COURT OF APPEALS DECISION DATED AND FILED

May 20, 1998

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. 98-0156

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

BROWN, J. Edward J. Thompson appeals from an order holding that he unreasonably refused to submit to a chemical test required by the implied consent law. He argues that the officer in this case exceeded his statutory duty of reading the Informing the Accused form to him by reading it again, and in particular, asking after each paragraph during this second reading whether he understood. Thompson argues that this caused him to believe he did not have to

consent to the test until he actually understood the form. We hold that while the officer did exceed his duty, the information supplied was not misleading, and if Thompson was confused, he was subjectively confused—a defense not recognized in Wisconsin law. We affirm.

The facts are not disputed. The officer read section A of the Informing the Accused form. Thompson claimed not to understand. The officer read it to him again, and after each paragraph, asked whether he understood. Thompson did not say whether he understood or not. The officer then asked whether Thompson would submit to the test, and Thompson did not answer. The officer then marked a refusal. The trial court held that Thompson unreasonably refused and Thompson appeals from the order.

In ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995), this court analyzed prior case law on the subject of what happens when an officer either gives more information about informed consent to an accused than the legislature calls for or less than called for. We discovered a three-factor test emerging from the case law. Distilled to its essence, the test announced was as follows:

> (1) Has the law enforcement officer not met, or exceeded his 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?

Id. at 280, 542 N.W.2d at 200.

We agree with Thompson that the officer exceeded his duty by reciting the form again to Thompson after he claimed not to understand what had been read to him. But there is nothing wrong with an officer trying to help the accused understand the form better. There is only a problem if the information given is misleading, and the accused's ability to intelligently decide whether to take the test is affected by the misleading information.

Here, nothing the officer said to Thompson was misleading. All the officer did was repeat the statutory language to him and ask him after each paragraph whether he understood. The belief that Thompson now says he has—that he thought he did not have to decide whether to take the test until he understood it—is his own subjective conclusion. In ***Quelle***, we rejected the idea that if the information given is not misleading from an objective standpoint, the accused can evade the consequences of refusing by claiming nonetheless to be confused.

Thompson asserts that his subjective confusion is distinguishable from the subjective confusion claimed by Quelle. In Quelle's case, the officer tried to explain the form in his own words so that she could better understand what was expected of her. Even though the officer's personal colloquy was not contrary to the law, Quelle claims she was confused by it all. We rejected her defense. Thompson contends that, here, the officer read the statutory language—he did not try to explain the statutory language in his own words. Thompson claims this different set of facts makes all the difference.

We fail to understand how this is so. If anything, the officer's actions in repeating the statutory language rather than trying to explain it in his

own words renders a less problematic result. And, really, subjective confusion is subjective confusion, no matter what the source. We affirm the order.

By the Court.—Order affirmed.

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