

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 10, 1996

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

NOTICE

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

No. 96-1265

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY A. KIEFER,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

DYKMAN, P.J.¹ Tracy A. Kiefer appeals from an order revoking his operating privileges for one year, pursuant to § 343.305(10)(b)2, STATS., for refusing to submit to a breath test. Kiefer argues that: (1) he was inadequately warned under the informed consent law, § 343.305, STATS.; (2) his due process rights were violated because the Informing the Accused form is confusing; and (3) the officer did not read him the Informing the Accused form prior to

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

requesting him to submit to chemical testing. We reject Kiefer's arguments, and therefore affirm.

BACKGROUND

On September 16, 1995, at approximately 11:50 p.m., Dane County Sheriff's Deputy Michelle Shelhamer observed Kiefer's vehicle cross the center line several times. She stopped Kiefer's vehicle. Upon noticing that Kiefer's eyes were bloodshot and smelling a strong odor of intoxicants, Deputy Shelhamer asked Kiefer to perform several field sobriety tests. Deputy Shelhamer then administered a preliminary breath test, which registered .19. She arrested Kiefer for operating a motor vehicle while under the influence of an intoxicant and took him to the Public Safety Building.

Deputy Shelhamer testified that she took Kiefer into the intoxilyzer room, read him the Informing the Accused form and requested a chemical test of his breath. Kiefer initially consented to the test. When Deputy Sanke attempted to administer the test, however, Kiefer bit the mouthpiece and did not make a tight seal around it as instructed. He then backed away from the intoxilyzer. Deputy Sanke terminated the test and marked it as a refusal.

The trial court found that Kiefer was given the Informing the Accused form at 12:45 a.m., the Notice of Intent to Suspend Operating Privileges at 1:05 a.m., the Administrative Review Request form at an unspecified time, but after the notice of suspension, and the Notice of Intent to Revoke at 1:15 a.m. Deputy Shelhamer completed the Alcohol Influence Report at 1:30 a.m.

At the refusal hearing on April 22, 1996, Kiefer argued that the State failed to establish that Deputy Shelhamer had complied with Wisconsin's implied consent law procedures. The circuit court held that Kiefer had been properly informed and had unlawfully refused to submit to chemical testing. The circuit court ordered that Kiefer's operating privileges be revoked for one year. Kiefer appeals.

QUELLE TEST

Kiefer argues that the order revoking his operating privileges should be reversed because the arresting officer did not adequately comply with the requirements of the informed consent law, § 343.305, STATS. The application of a statute to a particular set of facts is a question of law, which we review *de novo*. *DOR v. Sentry Fin. Servs. Corp.*, 161 Wis.2d 902, 910, 469 N.W.2d 235, 238 (Ct. App. 1991).

In *County of Ozaukee v. Quelle*, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995), we established a three-part test for assessing the adequacy of the warning process under the implied consent law:

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

Id. at 280, 542 N.W.2d at 200. If all three elements of the *Quelle* test are satisfied, the officer has failed to comply with the statutory requirements of the informed consent law, and the driver's operating privileges cannot be revoked for refusing to submit to chemical testing. See *id.* at 278-79, 542 N.W.2d at 199-200; *State v. Zielke*, 137 Wis.2d 39, 48-49, 403 N.W.2d 427, 431 (1987).

Section 343.305(9), STATS., provides that the penalty for refusal is judicial revocation, not suspension. Deputy Shelhamer exceeded her duty under § 343.305(4) by providing Kiefer with the Notice of Intent to Suspend Operating Privileges, and this information was misleading because Kiefer was not suspended for refusing to submit to testing. Therefore, the first and second prongs of the *Quelle* test are satisfied.

Regarding the third prong of the *Quelle* test, Kiefer argues that he refused to submit to the chemical breath test because the notice of suspension indicated he had already been suspended for six months. The trial court, however, found that Kiefer was given the notice of suspension *after* he refused to submit to the second test. We will uphold the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.

The trial court based its findings primarily on the times that Deputy Shelhamer had indicated on the various forms. The trial court noted that its findings were consistent with the testimony of Deputy Shelhamer. The court also concluded that, given Kiefer's state of intoxication after arrest, his testimony as to the sequence of events in the intoxilyzer room was somewhat suspect. When the trial court acts as the finder of fact, "it is the ultimate arbiter of both the credibility of witnesses ... and the weight to be given to each witness' testimony." *In re Estate of Czerniejewski*, 185 Wis.2d 892, 898, 519 N.W.2d 702, 704-05 (Ct. App. 1994) (citations omitted). The trial court's findings are not clearly erroneous, and therefore we will not set them aside.

Kiefer had already refused to take the test when the notice of suspension was provided to him. Therefore, the failure of Deputy Shelhamer to properly inform him did not affect his ability to make a choice about chemical testing. As Kiefer had already decided to refuse testing prior to receiving the misleading information, the third prong of the *Quelle* test is not satisfied. Therefore, Kiefer's refusal was unlawful and his operating privileges were properly revoked.

DUE PROCESS

Kiefer argues that the Informing the Accused form is confusing and that it is a due process violation to revoke his operating privileges due to his confusion in the interpretation of the form. Complaints about the adequacy of the Informing the Accused form are questions of law, which we review without deference to the trial court. *State v. Drexler*, 199 Wis.2d 128, 136, 544 N.W.2d 903, 906 (Ct. App. 1995).

In *Village of Oregon v. Bryant*, 188 Wis.2d 680, 524 N.W.2d 635 (1994), the Wisconsin Supreme Court held as a matter of law that the informed consent law and the Informing the Accused form are not contradictory or

misleading. *Id.* at 693-94, 524 N.W.2d at 640. The court concluded "that the only basis asserted as a violation of due process—that the accused was either misinformed or the statutes were hopelessly confused and contradictory—is without foundation." *Id.* at 692, 524 N.W.2d at 640. Likewise, we conclude that Kiefer's due process rights were not violated.

READING OF THE INFORMING THE ACCUSED FORM

Kiefer argues that the officer did not read him the Informing the Accused form prior to requesting him to submit to chemical testing, as required by § 343.305(4), STATS. The trial court's findings contradict his contention, however, as the court found that "[Kiefer] refused to take the test *after* he was given the information on the informing the accused document." (Emphasis added.) The trial court's finding is supported by the testimony of Kiefer himself, who specifically recalled being read the Informing the Accused form. We uphold the court's finding because it is supported by the evidence and is not clearly erroneous. Therefore, Kiefer was sufficiently informed under § 343.305(4).

By the Court.—Order affirmed.

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