to take the test.

¶10 Here again, there is no reference to the taking of Kloss's blood sample as the basis for the motion. Instead, the argument harkens back to Kloss's written motion which, as we have noted, makes no linkage or reference to the taking of the blood sample.

¶11 The trial court rejected Kloss's motion to dismiss, concluding that the information conveyed to Kloss via the Informing the Accused form complied with the demands of due process. Understandably, the court's ruling did not reference the taking of Kloss's blood sample.

¶12 On appeal, Kloss argues that he was "tricked" into refusing the test because he was not forewarned that the police would obtain a sample of his blood regardless of his refusal. However, as our recounting of the history of this case reveals, Kloss never asserted this ground as the basis of his constitutional challenge in his motion, in the evidence or in his argument. In fact, as best we can tell from the appellate record, the trial court did not even know of this event. We deem Kloss's appellate issue waived. We do not address issues that are raised for

the first time on appeal.[3] *See* ***C.A.K. v. State***, 154 Wis.2d 612, 624, 453 N.W.2d 897, 902 (1990).

By the Court.—Order affirmed.

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

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[3] We appreciate that the State does not argue waiver. However, when an issue is waived, we are deprived of important information on the issue—the trial court's reasoning. Although we owe no deference to the trial court's ruling on a question of law, we nonetheless value the court's decision. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993). Moreover, although the issue in this case is of constitutional dimension, it is also fact dependent. When the record is devoid of relevant facts germane to the issue, waiver is all the more appropriate.