COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0381-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRENDA K. ROBERTS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

¶1 SNYDER, J. The State of Wisconsin appeals from an order suppressing the blood alcohol test result obtained from Brenda K. Roberts under § 343.305, STATS., the implied consent law. Because the arresting officer advised Roberts that the underlying operating while intoxicated (OWI) arrest was for a first offense (subject to civil penalties) when, in fact, the arrest was for a fifth offense (subject to criminal penalties including a mandatory jail sentence), the trial

court held that the test result was not admissible evidence at trial. The State contends that the blood alcohol test result is admissible evidence at trial regardless of the misinformation. We affirm the suppression order.

¶2 On September 22, 1998, Roberts was arrested in the city of Neenah for an alleged OWI violation contrary to § 346.63(1)(a), STATS. Roberts was taken to the Neenah police station for a blood alcohol test. Prior to administering the chemical test, the arresting officer, Dean Gitter, obtained Roberts's driving record which indicated that she had four prior OWI convictions. Gitter calculated that this was a first offense for Roberts because none of the prior convictions was within the preceding five years.[1] Gitter read Roberts the required Informing the Accused form, and Roberts contends that Gitter told her that the consequences of failing the test would not include jail time because the violation would be a first OWI offense. Roberts then consented to the test, which revealed a prohibited blood alcohol concentration and resulted in Roberts receiving an additional citation for violating § 346.63(1)(b). Roberts moved to suppress the results of the chemical test as admissible trial evidence and the trial court granted her motion. The State appeals from the order.

¶3 At the suppression hearing, Roberts testified that she told Gitter that she would not submit to a chemical test for blood alcohol because she was "afraid [she] was going to jail because [she] had four prior convictions." She further testified that Gitter told her that she was being charged with a first offense and would not be exposed to a jail sentence. Gitter testified that he understood that the

[1] The teletype indicated that Roberts had prior convictions for OWI on February 24, 1993, April 23, 1990 (Winnebago county), April 23, 1990 (Outagamie county) and October 27, 1988.

violation was a first offense OWI, that it was possible he told Roberts that the arrest was for a first offense OWI, and that he wrote in his incident report that "[i]t should be noted that although Brenda Roberts has four prior convictions for operating a motor vehicle while under the influence of intoxicants none of these convictions are within the last five years."

¶4 Whether Gitter told Roberts that jail time would not be a consequence of submitting to a chemical test under the implied consent law is a question of fact. We will not reverse a trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985). The trial court found that Roberts's testimony that Gitter told her that she was being charged with a first offense and would not be subject to a jail sentence was credible and was corroborated by the police report. The trial court's findings are not erroneous.

¶5 The application of a statute to a particular set of facts presents a question of law which we review independently of the trial court. *See* ***State v. Big John***, 146 Wis.2d 741, 748, 432 N.W.2d 576, 579 (1988). We evaluate the sufficiency of the implied consent warnings by applying the three-part test announced in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995):

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m)[, STATS.,] 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?

¶6 Roberts does not contend that Gitter failed to provide the statutory warnings required under the implied consent law.[2] Rather, she complains that Gitter exceeded that duty by telling her that the OWI violation was a first offense that would not subject her to jail time. We agree that the law enforcement officer exceeded his duty to provide information to Roberts under the implied consent law and that the first prong of the ***Quelle*** test is met.

¶7 We also agree with Roberts that Gitter's oversupply of information concerning the classification of Roberts's OWI as a first offense was misleading. She was told that jail time would not be a consequence of adverse chemical test result evidence when the contrary was true. During his testimony, Gitter conceded that he had miscalculated the number of Roberts's OWI offenses as repeaters. The statutory time period triggering enhanced penalties for repeater OWI violations had been increased from five years to ten years at the time of Roberts's offense. *See* 1993 Wis. Act 317, § 7. Because Roberts had four OWI convictions within the prior ten years, she was facing a fifth OWI offense rather than a first.

¶8 A first violation of § 346.63(1), STATS., subjects a person to a forfeiture. *See* § 346.65(2)(a), STATS. A fifth violation of § 346.63(1) subjects the person convicted to a fine and mandatory jail sentence. *See* § 346.65(2)(e). Because the violation was a fifth OWI offense rather than a first offense, the information misled Roberts as to the consequences of providing chemical test evidence and the answer to the second ***Quelle*** factor is therefore yes.

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[2] Roberts was read the following information from the Informing the Accused form that is applicable to a test subject who consents to take a chemical test:

> If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended.

¶9 As to the third ***Quelle*** factor, Roberts testified that prior to taking the chemical test she told Gitter that she would not comply with the implied consent law because the chemical test evidence could subject her to a jail sentence as a repeat offender. After Gitter reviewed Roberts's prior OWI record and told her that she would be charged as a first-time offender, not subject to a jail term, Roberts chose to take the test. We are satisfied that the misinformation concerning Roberts being a first-time offender was instrumental in affecting her ability to make an informed choice about submitting to the chemical test. We conclude that all three of the ***Quelle*** test factors have been affirmatively established, and, accordingly, the test result was suppressible as evidence because the warnings provided to Roberts were statutorily insufficient.

¶10 The State cites to ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), and argues that even if the allegations in Roberts's motion are correct, suppression of the blood test result is not mandated. In ***Zielke***, a blood sample was drawn from the defendant after an implied consent test refusal based upon probable cause and our supreme court held that "if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." ***Id.*** at 52, 403 N.W.2d at 433. Here, the blood alcohol evidence obtained from Roberts resulted solely from the implied consent chemical test procedure. Roberts neither refused the requested implied consent test nor was blood alcohol evidence "otherwise constitutionally obtained" from Roberts. We are satisfied that the sufficiency of the implied consent procedure warnings is governed by the application of the three ***Quelle*** test factors.

¶11 The State also contends that we should reverse the trial court's suppression order because it could have obtained the blood alcohol evidence by

some other means. Roberts points out that the State did not make this argument to the trial court and that we should not consider it as a basis to reverse a trial court ruling. We agree. First, we need not address a claim on appeal that was never raised or considered in the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (an appellate court will generally not review an issue for the first time on appeal); *see also* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). Second, a party seeking reversal of a trial court ruling may not advance arguments on appeal which were not presented to the trial court. *See* ***State v. Holt***, 128 Wis.2d 110, 122-23, 382 N.W.2d 679, 686 (Ct. App. 1985). Because the State seeks to reverse the trial court's suppression order, it has waived the issue on appeal by not first presenting it to the trial court.

¶12 We conclude that Roberts's statutory right to be accurately informed as to the consequences of complying with the implied consent law was insufficient under the three-part ***Quelle*** test. Consequently, we affirm the trial court's order suppressing the blood alcohol test result obtained under the implied consent statute.

By the Court.—Order affirmed.

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