COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1579

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

CITY OF NEKOOSA,

PLAINTIFF-RESPONDENT,

V.

STEVEN J. MELIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Steven Melin appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration (OMVPAC). Melin contends that the circuit court erred in denying his motion to preclude the City of Nekoosa from "automatically" admitting the results of an Intoxilyzer test

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

which formed the basis for his conviction. Specifically, Melin argues that he was misled when the arresting officer read to him from an outdated form which understated the time period for counting past violations for purposes of enhancing penalties for alcohol-related driving offenses. We conclude, however, that the misinformation did not affect Melin's ability to choose whether to submit to the test. Thus, the circuit court did not err when it denied Melin's motion, and we affirm the conviction.

BACKGROUND

¶2 A City of Nekoosa police officer arrested Melin for operating a motor vehicle while under the influence of an intoxicant (OMVWI). The officer drove Melin to the Nekoosa police station, where the officer read to him a form entitled "Informing the Accused." The relevant portion of the form provided:

> If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations or convictions within a *five year* period which would be counted under s. 343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

(Emphasis added.) At the time of the offense, however, the relevant statutes provided that drivers with prior alcohol-related suspensions, revocations or convictions within a *ten-year* period would be subject to these additional penalties.

¶3 After reading the form to Melin, the officer asked him to submit to an Intoxilyzer breath test. Melin agreed, and the test result indicated that his alcohol concentration was well above the legal limit to convict him of OMVPAC. At the time of his arrest and testing, Melin had no prior alcohol-related offenses

which would have triggered additional penalties upon his refusal to submit to testing or upon his conviction of the instant offense.

¶4 Later, Melin filed a "Motion to Preclude Reliance on Presumptions of Automatic Admissibility." In his motion, Melin asserted that the arresting officer violated Wisconsin's implied consent law when he read to Melin from the outdated form, and claimed the error to be sufficient grounds for precluding the prosecution from admitting the results of the Intoxilyzer test without first presenting expert testimony as a foundation. The court denied Melin's motion and subsequently found him guilty of OMVPAC. Melin appeals the judgment of conviction.

ANALYSIS

¶5 The interpretation of the implied consent law, § 343.305, STATS., and its application to undisputed facts present questions of law which we review de novo. *See* ***State v. Sutton***, 177 Wis.2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993).

¶6 Under the implied consent law, every Wisconsin driver "is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity [of alcohol] in his or her blood or breath." *See* § 343.305(2), STATS. A driver may revoke this consent, however, by refusing to take the test. *See* § 343.305(9), and ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 277, 542 N.W.2d 196, 199 (Ct. App. 1995). At the time of Melin's arrest for OMVWI, the arresting officer was required under § 343.305(2), STATS., 1995-96, to give Melin certain "warnings and advice" before requesting

that he submit to a breath test.[2] *See* ***State v. Geraldson***, 176 Wis.2d 487, 492, 500 N.W.2d 415, 417 (Ct. App. 1993). If a driver refuses to be tested, the officer must confiscate his or her driver's license and issue a notice of intent to revoke the driver's operating privileges. *See* § 343.305(9). If the driver submits to chemical testing, and the test is "administered in accordance with [§ 343.305]," the test result is admissible on the issue of whether the driver was OMVWI or PAC. *See* § 343.305(5)(d).

¶7 The City does not dispute that the arresting officer mistakenly told Melin that only alcohol-related driving offenses within the past five years would subject him to additional penalties. Melin asserts that the officer thus failed to comply with the requirements of § 343.305(4), STATS., 1995-96, and the City consequently lost the ability to have the Intoxilyzer test result admitted at trial under § 343.305(5)(d), without accompanying expert testimony. We conclude, however, that the officer's error did not affect Melin's ability to choose whether to submit to the requested test, and that the results of Melin's breath test were therefore admissible under paragraph (5)(d).

¶8 To "assess the adequacy of the warning process under the implied consent law," we apply the three-part test set forth in ***County of Ozaukee v.***

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[2] Melin's arrest for OMVWI occurred on April 29, 1998. At that time, law enforcement officers were directed, under § 343.305(4), STATS., 1995-96, to orally inform persons whom they had requested to submit to chemical testing of the information set forth in that subsection. The Department of Transportation prepared "Informing the Accused" forms which paraphrased the required information, and it supplied these forms to law enforcement agencies. Sections 343.305(4)(b) and (c), 1995-96, cited a ten-year period for counting past offenses for purposes of enhancing penalties for alcohol-related offenses. Subsection 4 has since been amended, however, to specify verbatim what officers are to tell persons whom they request to submit to testing, and the mandatory language makes no reference to a time period for counting past offenses. *See* § 343.305(4), STATS., 1997-98. The new verbatim requirement did not become effective until August 1, 1998. *See* 1997 Wis. Act 107, §§ 8 and 9.

Quelle, 198 Wis.2d at 280, 542 N.W.2d at 200. Under ***Quelle***, we are to make the following inquiries:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under § 343.305(4) … to provide information to the accused driver;
>
> (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?

Id. In order to obtain his requested relief, Melin bears the burden of establishing that each of these three questions must be answered affirmatively. *See* ***id***. at 285-86, 542 N.W.2d at 202; and ***State v. Schirmang***, 210 Wis.2d 324, 330, 565 N.W.2d 225, 228 (Ct. App. 1997).

¶9 The City concedes that the first two prongs of this test have been satisfied: the officer failed to meet his duty under § 343.305(4), STATS., 1995-96, when he read Melin his rights from an outdated form, and the erroneous information Melin received was misleading. Thus, the dispositive issue is whether Melin has also satisfied the third prong of the ***Quelle*** test. To answer this question, we consider whether Melin has established a causal connection between the officer's mistake and Melin's decision to submit to the breath test. *Cf.* ***State v. Ludwigson***, 212 Wis.2d 871, 876, 569 N.W.2d 762, 765 (Ct. App. 1997) (holding that, at a refusal hearing under § 343.305(9), a driver has the burden of proving that erroneous information caused the driver to refuse to take the test).

¶10 The purpose of the "informing the accused" requirement of the implied consent law, at least as it stood at the time of Melin's arrest, is "to inform

drivers of the rights and penalties *applicable to them*." *See* ***Quelle***, 198 Wis.2d at 279, 542 N.W.2d at 199 (*citing* ***State v. Geraldson***, 176 Wis.2d 487, 494, 500 N.W.2d 415, 418 (Ct. App. 1993)) (emphasis added). We have already had occasion to apply the ***Quelle*** criteria to facts quite similar to those before us now. *See* ***State v. Schirmang***, 210 Wis.2d 324, 565 N.W.2d 225 (Ct. App. 1997). As in this case, the arresting officer in ***Schirmang*** told the driver that he would be subject to additional penalties if he had had two or more alcohol-related driving offenses within the past five years, although the correct time period was in fact ten years. *See* ***id.*** at 327-28, 565 N.W.2d at 227. The driver refused to submit to a test and his operating privilege was revoked following a refusal hearing under § 343.305(9), STATS. *See* ***id***. at 328, 565 N.W.2d at 227.

¶11 Unlike Melin, who had no prior alcohol-related offenses within the ten years preceding his arrest on the instant offense, the driver in ***Schirmang*** had two prior OMVWI convictions, one having occurred within five years of his arrest, and one within ten years. *See* ***id***. We concluded that the third prong of the ***Quelle*** test had been satisfied because the mistake made by the arresting officer "affected [the driver's] ability to make a rational choice," given that the penalties which actually affected him were misstated. *See* ***id***. at 331, 565 N.W.2d at 228. Put another way, the driver in ***Schirmang*** had not been correctly "informed of all the statutorily designated information which *that driver* need[ed] to know in order to make an informed decision." *See* ***id***. at 330, 565 N.W.2d at 228 (emphasis added).

¶12 Melin contends that because both his case and ***Schirmang*** involve the giving of erroneous information regarding the look-back period for prior alcohol-related offenses, we must reverse his conviction and direct the trial court to grant his motion. As we have noted, however, ***Schirmang*** is easily

distinguished. Melin had no prior alcohol-related offenses within the past ten years, and consequently, he was not "actually affected" by the arresting officer's misstatement of the time period for considering past offenses. Unlike the driver in ***Schirmang***, Melin was not deprived of the information he "need[ed] to know in order to make an informed decision" regarding whether to submit to chemical testing. *See* ***id***.

CONCLUSION

¶13 Because Melin has not established that "the failure to properly inform [him] affected his … ability to make the choice about chemical testing," which is the third necessary showing under ***Quelle***, 198 Wis.2d at 280, 542 N.W.2d at 200, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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