COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

NOTICE

No. 96-2401

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDALL S. RUETH,

Defendant-Appellant.

Appeal from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

ROGGENSACK, J.[1] Randall S. Rueth appeals from an order revoking his driver's license for one year. He seeks review of the circuit court's determination that his refusal to submit to a chemical blood test after his arrest for operating a motor vehicle while intoxicated (OMVWI) was unlawful. Rueth claims the court erred when: (1) it concluded probable cause for the request to submit to chemical testing existed, without requiring testimony from the officer

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

who had administered Rueth's field sobriety tests; (2) it determined the information provided to Rueth before his refusal was timely, despite its being given in the back of the squad car without any specimen-taking capabilities at hand; and (3) it held that Rueth's refusal was informed, despite an ambiguous sentence in the Informing the Accused form and an inaccurate statement of the consequences of refusal made by the requesting officer. For the reasons discussed below, none of Rueth's arguments are persuasive. Accordingly, the order of the trial court is affirmed.

BACKGROUND

On April 14, 1996, at about 5:23 p.m. Officer Brandon J. Beecroft observed Rueth's van traveling 40 to 45 m.p.h. in a 25 m.p.h. zone and then driving past a yellow and red striped barricade which prohibited through traffic. Beecroft activated his red and blue lights and followed Rueth's van as it drove onto a lawn to avoid a second barricade. Eventually Rueth pulled over. However, as soon as Beecroft began to exit his squad car, Rueth took off. Beecroft pursued and pulled the van over once again, only to have it take off a second time when he opened his squad car door. After Beecroft pulled Rueth's van over for a third time, Rueth got out of his van, and refused to obey Beecroft's order to get back into it. Rueth asked Beecroft to give him a break because he had formerly served as a military police officer in the marines. He became very agitated.

Officer Durkee responded to Beecroft's call for backup. Durkee questioned Rueth, who admitted that he had been drinking at a bar. During the field sobriety test given by Durkee, Rueth failed to properly touch his heel to his toe. Upon observing this, Beecroft asked Rueth to take a preliminary breath test. After the PBT registered .18, Beecroft informed Rueth that he was under arrest for OMVWI, pursuant to § 346.63(1)(a), STATS. Beecroft placed Rueth in the back of his squad car, where he read him the Informing the Accused form, and asked him to submit to an evidentiary blood test. Rueth initially refused, but later changed his mind, after Beecroft told him that he was going to write out an Intent to Revoke form. En route to the hospital where the blood sample was to be taken, Rueth changed his mind again, and refused to give blood. The last statement the officer made to Rueth on the issue was that he was going to administratively "suspend" Rueth's license if he refused the blood test.

Beecroft issued Rueth a notice of intent to revoke his license, pursuant to § 343.305(9), STATS. Rueth requested a refusal hearing, which was held on August 13, 1996. Beecroft was the only witness to testify. He admitted that he had not administered the field sobriety tests himself, but said he observed the heel-to-toe test from his squad car as he ran Rueth's information into County dispatch. Rueth challenged the State's probable cause and the sufficiency of the information he had been provided relative to his refusal. The trial court determined that Rueth had unlawfully refused to submit to the blood test.

DISCUSSION

Standard of Review.

The interpretation of Wisconsin's implied consent law and its application to undisputed facts present questions of law which this court reviews independently. ***State v. Sutton***, 177 Wis.2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993).

Implied Consent Law.

When an officer arrests a person for OMVWI, the officer may ask the person to provide a blood, urine or breath sample. Section 343.305(3)(a), STATS. The officer must orally inform the person of his or her rights under Wisconsin's implied consent law at the time a chemical test specimen is requested. Section 343.305(4). If the person then refuses to provide the requested sample, the officer shall take the person's driving license and issue a notice of intent to revoke the person's driving privileges. Section 343.305(9)(a).

The person may request a refusal hearing to determine the validity of the revocation. Section 343.305(9)(a)4., STATS. The only issues at a refusal hearing are: (1) whether the requesting officer had probable cause to believe that the person was driving while under the influence of an intoxicant; (2) whether the officer complied with the informational provisions of § 343.305(4); (3) whether the person refused to permit a blood, breath or urine test; and (4)

whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol. Section 343.305(9)(a)5.; ***State v. Wille***, 185 Wis.2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994). Rueth raises the first three of these issues on appeal.

Probable Cause.

In regard to the determination of probable cause, the State carries a substantially lower burden of persuasion at a refusal hearing than at a suppression hearing. ***Wille***, 185 Wis.2d at 681, 518 N.W.2d at 328. At the refusal hearing, "the state must only present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986).[2] The court does not weigh the evidence for and against probable cause or determine the credibility of the witnesses. ***Id***. at 36, 381 N.W.2d at 308. Indeed, the court does not even need to believe the officer's account. "It need only be persuaded that the State's account is plausible." ***Wille***, 185 Wis.2d at 681, 679 N.W.2d at 328.

The arresting officer in this case knew that Rueth had been driving 20 miles in excess of the posted speed limit, had disregarded traffic signs and the flashing emergency lights of a pursuing squad car, and had disobeyed the officer's command to remain in his van. He knew that Rueth had admitted drinking, was very agitated, had difficulty with at least one field sobriety test, and had registered .18 on his PBT. In addition, Rueth's request to be given a break could be interpreted as consciousness of guilt. These facts could reasonably lead Beecroft to believe that Rueth had been driving while intoxicated. Beecroft's account was plausible regardless of whether he administered the field sobriety test himself. No additional testimony was required to establish probable cause to request a blood test.[3]

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[2] The supreme court refers to the hearing provided for in § 343.305(9)(a), STATS., as a "revocation hearing," rather than as a "refusal hearing."

[3] Rueth also claims in passing that he was deprived of the opportunity to contest probable cause by the State's failure to place Officer Durkee on the stand. However, there is nothing in the record to indicate that the defense was precluded from calling Durkee

Informing the Accused and Refusal.

Refusal to submit to blood testing cannot result in revocation of operating privileges unless the person has been adequately informed of his rights under the law. *See* ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 693, 524 N.W.2d 635, 640 (1994). In order to successfully challenge the sufficiency of the warning given by a law enforcement officer under the implied consent law, an accused driver must show that: (1) the requesting officer either failed to meet or exceeded his duty to inform the accused under § 343.305(4), STATS.; (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. ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995).

Rueth first contends that his refusal to provide a blood sample was not an adequately informed one under § 343.305(4), STATS., because the request was made in the back of a squad car rather than in a place where a specimen could actually be obtained. In effect, Rueth would have this court read the statute to require that an officer read a suspect the Informing the Accused form "at the time a chemical test specimen is requested *and ready to be obtained.*" However, the language of the statute clearly and unambiguously refers only to the time at which the request for a specimen is made. The plain meaning of a statute must be followed. ***Sutton***, 177 Wis.2d at 716, 503 N.W.2d at 329. Furthermore, this court will not construe a statute in a manner that would lead to absurd results. ***State v. Disch***, 129 Wis.2d 225, 233, 385 N.W.2d 140, 143 (1986). It would be a waste of time to require an arresting officer to take a suspect to a hospital or clinic, for instance, without first ascertaining whether he intends to submit to testing. Therefore, this court declines to construe the time element of subsec. (4) as narrowly as Rueth urges. We conclude that the phrase "at the time a chemical test specimen is requested," as used in § 343.305(4), refers to any time after arrest and before a sample is taken when an officer asks a suspect whether he will submit to chemical testing.

Rueth next claims that the information provided to him in the Informing the Accused form misrepresented the conditions under which an

(..continued)
himself, if it believed his testimony would have been favorable.

accused's vehicle would be subject to forfeiture. Paragraph five of the Department of Transportation form states:

> If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations or convictions within a 10 year period and after January 1, 1988, which would be counted under s.343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

This is an accurate condensation of the statute, when read as requiring either a failed chemical test plus two prior convictions, or a refusal plus two prior convictions, before a vehicle could be seized and forfeited. However, the statement could also be read in the disjunctive to authorize a forfeiture based on a prohibited alcohol concentration without the requirement of two prior convictions. However, even if the form could be considered misleading in this regard, Rueth has failed to show that his ability to make an informed choice was impacted. He presented no evidence that he actually believed forfeiture was a possibility based solely on the results of a chemical test.

Rueth mistakenly relies on our decision in ***County of Ozaukee v. Quelle*** for the proposition that his subjective understanding of the warning he was given is irrelevant. In ***Quelle***, this court held that a driver's subjective confusion over the difference between a preliminary breath test and an Intoxilyzer was not enough to challenge the sufficiency of the information she was given under the statute. ***Quelle***, 198 Wis.2d at 280, 542 N.W.2d at 200. Because Quelle failed to satisfy the second prong of the informed refusal test dealing with objectively misleading information, the court never reached the question of what effect the information she was given had on her ability to make an informed choice. Nothing in that case suggests that a subjective analysis under the third prong would be inappropriate once the second prong is satisfied. Indeed, such an analysis is required.

"[T]he implied consent warnings are designed to inform drivers of the rights and penalties applicable to them." ***Quelle***, 198 Wis.2d at 279, 542

N.W.2d at 199. Forfeiture penalties were not applicable to Rueth because he did not have two prior drunk driving convictions. The Informing the Accused form which was read to Rueth was capable of accurately advising him of that fact. In the absence of any evidence that the possible ambiguity of the form led Rueth to refuse to take the blood test, this court cannot conclude his refusal was uninformed.

Rueth also contends that the officer's final statement that he would "administratively suspend" rather than "revoke" his license rendered Rueth's refusal uninformed. It is true that the officer did not use the same term as is found in the statutes. However, the accused is obligated "to take the test promptly or to refuse it promptly. If he refuses, the consequences flow from the implied consent statute." ***State v. Neitzel***, 95 Wis.2d 191, 205, 289 N.W.2d 828, 835 (1980). Rueth's initial refusal to submit to blood testing after having been read the Informing the Accused form subjected him to a license revocation. Rueth does not explain how or why this post-refusal statement by the officer is relevant here. Therefore, we conclude that the record does not support Rueth's assertion that his refusal was uninformed.

CONCLUSION

The undisputed testimony of the arresting officer was sufficient to establish probable cause to arrest Rueth and to request him to submit to a chemical blood test. The request was properly made after the defendant's arrest and after he had been informed of his rights under Wisconsin's implied consent law, notwithstanding the fact that the request came in the back of the squad car. The refusal was informed despite the wording of the Informing the Accused form and the officer's use of the word "suspend" rather than "revoke."

By the Court. – Order affirmed.

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