COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1123 **Cir. Ct. No. 01 CT 5644**

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

IN RE THE MATTER OF THE REFUSAL OF RANDOLPH A. CLARK:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDOLPH A. CLARK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

¶1 FINE, J. Randolph A. Clark appeals from an order revoking for one year his privilege to drive in Wisconsin after the trial court found unreasonable

Clark's refusal to submit to the chemical testing of his blood-alcohol level.[1] We affirm.

I.

¶2 Clark was driving the wrong way on a one-way street at 12:40 a.m. when he was stopped by a Milwaukee police officer, who suspected him of driving while drunk. After Clark failed some field-sobriety tests, the officer arrested him. After the officer arrested Clark and took him to the police station, the officer read to him the "Informing the Accused" form. The officer testified that he read the form "[w]ord for word." Clark admitted during his testimony that he refused to submit to a chemical testing of his blood-alcohol level. He claims, however, that the officer confused him about his rights and responsibilities under the implied-consent law.

¶3 During Clark's direct-examination as an adverse witness called by the State, Clark told the trial court that "while the officer and I were at the vehicle," the "officer asked me if I was going to, ah, take the breath -- Breathalyzer test at this time." Clark testified that he told the officer that he would not, and that, later, when the officer read the "Informing the Accused" form to him at the police station, Clark again said that he would not take the test because he "was remaining consistent with" his "earlier comments" that he would not so submit. When his lawyer examined him, however, Clark refined his earlier testimony that the "officer asked me if I was going to, ah, take the breath -- Breathalyzer test at this time" to: "The officer asked me, 'Mr. Clark, are you going to refuse the breath test at this time?'" Clark testified that he replied "Yes." Clark then had the following colloquy with his lawyer:

[1] Clark's notice of appeal erroneously indicates that it is from the trial court's "Order of Judgment."

Q. Was that question asked in a leading manner, as you just imitated it?

A. It seemed to me at the time that it was an option and the other tests that we just performed were not options.

Q. So is it your testimony then that you made certain assumptions based on how the question was asked?

A. Yes.

Q. What assumptions did you make?

A. That it was normal to do that.

Q. And what do you mean by that?

A. Normal to not take the breath test at that time.

When his lawyer asked why he refused to take the test at the police station after the "Informing the Accused" form had been read to him, Clark repeated that he "was remaining consistent with my response to the officer in the field." His lawyer then asked him the following question and received the ensuing answer:

Q. The penalties threatened in the Informing the Accused form, did you believe those had already been invoked against you?

A. Based on the arrest, yes.

When asked by the State where the "Informing the Accused" form indicated that his right to drive in Wisconsin had already been revoked by the arrest, Clark could not point to any language in the form but claimed that that "was exactly what I interpreted." Later, when his lawyer resumed the examination, Clark answered the following question with a "yes": "The -- the sentence [from the "Informing the Accused" form] says, 'If you refuse to take any tests that this agency requests' did you take your question and answer with the officer [*sic*] to be a request and a decline?"

¶4 The officer who arrested Clark testified that after Clark told him that he would not submit to a test of his blood-alcohol level:

> I explained to him that it would be an additional charge, and I tried telling him that it was to his benefit to do the breath test, and I told him he could read it over. I don't recall if he read it himself or if -- or not, um, but I know for a fact that I tried convincing him to take the breath -- for -- 'cuz it would be in his best interest to him.

The officer said that this conversation took place "in the Intoximeter room," and that although he did not "recall" asking Clark earlier whether Clark would submit to a test, it was "possible."

¶5 In finding that Clark unlawfully refused to submit to a test of his blood-alcohol level, the trial court found that the officer read the "Informing the Accused" form "word for word" to him, and that "[w]hether or not something was said on the street" about whether Clark would or would not submit to the test was not entitled to "that much weight."

II.

¶6 The requirement that drivers in Wisconsin submit to a test of their blood-alcohol level when suspected of driving while impaired was, of course, designed to "combat drunk driving." ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646, 652 (1999). Thus, the law must be construed "liberally" to effectuate that purpose. ***Id.***, 227 Wis. 2d at 224–225, 595 N.W.2d at 652. Although a trial court's findings of fact may not be set aside unless they are "clearly erroneous," WIS. STAT. RULE 805.17(2), a determination whether a refusal to submit to a blood-alcohol test is proper or improper "is a question of law" that we review *de novo*, ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762, 764 (Ct. App. 1997).

¶7 Clark contends on this appeal that the arresting officer's colloquy with him in the field made Clark believe that he had nothing to lose by refusing to take the blood-alcohol-level test. He argues that under ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), his refusal was thus justified.

¶8 In ***Quelle***, we held that a driver may not be found to have unlawfully refused to take a test of his or her blood-alcohol level if the officer either withholds information that must be given to the driver, or tells something to the driver that is wrong, *and* what the officer did "affected his or her ability to make the choice." ***Id.***, 198 Wis. 2d at 280, 542 N.W.2d at 200. *See also* ***State v. Schirmang***, 210 Wis. 2d 324, 331, 565 N.W.2d 225, 228 (Ct. App. 1997) (the "misinformation" must affect driver's "ability to make a rational choice"). "The defendant has the ultimate burden of proving the causation element to a preponderance of the evidence." ***Ludwigson***, 212 Wis. 2d at 876, 569 N.W.2d at 765. Additionally, the analysis focuses on what a reasonable driver would comprehend, not the defendant's subjective, *post hoc* self-serving recollections. ***Reitter***, 227 Wis. 2d at 229, 595 N.W.2d at 654; ***Quelle***, 198 Wis. 2d at 280–281, 542 N.W.2d at 200.

¶9 Clark claims that the officer's statement to him that it was in his "best interest" to take the blood-alcohol-level test was erroneous, and, additionally, as noted from his testimony, that also he thought that his driving privileges had already been revoked so that he faced no additional penalties by not taking the test. Clark's first contention falters on logic; he has not explained how the officer's comment that it would be good for him to take the test persuaded him *not* to take the test. He has thus not satisfied his burden in connection with his first contention. As for Clark's second claim, he points to nothing in either the

"Informing the Accused" form or in what the officer told him, either in the field or at the police station, that supports his alleged belief that his operating privileges had already been automatically revoked by his arrest; as noted, a mere subjective claim of confusion is not enough.

By the Court.—Order affirmed.

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