COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3231

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL J. JURKOVIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Daniel J. Jurkovic appeals from an order determining that he unlawfully refused to submit to a chemical test in violation of

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

WIS. STAT. § 343.305 (1997-98).[2] He claims that the trial court erred when it determined that his repeated request to speak with an attorney when asked whether he would consent to a blood test constituted a refusal. Because the circumstances presented in this case constitute a refusal, the trial court did not err in so concluding, and this court affirms.

I. BACKGROUND

¶2 On June 8, 1999, Jurkovic was stopped and ultimately arrested for Operating a Motor Vehicle While Under the Influence of Alcohol (OWI). Following his arrest, City of West Allis Police Officer Robin Walsh transported Jurkovic to West Allis Memorial Hospital for a blood test. At approximately 1:50 a.m., Officer Walsh read Jurkovic the Informing the Accused Form.

¶3 Following the reading of the form, Officer Walsh asked Jurkovic whether he would submit to a blood draw. Jurkovic's response was that he wanted a lawyer. Officer Walsh then advised Jurkovic that this was his fourth offense for OWI and "it was mandated by the State that we take his blood." Jurkovic responded that he wanted a lawyer. At that point, Officer Walsh told Jurkovic that she needed a yes or no answer. Jurkovic did not respond. Officer Walsh interpreted this to be a refusal to consent to the blood test.

¶4 Officer Walsh then advised Jurkovic that because this was his fourth offense, they would have to take a blood sample against his will. Jurkovic indicated that he understood and submitted to the test. The test revealed that Jurkovic's blood alcohol count was .22.

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

¶5 A refusal hearing was conducted in November 1999. The trial court determined that the "officer gave [Jurkovic] misinformation concerning the State's requiring him to submit to a blood test." The trial court based this ruling on the fact that there is no state law that requires a blood draw on a fourth offense OWI. Rather, the state statute requires a defendant to comply with the officer's request for a chemical test, *see* WIS. STAT. § 343.305(2), and provides the law enforcement agency with the discretion to designate which of the tests shall be administered first, *see* § 343.305(5). The West Allis Police Department's policy was to perform a blood test after a third offense OWI.

¶6 Despite its determination that the officer provided Jurkovic with misinformation, the trial court found that Jurkovic refused to consent. The trial court noted that Jurkovic failed to promptly answer yes, and that his repeated request for a lawyer, coupled with his nonverbal conduct, constituted a refusal. The trial court also found that Jurkovic's subsequent cooperation with the blood draw does not change the fact that he refused to consent to the test.

¶7 The trial court issued an order concluding that Jurkovic refused to consent to the chemical test, that the refusal was unlawful, and that he was subject to the corresponding penalties. Jurkovic appeals from that order.

II. DISCUSSION

¶8 Jurkovic seizes upon the trial court's comment that he was "misinformed" and contends that the misinformation misled him. He argues that when a defendant is misinformed by a police officer, it is reasonable to ask to speak with an attorney, and that should not be construed as a refusal. He also argues that the misinformation creates *per se* prejudice to Jurkovic, justifying a reversal of the trial court's order. This court is not persuaded.

¶9 Interpretation and application of WIS. STAT. § 343.305 to a particular set of facts presents a question of law that this court reviews independently. *See* ***State v. Wilke***, 152 Wis. 2d 243, 247, 44 N.W.2d 13 (Ct. App. 1989). WISCONSIN STAT. § 343.305 provides in pertinent part:

> **(2)** IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, 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 or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a) or (am), and may designate which of the tests shall be administered first.
>
> **(3)** REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her 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.
>
> (am) Prior to arrest, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2) whenever a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person is violating or has violated s. 346.63 (7). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. For

> the purposes of this paragraph, "law enforcement officer" includes inspectors in the performance of duties under s. 110.07 (3).
>
> ….
>
> **(4)** INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
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> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> 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 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.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

¶10 When law enforcement officers fail to comply with the implied consent statute, the driver's license cannot be revoked for refusing to submit to chemical tests. *See* ***State v. Zielke***, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (1987). Furthermore, if the procedures of WIS. STAT. § 343.305 are not followed, the state cannot rely on the favorable statutory presumptions concerning the admissibility of chemical-test results set forth in § 343.305(7). *See* ***id.*** "In addition, the fact of

refusal cannot be used in a subsequent criminal prosecution for drunk driving as evidence of the driver's consciousness of guilt." ***Id.***

¶11 Thus, the issue here is whether Officer Walsh complied with the implied consent statute. There is a three-step standard governing whether the warning process under the implied consent law was adequately followed:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading; *and*
>
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

County of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995). This standard was re-affirmed by our supreme court in ***State v. Reitter***, 227 Wis. 2d 213, 233, 595 N.W.2d 646 (1999).

¶12 In applying the three-step standard here, this court concludes that Jurkovic has failed to show that Officer Walsh did not substantially comply with the consent statute. *See* ***id.*** at 232. It is undisputed that Officer Walsh read Jurkovic the implied consent warnings from the form before asking him if he would submit to the blood test. Jurkovic did not answer yes or no, but stated that he wanted to speak to his lawyer. It was only at this point that Jurkovic was allegedly "misinformed" that the state required a blood test because of the number of Jurkovic's prior convictions. Although Officer Walsh's statement was technically incorrect, it created a distinction without any meaningful difference. As pointed out by the State in its brief, state law does mandate that an OWI arrestee comply with the officer's request for the specific test requested. The

arrestee does not have the choice of which test he or she will take, or the "right" to refuse to do so. *See* ***id.*** at 225. Thus, the technical incorrectness of Officer Walsh's response to Jurkovic's request for an attorney did not materially impact Jurkovic's decision. In other words, the statement by Officer Walsh was not misleading.

¶13 Further, the statement did not alter Jurkovic's stance. When advised by Officer Walsh that the state required the blood draw, Jurkovic repeated the same statement: he wanted to speak to his attorney. Thus, even if the alleged statement by Officer Walsh qualified as "misinformation," it did not affect Jurkovic's actions. Our supreme court recently concluded in ***Reitter*** that a repeated request for an attorney can serve as a refusal to consent. *See* ***id.*** at 234. In fact, there is no right to consult with an attorney at this stage of the proceedings. *See* ***id.*** at 225.

¶14 Jurkovic contends that he never "articulated a refusal to submit to a blood test." However, that is not the standard by which these cases are governed. "[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." ***Id.*** at 234-35 (citation omitted). "The implied consent law does not require a verbal refusal." ***Id.*** at 234. Rather, conduct that is uncooperative, thereby preventing or delaying the administration of the test can constitute a refusal. *See* ***id.*** Some examples of such conduct include: refusing to give a yes or no answer, instead repeatedly asking for counsel; *see* ***id.***; refusing to give a yes or no answer, instead repeatedly asking to use the restroom; *see* ***State v. Rydeski***, 214 Wis. 2d 101, 107, 571 N.W.2d 417 (Ct. App. 1997); and insisting on waiting for an attorney to arrive before submitting to the test; *see* ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980).

¶15 Here, Zurkovic is not unfamiliar with the procedures involved. This was his fourth OWI offense. He was read the proper warnings, and did not give a proper response. Once the proper warnings are given and the accused does not willingly submit to the test, a refusal has occurred, and the accused is subject to the consequences. *See* ***id.*** To allow defendants to manipulate the system by refusing to cooperate, only to subsequently argue on appeal that the lack of cooperation did not constitute a refusal, would undermine the legislature's "intention to facilitate drunk driving convictions." *See* ***Reitter***, 227 Wis. 2d at 231.

¶16 Accordingly, this court concludes that any "misinformation" was not misleading and did not affect Jurkovic's ability to make a choice. Therefore, the trial court reached the correct conclusion when it ruled that Jurkovic's conduct constituted an unlawful refusal to submit to a chemical test.

By the Court.—Order affirmed.

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