COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3066

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

IN THE MATTER OF THE REFUSAL OF JOHN G. YAGER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN G. YAGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

DYKMAN, P.J.[1] John Yager appeals from an order finding that he refused to submit to a test under the implied consent statute, § 343.305, STATS. The issues are: (1) whether Yager was properly informed of his rights under the

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

implied consent law; and (2) whether Yager refused to submit to a chemical test of his blood. We conclude that Yager was properly advised of his rights and has not established that his refusal was based on excessive or misleading information. Accordingly, we affirm.

BACKGROUND

On April 17, 1998, Yager was arrested for operating a motor vehicle while under the influence of an intoxicant. After arresting Yager, Deputy Daniel Carey took Yager to the Iowa County Sheriff's Department. After arriving at the department, Deputy Carey read Yager the Informing the Accused form and permitted Yager to read the form himself. After reviewing the form, Yager verbally agreed to submit to a chemical test of his blood.

Deputy Carey then gave Yager a printed hospital consent form. After Deputy Carey spoke with Yager regarding the hospital's form, Yager refused to sign the hospital form. Deputy Carey contacted the hospital and was advised that the hospital would consider a verbal consent to the test sufficient. Yager indicated that he would provide his verbal consent to draw blood.

At the hospital, a nurse explained the hospital consent form to Yager. Yager then took the form from the nurse and read it for approximately five to ten minutes. After reading the form, Yager stated that he was not going to sign the form and refused to submit to the test. Deputy Carey then destroyed the original Informing the Accused form and completed another Informing the Accused form indicating Yager's refusal.

Yager requested and was granted a hearing. At that hearing, the trial court concluded that Yager refused to submit to the test. Yager now appeals.

STANDARD OF REVIEW

The issue in this case requires the application of the implied consent statute to undisputed facts. Such an application presents a question of law that we review de novo. *See* ***Gonzalez v. Teskey***, 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990).

DISCUSSION

Wisconsin's implied consent law, which is set out in § 343.305(2), STATS., provides that anyone who operates a motor vehicle upon the public highways of this state is deemed to have consented to a properly administered test to determine his or her blood alcohol content. *See* ***State v. Rydeski***, 214 Wis.2d 101, 109, 571 N.W.2d 417, 419 (Ct. App.), *rev. denied*, 215 Wis.2d 426, 576 N.W.2d 281 (1997). Under our implied consent law, an officer must inform the arrestee of the arrestee's implied consent to a test; that if the arrestee refuses the test his license will be revoked; and that the arrestee may have an additional test conducted. *See* § 343.305(4).

If a law enforcement officer determines that the arrestee failed to comply with the requirements of the implied consent statute, the arrestee may request a hearing within ten days of being issued a notice of intent to revoke his or her operating privilege. *See* § 343.305(9)(a)4, STATS. The issues addressed at this hearing are: (1) whether the officer had probable cause to arrest the defendant, (2) whether the officer correctly informed the defendant under the implied consent law, and (3) whether the suspect refused the test. *See* § 343.305(9)(a)5, STATS.; s*ee also* ***State v. Spring***, 204 Wis.2d 343, 350, 555 N.W.2d 384, 388 (Ct. App. 1996). Because Yager does not contest that there was probable cause for his

arrest, we need only address the final two issues. We will address them in reverse order.

We first will consider whether Yager refused to submit to a blood-alcohol test. Yager argues that he did not refuse to submit to a test; he merely refused to sign the hospital consent form. We have held that any failure to submit to a chemical test, other than because of physical inability, is an improper refusal that invokes the penalties of the implied consent statute. *See* ***Rydeski***, 214 Wis.2d at 106, 571 N.W.2d at 419. Yager admits in his brief that after the nurse explained the consent form to him, he refused to sign the consent form *and* refused to submit to a chemical test. We view this as a refusal.

Yager also contends that he did not refuse to submit to a test, because he was never given the opportunity to take the test after he declined to sign the hospital consent form. However, Deputy Carey informed Yager on two occasions that he did not have to sign the hospital consent form in order to submit to the test, yet Yager still refused to submit to the test. We therefore conclude that Yager's overall conduct amounts to a refusal.

We next consider whether Yager was advised of his rights under the implied consent statute. The issue is related to the refusal issue because Yager claims that his refusal was based on the belief that he was misled by the nurse's explanation of the hospital consent form. Section 343.305(4), STATS., describes the information that a police officer must read to the accused to properly inform the accused of his rights and duties under our implied consent law.[2] We conclude

[2] Section 343.305(4) STATS., currently reads as follows:

> At the time that a chemical test specimen is requested under sub. (3)(a) or (am), the law enforcement officer shall read

(continued)

that because Officer Carey read Yager all applicable sections of the Informing the Accused form, the requirements of § 343.305(4) are satisfied.

Yager, however, claims that he was misled by the nurse's explanation of the hospital's consent form, and that the the State bears the burden of proving that he was not mislead by the nurse's explanation. We disagree.

In ***State v. Ludwigson***, 212 Wis.2d 871, 569 N.W.2d 762 (Ct. App.), we held that when an officer has exceeded the duty under § 343.305(4), STATS., and provides extra information and the extra information provided is erroneous, it

---

> the following to the person from whom the test specimen is requested:
>
> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

is the defendant's burden to prove by a preponderance of the evidence that the erroneous information caused Yager to refuse to take the test. *See* ***Ludwigson***, 212 Wis.2d at 873, 569 N.W.2d at 764. This burden is only satisfied when the following questions are answered in the affirmative: (1) Has the law enforcement officer not met, or exceeded his or her duty under § 343.305(4) or (4m) to provide information to the accused driver? (2) Is the lack or oversupply of information misleading? (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing? *See* ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995).

We conclude that by providing Yager with the hospital consent form and having the nurse explain the form, Deputy Carey exceeded his duties under the implied consent law. However, Yager has not provided any evidence that this extra information misled him, or that it affected his ability to decide whether to submit to the test. Instead, Yager incorrectly argues that the State has the burden of providing evidence that Yager was *not* misled.

In ***State v. Spring***, 204 Wis.2d 343, 555 N.W.2d 384 (Ct. App. 1996), we concluded that a form that memorializes in writing what the suspect is otherwise required to do under the implied consent law is not misleading, and that an accused may not refuse to submit to a chemical test based on such a form.[3] *See* ***id.*** at 353, 555 N.W.2d at 389.

[3] In ***Cook v. Cook,*** 208 Wis.2d 166, 189-190, 560 N.W.2d 246, 256 (1997), we held that we may not overrule, modify or withdraw language from one of our previously published decisions. The appropriate action is to note the case's infirmity.

(continued)

Yager claims that he refused to submit to the blood test, because the information the nurse gave him regarding the hospital consent form was misleading. He stated that he was concerned that after he left Deputy Carey's presence, the officer would fill in the blanks on the hospital consent form in such a way that the form would be used to construe his guilt.

This is irrelevant under ***Spring***. Yager is correct that information can be inserted in the form. But the risk of forgery did not make the form misleading nor did it misinform Yager. The fact remains that Yager refused the test. Under the holding of ***Spring***, Yager was not entitled to refuse a test based on a form that does not misinform and is not misleading. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

We believe that ***Spring*** was wrongly decided. There is no statutory requirement that an accused sign a hospital's form. Our conclusion that we inquire only into whether the content of the form misinforms or misleads the suspect is without legislative authority. An implied consent form containing an unambiguous agreement to release the hospital from its negligence would neither misinform or mislead a suspect. Following ***Spring***, however, a suspect who agrees to take a blood test but refuses to sign such a form would be deemed to have refused the test. Even if the form contained no release, a suspect who expressly agreed to take the test, but refused to sign the form, is deemed to have refused the test. We cannot see how this advances the purposes of our implied consent law. As we see from this case, it only adds another factor from which a defendant may assert confusion. Had the legislature desired such a result, it would have so provided.