

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 16, 2010**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2009AP818-CR**

**Cir. Ct. No. 2007CF161**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY J. NELSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Barron County:  
JAMES C. BABLER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Anthony Nelson appeals a judgment of conviction, entered pursuant to a plea agreement, for homicide by negligent operation of a vehicle, party to the crime, and operating a motor vehicle while intoxicated, fifth or subsequent offense. The issue is whether a deputy sheriff from Barron County

was authorized under the implied consent law to obtain a sample of Nelson's blood in Polk County. We affirm the conviction.

¶2 Barron County deputy sheriff Vincent Graf investigated a fatal accident that occurred in Barron County. The front seat passenger was killed when a van went off the road and struck a tree. Nelson was the only other person at the scene. Nelson was transported to a hospital in Polk County. Graf followed the ambulance to the hospital, where Graf read Nelson the Informing the Accused form and obtained a blood sample.<sup>1</sup>

¶3 Nelson argues the seizure of his blood was unlawful because a law enforcement officer has no authority to obtain a blood sample outside his jurisdiction. We reject Nelson's argument.

¶4 The plain language of WIS. STAT. § 349.03(4)<sup>2</sup> provides that "[i]f a violation under [WIS. STAT.] s. 343.305 ... occurs within a law enforcement officer's jurisdiction, he or she may enforce the violation anywhere in the state." Section 343.305(3) specifically permits breath, blood or urine samples pertaining to a group of laws, including WIS. STAT. § 346.63, operating while intoxicated; WIS. STAT. § 940.09, homicide by intoxicated use of a vehicle; and WIS. STAT. § 940.25, injury by intoxicated use of a vehicle.

¶5 In this case, deputy Graf was enforcing WIS. STAT. § 940.09 when he requested a sample of Nelson's blood. The implied consent law authorizes officers to enforce WIS. STAT. § 940.09 by requesting a suspect to provide a blood

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<sup>1</sup> Nelson agreed to provide a blood sample.

<sup>2</sup> References to Wisconsin statutes are to the 2007-08 version unless otherwise noted.

sample in either or both of two situations. First, a sample may be requested when the officer detects any presence of alcohol on a person who operated a vehicle involved in an accident that caused death. WIS. STAT. § 343.305(3)(ar). An arrest is not a prerequisite to such a request. *Id.* Second, a sample may be requested when the suspect has been arrested for homicide by intoxicated use of a vehicle. WIS. STAT. § 343.305(3)(a).

¶6 Here, both subsections permitted Graf to ask Nelson to provide a blood sample. Graf detected the odor of intoxicants on Nelson, and his eyes and speech led the deputy to reasonably believe Nelson was under the influence of intoxicants. Graf also had good reason to believe Nelson had been operating the vehicle in which the passenger died. The van was registered to Nelson. It had no back seats and thus could not accommodate more than two persons. There was no one else at the scene besides Nelson and the deceased person in the front passenger seat. Moreover, Nelson had an injury to his forehead consistent with a crack in the windshield on the driver's side of the van. Accordingly, Graf was justified in requesting a blood sample under WIS. STAT. § 343.305(3)(ar). However, because Nelson was arrested for homicide by intoxicated use of a vehicle,<sup>3</sup> the request for blood was also authorized under § 343.305(3).<sup>4</sup>

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<sup>3</sup> Although Nelson disputes whether he was under arrest, Graf testified he arrested Nelson at the time he read Nelson the Informing the Accused form, which also states the accused has been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both.

<sup>4</sup> Nelson failed to file a reply brief in response to the State's statutory arguments. Although we decide the merits of Nelson's appeal, we note arguments not refuted are deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

