COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1676 **Cir. Ct. No. 03TR000819**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. FRENCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Daniel R. French insists that his swearing and talking while the arresting officer read the implied consent warnings prevented the officer from using reasonable means to convey the contents of the warnings to

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

him. We affirm because any other result would jeopardize the arresting officer's ability to obtain evidence of intoxication and get drunk drivers off the road.

¶2 French's challenge is to the trial court's determination that he unreasonably refused to submit to a chemical test; he does not challenge the probable cause for arrest. Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews independently. ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528. "To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous." ***State v. Baratka***, 2002 WI App 288, ¶7, 258 Wis. 2d 342, 654 N.W.2d 875, *review denied*, 2003 WI 16, 259 Wis. 2d 104, 657 N.W.2d 708 (Wis. Feb. 19, 2003) (No. 02-0770).

¶3 After refusing to submit to a chemical test, French was served with a Notice of Intent to Revoke Operating Privileges, and he immediately sought a refusal hearing. The only issues at a refusal hearing are: (1) whether the officer had probable cause to believe that the person was driving while under the influence of alcohol; (2) whether the officer complied with the informational provisions of the implied consent statute; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol. ***State v. Nordness***, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986). As French's hearing developed, the only contested issue was whether the arresting officer reasonably conveyed the implied consent warnings to French.

¶4 Officer Jason Freiboth of the City of Manitowoc Police Department was the arresting officer and testified at the refusal hearing. He testified that after

arresting French, he placed him in the back of the squad car. Freiboth sat in the driver's seat and read the Informing the Accused form to French. Freiboth testified, "The entire time I was reading the form, [French] was telling me that I should have given him a break, I should have given him a ride home, should have followed him home. He was pretty much talking the entire time I was reading the form." The officer testified that French also swore at him. Freiboth admitted that he did not ask French to be quiet or read the entire form to him more than once.

¶5 After reading the form, Freiboth asked French if he would submit to a blood test. And, instantaneously, French responded, "no," giving the officer the impression that French did not understand what he was answering. Freiboth asked the question a second time and after responding, "no," French immediately asked, "well, what happens if I say no?" The officer answered by rereading part of the implied consent warnings dealing with the potential revocation of operating privileges if the apprehended driver refuses to submit to a chemical test. Freiboth then drove to the hospital and for a third time he asked French if he would submit to a blood draw and French, for a third time, refused.

¶6 French testified at the refusal hearing. His testimony did not contradict Freiboth's testimony on the facts critical to this appeal. He testified that he did not realize that the officer was reading the implied consent warnings to him while he swore at the officer and begged for a break.

¶7 The trial court found that Freiboth was a credible witness, while French suffered from selective memory that called his credibility into doubt. The court found that French's refusal was unreasonable because the arresting officer had reasonably complied with the informational provisions of the implied consent law.

¶8 We begin our discussions with a general principle of appellate review. The assessment of weight and credibility is uniquely a trial court function, not an appellate function. ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). We will not interfere with the trial court's credibility determinations because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony. Thus, the trial judge, when acting as the factfinder, is considered the ultimate arbiter of the credibility of a witness." ***Id.*** at 152 (citation omitted). For that reason, we accept the testimony of Freiboth and reject the testimony of French.

¶9 The issue this appeal presents is whether Freiboth complied with the informational requirements of the implied consent law. In ***Piddington***, the Wisconsin Supreme Court held that the answer to this question "turns on whether [the arresting officer] used reasonable methods which would reasonably convey the warnings and rights in § 343.305(4)." ***Piddington***, 241 Wis. 2d 754, ¶22. The supreme court repeated the requirement that the State has the burden to show by a preponderance of the evidence that the methods used by the arresting officer would reasonably convey the implied consent warnings. ***Id.*** After the State has met its burden, the burden then shifts to the driver to show that (1) the officer misstated the warnings and (2) the officer used unreasonable methods to convey the warnings that impacted on the driver's ability to make the choices available in the law. ***Id.***, ¶22 n.11.

¶10 We are satisfied that the State has met its burden. This is not a case where the barrier to communications between the officer and the driver is due to deafness or a difference in language. This is a case where the barrier to communications originated from French. The credible evidence establishes that French was insensible and swore and rattled on, oblivious to what the arresting

officer was saying. ***Piddington*** requires an arresting officer to use reasonable methods to convey the implied consent warnings; it does not require the officer to politely wait for the driver to stop talking or to ask permission of the driver to convey the warnings. *See* ***id.***, ¶28 (the officer does not have to use extraordinary or impractical measures to convey the implied consent warnings).

¶11 French does not challenge the accuracy of the implied consent warnings; he limits his challenge to a complaint that Freiboth used unreasonable methods to convey the warnings that impacted on his ability to make the choices available in the law. French is not persuasive. After the officer completed reading the warnings and asked French if he would submit to a blood test, French replied, "no." Refusing the blood test is a choice available in the law. French made that choice, not once, not twice, but three times. When asked if he would submit to a blood test, French did not respond with a question asking what choices he had, he responded in the negative. It is reasonable to reach the conclusion that French did hear the warnings as read by the officer because he emphatically refused a blood test three different times.

¶12 Freiboth's testimony that French responded to the question of whether he would submit to a blood test so quickly that Freiboth thought French did not understand what he was answering is of no relevance. When the complaint is that the arresting officer did not reasonably convey the implied consent warnings, our focus is on the conduct of the officer. ***Id.***, ¶1.

> [T]he determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver. This approach ensures that the driver cannot subsequently raise a defense of "subjective confusion," that is, whether the implied consent warnings were sufficiently administered must not depend upon the perception of the accused driver. Whether

> the implied consent warnings have been reasonably conveyed is not a subjective test; it does not "require assessing the *driver's perception* of the information delivered to him or her."

Id., ¶21 (citations omitted).

¶13 Courts must construe the implied consent law liberally to effectuate its purpose, which is "to facilitate the collection of evidence, … not … to enhance the rights of alleged drunk drivers." ***State v. Reitter***, 227 Wis. 2d 213, 224, 595 N.W.2d 646 (1999). 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 (1983). If we were to accept French's premise that an apprehended driver can frustrate the giving of implied consent warnings by swearing, talking or begging for leniency, we would stymie the State's efforts to reduce the scourge of drunk driving.

¶14 We conclude that Freiboth's persistence in reading the implied consent warnings once, over the ruckus made by French, was a reasonable method to reasonably convey the warnings to French. *See* ***Piddington***, 241 Wis. 2d 754, ¶23. We affirm because under the circumstances, French was properly advised of his rights under the implied consent law.

By the Court.—Order affirmed.

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