COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1798 **Cir. Ct. No. 2013TR343**

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

IN THE MATTER OF THE REFUSAL OF CARL J. OPELT:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL J. OPELT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.[1] Carl Opelt appeals a judgment of conviction revoking his operating privileges under the implied consent law, WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§ 343.305, following his alleged refusal to submit to a chemical test of his blood. The only issue presented on appeal is whether Opelt refused to promptly submit to the requested test. I conclude that the circuit court did not clearly err in finding facts and that as a matter of law Opelt refused to promptly submit to the test. Accordingly, I affirm the decisions of the circuit court.

BACKGROUND

¶2 The facts were established through testimony of the only witness at the refusal hearing, the arresting police officer. The officer testified that he placed Opelt under arrest for operating a motor vehicle while intoxicated and then transported him to a hospital. While the two men were in the patrol car in the parking lot of the hospital, the officer read to Opelt the "Informing the Accused" form, as required by the implied consent law, requesting that Opelt submit to an evidentiary chemical test of his blood. *See* WIS. STAT. § 343.305(4).

¶3 According to the testimony of the officer, Opelt failed to give a clear affirmative response to the officer's repeated requests. Even Opelt's responses that included the word "yes" were

> not in the context where I would consider it a voluntary yes. It was associated with other words of yes, no, never say yes type of comments.

¶4 At the hearing, the court listened to an audio recording made of the back-and-forth between the officer and Opelt on this topic, and the transcript of the hearing reflects the contents of the recording. After hearing the officer's testimony and listening to the recording, the circuit court found that the officer asked Opelt "at least 14 times" if he would submit to the test, and "every answer

the defendant gave" was "at best equivocal."[2] "The only time [the] defendant actually said 'yes' he immediately followed it with 'Don't ever say yes.'" The court concluded that this constituted a refusal. Opelt appeals.

DISCUSSION

¶5 Opelt's sole argument on appeal is that he did not refuse to submit to the requested test. Opelt does not challenge the accuracy of the transcript of the officer's requests and his responses. However, while not properly framed as an argument, Opelt in essence argues that the circuit court clearly erred in finding that each answer that the defendant gave to the officer's many requests was "at best equivocal." Opelt argues as follows:

> [Opelt] said "let's go do it" or words to that effect seven consecutive times. It is within [sic] those answers that Mr. Opelt submitted, and the officer should have just proceeded with the test. Instead, [the officer] inaccurately told Mr. Opelt that his submissions were inadequate.

While acknowledging that he never responded to the officer with the unqualified "yes" sought by the officer, Opelt argues that he effectively submitted to the test through his responses and "in no way 'prevented the officers from administering the test.'"

¶6 In Opelt's favor, I will first proceed as though he has properly framed an argument that the circuit court clearly erred in its finding that all of his responses were at best equivocal. I explain that Opelt provides no basis to conclude that the court clearly erred in making that finding. I next proceed, again

[2] While I base my decision on the proposition that the officer made "at least 14" requests that Opelt submit to the test, following the circuit court's finding, I simply observe that the transcript appears to reflect twenty requests.

in Opelt's favor, as though he has presented an argument that, even if the court did not commit clear error in finding facts, as a matter of law Opelt's failure to give a non-equivocal answer should not count as a refusal.

¶7 This court upholds the factual findings of a circuit court unless they are clearly erroneous. ***State v. Novy***, 2013 WI 23, ¶22, 346 Wis. 2d 289, 827 N.W.2d 610. The application of the implied consent statute to uncontested facts is a question of law that I review de novo. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

Circuit Court Findings

¶8 The transcript confirms the circuit court's implied finding that the officer delivered his many requests in an understandable, proper manner. Many of Opelt's responses to these requests were expressions of confusion or were nonresponsive. A second category of responses involved inconsistent answers, such as, "I guess, no, yeah, whatever."

¶9 Opelt's factual argument highlights a third category, which included statements to the effect of, "Well, we can go in there and get a blood test," "If that's what you need, let's go do it," and, "If you want it, we can do it." Opelt argues that these responses were unequivocal statements signaling submission. However, this argument is undermined by the fact that, in each instance when Opelt suggested to the officer that his answer to the question *might* be "yes," the officer reasonably followed up with a request for Opelt to clarify that he in fact wanted to submit to the test, and in each instance Opelt used a rhetorical device to avoid doing so. The following is a typical example:

> OPELT: Well, we can go in there and get a blood test.

OFFICER: So yes, you will?

OPELT: If you want it, we can do it.

OFFICER: So yes, okay. Consider that a yes, that you will—

OPELT: No, *not consider it a yes*, if that's what you need.

(Emphasis added.) It is obvious that Opelt was trying to make a game out of not giving the officer the unambiguous answer that the officer made clear he needed in order to complete the Informing the Accused form. Indeed, the officer warned Opelt at one point that Opelt should not play a "game," to which Opelt responded, in seeming defiance, "I am not playing your game." The question of equivocation is not resolved by asking whether the word "yes" passed Opelt's lips, as Opelt suggests the circuit court believed. Opelt could have given any variation of an *unqualified* "yup," "fine," "okay," "sure," or "correct," in response to the officer's repeated question to the effect of, "Is that a 'yes'?" Opelt not only failed to do so, he made sport out of avoiding doing so.

¶10 In sum, Opelt fails to explain why I should conclude that the circuit court clearly erred in finding that all of his responses were at best equivocal.

Refusal as a Matter of Law

¶11 Although Opelt contends that my review of the circuit court's decision is de novo, he fails to present any arguments that would require me to apply de novo review. To the extent Opelt means to argue that the circuit court misapplied the law, I cannot readily distinguish any such argument from the argument addressed above regarding the circuit court's factual findings. Nonetheless, I address a legal argument that he may be trying to make.

¶12 Opelt may mean to argue that, even if the circuit court did not err in finding that his responses were entirely equivocal, those responses did not amount to a refusal, as a matter of law, because Opelt "repeatedly offered to take the test" and Opelt did not actually "prevent[] the officer[] from administering" it. Opelt relies on ***Rydeski*** and ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), to support what may be an argument that, as a matter of law, he did not refuse the officer's requests that he submit to the test.

¶13 In ***Rydeski***, the defendant initially agreed to submit to a test, and never verbally refused to do so. ***Rydeski***, 214 Wis. 2d at 104, 107. However, in response to repeated requests from the officer subsequent to his initial agreement, he engaged in a series of behaviors that prevented the test from occurring, which included requesting to use the restroom and declining to approach the testing machine. ***Id.*** at 105, 107. This court stated that, despite the absence of verbal refusal, Rydeski's conduct prevented the officer "from administering the test, and therefore, we conclude that Rydeski refused to submit to the test." ***Id.*** at 107. This holding rested in part on the accused's obligation to "take the test promptly or to refuse it promptly" and the statutory requirement that, when a person refuses to submit to a test, "the law enforcement officer shall '*immediately*' take possession of the person's license and prepare a notice of intent to revoke ... the person's operating privilege." ***Id.*** at 109 (quoting WIS. STAT. § 343.305(9)(a)) (emphasis in ***Rydeski***).

¶14 In ***Reitter***, the supreme court concluded that there was a "constructive refusal" when the defendant repeatedly insisted on speaking to an attorney after an officer explained to him five times that he needed to give a "yes or no answer" and that his continual request for counsel would be deemed a refusal. *See* ***Reitter***, 227 Wis. 2d at 220-21. The court concluded that:

> The implied consent law does not require a verbal refusal. Rather, the conduct of the defendant may constitute an unlawful refusal. Conduct that is "uncooperative" or that prevents an officer from obtaining a breath sample results in refusal. "[I]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal."
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> ….
>
> In this case, Reitter contends he never "articulated a refusal"; on the contrary, he told Deputy Roscizewski "I'm not refusing." But Reitter's actions ring louder than his articulated words, and regardless of his words, he refused in fact.… Reitter engaged in at least five exchanges with the deputies and prevented the officers from administering the test.… Reitter listened to repeated readings of the "Informing the Accused" Form and was warned that his conduct could result in a refusal. Nonetheless, Reitter refused to answer Deputy Sipher's repeated question. Reitter was uncooperative and belligerent. Both Deputy Sipher and Deputy Roscizewski correctly concluded that Reitter had no plans to take the test until he had an opportunity to speak with his attorney.

Id. at 234, 237 (citations omitted).

¶15 There are two problems with Opelt's argument. First, Opelt's contention that he "repeatedly offered to take the test" is indistinguishable from his implied argument that the circuit court erred in finding that his statements to the officer were at best equivocal. I have already determined that the circuit court did not err in this respect.

¶16 Second, Opelt fails to persuasively distinguish the facts of this case from those in ***Reitter*** and ***Rydeski***. As these cases explain, the question is whether Opelt's statements and conduct ever amounted to a refusal, even if he made some statements at various times that, considered in isolation, would suggest an intent to submit. *See* ***Reitter***, 227 Wis. 2d at 234-37; ***Rydeski***, 214 Wis. 2d at 106-07. I conclude that Opelt's statements and conduct amounted to a refusal.

¶17 Opelt's obligation under the implied consent law was to "promptly submit or refuse to submit" to the test. *See* ***Rydeski***, 214 Wis. 2d at 109. The officer sought an unambiguous response from Opelt at least fourteen times. Opelt repeatedly refused to clarify his responses so that the officer could register an unambiguous "yes" or "no" answer, and instead evaded the officer's questions or answered with irrelevant statements. As the circuit court aptly explained:

> The defendant's statements and actions constitute a refusal. There is no other reasonable interpretation of the interaction between defendant and the officer. Anything defendant said that could be remotely construed as a "yes" was immediately followed by a condition, limitation or outright denial/no answer.

As in ***Rydeski*** and ***Reitter***, Opelt's evasive conduct in refusing to provide an unambiguous answer, after being given plain and ample opportunities to do so, prevented the officer from administering the test and amounted to a refusal.

¶18 In sum, Opelt refused constructively, if not actually, under circuit court findings that are not clearly erroneous.

By the Court.—Judgment affirmed.

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