COURT OF APPEALS DECISION DATED AND FILED

January 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 04-2190-CR **Cir. Ct. No. 04CT000017**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. MEURER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Upon his plea of no contest, Michael R. Meurer was convicted of operating a motor vehicle while intoxicated (third offense) pursuant to WIS. STAT. § 346.63(1)(a). Pretrial, Meurer moved to bar the State

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

from relying on the presumption of automatic admissibility accorded to the result of a chemical test performed on his blood. The trial court denied the motion. Meurer challenges this ruling on appeal.

FACTS AND PROCEDURAL HISTORY

¶2 The facts are brief and undisputed. We take them from the testimony of the two witnesses who testified at the pretrial hearing—City of Fond du Lac Police Officer Aaron Goldstein and Meurer. Goldstein testified that on December 13, 2003, at approximately 8:45 P.M., during the hours of darkness, he observed a motor vehicle traveling westbound on a city street without its headlights illuminated. Goldstein stopped the vehicle, identified Meurer as the operator, detected an odor of intoxicants on Meurer's breath, and noted that Meurer's eyes were glassy and bloodshot. Goldstein then had Meurer perform three field sobriety tests—the "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one-leg stand" test. Goldstein observed clues of intoxication during all of these tests. Based on the totality of the circumstances, Goldstein arrested Meurer for OWI.

¶3 Meurer was then transported to a local hospital for a blood draw. There Goldstein advised Meurer under the implied consent law and inquired whether Meurer would consent to a blood test. Meurer consented. Later testing revealed a blood alcohol concentration above the legal limit.

¶4 Meurer's testimony did not dispute Goldstein's testimony. However, he additionally testified to a conversation he had with Goldstein after he was arrested and before he was transported to the hospital. According to Meurer, he asked Goldstein whether he had passed the field sobriety tests and Goldstein responded that he had. Meurer then asked Goldstein if he was free to go, and

Goldstein responded, “No, because I feel you are impaired to drive.” Goldstein was not asked about this alleged conversation during his direct or cross-examination. Nor was he called as a rebuttal witness.

¶5 Meurer contended that the Goldstein’s answers to his questions constituted misinformation under the implied consent law, inducing him to believe that he did not have the right to refuse the blood test. As a result, Meurer argued that the blood test result was not entitled to automatic admissibility pursuant to WIS. STAT. § 885.235(1g).

¶6 The trial court denied Meurer’s motion. In support, the court noted that Goldstein had read the Informing the Accused information to Meurer verbatim, and that Goldstein’s answers to Meurer’s question were not misleading and that “there is no basis to conclude that whatever was told to the defendant affected his decision to consent to the test.” Meurer appeals.

DISCUSSION

¶7 Because of the manner in which the State responds to Meurer’s argument, we begin by identifying Meurer’s specific appellate issue. The State interprets Meurer to argue that Goldstein’s statements that Meurer had passed the field sobriety tests, coupled with Goldstein’s further statement that he nonetheless intended to transport Meurer to the hospital for a blood test, rendered Meurer subjectively confused. From this premise, the State correctly observes that the law does not recognize a claim of “subjective confusion” as a basis for excluding or limiting the use of a chemical test result. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995).

¶8 We agree with the State that a logical inference to be drawn from Meurer's argument is that he was subjectively confused by Goldstein's answers to his questions. However, Meurer is not asserting his state of subjective confusion as the basis for limiting the evidentiary use of the chemical test result. Rather, Meurer contends that Goldstein's answers constituted a misstatement of the implied consent law and, therefore, Meurer based his decision whether to submit to the test on inaccurate information. Thus, we reject the State's interpretation of Meurer's appellate argument. This is not a "subjective confusion" case.

¶9 In support of his argument that Goldstein's answers to his questions misstated the implied consent law, Meurer relies on the well-established law that an OWI suspect is entitled to adequate information regarding his or her rights under the implied consent law. *See* ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 693-94, 524 N.W.2d 635 (1994); *see also* ***State v. Schirmang***, 210 Wis. 2d 324, 330, 565 N.W.2d 225 (Ct. App. 1997). Meurer's argument requires that we apply this law to the undisputed facts of this case. That exercise presents a question of law that we review independent of the trial court. ***State v. Sutton***, 177 Wis. 2d 709, 713, 503 N.W.2d 326 (Ct. App. 1993). However, despite our de novo standard of review, we value a trial court's decision on a question of law. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).[2]

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[2] A portion of Meurer's brief argues why we should decide this case on the basis that Goldstein, in fact, made the statement to Meurer. We need no persuasion on this point. The trial court decided the issue assuming that Goldstein made the statement. As noted earlier, Goldstein was not asked about this statement in his direct or cross-examination. Nor did the State call Goldstein as a rebuttal witness to address this matter after Meurer testified to the statement during the defense portion of the hearing.

¶10 In rejecting Meurer's motion, the trial court stated, "there is no basis to conclude that whatever was told to the defendant affected his decision to consent to the test." We fully agree because, like the trial court, we see no linkage between Goldstein's answers to Meurer's questions and the implied consent phase of the investigation.[3] Goldstein simply answered Meurer's questions, advising that although Meurer had passed the field sobriety tests, the investigation would continue at the hospital because Goldstein believed that Meurer's ability to drive was impaired. Thereafter, Goldstein correctly informed Meurer under the implied consent law at the hospital, including the warnings as to the consequences for refusing the test. Under those circumstances, no reasonable person would conclude that he or she was without a choice in the matter.

CONCLUSION

¶11 We uphold the trial court's ruling denying Meurer's pretrial motion to limit the evidentiary use of the chemical test result. Consequently, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

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[3] Neither Meurer's brief-in-chief nor his reply brief fills this void.