COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2066 **Cir. Ct. No. 2005TR9041**

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

IN THE MATTER OF THE REFUSAL OF MARIANNE PAYLEITNER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIANNE PAYLEITNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

¶1 SNYDER, P.J.[1] Marianne Payleitner appeals from a judgment revoking her operating privilege after it was determined that Payleitner improperly refused to submit to an evidentiary chemical test of her blood, as required by Wisconsin's implied consent law, WIS. STAT. § 343.305. Payleitner contends that the police officer did not have probable cause to stop and arrest her for drunk driving in the parking lot of a private country club. Payleitner also argues that the arresting officer improperly informed the accused, and that she did not refuse to submit to testing under § 343.305. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 At 1:00 a.m. on October 2, 2005, Sergeant Ryan Unger of the Elm Grove Police Department was dispatched to the Western Racquet Club ("the club") after an employee reported that two patrons were intoxicated and about to drive. When he drove into the club parking lot, he passed a sign that read, "WRC Private." Unger testified that no physical barriers prevented him from entering the lot, and that he believed the club was open to the public.

¶3 In the parking lot, Sergeant Unger spotted the vehicle with the reported plate number and the matching physical description. He observed that the vehicle was parked horizontally to the parking spaces with its lights on and emitting exhaust. When Unger approached the vehicle, the driver identified herself as Marianne Payleitner. Unger noticed her eyes were glassy and bloodshot, her speech was slurred, and there was a strong odor of intoxicants. Unger told Payleitner that club employees believed she was too intoxicated to drive, to which she responded that she was just sitting in the lot. The reporting

[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 indicated.

employee at the scene told Unger that she observed the vehicle back out of its parking space and drive to its current location.

¶4 Sergeant Unger then asked Payleitner to perform field sobriety tests, and she performed the horizontal gaze nystagmus test. He also asked her whether she drove the vehicle to its current location, and she answered, "Right." However, Payleitner became uncooperative and repeatedly asserted that she was not driving. After making several attempts to encourage her to submit to further testing, Unger arrested her for operating while intoxicated based on the account of the club employee, Unger's observations, and the results of the HGN test.

¶5 At the police station, Sergeant Unger read to Payleitner the Informing the Accused Form, and he initialed each section as he read it. Payleitner stipulated that Unger read the form to her at the suppression hearing. Unger testified that she appeared to understand what he was saying and did not ask questions. He stated:

> I asked [Payleitner] if she would submit to an evidentiary chemical test of her blood.... [S]he stated she did not understand. I asked her what part of the form she did not understand, and again, she stated she was not driving her car. She never indicated which part of the form she did not understand.... She asked me to read it again in its entirety.... I advised her I was not going to read the form again. Based upon my contact with her, I believed that she was stalling the investigation, or trying to hinder it, and I advised her I was not going to read the entire form over to her again, and again, I asked her if she was going to submit to a chemical test of her blood.... She again stated she was not driving the car. That went on a couple of times. Eventually, I advised her if she refused to answer the question, I would consider it a refusal.

¶6 Payleitner submitted to the blood test after Sergeant Unger marked her response as a refusal. She was served with a Notice of Intent to Revoke Operating Privileges and charged with OWI. Payleitner filed a motion to suppress

based on a lack of probable cause, asserting that the parking lot in which she was arrested was not a "highway" pursuant to WIS. STAT. § 346.61. The trial court denied the motion. A jury trial was held on the charge for OWI, and the jury found Payleitner not guilty. However, the trial court held that Payleitner improperly refused to submit to a chemical test of her blood and the court then revoked her license for twenty-four months.

DISCUSSION

¶7 Payleitner asserts that the trial court erred in its finding that she improperly refused to submit to an evidentiary chemical test of her blood, as required by WIS. STAT. § 343.305. Under Wisconsin law, when a driver is alleged to have improperly refused to submit to a blood test, the issues are limited to (1) whether the officer stopping the driver had probable cause to believe the driver was operating a motor vehicle while under the influence of alcohol, (2) whether the officer properly informed the driver of his or her rights and responsibilities under the implied consent law, and (3) whether the defendant improperly refused the test. Sec. 343.305(9)(a)5.

¶8 First, Payleitner argues that Sergeant Unger did not have probable cause to stop and arrest her for drunk driving in the parking lot of the private country club. We review probable cause under a de novo standard of review. *See* ***County of Jefferson v. Renz,*** 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The test of probable cause under the refusal hearing statute is greater than the reasonable suspicion necessary to justify an investigative stop, but less than the level of proof required to establish probable cause for arrest. ***Id.*** at 314; ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994) ("The State's burden of persuasion at a refusal hearing is substantially less than at a suppression

hearing."). We look only to see if the State established that the arresting officer had probable cause to believe that Payleitner was operating a motor vehicle while under the influence of an intoxicant. *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The evidentiary scope of the refusal hearing is narrow, and the court simply ascertains the plausibility of the arresting officer's account. *See* ***id.*** at 35-36.

¶9 Payleitner does not argue that Sergeant Unger lacked probable cause to believe that she was intoxicated based on the club employee's report or Unger's own observations. Instead, she asserts that Unger did not have probable cause to believe that the club's parking lot was held out for public use as required by WIS. STAT. § 346.61. Operating while intoxicated applies to highways, as well as to "all premises held out to the public for use of their motor vehicles ... whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." ***Id.***

¶10 The supreme court considered the meaning of "held out to the public" in ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 419 N.W.2d 236 (1988). In ***Phillips***, the parking lot at issue was not intended to be available for public use because it was used only by employees and had a sign that read, "AMC parking only. Violators will be towed at own expense." ***Id.*** at 553. The supreme court interpreted "held out to the public" to mean that the person or corporation managing the premises intended to allow the public as a whole to make use of the premises for their motor vehicles. ***Id.*** at 558.

¶11 The court in ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993), further clarified the test. In ***Richling***, the court held

that a tavern parking lot, even if restricted only to customer use, was "held out to the public" under WIS. STAT. § 346.61:

> [I]t is not necessary that a business establishment's customers form a representative cross section of a city or town's population for them to be considered the "public" within [WIS. STAT. 346.61]. Nor is it necessary that some minimum percentage of the city's population patronize the business.
>
> [T]he appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the [premises] in an authorized manner.... The lot where Richling was arrested therefore falls under the category of "premises held out to the public." This is in contrast with the lot in ***Phillips*** where, on a daily basis, only those motorists who were employed by AMC, a "defined, limited portion of the citizenry," would be authorized to park there.

Richling, 178 Wis. 2d at 860-61 (footnote omitted).

¶12 The State met its burden of proving that Sergeant Unger had probable cause to believe that the club parking lot was held out to the public. Unger drove past a sign that read, "WRC Private." However, he could have reasonably believed the club parking lot was open to club patrons as members of the public pursuant to ***Richling***. Furthermore, WIS. STAT. § 346.61 states that premises may be held out to the public regardless of whether they are publicly or privately owned. There were no physical barriers blocking Unger's entrance to the club, and he had no knowledge of the club having any vehicles towed from the property. Thus, Unger had probable cause to believe that Payleitner was operating a motor vehicle on premises held out for public use.

¶13 Second, Payleitner argues that Sergeant Unger improperly informed her of her rights and responsibilities under the implied consent law, and her ability to make a choice about refusing was thereby affected.

¶14 Wisconsin drivers impliedly consent to submit to an evidentiary chemical test of their blood. WIS. STAT. § 343.305(2). However, a driver may revoke consent by simply refusing to take the test. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995). A driver can choose not to take the chemical test after law enforcement provides him or her with certain information, although certain risks and consequences are associated with this choice. ***Id.*** When reviewing whether an arresting officer substantially complied with the statutory requirements of informed consent, we will uphold the circuit court's findings of fact unless they are clearly erroneous; however, where the challenge is to the court's application of the implied consent law to those facts, our review is de novo. *See* ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379.

¶15 When determining whether an officer has satisfied the statutory informed consent requirements, we use a three-part inquiry. First, we ask whether the officer failed to meet or exceeded his or her duty to inform the accused driver pursuant to WIS. STAT. § 343.305(4). ***Quelle***, 198 Wis. 2d at 280. If so, we consider whether the lack or oversupply of information misled the accused driver. ***Quelle***, 198 Wis. 2d at 280. Finally, we ask whether the officer's failure to properly inform affected the accused's ability to make a choice about whether to submit to the chemical test. ***Id.***

¶16 Whether or not an officer has complied with WIS. STAT. § 343.305 is based upon the conduct of the officer, not the driver's comprehension of the officer's message**.** ***State v. Piddington***, 2001 WI 24, ¶21, 241 Wis. 2d 754, 623 N.W.2d 528. The ***Quelle*** court expressly denied the right to any defense based on subjective confusion. ***Quelle***, 198 Wis. 2d at 281. Instead, it held that "the legislature has adequately addressed any risk of confusion by imposing a statutory

duty on the police to provide accused drivers with specific information." ***Id***. An officer does not have a duty to explain or do more than read the information form. *See* ***id.*** at 280-81.

¶17 Payleitner has not met her burden of showing how Sergeant Unger failed to meet or exceeded his duty to inform the accused. Payleitner stipulated at the suppression hearing that Unger read the form to her. He initialed each section of the form as he read it to her. Payleitner also does not show that there was a lack of information or an oversupply of information that misled her. She does not claim that Unger omitted or added to any portion of the form. Instead, she asserts that because of her subjective confusion, Unger had a duty to repeat the form to her. Unger had no duty to do more than read the information on the form, regardless of whether Payleitner was subjectively confused. Because a defense of subjective confusion is not recognized, and because Unger met his statutory duty to inform Payleitner by reading the form, any confusion as to whether or not to comply does not stem from a failing on Unger's part.

¶18 Lastly, Payleitner argues that her physical acts did not constitute a refusal pursuant to WIS. STAT. § 343.305(9). She argues that because she did not explicitly state that she refused to take the test, she did not refuse in fact. Payleitner also asserts that because she eventually complied and took a blood test after Sergeant Unger marked on the form that she refused, she did not refuse in fact.

¶19 Similar arguments were made by the defendant in ***State v. Rydeski***, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997). There, Rydeski was asked to take an Intoxilyzer test and he repeatedly responded by asking to use the restroom. ***Id.*** at 104-05. At the refusal hearing, the defendant asserted that his actions did

not constitute a refusal. ***Id.*** at 105. On appeal, the court found his acts to constitute a refusal because a refusal need not be verbal, and conduct may serve as a basis for a refusal. ***Id.*** at 106. Furthermore, uncooperative conduct may constitute a refusal. ***Id.*** The accused has an obligation to take the test promptly or to refuse it promptly. ***Id.*** at 108. Furthermore, a defendant's eventual consent to the test does not "cure" a prior refusal. *See* ***id.***

¶20 Payleitner's actions constituted a refusal pursuant to WIS. STAT. § 343.305(9). Although Payleitner did not expressly state to Sergeant Unger that she refused, her uncooperative conduct constituted a refusal. Payleitner first requested that Unger repeat the entire form to her, and when Unger asked her which portion she did not understand, she responded that she was not driving the car. Her statement was not responsive to his reading of the Informing of the Accused. Unger could reasonably interpret her actions as delay tactics constituting a refusal, particularly in light of the State's interest in prompt testing. Payleitner also cannot rely on the fact that she later underwent a blood test to cure her refusal.

CONCLUSION

¶21 We conclude that Payleitner improperly refused to submit to an evidentiary chemical test of her blood, as required by Wisconsin's implied consent law. Furthermore, Sergeant Unger had probable cause to believe that Payleitner was operating a motor vehicle while intoxicated. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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