COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1696-FT **Cir. Ct. No. 2014TR1387**

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

IN THE MATTER OF THE REFUSAL OF SCOTT S. MAHLER:

COUNTY OF EAU CLAIRE,

PLAINTIFF-RESPONDENT,

V.

SCOTT S. MAHLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Scott Mahler appeals an order finding unreasonable his refusal to consent to a chemical test of his blood. He argues the circuit court erred in so finding because the arresting officer did not comply with the requirements of the implied consent statute, specifically with respect to the warnings contained in WIS. STAT. § 343.305(4).[2] We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2013-14 versions unless otherwise noted.

[2] WISCONSIN STAT. § 343.305(4) provides:

> INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a), (am), or (ar), 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 the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, 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.
>
> 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.

(continued)

BACKGROUND

¶2 A refusal hearing was conducted on June 23, 2014, after Mahler's February 22, 2014 arrest for driving while intoxicated. Sergeant Travis Holbrook of the Eau Claire County Sheriff's Office testified he stopped Mahler's vehicle at approximately 2:45 a.m. Holbrook had observed Mahler driving without the use of his headlights and swerving within his lane of travel. Holbrook testified that the vehicle smelled of intoxicants and that Mahler was the sole occupant. Holbrook also observed Mahler's speech was slurred and he appeared confused when asked to retrieve his driver's license. Mahler originally denied having consumed any intoxicants before driving; later, he admitted to having "a few."

¶3 According to Holbrook, prior to performing standard field sobriety tests outside the vehicle, Mahler showed balance problems and unsteadiness, swaying from side-to-side and from front-to-back. After Mahler failed three field sobriety tests, and a preliminary breath test to which he consented resulted in a .23 blood alcohol content (BAC), Holbrook arrested Mahler for driving while intoxicated.

¶4 Holbrook testified he read Mahler the Informing the Accused form "verbatim how it's printed on the report." Holbrook testified Mahler did not ask any questions or request that Holbrook repeat any of the information, but rather, indicated he understood. Holbrook testified Mahler declined Holbrook's request

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> 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.

to submit to an evidentiary chemical test of his blood and Mahler was provided a Notice of Intent to Revoke Operating Privilege.

¶5 On cross-examination, Holbrook conceded he did not ask Mahler whether he understood the form. The defense then asked Holbrook whether he had filled out the Informing the Accused form shortly after the arrest. Holbrook testified that he filled it out at "approximately three o'clock" and confirmed his signature and badge number. The defense asked about Mahler's copy of the Informing the Accused form, which was missing the date, time, and Holbrook's signature. Defense counsel asked Holbrook whether it was possible at the time Mahler was in custody, if "you didn't sign it, you didn't date it, and … then dated it sometime later[?]" Holbrook ultimately explained Mahler's copy was not signed because it was not "automatically populate[d]" by the computer.

¶6 Mahler also testified at the refusal hearing, and he denied that Holbrook read him the Informing the Accused form. He testified he was handcuffed in the back of the police car and he thought Holbrook "may have been reading something," but that he could not hear Holbrook very well, nor did he understand what was being read. On cross-examination, Mahler conceded he remembered refusing Holbrook's request that he answer questions about his drinking history, and that exchange also took place while Mahler was in the back of the squad car and Holbrook was up front.

¶7 At the conclusion of testimony, the circuit court recognized there had been contradicting evidence, and observed at such a point "the court is allowed to judge the credibility of the witnesses. But under the totality of the circumstances, it seems to make reasonable sense that somebody with a level of intoxication may not have a [perfect] memory of something they do not go

through every day." It found there was reasonable suspicion to support the traffic stop, and that Holbrook had probable cause for the arrest based on the smell of intoxicants in the vehicle occupied solely by Mahler, Mahler's slurred speech, his admission of consumption of intoxicants after his initial denial, and Mahler's "fairly high rate" of failure on the field sobriety tests.

¶8 The court concluded Mahler's refusal was unreasonable, finding Holbrook's "testimony was fairly straightforward, I think he said it's my common practice to read the Informing the Accused word-for-word or verbatim …. [T]here was to my understanding, the testimony of the officer, an understanding that Mr. Mahler was understanding what was going on."

DISCUSSION

¶9 The refusal to submit to a chemical test for intoxication can only result in the revocation of the defendant's operating privileges if the person was adequately informed of his or her rights prior to the refusal. ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶51, 308 Wis. 2d 65, 746 N.W.2d 243. The circuit court determines whether an officer informed the accused in compliance with WIS. STAT. § 343.305(4). ***Id.***, ¶¶63-64. Its factual findings will be upheld unless clearly erroneous, *see* ***State v. Eckert***, 203 Wis. 2d 497, 507, 553 N.W.2d 539 (Ct. App. 1996), while its application of the implied consent statute to those facts is a question of law that this court reviews de novo, *see* ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999).

¶10 The County had the burden of showing by a preponderance of the evidence that Mahler was given the required warnings in compliance with the statute. *See* ***State v. Piddington***, 2001 WI 24, ¶22, 241 Wis. 2d 754, 623 N.W.2d 528 ("[T]he State has the burden of proof of showing, by a preponderance of the

evidence, that the methods used would reasonably convey the implied consent warnings."). As a general matter, "an officer only has a duty to provide the information on the [Informing the Accused] form." ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 284, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***Smith***, 308 Wis. 2d 65, ¶64.[3] Therefore, the burden of showing a defendant was provided the statutorily required information may be met by the officer's testimony that he or she read the defendant the information contained in the Informing the Accused form. *See* ***Reitter***, 227 Wis. 2d at 230. Notably, "the determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver." ***Piddington***, 241 Wis. 2d 754, ¶21.

¶11 On appeal, Mahler argues Holbrook failed to comply with his duty under WIS. STAT. § 343.305(4), and the first prong of the ***Quelle*** test. Mahler

[3] In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), this court adopted a three-part standard to assess the adequacy of the warning process under the implied consent law, considering:

> (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?

However, the Wisconsin Supreme Court abrogated ***Quelle*** in 2008, declaring, "Language in ***Quelle*** (and any subsequent cases applying ***Quelle***) stating that the ***Quelle*** three-prong inquiry, including prejudice, applies when a law enforcement officer fails to provide the statutorily required information is withdrawn. The [***State v.***] ***Wilke*** [152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989)] analysis applies when a law enforcement officer fails to provide the statutorily required information." ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243.

asserts Holbrook's failure to comply with the first prong of ***Quelle*** and § 343.305(4) "is evidenced by the officer's failure to both sign the form and have [Mahler] sign the form. Without these endorsements at the time of arrest there is no way to objectively say that the officer fully complied with the statutory requirements." Mahler further asserts Holbrook "made no effort to explain the form or its contents to Mr. Mahler nor did [Holbrook] ever enquire whether or not [Mahler] understood it or its contents and the potential consequences of [Mahler's] choice as to consent or not to a chemical test." Mahler argues that by not complying with the requirements of § 343.305(4), the second prong of the ***Quelle*** test is implicated "because there is no way to know what other statutory requirements were not fulfilled." Mahler concludes, "Since it is clear that the statutory requirements were not complied with[,] it is reasonable to assume that the incorrect procedure did in fact affect [Mahler's] ability to make the choice about chemical testing." (Capitalization omitted.)

¶12 We reject Mahler's arguments. Our supreme court abrogated ***Quelle*** through its decision in ***Smith*** in 2008, a fact both parties neglect to mention. Since ***Smith***, the application of the ***Quelle*** three-pronged test has been restricted to those cases where an officer provides excess information, as opposed to cases in which a defendant alleges an officer failed to provide the statutorily required information. *See* ***Eau Claire Cnty. v. Grogan***, No. 2014AP172, unpublished slip op. ¶12 n.4 (WI App July 1, 2014). Here, Mahler is not alleging Holbrook provided excess information, and ***Quelle*** is therefore inapt.

¶13 Instead, ***State v. Wilke***, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989), applies when a law enforcement officer is alleged to have failed to comply with WIS. STAT. § 343.305(4). ***Smith***, 308 Wis. 2d 65, ¶¶63-64. In ***Wilke***, this court ordered that no action be taken on the accused's operating privileges based

on his refusal when the law enforcement officer failed to deliver a component of the statutorily required information relating to penalties. ***Wilke***, 152 Wis. 2d at 248. We emphasized "[t]his failure was partial—not substantial—compliance [with WIS. STAT. § 343.305(4)]. Although not requiring complete compliance, substantial compliance does require 'actual compliance in respect to the substance essential to every reasonable objective of the statute.'" ***Id.*** at 250 (citations omitted).

¶14 In accordance with ***Wilke***, a circuit court considers whether an officer failed to inform the accused in substantial compliance with WIS. STAT. § 343.305(4). *See* ***id.*** We observe "an officer's only duty … is to administer the information contained in the 'Informing the Accused' [f]orm. … Explanations that exceed the statute's language would cause an 'oversupply of information' and encourage 'misled' defendants to challenge an officer's compliance with statutory requirements." ***Reitter***, 227 Wis. 2d at 230-31. Here, Holbrook testified, and the court accepted as credible, that he read the Informing the Accused form verbatim. That is all that is required.

¶15 Further, in response to Mahler's argument that Holbrook failed to comply with WIS. STAT. § 343.305(4) because of his alleged failure to sign the Informing the Accused,[4] we note:

> The statute … only requires arresting officers to inform defendants *orally* about the law; it does not mandate written completion of the form, and it does not obligate officers to fill out the form in any particular manner. Where officers fulfill the essential statutory requirements,

[4] Mahler's arguments notwithstanding, Holbrook testified he signed the Informing the Accused, and a signed copy of the form was entered into evidence as exhibit one, complete with "2-22-14 @ Approx 0300 a.m." on the "Date and Time Signed" line.

> substantial compliance is not fatal to an officer's execution of the implied consent statute.

Id. at 233 (citing ***Wilke***, 152 Wis. 2d at 250).

¶16 Finally, we reiterate that the circuit court's determination of whether the implied consent warnings have been reasonably conveyed is not subjective, nor dependent on the driver's perception of the information. ***Piddington***, 241 Wis. 2d 754, ¶21. Rather,

> [t]he determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver. This approach ensures that the driver cannot subsequently raise a defense of "subjective confusion," that is, whether the implied consent warnings were sufficiently administered must not depend upon the perception of the accused driver. Whether the implied consent warnings have been reasonably conveyed is not a subjective test; it does not "require assessing the *driver's perception* of the information delivered to him or her."

Id. (citations omitted) (emphasis original). The circuit court observed this point at the hearing, commenting that the defense "indicated that he wasn't even sure that he understood. That's not in the statute." Neither Holbrook nor the circuit court was required to assess Mahler's subjective comprehension of the warnings; nevertheless, the court noted "that the officer indicated on direct an understanding that Mr. Mahler had understood. … [T]here was to my understanding, the testimony of the officer, an understanding that Mr. Mahler was understanding what was going on."

¶17 Accordingly, the circuit court's findings of fact were not clearly erroneous. Mahler's refusal was unreasonable because Holbrook's reading of the Informing the Accused form reasonably conveyed the implied consent warnings.

By the Court.—Order affirmed.

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