COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2926

Cir. Ct. Nos. 02TR006549
02TR006550

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. LOBAUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Timothy J. Lobaugh appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI). The issue is whether the trial court properly admitted evidence at the jury trial of

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

Lobaugh's refusal to submit to field sobriety tests. We uphold the trial court's ruling and affirm the judgment of conviction.

¶2 The relevant facts are brief and undisputed. We take them from the testimony of Sergeant Steve Cobb of the City of Sheboygan Police Department at a motion in limine hearing before the evidentiary phase of the jury trial began. On June 19, 2003, Cobb observed a vehicle being operated in an erratic manner. Cobb stopped the vehicle and identified Lobaugh as the operator. Cobb directed another officer on the scene to conduct field sobriety tests on Lobaugh. When this officer asked Lobaugh to perform a horizontal gage nystagmus test, Lobaugh asked if the tests were mandatory. Cobb responded that the tests were not mandatory and then added, "However, if you refuse to take the tests, we would simply have to consider all the other factors, in making a determination as to how to resolve this." Lobaugh then refused to submit to any field sobriety tests, and he was arrested. The City charged Lobaugh with OWI, first offense, Lobaugh plead not guilty and the matter was scheduled for a jury trial.[2]

¶3 At the motion in limine hearing, Lobaugh sought to bar the City from using evidence of his refusal to submit to the field sobriety tests. Lobaugh argued that Cobb's response to his inquiry led him to believe that his refusal would not be used against him. The trial court denied the motion. The jury found Lobaugh guilty and he appeals.[3]

[2] The City also charged Lobaugh with operating with a prohibited blood alcohol content (BAC).

[3] However, the jury found Lobaugh not guilty of the accompanying BAC charge.

¶4 Lobaugh does not dispute the general rules that evidence of a refusal to submit to field sobriety tests is admissible as consciousness of guilt, *see* ***State v. Bolstad***, 124 Wis. 2d 576, 583, 370 N.W.2d 257 (1985),[4] and that the use of such evidence does not violate the Fifth Amendment or the equivalent provision of the Wisconsin Constitution, Article I, § 8. ***State v. Mallick***, 210 Wis. 2d 427, 434-35, 565 N.W.2d 245 (Ct. App. 1997). However, Lobaugh contends that those rules do not apply when the police cause a suspect to believe that evidence of the refusal will not be used in any ensuing prosecution of the case. Lobaugh argues that Cobb's statement telling him that if he refused the tests, "we would simply have to consider all the other factors, in making a determination as to how to resolve this" functionally advised him that his refusal would not be used against him in any ensuing prosecution. As such, Lobaugh concludes that the City's use of his refusal in the jury trial was fundamentally unfair in violation of his due process protections.

¶5 In support, Lobaugh relies on ***Raley v. Ohio***, 360 U.S. 423 (1959), where three of the appellants had been convicted for failing to answer questions put to them at an inquiry before the Un-American Activities Commission of the Ohio Legislature. ***Id***. at 424. Before the defendants testified, they were informed of their privilege against self-incrimination under the Ohio Constitution, but they were not further informed that an Ohio immunity statute deprived them of the right to invoke the privilege against self-incrimination. ***Id***. at 425. The Supreme Court reversed the convictions, stating that the prosecutions "sanction an

[4] In ***State v. Bolstad***, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), the supreme court was considering evidence of a refusal to submit to a chemical test under the implied consent law, whereas this case concerns field sobriety tests. That distinction does not call for a different conclusion as to the admissibility of a refusal.

indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." ***Id***. at 426. This, the Court concluded, constituted a violation of the Due Process Clause. ***Id***. at 437.

¶6 We disagree with Lobaugh that this is a ***Raley*** situation. In ***Raley***, the defendants were expressly told that they were entitled to invoke the privilege—a message clearly indicating that a refusal to answer would not carry any prosecutorial consequences. Relying on that advice, the defendants refused to answer certain questions, only to have the State prosecute them for following that advice. Understandably, the Supreme Court labeled the State's conduct as "entrapment."

¶7 Here, Cobb's statement to Lobaugh did not make any representations or promises to Lobaugh as to the evidentiary consequences of Lobaugh's decision regarding the tests. Instead, Cobb simply told Lobaugh that if he refused the tests, the police would resolve the matter based on the other factors known to them. From that, a reasonable person would understand that if the tests were refused, the police would have to use other information in making the decision whether or not to arrest, not as a promise that any refusal would not be admissible evidence in any ensuing prosecution.

¶8 Moreover, unlike ***Raley*** where the defendants were not informed of the Ohio statute which gave them immunity, Cobb's statements to Lobaugh did not withhold or conceal any additional information relevant to Lobaugh's decision whether to perform the tests. Lobaugh's question inquired whether he had to submit to the tests, not whether his refusal would be admissible at a trial. It was not Cobb's role to deliver an evidentiary lecture to Lobaugh on the scene of this

OWI investigation. Instead, Cobb correctly answered Lobaugh's question and further correctly stated that if Lobaugh refused the tests, the police would resolve the matter based on the other factors known to them.

¶9 In summary, the police did not entrap Lobaugh into believing that his refusal would not be used against him as evidence. This is not a ***Raley*** case.

¶10 Even if his refusal evidence qualified for admission, Lobaugh argues that the trial court should have excluded the evidence because the prejudicial effect outweighed the probative value pursuant to WIS. STAT. § 904.03. In support, Lobaugh renews the argument we have already rejected—that Lobaugh reasonably believed that Cobb's statement assured him that evidence of his refusal would not be used against him. According to Lobaugh, his belief outweighed the probative value of the evidence as to consciousness of guilt.

¶11 However, we have already rejected the notion that a reasonable person would have concluded that Cobb's statement was an assurance that a refusal would not be admissible at an ensuing prosecution. Given that, we conclude that the trial court properly determined that the jury should be the ultimate arbiter of the evidence regarding Lobaugh's refusal. A trial court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of discretion. ***State v. Weed***, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. Given the parties' competing interpretations of Lobaugh's refusal, we hold that the trial court did not err in the exercise of its discretion by admitting the refusal evidence.

¶12 We uphold the trial court's evidentiary ruling. Therefore, we affirm the forfeiture judgment of conviction.

By the Court – Judgment affirmed.

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