COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1587 **Cir. Ct. No. 2009TR6199**

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

IN THE MATTER OF THE REFUSAL OF ROBERT J. RUGGLES:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT J. RUGGLES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Reversed.*

¶1 NEUBAUER, P.J.[1] The State appeals from a circuit court order dismissing the refusal proceeding pending against Robert J. Ruggles on the grounds that Ruggles was not informed that if he refused a breath sample, a blood test would be compelled. Because the statutory law does not require this information to be provided to the accused under WIS. STAT. § 343.305 and Ruggles does not have a right—constitutional or otherwise—to receive the information, we reverse the order.

¶2 With respect to Ruggles' underlying offense, the circuit court made the following findings. On December 2, 2009, at approximately 12:11 a.m., Officer Michael McCarthy of the Sheboygan police department pulled over a vehicle operated by Ruggles because it did not have its headlights on. McCarthy noticed an odor of intoxicants; this prompted McCarthy to request Ruggles to perform field sobriety tests. Based on Ruggles' performance in these tests, McCarthy placed Ruggles under arrest for operating while intoxicated and took him to the police department.

¶3 At the hearing on Ruggles' motion to dismiss the refusal proceedings, McCarthy testified that he read the Informing the Accused form "verbatim" to Ruggles. McCarthy then asked if Ruggles would submit to an evidentiary breath test and Ruggles declined. McCarthy asked again to verify the answer and Ruggles confirmed that he did not wish to provide a breath sample. McCarthy marked "no" on the Informing the Accused form, and "finished out the [twenty] minute observation period." At that time, McCarthy escorted Ruggles to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the "intoximeter room" and again asked Ruggles to submit to a breath test. Ruggles again refused.

¶4 McCarthy handcuffed Ruggles and advised him that he would be transported to the hospital to obtain a blood sample. McCarthy testified that Ruggles was cooperative when he was taken to the hospital for the blood draw. The results of this blood draw revealed Ruggles' blood alcohol concentration to be over the legal limit.

¶5 Ruggles testified at the motion hearing that he had inferred from McCarthy's reading of the Informing the Accused form that he had two choices: refuse the test or not refuse the test. Ruggles testified that McCarthy did not inform him that if he refused the breath test another procedure would be done. Ruggles testified that he would not have refused the breath test if he had been informed that he would be compelled to give a blood sample.

¶6 The circuit court identified the issue as "whether the informing the accused form reflects the current state of the implied consent law in Wisconsin." The circuit court stated its belief that the information regarding the compelled blood draw should be part of the form and, as a result, determined that Ruggles was not able to make an intelligent and informed decision. The court granted Ruggles' motion to dismiss the refusal proceeding. The State appeals.

¶7 Under Wisconsin's implied consent law, every Wisconsin driver is deemed to have consented to chemical testing for the purpose of determining the presence or quantity of alcohol in his or her blood or breath. WIS. STAT. § 343.305(2). As a result, drivers accused of operating a motor vehicle while intoxicated have no "right" to refuse a chemical test. *See* ***State v. Gibson***, 2001 WI App 71, ¶9, 242 Wis. 2d 267, 626 N.W.2d 73; ***State v. Reitter***, 227 Wis. 2d

213, 225, 595 N.W.2d 646 (1999) (citing ***State v. Crandall***, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986)). The legislature determines what arresting officers must tell defendants prior to the administration of a chemical test, and it has done so. Section 343.305(4) instructs that, prior to requesting a test specimen, a law enforcement officer must read the Informing the Accused form to advise the person of the consequences of refusal. Complaints about the adequacy of the Informing the Accused form, including those pertaining to due process, are questions of law that we review without deference to the circuit court. ***State v. Drexler***, 199 Wis. 2d 128, 136, 544 N.W.2d 903 (Ct. App. 1995).

¶8 Here, the standard Wisconsin Department of Transportation Informing the Accused form read to Ruggles by McCarthy provides:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> 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.

It is undisputed that McCarthy properly read the Informing the Accused form to Ruggles. It is also undisputed that the form contains the statutorily required information set forth in WIS. STAT. § 343.305(4). Ruggles concedes that the officer had authority to compel a blood test upon his refusal pursuant to ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), and he does not challenge the constitutionality of the statutory procedure for revocation under § 343.305(9). Therefore, the narrow issue as framed by Ruggles is whether he had a constitutional due process right to be provided with additional information—specifically, that a blood draw could be performed without his consent.[2] We conclude that he did not.

¶9 It is well established that there is no constitutional right to refuse a request for a chemical test. ***Crandall***, 133 Wis. 2d at 255, 259-60.[3] As recognized by the ***Reitter*** court:

> The due process clause of the Wisconsin Constitution, article I section 8(1), grants citizens due process protections. Due process protections, however, do not extend to defendants who refuse to submit to chemical tests under implied consent statutes: the right of refusal, if

[2] Ruggles additionally raises, but does not develop, an argument with respect to his constitutional right to equal protection. We need not address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not address insufficiently developed arguments).

[3] In ***State v. Crandall***, 133 Wis. 2d 251, 259-60, 394 N.W.2d 905 (1986), the supreme court held that the accused has no constitutional due process right to be informed that a refusal could be used against him or her at trial and that the Informing the Accused form used at that time satisfied due process requirements. We note that the current version of WIS. STAT. § 343.305(4) nevertheless now incorporates the warning held to be unnecessary in ***Crandall***.

> granted by the legislature, is a statutory privilege, not a constitutional right.

Reitter, 227 Wis. 2d at 239 (footnote omitted).

¶10 "To prove a due process violation, [a defendant] must show that the State deprived him [or her] of a constitutionally protected interest." ***Id.*** at 240. As noted above, there is no constitutional due process interest in the right to refuse a chemical test. However, there is a statutory requirement that the accused be provided with the information set forth in WIS. STAT. § 343.305(4), and our supreme court has held that information, set forth in the form read to Ruggles, is all that is required to meet due process requirements. *See* ***Crandall***, 133 Wis. 2d at 260; *see also* ***Reitter***, 227 Wis. 2d at 225 ("The law requires no more than what the implied consent statute sets forth."). Here, the form warned Ruggles that refusal would result in his license being revoked and would subject him to other penalties. This warning "made it clear that refusing the test was not a 'safe harbor,' free of adverse consequences." ***Crandall***, 133 Wis. 2d at 255 (quoting ***South Dakota v. Neville***, 459 U.S. 553, 566 (1983)). There is no constitutional or statutory requirement that the accused be specifically informed of all possible consequences. ***Crandall***, 133 Wis. 2d at 259-60. "[B]ecause the 'Informing the Accused' Form adequately alerts accused drivers to the testing process and the consequences of refusal, the provisions of the implied consent statute do not violate due process."[4] ***Reitter***, 227 Wis. 2d at 240.

[4] In ***State v. Marshall***, 2002 WI App 73, ¶12, 251 Wis. 2d 408, 642 N.W.2d 571, we addressed the process in the context of a Fourth Amendment challenge to the forcible warrantless blood draw that follows a refusal. There, we explained:

(continued)

¶11 Because Ruggles was provided with all of the statutorily required information before his refusal, there was no violation of his constitutional due process rights. We therefore reverse the circuit court's dismissal order and remand for further proceedings.

By the Court.—Order reversed.

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

> [W]e are satisfied that even if an arrestee refuses to submit to a voluntary blood test, an officer may acknowledge the refusal, complete the "Notice of Intent to Revoke Operating Privilege" form as provided by WIS. STAT. § 343.305(9)(a), and then proceed with an involuntary blood test as the basis for the operating a motor vehicle with a prohibited blood alcohol concentration (PAC) charge and in support of the operating a motor vehicle while intoxicated charge.
>
> However, the following question naturally arises: What is the significance of having the right to refuse voluntary chemical testing, when law enforcement may force testing regardless of consent? The answer is that a driver who refuses to submit to chemical testing faces certain risks and consequences that are entirely independent from the OWI/PAC offense…. [W]hile the implied consent statute provides an incentive for voluntary chemical testing, i.e., not facing civil refusal procedures and automatic revocation, voluntary testing is not the exclusive means that blood, urine or breath samples may be constitutionally obtained.

Marshall, 251 Wis. 2d 408, ¶12-13 (citations omitted).