COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2152-FT **Cir. Ct. No. 2004CV534**

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

CITY OF WISCONSIN RAPIDS,

PLAINTIFF-RESPONDENT,

V.

WAYNE J. OLTESVIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Wayne J. Oltesvig was tried before a jury on drunk driving charges. The jury found him guilty of operating a motor vehicle

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04), decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

with a prohibited blood alcohol concentration, first offense, and judgment was entered accordingly.[2] Oltesvig argues that the trial court should not have allowed the results of his blood alcohol test into evidence because the State failed to demonstrate compliance with the implied consent law. We reject the argument and affirm the trial court.

Background

¶2 Oltesvig asserts trial error. Thus, the relevant background information is what happened at trial that relates to the error he alleges.

¶3 A City of Wisconsin Rapids police officer testified as follows. He stopped Oltesvig for speeding. Because the officer detected the odor of alcohol on Oltesvig's breath and had observed some poor driving behavior, he had Oltesvig perform a number of field sobriety tests. The officer arrested Oltesvig for operating a motor vehicle while intoxicated, first offense.

¶4 The prosecutor asked the officer what happened after he arrested Oltesvig:

> [Prosecutor]: And after Mr. Oltesvig was in the back of your squad car, if you can tell the jury what you did and where you went.
>
> [Officer]: From there I did issue him a citation for operating while intoxicated, it would be his first offense. I did explain this to him and he stated he had no questions

[2] Oltesvig was charged with and convicted of both operating while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a), and operating with a prohibited alcohol concentration, contrary to § 346.63(1)(b). Those two convictions are treated as one, however. *See* § 346.63(1)(c). For convenience, we will only refer to the convictions as one for operating with a prohibited alcohol concentration.

> with this and I then read him the informing the accused form.
>
> [Prosecutor]: And what is the informing the accused form?
>
> [Officer]: Informing the accused, basic version is asking permission for a blood draw from a lab technician and that's to gain evidentiary blood to determine how much alcohol would be in the defendant's system.

Thereafter, blood was drawn from Oltesvig.

¶5 After the arresting officer was excused, the City next called as a witness a State Crime Laboratory chemist to testify about the results of Oltesvig's blood test. Oltesvig's attorney objected:

> [Defense Counsel]: I would object at this point on foundation grounds. It's a technical objection only, however. The informing the accused is not in evidence; therefore, statutory compliance is not in evidence.
>
> THE COURT: I believe he asked about his test results, not informing the accused.
>
> [Defense Counsel]: I understand that, sir, but unless the informing the accused was read and the statute was complied with, there is no presumptive admissibility to this test. While the officer testified that he read something, unless I missed it, I didn't see it marked or moved into evidence.
>
> THE COURT: Overruled. I believe that the officer did testify he did read the informing the accused. I do have notes of that. So overruled.

Thereafter, the chemist testified that his analysis of Oltesvig's blood sample showed a blood alcohol concentration of .184. The jury found Oltesvig guilty of operating a motor vehicle with a prohibited alcohol concentration.

Discussion

¶6 Oltesvig argues that the trial court erred when it allowed his blood test results into evidence. Oltesvig contends that the City did not prove compliance with the implied consent law, and therefore lost "automatic admissibility" of the blood test results. More specifically, Oltesvig argues that, although the officer testified that he read Oltesvig an "informing the accused" form, there is no way to tell whether the form the officer used complied with WIS. STAT. § 343.305(4) because the form was not admitted at trial. Oltesvig correctly explains that if the City did not prove compliance with the implied consent law, it loses automatic admissibility of the blood test results. Without the benefit of automatic admissibility, the City needed to provide a separate foundation for admissibility and failed to do so. Therefore, Oltesvig contends, the blood test results were improperly admitted into evidence. We conclude, however, that the officer's testimony was sufficient to show that he complied with § 343.305(4) and that Oltesvig waived his opportunity to force the City to prove more specifically the content of the informing the accused information read to him.

¶7 We agree with Oltesvig that the City had the burden of showing, by a preponderance of the evidence, that the warnings the arresting officer gave him complied with the implied consent law. *See* ***State v. Piddington***, 2001 WI 24, ¶22, 241 Wis. 2d 754, 623 N.W.2d 528. However, absent an objection, this burden is met if an officer testifies that he or she read the accused "the informing the accused form" or words to that effect. Implied consent law does not require that the actual text of the warnings be admitted into evidence. The "informing the accused" form is a standard form created by the Department of Transportation that is intended to parrot the warnings in the implied consent law. *See* ***State v. Zielke***, 137 Wis. 2d 39, 43, 403 N.W.2d 427 (1987). In general, an arresting officer can

satisfy WIS. STAT. § 343.305(4) by reading the "informing the accused" form to an accused driver. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 284, 542 N.W.2d 196 (Ct. App. 1995).

¶8 The trial court, the prosecutor, and the defense attorney all understood the testifying officer to be asserting that he read an informing the accused form that complied with WIS. STAT. § 343.305(4). That, of course, is why the officer's testimony on the topic was relevant and why Oltesvig's counsel did not object to it. In the unlikely event Oltesvig's counsel thought the officer might have read a deficient form, the time to make that challenge was while the officer was still on the witness stand.

¶9 However, it is obvious that Oltesvig's counsel was not actually interested in determining whether the correct form was read. Rather, it seems he hoped that if he waited to make the challenge after the officer left the stand, the trial court, or this court, might conclude that the City had not met its burden. Like the trial court, we decline to do so. In the context of drunk driving cases, when an officer testifies that he or she has read the informing the accused form, and there is no objection to that testimony, it is reasonable for the circuit court to infer as a factual matter that the officer read from a form in compliance with WIS. STAT. § 343.305(4) and to apply the automatic admissibility rule. The failure of Oltesvig's counsel to object while the officer was on the stand constitutes waiver of the issue.

By the Court.—Judgment affirmed.

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