

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3159-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN T. WERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 SNYDER, J.¹ John T. Werner appeals from a judgment of conviction for operating a motor vehicle while intoxicated, second offense, and an

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 unless otherwise noted.

order denying his motion to suppress chemical test evidence. Werner argues that the chemical test evidence should have been suppressed because he was denied a fundamentally fair opportunity to seek an alternative chemical test. We disagree and affirm the judgment and the order.

FACTS

¶2 While on patrol in the late evening of August 10, 1999, Officer James Olsen of the City of Sheboygan Police Department made contact with Werner after detaining him for a traffic violation. Upon speaking with Werner, Olsen noticed an odor of intoxicants coming from Werner's vehicle. Olsen asked Werner to perform some field sobriety tests, which Werner failed.

¶3 Olsen then arrested Werner for operating a motor vehicle while intoxicated. Werner was transported to the Sheboygan police department where Olsen read him the Informing the Accused form, and asked Werner to submit to a chemical test of his breath. Werner signed the Informing the Accused form and provided a breath sample, which indicated that he had a blood alcohol concentration of 0.15%.

¶4 Both before and after the breath test, Werner asked whether he could have a urine test. Olsen told Werner that he would have an opportunity to go for a urine test at a later time, after he submitted to the primary breath test. Werner was informed that he could take a urine test at his own initiative and expense; Olsen also informed Werner that if he wanted to take an alternative test provided by the police, it would have to be a blood test. Werner agreed to submit to a breath test, which revealed a prohibited blood alcohol concentration, and a second charge of operating a motor vehicle with a prohibited alcohol concentration was issued.

¶5 Prior to trial, Werner filed several motions, including a motion to suppress the results of the breath test. Werner argued that he was denied the opportunity to take an alternative chemical test because Olsen failed to provide him with any information about the procedure for obtaining the additional test.

¶6 On October 18, 1999, a hearing was held on Werner's motions. The trial court denied all of Werner's motions, including the suppression motion, and found that Werner had been afforded the opportunity to take an additional test.

¶7 Werner then pled no contest to the charges. He appeals the order denying his suppression motion and his judgment of conviction.

DISCUSSION

¶8 Werner argues that in order for the right to a second chemical test to be afforded in a "fundamentally fair fashion," an arresting officer must, at a minimum, provide an accused driver with information regarding the test's "presumptive period of admissibility as prima facie evidence." We disagree.

¶9 First, we note that Werner arguably waived this specific argument by failing to raise it before the trial court. Before the trial court, Werner argued that "due diligence" required Olsen to explain to him where he needed to go to obtain the urine test. Here, Werner argues that he had a "limited window of opportunity within which to obtain evidence that would have the same *prima facie* affect [sic] as the State's evidence." Thus, before this court, Werner argues that Olsen should have informed him that the urine test must be gathered within three hours of the time of driving to carry the same evidentiary force as the primary test.

¶10 Normally, we will not address issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). However, this rule is not absolute, and an exception will be made in this instance. *Id.*

¶11 This case requires us to interpret WIS. STAT. § 343.305, Wisconsin's implied consent law. Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law we review de novo. *State v. Reitter*, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999).

¶12 WISCONSIN STAT. § 343.305 addresses tests for intoxication and states, in relevant part:

(2) IMPLIED CONSENT. Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b). Any such tests shall be administered upon the request of a law enforcement officer. **The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first.**

(3) REQUESTED OR REQUIRED. (a) Upon arrest of a person ... a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

....

(4) 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.”

(5) ADMINISTERING THE TEST; ADDITIONAL TESTS. (a) If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). **The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).** If the person has not been requested to provide a sample for a test under sub. (3)(a) or (am), the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test specified under sub. (3)(a) or (am). **The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered under sub. (3)(a) or (am).** If a person requests the agency to administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform a test under sub. (3)(a) or (am) that it is able to perform. The agency shall comply

with a request made in accordance with this paragraph.
(All emphases added.)

¶13 The Wisconsin legislature enacted the implied consent statute to combat drunk driving. *Reitter*, 227 Wis. 2d at 224. Designed to facilitate the collection of evidence, the law was not created to enhance the rights of alleged drunk drivers, and consequently, courts construe the implied consent law liberally. *Id.* at 224-25.

¶14 Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. WIS. STAT. § 343.305(2). The legislature has recognized that drivers being asked to take a chemical test should be informed of their choice to refuse the test, subject to certain risks and consequences inherent in this choice, and has required law enforcement officers to provide drivers with certain information. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277-78, 542 N.W.2d 196 (Ct. App. 1995). The duty of law enforcement under the implied consent law is to accurately deliver this information to the accused. *Id.* at 283.

¶15 The legislature determines exactly what arresting officers must tell defendants prior to the administration of a chemical test. *Reitter*, 227 Wis. 2d at 225. WISCONSIN STAT. § 343.305(4) requires officers to advise the accused about the nature of the driver's implied consent, and the Informing the Accused form meets the statutory mandate of alerting defendants to the implied consent law and their rights under it. *Id.* An officer's only duty under the implied consent law is to accurately provide the information contained on the Informing the Accused form to the driver; an officer need not explain all of the choices (and resulting consequences) embodied within the implied consent statute. *Quelle*, 198 Wis. 2d at 285.

¶16 The legislature decides what must be told to persons before the administration of a chemical test, and it is for the legislature, not this court, to add to the statutory scheme. *Reitter*, 227 Wis. 2d at 230. The law requires no more than what the implied consent statute sets forth. *Id.* at 225. An officer's correct explanation of the law cannot be grounds for suppression of the test results. *Quelle*, 198 Wis. 2d at 283.

¶17 Here, the trial court made the following findings of fact:

Mr. Werner was transported to the Sheboygan Police Department for an Intoxometer test. At the Police Department, he was read the Informing the Accused form, which essentially contains the information set forth at Section 345.305(4) of the Wisconsin Statutes.

Officer Olsen informed Mr. Werner that the primary chemical test of the Sheboygan Police Department was breathalyzer. He requested that ... Mr. Werner submit to a breathalyzer test, which he ultimately did. Mr. Werner requested a urine test as the second test. Officer Olsen informed Mr. Werner that he could take a urine test but he would have to pay for that test on his own and have that test performed on his own outside of the department because the department would provide as a second test a blood test. Mr. Werner declined to take a blood test or submit to a blood draw. The Court finds that Mr. Werner was afforded the opportunity to take a urine test. He was released to a sober responsible adult within about an hour after the time of the alleged driving.

¶18 Olsen read Werner the Informing the Accused form, the standard-issue state form from the Department of Transportation, and informed Werner of his right to an alternative test. WISCONSIN STAT. § 343.305 requires nothing more. Again, it is the legislature, not this court, which decides what must be told to persons before the administration of a chemical test, and it is for the legislature, not this court, to add to the statutory scheme. *Reitter*, 227 Wis. 2d at 230. Olsen did exactly as § 343.305 requires. In fact, it would have been foolhardy for Olsen

to provide additional information. Explanations that exceed the language of the statute would cause an “oversupply of information” and encourage “misled” defendants to challenge an officer’s compliance with statutory requirements. *Reitter*, 227 Wis. 2d at 231.

CONCLUSION

¶19 Werner was not denied an opportunity to seek an alternative chemical test. Olsen properly read Werner the Informing the Accused form and told him he could obtain a urine test at his own expense and initiative. Wisconsin’s implied consent law requires nothing more. The judgment of conviction and the order are affirmed.

By the Court.—Judgment and order affirmed.

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

