COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP172 **Cir. Ct. No. 2013TR11852**

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

IN THE MATTER OF THE REFUSAL OF MICHAEL A. GROGAN:

EAU CLAIRE COUNTY,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. GROGAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed.*

¶1 STARK, J.[1] Michael Grogan, pro se, appeals an order concluding he unlawfully refused to take a test for intoxication after arrest, contrary to WIS. STAT. § 343.305(9). Grogan argues the circuit court applied an improper legal standard when it determined ***Miranda***[2] warnings did not interfere with his ability to make an informed choice under the implied consent law. He contends that, because the officer gave him ***Miranda*** warnings after placing him under arrest, we must conclude he did not refuse the evidentiary chemical test. We reject Grogan's arguments and affirm.

BACKGROUND

¶2 At the refusal hearing, officer Chad Strasburg testified that, at approximately 2:58 a.m. on October 6, 2013, he was on patrol and observed the vehicle in front of him driving "erratically." The vehicle

> crossed the center line several times. It activated its brake lights for no apparent reason several times. It activated the right turn signal, then sped off, went past the next available right turn. It just about hit a curb … and then turned on its right turn signal, remained in the center lane, … took a right turn … without using the turn lane … [and] went … [i]n the opposite lane of travel.

¶3 Strasburg activated his emergency lights, and the vehicle turned into a Kwik Trip parking lot and stopped. Strasburg exited his vehicle, and the driver, Grogan, exited his vehicle and immediately began walking away from Strasburg. Strasburg followed Grogan and repeatedly yelled for Grogan to stop. Strasburg warned Grogan that he would deploy his Taser if Grogan did not comply. Grogan

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

eventually stopped and turned toward Strasburg. Strasburg ordered Grogan to his knees two or three times, and Grogan complied. Strasburg moved behind Grogan and waited for the backup officer, who had just arrived on scene, to assist him in securing Grogan. Grogan, however, "suddenly started to get up, grabbed at his keys that were on the ground, and at that point [Strasburg] told him to stop, and [he] activated [his] Taser." The backup officer handcuffed Grogan.

¶4 After Grogan was handcuffed, Strasburg read Grogan the ***Miranda*** warnings. Strasburg explained he read the warnings because he had just arrested Grogan and he wanted to ask Grogan some questions about alcohol consumption and about what was going on. Grogan immediately requested an attorney and, as a result, Strasburg did not ask Grogan any questions. Strasburg, however, testified that he observed Grogan's eyes were glassy and bloodshot and there was an odor of intoxicants on Grogan's breath. Given the indicia of impairment, Strasburg believed he also had probable cause to arrest Grogan for operating while intoxicated.

¶5 More than one hour later, at 4:12 a.m., Strasburg read Grogan the Informing the Accused form and twice asked Grogan if he would submit to a chemical test. Grogan did not respond to Strasburg's questions. Strasburg interpreted Grogan's silence as a refusal and issued Grogan a notice of intent to revoke his operating privilege.

¶6 At the refusal hearing, the State argued Grogan's conduct constituted a refusal. It asserted Grogan knew his conduct constituted a refusal because this was Grogan's third offense and because Grogan used to be a law enforcement officer. The State contended that, by refusing to answer whether he consented to the test, Strasburg had no choice but to assume that Grogan did not consent.

¶7 Grogan argued Strasburg had disregarded his law enforcement training and "botched" the implied consent portion by giving ***Miranda*** warnings before reading the Informing the Accused form. Grogan contended he clearly invoked his right to remain silent and his right to counsel by refusing to answer whether he consented to the test. He argued Strasburg caused him to exercise his rights and, accordingly, he lawfully refused the chemical test.

¶8 The circuit court rejected Grogan's argument that he was exercising his ***Miranda*** rights, explaining that Grogan could not "turn this on its head based upon his conduct and suggest there is then no refusal." The court concluded Grogan refused the chemical test by his conduct. It determined Grogan's refusal was "unreasonable" and he violated the implied consent law.

DISCUSSION

¶9 Grogan presents one issue on appeal: "Is the application of the ***Reitter***[3] rule … to be based upon the objective standard applied in the prior implied [consent] case law, or the subjective understanding of the accused[?]" (Some capitalization omitted.) This issue is identical to the issue raised by the defendant in ***State v. Kliss***, 2007 WI App 13, ¶6, 298 Wis. 2d 275, 728 N.W.2d 9 ("Kliss presents one issue on appeal: Is the application of the ***Reitter*** rule to be based upon the objective standard applied in prior implied consent case law, or the subjective understanding of the accused?"). Further, similar to the defendant in ***Kliss***, Grogan argues that the circuit court improperly applied a subjective test in determining whether he was misled to believe his ***Miranda*** rights applied to the evidentiary chemical test, and that, even if his subjective understanding was an

[3] ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999).

appropriate consideration, his refusal was nevertheless lawful. *See* ***Kliss***, 298 Wis. 2d 275, ¶6.

¶10 To put Grogan's arguments into context, we begin with a discussion of ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999). In that case, our supreme court held officers have no affirmative duty to advise custodial defendants that the right to counsel does not apply to the implied consent setting. ***Id.*** at 217-18. However, the court also appeared to hold that, as a matter of due process, if an officer either explicitly assures or implicitly suggests that a custodial defendant has a right to counsel, the officer may not mark down a refusal if the defendant acts upon that assurance or suggestion. ***Id.*** at 240-42. In ***State v. Verkler***, 2003 WI App 37, ¶8, 260 Wis. 2d 391, 659 N.W.2d 137, we expressly relied on this language to conclude that "if the officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel, that officer may not thereafter pull the rug out from under the defendant if he or she thereafter reasonably relies on this assurance or suggestion."

¶11 In ***Kliss***, the case in which the defendant made the same arguments Grogan now raises, we determined that "[w]here an officer reads the ***Miranda*** warnings prior to reading the Informing the Accused, the ***Reitter*** test must … be applied." ***Kliss***, 298 Wis. 2d 275, ¶13. When applying the ***Reitter*** test, "The court must determine whether, under the facts of the case, the ***Miranda*** warning misle[d] the defendant to believe the right to remain silent and to have an attorney *apply in the implied consent context*." ***Id.***, ¶17 (emphasis added). "If so, the court must then determine whether the defendant invoked the ***Miranda*** rights when faced with the decision whether to submit to an evidentiary chemical test." ***Id.*** "The reading of ***Miranda*** does not, in and of itself, lead us to conclude that the officer explicitly assured or implicitly suggested that a defendant has a right to

consult counsel or to stand silent in the face of the implied consent warnings." ***Id.*** "Furthermore, we will not presume reliance on the ***Miranda*** warnings." ***Id.*** We concluded a defendant must demonstrate both elements of the ***Reitter*** test in order for his or her refusal to be deemed lawful. ***Id.***, ¶¶17, 18.

¶12 We also rejected Kliss's assertion that the circuit court somehow applied a subjective confusion analysis. ***Id.***, ¶16. We noted the language Kliss relied on for his "subjective confusion" assertion came from ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), which held that "subjective confusion" was not a defense to the implied consent law.[4] ***Kliss***, 298 Wis. 2d 275, ¶16. We determined a circuit court did not rely on subjective confusion when applying the ***Reitter*** test. ***Id.*** Rather, when applying the ***Reitter*** test, the court makes "an objective assessment as to whether [the defendant's] statements or conduct could be perceived as reliance on his [or her] right to remain silent or to obtain legal counsel *with regard to the evidentiary chemical test*." ***Id.*** (emphasis in original).

[4] In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 273, 542 N.W.2d 196 (Ct. App. 1995), Quelle argued she was "subjectively confused" by the information the officer provided her about the implied consent law. We ultimately concluded "subjective confusion" was not a recognized defense in Wisconsin. ***Id.*** at 280. We held that, if a defendant wanted to argue he or she was misled by the information provided by the officer, the defendant needed to establish: (1) the officer did not meet, or exceeded, his or her duty to provide the statutory information; (2) the lack or oversupply of information was misleading; and (3) the misleading information affected the driver's ability to make a choice about the evidentiary chemical test. ***Id.***; *see also* ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶¶64, 72, 308 Wis. 2d 65, 746 N.W.2d 243 (concluding ***Quelle*** is the appropriate test when law enforcement provides excess information, but it should not be used if officer failed to give required information). Ultimately, in applying ***Quelle***, the circuit court is required to "assess[] the credibility … and determine[] as a matter of fact whether the erroneous information caused the defendant to refuse to take the test." ***State v. Ludwigson***, 212 Wis. 2d 871, 876, 569 N.W.2d 762 (Ct. App. 1997); *see also* ***Washburn Cnty.***, 308 Wis. 2d 65, ¶72.

¶13 In this case, Grogan's appellate arguments about the appropriate legal standard and whether the circuit court improperly relied on subjective confusion have been addressed by ***Kliss***. Because ***Kliss*** established the ***Reitter*** test is the appropriate analysis to use when determining whether ***Miranda*** warnings misled a defendant to believe the warnings applied in the implied consent context, we are left only with applying the ***Reitter*** test to the facts of this case. Application of facts to a legal standard is a question of law that we review without deference to the circuit court. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). A circuit court's factual determination will not be overturned unless clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 507, 553 N.W.2d 539 (Ct. App. 1996).

¶14 Applying the ***Reitter*** test to this case, we first determine whether Grogan satisfied the first prong of the test—that he was misled to believe the ***Miranda*** warnings pertained to Strasburg's request for a chemical test. *See* ***Kliss***, 298 Wis. 2d 275, ¶17; *see also* ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶¶68, 70, 72, 308 Wis. 2d 65, 746 N.W.2d 243 (defendant bears ultimate burden of proving by a preponderance of the evidence that erroneous information caused defendant to refuse to take test).

¶15 In ***Kliss***, the officer arrested Kliss for operating while intoxicated. ***Kliss***, 298 Wis. 2d 275, ¶3. After the arrest, the officer found marijuana in Kliss's possession. ***Id.*** The officer took Kliss to the police station and read him his ***Miranda*** rights. ***Id.***, ¶4. The officer asked Kliss if he wanted to answer questions, and Kliss responded, "No." ***Id.*** Approximately twenty minutes later, the officer issued Kliss a citation for first-offense operating while intoxicated and read Kliss the Informing the Accused form. ***Id.*** The officer asked Kliss if he would submit to an evidentiary chemical test of his breath, and Kliss responded, "No." ***Id.*** The

officer recorded Kliss's answer as a refusal and issued Kliss a Notice of Intent to Revoke. ***Id.***

¶16 In ***Kliss***, when applying the first ***Reitter*** prong, we noted there was no dispute that the officer read Kliss the ***Miranda*** warnings before reading the Informing the Accused form. ***Kliss***, 298 Wis. 2d 275, ¶14. We reasoned an argument could be made that the officer explicitly assured Kliss he had the right to remain silent and to obtain counsel prior to responding to the request for a chemical test. ***Id.*** However, we noted the discovery of the marijuana provided an explanation for the ***Miranda*** warnings. ***Id.*** We stated that, had operating while intoxicated been the only concern, Kliss would have a stronger argument that the ***Miranda*** warnings pertained to the officer's request for the chemical test. ***Id.*** Ultimately, because we concluded Kliss could not satisfy the second prong of the ***Reitter*** test—that he invoked his ***Miranda*** rights when he refused the test, we assumed without deciding the first prong of the ***Reitter*** test was satisfied. ***Id.***

¶17 On appeal, Grogan argues he satisfied the first prong because, unlike ***Kliss***, "it is undisputed that OWI was the only concern in the seizure of Grogan." We reject Grogan's argument. First, his argument improperly assumes that, because ***Miranda*** warnings were read sometime before the Informing the Accused, he was automatically misled to believe the warnings pertained to Strasburg's subsequent request for a chemical test. *See* ***Kliss***, 298 Wis. 2d 275, ¶17 ("The reading of ***Miranda*** does not, in and of itself, lead us to conclude that the officer explicitly assured or implicitly suggested that a defendant has a right to consult counsel or to stand silent in the face of the implied consent warnings."). Second, contrary to Grogan's assertion, it is not undisputed that OWI was the only concern when Strasburg arrested Grogan. The ***Miranda*** warnings in this case were given immediately after Grogan was handcuffed for failing to comply with

Strasburg's orders after the traffic stop. It was not until after Strasburg placed Grogan under arrest and gave Grogan the ***Miranda*** warnings that Strasburg observed further indicia of impairment that gave Strasburg probable cause to arrest Grogan for operating while intoxicated.

¶18 Based upon the objective analysis required under ***Kliss***, we conclude a reasonable person would have understood Strasburg's reading of the ***Miranda*** warnings was in response to Grogan's obstructionist behavior. This occurred before Strasburg observed the further indicia that gave him probable cause to arrest Grogan for OWI and approximately one hour before Strasburg fulfilled his duties under the implied consent law. The timing of these events coupled with the different factual circumstances providing bases for arrest do not support Grogan's contention that Strasburg misled him to believe the ***Miranda*** warnings applied in the implied consent context. Accordingly, we conclude Grogan has not satisfied the first prong of the ***Reitter*** test. His refusal was therefore not lawful, and we need not determine whether Grogan satisfied the second prong of the ***Reitter*** test. *See* ***Kliss***, 298 Wis. 2d 275, ¶17 (defendant must prove both prongs of ***Reitter*** test for lawful refusal). We also need not address Grogan's arguments related to his subjective understanding of the relationship between the ***Miranda*** warnings and implied consent.

¶19 Finally, within his argument section on the application of the ***Reitter*** test, Grogan appears to argue that Strasburg violated his rights under ***Miranda*** by asking him whether he would submit to a chemical test. To the extent Grogan is seeking a suppression remedy, we note that it is well established that ***Miranda*** does not apply in the implied consent context because requests to submit to a chemical test do not implicate testimonial utterances. *See* ***Reitter***, 227 Wis. 2d at 225; ***State v. Bunders***, 68 Wis. 2d 129, 133, 227 N.W.2d 727 (1975).

By the Court.—Order affirmed.

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