COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2563 **Cir. Ct. No. 2007CV995**

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

IN THE MATTER OF THE REFUSAL OF SCOTT R. WICK:

VILLAGE OF HARTLAND,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. WICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: RALPH RAMIREZ, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] In Wisconsin, a police officer wishing to perform a chemical test for intoxication upon a driver must first provide certain information so that the driver can give his or her informed consent. WIS. STAT. § 343.305(4). In ***State v. Piddington***, 2001 WI 24, ¶22, 241 Wis. 2d 754, 623 N.W.2d 528, our supreme court established the rule that an officer must use methods that would "reasonably convey" these warnings. The appellant in this case, Scott Wick, who is hearing impaired and wears hearing aids, contends that the officer who cited him for refusing a chemical test failed to use methods that would reasonably convey the warnings. We disagree and affirm. On the witness stand, Wick and the arresting officer told two very different stories about what happened on the night of Wick's arrest. The trial court believed the officer. We do not reverse factual findings unless they are clearly erroneous, and the trial court's are not. Under the version of the facts adopted by the trial court, the officer had no reason to think that Wick could not comprehend the spoken warnings, and thus no reason to think that the spoken warnings were not reasonably conveyed.

¶2 There are a few basic facts which are uncontested. On the evening of September 18, 2006, in Hartland, Wick hit the bumper of a parked car with his SUV while attempting to parallel park outside a restaurant. He and an acquaintance looked at the vehicles but did not see any damage, so Wick abandoned the spot and parked somewhere else. Wick went into the restaurant.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

¶3 An unidentified person who had witnessed the collision called the police. An officer was dispatched to the scene, and he found Wick inside the restaurant. The officer asked Wick to accompany him outside, where he showed him the damage that had been done to the parked car and began to question him. Upon detecting a "moderate" odor of intoxicants and noticing other indications that Wick might be intoxicated, the officer began to perform field sobriety tests on Wick. Upon completion of the field tests[2] as well as a preliminary breath test that showed a blood alcohol content of .088, the officer placed Wick under arrest.

¶4 The officer took Wick to the hospital in Oconomowoc, where he issued him a citation for operating while intoxicated. Here Wick's account begins to conflict sharply with that given by the officer. Wick's side of the story is as follows: Wick's hearing impairment makes it difficult or impossible for him to understand speech in some circumstances, particularly if the speaker is speaking quickly or if Wick cannot see the speaker's lips. The officer began to read him the Informing the Accused form. However, the officer was speaking so quickly that Wick could not understand. When Wick told the officer that he was hard of hearing and did not understand what the officer had said, the officer offered to read the form more loudly. Wick asked if he could simply read the form himself. The officer gave Wick the form to read. However, Wick is farsighted, and he could not read the form at arm's length without glasses. Wick asked the officer if he could get some reading glasses but the officer declined the request. Wick therefore put the form on the floor in front of him so as to read it better. After a

[2] Wick alleges some deficiencies in the officer's testing methods, and also notes that he consumed at least some beer at the restaurant, after he had ceased driving. However, Wick does not challenge the existence of probable cause to arrest, so we will not further discuss the issue.

short time the officer pulled the form away and stated that Wick was refusing to consent to a chemical test. Over Wick's objection that he was not refusing, the officer handcuffed him and took him to the police station. In Wick's account, he told the officer about his hearing impairment "numerous times" in the course of these events.

¶5 The officer's version sharply differs, as follows: Wick never told him he did not understand the reading of the form, but simply said that he wanted to read it himself. After Wick asked for his reading glasses and the officer stated that he did not have the glasses, Wick placed the form on the floor, but the officer did not believe that Wick was "making a serious attempt to read the form." Both before and after the form was read to him, Wick responded that he would not consent to a test without having his attorney present, and this was the reason that the officer considered him as having refused the test.[3] The officer stated that during his encounter, he had no difficulties communicating with Wick. He testified that he did not know whether Wick was wearing hearing aids on the night of the arrest.

¶6 At the end of two days of testimony, the circuit court made its ruling from the bench. It noted that, by its own observation, Wick's hearing aids "are flesh-colored, they're in his ear canal, and I respectfully disagree with [defense counsel] … they're not readily seen. They're not easy to see." The court noted that despite Wick's courtroom testimony that he could not understand the officer, the officer had testified that Wick understood all of the directions given to him in

[3] *See* ***State v. Neitzel***, 95 Wis. 2d 191, 204-05, 289 N.W.2d 828 (1980) (even though refusal to take a chemical test is conditioned on the accused's willingness to reconsider after conferring with counsel, a refusal has occurred under the statute).

the field sobriety tests. Therefore, the court concluded, this case is distinguishable from ***Piddington*** because the officer had no objective reason to believe that Wick was failing to comprehend his speech.

¶7 This appeal presents both legal and factual questions. We will uphold the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. §§ 805.17(2), 972.11(1). The proper interpretation and application of WIS. STAT. § 343.305(4) is a question of law that we review de novo. ***Piddington***, 241 Wis. 2d 754, ¶13.[4]

¶8 Wick contends on appeal, as he did in the trial court, that the officer failed to use methods that would reasonably convey the statutory warnings as required by ***Piddington***. In that case, a state trooper arrested a deaf motorist on suspicion of drunk driving. ***Piddington***, 241 Wis. 2d 754, ¶¶2, 5. During the course of the investigation and arrest, the trooper communicated with Piddington by way of an interpreter (Piddington's passenger), orally (Piddington could speech-read), and through handwritten notes. ***Id.***, ¶¶2-5. When a police officer with some working knowledge of American Sign Language (ASL) became available, the trooper arranged for himself and Piddington to meet her at a hospital. ***Id.***, ¶5.

[4] On the issue of whether the officer had probable cause to believe that the driver was intoxicated, *see* WIS. STAT. § 343.305(9)(a)5.a., the plaintiff at a refusal hearing has a particularly low burden of proof; the trial court need only determine that the arresting officer's account is plausible. ***State v. Wille***, 185 Wis. 2d 673, 681-82, 518 N.W.2d 325 (Ct. App. 1994). This in turn affects the appellate court's standard of review. However, since the issue in this case is not the existence of probable cause but whether the arresting officer complied with § 343.305(4), *see* § 343.305(9)(a)5.b., we will apply the "clearly erroneous" standard to the trial court's findings of fact.

¶9 At the hospital, the officer communicated with Piddington both orally and via ASL. ***Id***., 916. Piddington was given the Informing the Accused form. He was told to read the form and initial next to each paragraph only if he understood it. ***Id.*** He did so, and the police officer also read the form to him (the trooper initially tried to read Piddington the form but Piddington indicated that he could not read the trooper's lips, and so the officer took over, without objection from Piddington). ***Id.*** Piddington indicated that he would consent to a blood test, the result of which was a BAC of .206. ***Id.***

¶10 After being charged with OWI, Piddington moved to suppress the blood test results on the grounds that he had not understood the warnings he was given. ***Id.***, ¶¶8, 10. On appeal, the supreme court held that the determinative question was whether the police "used reasonable methods which would reasonably convey the warnings and rights in [WIS. STAT.] § 343.305(4)." ***Id.***, ¶22. The State (or, presumably, as in the instant case, other plaintiff) has the burden to show that such reasonable methods were used. ***Id.*** Whether methods are reasonable depends on the circumstances facing the arresting officer. ***Id.***, ¶23. The determination is based on the objective conduct of the police officer, and not on the subjective comprehension of the accused driver. ***Id.***, ¶21. In fact, whether the accused driver actually comprehends the warnings is "irrelevant." ***Id.***, ¶32 n.19.

¶11 Wick acknowledges the ***Piddington*** framework. As we see it, his basic argument is about the reasonableness of the officer's actions under the facts and circumstances presented. He argues that the arresting officer here "knew or should have known" of his hearing impairment, and therefore had a duty "reasonably to accommodate" the impairment, including a duty to "look further" in order to determine what would be required to adequately convey the warnings.

He posits that an officer, seeing that a suspected drunk driver is wearing hearing aids, should deduce that there may be a problem communicating the warnings in the usual way. He states that his hearing aids "should have been noted" by the officer here and that the failure to note them was "unreasonable." Wick further suggests that the officer "ignore[d]" evidence of his inability to hear during the interaction at the hospital, and that the trial court mistakenly justified this on the grounds that Wick could apparently comprehend the officer, and others, during the earlier events at the restaurant. Wick finally argues that in view of his farsightedness, the officer should have understood that he needed to place the Informing the Accused form on the floor in order to read it, and should have given him more time to do so.

¶12 We agree with the general principles stated by Wick: under ***Piddington***, an officer has a duty to use means that would reasonably convey the warnings under the circumstances at the time of arrest. ***Piddington***, 241 Wis. 2d 754, ¶23. We think that a duty to act reasonably under the circumstances clearly includes a duty to *take note* of the relevant circumstances. A police officer is not omniscient and cannot be expected to know everything that is going on, but neither can the officer willfully or unreasonably ignore facts suggesting that his or her suspect may not be able to comprehend spoken English. Further, we realize that a person with a hearing impairment who comprehends spoken language well in one situation may have trouble comprehending it in another. Last, we agree that if a person with a disability can read the Informing the Accused form but needs some simple accommodations to do so, allowing those accommodations is a component of reasonable action by the officer under the circumstances.

¶13 The trouble is that Wick is relying on his own version of the facts to argue that the above principles were violated here. He argues that his hearing aids

were visible enough that the officer should have noted them on the night in question. He fails, however, to note that the trial court found that the aids were "not readily seen" and "not easy to see." He argues that the officer should have noticed his hearing difficulties at the hospital, but fails to address the fact that the officer testified that there were no communication problems at any time. He argues that the officer should have allowed him to finish reading the form, but ignores the officer's testimony that Wick himself was not making a good-faith effort to read the form—and was instead continuing a pattern of refusing to cooperate with the officer's request for a chemical test.

¶14 The circuit court, in its oral ruling, correctly inquired as to what facts were available to the officer that would suggest how Wick could not comprehend the oral warnings. Though the court never came out and called Wick's version of events incredible, it clearly did give credence to the officer's version, never mentioning Wick's claim to have told the officer "numerous times" of his hearing impairment. Instead, the court found that there was nothing that would suggest to the officer that any hearing impairment existed. And, if the officer had no reason to know of any inability to comprehend the oral instructions, he also did not have any reason to think that Wick needed to read the form on his own in order to understand it.

¶15 On appeal, we are bound by the trial court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). Where there is conflicting testimony, it is for the trial court, not for this one, to assess credibility. *See* ***id.*** Under the trial court's accepted version of the facts, the circumstances facing the officer suggested that Wick could hear and comprehend his oral warnings. As such, the officer used means that would "reasonably convey" the warnings under the circumstances. *See* ***Piddington***, 241 Wis. 2d 754, ¶22. Since the warnings

were reasonably conveyed, Wick's continued insistence on having his attorney present for a chemical test constituted a refusal. *See* ***State v. Neitzel***, 95 Wis. 2d 191, 204-05, 289 N.W.2d 828 (1980).

By the Court.—Order affirmed.

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