COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1767-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN M. SHELLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

SNYDER, P.J. John M. Shelley appeals from an order finding that he wrongfully refused to submit to a chemical test of his blood. The trial court found that although the blood sample was ultimately obtained, Shelley verbally refused to provide the sample on at least four occasions. Because we conclude that this issue is controlled by ***State v. Rydeski,*** No. 97-0169-CR (Wis. Ct. App. Oct. 2, 1997, ordered published Nov. 20, 1997), we affirm the court's finding that Shelley refused to permit the blood draw.

Officer Robert J. Kuspa was dispatched to investigate a report of a man calling for help. When he arrived at the designated area, he found Shelley lying in the ditch line of the road with a motorcycle on top of him. Shelley told the officer that he had been driving down the road and was "cut off." Emergency medical personnel also arrived and began attending to Shelley's injuries. In speaking to Shelley while conducting an initial investigation, Kuspa observed that he had glassy, bloodshot eyes, slurred speech and an odor of intoxicants emanating from his breath. Kuspa asked Shelley to submit to a preliminary breath test, but he refused. Shelley was then transported by ambulance to the hospital, and Kuspa followed in order to continue his investigation.

While at the hospital, Kuspa informed Shelley that he suspected that Shelley had been operating while under the influence of intoxicants and requested that he perform verbal sobriety tests. Shelley agreed; he was unable to perform either test satisfactorily.[1] Shelley was subsequently placed under arrest for operating while under the influence. Kuspa read the Informing the Accused form to Shelley and asked him to submit to a chemical test of his blood. Although Shelley's response to this initial request was to swear and refuse, Kuspa again explained to him that if he did not submit to the blood test, his license would be revoked. Shelley then agreed to the officer's request. While Shelley continued to receive treatment for the injuries to his leg, Kuspa marked Shelley's assent to the requested blood test and waited for a phlebotomist to arrive to draw the blood.

[1] Kuspa first asked Shelley to perform the alphabet test. He testified that Shelley began very slowly, with pauses between each letter. When he reached "Q" he skipped a couple of letters before continuing in the same slow, deliberate manner. Kuspa also asked him to count backwards from 69 to 52. When Shelley reached "62" he appeared to become confused and kept counting back and forth between 62 and 63; he finally asked Kuspa if that was where he wanted him to stop.

Approximately twenty minutes later the lab technician arrived. When Kuspa informed Shelley that this person would be taking a blood sample, Shelley swore and refused. After Kuspa told him the blood would be drawn with or without his consent,[2] Shelley swore and vehemently refused. Kuspa informed Shelley that he was deeming this a refusal, to which Shelley replied, "I don't care, you do what you have to do," and reaffirmed, "you're still not going to get my blood."

After Kuspa called for the assistance of a security guard and prepared to obtain the blood sample by force, Shelley abruptly extended his arm outward to offer it for testing. The blood test was completed without the necessity of restraining Shelley.

A refusal hearing was held. Shelley argued that because he had verbally consented to the blood test, and then only "momentarily" withdrew that consent before ultimately renewing his consent and submitting to the blood draw, the trial court should find that he did not refuse the requested chemical test. Instead, the trial court found that Kuspa had complied with the statutory requirements of the implied consent law, and that "under all the circumstances a refusal occurred, notwithstanding that ultimately blood was obtained." The trial court then revoked Shelley's operating privilege for two years pursuant to § 343.305(10)(b)3, STATS.

Shelley now renews his argument that he "did in fact submit to the requested test" and contends that because no actual force was used in obtaining the

[2] This was in keeping with the policy of the City of Muskego Police Department which requires police officers to obtain a chemical test after a refusal if it is a second or subsequent offense.

test, he "effectively rescind[ed] any refusal that may have existed." He also claims that this court should extend the reasoning of ***State v. Brooks,*** 113 Wis.2d 347, 335 N.W.2d 354 (1983), and thereby conclude that because the State was ultimately successful in obtaining the blood sample, there was no reason to put him through a refusal proceeding and subject him to additional penalties. We are unpersuaded by this argument. We also conclude that the threshold issue of whether Shelley refused the requested chemical test is controlled by ***Rydeski***.

The question of whether an individual refused to submit to a chemical test requires us to apply the implied consent statute to the facts of the particular case. This is a question of law that we review de novo. *See* ***Olen v. Phelps,*** 200 Wis.2d 155, 160, 546 N.W.2d 176, 180 (Ct. App. 1996).

Section 343.305(1), STATS., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content. *See* ***Village of Elkhart Lake v. Borzyskowski,*** 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985). Any failure to submit to such a test, other than because of physical inability, is an improper refusal which invokes the penalties of the statute. *See* ***id.***

Shelley concedes that at one point he refused to submit to the test, but argues that because he subsequently agreed, his "momentary" refusal before ultimately acquiescing should not be deemed a refusal. This issue is controlled by ***Rydeski*** where we concluded that "[a] person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a 'reasonable time ….'" ***Rydeski,*** slip op. at 3. Therefore, an individual's subsequent willingness to submit to a test, as occurred in the instant case, does not cure the earlier refusal. *See* ***id.*** Once Shelley was advised by Kuspa that he was

considering his response a refusal, Shelley was no longer able to consent under the implied consent law.

Shelley argues that the supreme court's decision in ***Brooks*** should be extended and he reads ***Brooks*** as providing authority for an alternate holding: that because the State ultimately obtained the sample that it needed for the prosecution of the OWI offense, and that the blood sample was eventually obtained with only "a threat of force but not the actual use of force," there was no reason to put Shelley through an additional proceeding (the refusal hearing) and impose additional penalties.

Shelley's argument fails to take into account that the "purpose behind the implied consent law is to *facilitate* the gathering of evidence against drunk drivers." ***State v. Neitzel,*** 95 Wis.2d 191, 203, 289 N.W.2d 828, 835 (1980) (emphasis added). Based on the bright-line rule established in ***Rydeski,*** an individual who even briefly refuses has hampered the gathering of evidence. ***Rydeski*** also holds that a refusal, once made, cannot be rescinded. The penalty statute, § 343.305(10)(a), STATS., provides:

> If the court determines under sub. (9)(d) that a person improperly refused to take a test … the court shall proceed under this subsection…. If a hearing was requested, the revocation period shall commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

The penalty portion of the statute does not state that a court should lift the penalty if the requested chemical test was eventually obtained. Rather, applying the reasoning of ***Neitzel*** and ***Rydeski,*** we conclude that the purpose behind the implied consent statute is served when an individual's refusal, once noted, subjects him or her to refusal penalties. We therefore affirm the trial court's finding that Shelley's refusal was unreasonable and affirm.

By the Court.—Order affirmed.

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