

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 27, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2006AP536**

**Cir. Ct. No. 2006TR108**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE REFUSAL OF WILLIAM P. SERVI:**

**CITY OF NEW BERLIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**WILLIAM P. SERVI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:

RALPH M. RAMIREZ, Judge. *Affirmed.*

¶1 SNYDER, P.J.<sup>1</sup> William P. Servi appeals from a judgment convicting him of refusing to take a chemical test to determine the concentration of alcohol in his system, contrary to WIS. STAT. § 343.305(10), and revoking his license for a period of one year. Servi contends that he was provided erroneous information by the arresting officer, which misled him and caused him to refuse to submit to the test. We disagree and affirm the judgment of the circuit court.

### BACKGROUND

¶2 On September 20, 2005, at approximately 10:16 p.m., City of New Berlin Police Officer Richard Helm stopped the vehicle driven by Servi and ultimately arrested him for operating while intoxicated. Helm transported Servi to the police department's booking room where he issued the citation. On the standard Informing the Accused form, where the agency is to provide the type of chemical test that will be administered, Helm had written "breath." Helm then read the form to Servi, "from beginning to end."

¶3 Servi asked to read the form himself before giving an answer. After reading the form, Servi stated that he wanted to do a blood test instead of a breath test. Helm responded that his agency's primary test was a breath test and the secondary test was a urine test. He then told Servi that "if [Servi] did take our breath test, then he also had the option to have a test conducted by a qualified person of his choice at his expense, and if that ... [was] a blood test, that's what he could do." Ultimately, Helm filled out the Informing the Accused form to indicate

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

that Servi had refused to submit to the test. He then provided Servi with a copy of the form and issued a notice of intent to revoke Servi's operating privilege.

¶4 At the refusal hearing, Helm testified that he asked Servi if he would submit to the evidentiary chemical test of his breath and Servi said "no, that he'd only do a blood test because it was more accurate." Servi testified that he requested a blood or urine test both before and after reading the Informing the Accused form. According to Servi, the line allowing the agency to insert breath, blood or urine as the primary chemical test was still blank at the time Helm allowed him to read the form, which prompted him to request a blood test or a urine test. Servi asserted that Helm told him the department did not do urine testing and denied telling Helm that the only test he would take was a blood test.

¶5 The circuit court determined that Helm's testimony was more credible than Servi's and held that: (1) Helm followed appropriate procedure and complied with the law by reading the Informing the Accused form; (2) Helm asked Servi to submit to an evidentiary chemical test of his breath; (3) Servi refused; and (4) Servi's refusal was unreasonable under the circumstances. Servi appeals.

## DISCUSSION

¶6 Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. WIS. STAT. § 343.305(2). A person may revoke consent, however, by simply refusing to take the test. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277 542 N.W.2d 196 (Ct. App. 1995). Thus, a driver has a "right" not to take the chemical test, although certain risks and consequences are associated with this choice. *Id.* The legislature recognized that drivers being asked to take a chemical test should be informed of this choice and therefore

requires law enforcement officers to provide drivers with certain information. *Id.* at 277-78. When reviewing whether an arresting officer substantially complied with the statutory requirements, we will uphold the circuit court's findings of fact unless they are clearly erroneous; however, where the challenge is to the court's application of the implied consent to those facts, our review is de novo. *See State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379.

¶7 To demonstrate compliance with the statutes, the State must show by a preponderance of the evidence that law enforcement officers “used reasonable methods which would reasonably convey the warnings and rights in [WIS. STAT.] § 343.305(4).” *State v. Piddington*, 2001 WI 24, ¶22, 241 Wis. 2d 754, 623 N.W.2d 528. The Informing the Accused form reproduces the statutory language and states in relevant part:

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.

Whether the implied consent information was delivered in a sufficient manner depends upon the circumstances of the case. *Id.*, ¶23. The parties do not dispute that Helm read the entire form to Servi and then allowed Servi to review the form

himself. Thus, Helm complied, at least on a threshold level, with the WIS. STAT. § 343.305(4).

¶8 In *Quelle*, we set forth a three-pronged inquiry to determine whether, under specific facts and circumstances, the arresting officer satisfied the statutory requirements. First, we ask whether the officer failed to meet or exceeded his or her duty to inform the accused driver pursuant to WIS. STAT. § 343.305(4). *Quelle*, 198 Wis. 2d at 280. If so, we consider whether the lack or over-supply of information misled the accused driver. *Id.* Finally, we ask whether the officer's failure affected the accused's ability to make a choice about whether to submit to the chemical test. *Id.* Compliance with § 343.305 is based upon the conduct of the law enforcement officer, not the driver's comprehension of the officer's message. *Piddington*, 241 Wis. 2d 754, ¶21.

¶9 Here, the parties agree that Helm's statement regarding the evidentiary chemical tests failed to inform Servi that the secondary urine test would be available at agency expense. Accordingly, we must consider whether this lack of information misled Servi and affected his ability to make a choice about whether to submit to the agency's primary test, the breath test.

¶10 In his reply brief, Servi summarizes the crux of his appeal when he states, "*Technically*, Officer Helm may have hit the proper buttons: primary test, secondary test, alternate test at driver expense.... Helm did not explain that the secondary test would be at agency expense. But he did continue to explain that, if Servi did take the breath test he could obtain another test at his expense." Although WIS. STAT. § 343.305(5)(a) uses the term "alternative test," it is clear that the accused does not have a right to choose a test *instead* of the one the officer asks him or her to take; rather, the "alternative test" is *in addition* to that test.

*Schmidt*, 277 Wis. 2d 561, ¶11. A request for an additional test may be made before or after the accused submits to the primary test. *Id.*, ¶¶26-28. Thus, the question becomes whether Servi was asking for a blood or urine test in place of the primary breath test or as an additional test under § 343.305(5)(a). *See Schmidt*, 277 Wis. 2d 561, ¶31.

¶11 The discussion between Servi and Helm reveals that Servi requested the blood test in place of the breath test; though this is not his option to exercise under WIS. STAT. § 343.305(5)(a). We hold that Helm’s statement that Servi could obtain a blood test at his own expense after taking the primary breath test may have obscured the fact that Servi could have obtained a urine test at agency expense; however, Servi has failed to demonstrate a connection between Helm’s misstatement and Servi’s refusal to comply with the primary breath test.

¶12 At no time in the conversation between Servi and Helm did Servi indicate that he would, under any circumstance, submit to a breath test. Rather, Servi told Helm that “he wanted to do a blood test instead of a breath test” and indicated “he’d only do a blood test because it was more accurate.” As a result, Helm’s explanation of the chemical tests did not mislead Servi with regard to the primary test and did not affect Servi’s ability to decide whether to submit to the breath test before submitting to additional urine or blood tests. Consequently, the warning provided to Servi was sufficient for purposes of the implied consent law. *See Quelle*, 198 Wis. 2d at 280.

## CONCLUSION

¶13 We conclude that Helm substantially complied with WIS. STAT. § 343.305 when he read the Informing the Accused form to Servi and advised Servi that the agency’s primary evidentiary chemical test was a breath test.

Helm's misstatement regarding who was responsible for the expense associated with the secondary urine test did not mislead Servi or affect Servi's choice regarding whether to submit to the breath test because Servi stated that he would only agree to a blood test. We affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

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

