

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 2010

A. John Voelker
Acting 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. 2010AP863-CR

Cir. Ct. No. 2009CT561

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER GALVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
WILBUR W. WARREN III, Judge. *Reversed and cause remanded with
directions.*

¶1 REILLY, J.¹ Javier Galvan appeals from a judgment of the circuit court convicting him of operating a motor vehicle while intoxicated. Galvan argues that the circuit court improperly denied his motion to suppress the blood test results obtained after his arrest. The issue on appeal is whether the arresting officer used reasonable means in conveying the implied consent warnings to Galvan. We hold that the officer did not use reasonable means in conveying the implied consent warnings to Galvan and therefore reverse and remand to the circuit court to determine whether the evidence is admissible as a search incident to a lawful arrest.

FACTS

¶2 On April 26, 2009, Javier Galvan was pulled over by Trooper Michael Poupart for having an improper license plate bracket. Upon reaching Galvan's car, Poupart noticed an open can of beer in the center console and the smell of alcohol. Poupart asked who had been drinking in the car and the passenger responded that he was. Galvan denied that he had been drinking. Poupart called for a backup squad. While it is unclear when the backup deputy arrived, it is clear that he speaks Spanish.

¶3 Poupart asked Galvan to step out of the car so Poupart could administer the field sobriety tests. Poupart performed the horizontal gaze nystagmus (HGN) test and observed five of the six clues that indicate intoxication. Poupart testified that Galvan did not have any trouble understanding his instructions for the HGN test. Galvan was next instructed to perform the "walk

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

and turn” test, whereby he was told to take nine steps forward and nine steps back. Galvan lost his balance during this test. Poupart told Galvan to stand on one leg for thirty seconds. Galvan was unable to complete this test without repeatedly putting his foot down. After Poupart concluded that Galvan failed all three field sobriety tests, he asked Galvan to take a preliminary breath test (PBT). When Galvan failed the PBT, Poupart arrested Galvan for operating while intoxicated. Subsequent to Galvan’s arrest, Poupart submitted Galvan to a blood test under Wisconsin’s implied consent law, which revealed a BAC of .18.

¶4 Galvan testified through an interpreter that he can only say “basic things” in English, and that he does not understand the language well. Galvan testified that he was able to follow the instructions because Poupart showed him through movements what he wanted him to do. Galvan’s pastor testified that Galvan cannot speak English and that Galvan asks for an interpreter when needed.

¶5 Poupart does not speak or understand Spanish. The backup deputy, however, does speak Spanish. Poupart testified that Galvan’s English “seemed limited,” although he thought that Galvan understood what he was saying on the side of the road. Galvan responded to Poupart’s inquiries with one or two word answers. Poupart acknowledged that Galvan had difficulty understanding his instructions, and that he demonstrated the field sobriety tests to Galvan. When Galvan did not respond to a question from Poupart inquiring if Galvan had anything illegal in his possession, the backup deputy made the inquiry in Spanish and Galvan promptly answered the question in Spanish that he did not.

¶6 When Poupart took Galvan to the hospital, he did not ask the backup deputy to accompany him because he did not think that Galvan was a threat.² At the hospital, Poupart read Galvan the implied consent warnings in English. Poupart testified that when he asked Galvan if he would submit to a blood test, Galvan responded “yes.” Galvan testified he did not understand what the officer was asking him to do. Galvan never asked for an interpreter.

¶7 Galvan moved to suppress the results of his blood test on the grounds that he was not properly read the implied consent warnings. The circuit court denied the motion as it found that Galvan understood what Poupart was asking him and thus properly consented to the blood test. Galvan subsequently pled guilty to operating a motor vehicle while intoxicated, but his sentence was stayed while he appealed the circuit court’s order denying his motion to suppress the results of his blood test.

STANDARD OF REVIEW

¶8 When we review a motion to suppress evidence, we will uphold the circuit court’s factual findings unless they are clearly erroneous. *State v. Begicevic*, 2004 WI App 57, ¶3, 270 Wis. 2d 675, 678 N.W.2d 293. The application of the implied consent statute is a question of law that we review de novo. *See State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

² No evidence was presented that the backup deputy was unavailable to go to the hospital or unable to read the implied consent warnings in Spanish at the scene prior to Galvan being transported to the hospital.

DISCUSSION

¶9 Wisconsin’s implied consent law states that all Wisconsin motorists are deemed to have given consent to breath, blood, or urine tests when a police officer suspects that a motorist has been drinking and driving. WIS. STAT. § 343.305(2). Prior to requiring a motorist to submit to a chemical test an officer must read the warnings set forth in § 343.305(4). This is a statutory right that Wisconsin courts will strictly protect. *State v. Walstad*, 119 Wis. 2d 483, 527, 351 N.W.2d 469 (1984). Poupart properly suspected Galvan of drinking and driving and read the § 343.305(4) warnings in English.

¶10 An officer must use “reasonable” methods in conveying the implied consent warnings to suspects. *Piddington*, 241 Wis. 2d 754, ¶1. In *Piddington*, a deaf defendant was pulled over for driving erratically and ordered to perform a series of field sobriety tests. *Id.*, ¶2. The officer communicated with Piddington by using handwritten notes, gestures, and some speaking. *Id.*, ¶3. Piddington was arrested for failing the field sobriety tests. *Id.*, ¶5. At the police station, Piddington was given a copy of the implied consent warnings to read and initial. *Id.*, ¶6. A police officer with some working knowledge of sign language was also present and communicated the form to Piddington. *Id.*, ¶¶5-6. Piddington eventually consented to a blood test. *Id.*, ¶6.

¶11 Piddington later argued that the blood test results should be suppressed because he needed an American Sign Language interpreter to fully understand the field sobriety test and the implied consent warnings. *Id.*, ¶8. The supreme court concluded that the officer’s conduct was reasonable, and thus held that he did not violate the implied consent statute. *Id.*, ¶55. The court first noted that the test for whether the implied consent warnings were reasonably conveyed

is based on the objective conduct of the officer, and not whether the suspect understood the warnings. *Id.*, ¶21. Whether a suspect understands the implied consent warnings is irrelevant. *Id.*, ¶32 n.19. The burden is on the State to show that the officer's conduct was reasonable. *Id.*, ¶22.

¶12 In *Begicevic*, this court confronted a similar issue, only in that case the accused drunk driver was a Bosnian who spoke Croatian along with some limited German and English. *Begicevic*, 270 Wis. 2d 675, ¶11. We held that the arresting officer's conduct fell well short of the *Piddington* standard because the officer did not make an attempt to find an interpreter. *Begicevic*, 270 Wis. 2d 675, ¶21. Additionally, when the suspect was brought back to the station after he was arrested, the one officer present who spoke some German made no effort to translate the implied consent warnings, nor did he attempt to explain the implied consent warnings in German. *Id.*, ¶¶18-19.

¶13 The question on appeal is whether Poupart used reasonable means when he communicated the implied consent warnings in English to Galvan. Whether Galvan understood the implied consent warnings is irrelevant to whether Poupart's conduct in reading the warnings in English was reasonable.

¶14 We hold that Poupart's conduct was not reasonable and that he violated the standards set forth in *Piddington* and *Begicevic*. Poupart's conduct is very similar to the officers' actions in *Begicevic*, where the police made no effort to translate the implied consent warnings. *Begicevic*, 270 Wis. 2d 675, ¶¶18-21. Given that an officer who spoke German was present, this court held that the police did not act reasonably in conveying the implied consent warnings. *Id.*, ¶21.

¶15 Similarly, at the time of Galvan's arrest Poupart had a Spanish-speaking officer with him. The other officer even spoke some Spanish to Galvan

at one point when Galvan did not understand Poupart's English instructions. Poupart was thus aware that Galvan's ability to understand English was minimal. Given that the Spanish-speaking deputy could have read the implied consent warnings to Galvan in Spanish, Poupart's decision to read the warnings in English was unreasonable.

¶16 Poupart offered no compelling reason for the failure to have the Spanish-speaking deputy provide the warnings. If the State had offered a valid reason for why the other officer could not accompany Poupart—such as the other officer was called away to an emergency—we would consider that fact in our determination as to whether Poupart acted reasonably. See *Piddington*, 241 Wis. 2d 754, ¶28 (“That a law enforcement officer must use reasonable methods to convey the implied consent warnings does not mean the officer must take extraordinary, or even impracticable measures to convey the implied consent warnings.”). The only explanation that Poupart gave for not bringing the other deputy with him was that he did not think Galvan was a threat. The fact that Galvan was not seen as a security threat does not address whether the officer made a reasonable effort to convey the implied consent warnings.

¶17 While Poupart did not use reasonable means in conveying the implied consent warnings, we nonetheless remand to determine whether the blood test results are admissible. The purpose of the implied consent law is “to facilitate, not impede, the gathering of chemical test evidence in order to remove drunk drivers from the roads.” *State v. Zielke*, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987). Even if the State does not comply with the requirements of the implied consent statute, the evidence of the chemical test is still admissible if it was acquired constitutionally. *Id.* Chemical test results that are seized incident to a lawful arrest are admissible. *Id.* at 52. Additionally, if the driver consents to the

chemical test, it is not necessary that the officer comply with the implied consent warnings; the test results are admissible. *Id.* at 52-53.

¶18 As neither party briefed the issue of whether the evidence is admissible as a search incident to a lawful arrest, we remand so the circuit court can decide whether the evidence is admissible under the *Zielke* standard.

CONCLUSION

¶19 We hold that Poupart did not use reasonable means in conveying the implied consent warnings to Galvan. This appeal is remanded to the circuit court to determine whether the evidence is admissible as a search incident to a lawful arrest using the *Zielke* standard. We note that even if the circuit court finds that the blood test results are inadmissible, the State may still prosecute Galvan. *See State v. McCrossen*, 129 Wis. 2d 277, 297, 385 N.W.2d 161 (1986).

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

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

