

State of Wisconsin:

Circuit Court:

Milwaukee County

State of Wisconsin,

Plaintiff,

v.

Case No. 2011TR011067
2011TR11068

David Krakora,

Defendant.

Motion to Suppress Breath Test Result or, in the Alternative, to Deny the Breath Test Result Automatic Admissibility

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves to suppress the breath test result for the reason that the arresting officer did not comply with the procedure mandated by Sec. 343.305, Stats., the defect affects essential due process (i.e. the right to notice) and, therefore, suppression of the breath test result is the appropriate sanction. In the alternative, the court should order that the breath test result is not entitled to statutory automatic admissibility.

As grounds, the undersigned shows to the court as follows:

1. Attached hereto is the Notice of Intent to Revoke form that was used by the sheriff's deputy in this case.

2. The form is defective under Sec. 343.305(8)(am), Stats., because it failed to contain the following information: "IMPORTANT NOTICE — RESPOND WITHIN TEN (10) DAYS."

Wherefore, it is respectfully requested that the court suppress the breath test result; or, in the alternative, order that the breath test result is not entitled to statutory

automatic admissibility.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____

Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Suite 1200
Milwaukee, WI 53233

414.671.9484

State of Wisconsin:

Circuit Court:

Milwaukee County

State of Wisconsin,

Plaintiff,

v.

Case No. 2011TR011067
2011TR11068

David Krakora,

Defendant.

Memorandum of Law in Support of Motion to Suppress Breath Test Result or, in the Alternative, to Deny the Breath Test Result Automatic Admissibility

Argument

I. The Notice of Intent to Revoke form used in this case was statutorily defective, the defect is essential to due process and, therefore, the court must suppress the breath test result.

The Notice of Intent to Revoke form used by the deputy in this case was statutorily defective. Specifically, the form does not have the statutorily mandated warning: "IMPORTANT NOTICE — RESPOND WITHIN TEN (10) DAYS." The law is well-settled that the procedure mandated by Sec. 343.305, Stats. is mandatory. At a minimum, the failure to comply with the statutory procedure results in the breath test result losing its statutory automatic admissibility. However, where, as here, the defect is essential to due process, the court must suppress the breath test. The right to notice is a fundamental right under the due process clause. Thus, the defect in this case is essential to due process and, therefore, the proper sanction for the violation is

suppression.

A. The requirements of Sec. 343.305, Stats., are mandatory, and the failure to follow the procedure will, at a minimum, result in a loss of automatic admissibility; however, if the failure is “essential to due process” the court must suppress the test result.

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. Sec. 343.305(2), STATS. Prior to requiring a motorist to submit to a chemical test an officer must read the warnings set forth in Sec. 343.305(4), Stats. 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).

However, 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). But, "If the procedures set forth in sec. 343.305, Stats., are not followed the State not only forfeits its opportunity to revoke a driver's license for refusing to submit to a chemical test, *it also loses its right to rely on the automatic admissibility provisions of the law, sec. 343.305(7).*" (emphasis provided) *Id* at 49 Nonetheless, if the State fails to 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.

However, if the State's failure to follow the procedure under Sec. 343.305, Stats., is "essential to due process", suppression of the breath test is appropriate. *State v. McCrossen*, 129 Wis. 2d 277, 288 (Wis. 1986)

Thus, where the law enforcement agency does not comply with the requirements of the Implied Consent Law-- for example, if the Notice of Intent to Revoke form is statutorily defective-- at a minimum, the State forfeits the automatic admissibility of the

breath test result. If the defect affected essential due process rights, the court may impose the sanction of suppression.

B. The Notice of Intent to Revoke Form used in this case was statutorily defective.

Sec. 343.305(8)(am), Stats., requires that, upon a test result showing a prohibited blood/alcohol concentration, "The law enforcement officer shall provide the person with a separate form for the person to use to request the administrative review under this subsection. The form shall clearly indicate how to request an administrative review and shall clearly notify the person that this form must be submitted within 10 days from the notice date indicated on the form or the person's hearing rights will be deemed waived. The form shall, in no less than 16-point boldface type, be titled: IMPORTANT NOTICE — RESPOND WITHIN TEN (10) DAYS."

As the attached copy of the Notice of Intent to Revoke establishes, the form used in this case was statutorily defective in that it fails to contain the statutorily-mandated warning (i.e. IMPORTANT NOTICE-- RESPOND WITHIN TEN (10) DAYS) Thus the test was not conducted in accordance with Sec. 343.305, Stats.

C. The defect here was a fundamental defect of notice and, therefore, the court must suppress the breath test result.

Defects found in notices are either "fundamental" or "technical." See *Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992) . A fundamental defect in the notification process automatically deprives a court of personal jurisdiction over a defendant, but a technical defect does not deprive the court of personal jurisdiction when the plaintiff can show that the defendant suffered no prejudice because of the defect. *Id.* Deciding whether a defect in the notice sent to a defendant is fundamental or technical is a question of statutory interpretation See *Burnett v. Hill*, 207 Wis. 2d 110, 118, 557 N.W.2d 800 (1997).

In order to determine whether a defect in a notice was fundamental or technical, it is necessary to look at the purpose of the statute that controls the content and form of

the notice. See *State v. Gautschi*, 2000 WI App 274, P11, 240 Wis. 2d 83, 622 N.W.2d 24. "If the purpose of the [statute] was fulfilled, the defect was not fundamental but technical." *Id.*, quoting *Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 208, 562 N.W.2d 401 (1997).

Here, Sec. 343.305(8)(am), Stats. requires that the Notice of Intent to Revoke *shall* contain the warning; and, further, the statute requires that the warning be in a 16 point font, and all in capital letters. This unambiguously demonstrates the legislatures belief that this notice to the defendant was *essential*.

Because the notice in question does not involve the actual court proceedings, the court retains personal jurisdiction; however, because the defect in the Informing the Accused here is fundamental, the court should impose suppression as the sanction.

Conclusion

For these reasons, it is respectfully requested that the court suppress the breath test result; or, in the alternative, to order that the breath test result is not entitled to automatic admissibility.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____

Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Suite 1200
Milwaukee, WI 53233

414.671.9484