COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0355

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

IN THE MATTER OF THE REFUSAL OF THOMAS M. MAGUIRE:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. MAGUIRE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

VERGERONT, J.[1] Thomas M. Maguire appeals the trial court order finding that he unlawfully refused to submit to a chemical test of his blood

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

and directing that his operating privileges be revoked. He contends that the trial court erred because, as a matter of law, Maguire could not unlawfully refuse this test, since the requesting officers had "already deemed him" to have refused a test of his breath. It is irrelevant, Maguire argues, that the trial court found that Maguire did not refuse a test of his breath. Since the officer at the time "deemed him" to have refused a test of his breath, Maguire contends he was not obligated to submit to a blood test upon the officer's request. We conclude this argument is without merit and therefore affirm.

After Maguire was arrested for operating a motor vehicle while intoxicated, a deputy for the Rock County Sheriff's Department read Maguire the "Informing the Accused" form and asked him to submit to an evidentiary chemical test of his breath. Maguire agreed. Maguire blew into the mouthpiece of the intoxilyzer machine several times, but only one sample was accepted by the machine; the machine indicated that the others were invalid or deficient. The deputy marked on the form that Maguire refused the breath test, and then asked Maguire to submit to a blood test, which Maguire refused.

At the evidentiary hearing, the deputy explained that he and the operator of the machine decided that Maguire had refused to take the breath test because, based on their observations, he was not complying with the instructions for taking that test. However, there was evidence that the manual for the intoxilyzer did not instruct that the test should be marked as a refusal when the samples resulted in the readings that Maguire's samples had. The court found that Maguire had not refused to take the breath test. However, it found that he had refused to take the blood test.

Section 343.305(2), STATS., provides that all persons operating a motor vehicle on the public highways are "deemed to have given consent to one or more tests of his or her breath, blood, or urine, for the purpose of determining the presence or quantity in his or her blood or breath of alcohol …. when requested to do so by a law enforcement officer under sub. (3)(a)…." Section 343.305(3)(a) provides in part:

> Upon an arrest for a violation of s. 346.63(1) [operating while under the influence of an intoxicant or with a prohibited alcohol concentration], (2m) or (5) or a local ordinance in conformity therewith … a law enforcement officer may request the person to provide one or more samples of his breath, blood, or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

Section 343.305(9), STATS., provides in part: "If a person refuses to take a test under sub. (3)(a), 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.*** The person may then request a hearing at which the court determines whether the person improperly refused to take a test. *See* § 343.305(9) and (10).

The plain language of § 343.305(3)(a), STATS., permits a law enforcement officer to request more than one type of sample, and expressly states that compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. The trial court found that Maguire did not refuse to provide a breath sample. That, however, does not, under the plain language of the statute, mean he is not obligated to provide another sample if requested.

Maguire's argument, as we understand it, is that even though the court determined that Maguire did not refuse to provide a sample of his breath, the fact that the officer considered that he had refused somehow bars the request of another type of sample, or removes Maguire's obligation to provide that. We do not understand this argument. First, the statute does not indicate that if a person refuses to provide the first sample requested, he or she has no obligation to provide another upon request. Even if it did, the court has found Maguire did not refuse to provide a sample of his breath. Indeed, Maguire argued before the trial court that he did not refuse to provide a sample of his breath.

The cases Maguire cites do not support his argument. ***State v. McCrossen***, 129 Wis.2d 277, 385 N.W.2d 161 (1986), and ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), address the situation in which a person, after submitting to a requested test, may elect an alternative test as provided in § 343.305(5), STATS. These cases do not suggest that an officer may not request a sample of a different type after his or her first request. In ***State v. Rydeski***, 214 Wis.2d 101, 571 N.W.2d 417 (Ct. App. 1997), we held that Rydeski had in fact refused a request to submit to a test even though he never verbally refused, and also held that, having once refused, he was not entitled to a reasonable time within which to recant his refusal. ***Id.*** at 107-09, 571 N.W.2d at 419-20. Maguire points to our statement that "upon a refusal, the officer may 'immediately' gain possession of the accused's license and fill out the Notice of Intent to Revoke form." ***Id.*** at 109, 571 N.W.2d at 420. However, we did not state that the officer must do so; and we did not in any way suggest that the officer's determination that there was a refusal was somehow significant even after a court determined there was no refusal, a point never raised in ***Rydeski***.

Maguire's argument on appeal ignores the plain language of the statute, and the cases he relies on are wholly inapposite. We affirm the order of the trial court.

By the Court.—Order affirmed.

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