COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3022-FT **Cir. Ct. No. 2005TR699**

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

CITY OF PRINCETON,

PLAINTIFF-RESPONDENT,

V.

KAREN E. GRAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

¶1 SNYDER, P.J.[1] Karen E. Grams appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), first offense, contrary to WIS. STAT. § 346.63(1)(a). Pretrial, Grams moved to bar the City of Princeton from relying on the presumption of automatic admissibility accorded to the result of a chemical test performed on her blood. Grams contends that the arresting officer did not comply with Wisconsin's Informed Consent Law because the Informing the Accused form used by the officer was deficient. The circuit court denied the motion. Grams challenges this ruling on appeal, arguing that the Informing the Accused recitation must include a statement concerning the penalties for operating a motor vehicle with a detectable amount of a restricted controlled substance even where the only charge is one of OWI. We disagree and affirm the judgment of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 On April 8, 2005, City of Princeton Police Officer Benjamin Schmidt was on patrol in a marked squad car when he noticed that a black Isuzu was traveling with expired tags. Schmidt followed the vehicle and radioed dispatch for more information on the vehicle. Dispatch reported back that the vehicle was registered to a James Ross and confirmed that the license plates had expired. Schmidt then initiated a traffic stop.

¶3 As Schmidt approached the vehicle, he noticed two occupants and, when he reached the vehicle, the driver stepped out. Schmidt noticed a strong odor of intoxicants coming from the driver and the vehicle. Schmidt identified the

[1] This case is decided by one judge pursuant WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

driver as Grams and the passenger as James Ross. Schmidt also noticed that Grams' eyes were glassy and bloodshot. He asked Grams to perform field sobriety tests and she complied. Grams performed the horizontal gaze nystagmus, walk-and-turn, one-leg-stand, alphabet, and numbers tests. Based on Grams' performance on the field sobriety tests, Schmidt administered a preliminary breath test, which analyzed only a partial sample and produced a reading of .078 percent. Schmidt advised Grams that he believed she was intoxicated and placed her under arrest.

¶4 Schmidt took Grams to Berlin Memorial Hospital and issued her a citation for operating a motor vehicle while intoxicated. He read the Informing the Accused form to Grams and Grams agreed to a chemical test of her blood. Schmidt sent the blood sample to the State of Wisconsin Laboratory of Hygiene for analysis. Along with the sample, Schmidt sent a completed Blood and Urine Analysis form. The blood test resulted in a reading of .18 percent blood alcohol concentration and Schmidt then issued a second citation, this one for operating a motor vehicle with a prohibited alcohol content.

¶5 Grams pled not guilty and moved the court to preclude reliance on the presumption of automatic admissibility of the blood test results at trial. On September 2, 2005, the circuit court heard arguments on Grams' motion. The court held that "based on the facts in this case … [the court is] satisfied that the officer did what the officer was required to do at the time, reading the form that was available." After the circuit court denied Grams' motion, the parties stipulated that the court should enter judgment against Grams. Grams now appeals that judgment, arguing that it rests on an incorrect ruling by the circuit court.

DISCUSSION

¶6 Grams relies on the well-established law that an OWI suspect is entitled to adequate information regarding his or her rights under the implied consent law. *See* ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 693-94, 524 N.W.2d 635 (1994); ***State v. Schirmang***, 210 Wis. 2d 324, 330, 565 N.W.2d 225 (Ct. App. 1997). Grams' argument requires that we apply this law to the undisputed facts of this case. That exercise presents a question of law that we review independently. ***State v. Sutton***, 177 Wis. 2d 709, 713, 503 N.W.2d 326 (Ct. App. 1993).

¶7 Every driver in Wisconsin has impliedly consented to take a chemical test for blood alcohol content. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995); WIS. STAT. § 343.305(2). Police officers have a statutory duty under § 343.305(4) to inform accused drunk drivers of certain required information when requesting a chemical test. *See* ***Quelle***, 198 Wis. 2d at 280-81. Section 343.305(4) states:

> INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "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."

¶8 Grams does not dispute that the Informing the Accused form used by Schmidt on the night of the arrest mirrored the language of WIS. STAT. § 343.305(4). Instead, Grams argues that the Informing the Accused Form read by Schmidt was incomplete without a statement concerning the penalties for operating a motor vehicle with a detectable amount of a restricted controlled substance. She directs our attention to a revised Informing the Accused form that includes the following statement: "In addition, under 2003 Wisconsin Act 97, your operating privileges will also be suspended if a detectable amount of a restricted controlled substance is in your blood." Because the form read by Schmidt did not contain the additional language, Grams argues, Schmidt failed to meet his duty under the implied consent law.

¶9 Whether the officer has met his or her obligations to inform the accused as required by WIS. STAT. § 343.305(4) is determined by the application of a three-part inquiry:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 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?

Quelle, 198 Wis. 2d at 280 (emphasis omitted).

¶10 There is no language in WIS. STAT. § 343.305(4) requiring a law enforcement officer to specifically advise the accused of any consequences for operating a motor vehicle with a detectable amount of a restricted controlled substance where the accused driver has been arrested for OWI. The language regarding consequences for driving with a detectable amount of a restricted controlled substance apparently appears on a revised Informing the Accused form.[2] However, the additional language is not codified by statute and the form has no mandatory use date imposed by the Department of Transportation. Thus, we have no reservation in holding that Schmidt complied with the mandate of § 343.305(4) when he read the Informing the Accused form in use by his department at the time. Consequently, our ***Quelle*** inquiry ends because Grams has not established that she was provided an under or oversupply of information.

¶11 Grams also raises ***State v. Wilke***, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989), for the proposition that the Informing the Accused form must adequately advise a suspected drunk driver of all of the relevant consequences associated with having a positive chemical test result for the regulated substance at issue. Though the City neither tested for a controlled substance in Grams' blood nor brought any charges related to a controlled substance, she argues that "there is nothing seemingly to stop the City from retesting the sample for drugs in order to prosecute Ms. Grams again if it does not prevail at trial on the alcohol charge."

[2] The record contains an example of the revised form that includes the additional language and has a notation of 8/2004 at the top of the second page.

Grams points out that if the ***Wilke*** principle is violated, no nexus need be established between the under informing of the accused and any actual harm to that defendant. ***Id.***, at 251-52.

¶12 Grams' reliance on ***Wilke*** is misplaced. In ***Wilke***, we ultimately concluded that "[t]he legislature has clearly expressed its intent that a person be informed of all the information contained in [WIS. STAT. §] 343.305(4)" and that omitting information required by the statute was error. ***Wilke***, 152 Wis. 2d at 250-51. While Grams was not informed of the consequences relating to driving with a detectable amount of a restricted controlled substance in her blood, she was not charged with operating with a detectable amount of a restricted controlled substance in her blood and does not claim that she was doing so. *See* ***State v. Piskula***, 168 Wis. 2d 135, 137-41, 483 N.W.2d 250 (Ct. App. 1992) (holding that the arresting officer did not have to inform the accused about the consequences of operating a commercial motor vehicle while under the influence of drugs or alcohol and refusing to submit to a chemical test when operating a commercial motor vehicle because the accused was not operating a commercial vehicle). Information concerning the consequences of failing to submit to the test when the accused has a detectable amount of a restricted controlled substance in his or her blood was simply not relevant to Grams.

CONCLUSION

¶13 ***Quelle*** stands for the general premise that "implied consent warnings are designed to inform drivers of the rights and penalties *applicable to them.*" ***Quelle***, 198 Wis. 2d at 279 (emphasis added); *see also* ***Piskula***, 168 Wis. 2d at 140-41. Here, Grams was informed, in accordance with the statute, of the

consequences of operating while under the influence of alcohol and of refusing to submit to a chemical test. Nothing further is required.

By the Court.—Judgment affirmed.

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