COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2736

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

COUNTY OF DUNN,

PLAINTIFF-RESPONDENT,

v.

LAURENCE E. ECCLES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County: JOHN G. BARTHOLOMEW, Judge. *Affirmed.*

HOOVER, J. Laurence Eccles appeals an order revoking his operating privileges for one year pursuant to § 343.305(10)(b)2, STATS., upon the trial court's conclusion that Eccles's refusal to provide a sample of his breath for chemical testing as required under the implied consent law, § 343.305(3) was

unreasonable. Eccles contends that the trial court "abused its discretion"[1] by finding the refusal unreasonable in light of (1) a disability that rendered him unable to give informed consent to the test and (2) being misinformed by the arresting officer regarding the consequences of taking the test. This court has declared that subjective confusion is not an available defense to the requirements of the implied consent law. Further, the record does not sustain Eccles's contention that he was materially misinformed. The trial court's revocation order is therefore affirmed.

Only those facts that relate to the issues on appeal are recited. Eccles is dyslexic,[2] but is able to maintain employment as a commercial driver. He is also an emergency medical technician and volunteer firefighter. He was arrested for operating a motor vehicle while under the influence of an intoxicant contrary to § 363.63(1)(a), STATS. The arresting officer informed Eccles of his rights and responsibilities under the implied consent law by reading the Informing the Accused form to him.

Eccles claims that because of his dyslexia, he was confused and unable to comprehend the information recited to him by the officer. He thus could

---

[1] Our supreme court has replaced the term "abuse of discretion" with "erroneous exercise of discretion" because the former suggests an unjustified negative connotation. ***Hefty v. Hefty,*** 172 Wis.2d 124, 128 n.1, 493 N.W.2d 33, 34 n.1 (1992).

"The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." ***Mullen v. Coolong***, 153 Wis.2d 401, 406, 451 N.W.2d 412, 414 (1990). Eccles does not disclose the facts the trial court relied upon in arriving at the conclusion that his refusal was unreasonable. Even taking the evidence he relies upon as conclusive, however, Eccles is, under the applicable law, not entitled to relief.

[2] According to Dr. David Castleberg, who testified by deposition on Eccles's behalf, dyslexia describes a difficulty with reading.

not make an informed decision when asked whether he would submit to a breath test. Eccles's contention fails for two reasons. First, it contradicts the trial court's express finding that Eccles was capable of understanding and *did* understand the officer's recitation of the Informing the Accused. Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS. The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). Eccles does not develop an argument to suggest why the trial court's finding in this regard was clearly erroneous and is therefore deemed abandoned. *See* ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) ("We decline to develop his argument for him."). Nonetheless, this court has reviewed the trial transcript and is satisfied that there is ample evidence to support the trial court's finding.[3]

Equally dispositive is the holding in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995). This court expressly rejected the proposition that a suspect's subjective confusion concerning the information in the Informing the Accused renders a refusal reasonable. Eccles attempts to distinguish his situation from the facts in ***Quelle*** by asserting that he "was not subjectively

[3] The court considered, for example, Eccles's ability to respond to his attorney's "very rapid-fire examination," the nature of his employment, his apparent intelligence on the witness stand and Castleberg's deposition testimony that Eccles does not have any mental disabilities and does not have difficulty with oral communication. Although not specifically alluded to in its findings, the trial court also heard evidence that the officer gave Eccles an Informing the Accused form and had him follow along while reading it. In light of Eccles's numerous questions, the officer spent 20 minutes reviewing the form with him. Eccles then took the form, read it himself, and stated, "Yeah, I know what this is about." Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the court did not but could have reached. ***In re Estate of Dejmal***, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980).

confused by his inability to comprehend the implied consent form. [He] is unable to comprehend any reading of this nature, due to a physical disability … dyslexia." Eccles suggests that his dyslexia falls under the "physical disability" defense to a refusal provided for in § 343.305(9)(a)5c, STATS.[4] This argument is unpersuasive for three reasons. First, as indicated, it is contrary to the trial court's finding that he was able to understand. Second, the reason for the confusion is immaterial. Under ***Quelle***, confusion that arises out of an inability to interpret the Informing the Accused form is not a defense. ***Id***. at 280-83, 542 N.W.2d at 200-01. Finally, Eccles did not prove that dyslexia is the type of disability that rendered him physically *unable*, as opposed to unwilling, to submit to the test. Indeed, as the State points out, this court has held that mental condition cannot serve as the basis for properly refusing a chemical test. ***State v. Hagaman***, 133 Wis.2d 381, 383, 395 N.W.2d 617, 617-18 (Ct. App. 1986).

Eccles also asserts that the trial court erroneously exercised its discretion by finding his refusal unreasonable, because the officer gave him misleading and insufficient information and he was therefore unable to make an informed decision under the implied consent law. *See* ***Quelle***, 198 Wis.2d at 280-83, 542 N.W.2d at 200-01. Specifically, Eccles asked the arresting officer what would happen if he tested below .10, to which, Eccles's contends, the latter responded that the citation would stand.

Eccles's argument fails for two reasons. First, the only testimony regarding this exchange is as follows:

[4] Section 343.305(9)(a)5c, STATS., states in pertinent part: "The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol …."

> Q. Okay. What type of questions did Mr. Eccles ask you during the Informing the Accused period of time?
>
> A. He asked me what would happen if he tested under .10.
>
> Q. And what did you tell him?
>
> A. I told him the first the [sic] citation for operating while intoxicated would stand and the district attorney would decide on prosecution on the matter depending on what the actual concentration was under .10.

This court agrees with the State that the information Eccles elicited by his question, when viewed in its entirety, was accurate and neither misleading nor insufficient.

Another basis warrants rejection of Eccles's second argument. Although he assigns error to the trial court, it could not have erroneously exercised its discretion with regard to the issue of misinformation because this subject was not raised in the trial court. An issue may not be raised for the first time on appeal, and Eccles has thus waived any claimed error associated with the alleged misinformation. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).

In summary, the trial court's finding that Eccles was not confused about his rights and responsibilities under the implied consent law was not clearly erroneous. Even if such confusion had been established to the trial court's satisfaction, it would not serve as a defense to the refusal to take the chemical test. Further, a mental condition cannot serve as the basis for properly refusing a chemical test. Finally, Eccles was not misinformed concerning the implied consent law and,

in any event, the issue was not preserved for appeal. The trial court's revocation order is therefore affirmed.

By the Court.—Order affirmed.

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