COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-0304

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM H. JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

BROWN, J. William H. Jones claims that he reasonably refused to allow police officers to test him for blood alcohol content after he was arrested for operating a vehicle while intoxicated. He asserts that he was told by the officer reading him the Informing the Accused notice that the test he was being asked to submit to was a blood test. Instead, the officer directed him to take a breath test. He argues that this confusing information adversely affected his

ability to make a choice about chemical testing, thus rendering the entire process nugatory. But the trial court found that the officer asked him to take a breath test and never mentioned a blood test. That finding is not clearly erroneous and this court affirms.

On September 26, 1998, a Town of Waterford police officer arrested Jones for driving his motorcycle while intoxicated. At the police station, the officer issued Jones a citation for OWI and then read him the Informing the Accused notice. The officer testified that Jones told him he could not understand the notice provisions without the advice of an attorney. The officer explained that, at one point, Jones admitted to him that he did understand the provisions, but without the consent of his attorney, he did not understand them. The officer testified how he informed Jones that the primary test he was being asked to submit to was a breath test. After that, Jones refused to take the test. Jones indicated to the officer that he would not take the test without the consent of his attorney. The officer then waited for a "twenty minutes observation period" and then "had him go up to the Intoxilyzer, because it was ready to go." Jones was physically placed in front of the machine. Jones would not take the test. The officer further testified that at no time was there ever any mention of a blood test. Nor did Jones ever ask to go to the hospital to take a blood test.

A deputy for the Racine County Sheriff's Department was the operator of the intoxilyzer. The deputy testified that he was present when Jones was asked to take the test. The deputy affirmed that Jones said he would not take the test without his attorney's consent. The deputy also affirmed that the officer asked Jones several times to take a breath test.

Jones testified that the officer read from a form and requested that Jones take a blood test. Jones further testified that the officer asked him to read him the form. Jones said that the form explained how he was being asked to take a blood test. According to Jones, the term "breath test" was never mentioned to him. Jones said he thought he would be getting a blood test. But the officer marked him as refusing because he would not "blow into the machine." Jones says he told the officer, "I thought I was getting a blood test." He further asserts that he told the officer about how the form specified that he was being asked to take a blood test. Jones further testified that he "absolutely" would have taken a blood test.

In support of his testimony, Jones submitted a copy of the Informing the Accused sheet that was used by the officers in this case. The form asks the following question: "Will you submit to an evidentiary chemical test for your _____?" Beneath the line are three words in parentheses. These words are: breath, blood, urine. The pink copy, which was apparently given to Jones, had the word "breath" circled but had the word "blood" written above the blank line. This form became Exhibit 3 of the record. Exhibit 1, submitted by the State, had the same word, "breath," circled, but had the word "blood" crossed out and the word "breath" written in its place.

Jones explained that Exhibit 3 was the way the form was written on the evening in question and supports his contention that he was under the impression he would be given a blood test, not a breath test. The arresting officer admitted that he crossed out the word "blood" and put down the word "breath" after the fact. He also explained that Exhibit 1 was a true and correct copy of the altered original.

The trial court believed the police officers despite the documentary evidence submitted by Jones. The trial court said:

> We have two officers testifying, and I think it is important to assess the credibility of the witnesses. Two officers both have been sequestered, don't work on the same forces, and both of the officers testified that the arresting officer told [Jones] the breath test. He was taken and sat in front of the breath machine. I asked the ... deputy did he ever request a blood test or say anything about a blood test or say I thought I was supposed to take a blood test. Obviously this played no role in the defendant's refusal here.
>
> The defendant refused because he was intent on refusing to take any test ….

The trial court held that Jones had unreasonably refused and Jones appeals.

Jones correctly identifies the appropriate law with which to begin the analysis. That law is spelled out in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995). When a person claims that the "informing the accused" process was so muddled as to cause a reasonable refusal, three questions are asked. They are:

> (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?

There is no question in this court's mind that the first two questions must be answered in Jones' favor. The officer clearly did not meet his duty of providing accurate information on the written form as to what test Jones was being asked to take. Moreover, this lack of accurate information could be characterized as erroneous.

This court therefore turns to the third question. To answer this question, we begin with ***State v. Ludwigson***, 212 Wis.2d 871, 569 N.W.2d 762 (Ct. App. 1997). There we held that when the first two ***Quelle*** questions have been answered in favor of the defendant, it is the defendant's burden to prove by a preponderance of the evidence that the erroneous information caused the defendant to refuse to take the test. The third prong thus requires a fact-finding process by the trier of fact. *See* ***Ludwigson***, 212 Wis.2d at 876, 569 N.W.2d at 765.

The trial court found that the officer's error did not cause Jones to refuse to take the test. This factual determination is not clearly erroneous. As was stated by the trial court, the question of whether the officer's error affected Jones' decision about whether to take the test was a credibility call for the court to make. Jones claimed that the phrase "breath test" was never mentioned. But the officer and the deputy both testified that Jones was told several times that he was being asked to take a breath test. Further, Jones did not dispute the two law enforcement officers' statements that Jones was brought before the intoxilyzer and was asked to blow into the machine. The trial court believed the officers' version. As such, the error on the form played no part in the refusal.

By the Court.—Order affirmed.

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