COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0038-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK J. ENDRES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

VERGERONT, J.[1] Frank Endres appeals his conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to § 346.63(1)(a), STATS.,[2] and the order denying the motion to suppress

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

[2] Section 346.63(1)(a), STATS., provides:

> Operating under influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:

(continued)

his intoxilyzer test results. Endres contends Officer Duane J. Brehmer of the Waunakee Police Department did not comply with the implied consent statute because he failed to re-read the Informing the Accused form prior to administering a second breath test less than an hour after the first test was aborted. We conclude that, considering the circumstances presented in this case, a single reading of the Informing the Accused form was sufficient under the statute, and we therefore affirm.

BACKGROUND

Officer Brehmer testified at the suppression hearing that he arrested Endres for OWI and transported him to the Waunakee Police Department where he asked Endres to submit to a chemical test of his breath. Pursuant to § 343.305(4), STATS., 1995-96,[3] Officer Brehmer read the Informing the Accused form to Endres at 1:11 a.m., checking off each paragraph to indicate that he had read it to the defendant. One of the paragraphs informed Endres that, after submitting to the test, he could request an additional, alternative test.

Endres testified that Officer Brehmer had read him the form and that Endres understood he had a right to another test. Endres consented to the test and

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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely diving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

[3] Section 343.305(4), STATS., was repealed and recreated by 1997 Wis. Act 107, § 1 effective August 1, 1998. All references to § 343.305(4) in this opinion refer to the 1995-96 statute.

provided adequate samples of his breath, but Officer Brehmer aborted the test at 1:23 a.m. because the machine "failed its calibration test," a mechanism the intoxilyzer machine activates to insure that it is working properly. Endres testified that he did not ask for an alternative test at that time because he understood that the test had failed and could not be used. Officer Brehmer arranged an alternative site for a second intoxilyzer test at the nearby DeForest Police Department.

Shortly after arriving at the DeForest Police Department, Endres consented to the second test, which was administered at 2:02 a.m., less than one hour after Officer Brehmer had read Endres the Informing the Accused form. Officer Brehmer did not re-read the form prior to this second test, which registered a .18 alcohol content. Endres testified at the suppression hearing that if he had known of his rights, he would have requested another test, since he could not believe that he had tested as high as he did for the "little bit" he had to drink that day. Endres further testified that although he listened to and understood the Informing the Accused form while at the Waunakee Police Department, he did not understand that he had a right to an alternative test after submitting to the test at the DeForest Police Department.

Endres moved to suppress the results of the intoxilyzer test, arguing that the administration of the Informing the Accused form did not comply with § 343.503(4), STATS. The trial court denied Endres' motion, finding that Officer Brehmer had acted in "complete compliance" with the implied consent statute. Endres pleaded no contest.

DISCUSSION

On appeal, Endres again argues that Officer Brehmer failed to comply with § 343.305(4), STATS., and that his intoxilyzer test results should have

been suppressed. Interpreting the implied consent statute presents a question of law, which we review de novo. *See* ***Gonzalez v. Teskey***, 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990). The first step in the process of statutory interpretation is to look at the language of the statute. *See* ***State v. Sweat***, 208 Wis.2d 409, 414-415, 561 N.W.2d 695, 697 (1997). If the plain language of the statute is clear, we need not look beyond the statute itself: we simply apply the clear meaning of the statute to the facts before us. ***Id.***

Section 343.305(4), STATS., provides, in pertinent part:

> **Information.** At the time a chemical test specimen is requested under sub. (3) (a) or (am), the person shall be orally informed by the law enforcement officer that:
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> ….
>
> (d) After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

Endres contends that because the statute states that the driver "shall" be informed of certain rights "[a]t the time" the test is requested, Officer Brehmer needed to re-inform Endres of his rights, including his right to an alternative test, before administering the second test.

We disagree. We conclude that the plain language of the statute regarding the time at which the implied consent form must be read does not provide a limit on the time between the reading of the form and a successful test, but rather simply requires officers to read the form prior to administering a test. Also, as we stated in ***State v. Pawlow***, 98 Wis.2d 703, 704, 298 N.W.2d 220 (Ct. App. 1908) (quoting ***Scales v. State***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974)), the implied consent statute must be construed "in light of its policy to 'facilitate the taking of tests for intoxication and not to inhibit the ability of the

state to remove drunken drivers from the highway.'" The statutory intent was to ensure that the defendant was informed of his rights. Endres was informed of his rights prior to the administration of the first intoxilyzer test. We conclude that a proper reading of the Informing the Accused form is not invalidated by moving the arrestee to a different location. It is illogical to suggest that the trip to the second police station somehow negated the information given to Endres at the first police station. The trial court opined that Endres' argument for suppression "bordered on frivolous." We agree.[4]

By the Court.—Judgment and order affirmed.

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

[4] Endres also argues that Officer Brehmer failed to "substantially comply" with the informed consent law under the three-part test established in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995). Because we conclude, as the trial court did, that Officer Brehmer met his duty under §343.305(4), STATS., to provide information to the accused driver, thereby actually complying with the statute, we need not address this argument. *See* ***id.*** (first and threshold prong of the test for substantial compliance is whether the officer actually complied with statute).