COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3198-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL C. CULL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed and cause remanded.*

MYSE, J. Michael C. Cull appeals an order revoking his driving privileges for three years based upon his refusal to take a breath test. *See* § 343.305(10)(b)(4), STATS. Cull alleged that an Intoxilyzer operator indicated to him that his refusal would only result in a one-year revocation, and contends that the trial court erred by finding that he refused the test before he allegedly received this incorrect information. Because this court concludes that Cull did not voice a

refusal and further that the effect of his silence was ambiguous, the trial court's conclusion that he refused the test prior to the alleged conversation is erroneous. The order is therefore reversed and the matter remanded for a determination as to whether Cull was improperly advised by the Intoxilyzer operator as to the length of his suspension.

Cull was arrested for operating a motor vehicle while under the influence of an intoxicant, third offense, by officer Daniel Lee of the Prescott Police Department. Cull was transported to the Pierce County Jail, and Lee properly informed Cull of his rights by reading the appropriate portions of the informing the accused form. At the conclusion of the reading, Lee inquired as to whether Cull was willing to take the test. Cull did not respond to this inquiry, so Lee marked the form as a refusal and directed Cull to a deputy who was the operator of the Intoxilyzer machine.

Cull alleges that he then asked the deputy as to the length of suspension he would receive if he refused to take the test. Cull further alleges that the officer incorrectly advised him that the suspension would be for one year rather than the three-year period mandated by § 343.305(10)(b)(4), STATS. Neither the deputy nor Lee, who was present as a witness, could recall any such conversation with Cull. Cull alleges that if he was properly advised about the effect of a refusal he would not have refused the test, and that the warnings given to him were therefore defective under the test established in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 279, 542 N.W.2d 196, 199 (Ct. App. 1995).

The trial court concluded that because Cull's refusal came before the alleged misinformation there was no need to consider the effect of ***Quelle***. The relevant portions of the court's conclusion follow:

> There is no question but those [implied consent] warnings were correct. There is no testimony and no basis for any finding that Officer Lee misinformed the defendant. The defendant did not indicate he had asked Officer Lee during that process about whether he would be suspended or not. And after having correctly informed Mr. Cull, Officer Lee asked Mr. Cull if he refused. Mr. Cull said yes. I think that is the end of the case right there. I don't think beyond that it makes any difference if Mr. Lee – he only has one chance to refuse.

The factual findings of a trial court will be upheld unless clearly erroneous. Section 805.17(2), STATS. An appellate court will search the record for evidence that supports the trial court's factual findings. ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

This court concludes that the trial court's finding that Cull voiced a refusal to the test is clearly erroneous. There is no evidence in the record to suggest that Cull ever voiced a refusal to the test until after he spoke with the Intoxilyzer operator. On the contrary, all the limited evidence with respect to Lee's reading of the warnings points to Cull's silence:

> [The State]: And how did you read [the informed consent warnings]? In what order, or how did you do that?
>
> [Lee]: I read them in the order that they're numbered.
>
> Q And did Mr. Cull give any indication as to whether he understood or didn't understand them?
>
> A He didn't really look at me through the whole reading of them. As far as understanding them, he wouldn't acknowledge me.
>
> ….
>
> [Counsel for Cull]: You read the entire [informing the accused] form off to him, then. Is that what your testimony is today?
>
> [Lee]: Yes, it is.
>
> Q Okay. Do you know if he was listening to you, at that time?

> A He didn't acknowledge what I was saying. I read each item on there, and, you know, he didn't mention to me, either way.
>
> Q Where were you when you read this to him?
>
> A About two feet away from him. He was on one side of the counter, and I was on the other side.
>
> Q Where was the counter? Where are we at?
>
> A It's at the booking room at the Sheriff's Department.
>
> Q Oh, okay. Thank you. Then you read number one to him and proceded [sic] down, to read on down through number five to him?
>
> A Yes. I paused between each statement.
>
> Q Okay. Did you ask him to acknowledge any of those? Make a check mark or put your initials, or his initials, by each of those?
>
> A No, I didn't.

The form indicates that Lee then marked "refused."

The trial court's finding that Cull refused the test may be supported, however, by reading Cull's silence as a refusal. Both sides dispute the standard of review to be applied. This court, however, does not need to determine whether it is the defendant's actual state of mind (a subjective test) or a reasonable officer's belief that the defendant refused (an objective test) that constitutes a refusal, because under either test there is insufficient evidence in the record to establish that Cull's silence amounted to a refusal. The facts underlying Cull's silence are not disputed. Lee read the appropriate warnings to Cull, thereby fully and completely informing him of his rights. The information was presented in such a fashion so as to be clearly heard by Cull. At the conclusion of this reading Lee asked Cull whether he was willing to submit to the Intoxilyzer test, and Cull failed to respond. Lee therefore marked the form as a "refusal," and then presented Cull to the Intoxilyzer operator who made further inquiry as to whether Cull was willing to take the test.

Silence on the part of a defendant when asked whether he or she will consent to a breath test is an ambiguous act. Depending on the circumstances, silence may or may not demonstrate a refusal. For example, if the question as to consent is clearly heard and understood by the defendant, if the defendant is given a sufficient amount of time within which to respond, and if it is clear that the defendant's silence is merely a refusal to cooperate, silence properly may be viewed as a refusal. On the other hand, if the defendant fails to respond to a single question asked after a brief interval, this may reflect that the defendant is merely considering the various alternatives available to him or the nature of the rights of which he was just advised, or it also may reflect an assertion of the defendant's constitutional right to remain silent. Resolution of the inherent ambiguity silence poses will depend on the circumstances surrounding each case.

In this case the record reflects only that the question was asked and Cull did not respond. There is no indication in the record that the question was repeated, that the length of Cull's silence was of any specific duration, or that Cull was in any other way uncooperative with Lee. Further, some of the circumstances suggest that Cull did not mean his silence to constitute a refusal. For example, Cull asked the Intoxilyzer operator as to what the consequences of a refusal would be after it is alleged he already refused. The trial court could not properly construe these ambiguous facts to either establish Cull's subjective refusal or Lee's reasonable belief that Cull refused.

Having concluded that the trial court erred by concluding that a refusal took place before Cull was allegedly misadvised, it becomes necessary to examine whether or not Cull actually was misadvised and whether he relied on the improper advice. Cull stated at the refusal hearing that he relied on incorrect advice when he voiced his refusal to the Intoxilyzer operator. The Intoxilyzer

operator and Lee, on the other hand, testified that they could not remember any such discussion with Cull. Further, the operator testified that as a matter of practice he would not comment on questions concerning the length of a license suspension because he had no idea how long it would be suspended. This conflicting testimony raises an issue of fact that the trial court did not address, and this matter is therefore remanded for a determination as to whether the requesting officer exceeded his duty in informing the accused, whether the oversupply of information was misleading, and whether the driver's ability to make the choice about whether to submit to chemical testing was affected by this misinformation. *See* ***Quelle***, 198 Wis.2d at 280, 542 N.W.2d at 200.

By the Court.—Order reversed and cause remanded.

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