COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP392-CR **Cir. Ct. No. 2007CM330**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS R. BENINGHAUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Thomas R. Beninghaus does not prevail on his challenge to the circuit court's conclusion that additional information provided by

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the arresting officer when he was reading the Informing the Accused form caused him to submit to the chemical test after first refusing the test. Beninghaus failed to fulfill his burden of proof and present evidence of causation. We affirm.

¶2 After being arrested for third offense drunk driving, Beninghaus filed a motion to preclude the State from relying on the statutory presumptions concerning the admissibility of the breath test results. He argued that Officer Mike McCarthy violated WIS. STAT. § 343.305 by providing misleading information when the officer told him that it would be in his best interest to submit to the test and that this information contributed to his decision to take the test.

¶3 The only witness to testify at the motion hearing was the arresting officer. His uncontradicted testimony establishes that after he arrested Beninghaus for his third OWI charge, Beninghaus was transported to the city of Sheboygan police station for processing, including an evidentiary test of his breath. McCarthy, the arresting officer, read the Informing the Accused form to Beninghaus. When McCarthy asked Beninghaus if he would submit to the test, he asked for an attorney and followed with additional questions. McCarthy's reply was to reread the Informing the Accused form. Beninghaus refused to submit to the test and McCarthy told him it would be in his best interest to submit to the test and then reread paragraph two of the Informing the Accused form.[2] Beninghaus then agreed to submit to the test.

[2] Paragraph 2 of the Informing the Accused form provides:

(continued)

¶4 Applying ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds*, ***Washburn County v. Smith***, 2008 WI 23, __ Wis. 2d __, 746 N.W.2d 243,[3] the circuit court denied the motion. The court held that it "[couldn't] really say whether the officer over or understated the requisite information." It concluded that it "[couldn't] say that the officer [misled] the defendant." Finally, it held that the officer's statement—that it would be in Beninghaus' best interest to submit to the test—did not induce him to

> 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.

[3] In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), this court set forth a three-pronged standard to assess the adequacy of the warning process under the implied consent law:

> (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?

See ***Quelle***, 198 Wis. 2d at 280.

submit to the evidentiary chemical test. Subsequently, the court found Beninghaus guilty after a stipulated trial.[4] Beninghaus appeals.

¶5 The interpretation and application of WIS. STAT. § 343.305 to undisputed facts is a question of law that we determine independently of the circuit court. ***Smith***, 746 N.W.2d 243, ¶55. We examine the case law interpreting and applying § 343.305 to fact situations in which a law enforcement officer has given additional information to the person from whom a test is requested. ***Id.***

¶6 This case is controlled by our supreme court's recent decision in ***Smith***. Here and in ***Smith*** the arresting officer fulfilled his statutory duty under WIS. STAT. § 343.305(4) but then provided more information in excess of that duty.[5] ***Smith***, 746 N.W.2d 243, ¶¶72-73. Therefore, ***Smith*** instructs us to apply the three-prong ***Quelle*** inquiry as interpreted in ***State v. Ludwigson***, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997). ***Smith***, 746 N.W.2d 243, ¶72.

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[4] We leave for another day the question of whether an appellant in a criminal case can avoid the application of the guilty plea waiver rule by requesting a trial on stipulated facts rather than entering a guilty or no contest plea. It is a general principle of law that a "guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). An exception is provided by statute for suppression motions. WIS. STAT. § 971.31(10). A motion to preclude the State from relying on the statutory presumptions concerning the admissibility of the breath test results is obviously not one of the exceptions to the rule.

As we noted in ***County of Racine v. Smith***, 122 Wis. 2d 431, 435, 362 N.W.2d 439 (Ct. App. 1984), the reason for the exception for suppression motions was "to reduce the number of contested trials when the only contested issue was whether or not the denial of the motion to suppress was proper." Obviously, a stipulated trial is not a contested trial and we question why the guilty plea waiver rule should not be invoked when Beninghaus' only concern is the presumptions of admissibility assigned to test results.

[5] We believe it is a distinction without a difference that in ***Washburn County v. Smith***, 2008 WI 23, __ Wis. 2d __, 746 N.W.2d 243, the driver refused the chemical test and here ***Beninghaus*** ultimately submitted to the chemical test.

¶7 We find it is unnecessary to discuss the first two ***Quelle*** prongs to resolve this case. As in ***Smith***, Beninghaus has failed to make a prima facie showing as required by ***Ludwigson*** that McCarthy's statement that it would be in his best interest to take the test contributed to Beninghaus' decision to take or not take the test. *See* ***Ludwigson***, 212 Wis. 2d at 876.

¶8 In ***Smith***, 746 N.W.2d 243, ¶¶68-69, the supreme court approved the ***Ludwigson*** requirement placing the burden of proof on the party claiming the officer provided extraneous information that caused him or her to make a decision concerning submitting to a evidentiary chemical test. The ***Ludwigson*** court held:

> The third prong of the Quelle test requires a fact-finding process by the trier of fact. Consequently, the party claiming that the refusal was reasonable has the burden of production to present the trier of fact with enough evidence to make a prima facie showing of a causal connection between the misleading statements and the refusal to submit to chemical testing.
>
> Once the prima facie evidence has been submitted, the burden shifts to the State to prove otherwise. At the end, the trial judge, acting as the trier of fact, assesses the credibility of the two sides and determines as a matter of fact whether the erroneous extra information caused the defendant to refuse to take the test. The defendant has the ultimate burden of proving the causation element to a preponderance of the evidence. *Cf.* [WIS. STAT. § 343.305(9)(a)5.c.] (Driver did not refuse blood alcohol test if can prove by preponderance of the evidence that refusal was due to a physical inability to submit to the test because of a disability or disease.)
>
> Here Ludwigson never presented *any* evidence to show that the erroneous information caused her to refuse to take the test. She never took the stand on her own behalf and was not able to point out anything in the officer's testimony which would auger for a causation finding in her favor. For example, the officer never testified that after receiving the information, Ludwigson voiced any concerns because of the information provided. Instead, Ludwigson simply argues that because the information provided by the officer was erroneous, it had to mislead her as a matter of law. We

> reject her premise. She has a duty to prove not just the first two prongs of the ***Quelle*** test, but the third prong as well. She did not do so. The trial court basically determined that Ludwigson had not met her burden of proof regarding the third prong. We agree. When a party fails to produce any credible evidence as to an element, the party fails to meet his or her burden of proof as a matter of law. This is what occurred here.

Ludwigson, 212 Wis. 2d at 876-77 (citation omitted).

¶9 We affirm. Beninghaus does not carry his burden of proof on the third prong of ***Quelle***. He did not take the stand, he did not testify that McCarthy's statement that it would be in his best interest to take the test caused him to change his mind and submit to the test. He has not pointed out anything in McCarthy's testimony that even smells of causation. Rhetorical argument is not enough to carry the burden; there must be credible evidence to support Beninghaus' claim.

By the Court.—Judgment affirmed.

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