

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1110

**Cir. Ct. Nos. 02TR011708
02TR011709
02TR001710**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LISA WEIRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed and cause remanded with directions.*

¶1 CURLEY, J.¹ Lisa Weirick appeals the judgment finding her guilty of first offense operating a motor vehicle while intoxicated, contrary to WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

§ 346.63(1)(a) (2001-02),² entered following a court trial.³ Weirick argues that the trial court erred in denying her motion to suppress the intoximeter breath test results because the operator, when asked by Weirick, misstated the length of the license suspension mandated upon a finding of guilt to the charge of operating a motor vehicle while intoxicated. Weirick contends that the inaccuracy of this information invalidated the implied consent warnings and, thus, her test results should have been inadmissible at her trial. In the alternative, she submits that the trial court should have at least “stripped the test result of its presumptions [sic] of admissibility.” This court affirms.

I. BACKGROUND.

¶2 Weirick was initially pulled over by a Milwaukee County Deputy Sheriff for deviating from her lane of travel. Eventually she was charged with first offense operating a motor vehicle while intoxicated (OMVWI), and later with operating a motor vehicle with a prohibited alcohol concentration. She was also ticketed for deviating from her designated lane. After her arrest, she was taken to the Sheriff’s sub-station for the purpose of administering a breath test. Upon arrival, she was read the “Informing the Accused” form. Following the reading of the form, Weirick asked several questions, including one in which she asked the deputy how long her license would be suspended. The deputy told her that if she were to be found guilty, her license could be suspended for up to six months. The State concedes that upon a finding of guilt to the OMVWI charge, Weirick’s

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

³ The order of judgment mistakenly states that the verdict was the result of a jury trial. On remand, the judgment should be corrected.

driving privileges had to be suspended for a minimum of six months and could have been suspended for a maximum of nine months. *See* WIS. STAT. § 343.30(1q)(b)2.

¶3 Weirick elected to submit to the breath test, which revealed a prohibited alcohol concentration. She filed a motion seeking to suppress her test results because of the inaccurate information given to her regarding the license suspension. The trial court concluded that the misinformation was not material and, in any event, the trial court did not believe that the implied consent law is the exclusive means by which chemical test results are admissible.⁴ Later, Weirick was convicted of first offense OMVWI following a court trial.

II. ANALYSIS.

¶4 The interpretation of Wisconsin's implied consent law and its application to undisputed facts present questions of law that this court reviews independently. *State v. Schirmang*, 210 Wis. 2d 324, 329, 565 N.W.2d 225 (Ct. App. 1997). In the act of applying for a driver's license, every driver in Wisconsin impliedly consents to take a chemical test to determine blood alcohol content when certain statutory conditions are met. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277-78, 542 N.W.2d 196 (Ct. App. 1995); *see* WIS. STAT. § 343.305. After being arrested for operating a motor vehicle while intoxicated, an officer may ask a driver to provide a blood, urine, or breath sample. *See* WIS. STAT. § 343.305(2). The officer is required to orally inform the driver of his or her rights

⁴ The trial court also suggested that because police officers are permitted to use tactics such as lying when interrogating a suspect, an officer may be free to mislead a driver concerning the length of the license suspension. This court strongly disagrees that such a practice would be either appropriate or legal.

under Wisconsin's implied consent law when requesting a test. *See* WIS. STAT. § 343.305(4). Should the driver refuse to take the test, the driver's license is seized and the officer issues a notice of intent to revoke the person's operating privilege. *See* WIS. STAT. § 343.305(9).

¶5 Here, Weirick contends that: (1) she was misinformed because she was told the license suspension requirements were discretionary, when in fact the court is obligated to suspend a person's operating privileges for at least six months upon a finding of guilt; and (2) she was misinformed about the length of the suspension, since a driver's license can be suspended for up to nine months upon conviction. While this court agrees with the trial court's ultimate conclusion that the test results were admissible, it does so on different grounds.

¶6 First, contrary to Weirick's basic argument, the implied consent law is not implicated under the facts presented here. The officer who misadvised Weirick did not testify at the motion hearing, as the parties stipulated to the fact that the officer told her that upon a finding of guilt her license could be suspended for up to six months. The officer did, however, testify at an administrative suspension hearing held months earlier. His testimony follows:

Q. But you do remember telling her that if she took the test and failed it, her license could be suspended for up to six months?

A. No, I told her if she was found guilty.

Q. That her license would be suspended up to six months, correct?

A. Correct, right.

While the officer answered Weirick's question incorrectly, the answer only incorrectly advised Weirick of the length of the driving license suspension upon a

finding of guilt to the charge of OMVWI. The answer did not misinform Weirick about the possible repercussions of refusing to submit to a breath test.⁵ There is no requirement in the implied consent law that the law enforcement officer advise the suspected drunk driver of the length or duration of a suspension upon a finding of guilt to the charge of OMVWI. WISCONSIN STAT. § 343.305(4), in pertinent part, merely requires the officer to state:

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.

Weirick does not contend that the officer misled her as to the penalties for refusing to take the test or misinformed her regarding the length of the suspension for failing to take the test. Thus, the implied consent law was complied with and the breath test result was properly admitted.

¶7 Moreover, assuming that the length of a license suspension for OMVWI might tangentially affect a driver's decision to submit to a breath test, nevertheless, the holding in *Quelle*, 198 Wis. 2d at 269, dictates that the test results were admissible. There, the officer attempted to explain the various paragraphs of the implied consent form and, in doing so, confused *Quelle* about the implied consent law. The court held that subjective confusion is not a defense against the admission of the breath test results. Further, the trial court noted:

⁵ There is some ambiguity in the record as to what the deputy was referencing when he said "if she was found guilty." The defendant's trial brief assumes the deputy was referring to guilt to a charge of OMVWI, as the brief states that the "mandatory minimum suspension length for a first offense OWI is 6 months."

[A]n accused driver must make two showings when challenging an officer's conduct: one, that the officer misstated the warnings, or otherwise misinformed the driver, and two, that the officer's misconduct impacted his or her ability to make the choice available under the law.

Quelle, 198 Wis. 2d at 278. Here, Weirick was not misled about the penalties for failing to submit to the test, she was only misled about the length of the suspension of her operating privileges if she were to be convicted of OMVWI. This mistake was not fatal, nor did it impact her ability to make a decision to take the test. Further, Weirick had ample time to learn the actual license suspensions applicable to her upon a finding of guilt to OMVWI prior to her trial. Finally, this court is unpersuaded by the other cases submitted by Weirick as they are irrelevant to the facts here; the cases cited, *e.g.*, *Schirmang*, 210 Wis. 2d 324, and *State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989), dealt with situations when a party refused to submit to a test. Here, the test was taken.

¶8 For the reasons stated, this court affirms and remands with directions to correct the judgment.

By the Court.—Judgment affirmed and cause remanded with directions.

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

