COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2502-CR **Cir. Ct. No. 03CT001528**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Robert James appeals the judgment of conviction for operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a) (OWI). The issue on this appeal is whether the circuit court correctly denied his motion to preclude giving a presumption of automatic

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

admissibility to the results of the chemical test of his blood. We conclude the circuit court was correct, and we therefore affirm.

¶2 At the hearing on James' motion, the arresting officer testified as follows. After he stopped James' vehicle and arrested him, the officer told James that he was going to take him to the McFarland Police Department for a breath test. Upon arrival at the police station, the officer read James the Informing the Accused Form, without adding or subtracting any information to that provided by the form; he placed a check mark at the beginning of each paragraph after he read James the paragraph. The officer then asked James to consent to an evidentiary chemical test of his breath, and James consented.

¶3 James also testified at the hearing. His testimony included the following:

> Q. Once you were placed under arrest by the detective, what did you do?
>
> A. I was put in handcuffs and informed that I would be taken to the station for breathalyzer test.
>
> Q. How did you respond to that?
>
> A. I responded by saying okay.
>
> Q. Is that indeed, did you feel like you had any choice in that matter?
>
> A. Not at all.

James' testimony of what occurred at the police station did not contradict the officer's testimony.

¶4 James argued to the circuit court that he consented to the breath test at the site of the arrest because he felt he had no choice. He asserted that, because this consent occurred before the officer read him the Informing the Accused Form,

the process was a deviation from the implied consent law, with the result that the test did not have the presumption of admissibility provided for in WIS. STAT. §§ 343.305(5)(d) and 885.235.

¶5 The circuit court denied James' motion. The court found that at the arrest site the officer was not asking James whether he would consent to the breath test but was informing James where they were going and what the primary test was. The court therefore concluded that that interchange had no bearing on whether the officer complied with the implied consent law. The court also found that what the officer did at the station complied with the implied consent law.

¶6 James renews on appeal his argument that the officer deviated from the proper statutory procedure. The application of a statute to a given set of facts presents a question of law, which we review de novo. ***State v. Schmidt***, 2004 WI App 235, ¶13, ____Wis. 2d ___, 691 N.W.2d 379. To the extent that there are factual disputes, we accept the findings of the circuit court unless they are clearly erroneous, and we apply the statute to the facts as found by the circuit court. ***Id.*** The role of the fact finder includes deciding which inference to draw from undisputed facts when there are competing reasonable inferences. ***Schultz v. Sykes***, 2001 WI App 255, ¶39, 248 Wis. 2d 746, 638 N.W.2d 604.

¶7 WISCONSIN STAT. § 343.305(2) provides that a person operating a motor vehicle on the public highways is 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 of alcohol or controlled substances, when requested by a law enforcement officer and consistent with certain statutory prerequisites. Under § 343.305(3)(a) the legislature has authorized a police officer to request a person arrested for OWI to provide a sample of breath, blood, or urine for purposes of a

chemical test. At the time the officer asks an accused to submit to a chemical test, the officer must read to the accused a form prescribed by statute. Section 343.305(4). This form is generally referred to as the "Informing the Accused" form. The form must explain, among other things, that the officer wants to take samples of the accused's breath, blood, or urine to determine the concentration of alcohol or drugs in the accused's system. The form also states "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." ***Id.***

¶8 Whether the officer has met his or her obligations to inform the accused as required by WIS. STAT. § 343.305(4) is determined by the application of a three part inquiry:

> (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?

County of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995). This test does not involve assessing the driver's subjective perception of the information delivered but instead assesses the objective conduct of the officer. ***Id.***; ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528.

¶9 James argues that in this case the answer to the first inquiry is "yes" because the officer provided him with an "oversupply" of information. James refers here to the officer's testimony that, during the ten-minute ride to the station he and James "more than likely" had some conversation, although the officer

could not recall the subject matter. We conclude this testimony is irrelevant. Unless the subject matter of that conversation has some relationship to the chemical tests, that conversation has no bearing on the officer's compliance with WIS. STAT. § 343.305(4). There is no evidence on the subject matter of the conversation that occurred on the way to the station.

¶10 As for the officer's statement that he was going to take James to the station for a breath test, James does not explain why this is an "oversupply" of information. We have serious questions as to whether the first part of the ***Quelle*** standard is intended to include information that, as the circuit court found, is a description of what is going to happen next.[2] James may mean to argue that the officer's statement was an oversupply of information because it conveyed that he had to submit to the test. This is not, however, what the circuit court found. The court's finding that James "had no way of saying I am not going with you," does not address whether at the arrest scene James was given a choice about taking the test but, rather, whether he was given a choice about going to the police station.

¶11 However, even if we assume the officer's statement at the arrest scene meets the first part of the ***Quelle*** standard, we are satisfied it does not meet the second. The second inquiry involves determining whether the "additional information was false or otherwise misleading." 198 Wis. 2d at 282. When James arrived at the station, the officer completely and accurately read him the Informing of the Accused form. There is no basis in the record for concluding that, in view

[2] James does not appear to argue that the officer gave him *insufficient* information by asking him to consent to a breath test at the arrest site, before reading him the Informing the Accused form. Such an argument would have no merit in view of the court's finding that the officer was not asking him a question at that time, but was telling him where they were going and what the primary test was.

of this, the officer's statement at the arrest scene falsely conveyed that James did not have the option of refusing to take the breath test.

¶12 Accordingly, the circuit court correctly concluded that the officer complied with the implied consent statute and properly denied James' motion.

By the Court.—Judgment affirmed.

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