COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1328

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

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

v.

JAMES A. LENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] James A. Lenz appeals his conviction for operating a motor vehicle while intoxicated (OMVWI) and driving with a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

prohibited alcohol content (PAC). He claims that the circuit court erred in denying his motion to suppress evidence because the police officer misstated the penalty for refusing to take a chemical test to determine the concentration of alcohol in Lenz's system.[2] Because we conclude that the circuit court's finding that the officer did not misstate the penalty for refusal is not clearly erroneous, we affirm the decision of the circuit court.

BACKGROUND

¶2 In the early morning of October 31, 1998, Jefferson County Deputy Sheriff David Drayna observed a minivan speeding on State Highway 59. Drayna, who was driving a fully marked squad car, activated his emergency lights and pursued the van, which pulled over after some delay. When Drayna approached Lenz, the van's driver, he observed several signs of intoxication, including bloodshot and glassy eyes, slurred speech, and a strong odor of intoxicants, both from the van and from Lenz himself. Lenz subsequently failed three field sobriety tests. Drayna then placed him under arrest. Lenz consented to a blood test, which disclosed a blood-alcohol concentration of 0.176.

¶3 Lenz was charged with OMVWI and driving with a PAC, both as a first offender.[3] At a trial to the court, Lenz moved to suppress evidence of the

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[2] Lenz initially argued that seizure of his blood was unreasonable under the Fourth Amendment based on ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998). However, his reply brief recognized that the argument was abrogated by our decision in ***State v. Thorstad***, 2000 WI App 199, ___Wis. 2d. ___, ___ N.W.2d ___, where we declined to follow ***Nelson***. Accordingly, we do not address that argument.

[3] WIS. STAT. § 346.63 **Operating under influence of intoxicant or other drug.** (1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or

(continued)

result of the blood test on the grounds that Drayna had misled him by overstating the penalty for refusing to take it. Lenz and his brother-in-law (a passenger in the van) claimed that Drayna had told Lenz that his driver's license would be suspended for five years unless he agreed to the blood test. Drayna testified that he read Lenz the "Informing the Accused" form[4] and did not add any information. Another sheriff's deputy who had been present for part of the stop testified that he had not heard Drayna make any such statement to Lenz. The circuit court found that Drayna did not make the statement; then it convicted Lenz of OMVWI and driving with a PAC. Lenz appeals.

(b) The person has a prohibited alcohol concentration.

[4] The "Informing the Accused" form is issued by the Wisconsin Department of Transportation. It reads, in part:

> Under Wisconsin's Implied Consent Law, I am required to read this notice to you:
>
> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

DISCUSSION

Standard of Review.

¶4 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). "In addition, when the trial judge acts as the finder of fact, and … there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647, 650 (1979) (citation omitted).[5]

Factual Finding.

¶5 Lenz argues that the circuit court erred in concluding that Deputy Drayna had not overstated the penalties for refusing to consent to a blood test. Drayna's overstatement of the penalties, he claims, violated the WIS. STAT. § 343.305(4), the implied consent law. As a result, he argues, the circuit court should have granted his motion to suppress the results of the blood test. We disagree.

[5] In ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 274 N.W.2d 647 (1979), the supreme court applied the "great weight and clear preponderance" standard of review; however, "[w]hile we now apply the 'clearly erroneous' test as our standard of review for findings of fact made by a [circuit] court without a jury, cases which apply the 'great weight and clear preponderance' test to the same situation may be referred to for an explanation of this standard of review because the two tests in this state are essentially the same." ***Noll v. Dimiceli's, Inc***., 115 Wis. 2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

¶6 Substantial compliance with WIS. STAT. § 343.305(4) requires "actual compliance in respect to the substance essential to every reasonable objective of the statute." ***State v. Wilke***, 152 Wis. 2d 243, 250, 448 N.W.2d 13, 15 (Ct. App. 1989) (citation omitted). This means that a driver must be informed of all the statutorily designated information that he or she needs to make an informed decision. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 279, 542 N.W.2d 196, 199 (Ct. App. 1995). To successfully challenge the sufficiency of the warning given by a law enforcement officer under § 343.305(4), an accused driver must satisfy a three-pronged test: (1) the requesting officer either failed to meet or exceeded his duty to inform the accused under § 343.305(4); (2) the lack or oversupply of information was misleading; and (3) the driver's ability to make the choice about whether to submit to chemical testing was affected. *See* ***id.*** at 280, 542 N.W.2d at 200.

¶7 Here, the circuit court concluded that Deputy Drayna had neither failed to meet nor exceeded his duty to inform Lenz of his rights under the implied consent law. It based this conclusion on its finding that Drayna never told Lenz that his driver's license would be suspended for five years unless he agreed to the blood test. The record supports this finding. Lenz and his brother-in-law both testified that Drayna made the statement to Lenz while Lenz and Drayna were standing behind the van. Drayna, on the other hand, denied making the statement to Lenz. Drayna also testified that he did not even begin to discuss the blood test with Lenz until after Lenz had been arrested, handcuffed, and placed in Drayna's car. Deputy Gukich, who was present for part of the arrest, testified that he did not hear Drayna make such a statement to Lenz. Faced with directly conflicting testimony, the circuit court simply found Deputy Drayna's testimony more credible.

CONCLUSION

¶8 Because we conclude that the circuit court's finding that Officer Drayna did not misstate the penalty for refusal is not clearly erroneous, we affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

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