COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2007

David R. Schanker
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. 2006AP2739-FT

Cir. Ct. No. 2006TR969

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN THE MATTER OF THE REFUSAL OF CHARLES A. WETHERN:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHARLES A. WETHERN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with directions*.

¶1 HOOVER, P.J.[1] The State of Wisconsin appeals an order finding Charles Wethern's refusal to submit to a breath test for intoxication reasonable. The State argues the trial court erred when it concluded the police officer violated the implied consent statute, WIS. STAT. § 343.305(1), by incorrectly filling out a portion of the Informing the Accused form. The State argues the statute does not require the form be filled out properly and only requires that the officer read the form to the accused. We agree and therefore reverse and remand with directions that the trial court make a finding of fact as to whether the officer read the form to Wethern in a manner reasonably calculated to provide the information to him.

BACKGROUND

¶2 On April 14, 2006, deputy Jameson Wiltrout observed a vehicle being driven completely to the left of the centerline of Highway 70. Wiltrout pulled over the vehicle. Wiltrout approached the driver, Wethern, and detected a strong odor of intoxicants. Wethern's speech was slurred and Wethern admitted he had consumed three to four beers. Wiltrout administered field sobriety tests. Wethern was unable to touch his heel to his toe, was unable to keep his foot raised for the one-leg stand test, and did not properly recite the alphabet. Wiltrout administered a preliminary breath test which produced a reading of .20%. After placing Wethern under arrest, Wiltrout requested Wethern submit to a breath test for intoxication. Wethern refused and Wiltrout issued a notice of intent to revoke Wethern's operating privileges.

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[1] This is an expedited appeal decided by one judge. *See* WIS. STAT. RULE 809.17 and WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Wethern requested a hearing pursuant to WIS. STAT. § 343.305(9) on his refusal to submit to the test. At the hearing, Wiltrout testified he read Wethern the Informing the Accused form. However, Wiltrout conceded that he improperly filled in the bottom of the form. Wiltrout did not fill in what type of chemical test he asked Wethern to submit to, and instead wrote "refuse" in the blank. Wiltrout also failed to check "yes" or "no" next to the question asking whether Wethern would submit to the test. Additionally, Wiltrout did not fill in the blank next to the statement "he/she was identified by," and instead wrote "refuse." Wethern also failed to fill in the date and time the form was signed.

¶4 The circuit court held that Wethern's refusal to submit to the test was reasonable. The court found that Wiltrout failed to comply with WIS. STAT. § 343.305(4) because he improperly filled out the form, stating:

> But the form is a DOT form, and although the officer says he read it, the bottom half isn't part of the statutory form that's required, but it is part of what the evidence reveals. And it's clear that this officer made significant material errors with respect to the form.

DISCUSSION

¶5 Wisconsin's implied consent law, WIS. STAT. § 343.305(1), "provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content." ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App 1997). "Any failure to submit to such a test, other than because of physical inability, is an improper refusal which invokes the penalties of the statute." ***Id.***

¶6 The application of the implied consent statute to a set of facts is a question of law we review without deference. ***Id.*** When construing a statute, "we

begin with the language of the statute and give it the common, ordinary, and accepted meaning…." ***State v. Schmidt***, 2004 WI App 235, ¶15, 277 Wis. 2d 561, 691 N.W.2d 379.

¶7 The issue in this case is whether the officer complied with WIS. STAT. § 343.305(4).[2] Section 343.305(4) reads as follows:

> At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), 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. (Emphasis added.)

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[2] The issues at a refusal hearing are contained in WIS. STAT. § 343.305(9)(a)5, which reads, in part:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving….
>
> b. Whether the officer complied with sub. (4).
>
> c. Whether the person refused to permit the test.

The unambiguous language of this statute simply requires that the law enforcement officer *read* the above information on the form to the accused. Nothing in the statute requires the law enforcement officer to fill out the bottom portion of the form.[3] To do so would be contrary to the implied consent law's purpose of keeping drunk drivers off the roads. *See* ***Scales v. State***, 64 Wis. 2d 485, 493-94, 219 N.W.2d 286 (1974). The supreme court has held that an officer must supply the information on the form in a manner reasonably calculated to convey it to the defendant, either by reading the form or by having it provided via an interpreter. ***State v. Piddington***, 2001 WI 24, ¶28, 241 Wis. 2d 754, 623 N.W.2d 528.

¶8 In this case, Wiltrout testified that he read the form to Wethern. Wethern did not testify to contradict this statement. The trial court made no explicit findings of fact as to whether Wiltrout read the form to Wethern and instead focused on the errors in the form. While the errors may bear on the officer's credibility, they do not alone prove Wethern failed to comply with the implied consent statute. We therefore reverse and remand so the trial court may make a finding of fact as to whether Wiltrout supplied the information on the form to Wethern in a way reasonably calculated to convey the information to him. *See* ***id.***[4]

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[3] Therefore, errors in completing the form would be immaterial, unless they may give rise to an inference that the officer's testimony might similarly be infected with errors. This is, at best, a dubious inference, especially given the nature of the so-called errors in this instance. The information the officer supplied on the form was not inaccurate; it was merely non-responsive.

[4] We also note, the trial court focused on the officer's failure to fill in a date and time stating, "[m]ost importantly to me is the fact that it's not dated or the time is not recited on the form…. There must be that 20-minute observation period." The twenty-minute observation period required by WISCONSIN ADMINISTRATIVE CODE § TRANS 311.06(3)(a) (2005) is not an issue at the refusal hearing. *See* WIS. STAT. § 343.305(9)(a).

By the Court.—Order reversed and cause remanded with directions.

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