COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1950 **Cir. Ct. No. 01-TR-51**

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

IN THE MATTER OF THE REFUSAL OF STEVEN C. HINZMANN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN C. HINZMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Steven Hinzmann appeals from the trial court's order determining that he unlawfully refused to submit to a chemical test in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violation of WIS. STAT. § 343.305(9). He contends that since he did ultimately agree to submit to a blood test, the purpose of the refusal statute was met and that certain of the officer's explanations and the officer's attempt to obtain his signature interfered with his ability to make a choice that complied with the law. We reject both arguments and affirm.

¶2 Sergeant Michael Selck of the Lake Mills Police Department arrested Hinzmann for operating while under the influence of an intoxicant and took him to the Lake Mills Police Department. There is no dispute that there was probable cause to arrest. At the station, Sergeant Selck read Hinzmann the informing the accused form, filling out each blank space as he went along. In the blank for the violation, the officer wrote "OWI 4th offense" because the dispatcher had informed him this was Hinzmann's fourth offense. The officer wrote "breath" for the type of test and marked the box next to "yes" because Hinzmann said he would take that test. Before Hinzmann said he would take the breath test, Sergeant Selck told him that if he did not submit to that test, his license would be revoked and he would be taken to the hospital for a blood draw. After completing the form, Sergeant Selck asked Hinzmann to sign it. There is not a signature line on the form, but it is the officer's practice to ask for a signature so that he can show that the person signing read the form and was present. Hinzmann objected to signing the form because he said he had only two priors, not three. Sergeant Selck crossed out "4th" and wrote "3rd" and again gave Hinzmann the form to sign, but Hinzmann refused to sign.

¶3 Sergeant Selck then began to prepare the intoximeter machine to take a breath sample, but Hinzmann refused to provide a sample and did not give

an explanation. The officer again advised him that he would be subject to refusal penalties and taken to the hospital to draw blood.[2] However, Hinzmann still refused to take the breath test. Hinzmann's response to being told that, if he refused to give a breath sample, the officer would take him to the hospital for a blood draw was, "Lets go." The officer took Hinzmann to the hospital and he submitted to a blood draw without any objection.

¶4 The trial court found that Hinzmann had refused to take the breath test. The court determined that the officer's request for a signature and changing the offense from fourth to third did not constitute providing misleading information and also determined that the officer's post-refusal explanation did not convert the primary test from a breath test to a blood test.

DISCUSSION

¶5 Resolution of the issues on this appeal requires that we apply the implied consent statute, WIS. STAT. § 343.305(2), to the facts as found by the trial court. We accept the factual findings of the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2); *see also* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990). The application of the implied consent statute to the facts found by the trial court is a question of law, which we review de novo. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

[2] The officer may also have told Hinzmann that if he refused he would be subject not only to the refusal penalties but could also still be found guilty of an OWI.

¶6 WISCONSIN STAT. § 343.305(2) provides that all persons operating a motor vehicle on the public highways are "deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer under sub. (3)(a) …." Section 343.305(3)(a) provides in part:

> Upon an arrest of a person for a violation of s. 346.63(1) [operating while under the influence of an intoxicant or with a prohibited alcohol concentration], (2m) or (5) or a local ordinance in conformity therewith … a law enforcement officer may request the person to provide one or more samples of his breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

¶7 The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The statute is designed to facilitate the collection of evidence and to secure convictions. ***Id.*** at 223-24

¶8 Hinzmann first contends that, because he permitted his blood to be withdrawn, the purpose of the statute was met: the State has the benefit of the results of the blood test. Therefore, Hinzmann contends, he did not refuse to undergo testing within the meaning of the statute. This argument has no support in the case law interpreting and applying the statute.

¶9 The record supports a finding that Hinzmann refused to take the breath test, and Hinzmann does not argue otherwise. That refusal is a violation of the statute. The fact that that he agreed to and did take a blood test does not cure or remove the violation. It is solely the law enforcement agency's decision about which of the three alternate tests to designate as the test to administer first—

chemical, breath, or blood—and the driver does not have the right to turn down the first test offered by the agency and choose one of the other two. ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 895-96, 266 N.W.2d 618 (1978) (decided under WIS. STAT. § 343.305(1) now § 343.305(2)). Once a person has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the requested test, and upon a refusal, the officer may "immediately" gain possession of the accused's license and prepare a notice of intent to revoke. ***Rydeski***, 214 Wis. 2d at 109.

¶10 Hinzmann next argues that Officer Selck did not comply with the duties imposed on an arresting officer under the implied consent statute, and, thus, revocation of his operating privilege is improper even if he did refuse to take a chemical test within the meaning of WIS. STAT. § 343.305(2). ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), establishes the three-part standard that is applied to assess the adequacy of the warnings mandated under the implied consent statute:

> (1) Has the law enforcement officer not met, or exceeded his or her 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 280-81.

¶11 Hinzmann argues that the officer's request that he sign the form exceeds the information he was obligated to provide, as did the officer's comments that if he refused he would be taken to the hospital for a blood draw. Assuming without deciding that this constitutes an "oversupply" of information, Hinzmann does not explain how either the signature request or the statement on

the blood draw was misleading or affected his ability to make the choice about submitting to the breath test. Beyond making the assertion, Hinzmann does not develop the argument, and we can see no reason why logically this would be so.

¶12 Accordingly, we conclude the trial court correctly decided that Hinzmann had refused to submit to a chemical test under the implied consent statute and that his operating privilege could properly be revoked.

By the Court.—Order affirmed.

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