COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2624-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT MORRISSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RONALD S. BROOKS, Judge. *Reversed.*

¶1 SCHUDSON, J. [1] Scott Morrissey appeals from the judgment of conviction for operating an automobile while under the influence of an intoxicant – third offense, following his guilty plea. He argues that the trial court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

denying his motion to suppress evidence. This court agrees and, therefore, reverses.

¶2 The facts relevant to the resolution of the issue on appeal are undisputed. On July 26, 1998, City of Wauwatosa Police Officer Peter John Drusick arrested Morrissey for operating an automobile while under the influence of an intoxicant. The parties stipulated to the following facts:

> After being advised of his rights under the Implied Consent Law, [Morrissey] was asked to submit to a blood test. When [Morrissey] indicated that he did not wish to do so, he was told by law enforcement, that if he did not agree to submit that he would be strapped down and blood would be forcibly drawn from him. Based upon that information, [Morrissey] agreed to submit to a blood test. [Morrissey] was willing to submit to a breath test (Intoxilyzer 5000).[2]

¶3 Morrissey offers several theories in support of his arguments that he "did not in fact consent to seizure of his blood nor was there valid implied

[2] The quoted excerpt is from the first section, titled "Stipulated Facts," of Morrissey's trial court memorandum in support of his motion to suppress the blood test results. This court has carefully examined the record to determine whether, in fact, this was the stipulation.

At the November 3, 1998 hearing on Morrissey's suppression motion, defense counsel commented that a police officer told Morrissey, "[Y]ou have to [submit to a blood test] or we'll strap you down and take it." The trial court then said, "Right." On December 30, 1998, the day the trial court announced its decision on the motion, defense counsel referred to the "stipulation as part of [the defense] memorandum," and the trial court responded, "Right." Defense counsel then stated, "Because that's what I agreed, the three of us, counsel, myself and yourself, correct." The State, while never explicitly confirming the stipulation, never disputed defense counsel's account.

Apparently, the stipulation was derived from a videotape, viewed by the parties and the trial court, of Morrissey's driving, arrest, and refusal to submit to a blood test. Unfortunately, the videotape either was never marked as an exhibit and formally introduced into evidence, or it was offered and received, but later withdrawn; the trial court record is unclear. What is clear, however, is that the videotape has not been provided to this court as part of the appellate record.

We caution the parties to make careful trial court records, to clarify the basis for and terms of any stipulation, and to ensure that appellate records are complete.

consent," and, further, that the seizure of his blood was "unreasonable under the fourth amendment." While some of his theories are imprecise and unconvincing, one is specific, significant and, as measured by Wisconsin case law, novel. Morrissey maintains, "The only penalty for refusing under the implied consent law is the revocation of the defendant's operating privileges—nothing in the implied consent law authorizes an involuntary blood draw."

¶4 At first glance, Wisconsin case law seems to come tantalizingly close to conclusively rejecting the novel theory Morrissey presents. But carefully considered, the case law sends mixed messages. Fastidiously sorting out the facts and holdings, however, one ultimately recognizes that none of the case law has (1) presented the exact circumstances of this case; or (2) addressed the key argument Morrissey makes: that under Wisconsin's implied consent law, once an arrestee refuses to submit to a blood test, police must immediately respond with the statutorily prescribed revocation procedure, and not compel submission by threatening an arrestee that he or she "would be strapped down and blood would be forcibly drawn." Consistent with the case law and the sound public policies it recognizes, and in furtherance of prudent police practices, this court concludes that Morrissey is correct.

¶5 WISCONSIN STAT. § 343.305(2) (1997-98),[3] a portion of Wisconsin's implied consent law, provides, in part:

> Any person who … operates a motor vehicle upon the public highways of this state … is 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

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer.

Moreover, blood may be drawn involuntarily, and without a warrant, from a person lawfully arrested for a drunk-driving related offense. *See* ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).[4]

¶6 "Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law," subject to *de novo* review. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999).

¶7 The warnings provided under the implied consent law include the following:

> 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*

[4] The supreme court explained:

> [A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993) (footnote omitted). Morrissey challenges only the fourth criterion, maintaining that his offer to take a breath test should be considered as part and parcel of his "reasonable objection" to the blood test. He is wrong. To accept his theory would be to undermine the police discretion, under WIS. STAT. § 343.305(2), to "designate which of the tests shall be administered first." *See also* ***State v. Reitter***, 227 Wis. 2d 213, 225, 595 N.W.2d 646 (1999) ("drivers accused of operating a vehicle while intoxicated have no 'right' to refuse a chemical test").

> *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.*

WIS. STAT. § 343.305(4) (emphasis added). Further, WIS. STAT. § 343.305(9)(a) provides, in relevant part:

> *If a person refuses to take a test* under sub. (3) (a) [authorizing a law enforcement officer to "request the person to provide one or more samples of his or her breath, blood or urine"], *the law enforcement officer shall immediately take possession of the person's license and prepare a notice to revoke* … the person's operating privilege.

(Emphasis added.) Thus, in WIS. STAT. § 343.305(4) and WIS. STAT. § 343.305(9)(a), respectively, the legislature has specified that if a person refuses to take a test, his or her license "will be revoked" and the officer, upon the refusal, "shall immediately" take the actions to bring about the revocation.

¶8 Neither statute, nor any other, provides a police officer the option to ignore or delay these dictates.[5] Neither statute, nor any other, provides a police officer the option to attempt to threaten an arrestee that he or she "would be strapped down and blood would be forcibly drawn," or to compel testing in any other way. Our supreme court has spoken clearly: "Once there has been a proper explanation and there has been a refusal, … a refusal has occurred under the statute and the accused is subject to the consequences of a mandatory suspension." ***Reitter***, 227 Wis. 2d at 237 n.18.

[5] Notwithstanding its use of the term "shall," WIS. STAT. § 343.305(9)(a) is "directory, not mandatory," for the purpose of determining whether a court has personal jurisdiction over a defendant despite the failure of a law enforcement officer to immediately prepare and serve the notice to revoke, following an arrestee's refusal. *See* ***State v. Moline***, 170 Wis. 2d 531, 542, 489 N.W.2d 667 (Ct. App. 1992). Because neither the supreme court nor this court has decided whether the statute is directory or mandatory in the context presented in the instant appeal, this court, in this decision, will refer to the statute's "dictates," rather than to what might be termed its "directives" or "mandates."

¶9 Indeed, although, as matter of law, a driver arrested for intoxicated driving has "no 'right' to refuse a chemical test," ***id.*** at 225, a driver still may refuse to take a chemical test as long as he or she is prepared to suffer the consequences. As this court has explained, "*a driver has a 'right' not to take the chemical test* (although there are certain risks and consequences inherent in this choice)." ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995) (emphasis added).

¶10 Moreover, as we also have explained, "the warnings provided drivers under the implied consent law are analogous to those employed in ***Miranda***-type cases." ***Id.*** at 276 (footnote omitted). It is important, however, to be very clear in this regard. After all, "[o]fficers who administer a test under the implied consent statute are not required to advise defendants about ***Miranda*** rights … (***Miranda*** rules do not apply because request to submit to a chemical test does not implicate testimonial evidence)." ***Reitter***, 227 Wis. 2d at 225 (citation omitted). Further, the implied consent law confers statutory rights, not constitutional ones, *see* ***Quelle***, 198 Wis. 2d at 276 n.1, and, not surprisingly therefore, our supreme court "has been reluctant 'to devise a "***Miranda***-like" card' under the implied consent statute." ***Id.*** at 230 (citation omitted).

¶11 Thus, while implied consent warnings certainly are not *constitutionally comparable* to ***Miranda*** warnings, they are "*analogous*," *see* ***Quelle***, 198 Wis. 2d at 276 (emphasis added), for the purpose of governing the law enforcement response to an arrestee's refusal. When a person, upon receiving the ***Miranda*** warnings, invokes the right to remain silent or the right to have counsel present, all questioning must cease, and any police effort to persuade or compel the arrestee to relinquish the invoked right is improper. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). *Analogously*, when an arrestee refuses a test under the

implied consent law, police efforts to compel an arrestee to submit must cease, and the officer must comply with the statutory dictates.

¶12 The State argues that ***Bohling*** requires affirmance of the trial court's denial of Morrissey's suppression motion. A cursory review of ***Bohling*** would seem to support the State's position. After all, in ***Bohling***, as in the instant case, when a person arrested for intoxicated driving objected to a blood test, "the officer informed him that restraint would be used if necessary." ***Bohling***, 173 Wis. 2d at 535. The arrestee then still refused to sign a consent form, but ultimately submitted to the blood test. ***Id.*** The supreme court, in a four-to-three decision, reversed this court's decision, which had affirmed the trial court's suppression of the test results. The supreme court concluded

> that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication.

Id. at 547-48.[6] *See also* WIS. STAT. § 343.305(3)(c) (implied consent law "does not limit the right of law enforcement officer to obtain evidence by any other lawful means").

¶13 In ***Bohling***, however, the supreme court never addressed the contention Morrissey presents here: that "[t]he only penalty for refusing under the

[6] Morrissey argues that his case is significantly distinguishable from ***Bohling*** because he offered to take a breath test, whereas the defendant in ***Bohling*** refused a breath test before refusing the blood test. *See* ***id.*** at 534-35. Morrissey is wrong. As noted above, a decision attaching significance to that distinction inevitably would undermine the specific, statutory authority of law enforcement agencies to "designate which of the tests shall be administered first." *See* WIS. STAT. § 343.305(2).

implied consent law is the revocation of the defendant's operating privileges—nothing in the implied consent law authorizes an involuntary blood draw." In ***Bohling***, the supreme court never addressed the dictates of WIS. STAT. §§ 343.305(5) & (9). In ***Bohling***, decided two years before this court's decision in ***Quelle***, the supreme court perforce did not address the implications of this court's conclusion that implied consent warnings are "analogous" to ***Miranda*** warnings.

¶14 And in ***Bohling***, the supreme court did not address the cogent argument that to countenance police conduct such as that in this case would be to reach what Morrissey aptly terms "a dangerous conclusion." Indeed, not only would such a conclusion "encourage[] defendants to become physically resistive to alcohol testing" lest a court "construe [their] behavior as 'implied consent,'" as Morrissey argues, but such a conclusion also would allow police to ignore the dictates of WIS. STAT. §§ 343.305(5) & (9)(a) and, without limitation, to compel an arrestee to submit to a test. Clearly, the legislature, delineating specified statutory procedures for an immediate and non-violent police response to a refusal, could not have intended such an absurd result. *See* ***State v. Gould***, 56 Wis. 2d 808, 812, 202 N.W.2d 903 (1973) (court will reject statutory interpretation that renders absurd result).[7]

[7] In ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), while the supreme court concluded that the failure to advise an arrestee of the right to an alternative test under WIS. STAT. § 343.305(3)(a) did not preclude the police "from obtaining chemical test evidence by alternative constitutional means," ***id.*** at 41, the supreme court did not address the issue in this case. Indeed, although, a cursory reading of certain ***Zielke*** passages could support the State's position, it should be noted that, in ***Zielke***, the arrestee had *not* refused to take a blood test and the supreme court was never considering the propriety of the police response to a *refusal*. *See* ***id.*** at 44-45.

(continued)

¶15 "[I]t is for the legislature," not appellate courts, "to add to the statutory scheme." *See* ***Reitter***, 227 Wis. 2d at 230. "Inasmuch as the implied consent law is a statutory creation, it is the legislature … which should impose duties upon officers in the implied consent setting." ***Id.*** at 217-18. Likewise, it is the legislature, if it sees fit to do so, that could offer officers the option of ignoring a refusal in order to compel an arrestee to take a test.

¶16 The improvidence of such an option, however, further illuminates the logic of this court's conclusion in the instant appeal. Under the present statutory scheme, a refusal is "immediately" met with a powerful response—the virtual certainty of license revocation, *and* the virtual certainty that, in the event of a trial on the underlying offense, the fact-finder will receive compelling evidence of the defendant's guilt. Indeed, many seasoned prosecutors consider evidence of a refusal to be more powerful, and much less susceptible to impeachment, than evidence of blood-alcohol concentration.

¶17 Thus, when police promptly respond to a refusal as the statute dictates, they lose nothing in their fight against drunk driving. *See* ***Scales v. State***,

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And in ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d 347 (Ct. App. 1992), while this court concluded that "the forcible extraction of a blood sample was a reasonable search by fourth amendment standards once [the defendant] refused the test under the implied consent law," *see* ***id.*** at 583, and that, under the circumstances of the case, the test results were admissible, *see* ***id.*** at 592, this court did not consider the *statutory* theory Morrissey presents.

Still, this court readily acknowledges that certain excerpts from ***Bohling***, ***Zielke***, and ***Krause*** could be read to support the State's position. Additionally, in another one-judge appeal, this court, while also not addressing the precise theory presented here, stated "that a … warrantless blood draw to obtain blood alcohol concentration (BAC) evidence is available to law enforcement agencies *regardless of the existence of the implied consent law* if the officer meets the ***Bohling*** criteria." ***State v. Krogman***, No. 97-3400, unpublished slip op. at 5 (Wis. Ct. App. March 18, 1998) (emphasis added), petition for review denied, 218 Wis. 2d 168, 578 N.W.2d 211 (1998). The latter case is noted here, of course, not for any precedential value, but rather, to further alert the parties to the need for supreme court review of the very important and intriguing issue presented in the instant appeal.

64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974) (implied consent law must not be construed to "inhibit the ability of the state to remove drunken drivers from the highway"). Indeed, they gain. Rather than prolonging their encounter with an arrestee and risking confrontation or violence by threatening to "strap down" or compel the person in some other way, officers who "immediately" respond as the statute dictates, will (1) promptly trigger license revocation; (2) effectively establish evidence of the refusal, so utterly convincing to judge and jury; and (3) expeditiously complete their responsibility with the arrestee and return to the streets to arrest the next drunk driver. No wonder, therefore, that the supreme court has advised that, upon hearing a refusal, an officer should "respond to defendants in a manner that is both direct and polite." ***Reitter***, 227 Wis. 2d at 231.

¶18 Accordingly, this court reverses the judgment and remands the case to the trial court. According to the stipulation, Morrissey refused to submit to a blood test, and the police failed to respond to his refusal according to the statutory dictates. Therefore, should the case go to trial, the State would not be allowed to introduce evidence of the blood test results, but would be permitted to introduce evidence that Morrissey refused to submit to the test. *See* WIS. STAT. § 343.305(4).

By the Court.—Judgment reversed.

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