COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2006AP1408
2006AP1409

Cir. Ct. Nos. 2005TR1961
2006TR794

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

NO. 2006AP1408

COUNTY OF ADAMS,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. KOSOBUD,

DEFENDANT-APPELLANT.

NO. 2006AP1409

IN THE MATTER OF THE REFUSAL OF MICHAEL J. KOSOBUD:

COUNTY OF ADAMS,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. KOSOBUD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: GUY D. DUTCHER, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Michael Kosobud appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant and an order revoking his driver's license for twelve months. Kosobud argues that the circuit court erred by concluding that he improperly refused the arresting officer's request for a chemical test. He asks that we vacate the order revoking his driver's license. We reject his argument and affirm.

Background

¶2 On September 23, 2005, at approximately 1:48 a.m., an officer with the Adams County Sheriff's Department observed a vehicle pull over to the shoulder of the road. The officer pulled up behind the vehicle and observed Kosobud exit the vehicle. Kosobud stumbled across the lane toward the center of the road, then began walking toward the officer. Kosobud called to the officer by name, and told the officer that he knew he should not be driving. The officer recognized Kosobud, who was a former City of Adams police officer.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 The officer observed that Kosobud was staggering and stumbling, that his speech was slow and slurred, and that his eyes were bloodshot and glossy. In addition, the officer detected an odor of intoxicants emanating from Kosobud's breath. Kosobud told the officer that he had had too much to drink, but would not say specifically how much he drank. Kosobud also declined to perform field sobriety tests.

¶4 The officer arrested Kosobud and transported him to the Adams County Sheriff's Department. After issuing Kosobud a citation for operating a vehicle while intoxicated, the officer read Kosobud the "Informing the Accused" form. The form ended with the question, "Will you submit to an evidentiary chemical test of your breath?" In response to this question, Kosobud said that he wanted to speak to an attorney before he answered any questions. The officer told Kosobud that an attorney was not "necessary" and again asked Kosobud if he would submit to the test. Kosobud reiterated that he would not proceed without a lawyer. The officer marked Kosobud as a "refusal."

¶5 The circuit court concluded that Kosobud improperly refused the test and ordered Kosobud's driver's license revoked.

Discussion

¶6 "The trial court's decision that a refusal is improper is a question of law. As an appellate court, we review questions of law independently without deference to the decision of the trial court." ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997).

¶7 Kosobud argues that he did not improperly refuse a chemical test of his breath because the arresting officer failed to comply with the implied consent

law. He argues that the officer's statement that an attorney was not "necessary" misinformed him, implicitly suggesting that he had the right to counsel and that having an attorney was a "discretionary" decision for Kosobud to make. Accordingly, Kosobud asserts, when he subsequently declined to take the breath test without an attorney, he was acting on the officer's suggestion that he was entitled to an attorney. Kosobud relies on ***State v. Verkler***, 2003 WI App 37, 260 Wis. 2d 391, 659 N.W.2d 137, and ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999). We reject Kosobud's argument for the reasons that follow.

¶8 In ***Verkler***, we explained that

> there now exists a narrow exception to the rule announced by the supreme court in ***State v. Neitzel***, 95 Wis. 2d 191, 204, 289 N.W.2d 828 (1980). The ***Neitzel*** rule is that wanting to first consult with counsel before deciding whether to submit to a breath test is not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not immediately agreeing to take the breath test. *See* ***id.*** at 205. The narrow exception is the ***Reitter*** rule: If the officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel, that officer may not thereafter pull the rug out from under the defendant if he or she thereafter reasonably relies on this assurance or suggestion. *See* ***Reitter***, 227 Wis. 2d at 240-42.

Verkler, 260 Wis. 2d 391, ¶8.

¶9 ***Reitter*** states a three-prong test, placing the burden on the defendant to show that (1) the arresting officer either failed to meet or exceeded his or her duty to inform the accused driver; (2) the lack or oversupply of information misled the accused driver; and (3) the arresting officer's failure to inform the driver affected the driver's ability to make a choice about submitting to the chemical test.

Reitter, 227 Wis. 2d at 233; *see also* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995).

¶10 Kosobud's argument fails because he had already refused the test before the officer stated that an attorney was not necessary. Specifically, when the officer completed the Informing the Accused form by reading to Kosobud the question, "Will you submit to an evidentiary chemical test of your breath," Kosobud's response was a refusal. Kosobud said, in effect, that he would not answer whether he would take the test, or any other question, until he spoke with an attorney. As we explained in ***Verkler***, the defendant's desire to consult with counsel before deciding whether to submit to a chemical test is "not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not *immediately* agreeing to take the … test." ***Verkler***, 260 Wis. 2d 391, ¶8 (emphasis added); *see also* ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980) ("The obligation of the accused is to take the test promptly or to refuse it promptly."). Thus, Kosobud's refusal occurred before the officer stated that an attorney was not necessary.

¶11 Furthermore, even if we concluded that Kosobud had not yet refused when the officer made the not-"necessary" comment, we would still affirm the circuit court.

¶12 Pertinent here, even if an officer misinforms a defendant by failing to meet or exceeding his duty to inform the defendant, the defendant still must show that he was misled and that he reasonably relied on the misinformation such that it affected his ability to make a choice in deciding whether to submit to a test. *See* ***Reitter***, 227 Wis. 2d at 233; ***Verkler***, 260 Wis. 2d 391, ¶8; ***Quelle***, 198 Wis. 2d at 280; *see also* ***Quelle***, 198 Wis. 2d at 278 (defendant must show that "the

officer's misconduct impacted his or her ability to make the choice available under the law").

¶13 We question whether, under the facts of this case, the arresting officer's statement misinformed Kosobud within the meaning of ***Verkler*** and ***Reitter***. We will assume for the sake of argument, however, that the statement was ambiguous and might reasonably be interpreted as implying, incorrectly, that Kosobud had the right to an attorney. Even so, we conclude that Kosobud's argument fails because he did not meet his burden of producing evidence to support a finding that he was misled or that he reasonably relied on the officer's statement.

¶14 Kosobud, a former police officer, did not testify at the refusal hearing and, therefore, did not provide any firsthand explanation as to whether he was misled. And, he presented no other evidence at the hearing establishing that he was misled.

¶15 Likewise, Kosobud failed to present evidence establishing that he reasonably relied on the officer's statement. On the contrary, all the evidence points to the conclusion that Kosobud had decided not to submit to the test before the officer's statement that an attorney was not necessary. As previously indicated, Kosobud had, by that point, already responded to the officer's question, "Will you submit to an evidentiary chemical test of your breath," by stating that he wanted an attorney before answering any questions. Kosobud was unequivocal. Moreover, he had already refused to disclose how much he had to drink and refused to perform field sobriety tests.

¶16 In sum, Kosobud relies on speculation. He assumes that, if the officer misinformed him, it follows that he was misled and acted on the

misinformation. His logic is faulty. He needed to show not only that he was misinformed, but that the misinformation made a difference.

By the Court.—Judgment and order affirmed.

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