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DISTRICT II

February 19, 2025

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2024AP215-CR

State of Wisconsin v. Dana Michael Zeman (L.C. #2019CF800)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dana Michael Zeman appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, fourth offense, contrary to WIS. STAT. § 346.63(1)(b) (2021-22).¹ Zeman argues that his due process rights were violated when a police officer gave him misleading information before he refused to submit to a blood test. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Zeman was charged with operating a motor vehicle while intoxicated (OWI) and operating with a prohibited alcohol content (PAC), each as a fourth offense. At issue is Zeman's motion to suppress his postarrest blood test results taken pursuant to a warrant after he refused to submit to a blood draw. He contends that his refusal was not unlawful under Wisconsin's implied consent law, WIS. STAT. § 343.305(2), because before he refused to submit to a blood test he "was misinformed by the arresting officer that he had the option to submit to a breath test in lieu of a blood test."

Officer Kevin Post was the only witness to testify at the evidentiary hearings regarding Zeman's motion to suppress. Post testified that a caller contacted dispatch early in the evening of November 9, 2019, to report a vehicle that was driving erratically. The witness reported that the vehicle went the wrong way partially on an exit ramp on Interstate I-43, then backed up the ramp, going through red lights each time, and then, after getting onto I-43, was "all over the road," weaving between traffic lanes without signaling, almost striking a guardrail, and eventually hitting a curb.

Post located the vehicle and found Zeman in a tavern down the road. Zeman audibly slurred his speech and swayed from side to side. After Post conducted field sobriety tests, he arrested Zeman for OWI.

As Post placed handcuffs on Zeman, a fellow officer, Officer Lor, spoke with some people whom Zeman had invited outside while he completed field sobriety tests. During that exchange, Lor said to those individuals that Zeman would have an option to take a breath or blood test following his arrest.

Post subsequently read the Informing the Accused form to Zeman verbatim. Zeman refused to submit to Post's request for a blood test. Zeman was not provided with an option to choose the first test, nor did he request an alternate test. Zeman's blood was drawn at a local hospital pursuant to a search warrant.

The circuit court denied Zeman's motion to suppress the blood test results. The court acknowledged that Lor said that Zeman had "the option to take a breath test at the [police department] or a blood test." The court also found that Post told Zeman that "he would be asked to submit to a blood test or a breath test." Post subsequently read the Informing the Accused form verbatim, which advised Zeman that "he would be asked to submit to a blood test or a breath test." There was no evidence that "Post told Mr. Zeman he'd be able to choose which test he took." Additionally, the court noted that when Zeman refused, he did not request an alternative test, nor did he "indicate in any way he believed he had the ability to choose between a blood or breath test." The court also noted that Zeman elected not to testify or present any evidence supporting his purported belief that he had a choice to pick between a breath or blood test.

A jury subsequently found Zeman guilty of both charges. Zeman appeals.

The refusal to submit to a chemical test for intoxication is unlawful if a suspect is adequately informed of his or her rights prior to the refusal. *Washburn County v. Smith*, 2008 WI 23, ¶51, 308 Wis. 2d 65, 746 N.W.2d 243.² The circuit court's decision that a refusal to take

² A court is required to revoke the person's operating privilege when there is an unlawful refusal. WIS. STAT. § 343.305(9)(d), (10).

a chemical test is improper is a question of law which, on appeal, is reviewed de novo. *See State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). The court’s findings of fact, however, will not be disturbed unless they are clearly erroneous. *See State v. Eckert*, 203 Wis. 2d 497, 507, 553 N.W.2d 539 (Ct. App. 1996).

The implied consent law aims to help law enforcement secure evidence of impaired driving by leveling a penalty on drivers who refuse. *See State v. Zielke*, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987); WIS. STAT. § 343.305(2), (3), (9). The law provides in pertinent part: “Upon arrest of a person for [OWI], a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose” of determining the presence or quantity of alcohol or controlled substances in his or her system. Sec. 343.305(3)(a). When the officer requests the test, the officer must read the Informing the Accused form, a script that the legislature requires the requesting officer to read to the accused, which explains that if the driver refuses to take the test, there will be penalties.³ Sec. 343.305(4). The test results, or the fact that the accused refuses to take the test, can be used against the accused in court.

³ The Informing the Accused form was admitted into evidence. The form Post read to Zeman stated as follows:

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 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.

(continued)

Zeman contends that he lawfully refused to submit to a blood test. He argues that because Officer Lor stated that he would have a choice whether to take a blood or breath test, he did not make an informed choice under the implied consent statute in violation of his constitutional right to due process.⁴ This court rejects Zeman's challenge.

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.

In addition, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood.

The next line on the form states: "Will you submit to an evidentiary chemical test of your Blood?" Zeman's response was marked, "No." Post initialed each paragraph of the form after he read the paragraph verbatim to Zeman, and he certified that he read the information to Zeman and provided him with a copy of the form.

⁴ Zeman does not challenge the stop or his arrest for OWI. He has also abandoned his other challenges raised before the circuit court.

Zeman’s argument that he was improperly denied his due process rights turns on the adequacy of the information provided by the officers pursuant to the implied consent statute.⁵ To assess the adequacy of the information provided by a law enforcement officer under the implied consent law, this court applies the following three-prong inquiry:

- (1) Has the law enforcement officer not met, or exceeded his or her duty under [WIS. STAT.] §§ 343.305(4) and 343.305(4m) 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?

County of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated in part by Smith*, 308 Wis. 2d 65, ¶64; *see also Smith*, 308 Wis. 2d 65, ¶72 (applying the *Quelle* three-prong inquiry to fact situations “in which the law enforcement officer provided all the statutorily required information but then provided more information in excess of his duty under § 343.305(4)”).

As to the first prong, it is undisputed that Post read the form verbatim. Here, Zeman essentially argues that Lor’s comment provided additional information that was misleading.⁶

⁵ We reject Zeman’s contention that there is no developed body of law applicable to his due process challenge. His due process argument is based on the accuracy of the information provided under the implied consent statute and, as set forth herein, Wisconsin has well-developed caselaw within which we consider whether his refusal was informed.

⁶ We agree with the circuit court that Post’s statement to Zeman that “he would be asked to submit to a blood test or a breath test,” was entirely consistent with the Informing the Accused form, was a correct statement of law enforcement’s option under the implied consent law, and did not suggest that Zeman could choose which test would be performed.

The second prong of the *Quelle* inquiry requires that this court “examine the specific facts and determine if this additional information was false or otherwise misleading.” *Quelle*, 198 Wis. 2d at 282. Under this second prong, “misleading” is synonymous with “erroneous.” See *Smith*, 308 Wis. 2d 65, ¶¶83-86. Upon review of the record, this court agrees with the circuit court’s conclusion that the additional information provided by Lor was not false or misleading.

That Lor noted that Zeman could choose whether to take a breath or blood test was consistent with the option the implied consent statute provides after the suspect submits to the test chosen by the arresting officer. Post read the Informing the Accused form verbatim, which clearly advised Zeman that he would be required to submit to a first test, and that he could then choose to take other tests if he took the test requested by police, including another at police expense, and even that he could arrange to have another test performed by another qualified person at his own expense. While Lor’s comment did not specify whether the choice could be made for the first or second test, the Informing the Accused form read to Zeman clearly did. Moreover, the circuit court found that Post did not advise Zeman that he could choose the first test and that Zeman did not ask for “an alternate test or indicate in any way he believed he had the ability to choose between a blood or breath test.” Zeman does not contend that the court’s findings of fact were clearly erroneous. Zeman has failed to show that Lor’s statement was misleading.

Under the third prong, as the circuit court aptly noted, Zeman chose not to testify, and thus there is no evidence that Lor’s statement affected his ability to make the choice whether to consent to the blood draw. Zeman had the burden of proof on this element and has failed to show that the challenged statement contributed to his refusal to submit to chemical testing. See

Ludwigson, 212 Wis. 2d at 873 (stating that defendant bears the ultimate burden of proving by a preponderance of the evidence that erroneous information caused defendant to refuse to take the test). Thus, Zeman's argument that he was denied his constitutional due process rights solely on account of Lor's comment fails. The court properly denied Zeman's motion to suppress because Zeman's refusal was unlawful.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals