COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0282

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

IN THE MATTER OF THE REFUSAL OF SALLY S. BOERNER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SALLY S. BOERNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: WILLILAM F. HUE, Judge. *Affirmed.*

DYKMAN, P.J.[1] Sally S. Boerner appeals from an order in which the trial court found that she refused to submit to a chemical test in violation of

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

§ 343.305(9), STATS., as well as from an order denying her motion for relief from the order. Boerner argues that she did not refuse to submit to the test. She contends that she initially agreed to the test but became confused after Deputy Gukich read the "Informing the Accused" form to her. We conclude that subjective confusion is not a defense for failing to submit to a chemical test, and that Boerner's responses amount to a refusal. Boerner also argues that, even if she did refuse to submit to the chemical test, the refusal order is inequitable because the State ultimately obtained a sample of her blood. We disagree. Accordingly, we affirm.

BACKGROUND

On September 21, 1997, Sheriff's Deputy Gukich arrested Boerner for operating a motor vehicle while intoxicated. At the scene of the traffic stop, Deputy Gukich requested that Boerner submit to a preliminary breath test (PBT). Boerner declined. At that point, Gukich informed her that she would need to submit to a chemical test of her blood, and she said "okay." While in the squad car, Gukich read Boerner the "Informing the Accused" form. At that point, Boerner became confused, believing that she already consented to the blood test. Gukich then tried to explain the informed consent law to her, particularly the fact that her operating privileges would be revoked if she refused to submit to the test. Gukich then again asked Boerner if she would submit to an evidentiary chemical test. Boerner stated that she was still unsure and wanted to think about it for a while. Gukich then drove toward Jefferson.

As they approached the Jefferson city limits, Gukich pulled the squad car to the side of the road and once again asked Boerner if she would submit to a chemical test of her blood. Boerner stated that she was scared and did not

understand what was going on. Gukich construed Boerner's confusion as a refusal. Gukich was then instructed by a supervisor to transport Boerner to a health care facility and have a sample of her blood drawn for evidentiary testing. Boerner willingly submitted to that test.

Boerner promptly requested a refusal hearing. The trial court concluded that Boerner's indecisiveness constituted an unreasonable refusal. The trial court also denied Boerner's request for relief from the order. Boerner now appeals.

DISCUSSION

1. *Refusal to Submit*

The first issue is whether Boerner refused to submit to the chemical blood test. The question of whether an individual refused to submit to a chemical test requires us to apply the implied consent statute to the facts of a particular case, which is a question of law that we review *de novo*. *See* ***Olen v. Phelps***, 200 Wis.2d 155, 160, 546 N.W.2d 176, 180 (Ct. App. 1996).

The implied consent law, set out in § 343.305(2), STATS., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content. *See* ***State v. Rydeski,*** 214 Wis.2d 101, 109, 571 N.W.2d 417, 419 (Ct. App. 1997).[2] Once a person has been properly informed of the implied consent law, that person must

[2] The purpose behind the implied consent law is to facilitate the gathering of evidence against drunk drivers. ***State v. Neitzel***, 95 Wis.2d 191, 203, 289 N.W.2d 828, 835 (1980). The law is designed to secure convictions and get drunk drivers off the highways. ***State v. Brooks***, 113 Wis.2d 347, 356, 335 N.W.2d 354, 355 (1983). The statute is to be liberally construed to effectuate that purpose. ***State v. Scales***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974).

promptly submit or refuse to submit to the required test. ***Id.*** at 109, 571 N.W.2d at 420 (quoting ***State v. Neitzel***, 95 Wis.2d 191, 205, 289 N.W.2d 828, 835 (1980)). Any failure to submit to the test, other than because of physical inability, is an improper refusal that invokes the penalties of the statute. ***Id.*** at 109, 571 N.W.2d at 419.

Boerner contends that after she was stopped, she informed Gukich that she was willing to submit to a blood test. This statement, however, was made before Gukich read her the "Informing the Accused" form. ***Rydeski*** holds that an accused must be informed about the implied consent statute before their response is considered binding. ***Rydeski***, 214 Wis.2d at 109, 571 N.W.2d at 420. We conclude that Boerner was not "informed" about the implied consent statute until after Gukich read her the entire "Informing the Accused" form. After Gukich read her the form and asked her whether she wanted to submit to the test, Boerner stated that she was unsure and needed time to think about it. This hesitation amounts to a refusal. *See* ***Rydeski***, 214 Wis.2d at 109, 571 N.W.2d at 420.

Boerner also argues that after Gukich read her the form, she became confused. Subjective confusion, however, is not a recognized defense for failing to submit to chemical test under § 343.305, STATS. *See* ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995). In ***Quelle***, the court stated that all the information the accused needs to make his or her decision is adequately provided within the "Informing the Accused" form, which is read by the officer. ***Id.*** at 283, 542 N.W.2d at 201. Any confusion arising from the reading of the form is of the accused's own making. The officer is not required to provide additional explanation of the law if the driver remains confused after the officer reads the form to the driver. *See* ***id.*** at 281, 542 N.W.2d at 200.

The only defense to a refusal, absent a physical inability to submit, is that the officer tainted the warning process under the implied consent law. The ***Quelle*** court established a three-part standard for courts to apply when assessing the adequacy of the warning process. The test is as follows: (1) whether the law enforcement officer has not met, or exceeded his or her duties under §§ 343.305(4) and (4m), STATS., to provide information to the accused driver; (2) whether the lack or oversupply of information is misleading; and (3) whether the failure to properly inform the driver affected the driver's ability to make the choice about chemical testing. ***Quelle,*** 198 Wis.2d at 280, 542 N.W.2d at 200.

Deputy Gukich read the "Informing the Accused" form to Boerner. She said that she didn't understand and wanted time to think about it. He re-read portions of the form to aid in her understanding but was unsuccessful. As they approached the Jefferson city limits, Gukich pulled over and asked her again whether she would submit to the test. She again stated that she was unsure and still wanted to think about it. Gulick stated that he needed a "yes" or a "no." Gukich testified that Boerner then said "no."

While Gukich may have been repetitious when he read portions of the form more than once, he did not exceed his duty or mislead Boerner by oversupplying her with information. He simply was trying to get her to understand the implied consent law. We also are satisfied that Gukich did not mislead Boerner as to her rights under the statute when he informed her that her probation officer had placed a "hold" on her for violating the terms of her probation. We therefore conclude that Boerner was properly informed of her options under the statute, and there is no evidence that anything she was told was erroneous or misleading. Consequently, we need not apply the third prong of the ***Quelle*** standard.

Boerner also argues that her responses should not be construed as a refusal because she voluntarily submitted to the test once they arrived at the testing facility. We disagree. Boerner's response after Gukich read her the form and asked whether she would submit to a chemical test was, for all intents and purposes, a refusal. It is irrelevant that she later changed her mind and submitted to the test. *See* ***Rydeski***, 214 Wis.2d at 109, 571 N.W.2d at 420.[3]

2. *Request for Relief from Inequitable Order*

Boerner also argues that, even if she did refuse to submit to the test, the refusal order was inequitable because the State ultimately obtained a sample of her blood.[4] Boerner relies primarily on ***State v. Brooks***, 113 Wis.2d 347, 335

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[3] In ***State v. Bohling***, 173 Wis.2d 529, 494 N.W.2d 399 (1993), *cert. denied*, 510 U.S. 836 (1993), the supreme court held that, as long as certain elements are met, the State is entitled to a sample of the driver's blood regardless of whether he or she voluntarily submits to the testing. The court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a permissible warrantless blood draw at the direction of a law enforcement officer under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. ***Id.*** at 533-34, 494 N.W.2d at 400. We are satisfied that all four of the ***Bohling*** factors have been met. First, there is no dispute that Boerner was lawfully arrested. Second, Gukich believed that the blood test would confirm his suspicion that Boerner was intoxicated. Third, the blood was drawn in a reasonable manner. And, finally, Boerner admits that she voluntarily submitted to the test.

[4] Boerner argues that she is entitled to relief under § 806.07(1), STATS., which states:

> On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
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> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);

(continued)

N.W.2d 354 (1983). In ***Brooks***, the defendant was arrested for driving while intoxicated. ***Id.*** at 349, 335 N.W.2d at 355. After he was read his rights under the implied consent law, Brooks refused to submit to an intoxication test. The officer gave Brooks a citation for driving while intoxicated, along with a written notice that it was the State's intent to seek revocation of his driver's license for refusing to submit to the intoxication test. ***Id.***

Prior to the refusal hearing, Brooks pled guilty to the charge of operating a vehicle while intoxicated. Based on this plea, the trial court dismissed the refusal action. ***Id.*** at 350, 335 N.W.2d at 356. The supreme court upheld the dismissal concluding that the purpose of implied consent law and the refusal proceedings are so intimately connected with the OWI law that they exist for the same purpose, which is to secure evidence to sustain prosecutions under § 349.63(1), STATS. Once a prosecution has been completed by a plea of guilty, the legislative purpose for the refusal penalties has been accomplished, and the refusal proceeding should be dismissed. ***Id.*** at 356, 335 N.W.2d at 358.

Boerner argues that, similar to ***Brooks***, the purpose of the statute has been met; therefore, it is inequitable to punish her for her refusal. However, in

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> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
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> (d) The judgment is void;
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> (e) The judgment has been satisfied, released or discharged;
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> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Brooks, a blood test proved to be unnecessary because the defendant pled guilty to driving while intoxicated. In this case, Boerner did not plead guilty. Should the results from her blood test not confirm that she was driving with a BAC above the legal limit, she still violated the implied consent statute by unlawfully refusing to submit to the test. If we were to reverse the trial court's refusal order because a blood sample was obtained, and the chemical test established that she had a BAC below the legal limit, we would be ignoring the implied consent law. ***Brooks*** would be controlling had Boerner pleaded guilty to driving while intoxicated, but we decline to extend the reasoning in ***Brooks*** to include situations in which guilt has not been similarly established. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.