COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2661 **Cir. Ct. No. 2012TR4805**

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

IN THE MATTER OF THE REFUSAL OF RANDEL R. CLARK:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDEL R. CLARK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Randel Clark appeals an order of the circuit court concluding that Clark's refusal to submit to a chemical test, requested by a sheriff's deputy pursuant to WIS. STAT. § 343.305, was unreasonable. The court revoked Clark's operating privilege for one year. Clark's sole argument on appeal is that the circuit court erroneously concluded that the State met its burden of showing that the arresting deputy conveyed the implied consent warnings in reading the Informing the Accused form to Clark "using those methods which reasonably assure access to those warnings." *See* ***State v. Piddington***, 2001 WI 24, ¶24, 241 Wis. 2d 754, 623 N.W.2d 528. For the following reasons, I affirm.

Background

¶2 The following is a summary of relevant evidence from the refusal hearing, with an emphasis on facts bearing on whether the arresting officer took reasonable steps under the circumstances to convey the warnings. *See* ***id.***, ¶23. At the conclusion of the hearing the court found both of the two witnesses at the hearing, the deputy and Clark, to be credible and there is no dispute now between the parties regarding relevant facts.

¶3 The sheriff's deputy testified that, while on patrol one night, he stopped Clark's vehicle after observing traffic violations. After the deputy made contact with Clark and advised him of the reasons for the stop, the two men "had a conversation at [the vehicle] window regarding his current address and just about the reasons for the stop and what he had been doing during the course of the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

evening." During this discussion, Clark told the deputy that he had consumed "five or six beers."

¶4 Clark agreed to participate in field sobriety tests, which he then performed in a cooperative manner under instructions from the deputy. Clark also agreed to a preliminary breath test.

¶5 The deputy informed Clark that he was under arrest for operating a vehicle while intoxicated, handcuffed Clark's hands in front of his body, and placed Clark in the back seat of the deputy's patrol car. As the deputy sat in the front seat of the patrol car and Clark sat in the back seat, the deputy read, in its entirety and word-for-word, the Informing the Accused form, without adding extra information. Facing forward, the deputy read the contents of the form from a laptop computer mounted in the patrol car. In reading from the computer monitor, the deputy used a tone of voice "louder than normal, as there's other things going on in the car that could create noise, but I made sure that he could hear me."

¶6 The last sentence on the form is the question: "Will you submit to an evidentiary chemical test of your blood?", which the deputy posed to Clark after turning his body around to face Clark. To this question, "Mr. Clark said no, he would not submit to the test."

¶7 Clark testified in relevant part that, while he sat in the patrol car after his arrest, the deputy read something to Clark while facing away from Clark, but Clark was unable to hear what the deputy was saying until the deputy turned to face Clark and asked Clark if he would submit to the test. Clark testified that he has tinnitus in both ears and considers himself hearing impaired. He sometimes has to read lips. Clark acknowledged that at no time did he communicate to the deputy that he was having difficulty hearing him.

Discussion

¶8 Whether the deputy used reasonable means to convey the necessary implied consent warnings, WIS. STAT. § 343.305(4), is a question of law to be reviewed de novo. ***State v. Begicevic***, 2004 WI App 57, ¶11, 270 Wis. 2d 675, 678 N.W.2d 293. As indicated above, this appeal does not involve an argument that any finding of evidentiary fact by the circuit court is clearly erroneous.

¶9 Clark recognizes on appeal that the question presented here is whether the State has shown, by a preponderance of the evidence, that the deputy "used reasonable methods which would reasonably convey the warnings and rights in § 343.305(4)" under "the circumstances facing the arresting officer." *See* ***Piddington***, 241 Wis. 2d 754, ¶¶22-23. In addition, Clark acknowledges that, under ***Piddington***, "Whether [the driver] subjectively understood the warnings is irrelevant. Rather, whether there was compliance with § 343.305 remains focused upon the objective conduct of the law enforcement officer or officers involved." ***Id.***, ¶32 n.19.

¶10 Clark argues that the deputy's communication methods, viewed objectively, were inadequate because the deputy "did not use multiple methods to assure that the warning was conveyed," and the State did not show that the deputy "ever asked Mr. Clark if he could hear" what the deputy was saying or "paused or stopped after reading each paragraph." Clark argues that these steps were necessary at least in part because, as the deputy conceded, there was "noise in the vehicle."

¶11 Regarding the last point, there was not testimony about the level or types of background noise in the patrol car. However, the court credited the testimony of the deputy that he raised the volume of his voice in reading the form

in an attempt to overcome whatever background noise there was and, presumably, also to overcome the fact that the deputy was facing forward and not facing Clark.[2]

¶12 More generally, I conclude that the record supports the circuit court's conclusion that the State carried its burden under ***Piddington***. The testimony reflects that the deputy and Clark engaged in a number of discussions from the time of the stop to the time that the deputy read the form to Clark without any explicit or implied suggestion by Clark that he was hearing impaired or even, more generally, that he could not understand everything the deputy said to him. I refer here to testimony about the initial discussion at Clark's vehicle, the field sobriety tests, the arrest, and other interactions leading to Clark's sitting in the patrol car.

¶13 Also relevant to the analysis is the fact that the warning process ends with a question, which Clark here answered without question or qualification. The record in this case supports a conclusion that the deputy could have reasonably assumed that, if Clark had not heard or understood what the deputy said before asking the question, Clark would likely not have simply answered no, but might well have said something along the lines of, "I couldn't hear all that. What's this test?" This is particularly true given that Clark presents no reason why the deputy would or should have had any indication that Clark might have some type of hearing impairment that could affect his ability to hear the deputy.

[2] The circuit court parenthetically noted in its decision that it would generally be the better practice for arresting officers to position themselves so that they are face-to-face with arrestees when reading the form. I agree that this is the better practice when feasible, and that such a practice increases the odds that an officer will meet the applicable standards under ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528.

¶14 In essence, Clark invites this court to add safeguards to the "informing" process not found in ***Piddington***, such as a requirement that the information be conveyed using "multiple methods" or that officers must in all cases ask arrestees if they understand all of the information or must in all cases pause between paragraphs in reading. If, as Clark effectively argues, officers are required always to use "multiple methods" to convey the information, to affirmatively confirm arrestee understandings of the information, or to pause between paragraphs, then these requirements, or at least analogs to them, would have been stated in ***Piddington*** or subsequent supreme court precedent not cited by Clark.

¶15 Instead, ***Piddington*** appears to control, and it requires only reasonable steps based on an objective view of the conduct of the officer under the particular circumstances presented in each individual case and holds that after-the-fact defense claims of "subjective confusion" carry no weight. *See* ***id.***, ¶21. Therefore, Clark cannot prevail on his after-the-fact claim of impairment that the record reflects was completely unknown to, and not reasonably suspected by, the deputy. The State presented evidence establishing that the deputy used reasonable methods to convey the warnings to Clark under the circumstances known to the deputy at the time of the warning, as described at the refusal hearing.

By the Court.—Order affirmed.

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