COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1486 **Cir. Ct. No. 2010TR11451**

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

IN THE MATTER OF THE REFUSAL OF NANCY C. BUSH:

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

NANCY C. BUSH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond Du Lac County: GARY R. SHARPE, Judge. *Judgment and order affirmed*.

¶1 BROWN, C.J.[1] Nancy C. Bush appeals from the judgment of conviction and order issued by the circuit court upon its decision that she refused a chemical test of her blood, in violation of Wisconsin's implied consent law, WIS. STAT. § 343.305. She claims that she did not mean to refuse; she just had asked a question of the deputy who read the form and was silently waiting for an answer. She agrees that the law allows law enforcement officers to mark a refusal when there has been some kind of affirmative noncooperation. But she claims that her conduct did not fall into that category. We disagree that evidence of some verbal or physical showing of noncooperation is a necessary condition precedent to marking down a refusal in the absence of a straight-out "yes" or "no" by the accused. Her obligation was to give her answer promptly. She did not. We affirm.

¶2 Bush's appeal focuses upon her interaction with the sheriff's deputy who arrested her for driving while intoxicated, after the deputy took her to the hospital for blood testing. Sometime shortly before 1:20 a.m., the deputy read Bush an Informing the Accused form, which provides all of the information that the legislature has commanded be given to a driver before a law enforcement officer asks the driver to submit to a chemical test. *See* WIS. STAT. § 343.305(4).

¶3 After reading this information to Bush, the deputy asked her to submit to the blood test. Bush did not respond to him. She just sat there, silent. In response to the silence, the deputy offered to reread the form. Bush declined the offer, stating that she understood the information but not the "consequences."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). 809.23(1). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The deputy did not respond to her, and Bush was silent. After a period of this "dead silence," perhaps a few minutes, the deputy asked her once more if she would take the test. There was no answer. The deputy interpreted Bush's behavior as a refusal to submit to the test, and told her as he marked the form that he was checking the box for "no," that she was not submitting to the test. Bush gave "no reaction at that point." Only later, when Bush became aware that her refusal meant she was going to jail for twelve hours, did she ask to take the test.

¶4 As the circuit court noted, under the implied consent law, when Bush said she understood the information but not the "consequences," the deputy properly offered nothing more than a rereading of the form. Not only was rereading the form all that the deputy was required to do, he was trained, correctly, not to respond with any information other than what he had already read to Bush, *see* ***State v. Reitter***, 227 Wis. 2d 213, 232 n.14, 595 N.W.2d 646 (1999), information that Bush said she understood.

¶5 Once the Informing the Accused directives were given to her, Bush's obligation was "to take the test promptly or to refuse it promptly." ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980). Bush did not do anything "promptly," and the officer reasonably interpreted her passive silence as refusal to cooperate with the testing.

¶6 Bush is correct that in some of the past cases in which a driver's conduct was enough to constitute "refusal," the conduct went beyond mere silence to a more affirmative verbal or physical lack of cooperation—e.g., ***State v. Rydeski***, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997) (driver asks to use the bathroom just as the twenty-minute observation period ends, and despite the officer's repeated requests that he submit to the test); ***Village of Elkhart Lake v.***

Borzyskowski, 123 Wis. 2d 185, 190-91, 366 N.W.2d 506 (Ct. App. 1985) (officer "could hear and feel air escaping from around the mouthpiece" and saw no deep breath being taken, despite repeated instructions about blowing "deep lung air" into the mouthpiece).

¶7 But affirmative acts of noncooperation take many forms. Silence alone can be an affirmative act of noncooperation in a given case. Here, the deputy testified that he arrived at the hospital at 1:09 a.m.; completed the citations in the squad, which took "[a] minute or two at the very most"; led Bush into the "police room" in the hospital; read Bush all of the required information, checking off the paragraphs as he read; asked Bush whether she was going to submit to the test; in the face of her silence, offered to reread the information, and was told by Bush that she understood the information but not the "consequences"; asked again whether she would submit to the test; and, when Bush again did not respond, at 1:20 a.m., marked on the form that Bush had refused the test. The deputy did not know exactly how long they sat in silence, but testified that it "could have been a few minutes." A reasonable police officer in the same position as the deputy could conclude that Bush was being noncooperative by her silence.

¶8 Her explanation that she was just waiting for an answer to her question is unavailing. As the circuit court stated, it is well-settled Wisconsin law that "the officer is not required to [in response to a question about the consequences of refusal] go into a conversation about the various consequences and impact of the decision not to take the test." In these circumstances, we will not disturb the circuit court's judgment that the officer reasonably inferred from the silence that Bush was not consenting to the testing.

¶9 This is not to say that the deputy had no discretion to answer Bush's question or allow her to take the test after all, when she volunteered to do so upon realizing that her refusal meant she would be held in jail for twelve hours. Rather, he had no obligation to do so. She, on the other hand, did have an obligation; that was to answer promptly. *Compare* ***Reitter***, 227 Wis. 2d at 231-32 ("[W]e see no harm in allowing the officer to state briefly that the right to counsel does not attach to the implied consent setting. That said, we do see harm in transforming a common courtesy into an affirmative duty judicially superimposed on a legislative scheme."). The legislative mandate to cooperate "promptly" with the testing is virtually[2] absolute, and her prolonged silence alone constituted refusal under the facts of this case.

By the Court.—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* WIS. STAT. § 809.23(1)(b)4.

[2] The statute provides only one excuse for refusal: "a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol … or other drugs." *See* WIS. STAT. § 343.305(9)(a)5.c.