COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1978

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

IN THE MATTER OF THE REFUSAL OF STANLEY A. OTIS:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STANLEY A. OTIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded.*

¶1 ROGGENSACK, J.[1] The State of Wisconsin appeals from an order of the circuit court determining that Stanley A. Otis's refusal to submit to a

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

chemical test under § 343.305, STATS., was reasonable. The circuit court concluded that the arresting officer gave information to Otis, in addition to that required by statute, which "created some confusion" about the availability of an alternate test and therefore about whether to submit to the intoxilizer test that was requested. Because the additional information given to Otis was not erroneous, we conclude the circuit court erred in concluding that Otis's refusal was reasonable; and therefore, we reverse.

BACKGROUND

¶2 Otis was stopped and arrested for operating a motor vehicle while under the influence of an intoxicant (OMVWI) by Wisconsin State Trooper Adrian Logan. As the first step in processing that OMVWI, Logan read Otis the Informing the Accused form pursuant to Wisconsin's Implied Consent law.[2]

[2] The form Logan read to Otis stated:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> 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 privileges 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

(continued)

When he asked Otis whether he would submit to a chemical breath test, Otis answered "Yes."

¶3 As Logan was entering information about Otis into the Intoxilyzer in preparation for Otis's test, Otis requested a blood test. Logan answered that Otis had to take the primary breath test before Logan could "facilitate" him taking the alternative blood test. Otis then responded that he did not want to take the breath test. Logan then filled out a new Informing the Accused form, indicating that Otis refused to submit to the breath test. Otis continued to demand a blood test. Logan explained that after he completed the paperwork, Otis was free to have a blood test at his own expense.

¶4 Otis challenged the revocation of his driving privileges, which occurred because of his refusal. At the refusal hearing, Otis focused on two sentences in Logan's police report. In response to Otis's demand for a blood test, Logan wrote in his report "I explained to him that he had to take the primary test, breath, before the alternative, blood, could be given. I also informed him that after the Intoxilyzer test he was free to have a blood test at his expense." Otis argued at the refusal hearing that this information was erroneous because Otis was entitled to a blood test at the expense of law enforcement upon completing the breath test. The circuit court concluded that this information was misleading; and therefore, it concluded that Otis's license was improperly revoked based on his refusal. The State appeals.

> 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.

DISCUSSION

Standard of Review.

¶5 Whether a refusal to take a chemical test to determine alcohol concentration in a driver's body is reasonable is a question of law which we review *de novo*. *See* ***State v. Ludwigson***, 212 Wis.2d 871, 875, 569 N.W.2d 762, 764 (Ct. App. 1997). Additionally, interpretation of § 343.305, STATS., and its application to undisputed facts present questions of law which we review *de novo*. *See* ***State v. Schirmang***, 210 Wis.2d 324, 329, 565 N.W.2d 225, 227 (Ct. App. 1997).

Adequacy of Refusal Warning.

¶6 By applying for a driver's license, every driver in Wisconsin impliedly consents to take a chemical test for alcohol content. *See* ***id.*** However, an officer must orally inform a driver of his or her rights under Wisconsin's implied consent law when requesting the chemical test. *See* § 343.305(4), STATS. A person may refuse to take the chemical test. However, if a driver does refuse, the officer will take that person's license and will issue a notice of intent to revoke driving privileges. *See* § 343.305(9)(a).

¶7 Upon revocation, the driver may request a refusal hearing to determine whether the driver's refusal was reasonable. *See* § 343.305(9)(a)4., STATS. A revocation of operating privileges is not valid unless the person has first been adequately informed of his rights under § 343.305(4). *See* ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 693, 524 N.W.2d 635, 640 (1994). "This means that a driver must be informed of all the statutorily designated information which that driver needs to know in order to make an informed decision." ***Schirmang***, 210

Wis.2d at 330, 565 N.W.2d at 228. Subjective confusion about the information provided is not a defense to revocation based on refusal. *See* ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995).

¶8 We apply a three-element test to examine the sufficiency of the warning given by a law enforcement officer under § 343.305(4), STATS.: (1) whether the requesting officer either failed to meet or exceeded his duty to inform the accused under § 343.305(4); (2) whether the lack or oversupply of information was misleading; and (3) whether the driver's ability to make the choice about whether to submit to chemical testing was affected. *See* ***Schirmang***, 210 Wis.2d at 330, 565 N.W.2d at 228. A driver must prevail on all three elements before his refusal is reasonable.

¶9 The State concedes that Logan exceeded his duty under the statute to inform Otis of his rights by answering Otis's questions after reading him the Informing the Accused form. However, the State contends that Logan did not provide erroneous information; and therefore, Otis has not met the second element of the test. We agree.

¶10 In ***Ludwigson***, 212 Wis.2d at 874 n.1, 569 N.W.2d at 764 n.1 (Ct. App. 1997), the State argued that the second element (that the oversupply of information was misleading) was not satisfied where an officer told Ludwigson that the sanction for refusing to submit to the test was a one-year revocation of driving privileges. This was incorrect because Ludwigson had a previous conviction for operating while intoxicated; and therefore, her revocation period would have been two years. *See* ***id.*** In reasoning to our conclusion, we clarified, "[t]he term 'misleading' in the second ***Quelle*** prong was meant by this court to be synonymous with the term 'erroneous.'" *See* ***id.*** at 875, 569 N.W.2d at 764

(citation omitted). We then held as a matter of law that the officer exceeded his duty in providing this information and that the information was erroneous, which satisfied the second element. *See* ***id.*** at 875, 569 N.W.2d at 764-65.

¶11 Under ***Ludwigson***, therefore, we must determine whether the information given by Logan was erroneous. We examine what Logan told Otis step-by-step. First, by reading the Informing the Accused form to Otis, Logan told him:

> 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.

Therefore, Otis was informed that he could receive an alternative test free of charge if he took the tests requested by Logan. Additionally, he was also told that he could receive a test conducted by a technician of his choosing at his own expense, if he desired.

¶12 After receiving this information from Logan, Otis requested a blood test. Logan informed Otis that he first had to take the primary test (breath) before the alternative test (blood) would be given. This information is not erroneous because law enforcement is required to provide a driver with an alternative test only if the driver requests such test and he or she submits to that agency's primary test. *See* § 343.305(5)(a), STATS.

¶13 According to Logan's testimony, Otis continued to demand a blood test after Logan had already informed Otis twice that if he complied with the breath test, law enforcement would arrange for a blood test. In response to Otis's continued demands, Logan stated that Otis was free to obtain a blood test at his

own expense after the paperwork was finished. That statement is not erroneous. Logan simply reiterated a true statement—any driver arrested for OMVWI always has the option of obtaining a blood test at his or her own expense. The statement does not become erroneous simply because Logan did not repeat, for a third time, that if Otis complied with the breath test, law enforcement would pay for his blood test.

¶14 Otis argued to the circuit court that what made Logan's statement erroneous was the timing of the statement; that is, he contends that Logan made this statement *before* he refused to submit to the breath test. Therefore, he implies that Logan had a duty to repeat that Otis had a right to receive an alternative test at law enforcement expense because Logan could not know whether Otis would submit to the breath test.

¶15 We reject Otis's claim that a law enforcement officer has a duty to repeat information from a refusal warning for a third time in order to adequately inform a driver. Moreover, we note that our review of the record does not support Otis's contention regarding the timing of the events. Otis relies on Logan's testimony during cross-examination where counsel for Otis asked Logan about the statement that Otis was free to have a blood test at his own expense:

> Q. [Reading from the police report] "I explained to him that he had to take the primary test, breath, before the alternative, blood, could be given. I also informed him that after the Intoxilyzer test he was free to have a blood test at his expense." Is that what your report says?
>
> A. Yes.
>
> Q. So before you entered the information in the Intoxilyzer machine and before he refused to take the test you told him that he had to pay for the blood test, isn't that correct?

A. *No, I didn't.*

Q. Are you telling me, officer, it's your testimony today that your report is inaccurate?

A. *No, I'm not.*

Q. Is your report accurate, sir?

A. What you're saying –

Q. Officer, answer my question please.

A. Yes, it is.

(Emphasis added.)

¶16 Logan testified on direct examination that he did not make this statement about the blood test until *after* Otis had refused to take the breath test, which occurred *after* he had read him the Informing the Accused form. He said nothing on cross-examination to contradict his earlier testimony. At that point, Otis no longer had a right to a blood test at law enforcement expense because he had refused the primary breath test. Further, Otis chose not to testify at the hearing; therefore, there is no evidence in the record, including the last sentence in the police report under the heading **FIRST INFORMING THE ACCUSED,** to controvert Logan's testimony that he made the statement regarding Otis's right to obtain a blood test at his own expense after Otis refused the breath test.

¶17 Otis had a right to have a blood test done by a technician of his choosing at his expense. Therefore, Logan's statement regarding Otis's right to obtain a blood test at his own expense was not a misstatement of the law, and because Logan had already informed Otis that he could have a secondary test "free of charge" after he completed the primary test, we conclude Otis failed to prove that the oversupply of information he received was erroneous. Therefore, Otis did

not satisfy the second element of the test necessary to conclude that his refusal was reasonable.

CONCLUSION

¶18 We conclude that the information given to Otis was not erroneous. Accordingly, we reverse the order of the circuit court dismissing the refusal issue from Otis's prosecution and we remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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