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DISTRICT IV

May 2, 2024

To:

Hon. Joseph G. Sciascia
Circuit Court Judge
Electronic Notice

Kelly Enright
Clerk of Circuit Court
Dodge County Justice Facility
Electronic Notice

Walter Arthur Piel Jr.
Electronic Notice

Chad Wozniak
Dodge County District Attorney's Office
210 W. Center St.
Juneau, WI 53039

You are hereby notified that the Court has entered the following opinion and order:

2023AP2002 In the matter of the refusal of Megan Elizabeth Dunneisen: State of Wisconsin v. Megan Elizabeth Dunneisen (L.C. # 2023TR1904)

Before Taylor, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Megan Dunneisen appeals a revocation judgment for unlawfully refusing to submit to chemical testing of her blood pursuant to Wisconsin's implied consent law, WIS. STAT. § 343.305. Dunneisen contends that her refusal warning was inadequate because the arresting deputy supplied misleading additional information. On this court's own motion, this appeal is

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

disposed of summarily pursuant to WIS. STAT. RULE 809.21(1).[2] I reject Dunneisen's argument and affirm.

In the evening of May 28, 2023, a Dodge County deputy law enforcement officer stopped a car driven by Dunneisen for a suspected speeding violation. There were passengers under the age of 16 in the car. The deputy's interactions with Dunneisen led him to believe that Dunneisen was under the influence of alcohol. After an investigation, the deputy placed Dunneisen under arrest on suspicion of operating while intoxicated (OWI).

The following facts are taken from audiovisual evidence from the deputy's body-worn camera, presented at the revocation hearing. After Dunneisen's arrest, the deputy read Dunneisen the entire statutory "Informing the Accused" script multiple times, which indicated that law enforcement wanted to take a sample of Dunneisen's blood for chemical testing. *See* WIS. STAT. § 343.305(4). Among other things, the script states that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." Sec. 343.305(4). Dunneisen asked the deputy questions about license revocation, and in response, the deputy read the aforementioned sentence multiple times. Finally, in further response to Dunneisen's continued questions, the deputy said: "if you refuse … I'm going to issue a notice of intent to revoke operating privileges. I'll complete an affidavit in support of a search warrant, and I will apply for a search warrant for your blood. It's up to the judge to review it." As addressed below, it appears that it is this statement by the deputy which Dunneisen alleges was misleading additional information.

[2] WISCONSIN STAT. RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

Ultimately, Dunneisen refused to submit to the requested blood test. The deputy prepared an affidavit and applied for a search warrant. The deputy issued a civil notice of intent to revoke Dunneisen's operating privilege under WIS. STAT. § 343.305(9)(a) for refusing to submit to a blood test after being arrested on suspicion of committing an OWI offense, specifically, first-offense OWI involving passengers under 16 years of age in the motor vehicle. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(f).

Dunneisen requested a refusal hearing under WIS. STAT. § 343.305(9)(a). During the hearing, Dunneisen argued, among other things, that her refusal warning was inadequate because the deputy supplied misleading additional information. The circuit court rejected Dunneisen's arguments and entered a revocation judgment, which Dunneisen appeals.[3]

When a law enforcement officer arrests a person for an OWI-related offense, the officer may seek to obtain a sample of the person's blood, breath, or urine for chemical testing. WIS. STAT. § 343.305(3)(a). "A refusal to submit to a chemical test for intoxication cannot result in revocation of operating privileges unless the person has first been adequately informed of his [or her] rights under the law." ***Washburn County v. Smith***, 2008 WI 23, ¶51, 308 Wis. 2d 65, 746 N.W.2d 243. To that end, the officer reads the statutory Informing the Accused script. *See* § 343.305(4). If the person refuses to submit to a requested blood test, the officer may apply for a warrant for a blood test notwithstanding the refusal. *See* ***State v. Forrett***, 2022 WI 37, ¶8, 401 Wis. 2d 678, 974 N.W.2d 422.

[3] The State failed to timely file a respondent's brief, and it did not file a brief until this court issued an order warning the State that failure to file a brief within five days would result in the sanction of summary reversal. *See* ***Raz v. Brown***, 2003 WI 29, ¶36, 260 Wis. 2d 614, 660 N.W.2d 647. The State offered no explanation for its delay. I admonish the State for its lack of diligence, which has delayed the resolution of this appeal.

To show that a refusal warning was inadequate due to an oversupply of information beyond the Informing the Accused script, a person must show all of the following: (1) that the law enforcement officer exceeded his or her legal duty to provide information, (2) that the oversupply of information was misleading, and (3) that the oversupply of information affected the person's ability to make the choice about chemical testing. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***Smith***, 308 Wis. 2d 65, ¶64; *see also* ***Smith***, 308 Wis. 2d 65, ¶72. This inquiry is objective, and considers the "conduct of [the] officer, rather than … the comprehension of the accused driver." ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528.

"Application of the implied consent statute to an undisputed set of facts … is a question of law that this court reviews de novo." ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999).

Dunneisen argues that her refusal warning was inadequate because the deputy supplied misleading additional information about obtaining a search warrant for a sample and testing of her blood. According to Dunneisen, the deputy's statements concerning the warrant led her to believe that the court had input into her "implied consent decision," which resulted in her refusing the blood test. Dunneisen has shown that the deputy exceeded his legal duty by supplying additional information beyond the Informing the Accused script. However, Dunneisen fails to show that the additional information was misleading.

Dunneisen concedes that the additional information supplied by the deputy is accurate. However, Dunneisen contends that this information led her to the mistaken belief that there was "an additional step in the process," and a judge would "review the matter before she would have

to make her decision" whether to submit to a blood test. According to Dunneisen, she believed that, by refusing to take the test, she was "simply selecting an option of asking the Court to decide," and she would suffer no penalties under Wisconsin's implied consent law for that choice. Dunneisen's arguments are unpersuasive.

First, Dunneisen fails to identify exactly what statements by the deputy were misleading and resulted in her believing that "the Court would review the matter before she would have to make her decision." She only identifies the deputy's general discussion of the warrant procedure as misleading. I infer that she is referencing these statements by the deputy: "If you refuse … I'm going to issue a notice of intent to revoke operating privileges. I'll complete an affidavit in support of a search warrant, and I will apply for a search warrant for your blood. It's up to the judge to review it." There is nothing in these statements that condition the revocation of Dunneisen's operating privilege and other penalties on anything other than her refusal to take the requested blood test.

Further, Dunneisen fails to explain how the additional warrant information supplied by the deputy would lead a reasonable person to believe that the revocation of their operating privilege for refusing to take the requested test was conditioned upon court approval. *See* ***Piddington***, 241 Wis. 2d 754, ¶21 (whether a refusal warning is inadequate due to an oversupply of information is evaluated under an objective standard). The deputy gave Dunneisen information repeatedly that would have made it clear to a reasonable person that refusal to consent to the requested blood test would result in her operating privilege being revoked. As noted above, the deputy read to Dunneisen the Informing the Accused script multiple times,

which specifically states that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties."[4] In addition to reading the Informing the Accused form multiple times, the deputy also specifically said to Dunneisen that "if you refuse … I'm going to issue a notice of intent to revoke operating privileges." Dunneisen makes no argument as to how the additional information given by the deputy pertaining to the warrant process could lead a reasonable person to believe there would be no penalties for refusing to submit to the test requested by the deputy.[5]

Rather, Dunneisen's argument appears to be based on her testimony that she was, subjectively, confused by the additional information. However, a defendant's "subjective confusion" is not a defense in a refusal proceeding. ***Quelle***, 198 Wis. 2d at 280. Dunneisen cannot rely on her testimony that she was subjectively confused by the additional information given by the deputy—she must show that the information was misleading under the applicable objective standard, which she has failed to do.

[4] The audiovisual recording of the encounter shows that, at times, the deputy read the Informing the Accused script at a rapid pace, in a manner that made it difficult for this court to comprehend his words. Although Dunneisen testified at the hearing that the deputy's rapid pace made it difficult for her to understand the script, Dunneisen makes no argument to that effect on appeal. Accordingly, I address this issue no further.

[5] Dunneisen contends that the additional information given by the deputy "impl[ied]" that a judge "would be involved in" her decision whether to provide a blood sample pursuant to implied consent law, and Dunneisen may intend this as an argument that the additional information was objectively misleading. However, Dunneisen fails to explain how any information given by the deputy would reasonably give rise to that implication.

Accordingly, I reject Dunneisen's argument and affirm the revocation judgment.[6]

IT IS ORDERED that the revocation judgment is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[6] The parties' briefs do not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule was amended in 2021, *see* S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), because briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for e-filing. As our supreme court explained when it amended the rule, the new pagination requirement ensures that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at x1.