COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1911-CR **Cir. Ct. No. 2005CT48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN R. STOCKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Stephen R. Stocki appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense. He challenges the trial court's denial of his motion to suppress evidence in which he argued that he had been impermissibly denied his

[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.

right to an alternative chemical test. The trial court made a credibility determination that we are not in a position to disturb. We affirm.

¶2 On January 4, 2005, North Fond du Lac Police Department Patrol Officer Pete Vergos arrested Stocki for OWI. Following his arrest, the State filed a complaint charging Stocki with the same. Stocki filed multiple pretrial motions, including the motion in which he argued that he was impermissibly denied an alternative chemical test. The trial court conducted a hearing on the motions on March 28, 2005.

¶3 Vergos testified that after he had arrested Stocki, he transported Stocki to the hospital for a chemical test of his blood. He recounted that when they arrived at the hospital, he and Stocki reviewed the Informing the Accused form together. The form states, in pertinent part:

> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

Vergos testified that he

> read the form verbatim, word for word. After every paragraph I asked him if he understood. I initialed after every paragraph when he did indicate that he understood, and, at the end, I asked him if he would submit to an evidentiary chemical test of his blood. He indicated that, yes, he would, and then I continued to fill out the rest of the form saying I had read the above information to Stephen R. Stocki who has been arrested for violation of [OWI, second].

¶4 Stocki testified that when Vergos read him the Informing the Accused form, he asked Vergos about the alternative test. Stocki stated that

"through the explanation of the officer, I was led to believe that if I wanted another test, that I would have to go privately and pay for that myself." He testified that he could not remember what Vergos told him that led him to draw such a conclusion. When asked about what he specifically said to Vergos about the alternative test, Stocki commented, "I remember asking just about that part in particular on the sheet that he had read to me because I didn't clearly understand that part, so I had asked about that." He further averred, "I asked about the alternate test. I wanted to know. I wanted more information on the alternate tests, basically. I didn't fully understand what my options were as far as that went, and I wanted more information." He could not, however, remember exactly how Vergos responded to his request for more information. He testified, "He kind of gave me an explanation of—or of his interpretation maybe of what this says and, like I said, just from what he said, I remember that if I wanted another test, I had to go pay for it." Stocki confirmed that he did not actually request another chemical test.

¶5 On rebuttal, Vergos testified that when Stocki did ask him about one of the paragraphs on the Informing the Accused form, he simply "re-read the form and it's verbatim. I did not answer any questions saying my own personal opinion. I just read exactly what was on the form and that was it." When pressed on the issue, Vergos reiterated that he did not explain any of the paragraphs on the form. Vergos testified, "I just re-read the form. If he had a question about any section of the form, I re-read it."

¶6 The trial court denied Stocki's motion to suppress evidence due to an impermissible denial of an alternative test. The court explained:

> There is testimony that the officer read the Informing the Accused form. The defendant has acknowledged that

> he saw that form; that it was read to him; that his recollection was that he had questions about the third paragraph having to do with an alternate test; that the officer has testified that in regard to that. It is his recollection that he re-read the third paragraph to Mr. Stocki ….
>
> And case law indicates that this officer did exactly what case law requires is that you restate the paragraph that is causing the confusion without any further elaboration and that's what this officer did.

Subsequently, Stocki was convicted of OWI, second offense.

¶7 On appeal, Stocki concedes that the trial court deemed Vergos' testimony that he simply re-read Stocki the Informing the Accused form "without any further elaboration as more credible than his own." Thus, his appeal is essentially limited to challenging the court's credibility determination.

¶8 We will not now reweigh the testimony of the witnesses and redetermine the credibility of those witnesses in order to reach a different conclusion than the trial court. The trial court, not this court, is the arbiter of conflicting testimony. ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). As this court has frequently stated, it is not our function to review questions as to weight of testimony and credibility of witnesses. ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). These are matters to be determined by the trial court and their determination will not be disturbed where more than one reasonable inference can be drawn from credible evidence. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998). The trial court is in a far better position than an appellate court to make such determinations because the trial court has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Id.*** at 665. The trial court also has a superior view of the total circumstances of the witnesses' testimony. ***State v. Owens***, 148

Wis. 2d 922, 929, 436 N.W.2d 869 (1989). Consequently, the trial court's findings of fact are upset only when clearly erroneous. ***Id.***

¶9 Stocki argues that in finding Vergos' testimony more credible, the trial court failed to acknowledge that Vergos makes "hundreds of Operating While Intoxicated arrests each year, making it hard to differentiate one from another. Over time, the arrests are no longer independently recalled, but blur into one another." He then reasons that because this incident was an isolated one for Stocki, the events would have been "affixed in Mr. Stocki's memory more clearly and solidly than in Officer Vergos'."

¶10 We reject this argument for several reasons. First, Stocki's novel argument assumes that an inexperienced observer, the defendant, is more credible than an experienced observer, the police officer. Second, Stocki offers no evidence demonstrating that Vergos had, in fact, made hundreds of arrests for OWI. Indeed, Vergos testified that, at the time of the motion hearing, he had been employed by the police department for only one year. As the State points out, it is hard to believe that within the span of that year, Vergos had the opportunity to make hundreds of OWI arrests in the Village of North Fond du Lac. Finally, Stocki did not raise this argument below. We therefore will not consider it further. *See* ***State v. Konrath***, 218 Wis. 2d 290, 296 n.8, 577 N.W.2d 601 (1998) (generally, appellate court will not consider arguments raised for the first time on appeal).

¶11 Stocki next maintains that his testimony is more credible because Vergos initialed each of the paragraphs on the Informing the Accused form only once. He assumes that if Vergos had read the paragraph concerning the alternative tests a second time, he would have initialed the paragraph a second time.

¶12 We reject this argument for several reasons. First, Vergos did not have a duty to initial the paragraph as many times as he read it to Stocki. Second, Stocki offers no evidence showing that it was Vergos' general practice to initial paragraphs each time he read them to arrestees. Finally, Stocki did not raise this argument below. We will not consider it further. *See* ***id.***

¶13 After reviewing the record and Stocki's briefs, we see no reason to disturb the trial court's finding that Vergos simply re-read the Informing the Accused form, without further explanation, in response to Stocki's questions about an alternative test. Because we uphold the trial court's credibility finding in this regard, we need not address the merits of Stocki's claim that he was impermissibly denied his right to an alternative test by misleading information provided by Vergos. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277-78, 284, 542 N.W.2d 196 (Ct. App. 1995) (concluding that 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); ***State v. Reitter***, 227 Wis. 2d 213, 225, 595 N.W.2d 646 (1999) (holding that WIS. STAT. § 343.305(4) requires officers to advise the accused about the nature of the driver's implied consent, and the "Informing the Accused" form meets the statutory mandate of alerting defendants to the law and their rights under it).

By the Court.—Judgment affirmed.

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