

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2003

Cornelia G. Clark
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. 03-0837

Cir. Ct. Nos. 02TR009609
02TR010413

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF KOHLER,

PLAINTIFF-RESPONDENT,

v.

JOHN M. ERDMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ The issue on appeal is whether there was substantial compliance with WIS. STAT. § 343.305(4) of Wisconsin's implied consent law. John M. Erdmann appeals from a judgment of conviction for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

operating a motor vehicle with a prohibited alcohol concentration (first offense) contrary to WIS. STAT. § 346.63(1)(a). Erdmann argues that the arresting officer failed to comply with the implied consent law. We disagree and affirm the trial court.

¶2 The facts are undisputed. On August 25, 2002, Erdmann was stopped while driving his motor vehicle for weaving in his lane of travel. He was placed under arrest for operating a motor vehicle while intoxicated (OWI). He was then placed in the backseat of the arresting officer's squad car, where the officer read aloud from the Informing the Accused form.

¶3 The relevant portion of the Informing the Accused form states:

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.

WIS. STAT. § 343.305(4) (emphasis added). The officer read the form as printed except for one word. The parties stipulated that a videotape, recorded at the time, shows that the arresting officer said the incorrect word "suspect" instead of the correct word "subject":

If you refuse to take any test that this agency requests, your operating privileges [will] be revoked and you will be *suspect* to other penalties. (Emphasis added.)

¶4 After the officer read the form, Erdmann agreed to take a blood test. The test result revealed a blood alcohol level of .176%. Thereafter, Erdmann was charged with operating a motor vehicle with a prohibited alcohol concentration and OWI.

¶5 On December 26, 2002, Erdmann filed a motion to suppress the blood test result. On January 2, 2003, a hearing was held on Erdmann's motion to

suppress. Erdmann argued that the officer failed to substantially comply with the implied consent law. In the alternative, Erdmann requested that the test result be stripped of its presumption of admissibility and accuracy under WIS. STAT. § 885.235. The Village of Kohler argued that the officer's misstatement still substantially complied with the implied consent law. The Village additionally argued that even if the misstatement was a violation of the implied consent law, the proper remedy was not suppression.

¶6 The trial court denied Erdmann's suppression motion. Specifically, the court stated that the use of the word "suspect" rather than "subject" was inadvertent and insignificant. The court dismissed the OWI charge and entered a judgment of conviction on the charge of PAC. Erdmann appeals.

¶7 The interpretation of the implied consent law and its application to undisputed facts present questions of law which this court reviews independently from the trial court. *State v. Schirmang*, 210 Wis. 2d 324, 329, 565 N.W.2d 225 (Ct. App. 1997).

¶8 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).²

² WISCONSIN STAT. § 343.305(2) provides:

(continued)

Police officers have a statutory duty under § 343.305(4) to inform accused drunk drivers of certain required information when requesting a chemical test. *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) 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.

(2) IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, 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.

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."

¶9 While this statute is clearly mandatory ("the law enforcement officer *shall* read the following" WIS. STAT. § 343.305(4) (emphasis added)), it is legally sufficient for an officer to have "substantially" complied with its requirements. *See Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 197, 405 N.W.2d 732 (Ct. App. 1987) (where we held that substantial compliance with a mandatory statute may be legally sufficient); *see also State v. Wilke*, 152 Wis. 2d 243, 250, 448 N.W.2d 13 (Ct. App. 1989) (where we approvingly discussed substantial compliance as opposed to partial compliance, which we held was not legally sufficient for compliance with the implied consent law). Substantial compliance is "actual compliance in respect to the *substance* essential to every reasonable objective of the statute." *Wilke*, 152 Wis. 2d at 250 (emphasis added; citation omitted).

¶10 In *Quelle*, 198 Wis. 2d at 280, we adopted a three-part test to determine whether an officer has complied with 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?

We address each part of the test in order.

¶11 First, at the time of Erdmann's arrest, the officer read the Informing the Accused form as printed, except for one word. He misstated the word "subject." Pointing out this *one word* misstatement without more does not equate to a showing that the officer did not meet his duty under WIS. STAT. § 343.305(4) "to provide information to the accused driver." *Quelle*, 198 Wis. 2d at 280. Erdmann fails to meet the first part of the test.

¶12 Second, Erdmann claims that the officer's pronunciation error rendered the information given to him "meaningless" and "distorted to the point of nonexistence." However, Erdmann provides no support for this conclusion in his brief. Further, there is nothing in the record that demonstrates that Erdmann was confused by the misstated word or that this misstatement rendered the entire warning meaningless. Erdmann fails to meet the second part of the test.

¶13 Third, Erdmann has not shown that the information as given by the officer affected his ability to make the choice about chemical testing. Again, he provides no supportive arguments or evidence for us to even consider. Erdmann fails to meet the third part of the three-part test.

¶14 Given Erdmann's unsupported, conclusory arguments, we must agree with the trial court that the officer's one-word misstatement was insignificant. We hold that the officer substantially complied with his duties under WIS. STAT. § 343.305(4).³

³ The officer did not fail to comply with WIS. STAT. § 343.305(4); therefore, we need not address Erdmann's remedy argument.

By the Court.—Judgment affirmed.

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

