COURT OF APPEALS DECISION DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 98-2572

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. FISCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

SNYDER, P.J. Thomas M. Fischer appeals from a judgment revoking his driving privileges for unreasonably refusing to submit to an evidentiary blood test. Fischer contends that he did not refuse the blood test but merely exercised his constitutional right to remain silent when he chose not to answer the deputy's request to submit to the blood test. Because we determine that Fischer's failure to answer constituted an unreasonable refusal, we affirm the trial court's judgment.

On May 29, 1998, at 3:47 a.m., Walworth County Sheriff's Deputies Jeffrey Maas and Edward York were called to investigate a vehicle that was stopped at a stop sign with its engine running and the driver slumped over the steering wheel. Maas found Fischer resting in the vehicle; he appeared dazed and confused, and there was an odor of intoxicants emanating from inside the vehicle. Maas requested that Fischer perform field sobriety tests. Fischer performed each test poorly. He was then placed under arrest and transported to Lakeland Medical Center in order to obtain an evidentiary blood sample.

At the medical center, while York was reading to Fischer the Informing the Accused form, Fischer presented the deputies a card with printed material on it. As York finished reading the Informing the Accused form, he asked Fischer if he would submit to an evidentiary blood test. Fischer responded that the deputies had not read the card that he had provided them and that they were violating his rights. York again asked if Fischer would submit to a blood test and he provided the same response. After York asked Fischer a third time, Fischer gave no answer. York then marked on the Informing the Accused form that Fischer would not submit to the blood test because he had "refused to answer [the] question."

At Fischer's § 343.305(9), STATS., refusal hearing, he testified as follows:

> I asked the officer if he had read the card, which I had given them earlier, which stated my constitutional rights, and he said that he did not. And then he asked me a second time [to submit to the blood test]. And I again asked him; and that they were violating my rights; that they needed to read the card. He asked me if I was refusing. I told him, no, I'm not refusing.

According to Fischer, the card he presented the deputies contained a statement of his constitutional right to remain silent. The trial court decided that Fischer's conduct constituted an unreasonable refusal and therefore revoked his driving privileges pursuant to § 343.305(10). Fischer appeals.

Fischer contends that his failure to answer the deputy's request to submit to a blood test was not a refusal. The application of the implied consent statute to a set of facts is a question of law which we review de novo. *See* ***State v. Rydeski***, 214 Wis.2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997). We conclude that by virtue of his conduct, Fischer unreasonably refused to submit to a blood test.

Wisconsin's implied consent law provides that any person operating a motor vehicle is deemed to have consented to a properly administered test to determine the person's blood alcohol content. *See* § 343.305(2), STATS.; ***Rydeski***, 214 Wis.2d at 106, 571 N.W.2d at 419. Any failure to submit to such a test, barring a physical disability or disease, is an improper refusal as a matter of law. *See* § 343.305(9)(a)5.c, STATS.; ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985).

Fischer contends that he was not obligated to answer the deputy's request to submit to a blood test because statements made by a defendant in the context of an implied consent law test may be subject to the ***Miranda***[1] rule. However, relying on ***State v. Bunders***, 68 Wis.2d 129, 227 N.W.2d 727 (1975), Fischer concedes that "[n]either reading nor waiver of ***Miranda*** rights is required before a person arrested for OWI may be asked to submit to an implied consent

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

law test." The State asserts, and we agree, that the ***Bunders*** court also decided that a request to submit to chemical tests does not involve testimonial utterances on the part of the suspect and that the ***Miranda*** rule does not apply. *See* ***Bunders***, 68 Wis.2d at 132, 227 N.W.2d at 729. As the court stated:

> "... Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical [blood test]. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

Id. (quoting ***Schmerber v. California***, 384 U.S. 757 (1966)). Accordingly, we are not persuaded that Fischer's ***Miranda*** rights were triggered by the deputy's request that Fischer submit to a blood test.

Next, Fischer claims that besides never verbally refusing to take a blood test, he did nothing to prevent the administration of such a test. As a consequence, Fischer concludes, there was no refusal.

Wisconsin law is clear that a verbal refusal is not required. An accused's actions may qualify as a basis for a refusal. *See* ***Rydeski***, 214 Wis.2d at 106, 571 N.W.2d at 419. In ***Rydeski***, the defendant initially agreed to take an Intoxilyzer test. *See* ***id.*** at 104, 571 N.W.2d at 418. The defendant was informed that a twenty-minute observation period was required prior to administering the test. *See* ***id.*** When the defendant asked to use the restroom, he was informed that he could either wait until after the test or he could use the restroom under the officer's direct supervision. *See* ***id.*** The defendant agree to wait. *See* ***id.*** At the end of the twenty-minute period, the officer repeatedly asked the defendant to

submit to the test; the defendant refused and proceeded to use the restroom. *See* ***id.*** at 107, 571 N.W.2d at 419. Because the defendant did not comply with the officer's instructions, we decided that the defendant's behavior constituted a refusal.

Similarly, in ***Borzyskowski***, the defendant agreed to take a breathalyzer test, but when asked to perform the test, he repeatedly failed to cooperate with the test procedures. *See* ***Borzyskowski***, 123 Wis.2d at 190-91, 366 N.W.2d at 509. We concluded that the defendant's uncooperative conduct would be deemed a refusal. *See* ***id.*** at 191, 366 N.W.2d at 509.

Here, the deputies requested three times that Fischer submit to a blood test. The deputies unequivocally asked, "Will you submit to an evidentiary chemical test of your blood?" Each time Fischer chose not to answer the request but instead insisted that the deputies read him "the card" which purportedly stated his constitutional rights. On the third request, Fischer did not answer at all. Because Fischer did not have a disability or disease when requested to submit to the test, we must conclude that Fischer's failure to answer constitutes an unreasonable refusal.

Finally, Fischer asserts that the deputies did not demand that he submit to a test or forcibly take blood from him. However, Fischer provides no support for his suggestion that deputies must demand submission or use force before a refusal can be found. Thus, because Fischer's arguments lack merit, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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