**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

MAY 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3103**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DANIEL T. SUCHLA,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

ANDERSON, P.J. Daniel T. Suchla insists that information provided to him after he submitted to a chemical test of his blood affirmatively misled him as to the consequences and utility of exercising his right to an alternate test. On appeal, he argues that the trial court erred in not suppressing the results of the chemical test because of this deprivation of his due process rights. We disagree and affirm the judgment of conviction for operating a commercial motor vehicle with a prohibited alcohol concentration.

This case was submitted to the trial court on a stipulated set of facts; therefore, in our review we will consider the application of the implied consent statute to the undisputed facts. Such an application presents a question of law which we review independently of the trial court. ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990).

The facts are that while operating a commercial motor vehicle, Suchla was arrested by a state trooper, charged with a violation of § 346.63(7), STATS., and taken to the state patrol headquarters in Waukesha for processing. Before he was asked to submit to a chemical test, Suchla was read all eight paragraphs of the Informing the Accused form.[1] Suchla agreed to submit to chemical testing with a result of 0.06 grams of alcohol per 210 liters of breath. The state trooper served Suchla with a Notice of Intent to Suspend Operating Privileges. Suchla never requested an alternate test while at state patrol headquarters.

---

[1] Of the eight paragraphs contained in the Informing the Accused form read to Suchla, two merit attention:

> 4. If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.
>
> ….
>
> 8. If you were driving or operating a commercial motor vehicle, you take one or more chemical tests and the result of any test indicates an alcohol concentration of 0.04 or more, upon conviction of such offense you will be disqualified from operating a commercial motor vehicle and may be subject to other penalties.

Suchla filed a motion to suppress the results of the chemical testing on the grounds that he was misled by the information provided to him by the state trooper. In support of his motion he contended that the state trooper misinformed him that the 0.06 grams test result would be the basis for the administrative suspension of his operating privilege and he was effectively dissuaded from exercising his statutory right to an alternate test. In rejecting his argument, the trial court relied upon ***State v. Sutton***, 177 Wis.2d 709, 503 N.W.2d 326 (Ct. App. 1993), and held that the state trooper's overstatement of the consequences of the chemical test results did not mandate the suppression of the results, the loss of the automatic admissibility of the test results, or the loss of the statutory presumptions afforded chemical test evidence. Suchla renews his argument on appeal.

The State concedes that Suchla was misinformed by the state trooper. The trooper incorrectly advised Suchla that his 0.06 grams test result constituted a "prohibited alcohol concentration" and his operating privileges would be administratively suspended.

An individual's operating privileges are administratively suspended if any results of a chemical test indicate a "prohibited alcohol concentration." Section 343.305(7)(a), STATS. For a person without a drunk driving record, a "prohibited alcohol concentration" is defined as a blood alcohol concentration of 0.1 grams or more of alcohol in 210 liters of the person's breath. Section 340.01(46m), STATS. Suchla's test results of 0.06 grams are outside the definition of a "prohibited alcohol concentration;" therefore, his operating privileges could not have been suspended.

Suchla argues that this misinformation deterred him from seeking an alternate test. While he recognizes that paragraph three of the Informing the Accused form properly advised him that he had a right to a second test, he asserts that all other information, including the misinformation, left him with the impression that an alternate test would not have a favorable impact on his predicament. He argues that being misled about his legal rights and obligations constitutes a violation of his due process rights and the violation is compounded when the misinformation denies him his right to an alternate chemical test.

When we evaluate the sufficiency of the implied consent warning, we apply the three-part test announced in ***County of Ozaukee v. Quelle,*** 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995):

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m), STATS., to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading; *and*
>
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

The answer to parts one and two is "Yes." In advising Suchla that his operating privileges were going to be administratively suspended because of the 0.06 grams test result, the state trooper exceeded the statutory requirements and provided Suchla with misleading information.

The answer to the third part of the test is "No." Although Suchla argues that the misinformation "effectively dissuaded" him from requesting the

second test, he has not presented any evidence that he would have requested the alternate test if he had not been misinformed. Under the circumstances it was incumbent upon Suchla to present evidence that he actually wanted the alternate test. Suchla was read the first five paragraphs of the Informing the Accused form. He was also read those provisions relating to operators of commercial motor vehicles and was told that if his blood alcohol content was 0.04 grams or greater and he was convicted of the offense, he would be disqualified from operating a commercial motor vehicle. It is impossible to conclude that the misinformation is what kept Suchla from requesting the second test. It is equally plausible that he did not ask for the alternate test because he was aware of the potential consequences he faced as the operator of a commercial motor vehicle. He had been advised that a 0.04 reading carried consequences and that his reading was 0.06; arguably, this correct information convinced him that the alternate test would not be beneficial.

*By the Court.*—Judgment affirmed.

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