COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2364 **Cir. Ct. No. 2015FO500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD G. VERKUYLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: VICKI L. CLUSSMAN, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Donald G. Verkuylen appeals the circuit court's order finding that Verkuylen's refusal to submit to a blood test violated the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g). All references to the Wisconsin Statutes are to the 2015-16 version.

(continued)

implied consent law that applies to motor boating, WIS. STAT. §§ 30.683 and 30.684. A first offense violation of that law, as was charged here, entails only a civil forfeiture. *See* WIS. STAT. §§ 30.684(1)(b)2. and 30.80(6)(a)1. For reasons explained below, I conclude that each of Verkuylen's arguments lacks merit or is forfeited. I affirm the order.

Background

¶2 While operating a motorboat, Verkuylen was stopped for a suspected noise violation. Further investigation led to Verkuylen's arrest for operating a motorboat while under the influence of an intoxicant.

¶3 The warden who arrested Verkuylen read Verkuylen an "Informing the Accused" form and requested that he submit to an evidentiary chemical test of his blood. Verkuylen refused to submit and, based on that refusal, received a citation for violating the motorboat implied consent law. Verkuylen also received a citation for operating a motorboat while under the influence of an intoxicant.

¶4 Verkuylen moved to dismiss the refusal citation, arguing that the Informing the Accused form the warden used was outdated and not in compliance with the general implied consent statute, WIS. STAT. § 343.305. More specifically, Verkuylen argued that the form omitted information, required by that statute, referring to certain accident situations. *See* § 343.305(4). Verkuylen asserted that the general implied consent statute applied to his refusal because the legislature

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On May 4, 2017, Verkuylen moved that this case be assigned to a three-judge panel so that it would be eligible for publication. I deny the motion. First, the motion is untimely. *See* WIS. STAT. RULE 809.41(1). Second, this opinion does not warrant publication.

has "piggyback[ed]" the general statute's requirements onto the motorboat implied consent law.

¶5 The circuit court expressed doubt as to this "piggyback" argument, but ultimately did not resolve the question. Instead, the court reasoned that the warden substantially complied with the general implied consent statute and that this substantial compliance was sufficient. The court therefore denied Verkuylen's motion to dismiss the refusal citation.

¶6 Faced with this ruling, Verkuylen entered into a stipulation under which he agreed that his refusal violated the motorboat implied consent law and the State agreed to dismiss the operating-while-intoxicated citation. The circuit court approved the stipulation, adopting it as the court's order. Verkuylen appeals that order.

Discussion

¶7 On appeal, I cannot tell whether Verkuylen has abandoned his "piggyback" argument. Regardless, his argument on that topic is plainly not persuasive. Verkuylen's circuit court briefing reveals that the argument turns on a single provision in the motorboat implied consent law, WIS. STAT. § 30.684(2)(d). That provision incorporates the general implied consent statute's requirements for *performing* a blood or urine test, but it does *not* incorporate the general statute's requirements for *informing the accused*. *See* § 30.684(2)(d) (referencing WIS. STAT. § 343.305(6)). On the contrary, other provisions in § 30.684 make clear that, in the motorboat context, the accused must be informed of *different*

information that does *not* include the accident-related information that, before the circuit court, Verkuylen complained was missing. *See* § 30.684(1)(b).[2]

[2] WISCONSIN STAT. § 30.684(1)(b) provides:

> (b) *Information.* A law enforcement officer requesting a person to provide a sample or to submit to a chemical test under par. (a) shall inform the person at the time of the request and prior to obtaining the sample or administering the test:
>
> 1. That he or she is deemed to have consented to tests under s. 30.683;
>
> 2. That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681(1)(a); and
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> 3. That in addition to the designated chemical test under sub. (2)(b), he or she may have an additional chemical test under sub. (3)(a).

The general implied consent statute, in contrast, provides:

> **(4)** INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
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> "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 the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, 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

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¶8 Verkuylen now makes the additional argument that the warden failed to provide him with different information, as required by WIS. STAT. § 30.684(1)(b). Verkuylen argues, as I understand it, that the omission of *that* information renders his refusal citation invalid.

¶9 Verkuylen failed to raise this WIS. STAT. § 30.684(1)(b) argument in the circuit court. I conclude that the argument is forfeited and, on that basis, decline to address it. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues).

¶10 The forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *See* ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727. The rule "enable[s] the circuit court to avoid or correct any error with minimal

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> penalties. The test results or the fact that you refused testing can be used against you in court.
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> 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."

WIS. STAT. § 343.305(4).

disruption of the judicial process, eliminating the need for appeal." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

¶11 Verkuylen may believe that his WIS. STAT. § 30.684(1)(b) argument is not new but instead merely a refinement of his circuit court argument. If so, I disagree. Verkuylen's § 30.684(1)(b) argument raises additional questions that Verkuylen never put before the circuit court, including what remedy is available when an officer fails to comply with informing the accused requirements in the motorboat implied consent law. I decline to address these questions for the first time on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("[Appellate courts] will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

¶12 Finally, Verkuylen appears to make arguments relating to the validity of consent given under implied consent laws. Verkuylen fails to explain how these arguments relate to the citation he was issued for *refusing* to submit to a blood test. Regardless, these consent-related arguments, like Verkuylen's WIS. STAT. § 30.684(1)(b) argument, are raised for the first time on appeal. Thus, as with Verkuylen's § 30.684(1)(b) argument, I conclude that these consent-related arguments are forfeited and, on that basis, decline to address them.

Conclusion

¶13 For the reasons stated above, I affirm the circuit court's order finding Verkuylen in violation of the motorboat implied consent law.

By the Court.—Order affirmed.

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