**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 24, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-0760**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MILTON H. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

¶1 NETTEHSIEM, J. Milton H. Smith appeals from an order finding that he unlawfully refused to submit to a chemical test under the implied consent law, as well as an order denying his motion for relief from that order pursuant to § 806.07(1)(d) and (g), STATS. Smith argues that the information provided to him in the Informing the Accused form did not comply with the implied consent law because it understated the applicable penalties or otherwise misled him. He also

contends that he was "tricked" into refusing the test because he was not informed that the police could have obtained a warrantless draw of his blood in any event.

¶2 We reject Smith's arguments. We affirm the circuit court's ruling that the police officers substantially complied with their statutory duty to correctly inform Smith under the statute. We further hold that Smith was not deceived into refusing the test such that he was entitled to relief under § 806.07(1)(d) and (g), STATS.

## FACTS

¶3 Smith was arrested on September 2, 1997, for operating a motor vehicle while under the influence of intoxicants (OWI). As a result, he was transported to the Village of Menomonee Falls Police Department so that a chemical test of his breath could be performed. Prior to requesting a breath test from Smith, Officer James Nichols read Smith a standard Informing the Accused form issued by the Department of Transportation (DOT).

¶4 This form conveys all of the information required by § 343.305(4), STATS., 1995-96.[1] The form is broken down into two sections, marked "A" and "B." The "A" section consists of five paragraphs. The first four paragraphs convey information pertinent to all OWI suspects. The fifth paragraph additionally warns of certain sanctions (vehicle immobilization, seizure or forfeiture) if the suspect is a repeat offender and: (1) refuses the test, or (2) takes the test and the result is a prohibited alcohol concentration.

[1] Our initial opinion in this case erroneously addressed Smith's argument under the current version of § 343.305(4), STATS. Instead, we should have addressed those arguments under the 1995-96 version of the statute. When we learned of our error, we withdrew our original opinion. All further references to § 343.305, in this opinion apply to the 1995-96 version of the statute.

¶5 Nichols testified that he checked off each paragraph on the form as he read each provision to Smith. After being read the entire form, Smith refused to submit to a chemical test of his breath.

¶6 At the time of the arrest, the police believed that this was Smith's only OWI offense within the relevant statutory period. Thus, Smith was issued a citation for first-offense OWI under a local ordinance that was the corollary of § 346.63(1)(a), STATS. Later, a more detailed review of Smith's driving record revealed two prior OWI convictions, which occurred July 15, 1988, and July 6, 1992. In light of these discoveries, the matter was transferred to the district attorney's office. The district attorney then recharged this offense as an OWI third offense and included an additional enhancer based on the fact that a minor passenger was in the vehicle at the time of the offense. *See* § 346.65(2)(f), STATS.

¶7 Based upon Smith's refusal to submit to a chemical test, the State also commenced the instant refusal proceeding. A hearing was held pursuant to § 343.305(9)(a)4, STATS., to determine if Smith's refusal to submit to testing was justified. After hearing testimony from Nichols and reviewing briefs from the parties, the circuit court found that Smith unlawfully refused to submit to testing and subsequently suspended his operating privileges for two years. Smith appeals.

## DISCUSSION

### *A. The Implied Consent Law Generally*

¶8 Although Smith's brief takes us into other provisions of the implied consent and drunk driving laws, we hold that the provisions of § 343.305(4), STATS., squarely govern this case. This statutory section dictates the information that the police must deliver to an OWI suspect prior to asking the suspect to

submit to chemical testing under the implied consent law. Smith focuses on para. (c) of the statute which reads:

> If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration and was driving or operating a motor vehicle, the person will be subject to penalties, the person's operating privilege will be suspended under this section and a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior convictions, suspensions or revocations within a 10-year period that would be counted under s. 343.307(1) ….

¶9 Smith first argues that the warnings given to him constituted an impermissible understatement of the applicable penalties for refusing to submit to a chemical test. Smith contends that these understatements prevented him from being able to make an informed decision whether or not to submit to the requested test.

¶10 Smith breaks his argument out into two segments. First, he contends that the information constituted an impermissible understatement because, at the time he refused the test, he had been issued a citation charging a first-offense ordinance violation. This argument is a nonstarter. Whether he was a first-time offender, a second-time offender or a tenth-time offender, Smith would have received the same implied consent warnings and his obligations under the implied consent law were the same regardless of his prior record. The warnings as to multiple offenders are couched in the conditional "if" language. ("If you … have two or more prior suspensions, revocations or convictions ….") Smith was fairly and correctly informed under the statute and the issuance of a traffic citation does not alter this fact.

¶11 Smith's second understatement argument is based on the fact that he was not warned about the penalties resulting from the presence of a minor passenger in the vehicle during the underlying incident. Smith reasons that "[h]aving previously chosen to enumerate the penalties specially reserved for those with two or more prior offenses, the legislature's failure to integrate this new and most serious felony consequence into the Implied Consent [L]aw is misleading." We read Smith to argue that since the implied consent warnings venture into advising about *some* of the enhancer consequences, the warnings must inform of *all* enhancer consequences.

¶12 We first note that the implied consent warnings set out in the Informing the Accused form have been held by the supreme court to not be contradictory or confusing. *See* ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 693, 524 N.W.2d 635, 640 (1994). Questions about the sufficiency of a warning given in a particular case are resolved by determining whether the warning given substantially complied with the statutory requirements expressed in § 343.305(4), STATS. This section requires "actual compliance in respect to the substance essential to every reasonable objective of the statute." ***State v. Wilke***, 152 Wis.2d 243, 250, 448 N.W.2d 13, 15 (Ct. App. 1989) (quoted source omitted). "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." ***State v. Schirmang***, 210 Wis.2d 324, 330, 565 N.W.2d 225, 228 (Ct. App. 1997).

¶13 Smith argues that the understated penalties cannot constitute substantial compliance because they do not recite the full panoply of possible OWI penalties that can be visited upon an offender with two or more prior convictions. He additionally argues that the understatement regarding the penalty for having a minor as a passenger violated due process because "[h]aving previously chosen to

enumerate the penalties specially reserved for those with two or more prior offenses, the legislature's failure to integrate this new and most serious felony consequence … is misleading." Smith contends that this understatement deprived him of an opportunity to make an informed decision regarding his rights and obligations under the implied consent law.

¶14 But the problem with Smith's argument is that the implied consent law warnings deal with the penalties for violations of the implied consent law—that is a refusal to take the test or a prohibited alcohol concentration if the test is taken. *The implied consent warnings and the implied consent penalties do not purport to address violations of the statutes relating to drunk driving.* As Smith acknowledges, he makes no claim that the police did not comply with the statutory directive of § 343.305(4)(c), STATS.

¶15 Moreover, we reject the premise of Smith's argument that § 343.305(4)(c), STATS., is deficient because it did not include a warning about the penalties for having a minor passenger in the vehicle. Smith seems to assume that before this added penalty enhancer was enacted, the implied consent warnings in the statute recited all of the penalties which could be visited on a multiple OWI offender. ("Having previously chosen to enumerate the penalties specially reserved for [multiple offenders], the legislature's failure to integrate this new … consequence into the Implied Consent [L]aw is misleading.") In fact, the implied consent warnings before the enactment of the enhancer pertaining to minor passengers did not warn of many of the penalties that flowed from two or more prior convictions (i.e., increased fines and imprisonment).

¶16 In short, the legislature has decreed certain penalties under the implied consent law and it has limited the warnings that must be given to those

recited in the statute. The legislature has never evinced an intent that the implied consent warnings must venture into the array of penalties which might be visited upon an OWI offender following conviction in an OWI prosecution.

¶17 We therefore reject Smith's reliance on various implied consent and OWI cases in which claims were made that the required warnings mandated by the implied consent law were not given, or were overstated or understated. Here, the warnings satisfied the implied consent law in the first instance.

*C. Section 806.07, STATS., Relief*

¶18 Smith also challenges the circuit court's rejection of his motion for relief under § 806.07, STATS. Smith's appellate briefs do not identify the particular paragraph(s) of the statute upon which he relies. However, our review of the record reveals that in the circuit court Smith premised his motion on paragraphs (1)(d) and (g) of the statute. Paragraph (d) allows relief when "[t]he judgment is void." Paragraph (g) allows relief when "[i]t is no longer equitable that the judgment should have prospective application." Motions under § 806.07 are reviewed for an erroneous exercise of discretion. *See* ***Kovalic v. DEC Int'l***, 186 Wis.2d 162, 166, 519 N.W.2d 351, 353 (Ct. App. 1994).

¶19 Smith contends that he was "tricked" into refusing the test because, unbeknownst to him, the officers could have taken a blood sample without his consent under ***State v. Bohling***, 173 Wis.2d 529, 533-34, 494 N.W.2d 399, 399-400 (1993) (holding that dissipation of alcohol from the bloodstream constitutes sufficient exigency to justify a warrantless blood draw). Under these circumstances, Smith reasons that the advice that he had a right to refuse the test served "no purpose other than to encourage a 'no' answer, for which additional penalties … apply."

¶20 The premise underlying Smith's argument is that the police would have taken his blood forcefully. However, his premise fails. In ***Bohling***, the police department had a departmental policy in effect that all third and subsequent drunk driving offenders who refused to submit to testing were subject to warrantless blood draws. *See* ***id.*** at 534, 494 N.W.2d at 400. Here, however, there is no showing that the Village of Menomonee Falls Police Department has any policy in effect that requires warrantless blood draws of OWI suspects under any circumstances. This is borne out by the fact that the police did not perform such a procedure on Smith after he refused the test. Smith was not "tricked" into refusing the test.

## CONCLUSION

¶21 The implied consent warnings provided to Smith fully complied with the implied consent law. Thus, the police not only substantially, but also fully, complied with the statute. We reject Smith's argument that the warnings here were deficient because they did not include the penalty information for an OWI conviction accompanied by the presence of a minor in the motor vehicle. Finally, Smith has failed to demonstrate that the police would have conducted a warrantless blood draw under ***Bohling***. Therefore, he was not entitled to relief under § 806.07, STATS.

*By the Court.*—Orders affirmed.

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