COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0671

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

IN THE MATTER OF THE REFUSAL OF MILTON A. BUMPERS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON A. BUMPERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Milton Bumpers appeals an order revoking his operating privilege for failing to submit to chemical testing as required under WIS. STAT. § 343.305. Bumpers contends that his response when the arresting officer asked him to submit to an evidentiary chemical test of his breath was not a refusal, and that he should have been instructed by the officer that he had to answer either "yes" or "no" to the request, before his response was deemed a refusal. We conclude that Bumpers' conduct and lack of an affirmative response was properly deemed a refusal. Accordingly, we affirm the order revoking his driving privilege.

BACKGROUND

¶2 A City of Madison police officer arrested Bumpers for operating a motor vehicle while under the influence of an intoxicant (OMVWI) in violation of WIS. STAT. § 346.63(1)(a). The arresting officer issued Bumpers a "Notice of Intent to Revoke Operating Privilege" for having refused a chemical test for blood alcohol concentration. *See* WIS. STAT. § 343.305(9)(a). Bumpers requested a refusal hearing under § 343.305(9)(a)4.

¶3 The arresting officer testified at the refusal hearing that she took Bumpers to a holding cell and subsequently read Bumpers the "Informing the Accused" form as required by Wisconsin's implied consent law. *See* WIS. STAT. § 343.305(4). After the officer began reading the form, Bumpers stated that he was hard of hearing. The officer, who testified that she was standing only a few inches from Bumpers, told him that he had no problem hearing her earlier that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

evening. Bumpers then told her that he needed an interpreter. The officer began reading the form again, after which Bumpers told her, "[l]ouder, louder." The officer testified that, prior to her reading Bumpers the form, he had no problem hearing her and that she thought he was "trying to play games with the process." She began reading again in a louder voice.

¶4 After reading the form to Bumpers, the officer asked him if he would submit to an evidentiary chemical test of his breath. The backup officer who had assisted with Bumpers' arrest testified that she was present during this time and told Bumpers "that he needed to reply to the question or he would be marked as a refusal." Bumpers then responded that he didn't know that the officer asking the question was speaking to him. The arresting officer again asked Bumpers whether he would submit to the test. Rather than responding "yes" or "no," Bumpers asked for an attorney.

¶5 The officer then directed that Bumpers be recorded as having refused the test. According to the arresting officer, several minutes after it was marked a refusal, Bumpers told the officer he would take the test.[2] When asked whether she, too, would "interpret [Bumpers'] conduct as indicative of a refusal," the backup officer responded that she would, explaining:

> It appeared to me as though Mr. Bumpers was playing games during the process. He was verbally abusive to us. He remained in handcuffs during this time because he was very agitated. An then when [the arresting officer] started reading the form and he started yelling, "Louder, louder," obviously, it seemed obvious to me that Mr.

[2] The backup officer testified that her report indicated Bumpers' request came "about three minutes after he was marked as a refusal." The trial court found that the request occurred "[a]bout three minutes later."

> Bumpers should be able to hear what was going on, because when he was initially contacted and we performed the investigation on Williamson Street, there would have been much more background noise, traffic noise, and we were even standing much further distances away from him. He certainly was able to hear us at that point and answered our questions when we asked him. And now, in a controlled environment where it's much easier to hear, he's asking for [the arresting officer] to yell to him.

¶6 Bumpers did not testify at the hearing and did not present any testimony or other evidence. The trial court noted that Bumpers made no claim at the hearing that he was unable to hear or understand what the arresting officer read to him. The court credited the officers' impressions that Bumpers was "playing games," and found that Bumpers "refused to take the test by his words and his actions, which constitutes a constructive refusal." The court subsequently entered an order revoking Bumpers' driving privilege for two years, which order Bumpers appeals.

ANALYSIS

¶7 Bumpers concedes that the officer had probable cause to arrest him and that the officer complied with the informational provisions of WIS. STAT. § 343.305(4). Bumpers also does not claim that his alleged refusal to submit to the test was due to a physical inability unrelated to his use of alcohol. Thus, the only issue before us is whether Bumpers' conduct when he was asked to submit to a chemical test of his breath constituted a constructive refusal to take the test. The relevant facts are largely undisputed, and Bumpers does not claim the trial court's factual findings were clearly erroneous. *See* WIS. STAT. § 805.17(2). This appeal therefore involves the application of the implied consent statute to found facts, which presents a question of law that this court reviews de novo. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

¶8 Under WIS. STAT. § 343.305(2), "[a]ny person who … drives or 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 or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer." Absent a physical inability unrelated to the use of an intoxicant, a refusal to submit to such a test is improper and triggers statutory penalties. Section 343.305(9)(a); ***Rydeski***, 214 Wis. 2d at 106. A verbal refusal is not required, and the actions or conduct of the OMVWI arrestee, may "serve as the basis for a refusal." ***Id***.

¶9 Bumpers claims that his single request for an attorney in response to the officer's inquiry whether he would submit to the breath test cannot constitute a refusal. He argues that if he had "persistently or repeatedly asked for an attorney, his requests might have risen to the status of a constructive refusal." Bumpers cites ***Rydeski,*** as well as ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999) and ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), for the proposition that it takes more than a mere request to consult with an attorney to constitute a refusal. We conclude, however, that the facts of the cited cases do not establish a threshold level of uncooperative conduct which must occur before an arresting officer may conclude that an arrestee has constructively refused to submit to a test.

¶10 The principal issue in ***Neitzel*** was whether an OMVWI arrestee "was entitled to consult counsel before deciding to take or refuse to take a chemical test for intoxication." ***Neitzel***, 95 Wis. 2d at 193. The supreme court concluded that an arrested driver "has no right to counsel before deciding whether to submit to chemical testing for intoxication under the implied consent law." ***Id***. at 206. Accordingly, it affirmed an order revoking the driving privilege of an OMVWI arrestee who "repeatedly refused to take the test until his lawyer was present." ***Id***.

at 196. The arresting officer gave the arrested driver the opportunity to call an attorney prior to the test but warned him several times that "his insistence on waiting for his lawyer would be construed as a refusal to take the test." ***Id***. The court thus rejected the driver's claim to have been confused on account of the officer's permitting him to call his attorney. ***Id***. at 205-06. Nowhere in the opinion, however, does the court expressly consider what conduct by an arrested driver may be deemed to be a refusal of a requested test.

¶11 This court addressed that question, however, in ***Rydeski***. We concluded there that, although an OMVWI arrestee had initially agreed to take a breath test, his subsequent conduct constituted a refusal. ***Rydeski***, 214 Wis. 2d at 107. That conduct included the driver's insistence on using the bathroom prior to the test despite the officer's having asked him to take the test "at least five times." ***Id***. We did not say, or even suggest, however, that an officer must make multiple requests before deeming an arrestee to have refused a test, nor that the officer must wait for a specified time before doing so. Significantly, we rejected an argument in favor of a "reasonable recantation period," concluding instead that

> once a person has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the requested test, and 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. A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants with a "reasonable time" …. [The driver]'s willingness to submit to the test, subsequent to his earlier refusal, does not cure the refusal.

Id. at 109.

¶12 The supreme court similarly concluded in ***Reitter*** that an OMVWI arrestee's conduct "constituted a constructive refusal" to submit to a chemical test

of his breath. ***Reitter***, 227 Wis. 2d at 237. There, the driver had 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. ***Id***. at 220-21. Although the court noted the similarity to the facts presented in ***Neitzel*** and ***Rydeski***, it did not cite them as providing a minimum level of uncooperative conduct, absent which a refusal could not be declared. To the contrary, in explaining that an arresting officer "is under no affirmative duty to advise the defendant that the right to counsel does not attach to the implied consent statute," ***id***. at 231, the court expressly concluded "that an officer's only duty under these circumstances is to administer the information contained in the 'Informing the Accused' Form." ***Id***. at 230.[3]

¶13 In summary, nothing in the cited cases, or in WIS. STAT. § 343.305(9), suggests that an officer must repeatedly request an OMVWI arrestee to take a breath test as Bumpers contends, or that the officer must wait for a specified time or provide information beyond that required by statute, before declaring a refusal. As we noted in ***Village of Elkhart Lake v. Borzyskowski***, 123

[3] Although it concluded that an officer is under no statutory or constitutional duty to inform an OMVWI arrestee that the right to counsel does not apply regarding the decision to submit to or refuse a chemical test, the supreme court stated that "[g]ood practice should lead professional, courteous officers to advise insistent defendants that the right to counsel does not apply to chemical tests." ***State v. Reitter***, 227 Wis. 2d 213, 231, 595 N.W.2d 646 (1999). There is evidence in the present record suggesting that it is a customary practice for Madison police officers, when an OMVWI arrestee asks to speak to an attorney before submitting to a test, to explain that there is no right to consult an attorney prior to the test, that a "yes or no" answer must be given to the request, and that a failure to do so may result in a refusal. We conclude that such a practice, however salutatory, is not a legal requirement. We, like the supreme court, are reluctant to "transform[] a common courtesy into an affirmative duty judicially superimposed on a legislative scheme." ***Id***. at 232. We note further that an officer's willingness and ability to extend courtesies to an OMVWI arrestee may be impacted by the attitude and behavior exhibited by the arrestee, and rightly so.

Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985), "[a] refusal results because '[i]t is the reality of the situation that must govern ….'" ***Id***. at 192 (citation omitted).

¶14 Here, Bumpers' conduct was described by the backup officer as "verbally abusive" and "very agitated," and he did more than merely request an attorney. When the officer began reading him the statutory information, Bumpers initially said that he was hard of hearing and that he needed an interpreter, although he had previously shown no signs of a hearing impairment and, indeed, made no such claim at the refusal hearing. He pretended to not know that the officer was speaking to him, even though he was apparently alone in the holding cell and the officer was "inches" from him. The backup officer specifically instructed Bumpers that he needed to reply to the test request or he would be "marked as a refusal." The arresting officer then repeated the request. Both officers stated their impressions that Bumpers was "playing games," and explained the basis for their impressions.

¶15 Courts must construe the implied consent law liberally to effectuate its purpose, which is "to facilitate the collection of evidence … not … to enhance the rights of alleged drunk drivers." ***Reitter***, 227 Wis. 2d at 224; *see also* ***Neitzel***, 95 Wis. 2d. at 203-4 ("The purpose behind the implied consent law is to facilitate the gathering of evidence against drunk drivers ... not to inhibit the ability of the state to remove drunken drivers from the highway."). The trial court ably expressed the intent of the implied consent law and applied it to the facts at hand:

> The law has many intents, and some of them have been discussed today. Another intent is to get evidence of the situation in an efficient and reasonable and fair way, in addition to the other reasons for the law we've already argued.

I think I need to look at the totality of the circumstances…. [A] piece of the evidence that's pretty important in this case is the officer's testimony that the defendant was playing games. I think that testimony is corroborated by his decision three minutes later once he saw that he was marked as a refusal to then offer to take the test. The impression one gets is certainly the defendant would have continued to play games until the game was over. He made a decision, and he made a bad decision, and the officer marked a refusal.

Could the officer have said, "I'll give you another chance"? Could the officer have done it four times, five times, three times, two times? Certainly. But the cases cited today don't say that if you don't do that, it's not a refusal. They just say in those situations, it was a refusal.

I think the law is pretty clear that a defendant needs to respond promptly to the question, "Will you submit to a test." So what other officers would have done in certain situations or even in this situation really isn't relevant. The question is did the defendant promptly agree to take the test, or did he not agree to take the test.

There are reasons for … the requirement that there be a prompt response. One is the 20-minute observation period. We don't know in our case if that had been broken or not, but obviously, one reason to not let a defendant come back later and say, "I want to take the test" is to have to restart the 20-minute observation period.

Another reason why there has to be a prompt response is the evidence is dissipating at all times, and the quicker you get it, the more accurate it can be, although with expert testimony, you can sometimes overcome that.

Another reason, obviously, for requiring a prompt response is to get the officers back on the street rather than having them required to dance with a defendant when the defendant's been given a chance to take the test.

I think we always get in trouble when we try to insist on yes or no responses to questions…. He could have said, "I will not take the test," "I will take the test," "Give me the test," "There's nothing you can do to get me to take the test." There's a lot of ways to respond without using the words "yes" or "no." So to say that someone has to be told that you have to say "yes" or "no" I don't think is what the law is.

> I think the intent of the law also is to not require law enforcement in the field to have to give explanations. I think they're in an impossible situation sometimes. If they give an explanation, the explanation gets attacked. If they don't give an explanation, they get attacked for not giving an explanation. And I think that's why the law requires reading the form, and it requires a prompt response. I don't think the intent of the law is to require officers to give explanations. If they choose to do so, fine. But they do so at their peril if they make a mistake, and there's lots of cases about what happens if officers make a mistake in explaining the law.
>
> So, having said all that, I think when you put all the circumstances together, the defendant did not promptly agree to take the test, which under the law he had previously consented to…. He refused to take the test by his words and his actions, which constitutes a constructive refusal.

¶16 We conclude, as did the trial court, that the totality of Bumpers' uncooperative conduct and his failure to assent to taking the test after two requests constitute a refusal under WIS. STAT. § 343.305(9).

CONCLUSION

¶17 For the reasons discussed above, we affirm the order of the circuit court revoking Bumpers' driving privilege.

By the Court.—Order affirmed.

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