COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3142-FT

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

CITY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

v.

KATHLEEN M. FLOOD,

DEFENDANT-APPELLANT.

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

¶1 BROWN, P.J.[1] In this appeal from an intoxicated driving conviction, Kathleen M. Flood contests an order denying her motion to suppress

[1]. This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

the results of a breath test showing a .22% blood alcohol test result, over twice the legal limit. She claims that erroneous information supplied by the arresting officer concerning the implications of refusing to take the test caused her to submit to the test when she had earlier refused. Flood correctly observes that the law gives her a choice whether to comply with the implied consent law. She then reasons that since her choice was tainted by the officer's erroneous information, the choice amounted to no choice at all. Thus, she argues, the evidence must be suppressed. We hold that the trial court's finding of fact that the mistaken information did not cause Flood to change her mind is not clearly erroneous and affirm.

¶2 After Flood was arrested for driving while intoxicated, the arresting officer read Flood the Informing the Accused form. When asked whether she would submit to an evidentiary test of her breath, Flood refused. Instead of simply marking a refusal, however, the officer apparently attempted to change Flood's mind about refusing. He explained that "by not submitting to the test that more penalties would ensue and one of them being that she would probably lose her license for one to three year period if the Court found that." Flood changed her mind and submitted to the test. The test results showed a .22%. The officer thereafter cited her with two ordinance violations: one for operating while intoxicated and one for driving with a blood alcohol content of over .10%. Flood asked for a trial. She thereafter brought her motion to suppress based upon the same arguments she raises now. After an evidentiary hearing, the trial court denied the motion in a bench decision. Flood was found guilty after a court trial of operating while intoxicated. She then commenced the instant appeal.

¶3 In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), we held that an accused has a right not to take a chemical test after being arrested for driving while intoxicated. In ***Quelle***, we also pointed out

how the law requires that accused drivers must be informed of this choice and that this is accomplished by reading the Informing the Accused form to the accused. ***Id***. at 277-78. We further observed that, despite the better practice of simply reading the form, some officers deviate from the form. *See* ***id***. at 278-79. We cautioned that such deviation may result in the choice being affected in a prejudicial manner. We enunciated a three-prong 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 §§ 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. Neither Flood nor the City of Fond du Lac disputes that this is the law.

¶4 Also, there is no dispute here about whether Flood has proven the first two prongs of the ***Quelle*** test. Clearly, she has. The officer went beyond reading the form and tried to change Flood's mind about refusing. He did this by telling her what the repercussions could be to her license status if she refused. Therefore, the first prong was met. Further, the officer told her that she would probably lose her license for one to three years if the court so found. This was in error since the most that she could lose would be one year without license privileges. WIS. STAT. § 343.305(10)(b)2. Thus, the second prong has been proven.

¶5 The parties do dispute whether the third factor was proven. Flood claims that the facts stand by themselves and present a situation akin to "res ipsa loquitor" because she had refused to take the test before the officer tried to change her mind, and agreed to take the test after the officer gave her the mistaken information. The City disagrees.

¶6 In resolving the dispute, the first thing we must recognize is our standard of review. The third prong of the ***Quelle*** test is a factual determination subject to the clearly erroneous rule. *See* ***State v. Ludwigson***, 212 Wis. 2d 871, 876, 569 N.W.2d 762 (Ct. App. 1997). Thus, Flood's contention that we are dealing with a question of law which we review de novo is simply wrong.

¶7 Next, it is important to remember what the question is and what the question is not. The question is not whether the extra information affected the accused driver's decision, but whether the *mistaken* information affected the choice. Indeed, if the officer overdoes it and says things outside of the informed consent form, but that information is accurate, the extra information supplied may well affect the choice, but does not *unlawfully* affect the choice. If, however, the officer says things that are mistaken and those erroneous comments are found by the trial court to have adversely affected the accused driver's choice, the choice is deemed tainted.

¶8 What we have here is a comment made by the officer that was half accurate and half inaccurate. The officer told Flood that by not submitting to the test, more penalties would ensue, one of them being that she would probably "lose her license" for a "one to three year period if the Court found that." The nonerroneous portion of this statement is that a one-year revocation was possible.

The erroneous portion of the statement was the officer's explanation that she could lose her license for more than one year: up to three years.

¶9 The trial court reasoned, in pertinent part, as follows:

> Certainly, the loss of license for a year would have some affect so …. [i]t's hard to see exactly what rights she was giving up. Certainly, what would have determined her changing her mind to take the test … would be … whether it was one to three years … the license is taken away. Certainly I can't believe that a person would say I am not going to take the test, I am going to gamble that I am only going to lose my license for a year.

¶10 In other words, the trial court considered the officer's reference to three years to be of de minimus importance to the question of whether Flood changed her mind to avoid having her license being taken away for a period of time because of her refusal. The trial court found that the driving force in Flood's change of mind was that she did not want to lose her license for any appreciable length of time because of her refusal. Whether it was for one year or for three years made no difference. According to the trial court, Flood did not want to go without her license because of her refusal to take the test, period.

¶11 This court concludes that the finding of fact is not clearly erroneous. Nowhere in the record is there any testimony by Flood that she would have stood fast by her refusal to take the test if the officer had said that she would probably lose her license for a year, but that upon hearing "three years," she changed her mind. The trial court, as finder of fact, was entitled to draw the inference that it was information that she probably would lose her license if the court so found which caused her to change her mind. The information Flood relied upon in making her choice was accurate, and therefore, she fails to prove the third prong of the ***Quelle*** test.

¶12 Because the trial court's finding is not clearly erroneous, this court affirms.

By the Court.—Judgment and order affirmed.

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