COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0032 **Cir. Ct. No. 01-TR-8971**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. ARBUCKLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, J.[1] In ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), we formulated a three-part test to use when

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

an allegedly intoxicated driver claims that he or she reasonably refused to take a test to measure alcohol because of misinformation given by a law enforcement officer. Here, we decide that James R. Arbuckle was given an oversupply of information that was incorrect, but that the incorrect information did not lead Arbuckle to refuse to take the test. We affirm.

¶2 Arbuckle, a New Mexico resident, was driving a motorcycle when he was stopped by a city of Sheboygan police officer and was eventually cited for speeding and operating while intoxicated. While being transported by the officer to the station house, Arbuckle informed the officer that he worked for the Department of Energy and he was concerned that an arrest and conviction for intoxicated driving could cost him his job. The officer responded that he needed to do his job, which was to process the arrest, and that anything happening afterward would be dealt with "later on."

¶3 At the station house, the officer read the Informing the Accused form. In response, Arbuckle again expressed his concern about what would happen with his New Mexico license as a result of his arrest. On direct examination, the officer said he replied by simply stating that he was not sure what New Mexico would do with a Wisconsin violation. However, the officer's answers on cross-examination revealed a much different story. First, the officer admitted that it was revealed to him that Arbuckle's job is to transport nuclear weapons in "semis." Second, instead of stating his uncertainty about what New Mexico might do, he admitted telling Arbuckle that any action taken by New Mexico to revoke or suspend his operating privilege would be dependent upon whether Wisconsin and New Mexico had a "reciprocal agreement" for exchange of information. Next, the officer admitted that he told Arbuckle that if New Mexico did not have reciprocity with Wisconsin, New Mexico would not find out

about the Wisconsin OWI. Additionally, the officer conceded that he possibly gave Arbuckle some examples of states that do share information with Wisconsin as a result of a regional reciprocal agreement, such as Illinois, Minnesota and Michigan. Finally, the officer told Arbuckle that even if New Mexico found out about the Wisconsin OWI, it was possible that he would "still be able to do his job for the Department of Energy." The officer even admitted that this last statement was "wrong and misleading." The officer explained that he made the statement because he "was trying to be a nice guy."

¶4 Arbuckle refused to consent to taking a breath alcohol test. He gave the officer no reason for his refusal. At the refusal hearing, he testified that based on the information supplied to him by the officer, he concluded that New Mexico might not find out about the Wisconsin OWI and decided that if "they" are not going to find out, "why take the test."

¶5 At the conclusion of the testimony, Arbuckle's attorney referenced his motion papers citing the ***Quelle*** factors: (1) has the law enforcement officer not met or exceeded his or her duty under the pertinent statutes 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? ***Id.*** Arbuckle's attorney then argued to the court that the officer in this case oversupplied Arbuckle with information, that the information was wrong and that the information led Arbuckle to refuse to take the test.

¶6 The trial court held that there was no oversupply of information because the officer gave no "assurances" about what New Mexico would do. The trial court also said that whatever information the officer gave Arbuckle

concerning his job was not misleading because Arbuckle should know more about how the OWI would affect his job than the officer. The trial court also remarked that Arbuckle did not ask the questions he did because he wanted information before he decided whether to take the breath test. Rather, the trial court found that Arbuckle wanted "reassurance." Finally, the trial court said it was not convinced that Arbuckle decided not to take the test on the strength of what the officer told to him. The trial court zeroed in on Arbuckle's testimony where he said, "If they are not going to find out, why take the test?" The trial court stated:

> I'm not convinced of the effect your testimony was in response to [defense counsel's] questions if they weren't going to find out, why take the test. That doesn't provide much to me. First of all, find out what? Finding out about not taking the test? Find out about the conviction, about OWI? He could have just as easily rationally said why not find out.… I didn't find that convincing.

The trial court found that the refusal was unreasonable. Arbuckle appeals.

¶7 The first two prongs of the ***Quelle*** test are questions of law. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). This is because this court is in just as good a position as is the trial court to determine if an oversupply of information has been given to the accused driver and whether that information is erroneous. The third prong is a question of fact. ***Id***. at 876. We will not overturn a factual finding on the third prong unless the trial court's findings are clearly erroneous.

¶8 We disagree with the State and the trial court that there was no oversupply of information. There certainly was. It was information that was outside the Informing the Accused form. That is the only question we need ask about that prong. The State's argument to the contrary and the trial court's comment as to this prong are simply wrong.

¶9 We also disagree with the State and the trial court about whether the information was erroneous. Both the State and the trial court seem to put a subjective spin on this prong. By that we mean that the State appears to contend, and the trial court appeared to rule, that since the officer did not intend to mislead because he couched everything in "possibilities" and because a person in Arbuckle's position would not feel he or she was misled, then there was no misleading information. But the second prong is not a subjective test. It is objective. The only question we ask is whether the information was wrong. There is no dispute that the information the officer gave Arbuckle about reciprocity agreements was erroneous. From an objective standpoint, Arbuckle satisfied the second prong.

¶10 It is not until the third prong that we get into the subjective analysis. And that is why the third prong requires fact-finding by the trial court. As to this prong, we uphold the trial court's finding. The trial court obviously did not believe Arbuckle when he testified that at the moment of the decision on whether or not to take the test, he decided that if "they" are not going to find out then why take the test. The credibility call by the trial court that Arbuckle did not in fact come to this subjective conclusion as the reason for not taking the test has considerable merit. First of all, as implied by the trial court, Arbuckle's statement is conclusory in tone. It fails to illuminate his actual thought processes at the time he made the decision about whether to refuse to take the test. The trial court did not know, for example, whether Arbuckle thought that he need not take the test because the State of New Mexico was not going to find out or because his employer was not going to find out. Also, the trial court did not know what it was that Arbuckle thought the authorities would not find out about. Was it the fact that he had been arrested for OWI? Or that he refused to take a breath test? Or that he

might not be convicted? In sum, Arbuckle's statement did not spell out his thought processes enough to gain credibility in the trial court's mind. We will not disturb the trial court's view about that.

¶11 Moreover, as the State cogently points out, if Arbuckle truly wanted to limit his exposure to any consequences, he would have decided to take the test since a result in his favor would mean no consequences at all—not in Wisconsin and not anywhere else. Arbuckle's stated reason for refusing, therefore, makes no sense.

¶12 Further, the trial court looked upon all the questions by Arbuckle to the officer as more akin to seeking reassurance that things would work out for him despite his arrest rather than being directed to whether he was going to take or not take the breath test. This inference is not clearly erroneous.

¶13 Finally, we point out that at no time did Arbuckle allocute his reason for refusing to the officer. Instead, he kept silent. While verbal allocution of the reason for refusing is not a condition precedent to the validity of the excuse, the courts can certainly infer that if the reason was not verbalized at the time the refusal was given, it is because the reason never existed.

¶14 We affirm because the trial court found that the third ***Quelle*** prong was not satisfied and such finding is not clearly erroneous.

By the Court.—Order affirmed.

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