COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2858-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT S. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] In this appeal from a third drunk driving conviction, Robert S. Martinez challenges an order denying his motion to suppress the results of a blood test showing a 0.142% blood alcohol concentration, nearly

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

twice the legal limit. He claims that additional information supplied by the arresting officer concerning the possibility that his blood would be forcibly withdrawn if he did not consent to a blood test tainted his right to make an informed choice about whether to comply with the implied consent law. Martinez reasons that his choice to comply was not voluntary since the officer informed him that regardless of his decision, a blood sample would be forcibly withdrawn. We affirm because we find that the oversupply of information to Martinez did not affect his ability to decide whether to comply with the implied consent law.

¶2 After Martinez was arrested for drunk driving, the arresting officer read Martinez the Informing the Accused form. In addition, the officer told Martinez that this was a criminal offense because it was his third arrest on the charge and that blood would be withdrawn. Martinez agreed to submit to a chemical test of his blood. The test results showed a 0.142% blood alcohol concentration. The officer issued a citation for operating a motor vehicle while intoxicated. Subsequently, the State issued a criminal complaint charging Martinez with one count of operating while intoxicated, third offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(c), and one count of operating a motor vehicle with a prohibited alcohol concentration, third offense, in violation of §§ 346.63(1)(b) and 346.65(2)(c).

¶3 Martinez brought a motion to suppress the results of the blood test on the grounds that he "was never offered an opportunity to decide whether to submit to testing or refuse chemical testing. He was told that a blood sample would be gathered regardless of how he chose to answer the submission question."

At the suppression hearing,[2] the arresting officer explained the additional information he provided Martinez after reading him the Informing the Accused form.

> Q [District Attorney] And after issuing him the citation what did you do?
>
> A At that point he requested his attorney, I did inform him that through our OWI procedure we do need to complete our procedure prior to him making any phone calls. Or contacting the attorney. I then issued him the citation, he did advise that he understood the citation. I then began to read him the Informing the Accused, after every paragraph I did ask him if he understood at which time he said that he did by nodding his head.
>
> At the end of the Informing the Accused I asked him if he wished to submit to an evidentiary chemical test of his blood, I did at that time inform him that looking over his record this would be his third offense which would make it criminal, so just for his information that if he wished -- or correction, if he wishes to submit to evidentiary chemical test of his blood it is his choice, but that being it is a criminal offense we will be withdrawing the blood.
>
> ….
>
> Q Officer, if Mr. Martinez had told you no, he wouldn't submit to a test, was it your intent to use -- was it your intent to take his blood?
>
> A Correct.
>
> ….
>
> Q Did you ever tell Mr. Martinez that blood would forcibly be withdrawn?
>
> A No, I did not.
>
> Q What was the extent of what you told him in terms of if he said no on the question will you consent?
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> A I informed Mr. Martinez at the time of the Informing the Accused that being that this is his third offense that -- I guess in turn I possibly did say that we

[2] The suppression hearing was conducted before the Hon. Patrick L. Willis. Subsequently, the Hon. Fred Hazlewood presided over the jury trial and sentencing and entered the judgment of conviction.

> would be taking his blood, so I guess if you consider that forcibly or not, I don't know.
>
> Q Well, that's for the judge to decide as trier of fact, what I'm trying to get from you is what were the words and circumstances in which you told him that you would take his blood, that his blood would be drawn even if he said no?
>
> A Being that this was his third offense, which would make it criminal, we have received the information that we can forcibly draw blood.
>
> Q Okay, maybe you don't understand my question. Tell the Judge what your words were to Mr. Martinez as close as you can recollect.
>
> A My words to Mr. Martinez were as I was reading the Informing the Accused and finished reading the Informing the Accused I informed him that looking over his record I do see that this is his third offense which would make this offense criminal, that it is his choice whether he wishes to agree to the blood or not agree to the blood, but just for his information that through the District Attorney's office we have received information on criminal offenses we are able to draw blood even if he refuses it.

¶4 The arresting officer added that he did not use an intimidating or threatening tone when explaining the Informing the Accused form to Martinez. He also testified that he never implied that force would be used to withdraw Martinez's blood if he refused to submit to an evidentiary test of his blood. The trial court denied Martinez's motion. Martinez was found guilty after a jury trial of operating a motor vehicle while intoxicated. He then launched the instant appeal.

¶5 Martinez contends that no court of supervisory jurisdiction in Wisconsin has permitted an arresting officer to create a "hybrid" procedure where the Informing the Accused form is coupled with the additional information that if the defendant does not consent, blood will be forcibly withdrawn. He speculates that the reason such a "hybrid" procedure has not been approved "is because to do so would make every single defendant's decision not to withdraw his or her

implied consent to chemical testing subject to a palpable suspicion that it is not voluntary."

¶6 We do not agree with Martinez's characterization of the issue in this appeal. We conclude that the question facing us is whether the additional information imparted by the arresting officer was an oversupply of information that failed to properly inform Martinez of his choices. In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), we pointed out how the law requires that accused drivers must be informed of this choice and that this is accomplished by reading the Informing the Accused form to the accused. ***Id.*** at 277-78. We further observed that, despite the better practice of simply reading the form, some officers deviate from the form. *See* ***id.*** at 278-79. We cautioned that such deviation might result in the choice being affected in a prejudicial manner. We enunciated a three-pronged test to help trial courts gauge when such deviation results in a violation of the right to an informed choice. The test is as follows:

> (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. If the answers to all three questions are "yes," then the choice has become tainted.

¶7 There is no doubt that the arresting officer deviated from the script of the Informing the Accused form.[3] The approved script does not include information that if this is a criminal offense, a defendant's blood can be withdrawn even if he or she refuses to submit to a chemical test.

¶8 Nevertheless, the oversupply of information was not misleading. A triad of decisions stand for the proposition that despite the implied consent law, police may use other constitutional means to collect evidence of the driver's intoxication. First, in ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987), the Wisconsin Supreme Court held that WIS. STAT. § 343.305 does not limit the manner in which evidence is obtained to prove that a driver operated while intoxicated. Second, the Wisconsin Supreme Court held in ***State v. Bohling***, 173

[3] WISCONSIN STAT. § 343.305(4) is the approved script of the Informing the Accused form:

> "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."

Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), that when there are exigent circumstances, an arresting officer may direct the taking of a warrantless blood sample if four criteria are present. Third, we recently held in ***State v. Thorstad***, 2000 WI App 199, ¶10, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 239 Wis. 2d 310, 619 N.W.2d 240 (Wis. Oct. 17, 2000) (No. 99-1765-CR), *cert. denied*, 121 S. Ct. 1099 (Feb. 20, 2001) (No. 00-1145), that ***Bohling*** does not require the driver to give consent or voluntarily take the blood test, nor does ***Bohling*** depend on whether the driver was deemed to have consented under the implied consent law.

¶9 Under ***Quelle***, the answers to all three questions must be "yes" before we can find Martinez's decision to be tainted. Consequently, Martinez's challenge fails because the information given to him was accurate. Martinez contends that even if the information was accurate, it had an impact on his decision to "voluntarily" submit to the chemical test. Whether the additional information casts doubt on the voluntariness of Martinez's consent to the chemical test is speculation. Nowhere in the record is there any testimony by Martinez that he would have refused to take the chemical test if the arresting officer had not strayed from the approved script of the Informing the Accused form and provided him with accurate information that his blood could be withdrawn without his consent. We agree with the trial court's reasoning:

> [I]ndeed it could be argued that the statement that the officer made operated to the defendant's benefit since if the officer would not have told him what he intended to do, it might lead a defendant to refuse to give consent and then wind up finding out that not only did they take a sample of his blood but he was subject to revocation for refusing to voluntarily consent under the implied consent law.

¶10 We affirm the trial court's refusal to suppress the results of Martinez's chemical test because we conclude that he made an informed choice to submit to the test. While the arresting officer deviated from the script of the Informing the Accused form and provided additional information, that information was accurate. Further, there is no evidence in the record that Martinez would not have consented to the chemical test if he had not been given the additional information. It would require speculation on our part to hold that the additional, accurate information coerced Martinez into complying with the implied consent law.

By the Court.—Judgment affirmed.

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