COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2900 **Cir. Ct. No. 01TR008888**

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

IN THE MATTER OF THE REFUSAL OF JEFFREY J. JACOBSEN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY J. JACOBSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Jeffrey Jacobsen was arrested for suspected driving while intoxicated and refused to permit a blood draw. He appeals an order of the circuit court revoking his operator's license. Jacobsen argues that the arresting officer failed to comply with the implied consent law and that the officer's behavior justified Jacobsen's refusal. We reject Jacobsen's arguments and affirm the circuit court.

Background

¶2 Jacobsen was stopped and arrested for driving while intoxicated. The arresting officer transported Jacobsen to a hospital for a blood draw. At the hospital, the officer read the "Informing the Accused" form to Jacobsen.

¶3 Initially, Jacobsen agreed to submit to the requested blood test. At this point, a phlebotomist entered the room to draw Jacobsen's blood. Jacobsen asked if he, Jacobsen, would get a sample of the blood. The officer told Jacobsen that two samples would be drawn and that the officer would send both to the State Hygiene Lab. Jacobsen asked the officer what his alternatives were. The officer testified he told Jacobsen that after Jacobsen submitted to the blood draw, another sample could be drawn at Jacobsen's request and expense. Jacobsen testified that the officer told him that he could: "Give blood, wait for your own sample later, or accept a refusal." Jacobsen said he would not submit to the blood draw unless he was allowed to keep a sample. Jacobsen refused to consent to the blood draw. Jacobsen testified that he was concerned that the officer might attempt to tamper

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

with the blood sample, and that he was suspicious because of the officer's inappropriate behavior.

Discussion

¶4 Jacobsen first argues that the arresting officer "oversupplied" Jacobsen with misleading information and that Jacobsen based his decision to refuse on this misinformation. We agree with the circuit court's rejection of this argument.

¶5 Jacobsen asserts that the standard of review is *de novo*, and the State does not disagree. In addition, both parties agree that the appropriate test to apply is found in ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995). In ***Quelle***, we set forth a three-pronged test to use when it is asserted that a refusal resulted from an officer giving too little or too much information:

> (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?

Id. at 280.

¶6 It is undisputed that the officer accurately read the applicable Informing the Accused form to Jacobsen. The information on that form included the following:

> 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.

See WIS. STAT. § 343.305(4). Jacobsen contends that after the officer gave this complete and accurate information, the officer provided additional misleading information.

¶7 Jacobsen complains that when he asked the officer about Jacobsen's "alternatives," the officer told Jacobsen that his only options were to consent or to refuse and that "[a]t no time did [the officer] inform Jacobsen that a breath or urine test would be available following completion of the blood draw, and that such test would be performed at law enforcement expense."

¶8 We agree with the circuit court's analysis. The circuit court determined that the context of the exchange between Jacobsen and the officer indicated that Jacobsen "was not asking globally about other tests that might be available." Instead, Jacobsen's "inquiries focused on how he could have his own tube of blood not subject to [the officer's] control." We have reviewed the transcripts and agree that it is clear from the context of Jacobsen's own testimony that he was not concerned with the testing method, but rather was concerned about the handling of the blood samples. Jacobsen testified that he asked the officer how the blood would be transported and, when Jacobsen learned the officer would be transporting the sample, he asked about alternatives. Jacobsen testified that he "kept insisting [he] wanted a sample to remain at the hospital." Accepting Jacobsen's own testimony as true, it is readily apparent that the officer and the hospital worker would have understood Jacobsen to be asking about his alternatives regarding blood samples.

¶9 As an alternative argument, Jacobsen seems to say that his focus was on the blood test because he was "not afforded the information that a second test would be immediately available in the event he chose to accede to the first request for blood." This argument is not persuasive. First, nothing in the statutes provides the suspect with the right to an "immediate" alternative test.[2] Second, Jacobsen was supplied the information required by statute when the officer read to Jacobsen the Informing the Accused form. This information was sufficient. *See* ***State v. Schirmang***, 210 Wis. 2d 324, 330, 565 N.W.2d 225 (Ct. App. 1997). Jacobsen asserts that the officer could have discharged his duty by rereading the Informing the Accused form. However, the testimony contains no suggestion that the officer had a reason to think that Jacobsen did not understand the information that had been read. To repeat, Jacobsen's follow-up questioning was directed toward Jacobsen's mistrust of the officer's handling of the blood samples. Moreover, it was not the officer's duty to ensure that Jacobsen understood the content of the Informing the Accused form. Rather, it was sufficient that the officer read the form accurately. *See* ***State v. Piddington***, 2001 WI 24, ¶20, 241 Wis. 2d 754, 623 N.W.2d 528 ("[A]n accused driver need not comprehend the implied consent warnings for the warnings to have been reasonably conveyed.").

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[2] WISCONSIN STAT. § 343.305(5)(a) reads, in relevant part:

> If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).... The agency shall comply with a request made in accordance with this paragraph.

¶10 Jacobsen separately argues that the circuit court erred by failing to take into account testimony regarding the arresting officer's demeanor. A nurse and a police officer from a different police agency both testified that the arresting officer acted unprofessionally toward hospital staff. These people said that the arresting officer used an angry voice when complaining to hospital personnel and was "close to out of control."

¶11 Jacobsen argues the circuit court should have concluded that the officer's "misconduct had a startling impact on … Jacobsen and, eventually, deprived him of the opportunity meaningfully to consider his options with regard to the chemical testing request due to the concern—and suspicion—the conduct engendered." Jacobsen argues that he did not "refuse" within the meaning of the statute because "professional conduct" on the part of the officer "surely is a prerequisite to [the officer's] statutory authority to make the demand."

¶12 There is a disconnect between Jacobsen's appellate argument and his testimony. Jacobsen did not testify that he was unable to make a voluntary decision regarding his refusal because of the officer's behavior or that Jacobsen was otherwise distracted by the officer's behavior during the time the officer explained options to Jacobsen. Indeed, if anything, one would expect that threatening behavior on the part of the officer would cause Jacobsen to *submit* to a blood draw even if he did not want to. Instead, Jacobsen's testimony only suggests that the officer's behavior caused Jacobsen to question whether the officer would tamper with the blood samples.

¶13 Whether the officer's behavior would cause a reasonable person to think that the officer might tamper with the blood samples and whether such a reasonable fear would void the refusal are issues that Jacobsen has not briefed.

Moreover, it is hard to imagine a reasonable person thinking that the officer's anger with the hospital staff would cause the officer to tamper with a blood draw sample.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4 (2001-02).