COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2173-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES H. BARTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

HOOVER, J. James Bartz appeals an order holding that he unlawfully refused to submit to a chemical test in violation of § 343.305(9), STATS.[1] Bartz initially took a breath test. The Intoxilyzer operator lacked confidence in the test result and recommended a blood test. The arresting officer,

[1] This is an expedited appeal under RULE 809.17, STATS.

Robert Taake, read an Informing the Accused form to Bartz, allegedly notifying him that the blood test was an "alternative" test. Bartz contends that the officer's purported designation of the blood test as an "alternative" test was misleading. He further challenges the trial court's finding that Bartz refused to submit to the requested testing. Contrary to Bartz's assertion, there was no evidence presented at the refusal hearing that Taake informed Bartz that the blood test was an alternative test as indicated on the Informing the Accused. Moreover, the undisputed facts compel the conclusion that Bartz refused to take the blood test. This court therefore affirms the trial court's refusal order.

Bartz was arrested for operating an automobile while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS. Taake advised Bartz of his rights and obligations under Wisconsin's implied consent law, § 343.305(4), STATS. Bartz agreed to take a breath test on an Intoxilyzer. The operator was unable to obtain a sufficient breath sample because Bartz permitted air to escape from around the mouthpiece. The operator recommended that a different chemical test be employed to determine Bartz's blood alcohol content. Taake completed a second Informing the Accused, which contained the following question: "Will you submit to an evidentiary chemical test of your blood?" The word "blood" was written in the blank space where, on the form used before the Intoxilyzer test, the word "breath" was written. Taake explained to Bartz that he, Taake, was "changing [his] primary designation to blood." Taake then read the new form to Bartz.

Bartz initially agreed to submit to a blood test. He then stated to Taake that he was not going to be pricked by a needle. Taake explained that a blood test necessarily involved using a needle, and Bartz then indicated that he would acquiesce. At the hospital, however, once it was time for the blood to be

drawn, Bartz refused to cooperate, again indicating that he was not going to "be pricked by a needle." Taake spent several minutes explaining the test procedure to Bartz. When Bartz "still refused to cooperate," Taake noted a refusal on the form and provided Bartz with a Notice of Intent to Revoke Operating Privileges, as required by § 343.305(9), STATS. Bartz requested a refusal hearing, at which the foregoing evidence was presented.

The trial court concluded that Bartz had unlawfully refused to submit to a chemical test based on the following findings:

> 1. The officer twice gave Bartz the information required by § 343.305(4), STATS., and gave it clearly.
>
> 2. Bartz refused or did not fully comply with the breath test procedure. He was uncooperative on four occasions in blowing into the Intoxilyzer machine, based on the operator's testimony that he observed and heard air escaping from the side of Bartz's mouth while blowing into the machine.
>
> 3. There was no evidence that Bartz was confused by Taake's request that he submit to an alternative blood test; he knew it was because "the first test did not work." Bartz was not confused because the "officer made it clear that an alternative test was now necessary because of the failure of the first test …."
>
> 4. The evidence is clear, and there is no question that Bartz would not consent to being pricked by a needle.
>
> 5. Bartz's refusal was not due to any physical inability to comply, nor any physical disability or disease.

Bartz first attacks the sufficiency of the implied consent warnings that preceded the proposed blood test. He relies on the test for assessing the adequacy of the warning process under the implied consent law promulgated in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995):

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m)[2] 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, 542 N.W.2d at 200. Bartz asserts that the ***Quelle*** test is objective.

Bartz first contends the first ***Quelle*** test is met. His entire argument rests upon the allegation that, after the breath test proved unsatisfactory, "[t]he arresting officer then indicated to Mr. Bartz that he would be administering a blood test, which the officer expressly described as an *alternative* test." Bartz does not attempt to demonstrate how this assertion relates to the first ***Quelle*** factor. Appellate courts typically decline to address issues raised on appeal that are inadequately briefed. *See* ***McEvoy v. GHC***, 213 Wis.2d 507, 530 n.8, 570 N.W.2d 397, 406 n.8 (1997). Here, however, it is sufficient to observe that Taake met his duty under § 343.305(4), STATS., to provide information to Bartz when he read him the Informing the Accused before requesting that he submit to a blood test.

Bartz next argues that Taake, by reading the second Informing the Accused, provided "objectively misleading" information, thus violating the second and third prongs of the ***Quelle*** test, which Bartz seems to apply in this case as an amalgam. Taake testified at the refusal hearing that after the Intoxilyzer test result proved unsatisfactory, "[i]t was decided to take an alternative test which would be

[2] Section 343.305(4m), STATS., relates to commercial licenses and is inapplicable to this case.

the blood test ...." Bartz notes that paragraph 3 of the Informing the Accused states that "[a]fter submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer ...." Bartz contends that:

> Paragraph 3 of the Informing the Accused indicates that after submitting to chemical testing, the accused may request an *alternative* test. The language used by both the arresting officer and the Informing the Accused indicated to defendant-appellant that the blood test was an alternative, not a primary test. After having already submitted to a primary breath test, the information provided reasonably leads to the conclusion that it was the accused who could determine whether he wanted the *alternative* blood draw. Designating the blood test as an *alternative* test was objectively misleading, meeting both the second and third prongs of the *Quelle* test.

There are several reasons Bartz's position is unpersuasive. First, the information in paragraph was not objectively erroneous[3] because Bartz *did* have the right to request an alternate test. The recitation of paragraph 3 was not objectively misleading because it unambiguously applies to a test the arrestee requests; Taake was the only one requesting that a blood test be taken. Perhaps most significantly, there is nothing in the record to suggest that Taake referred to the blood test as an "alternative" test when describing it to Bartz.[4] To the contrary, the only evidence presented was that Taake explained to Bartz that he was "changing [his] *primary* designation to blood." (Emphasis added.) Thus, the warning Taake gave Bartz does not implicate the second ***Quelle*** factor. Because

[3] "The term 'misleading' in the second ***Quelle*** prong was meant by this court to be synonymous with the term 'erroneous.'" ***State v. Ludwigson***, 212 Wis.2d 871, 875, 569 N.W.2d 762, 764 (Ct. App. 1997).

[4] "Alternative" is the adjective Taake used to describe the blood test *in court*.

there is no evidence that the information given to Bartz was misleading or erroneous, the third ***Quelle*** test is inapplicable.[5]

Bartz next argues that he did not refuse to submit to a blood test. This court disagrees. Bartz's unequivocal statement that he would not permit a medical procedure that he was informed was necessary to the blood test constituted a refusal to submit to the test.

Taake met his duty under § 343.305(4), STATS., to provide information to Bartz when he read the Informing the Accused to him before requesting that he submit to a blood test. There is no evidence in the record that the information Taake read to Bartz from the form was erroneous or misleading. Finally, when Bartz, understanding that blood would be drawn with a needle, refused to be "pricked by a needle," he unequivocally refused the blood test. The trial court's refusal order is therefore affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[5] This court thus need not consider Bartz's dubious contention that all three prongs of the ***Quelle*** standard are objective.