COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1013-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN CLAUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

SNYDER, P.J. Steven Claus appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI), third offense, in violation of §§ 346.63(1)(a) and 346.65(2)(c), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration, third offense, contrary to §§ 346.63(1)(b) and 346.65(2)(c). Claus argues that the trial court erred in admitting evidence of his refusal to submit to a chemical test and in allowing the State to

rely on a presumption of intoxication pursuant to § 885.235, STATS. We are not persuaded by Claus' arguments and therefore affirm the judgment of conviction.

FACTS

On January 12, 1997, at 10:34 p.m.,[1] Village of Thiensville Officer Douglas Friedrich stopped Claus for erratic driving. Noticing that Claus smelled of alcohol, Friedrich asked Claus to perform field sobriety tests. Claus failed a number of the tests and was then placed under arrest and transported to the police station. At the police station, Friedrich read Claus the Informing the Accused form and asked Claus if he would submit to an intoxilyzer test. Claus refused. Consequently, Friedrich completed the Notice of Intent to Revoke Operating Privileges but later failed to serve a copy of the notice upon Claus, the Department of Transportation and the Ozaukee County Clerk of Courts pursuant to § 343.305, STATS.[2]

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[1] Claus argues that there is a reasonable doubt whether Officer Douglas Friedrich stopped him at 10:34 p.m. We will address this issue below.

[2] Section 343.305(9)(a), STATS., provides in pertinent part:

> If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.… The officer shall issue a copy of the notice of intent to revoke the privilege to the person and submit or mail a copy with the person's license to the circuit court for the county in which the refusal is made. The officer shall also mail a copy of the notice of intent to revoke to the district attorney for that county and the department....

Although Friedrich did not serve copies of the Notice of Intent to Revoke Operating Privileges, he did, inexplicably, serve upon Claus a copy of the Notice of Intent to Suspend Operating Privileges, despite the fact that Claus did not submit to chemical testing which produced a result over the legal limit.

After Claus refused to take an intoxilyzer test, Friedrich escorted him to the hospital to obtain a blood sample. At 12:50 a.m.,[3] Claus submitted to the blood test, revealing a blood alcohol level of 0.189%. Claus was subsequently charged with operating a motor vehicle while intoxicated.

In March 1997, Claus moved the trial court to suppress evidence of his refusal to submit to a chemical test. At the March 31, 1997 suppression hearing, the State finally served upon Claus a Notice of Intent to Revoke Operating Privileges. Subsequently, the trial court denied Claus' motion to suppress. The court, relying on ***State v. Donner***, 192 Wis.2d 305, 531 N.W.2d 369 (Ct. App. 1995), reasoned that because Friedrich had read Claus the Informing the Accused form, Claus had been properly advised of the consequences of his refusal to submit to a chemical test. At a jury trial in November 1997, Claus was ultimately found guilty of both counts of OWI. Claus now appeals, arguing that the trial court erred in admitting evidence of his refusal to submit to a chemical test and in adopting a jury instruction that allowed the State to rely on the presumption of intoxication.

DISCUSSION

At trial, the court permitted the State to present evidence that Claus refused to submit to the intoxilyzer test at the police station. Consequently, the State was allowed to argue to the jury that such refusal reflected "consciousness of guilt" on the part of Claus. *See* ***State v. Bolstad***, 124 Wis.2d 576, 585, 370 N.W.2d 257, 262 (1985) (citation omitted). Claus contends that the trial court erred in admitting this evidence because he was not immediately provided with a

[3] Claus argues that a reasonable doubt exists whether the blood test was actually taken at 12:50 a.m. This argument will also be addressed below.

copy of the Notice of Intent to Revoke and was not later given an opportunity to be heard on the reasonableness of his refusal.

The issue here is whether the trial court admitted evidence of Claus' refusal consistent with the implied consent law under § 343.305, STATS. As a reviewing court, we must ask whether the trial court properly interpreted and applied the statute to the facts. *See* ***State v. Schirmang***, 210 Wis.2d 325, 329, 565 N.W.2d 225, 227 (Ct. App. 1997). This presents a question of law which is considered independently and without deference to the determination of the trial court. *See* ***State v. Zielke***, 137 Wis.2d 39, 44-45, 403 N.W.2d 427, 429 (1987).

In ***Donner***, we considered a situation closely resembling that of Claus. The defendant in ***Donner*** was stopped for erratic driving. *See* ***Donner***, 192 Wis.2d at 310, 531 N.W.2d at 371. After the police detected a strong odor of marijuana on Donner's breath, he was taken to the city police department where he was read an Informing the Accused form. *See* ***id.*** Although Donner submitted to an intoxilyzer test, he refused to submit to a blood test. *See* ***id.*** Despite Donner's refusal to take the blood test, the State never pursued a revocation hearing as provided by the implied consent law. *See* ***id.*** at 310, 531 N.W.2d at 371-72.

In ***Donner***, we acknowledged that refusal evidence is relevant because a jury may make a reasonable inference that the refusal demonstrates "consciousness of guilt" on the part of the defendant. *See* ***id.*** at 312-13, 531 N.W.2d at 372-73 (citations omitted). We also noted, however, that the supreme court in ***Zielke*** held that in order to obtain the benefit of using refusal evidence in a prosecution for the intoxicated use of a motor vehicle, police must provide the warnings set forth in § 343.305, STATS. *See* ***Donner***, 192 Wis.2d at 313, 531 N.W.2d at 373 (quoting ***Zielke***, 137 Wis.2d at 50-51, 403 N.W.2d at 432).

The police, consistent with the holding in ***Zielke***, advised Donner of the implied consent law by using an Informing the Accused form. *See* ***Donner***, 192 Wis.2d at 313, 531 N.W.2d at 373. Although the police did not provide Donner with a formal revocation hearing, we determined that ***Zielke*** does not mandate an inquiry "*within the context of a formal revocation hearing under the implied consent law*." ***Donner***, 192 Wis.2d at 313, 531 N.W.2d at 373. At a motion hearing and during trial, the trial court addressed whether the police properly informed Donner under the implied consent law. Accordingly, we held that Donner received the equivalent of an implied consent hearing within the context of the pretrial and trial proceedings. *See* ***id.*** at 314, 531 N.W.2d at 373. Donner, therefore, was afforded the protections guaranteed by ***Zielke*** before evidence was used against him. *See* ***Donner***, 192 Wis.2d at 314, 531 N.W.2d at 373.

In Claus' case, there is no dispute that Friedrich advised Claus of the implied consent law using an Informing the Accused form. In addition, Claus was afforded an opportunity to address whether he was properly informed under the implied consent law at the suppression hearing.[4] At trial, Friedrich testified that he informed Claus of the implied consent law. Claus, therefore, was given ample opportunity to contest the sufficiency of the information provided by Friedrich concerning the implied consent law. Thus, we conclude that Claus received the equivalent of an implied consent hearing. *See* ***id.*** Accordingly, the trial court properly admitted evidence of Claus' refusal.

[4] Because the record does not contain a transcript of the suppression hearing, it is unclear whether the parties or the court in fact explored the adequacy of the information provided by Friedrich.

The second issue on appeal is whether the trial court erred in issuing a jury instruction that incorporated a presumption of intoxication pursuant to § 885.235, STATS.[5] Claus argues that the jury was not in a position to decide whether the blood test results presented at trial should be given a presumptive effect because this issue contemplates a mixed question of law and fact. Additionally, Claus contends that the State failed to prove beyond a reasonable doubt that the blood test was taken within three hours as required by § 885.235. We find neither argument convincing.

A trial court may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. *See* ***State v. Turner***, 114 Wis.2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). The ultimate resolution of the issue of the appropriateness of giving a particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual grounds. *See* ***id.*** If we conclude that the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist. *See* ***State v. Paulson***, 106 Wis.2d 96, 108, 315 N.W.2d 350, 356 (1982).

The trial court adopted the following presumption of intoxication instruction which slightly modifies Wisconsin's model jury instruction, WIS J I—CRIMINAL 2660B:

> If you are satisfied beyond a reasonable doubt that the sample was taken within three hours after the defendant's

[5] Section 885.235(1)(cd), STATS., provides that if a blood sample was taken within three hours after the event to be proved:

> [T]he fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

> alleged operating of a motor vehicle and if you are satisfied beyond a reasonable doubt that there was .08 percent or more by weight of alcohol in the defendant's blood at the time the test was taken you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating or both, but you are not required to do so.

Claus argues that the court's instruction presented the jury with a mixed question of fact and law and thus was not properly before the jury. We disagree. The jury instruction issued by the court required the jury to make two factual determinations before it could make a presumption of intoxication. First, the jury was required to find beyond a reasonable doubt that the blood sample was taken within three hours after Claus' alleged operating of his motor vehicle. Second, the jury had to determine beyond a reasonable doubt that Claus had 0.08% or more by weight of alcohol in his blood at the time of the test. Both of these determinations are factual in nature and therefore clearly lie within the province of the jury. *See* ***First Nat'l Bank v. Wernhart***, 204 Wis.2d 361, 367, 555 N.W.2d 819, 821-22 (Ct. App. 1996). Additionally, the jury instruction created a permissive inference or presumption, which the supreme court has recognized as properly before a jury. *See* ***State v. Vick***, 104 Wis.2d 678, 694, 312 N.W.2d 489, 497 (1981).

Claus next disputes whether the State proved beyond a reasonable doubt that the blood test was taken within the three-hour period. Because this is a question of historical fact, we review the jury's finding under the clearly erroneous standard. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). Although there is conflicting testimony in the record as to whether the arrest was made at 10:34 p.m. or 9:34 p.m. and whether the blood sample was taken at 12:50 a.m. or 1:50 a.m., it was appropriate for the jury to decide this issue.

See ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990) ("It is the function of the trier of fact … to fairly resolve such conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from [the] facts."). Upon review of the record, we conclude that there was ample evidence for a jury to find that the blood test was taken within the three-hour period prescribed by § 885.235, STATS.

Thus, we hold that the trial court did not err in issuing a jury instruction which relied upon the presumption of intoxication under § 885.235, STATS.

By the Court.—Judgment affirmed.

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