COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0795-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES L. KLAESER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

NETTESHEIM, J. Charles L. Klaeser appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI).[1] He contends that the trial court should have suppressed evidence of a chemical test

[1] Klaeser was found guilty at a bench trial of both OWI and operating a motor vehicle with a prohibited blood alcohol concentration (PAC). The judgment recites a conviction for only OWI.

because the arresting officer failed to advise Klaeser about the commercial operator provisions of the implied consent law. We disagree and affirm the conviction.

The facts are straightforward. Klaeser is a licensed commercial driver. On August 19, 1995, Klaeser was arrested for OWI by Officer Jeff Mueller of the City of Kiel Police Department. Mueller transported Klaeser to a medical facility for purposes of a chemical test of his blood. Before the test, Mueller advised Klaeser of the provisions of the implied consent law applicable to regular drivers. However, he failed to advise Klaeser of the additional provisions applicable to commercial drivers. Klaeser submitted to the test which produced a prohibited blood alcohol concentration (PAC).

Based on this failure, Klaeser asked the trial court to suppress the results of the chemical test. The trial court declined. Relying on ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), the court instead ruled that the test results had lost their entitlement to automatic admissibility. Following a bench trial, Klaeser was found guilty and a judgment of conviction was entered against him. Klaeser appeals.[2]

Klaeser contends that Mueller's failure to fully advise him under the implied consent law constitutes a due process violation requiring suppression of the chemical test results. He rests his argument on a line of cases which hold that a defendant's driving privileges may not be revoked where the suspect has not

[2] We note that the issue Klaeser raises is likely moot. Klaeser was convicted of OWI, not the PAC charge. He makes no argument that the evidence supporting his conviction is insufficient or that the trial court even relied on the chemical test results in finding Klaeser guilty of the OWI charge. Nonetheless, we choose to address Klaeser's appellate issue on the merits.

been properly informed under the implied consent law, s*ee* ***State v. Riley***, 172 Wis.2d 452, 493 N.W.2d 401 (Ct. App. 1992), and that evidence of a refusal may not be admitted in the underlying OWI prosecution, *see* ***State v. Schirmang***, ___Wis.2d ___, 565 N.W.2d 225 (Ct. App. 1997).

However, the cases cited by Klaeser are cases where the suspect refused the test. Here, Klaeser submitted to the test. This implicates the ***Zielke*** case. There, the defendant was improperly advised under the implied consent law but submitted to the test. Both the trial court and the court of appeals held that the failure to properly advise the suspect under the implied consent law required suppression of the chemical test results.

The supreme court held to the contrary. The court said that "[t]he refusal procedures set forth in sec. 343.305, Stats., are separate and distinct from prosecution for the offense involving intoxicated use of a vehicle." ***Zielke,*** 137 Wis.2d at 47, 403 N.W.2d at 430. The court further stated:

> However, even though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g. automatic admissibility of results and use of the fact of refusal, *nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats., prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.*

Id. at 51, 403 N.W.2d at 432 (emphasis added).

Thus, depending on whether the suspect has refused or submitted to the chemical test, the supreme court has carved out different sanctions when the implied consent law is not followed. When the suspect refuses the test, the State may not revoke the suspect's license under the implied consent law and it may not

use evidence of the refusal in the underlying OWI prosecution. However, when the suspect takes the test, the State loses the automatic admissibility of the result. The trial court properly followed the ***Zielke*** ruling.

Klaeser argues that this produces the incongruous result of according greater relief to a suspect who refuses the test than that accorded to a suspect who takes the test. He contends that this violates the purpose of the implied consent law which is to facilitate the gathering of evidence against drunk drivers. *See* ***id***. at 46, 403 N.W.2d at 430. At first blush, that may appear true. However, closer scrutiny reveals otherwise. Were we to agree with Klaeser, we would create the absurd and unreasonable result which the ***Zielke*** ruling avoided. "To so hold would give greater rights to an alleged drunk driver under the fourth amendment than those afforded any other criminal defendant." ***Id***. at 52, 403 N.W.2d at 432. That result would be far more offensive than the mild incongruity resulting from the supreme court's distinction between cases where the suspect refuses the test and those where the suspect has taken the test.

By the Court.—Judgment affirmed.

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