COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1116-CR **Cir. Ct. No. 02CT001479**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY W. TYLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Danny Tyler appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI), second offense. Tyler contends that because the arresting officer misinformed him

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

of the penalty if convicted, the trial court erred when it failed to suppress the blood alcohol test or, in the alternative, stripped the test of its presumption of admissibility. The judgment is affirmed.

¶2 Tyler concedes that the officer had probable cause to arrest him for OWI and properly read the Informing the Accused form to him. He also does not take issue with the blood test result showing a blood alcohol concentration of 0.285 g/100ml. However, he contends that when he asked the officer what the penalty would be if he was convicted of OWI, the officer misinformed him that the revocation would be six months when in fact, as this was Tyler's second OWI offense, he was facing a revocation of twelve to eighteen months. Based on this misinformation, Tyler argues there cannot be substantial compliance with Wisconsin's implied consent law and the blood alcohol test results must be suppressed or at least its presumption of admissibility is lost. He also reasons that if the trial court had either suppressed the blood test results or stripped the result's presumption of admissibility and accuracy, the State did not have sufficient evidence to convict him of OWI.

¶3 The State does not dispute that at some point after the arrest, the arresting officer may have misinformed Tyler that he was facing a revocation of six months when in fact Tyler was facing a revocation of twelve to eighteen months. However, it contends this misinformation would not have affected Tyler's decision of whether to consent to the blood test and, even if it would have, suppression of the blood test results is not the proper remedy. It also argues the evidence was sufficient to convict Tyler.

¶4 The State reasons that since Tyler agreed to submit to the sampling of his blood, if convicted he would have faced a minimum revocation of twelve

months. Had Tyler refused to voluntarily submit to the blood draw, a blood sample would have been taken forcibly, and if convicted he would have faced a minimum revocation of twenty-four months. It concludes the officer's understatement of the possible revocation could not have affected Tyler's decision to take the blood test, as Tyler under these circumstances was better off agreeing to the blood draw. The State contends that Tyler made the only reasonable choice and certainly would not be better off if he had refused the blood draw. Therefore, it concludes there was still substantial compliance with Wisconsin's implied consent law even though the officer may have understated the possible revocation.

¶5 The State may very well be correct, but we need not decide this question. In ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987), the supreme court concluded

> that the implied consent law is designed to facilitate, not impede, the gathering of chemical test evidence in order to remove drunk drivers from the roads. It is not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood or urine. It does not, however, prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the constitutionally obtained evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose. Hence, we hold that noncompliance with the procedures set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle.

¶6 The ***Zielke*** court further concluded:

> However, even though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility

> of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats., prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle. Such a holding would lead to an absurd and unreasonable result.

Id. at 51. Therefore, even if we were to conclude the implied consent law was not substantially complied with when the officer understated the possible revocation, the State would merely lose the right to rely on the automatic admissibility provisions of WIS. STAT. § 343.305(5)(d).

¶7 We reject Tyler's conclusion that under these circumstances the evidence was insufficient to convict him. At the bench trial, Tyler and the State stipulated to the reports upon which the court based its decision. This evidence shows the officer observed Tyler's car drifting back and forth in its lane for several blocks and then later traveling south in the northbound lane. Tyler failed the field sobriety tests, and the blood test results according to the State Hygiene Lab's analysis showed Tyler's blood alcohol concentration of 0.285 g/100ml. This evidence is more than sufficient to support the OWI conviction.

By the Court.—Judgment affirmed.

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