COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP599-FT **Cir. Ct. No. 2004TR7349**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANNE CAROL VAN DOMMELEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Anne Carol Van Dommelen appeals from an order revoking her operating privilege pursuant to WIS. STAT. § 343.305(10). She argues that the arresting officer violated Wisconsin's implied consent law by providing erroneous information regarding the consequences of refusing a chemical blood test; moreover, she contends that the circuit court's decision to the contrary was error. We disagree and affirm the order of the circuit court.

¶2 The facts are brief and undisputed.[2] While on routine patrol in Sheboygan county on July 31, 2004, Sheboygan County Deputy Sheriff Shannon Brill stopped a vehicle with a suspected drunk driver. Brill identified Van Dommelen as the driver and ultimately placed her under arrest for operating a motor vehicle while intoxicated.

¶3 Brill read the Informing the Accused form to Van Dommelen and then asked if she would submit to an evidentiary chemical blood test. Van Dommelen asked Brill for advice on whether to take the test. Brill told Van Dommelen that it was "department policy not to give any legal advice in reference to that question." Van Dommelen then asked what would happen to her driver's license if she refused the test and Brill informed her that it would be revoked. Van Dommelen further inquired about consequences for her Michigan driver's license if she refused the test. At the refusal hearing, Brill stated that when Van Dommelen asked "whether her Michigan status would be revoked or

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

[2] For purposes of this appeal, the State has adopted Van Dommelen's rendition of the facts.

suspended … I informed her no." Van Dommelen stated that she "would not come back to Wisconsin then."

¶4 At the close of the refusal hearing, the circuit court decided all issues against Van Dommelen. Van Dommelen subsequently offered proof that she would face revocation consequences in Michigan as a result of her refusal to submit to chemical testing and asked the court to reconsider its position on the propriety of her refusal. The court declined to reconsider its position. The court then ordered that Van Dommelen's license be revoked for one year. Van Dommelen appeals.

¶5 Application of the implied consent statute to an undisputed set of facts is a question of law and subject to de novo review. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). We note at the outset of our analysis that the record reveals, and the parties do not dispute, that Brill correctly informed Van Dommelen as to Wisconsin's implied consent law by reading the Informing the Accused form. The only issue presented here, then, is whether Brill caused Van Dommelen to opt for refusal by misstating the potential consequences of refusal under foreign (Michigan) law.

¶6 In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277-78, 284, 542 N.W.2d 196 (Ct. App. 1995), we said the implied consent law requires that accused drivers must be informed of their choices and that this is accomplished by reading the Informing the Accused form to the accused. *See also* ***Reitter***, 227 Wis. 2d at 225. We further observed that some officers deviate from the form. *See* ***Quelle***, 198 Wis. 2d at 278-79. We articulated a three-pronged test to help trial courts gauge when such deviation results in a violation of the right to an informed choice. The test is as follows: (1) has the law enforcement officer not

met, or exceeded, his or her duty under WIS. STAT. § 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. If the answers to all three questions are "yes," then the choice has become tainted.

¶7 Van Dommelen asserts that all three ***Quelle*** factors are present here. She argues that Brill provided her with an oversupply of information, this constituted misinformation because it misstated the consequences for her Michigan driver's license, and she elected to refuse the chemical test because of the misinformation. The State responds that Van Dommelen "failed to offer *any* direct evidence at the refusal hearing as to the effect of the officer's misstatement on her thought process at the time of the refusal" and therefore did not demonstrate a causal link between the misstatement and her ultimate refusal.

¶8 The hearing transcript reveals that the circuit court did not reach the issue of causation. Van Dommelen asked the court to take judicial notice of the laws of Michigan, "specifically that they do impose a six-month suspension at least for the first offense." The court asked Van Dommelen to produce evidence regarding the Michigan law, which Van Dommelen was unable to do. Van Dommelen asked for an additional five days in order to produce the relevant Michigan law or regulation. The court, observing that the hearing had been adjourned once already, denied the request and decided to hear arguments without the missing information. After arguments, the court held:

> The issue here is whether or not the Court can take judicial notice of the laws in the state of Michigan in this regard.
>
> I would find that … some information was given by [Deputy Brill] … whether or not the defendant's Michigan status would be revoked or suspended, and he informed her no on that. The question here again, this would be more information than does appear in the Informing the Accused. Is the information incorrect or misleading? I cannot tell you whether or not it's incorrect or misleading in this particular instance…. I don't have anything before me now to indicate what the law is in the state of Michigan in this regard. Since it would require all three steps … that hasn't been established, therefore there has been a refusal and the penalties then that would go into effect will go into effect accordingly.

¶9 Van Dommelen filed a motion to reconsider, attaching portions of the Michigan Vehicle Code that allegedly establish that Brill's oversupply of information was incorrect and misleading. The court denied the motion.

¶10 The third prong of the ***Quelle*** test requires a fact-finding process by the trier of fact. The party claiming that the refusal was proper has the burden of production to present enough evidence to make a prima facie showing of a causal connection between the misleading statements and the refusal to submit to chemical testing. ***State v. Ludwigson***, 212 Wis. 2d 871, 876, 569 N.W.2d 762 (Ct. App. 1997). Once the prima facie evidence is submitted, the burden shifts to the State to refute it. ***Id***. In the end, the trier of fact assesses the credibility of the two sides and determines "as a matter of fact whether the erroneous extra information caused the defendant to refuse to take the test." ***Id***. Here, Van Dommelen had the ultimate burden of proving causation to a preponderance of the evidence. *See* ***id***.

¶11 At the hearing, Van Dommelen failed to produce any evidence upon which the circuit court could address the Michigan law. As a result, the court did

not and could not make any factual findings regarding causation. The court of appeals is an error-correcting court, and we do not engage in fact-finding. ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997). We review the decision of the circuit court based on the information the court had at the time it made the decision; we do not consider information not given to the circuit court. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 556, 508 N.W.2d 610 (Ct. App. 1993) (our review is confined to the facts in the record before the circuit court when it made its decision).

¶12 Even if we were to take up Van Dommelen's argument for causation, the supporting evidence is thin. Van Dommelen did not testify at the hearing. She offered Brill's deposition into evidence to demonstrate that Brill had told her that her Michigan operating privilege would not be revoked and she responded that she "would not come back to Wisconsin then." Her argument that she was misled by the allegedly incorrect statement is neither supported by a preponderance of the hearing evidence nor within the scope of the circuit court's findings of fact and is therefore insufficient on appeal.

¶13 We conclude that the circuit court did not err based on the evidence before it. We affirm the order finding Van Dommelen's refusal to submit to chemical testing improper and revoking her operating privilege for one year.

By the Court.—Order affirmed

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