COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0052 **Cir. Ct. Nos. 99-TR-5205**
00-TR-758

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

CITY OF NEW LONDON,

PLAINTIFF-RESPONDENT,

V.

JAMES E. KNAUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] James Knaus appeals his conviction for operating a motor vehicle while intoxicated (OMVWI) in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

§ 346.63(1)(a). We conclude that because Knaus stipulated to the admissibility of the result of a blood-alcohol test at his jury trial, he waived his right to challenge the City of New London's compliance with procedures set forth in the implied consent statute. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 On December 10, 1999, City of New London police officer Timothy Nitke arrested Knaus, charging him with violating WIS. STAT. § 346.63(1)(a). The arrest occurred after Nitke observed Knaus's vehicle weaving back and forth to the center line and then over the white line next to the shoulder of the road. After stopping Knaus's vehicle, Nitke further observed that Knaus swayed while walking, that his eyes were bloodshot and that there was a slight odor of intoxicants on his breath. Knaus admitted that he had been drinking and performed poorly on field sobriety tests. After the arrest, Knaus was taken to a hospital for a blood draw. The sample was later tested and showed a blood-alcohol concentration of 0.198.

¶3 Knaus obtained counsel, pled not guilty and requested a jury trial. Prior to trial, the circuit court met with the prosecutor and Knaus's attorney, at which point the court accepted an evidentiary stipulation concerning the result of the blood test. The transcript states:

> [Counsel for Knaus:] Because the defendant depends on a blood alcohol curve defense, if it eliminates the necessity of calling a witness, we'll stipulate to the admissibility of Exhibit Number 2 ….
>
> ….
>
> [Counsel for the City:] The city will agree to the stipulation that the blood/urine analysis, Exhibit 2, can be admitted into evidence without testimony and that Mr. Neuser, who is with the hygiene lab, can then be dismissed.

> ….
>
> THE COURT: Do you intend to somehow raise that the blood [] wasn't received at the lab of hygiene without the form?
>
> [Counsel for Knaus:] It says that right on it. I'm not asking for anything to be deleted. That's for sure. No, I'm stipulating to the exhibit in its entirety.
>
> ….
>
> [Counsel for the City:] …. In other words, the test result will be admitted—
>
> [Counsel for Knaus:] Right.
>
> [Counsel for the City:] —correct?
>
> THE COURT: Based upon the stipulation of the parties, Exhibit 2 will be admitted.

¶4 During the trial, the circuit court informed the jury, without objection from Knaus, that "[p]rior to the evidentiary portion of this trial counsel have stipulated to the admission of Exhibit 2, which is the blood/urine analysis, which shows the blood ethanol concentration was .198." After the close of evidence, however, Knaus's counsel moved to dismiss the charges[2] on the basis that the City failed to produce evidence concerning its compliance with WIS. STAT. § 343.305(4), which requires law enforcement officers to provide certain information to persons when requesting a blood, breath or urine test specimen under the implied consent law.

¶5 The circuit court denied the motion, concluding that the parties' express stipulation to the admissibility of the test result made it unnecessary for

[2] On appeal, Knaus does not assert that outright dismissal of the charges would be an appropriate remedy. Rather, he seeks a new trial on the charge that he violated WIS. STAT. § 346.63(1)(a).

the City to prove compliance with WIS. STAT. § 343.305(4). We agree and conclude that the effect of the stipulation was to waive any claim that the test result should not have been admitted into evidence at trial.

DISCUSSION

Standard of Review.

¶6 The construction of a stipulation is a question of law that we review *de novo*. *See* ***Cummings v. Klawitter***, 179 Wis. 2d 408, 415, 506 N.W.2d 750, 753 (Ct. App. 1993), *overruled on other grounds by* ***Johnson v. ABC Ins. Co.***, 193 Wis. 2d 35, 532 N.W.2d 130 (1995).

Effect of Stipulation.

¶7 As shown by the unambiguous excerpt from the transcript quoted above, Knaus expressly stipulated to the admissibility of the test result.[3] Once the parties stipulated to the admissibility of the test result, it became immaterial whether the City had complied with WIS. STAT. § 343.305(4). That is, the only purpose of proving compliance with the implied consent law would have been to establish a basis for the admissibility of the result of the blood test, and the stipulation relieved the City of that burden. *See* ***State v. Piddington***, 2001 WI 24, ¶34, 241 Wis. 2d 754, 623 N.W.2d 528. If Knaus wished to challenge the constitutionality of the search or the "informational foundation" for admitting the

[3] We also conclude that the stipulation did not reserve to Knaus the right to challenge the evidentiary foundation for the test result at any point, let alone after the close of evidence. To the extent Knaus attempts to characterize the stipulation as including such a reservation of rights by virtue of the uncertainty that trial counsel expressed as to whether the Informing the Accused form was a necessary exhibit, we disagree with his reading of the record.

result of the blood-alcohol test into evidence, the proper course would have been to file a motion to suppress or to object to the admissibility of the test result when it was offered by the City at trial.

¶8 Finally, to the extent Knaus cites ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), to support his contention that the lack of proof of compliance with the implied consent law merits suppression of the test result, he has misread ***Zielke***. First, we note that ***Zielke*** was decided in the context of a pretrial suppression hearing, and accordingly, waiver was not an issue in that case. *See* ***id.*** at 42, 403 N.W.2d at 428. Here, instead of taking appropriate and timely steps to challenge the admissibility of the test result, Knaus stipulated to the admissibility of the test result. Second, the actual holding of ***Zielke*** was that suppression of the result of the blood test was *not* appropriate even though the State conceded that it had not complied with the requirements of the implied consent law. Specifically, the court held:

> We conclude that the implied consent law is designed to facilitate, not impede, the gathering of chemical test evidence in order to remove drunk drivers from the roads. It is not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood or urine. It does not, however, prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the constitutionally obtained evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose. Hence, we hold that noncompliance with the procedures set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle.

Id. at 41, 403 N.W.2d at 428. Because Knaus never argued to the circuit court that the blood draw violated his fourth amendment rights and because we conclude that his stipulation to the admissibility of the test result waived his right to raise any such challenges, we do not address any constitutional issues on this appeal.

CONCLUSION

¶9 We conclude that because Knaus stipulated to the admissibility of the result of his blood-alcohol test at his jury trial, he waived his right to challenge the City of New London's compliance with procedures set forth in the implied consent statute. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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