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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2014AP1696-FT

IN THE MATTER OF THE REFUSAL OF SCOTT S. MAHLER:

COUNTY OF EAU CLAIRE,

Plaintiff-Respondent

v.

SCOTT S. MAHLER,

Defendant-Appellant.

APPEAL FROM AN ORDER FINDING THE REFUSAL TO TAKE A TEST FOR INTOXICATION UNREASONABLE IN EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE JON M. THEISEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

DID SCOTT MAHLER REFUSE TO TAKE A TEST FOR INTOXICATION AND WAS THAT REFUSAL UNREASONABLE?

The Trial Court Decided: Yes

STATEMENT OF FACTS

On June 23, 2014, a refusal hearing was held (16) following the defendant's request (4). At that hearing, Travis Holbrook, a sergeant with the Eau Claire County Sheriff's Office, testified that on February 22, 2014, at approximately 2:45 a.m., while driving westbound on Galloway Street, in the city and county of Eau

Claire, he saw an approaching eastbound vehicle without its headlights illuminated and swerving in its lane of travel (16:4-6). Sgt. Holbrook initiated a traffic stop by activating his emergency lights and siren and the vehicle eventually stopped in the 1900 block of Galloway Street (16:6-7). The driver of the vehicle was Scott Mahler (16:7). Sgt. Holbrook noted that the interior of the vehicle smelled of intoxicants and Scott Mahler was the only occupant of the vehicle (16:7-8). Sgt. Holbrook advised Mahler of the reason for the traffic stop and Mahler responded by turning on his headlights and then sighing (16:9). Sgt. Holbrook also noted that Mahler's speech sounded slurred and Mahler seemed confused when asked to retrieve his driver's license (16:10). Sgt. Holbrook asked Mahler if he had consumed any intoxicants before driving (16:11). Mahler first replied that he'd had none, then admitted that he'd had "a few" (16:11).

Sgt. Holbrook asked Mahler to exit the vehicle in order to perform standard field sobriety tests (16:11). When Mahler stepped out of the vehicle, he appeared to Sgt. Holbrook to be unsteady on his feet and to have problems with his balance, as Mahler used the door to steady himself while exiting the vehicle and Mahler's upper body swayed from side-to-side and front-to-back after he got out of the vehicle (16:11-12). Sgt. Holbrook conducted standardized field sobriety tests, observing four out of six possible clues on the HGN test – lack of smooth pursuit and distinct nystagmus at maximum deviation in each eye (16:13). He then observed seven out of eight possible clues during the walk and turn test (16:13-

15). Next Sgt. Holbrook witnessed three out of four possible clues on the one-leg stand test (16:16). Sgt. Holbrook then asked Mahler for a breath sample for a preliminary breath test which recorded a value of approximately .23 percent (16:16). Sgt. Holbrook then placed Mahler under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, and read Mahler the Informing the Accused form "verbatim how it's printed on the page" (16:16-17). Sgt. Holbrook testified that Mahler did not ask him to repeat any of it (16:34), did not ask any questions about the form (16:35) and didn't indicate in any way that he didn't understand what was read to him (16:34). Sgt. Holbrook testified that after he asked Mahler if he would submit to an evidentiary chemical test of his blood, he replied "no" (16:17). Sgt. Holbrook said that he provided Mahler with the Notice of Intent to Revoke Operating Privilege along with all the other paperwork, including citations, after the booking process at the Eau Claire County Jail (16:18).

After hearing testimony and arguments, the court found reasonable suspicion for the traffic stop based on Mahler's failure to have his headlights on (16:55-56). The court then found that Sgt. Holbrook had probable cause for the arrest based on his observations of slurred speech (16:56), Mahler's admission of having consumed alcohol after he previously denied it (16:56-57), the smell of alcohol inside the vehicle occupied by only Mahler (16:56) and "a fairly high rate" of failure on the field sobriety tests (16:57). The court accepted that Sgt. Holbrook

read Mahler the Informing the Accused form "word-for-word or verbatim" and that Mahler understood what was going on (16:58). The court then ruled that the refusal was unreasonable (16:58).

ARGUMENT

THE DEFENDANT'S REFUSAL TO TAKE A TEST FOR INTOXICATION WAS UNREASONABLE.

Standard of Review

Application of the implied consent statute to an undisputed set of facts is a question of law that the appellate court reviews de novo. State v. Rydeski, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). To the extent that the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. State v. Eckert, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996), as cited in State v. Baratka, 2002 WI App 288, ¶ 7, 258 Wis. 2d 342, 654 N.W.2d 875.

Legal Principles

Section 343.305, Wis. Stats., establishes what a law enforcement officer is required to do when a person refuses to take a test upon the request of that law enforcement officer following an arrest of that person for a violation of §346.63(1), Wis. Stats. Subsection (9)(a)(5) outlines the issues to be addressed at the Refusal Hearing. Those issues are limited to:

(a) Whether the officer had probable cause to believe the person was driving a motor vehicle while under the influence of an intoxicant and whether that person was lawfully arrested for violation of §346.63(1).

(b) Whether the officer complied with sub.(4) which requires the officer to read the precise language from the Informing the Accused form.

(c) Whether the person refused to permit the test.

Discussion

On June 23, 2014, the court heard the testimony of Sgt. Travis Holbrook, Scott Mahler and his mother Heidi Mahler at the Refusal Hearing and concluded that there was reasonable suspicion for Sgt. Holbrook to stop the vehicle driven by Scott Mahler on February 22, 2014. The court found that there was probable cause for the arrest of Scott Mahler following the administration of standardized field sobriety tests. The court also found that Sgt. Holbrook read to Scott Mahler the Informing the Accused form. Sgt. Holbrook testified that he read the entire form to Mahler verbatim and asked him if he would submit to an evidentiary chemical test of his blood. Sgt. Holbrook testified that the defendant responded to that question by saying "No". Sgt. Holbrook testified that he read the form to the defendant completely and did not vary from the language of the form. Mahler testified that he did not hear Sgt. Holbrook read him the Informing the Accused form and he did not understand what was read to him, although under those same

conditions, Mahler said he heard Sgt. Holbrook read him the pre-interrogation warning from the Alcohol/Drug Influence Report, after which he refused to answer questions (16:17-18).

What Mahler is asking in his appeal is for this Court to either overturn the trial court's findings of fact which were not clearly erroneous, or permit a "subjective confusion" defense which has been specifically rejected by the appellate courts and the Supreme Court of Wisconsin. The situation before this Court is not one in which it is alleged that Sgt. Holbrook misled Mahler by giving him an oversupply of information or erroneous information. See, *e.g.*, In the Matter of the Refusal of Eric D. Smith: Washburn County v. Eric D. Smith, 2008 WI 23, 308 Wis.2d 65, 746 N.W.2d 243, and County of Ozaukee v. Quelle, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995).

The Quelle court "reject[ed] Quelle's claim that the *Bryant* language suggests how an officer has a duty to "explain" and not merely read the information form, thereby reducing the chance that an accused driver would be "subjectively confused" by the warnings." *Id.* at 280. "Assigning any weight to the "subjective confusion" label chosen by the supreme court would contradict the legislature's conclusion that the oral delivery of information through §343.305(4) & (4m), STATS., provides appropriate protection for the accused drunk driver. Finally we note that judicial enactment of such a duty would open Pandora's box. The decision of whether the officer should have aided the confused driver could be

litigated *in absurdum*. We do not believe the supreme court intended such a result and hold to the three-part standard [used when an officer provides less than, more than, or something different from the Informing the Accused form] outlined above." *Id.* at 281.

As noted in the Quelle case, the three-part standard that is applied to assess the adequacy of the warning process under the implied consent law includes the following:

> (1) Has the law enforcement officer not met, or exceeded his 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 ability to make the choice about chemical testing?

Mahler's argument consists of three points:

(1) Sgt. Holbrook failed to comply with the first prong of Quelle by not meeting his duty under §343.305(4).

(2) The second prong of Quelle comes into question because Sgt. Holbrook didn't comply with the first prong.

(3) Since Sgt. Holbrook failed to comply with statutory requirements, it is reasonable to assume this affected Mahler's ability to make a choice about chemical testing.

The entire argument rests on Mahler's claim that Sgt. Holbrook failed to comply with the first prong of Quelle. The evidence of this failure, which was raised in the form of an argument to the court, is that Sgt. Holbrook failed to sign

the form and to have Mahler sign the form that was read to him (9:49-50), even though Sgt. Holbrook testified that he had signed the form (9:30-32) and a signed copy of the form was included in Exhibit 1. Despite the signature issue, the court concluded that Sgt. Holbrook read the Informing the Accused form to Scott Mahler. Since he did not vary from the language provided in §343.305(4) & (4m) when he read Mahler the form, and Mahler said "No" in response to the question: "Will you submit to an evidentiary chemical test of your blood?", Sgt. Holbrook complied with his duty to inform Mahler. He did not undersupply or oversupply information as he read the form verbatim. Mahler's suggestion that Sgt. Holbrook had a duty to ask Mahler whether he understood the Informing the Accused form and "whether he even heard it" being read to him (16:51-52) is not supported by the statutory language or case law. As noted in Quelle, the decision of whether Sgt. Holbrook "should have aided the confused driver could be litigated *in absurdum"*. That decision would be even more difficult when, as in this case, Sgt. Holbrook had no indication or reason to believe that Mahler was confused by anything that he had read to him.

CONCLUSION

The trial court properly decided that the Scott Mahler refused to take a test for intoxication as authorized by §343.305 of the Wisconsin Statutes, and that Mahler's refusal to take a test for intoxication was unreasonable. For the reasons

cited, the Order Finding the Defendant's Refusal to Take a Test for Intoxication Unreasonable should be upheld.

Dated this _____ day of January, 2015.

_____
Meri C. Larson
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is nine (9) pages and 1,782 words.

Dated this _____ day of January, 2015.

_____
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of January, 2015.

Respectfully submitted,

_____

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