COURT OF APPEALS
DECISION
DATED AND RELEASED

March 13, 1996

NOTICE

No. 95-2879-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS C. TEVIK,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed*.

BROWN, J. Dennis C. Tevik appeals from an order finding his refusal to submit to chemical testing unreasonable and revoking his operating privileges for twenty-four months. *See* § 343.305(10), STATS. He raises two challenges. First, he contends that the order is void because the police read him a defective Informing the Accused form. Next, he argues that the State should be judicially estopped from enforcing this order because it is

concurrently pursuing an administrative suspension of his license. *See* § 343.305(7). We reject both points and affirm.

The village of Pewaukee police arrested Tevik for operating under the influence on January 21, 1995. During processing, an officer read him a standard Informing the Accused form. One paragraph, however, had been modified with a sticker supplied to the police by the Department of Transportation. Instead of warning that prior violations occurring "within a five year period" could be grounds for action against the driver's vehicle (e.g., immobilization), the modified form stated that violations "after 01/01/88" may be counted.[1] The officer also gave Tevik a copy to read, but it did not have the DOT sticker on it. Tevik nonetheless refused to take the test.

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[1] The modified paragraph of the form the officer read stated:

> If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations and convictions after 01/01/88, 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.

The form that was given to Tevik stated:

> 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.

Because the officer could not obtain a breath sample under the implied consent procedures, and he was concerned that any alcohol in Tevik's blood stream would dissipate before he could obtain a warrant, the officer took Tevik to the hospital for a blood draw. *See* ***State v. Bohling***, 173 Wis.2d 529, 533, 494 N.W.2d 399, 400, *cert. denied,* 114 S. Ct. 112 (1993); *see also* § 343.305(3)(c), STATS. When the results showed Tevik's blood alcohol concentration to be above the legal limit, the officer issued him a notice of intent to suspend. *See* § 343.305(7) and (8).

We first turn to Tevik's complaint about the form. Here, he points to the differences in the form that the officer read aloud and the form that he was given to read. Tevik argues that the differences misled him. Moreover, he claims that both forms are legally insufficient because neither delivered the correct information: that prior violations will weigh in for *ten* years, not *five* years. *See* § 343.305(4), STATS. Whether this form was defective and how it possibly affected the officer's statutory duty to deliver information to an accused driver are questions of law we review de novo. *See* ***State v. Hagaman***, 133 Wis.2d 381, 384, 395 N.W.2d 617, 618 (Ct. App. 1986).

In his briefs, Tevik correctly describes that arresting officers have a duty to inform drivers of certain information set out in § 343.305(4) and (4m), STATS. But an officer's failure to perform these duties does not itself render the

test results inadmissible or the revocation order void. *See* ***County of Ozaukee v. Quelle***, ___ Wis.2d ___, 542 N.W.2d 196, 199 (Ct. App. 1995). The challenger must also show that the misinformation negatively affected his or her ability to make a decision about whether to accept or reject testing; the challenger must show prejudice. *See* ***id***. Because Tevik has not shown how the cited defects affected his ability to make the choice of accepting or rejecting testing, we hold that there is no reason to overturn the revocation order.

We thus reject Tevik's argument that the prejudice analysis set out in ***Quelle*** is not relevant in a revocation hearing. The ***Quelle*** decision synthesized several cases, including one where the accused driver refused the test and the court found this refusal unreasonable. *See* ***id.*** at ___, 542 N.W.2d at 199-200 (describing ***State v. Sutton***, 177 Wis.2d 709, 503 N.W.2d 326 (Ct. App. 1993)). Tevik is plainly wrong when he asserts that the ***Quelle*** analysis has no role in a revocation hearing.[2]

We now turn to Tevik's claim that the State should be judicially estopped from pursuing this revocation order because it is simultaneously pursuing an administrative suspension of his license. *See* § 343.305(7), STATS.

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[2] In a footnote, Tevik attempts to distinguish ***County of Ozaukee v. Quelle***, ___ Wis.2d ___, 542 N.W.2d 196 (Ct. App. 1995). He argues that the decision does not apply because "[i]n the cases providing the framework for that analysis, the correct form was used." However, in ***Quelle*** this court addressed inadequacies in the "warning process" proscribed under § 343.305(4) and (4m), STATS. *See* ***id.*** at ___, 542 N.W.2d at 200. While it is true that none of the cases in ***Quelle*** dealt with a defective form, the decision focused on what duties were required under the statutes. The statutory duties do not require the use of any form. The Informing the Accused form is simply a tool used by police in their efforts to ensure that all warnings are properly given.

He claims that the State is using two legally inconsistent means in its attempt to keep him off the road. As a remedy, he proposes that we deem the State to be judicially estopped from securing his revocation order.

The judicial estoppel doctrine gives us the discretionary power to prevent a litigant from asserting inconsistent positions and playing "fast and loose" with the court system. *See* ***State v. Fleming***, 181 Wis.2d 546, 558, 510 N.W.2d 837, 841 (Ct. App. 1993). Before we invoke our discretion, however, we must be satisfied that the party to be estopped is "guilty" of pursuing two different positions. *See* ***Harrison v. LIRC***, 187 Wis.2d 491, 495-96, 523 N.W.2d 138, 140 (Ct. App. 1994). In this proceeding, the State is arguing that Tevik refused testing. In the administrative proceeding, Tevik accuses it of claiming the inconsistent position that he "submitted" to testing. *See* § 343.305(7), STATS.

Nonetheless, these two proceedings are distinguishable. The hearing on Tevik's suspension is nonadversarial. *See* § 343.305(8)(b)1, STATS. Because it is nonadversarial, the State has not taken any "position" from which it can now be estopped. Tevik's opportunity to pursue his estoppel theory must wait until that administrative suspension is judicially reviewed. Then the State will have the opportunity to take a position.

By the Court.—Order affirmed.

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