COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP396-CR **Cir. Ct. No. 2013CT141**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR J. GODARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Victor Godard appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a third offense in violation of WIS. STAT. § 346.63(1)(a). Godard argues that the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court erred in denying his motion to suppress the results of his blood test because: (1) the arresting officer provided Godard with inaccurate and erroneous information, which caused Godard to refuse to submit to the implied consent blood test, and which thereby "denied [him] his right to a second test of his choosing;" and (2) the warrantless blood draw violated his constitutional rights. I conclude that the circuit court did not err in denying Godard's motion to suppress, because the officer did not provide inaccurate and erroneous information, and because the officer acted in good faith reliance on established Wisconsin Supreme Court precedent at the time the blood draw was obtained. Accordingly, I affirm the judgment.

BACKGROUND

¶2 The evidence offered at the suppression hearing consisted of a digital video recording captured by a camera inside the squad car of Deputy C.J. Micale, who stopped Godard and placed him under arrest for OWI. The facts relevant to the circumstances of the arrest and Godard's refusal to consent to the chemical test of his blood are substantially undisputed.

¶3 At approximately 3:00 a.m. on February 26, 2013, Deputy Micale was patrolling near the intersection of Old Hwy 73 and Poser Road in the Town of Elba when he observed a vehicle signaling right, even though there was no road for the vehicle to turn right onto. The vehicle stopped on Poser Road, and Micale pulled up behind the vehicle and approached the vehicle's driver, who was identified as Victor Godard.

¶4 Micale reported that Godard's eyes were "glossy" and his speech was "slightly slurred," and Micale could smell an odor of intoxicants coming from the vehicle. Micale asked Godard to perform several field sobriety tests, which

Godard failed, and a preliminary breath test, which registered a blood alcohol concentration level of 0.123. Micale then placed Godard under arrest for OWI.

¶5 While Micale attempted to make arrangements for Godard's vehicle, and before Micale informed Godard of his rights under the implied consent statute, Godard declared, "Well, you know what? … You're not getting blood.… I'm telling you guess what, implied consent, you're not getting blood." Godard told Micale, "I also have a right to have another test done … [b]y another doctor." In response, Micale explained, "[I]n order for another doctor to have that done, Victor, you have to make the arrangements for that."

¶6 Godard and Micale proceeded to have a lengthy exchange, whereby Godard accused Micale of "denying" him the right to a second blood test performed by his brother. Micale attempted to read Godard the "Informing the Accused" form but was repeatedly interrupted by Godard.

¶7 At approximately 3:52 a.m., Micale read Godard the "Informing the Accused" form verbatim. Micale then asked Godard, "[W]ill you submit to an evidentiary chemical test of your blood?" and Godard responded, "That's correct, but I also want a secondary test done." Micale replied, "Okay. Okay…. You can have the alternative test that the agency provides free of charge. If you want a test done by your brother, you make those arrangements and … you don't make them right now, okay?"

¶8 Godard responded, "Now you're violating my rights." When asked again whether he will submit to the blood test, Godard responded, "I'll take the first blood test.... But … only if I'm allowed to make arrangements to take the second blood test." Micale replied, "[Y]ou have the absolute right to take the alternative test which is the intoxilyzer which this agency provides free of charge."

Godard responded, "[O]h, no, no, no, no…. I also have the right to have another blood test taken at another hospital. Yes, I do."

¶9 The exchange between Godard and Micale continued with Godard asking several times whether Micale was denying him the right to a secondary test and Micale stating that Godard had the right to take a free secondary test offered by the agency or to make separate arrangements on his own. Micale also said to Godard, "You're not getting transported to another hospital," and, "It is not my responsibility to make those arrangements for you."

¶10 Godard repeatedly expressed that he wanted "a private test that [he is] willing to pay for." In response to these requests, Micale stated several times that Godard would have to "[m]ake those arrangements" and could do so "[a]s soon as the PO … drops the hold." Godard agreed, stating, "All right [sic]."

¶11 Micale transported Godard to the Beaver Dam Community Hospital, and Godard involuntarily submitted to a blood draw at approximately 4:25 a.m. Micale reported that while at the hospital, Godard "thrash[ed] around on several occasions and shout[ed] loudly stating that he wanted his own second blood draw and that he was being refused his right to have that second blood draw done." At least one other officer assisted Micale in securing Godard so that the blood draw could be performed. The subsequent blood test results report showed that Godard's blood alcohol level was 0.169 g/100 mL.

¶12 Godard filed a pretrial motion to suppress the results of the blood test based on the following arguments: (1) Micale denied Godard his right to obtain a second blood test under Wisconsin's implied consent law by providing misleading information that caused Godard to refuse to submit to the implied consent blood draw, and (2) the retroactive application of the recent Supreme

Court case, ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), required Micale to have obtained a search warrant prior to submitting Godard to the forced blood draw.

¶13 The circuit court denied the motion to suppress the blood test results. As to Godard's first argument, the court found that the information that Micale provided Godard "was accurate and not erroneous," explaining:

> The only evidence presented for the Court's review was a recording of the conversation between the deputy and the defendant. The Court listened to the tape of the conversation between the defendant and the arresting deputy. The deputy and the defendant had a back and forth banter regarding the defendant's right to have a second test. The defendant was quite belligerent and was attempting to make the deputy agree with the defendant's demand that the defendant be taken to another hospital where his brother could draw blood. The deputy rightfully informed the defendant that if he wanted the deputy to provide him with a secondary test, the deputy was ready, willing, and able to provide an intoxilyzer test at the jail. It is also clear that the deputy informed the defendant that the defendant could have a secondary test of his choice but that the defendant would have to make the arrangements. The deputy informed the defendant that the deputy would not be transporting the defendant to another hospital for the secondary blood draw. The Court finds that the deputy did provide additional information.
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> However, the Court finds that the additional information provided was not erroneous. The back-and-forth between the defendant and the arresting deputy must be evaluated under the totality of the situation in which the conversation was occurring. The deputy was attempting to professionally deal with a quite belligerent defendant. The deputy wanted to make clear to the defendant that the deputy was not, in any way, denying the defendant a secondary test and that he (the deputy) was willing to offer the intoxilyzer as the agency's second test. The deputy was clarifying his responsibilities under the implied consent law, the defendant wasn't listening to the deputy, and at times made responses that were non-responsive to the deputy's statement in an attempt to twist the meaning of what the deputy was attempting to communicate.

> The deputy also made it clear that the defendant had the responsibility to arrange for any other secondary test and that the deputy didn't have to transport the defendant to another hospital for a secondary blood draw. The deputy was correct in the extra information that he gave the defendant.

As to Godard's second argument, the circuit court held that the good faith exception applied and, therefore, preclude suppression of the warrantless blood draw under ***McNeely***.

¶14 Godard pled no contest to the charge of OWI as a third offense and brought this appeal.

DISCUSSION

¶15 In this appeal, Godard renews his argument that the evidence from the blood draw should be suppressed. Specifically, Godard argues that suppression is required because: (1) Micale denied Godard the statutory right to a second test of his choosing by providing Godard with misleading information that caused Godard to refuse to submit to the implied consent blood test; and (2) retroactive application of ***McNeely*** renders the warrantless seizure of Godard's blood a violation of his Fourth Amendment rights.

A. Standard of Review

¶16 This court analyzes the denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews

de novo. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The ultimate question of "whether the facts as found by the [circuit] court meet the constitutional standard" is also reviewed de novo. ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

B. Statutory Right to Second Blood Test

¶17 Godard's first argument is that Micale provided him with erroneous and misleading information, causing him to refuse the primary implied consent blood test and thereby denying him the statutory right to a second test of his choosing. As explained below, Godard's argument fails because the record demonstrates that Micale did not provide him with erroneous and misleading information.

¶18 "Wisconsin's implied consent law is intended to facilitate the ability of police to secure evidence of intoxication or controlled substances by persuading drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***State v. Padley***, 2014 WI App 65, ¶24, 354 Wis. 2d 545, 849 N.W.2d 867. "[A]ll persons accept [their 'implied consent'] as a condition of being licensed to drive a vehicle on Wisconsin public road ways." ***Id.***, ¶26; WIS. STAT. § 343.305(2). When a law enforcement officer requires that a driver decide whether to give consent to a requested primary chemical test, such as a blood test, the driver may either choose or refuse to consent. ***Padley***, 354 Wis. 2d 545, ¶25-28. A driver who declines to comply with the implied consent law by refusing to consent to a requested blood test suffers the penalties specified in the implied consent law, which include automatic license revocation. ***Id.***, ¶¶27, 31; WIS. STAT. § 343.305(10). Such a driver also loses the opportunity to submit to a secondary chemical test of the driver's choosing. *See* WIS. STAT. § 343.305(5).

¶19 WISCONSIN STAT. § 343.305(4) of the implied consent law requires that the arresting officer read to the driver the information contained in the "Informing the Accused" form so as to advise the driver of the nature of the driver's implied consent and his or her rights under the statute. ***Reitter***, 227 Wis. 2d at 225. Relevant to this case, the driver must be advised that if the driver submits to the requested primary chemical test, he or she "is permitted, upon his or her request, the alternative test provided by the agency … or, at his or her expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test." WIS. STAT. § 343.305(5).[2] This statutory right to a secondary test vests when the driver consents to the primary chemical test. *See, e.g.*, ***State v. Renard***, 123 Wis. 2d 458, 460, 367 N.W.2d 237 (Ct. App. 1985) (police had duty to perform requested secondary test because defendant consented to primary blood test). Here, Godard did not consent to the primary blood test requested by Micale, and therefore Godard had no opportunity to arrange a secondary test of his choosing.

¶20 Godard's argument, that he was improperly denied his statutory right to a secondary test, turns on the adequacy of the information provided by Micale. To assess the adequacy of the information provided by a law enforcement officer under the implied consent law, we apply the following three-prong inquiry:

> (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] The "Informing the Accused" form specifically states, "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." WIS. STAT. § 343.305(4).

> (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?

County of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995) (alteration in original); *see also* ***Washburn County v. Smith***, 2008 WI 23, ¶¶56-57, 72, 308 Wis. 2d 65, 746 N.W.2d 243 (applying the ***Quelle*** three-prong inquiry to fact situations in which the law enforcement officer "provided all the statutorily required information but then provided more information in excess of his duty under § 343.305(4)").

¶21 As to the first prong, the transcript of the recorded arrest shows that Deputy Micale informed Godard of his right to a secondary test by reading him the "Informing the Accused" form verbatim. Micale also reiterated several times, in accordance with WIS. STAT. § 343.305(4), that if Godard wanted a secondary test of his choosing rather than the free intoxilyzer test offered by the State, then Godard would need to make those arrangements at a later time. Micale also told Godard that Micale would not transport Godard to an alternative hospital. The circuit court found that Micale exceeded his duty under § 343.305(4) by providing additional information, and the parties do not contest that finding.[3] Accordingly, I accept the parties' concession that Micale exceeded his duty under § 343.305(4) by providing additional information to Godard.

[3] Although the circuit court applied ***Quelle***'s three-prong inquiry in deciding whether to suppress Godard's refusal to submit to the primary test, the parties do not argue that the application of the three-prong inquiry to the same set of facts changes in the context of deciding whether to suppress the primary test results.

¶22 The second prong of the ***Quelle*** inquiry requires that this court "examine the specific facts and determine if this additional information was false or otherwise misleading." ***Quelle***, 198 Wis. 2d at 282. Under this second prong, "'misleading' is synonymous with 'erroneous.'" ***Smith***, 308 Wis. 2d 65, ¶68 n.60, ¶56 n.43. Upon review of the record, I agree with the circuit court's conclusion that the additional information provided by Deputy Micale was not false or misleading. Micale accurately informed Godard that he would not be transported to another hospital of his choosing. *See* ***State v. Vincent***, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992) ("Nothing in the language of subsec. (2) of sec. 343.305, Stats., imposes a duty upon the agency to transport the accused to the site of the test facility chosen by the accused."). Micale also accurately told Godard that he would have to make the arrangements for the secondary test of his choosing later. *See* ***Vincent***, 171 Wis. 2d 129 (holding that the agency must promptly process the accused to afford the accused a "reasonable opportunity" to obtain an alternative test within three hours except under certain circumstances when that is not possible).

¶23 Godard cites to two instances in the transcript of the arrest where, Godard argues, Micale provided him with false and misleading information by telling him that "the only second test he could have was the intoxilyzer." However, Godard improperly focuses on two of Micale's statements in isolation and out of context in order to fit Godard's asserted subjective interpretation. *See* ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528 ("the determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver"). It is clear from the entire arrest transcript that Micale repeatedly informed Godard that Godard had

the right to a free secondary test by the agency, which was the intoxilyzer, and that if Godard did not want this to be his secondary test, he would have to make separate arrangements later. It would be unreasonable to require that a law enforcement officer state all of the parameters of the driver's right to additional tests (by the agency at no cost and/or at the driver's expense as separately arranged by the driver) each and every time where, as here, the officer stated all of those parameters many other times in the course of an extended conversation with the driver. In sum, Godard fails to show that Micale provided erroneous information as to Godard's rights under the implied consent law.

¶24 Because I conclude that Deputy Micale did not make any false or misleading statements to Godard, I do not need to examine the third prong. Under the ***Quelle*** inquiry, Godard has failed to demonstrate that the information provided to him was inadequate. Therefore, his argument, that he was denied his statutory right to a secondary blood test of his choosing because he refused the blood draw requested by Micale solely on account of incorrect information provided by Micale, fails.

C. McNeely and the Good Faith Exception

¶25 I now turn to Godard's second argument: the constitutionality of the warrantless blood draw in light of ***McNeely***. Godard claims that ***McNeely*** renders the State's warrantless blood draw a violation of Godard's Fourth Amendment right against unlawful seizure. Godard argues that the only evidence of exigent circumstances in this case was the natural dissipation of alcohol from his blood stream, which the United States Supreme Court clarified in ***McNeely*** does not by itself constitute a *per se* exigency justifying a warrantless blood draw. *See* 133 S. Ct at 1568. Godard further argues that we should not apply the good faith

exception articulated in ***State v. Dearborn***, which held that "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97.

¶26 This court recently addressed this issue in ***State v. Reese***, 2014 WI App 27, 353 Wis. 2d 266, 844 N.W.2d 396. Similar to the facts in ***Reese***, the warrantless blood draw in this case was performed before ***McNeely*** and after ***State v. Bohling***, in which our supreme court, in its interpretation of the United States Supreme Court's opinion in ***Schmerber v. California***, 384 U.S. 757 (1966), held that the natural dissipation of alcohol "constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation." ***State v. Bohling***, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993).

¶27 This court held in ***Reese*** that the ***Dearborn*** good faith exception applies when a warrantless blood draw was performed in reliance on ***Bohling***, prior to ***McNeely***. *See* ***Reese***, 353 Wis. 2d 266, ¶22. This court's decision in ***Reese*** is controlling.[4] *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185-190, 560 N.W.2d 246 (1997) (the court of appeals is bound by published decisions of the court of appeals). Consistent with ***Reese***, I conclude that in this case, Deputy Micale was following clear and well-settled Wisconsin precedent at the time of the blood

[4] In recognition that ***Reese*** is currently before the Wisconsin Supreme Court, Godard makes his argument here to preserve his rights pending action by that Court.

draw, and therefore, the good faith exception precludes suppression of the blood draw evidence.

CONCLUSION

¶28 For the reasons set forth above, I reject Godard's arguments that the circuit court erred in denying his motion to suppress the blood test results, and, therefore, I affirm.

By the Court.—Judgment affirmed.

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