COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0080 **Cir. Ct. No. 01-TR-1161**

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

COUNTY OF GREEN LAKE,

PLAINTIFF-RESPONDENT,

V.

JOHN F. LINDEMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

¶1 BROWN, J.[1] In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), we formulated a three-part test to use when an allegedly intoxicated driver claims that he or she refused to take a test to

[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.

measure blood alcohol content because of misinformation given by a law enforcement officer. The ***Quelle*** decision compels the court to determine:

> (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?

Quelle, 198 Wis. 2d at 280. Here, we decide that John F. Lindemann was given an oversupply of information that was misleading, but that the misleading information did not lead him to refuse to submit to a blood test. We affirm.

¶2 Lindemann, an Illinois resident, was driving an automobile when he was stopped by a Green Lake county sheriff's deputy for allegedly operating a motor vehicle while under the influence of an intoxicant. Subsequent to the stop and the administration of field sobriety tests, the deputy transported Lindemann to the hospital, issued him a citation for operating a motor vehicle while intoxicated, and attempted to obtain Lindemann's blood sample.

¶3 On at least two different occasions at the hospital, the deputy read Lindemann the Informing the Accused form and asked him if he would submit to a blood test. Lindemann responded to each inquiry with "I don't know." Ultimately, Lindemann refused to submit a blood sample. He gave the deputy no reason for this refusal.

¶4 At the refusal hearing, Lindemann testified that he chose not to submit to the blood test because he had asked the deputy whether the prosecutors would take into consideration the time span that had elapsed and that the deputy

responded "yes." (Approximately one hour had passed from the time of the arrest to the time Lindemann was asked to submit a blood sample.) According to Lindemann, this upset the standardization of the test. As he opined at the hearing, "[T]his test is predicated on the fact of a standard, and I felt if the prosecutor could change the numbers, thereafter changing the standard, it was unfair to me and I could no longer take the test."

¶5 The trial court held that Lindemann was not given information denying him an opportunity to make an informed decision because the manner in which Lindemann's question about time span was posed and the manner in which the deputy responded rendered that question and its answer noninformational. The trial court also characterized Lindemann's question and the deputy's response as vague and stated that the question was only misleading in light of Lindemann's subsequent analysis and interpretation of what his question was intended to ask and what the deputy's response was intended to convey. Furthermore, the trial court declined to characterize the deputy's response as misleading because "[h]ow Mr. Lindemann was intending to process that information, how he was intending to use it or even how he interpreted it is something totally within the domain of Mr. Lindemann." Finally, and notwithstanding Lindemann's "I don't know" responses to the deputy's queries about whether he would submit to the blood test, the trial court found the refusal "was in fact a refusal" and it was unreasonable.

¶6 The first two prongs of the ***Quelle*** test are questions of law. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). This is because this court is in just as good of a position as the trial court to determine if an oversupply of information has been given to the accused driver and whether that information is erroneous. The third prong is a question of fact. ***Id.*** at 876.

We will not overturn a factual finding on the third prong unless the trial court's findings are clearly erroneous.

¶7 We disagree with the trial court about whether Lindemann was given information that denied him an opportunity to make an informed decision. He certainly was. It was information that was outside the Informing the Accused form. That is the only question we need ask about that prong.

¶8 We also disagree with the trial court about whether the information was misleading. It appears the trial court ruled that the deputy's answer to Lindemann's question was not misleading and any misinformation resulted from Lindemann's interpretation of the deputy's answer. The second prong is not a subjective test. It is objective. The only question we ask is whether the information was misleading. Here, the deputy's response to Lindemann was incorrect because as a matter of law the passage of time is irrelevant to the test results as long as the sample is collected within three hours. *See* WIS. STAT. § 885.235(1g).

¶9 It is not until the third prong that we get into a subjective analysis. And that is why the third prong requires fact-finding by the trial court. As to this prong, we uphold the trial court's finding. The trial court obviously did not believe Lindemann when he testified that he decided not to take the test because there was no longer a standard, that the test became a variable, and that the prosecutor could look at the time span between the arrest and the test and factor that in. The credibility call by the trial court that Lindemann did not in fact come to this subjective conclusion as the reason for not taking the test has considerable merit. As stated by the trial court, absent an unequivocal request or a demonstrated willingness to submit to the test, the officer can only inquire so

many times before there has to be a conclusion drawn by the defined statement, by conduct or by some combination. Here, Lindemann was never definitive in expressing his willingness to submit to the test. In response to a yes-or-no question and in response to subsequent inquiries, Lindemann always responded, "I don't know."

¶10 Finally, we point out that at no time did Lindemann allocute to the deputy his reason for refusing to submit to the blood test. Instead, he kept silent. While verbal allocution of the reason for refusing is not a condition precedent to the validity of the excuse, the courts can certainly infer that if the reason was not verbalized at the time the refusal was given, it is because the reason never existed.

¶11 We affirm because the third ***Quelle*** prong was not satisfied.

By the Court.—Order affirmed.

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