COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 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. 2007AP1162-CR **Cir. Ct. No. 2005CT121**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANASTASIOS E. SALABOUNIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Anastasios E. Salabounis appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant and for operating with a prohibited alcohol concentration. He contends that the trial court erred when it refused to suppress the results of the evidentiary chemical test of his blood under Wisconsin's implied consent law. In the alternative, he argues that the results should not have been accorded a presumption of admissibility and accuracy under the implied consent law. Our review of the record indicates that the blood test results were properly admitted and therefore we affirm the judgment of the circuit court.

BACKGROUND

¶2 The case stems from a drunk driving arrest on February 21, 2005. Town of Bloomfield Police Chief Lloyd Cole stopped a vehicle for speeding and upon further investigation identified Salabounis as the driver. Police Officer Bradley Vinje joined Chief Cole on the scene shortly thereafter. Vinje observed that Salabounis was becoming agitated and tense, and he suspected that Salabounis might become "physically resistive." He also detected an odor of intoxicants and asked Salabounis whether he had consumed any alcohol. Salabounis first denied having any alcohol, but then stated that he had consumed one beer approximately twenty minutes prior to his traffic stop. Vinje placed handcuffs on Salabounis because Salabounis was "being verbally uncooperative" and Vinje "felt that placing handcuffs on him sooner than we normally would expect to would prevent any type of physical altercation."

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

¶3 Vinje performed the horizontal gaze nystagmus test on Salabounis to look for signs of impairment. There are six potential clues in the HGN test, and Vinje observed all six. He concluded that Salabounis was impaired by alcohol and placed him under arrest for OWI. Vinje then took Salabounis to the Lakeland Medical Center where he read him the Informing the Accused form in its entirety. Salabounis agreed to submit to an evidentiary chemical test of his blood.

¶4 Vinje testified that he observed Lisa Loepke, a registered nurse, draw blood from Salabounis. He stated that he watched her label the blood samples, place them in a plastic bag and hand them over to him to be sealed inside a blood alcohol collection kit. The kit, including Salabounis' name, birth date, driver's license number and citation number, was sealed and sent to the Wisconsin State Laboratory of Hygiene. Thomas Neuser, an advanced chemist at the Laboratory of Hygiene, testified that he performed the test on Salabounis' blood sample and prepared the report. He found a blood ethanol concentration of .168 grams per 100 milliliters of Salabounis' blood.

¶5 Prior to trial, Salabounis filed a motion in limine arguing, among other things, that the State should not be allowed to take advantage of the favorable presumptions of admissibility accorded chemical tests for intoxication under WIS. STAT. §§ 343.305(5)(d) and 885.235(1g)(c). He asserted that Vinje had used an outdated Informing the Accused form in violation of the implied consent law. The court denied the motion and the matter went to a jury trial. During the trial, Salabounis objected to the admission of the blood test results on grounds that the State failed to lay a proper foundation. The court nonetheless received the test results into evidence and the jury ultimately convicted Salabounis on both the OWI and the PAC charges. Salabounis appeals.

DISCUSSION

Informing the Accused

¶6 Salabounis argues that Vinje violated WIS. STAT. § 343.305 when Vinje failed to inform him of the consequences of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood. This additional language is included in some new Informing the Accused forms, but does not appear in the statute. In his brief, Salabounis writes, "It is a well-settled principle of Implied Consent jurisprudence that the Informing the Accused Form must adequately advise a suspected drunk driver of all of the relevant consequences associated with having a chemical test result which is positive for the regulated substance at issue." The application of the implied consent law to undisputed facts presents a question of law that this court reviews de novo. ***State v. Schirmang***, 210 Wis. 2d 324, 329, 565 N.W.2d 225 (Ct. App. 1997).

¶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 281. Section 343.305(4) provides:

> **(4)** INFORMATION. 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.
>
> 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 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 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.

¶9 Salabounis argues that the Informing the Accused form read to him was incomplete without a statement concerning the penalties for operating a motor vehicle with a detectable amount of a restricted controlled substance. Therefore, according to Salabounis, the arresting officer in this case failed to meet his duty under WIS. STAT. § 343.305(4). We cannot agree.

¶10 We ascertain no language in WIS. STAT. § 343.305(4) that requires 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 or PAC. The relevant portion of § 343.305(4) provides:

> 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.

The arresting officer read this required language to Salabounis.

¶11 The language concerning the consequences of driving when the suspect has a detectable amount of a restricted controlled substance in his or her blood apparently appears on a newer form that is not codified by the statute. The revised form by the Department of Transportation has been used in at least one other county. We are not aware of an effective date that mandates the use of this form in any other jurisdiction, and we have no indication that other jurisdictions plan on adopting the newer form. We therefore conclude that the arresting officer fully complied with WIS. STAT. § 343.305(4) when he read Salabounis the statutory language in the Informing the Accused form.

¶12 Salabounis directs us to ***State v. Wilke***, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989), for support. In ***Wilke***, we stated that when relevant information is withheld from the accused, no nexus need be established between the lack of information and any influence it might have had on the person's decision to submit to or refuse the evidentiary chemical test. ***Id.*** at 251. ***Wilke*** does not provide Salabounis with the support he desires. Though Salabounis was

not informed of the consequences relating to driving with a detectable amount of a restricted controlled substance in his blood, he was not charged with operating with a detectable amount of a restricted controlled substance in his blood and does not claim that he was doing so. The additional information about controlled substances, therefore, was irrelevant. *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).

¶13 ***Quelle*** teaches that the implied consent warnings are designed to inform drivers of the rights and penalties applicable to them. ***Quelle***, 198 Wis. 2d at 279; *see also* ***Piskula***, 168 Wis. 2d at 140-41 ("the reasonable objective of sec. 343.305(4) is to inform [noncommercial drivers] of their rights and penalties regarding refusal and a blood alcohol concentration [exceeding the legal limit]"). As explained, Salabounis was informed, in accordance with the statute, of the consequences of operating while under the influence of alcohol.

Foundation for Blood Test Result

¶14 Salabounis argues that the blood test results should have been suppressed because the trial record does not foundationally establish that Lisa Loepke, who performed the blood draw, was a person authorized to do so under WIS. STAT. § 343.305(5)(b). He contends that he was deprived of his right to confront witnesses when the State failed to call Loepke as a witness at trial. Section 343.305 provides the procedure to be followed when blood is drawn from

someone in custody for driving while under the influence of an intoxicant. Section 343.305(5)(b) requires that the blood be drawn by specified individuals:

> Blood may be withdrawn from the person … to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug … in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.* (Emphasis added.)

¶15 The admissibility of evidence lies within the sound discretion of the circuit court. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When reviewing a discretionary decision of the circuit court, the appellate court is to examine the record to determine if the circuit court logically interpreted the facts and applied the proper legal standard. ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995). However, whether WIS. STAT. § 343.305(5)(b) requires a person drawing blood to appear and personally testify to his or her qualifications presents a question of statutory interpretation. We review such questions de novo. ***State v. Wilson***, 170 Wis. 2d 720, 722, 490 N.W.2d 48 (Ct. App. 1992).

¶16 The Blood/Urine Analysis form introduced as evidence indicates that "Lisa M. Loepke RN" collected the blood specimen. Loepke did not testify at trial to establish her credentials, but her signature on the Blood/Urine Analysis form indicates that she is a registered nurse, a title that complies with the statute. Furthermore, Vinje testified that he had worked with Loepke "[f]or the last five years" and knew her as "a registered nurse employed by the Lakeland Medical Center." Vinje personally observed Loepke draw Salabounis' blood. He then watched her label the vials, place them into a plastic bag and turn them over to be sealed in the blood alcohol collection kit.

¶17 We are not persuaded that Loepke was statutorily required to appear at Salabounis' jury trial to testify that she is a registered nurse. While WIS. STAT. § 343.305(5)(b) requires that Loepke be qualified to draw blood, it does not specifically address the manner of establishing that qualification. Nor does the statute expressly require the personal attendance of the person drawing the blood as a witness. Thus, we look to the evidence to determine if the "qualification" requirement is satisfied.

¶18 We conclude that Loepke's status was sufficiently established by Vinje's uncontested testimony that he requested the blood draw at a medical facility and that he identified Loepke as a registered nurse with whom he had worked for five years. Because a sufficient evidentiary foundation existed to establish that Salabounis' blood sample was drawn by a qualified person, we hold that the trial court's admission of the test results into evidence was not an erroneous exercise of discretion.

¶19 In addition, the admission of Salabounis' blood test result evidence is supported by case law. In ***State v. Disch***, 119 Wis. 2d 461, 470, 351 N.W.2d 492 (1984), our supreme court held that a "blood test derived from a properly authenticated sample by legislative fiat is admissible." A blood analysis is judicially recognized as a scientific method, the result of which carries a prima facie presumption of accuracy. *See* ***id.*** at 473-74. When a chemical test result is challenged on the basis of noncompliance with underlying procedures, the result nonetheless carries a "prima facie presumption of accuracy" and is admissible. *See* ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 674, 314 N.W.2d 911 (Ct. App.

1981). Salabounis' challenge, therefore, goes to the weight of the blood alcohol evidence and not to its admissibility.[2] *See* ***id.*** at 675 n. 6.

¶20 The crux of Salabounis' argument is that, in the absence of Loepke's personal testimony, the test result was inadmissible hearsay, which violated Salabounis' Sixth Amendment right to confront witnesses as set forth in ***Crawford v. Washington***, 541 U.S. 36 (2004). ***Crawford*** stands for the principle that an out-of-court testimonial statement should not be admitted into evidence unless the witness is unavailable and the defendant has been afforded a prior opportunity for cross-examination. ***Id.*** at 68. Salabounis argues that Loepke's "statement," which consists of her signature with the registered nurse designation on the blood test result, is testimonial because an "objective witness reasonably [would] believe that the statement would be available for use at a later trial." ***Id.*** at 52.

¶21 Salabounis' argument would require us to focus on the signature of Loepke as the only evidence of her qualifications. However, Loepke's status as a registered nurse was established by other evidence at trial. When Salabounis objected to the blood test evidence on grounds the State had not laid a proper foundation, he acknowledged that:

[2] Even if the State failed to satisfy the requirements of the implied consent law regarding who may draw blood, this would not render the chemical test evidence inadmissible. *See* ***State v. Zielke***, 137 Wis. 2d 39, 53-54, 403 N.W.2d 427 (1987). Rather, such a failure would preclude the State from having the test result automatically admitted. *See* ***id.*** at 54. The State would have to establish the test result's relevance and probative value, and admissibility would rest on whether the blood test results were "constitutionally obtained." *See* ***id.*** at 52. The record establishes that Salabounis consented to the blood test. Thus, the State would have been able to demonstrate that the test results were constitutionally obtained and the evidence admissible. *See* ***id.*** at 52-53 (driver consent is a recognized exception to the Fourth Amendment warrant requirement).

> [His] concern would have been if you drew that knowledge simply from looking at the form, then it would be additional hearsay, ***Crawford***[-]type issue; but it appears if … I were to make my objection, I think the parties can stipulate that [Vinje] would take the stand and say that he has a personal knowledge of working with [Loepke] over the course of five or so years, that she is a registered nurse, and he knows who she is.

Salabounis conceded, and we agree, that ***Crawford*** is not implicated because the State did not rely on Loepke's signature on the form to establish compliance with WIS. STAT. § 343.305(5)(b).

CONCLUSION

¶22 We conclude that the controlled substance language contained in a new version of the Informing the Accused form was irrelevant under the facts of this case. Consequently, no violation of the implied consent law occurred. Furthermore, the State offered a sufficient evidentiary foundation to establish that Salabounis' blood sample was drawn by a qualified person under WIS. STAT. § 343.305(5)(b). Thus, no error occurred when the circuit court received the blood test results into evidence. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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