

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 04-0652

Cir. Ct. No. 02TR020264

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF JANUSZ DACA:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JANUSZ DACA,

DEFENDANT-APPELLANT.

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

¶1 DYKMAN, J.¹ Janusz Daca appeals from a judgment revoking his operating privileges for refusing to provide a breath sample when he was arrested for operating a vehicle while intoxicated (OWI). Daca contends that the arresting officer failed to use reasonable methods to convey to him the mandatory implied consent warnings set forth in WIS. STAT. § 343.305(4).² We affirm.

¹ This appeal is decided by one judge 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.

² WISCONSIN STAT. § 343.305(4) provides:

At the time that a chemical test specimen is requested under [statute], the law enforcement officer shall read the following to the person from whom the test specimen is requested:

“You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.”

BACKGROUND

¶2 Wisconsin State Trooper Mike Vasquez arrested Daga for operating under the influence of an intoxicant or other drug in violation of WIS. STAT. § 346.63(1). A video camera mounted in Vasquez's car and a microphone attached to Vasquez's belt recorded forty minutes of the stop. The videotape shows that Daga spoke with an accent. Vasquez communicated frequently in English with Daga throughout the stop and arrest. Daga responded in English to Vasquez's questions and requests. At one point, Daga spoke in Polish while making a phone call. There were occasions when Daga misunderstood a question and had to ask Vasquez to repeat himself.

¶3 After arresting Daga, Vasquez drove him to an intoximeter site. Vasquez read Daga the "Informing the Accused" notice pursuant to Wisconsin's Implied Consent Law, WIS. STAT. § 343.305(4). Vasquez did not give Daga an opportunity to read the warnings himself, nor did he ask if he understood what they meant. Vasquez did not ask if Daga needed an interpreter nor did Daga ask for an interpreter. Vasquez asked Daga to take the intoximeter test after reading him the implied consent warnings. Daga refused.

¶4 Daga moved the trial court for a hearing on his refusal. At the hearing, the trial court found Daga's refusal to be improper and revoked his operating privileges for a year. Daga appeals his revocation because he claims that Vasquez failed to use reasonable methods to convey the implied consent warnings to him.

DISCUSSION

¶5 Whether an officer used reasonable means to convey the implied consent warnings provided in WIS. STAT. § 343.305(4) is a question of law that we review de novo. *State v. Baratka*, 2002 WI App 288, ¶7, 258 Wis. 2d 342, 654 N.W.2d 875. In general, we will not disturb a trial court’s findings of historical fact on review unless we determine those findings to be clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). An appellate court, however, is “in just as good a position as the trial court to make factual inferences based on documentary evidence and ... need not defer to the trial court’s findings.” *Cohn v. Town of Randall*, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674.

¶6 When an individual arrested for OWI is asked to take a chemical test, a law enforcement officer must read the individual the “Informing the Accused” notice set forth in WIS. STAT. § 343.305(4). To demonstrate compliance with this provision, the State must show by a preponderance of the evidence that law enforcement officers “used reasonable methods which would reasonably convey the warnings and rights in § 343.305(4).” *State v. Piddington*, 2001 WI 24, ¶22, 241 Wis. 2d 754, 623 N.W.2d 528. “Whether the implied consent warnings given sufficiently comply with WIS. STAT. § 343.305(4) depends upon the circumstances at the time of arrest ... [and] upon the circumstances facing the arresting officer.” *Id.*, ¶23. “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 (citation omitted). Compliance with § 343.305, therefore, is based upon the conduct of the law enforcement officer, not the driver’s comprehension of the officer’s message. *Id.*

¶7 Daca asserts that his English is poor, and this should have been readily apparent to Vasquez when Daca asked him to repeat himself, or responded in a manner that otherwise showed that he had trouble understanding Vasquez. He notes that Vasquez read him the implied consent warnings only once and in English, did not ask if he understood what they meant and did not provide him the opportunity to read the warnings himself. He claims that these efforts, given his limited knowledge of English, did not constitute reasonable methods to convey the implied consent warnings. We disagree.

¶8 In *Piddington*, 241 Wis. 2d 754, the Wisconsin Supreme Court considered whether an arresting state trooper used reasonable methods to convey the implied consent warnings to an OWI suspect who was deaf and communicated with American Sign Language (ASL) and lip-reading English. There, Piddington and his passenger informed the state trooper that Piddington was deaf and twice requested a sign language interpreter during the stop. *Id.*, ¶3. The trooper attempted to find a law enforcement officer who knew ASL, but was unsuccessful at first. *Id.* The trooper used the passenger as an interpreter to communicate with Piddington, then communicated directly with Piddington through written notes, gestures and lip reading. *Id.* Later, a Madison Police Officer with a working knowledge of ASL arrived and conveyed the implied consent warnings by ASL and by reading the notice aloud to permit Piddington to lip read.

¶9 The *Piddington* Court concluded that the Trooper used reasonable methods under the circumstances at the time of the arrest to convey the implied consent warnings. *Piddington*, 241 Wis. 2d 754, ¶36. It added that reasonable methods do not require extraordinary, or even impractical measures to convey the implied consent warnings. *Id.*, ¶28. Further, it concluded that reasonableness must take into account that alcohol dissipates from the blood over time, and

therefore, the State cannot be expected to wait indefinitely to obtain an interpreter and risk losing evidence of intoxication. *Id.*

¶10 Here, our review of the record shows that Vasquez was not required to make efforts similar to those made by the officers in *Piddington* to deliver the implied consent warnings. Daca's proficiency in English is shown repeatedly in over forty minutes of video evidence. Daca responded without hesitation to most of Vasquez's questions and commands. When asked, "Is there anything in the vehicle that I should know about," Daca replied, "Nothing. There is nothing. You can check it out. There is nothing illegal." (Exhibit #2, 17:46:06) When told to "take off [his] glasses," Daca did so. (*Id.* at 17:34:36). Furthermore, Daca made clear requests that Vasquez not cite him for DUI but ticket him for speeding instead because it would have been his second OWI offense. (*Id.* at 17:52:56) While he sat handcuffed in the back seat of the trooper's car, Daca expressed concern that his vehicle was still on the road. (*Id.* at 17:42:46). Daca requested that his handcuffs be taken off so that he could dial his cell phone. These examples from the videotape (and others not discussed here) demonstrate Daca's English proficiency, and belie his claim that methods in addition to reading the "Informing the Accused" notice were necessary.

¶11 Daca contends that an exchange in which Vasquez asked him where he was coming from demonstrates his poor English skills. The videotape shows that the Trooper's question was ambiguous, and that this ambiguity was the cause of the misunderstanding:

Trooper: "Where are you coming from?"

Daca: "Where I was born or just where I live?"

Trooper: "What?"

Daca: “Where I came from or where I live?”

Trooper: “Where are you coming from?”

Daca: “From Poland.”

Trooper: “No where are you coming from now?”

Daca: “Necedah.”

(Exhibit #2, 17:50:42 – 17:51:06).

¶12 Daca notes that Trooper Vasquez heard him speak to a friend in Polish during a phone call. But this proves only that Daca speaks Polish; it says nothing about his English proficiency. Daca also asserts that his lack of comprehension when Vasquez asked him twice if he “[had] ‘Triple-A’ (AAA) coverage” demonstrates a poor grasp of the English language. But not knowing the popular acronym for the American Automobile Association, and what Vasquez meant by the question “Do you have AAA coverage?” shows only that Daca did not know what AAA is. We conclude that neither of these examples support Daca’s contention that Vasquez should have taken additional measures to convey the implied consent warnings.

¶13 Daca also contends that *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, compels the conclusion that Vasquez failed to use reasonable methods to convey the warnings. Begicevic was a native Croatian speaker who also spoke some German. *Id.*, ¶11. He asked the arresting officer if a German-speaking officer was available. An officer with some knowledge of German was found who acted as a translator, communicating the implied consent warnings in German and with hand signals. *Id.*, ¶18. We held that the officers’ “attempts to reasonably communicate with Begicevic f[e]ll woefully short of the standard set by the trooper in *Piddington*.” *Id.*, ¶21.

¶14 This case is distinguishable from *Begicevic*. The arresting officer in *Begicevic* testified that she “noticed that [Begicevic] had a strong accent right away, and [Begicevic] asked [her] if [she] spoke German.” *Begicevic*, 270 Wis. 2d 675, ¶17. Here, Daga never asked for an officer who spoke his native language. (Exhibit #2 at 17:27:15 to 18:10:42) Most importantly, we have forty minutes of videotape evidence from which we are able to conclude that Daga could converse easily in English. (*Id.*) The *Begicevic* court had no such compelling documentary evidence on which to base its conclusions.

¶15 Given Daga’s demonstrated proficiency in English, we conclude that Trooper Vasquez used reasonable means to convey the implied consent warnings to Daga, and that, therefore, Daga’s refusal was improper. Accordingly, we affirm the trial court’s judgment revoking Daga’s operating privileges for one year.

By the Court.—Judgment affirmed.

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

