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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

IN THE MATTER OF THE
REFUSAL OF CARL J. OPELT:
STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2013 AP 1798

vs.

CARL J. OPELT,

Cir. Ct. Case No. 2013-TR-343

Defendant-Appellant.

APPEAL FROM THE FINAL JUDGMENT DATED AUGUST 5, 2013,
OF THE CIRCUIT COURT FOR CLARK COUNTY
HONORABLE JON M. COUNSELL, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

At issue is whether the Defendant-Appellant refused a request to submit to a chemical test of his breath when he repeatedly offered to take the test but declined to use the word "yes."

Decided by the circuit court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant states that oral argument is unnecessary. The briefs are expected to fully present and meet the issue on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it would not justify the additional expenditure of court time or cost to the litigant. Wis. Stat. § 809.22(2)(b).

Publication would be appropriate. The opinion will apply an established rule of law to a factual situation significantly different from that in published opinions. Wis. Stat. § 809.23(1)(a)2.

STATEMENT OF THE CASE

The Defendant-Appellant, Carl J. Opelt ("Mr. Opelt"), appeals from a decision of Clark County Circuit Court in which the court convicted him of refusing to submit to chemical testing, contrary to Wis. Stat. § 343.305(9). On February 3, 2013, Officer Bembnister from the City of

Neillsville Police Department, arrested and cited Mr. Opelt for Operating while Impaired, First Offense, contrary to Wis. Stat. § 346.63(1)(a). (R. 17: 1-28; R. 10.) Officer Bembnister also cited Mr. Opelt for Refusal, contrary to § 343.305(9). (R. 1.) Mr. Opelt filed a timely request for a refusal hearing. (R. 3.) On June 19, 2013, prior to trial on the OWI charge, the circuit court held a refusal hearing. (R. 17.) The circuit court received testimony from Officer Bembnister, and also received as evidence, among other things, an audio recording and transcript of the alleged refusal. (*Id.*) Following the hearing, the parties filed briefs, and on August 2, 2013, the court issued an opinion convicting Mr. Opelt of Refusal. (R. 9.) On August 5, 2013, Mr. Opelt pled guilty to the OWI charge. (R. 10.) Mr. Opelt filed a notice of appeal on August 8, 2013. (R. 12.)

STATEMENT OF THE FACTS

Mr. Opelt was arrested for Operating while Impaired. (R. 17.) Following his arrest, Mr. Opelt told the officer he "should take him in or take him wherever [he wants] to take him" or words to that effect. (R. 17:12.) The arresting officer brought Mr. Opelt to Memorial Medical Center in Neillsville for a chemical test. (R.17:12.) From the parking lot, the officer read Mr. Opelt the standard Informing the Accused form.

(R. 17:12-13.) The officer asked Mr. Opelt if he would submit to an evidentiary chemical test of his blood. (R.17:13.) During the one-minute and forty-nine seconds which followed, Mr. Opelt provided several equivocal or non-responsive answers, such as, "you brought me up to the hospital" (R. 17:17-19,) "I employ 46 people in Neillsville," (R.17:17,) "what do you want me to do" (R.17:18,) and "you tell me what I have to do." (R. 17:18.)

But after one minute and forty-nine seconds, Mr. Opelt clarified that he would be willing to do the blood test. He said, "**Well, we can go in there and get a blood test**." (R. 17:19; R. 3:2)(emphasis added.) The officer asked, "So, yes you will?" Mr. Opelt responded, "**If you want it, then we can do it**." (*Id.*)(emphasis added.) At that point, Mr. Opelt had submitted. Prior to that point, Mr. Opelt had not declined. After that point, the officer continued to probe for either a "yes" or a "no":

> Q: So yes, consider that a yes, that you'll...
>
> A: **No, not consider it a yes, if that's what you need.**
>
> Q: Well, okay. I need you to answer. Here's the question. Okay, will you submit to an evidentiary chemical test of your blood? I need a yes or a no answer.
>
> A: **If that's what you need, we'll go do it**. Make sure you write that down there that **I said that if that's what you need**.

(R. 17:19.)(emphasis added).

At that point, Mr. Opelt had reiterated that he would submit to the test, but did not want to use the word yes. After that point, the officer continued probing for a "yes" or "no":

Q: So are you refusing?

A: **No, I am not refusing. I said if that's what you need, we'll go do it.**

Q: Okay, well, I need a, if that's, I need a "yes" or "no." If you not going to answer yes or no, I'm going to consider it a "no" then.

A: **I am just saying if that's what you need, we'll go do it**.

(R. 17:19-20)(emphasis added.)

By that point, Mr. Opelt had *repeatedly* submitted to the test while choosing words other than "yes." But rather than proceed to testing, the officer continued to probe for a specific "yes" or "no."

Q: Okay. Last time. I understand, but I can't play this game of

A: I am not playing your game.

Q: Okay, I need a "yes" or a "no."

A: **If that's what you need, let's go do it**.

Q: For the last time, if you say, if that's what you need, let's go do it, I'm going to say no.

A: Make sure you put that on your paper, **if that's what you need, let's go do it.**

Q: Are you answering "yes" or "no"?

A: I'm answering **if that's what has to be done, let's go do it.**

(R. 17: 20)(emphasis added.)

At this point, Mr. Opelt had submitted to the test on nine occasions without using the word yes. The officer continued to push for a "yes" or "no":

Q: Okay, I want to give you a chance to do it, but if you're not going to say yes or no, no ifs, ands, or buts. It's "yes" or "no." I'm not trying to argue with you either, okay. But I'm telling you, there's no if's ands or buts. It's a yes or no.

A: I'm saying…

Q: And I'm going to go with no if you don't want to give a yes or no.

A: **Put that in there if that's what you need, let's go do it.**

(R. 17:20-21)(emphasis added.)

By this point, Mr. Opelt had submitted ten times. It was only after the officer had not accepted Mr. Opelt's ten submissions that Mr. Opelt reverted to equivocal or non-oppositional responses:

Q: I can't. There's no spot for if and or but. It's a yes or no.

A: Okay. Put, say…

Q: I can't write that.

A: -- **maybe. Just put yes.**

Q: Yes. Okay.

A: No, just don't put no. Don't ever say yes. Just say if that's what --

Q: That's not the right answer. Okay, there is no if, and or maybe in this section. It is yes or no.

A: Well, that's –that's your paperwork.

Q: Yeah, and this is the paperwork that I got to fill out right now. So it is yes or no.

A: **Well, I'm not going to deny you. I'm not going to tell you no.**

Q: So then you're going to say yes.

A: **If that's where we're going, you've got me handcuffed, that's where we're going**. You're actually being a nice guy…

(R. 17:21-22)(emphasis added.)

After a few more words, the discussion about the chemical testing ended with Mr. Opelt about not giving up, and the officer responding that he was not asking Mr. Opelt to give anything up. (R. 17:22-23.)

STANDARD OF REVIEW

The interpretation of Wisconsin's Implied Consent Law and its application to undisputed facts present questions of law which the Court of Appeals reviews *de novo*. *See State v. Sutton*, 177 Wis. 2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993); *see State v. Reitter*, 227 Wis. 2d 213, 223, 595 N.W. 2d 646 (1999)(citation omitted).

ARGUMENT

I. Mr. Opelt did not refuse a request to submit to a chemical test of his blood when he repeatedly agreed to take the test without using the word "yes."

The circuit court's decision finding Refusal should be vacated. The Court of Appeals should find that Mr. Opelt promptly submitted on multiple occasions without refusing. Although Mr. Opelt never used the word "yes," the refusal statute has never required a specific "yes" answer. All that is required is a submission. Because Mr. Opelt submitted, the finding of refusal should be vacated.

The Wisconsin Supreme Court explained the implied consent statute in *State v. Reitter*:

> The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. Designed to facilitate the collection of evidence, the law was not created to enhance the rights of alleged drunk drivers. Rather, the implied consent statute was "designed to secure convictions." Given the legislature's intentions in passing the statute, courts construe the implied consent law liberally.

State v. Reitter, 227 Wis. 2d 213, 223-25, 595 N.W. 2d 646 (1999)(citations omitted).

The implied consent/refusal law is relatively straightfoward: When a Wisconsin driver gives implied consent to chemical testing, the driver has

no right to refuse a [chemical] test. *Id.* at 234. A "failure to submit to such a test" constitutes refusal. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W. 2d 417 (Ct. App. 1997).[1] Thus, conduct that prevents an officer from obtaining a breath sample constitutes a refusal. *Id.* "[O]nce 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. *Id.* at 109.

There is nothing in the statute that provides that the only way to submit is by saying the word "yes." *See* § 343.305(9). Likewise, it is well-established that there is nothing in the statute that provides that the only way to refuse is by saying the word "no." Rather, "it 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." *Reitter*, 227 Wis. at 234-35. "The conduct of the accused may serve as the basis for a refusal." *Rydeski*, at 106.

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[1] Section 343.305(9)(a) of the Wisconsin Statutes provides in part that if a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub.(10), the person's operating privilege.

Accordingly, if the Refusal statute is applied such that a refusal can occur without use of the word "no," then the Refusal statute should be applied such that a submission can occur without use of the word, "yes." As the Wisconsin Supreme Court explained in *Reitter*, "it is the reality of the situation that must govern." *Id.* In this case, the reality of the situation was that in less than two minutes of being asked to complete a blood test, Mr. Opelt stated, "let's go do it," and he repeated that over and over again. At least by the fourth time Mr. Opelt said, "let's go do it" or words to that effect, Officer Bembnister had an objectively reasonable basis upon which to conclude that Mr. Opelt was willing to complete chemical testing. He should have proceeded to testing without quibbling with a person believed to be impaired over semantics.

It is simply not a refusal to state "let's go do" the test. The fact that Officer Bembnister demanded a response different than, "let's go do it" does not support the conclusion that Mr. Opelt refused to "go do it." The State's reading of the statute would result in refusals where the question, "will you submit to an evidentiary chemical test" is answered with other assenting or permissive responses, such as "sure," or "okay." The reality of the situation is that "sure" and "okay" demonstrate consent, just as much as

the response "yes" or "let's go do it" does. Mr. Opelt's choice of words, in offering to do the test, in no way "prevented the officers from administering the test." *Reitter*, at 237. Thus, there was no refusal.

In the context of a Fourth Amendment search, the standard for measuring the scope of a suspect's consent "is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251 (1991). The same standard should apply here. Using this standard, if an objectively reasonable person would have believed, under the totality of the circumstances, that Mr. Opelt consented at some point between the first and seventh time he said, "let's go do it," then he consented. The only fair reading of Mr. Opelt's statements is that when he repeatedly said, "let's go do it," he was willing to go do it. The fact that he did not use the word "yes" does not make it a refusal.

Moreover, the circuit court's findings misconstrue the significance of Mr. Opelt's words. The circuit court found that Mr. Opelt, at best, provided equivocal answers. Admittedly, Mr. Opelt's initial answers were equivocal or uninformative, as were some of his final answers. But after his initial responses, Officer Bembnister offered Mr. Opelt a chance to

submit, which he did. He said "let's go do it" or words to that effect seven consecutive times. It is within those answers that Mr. Opelt submitted, and the officer should have just proceeded with the test. Instead, Officer Bembnister inaccurately told Mr. Opelt that his submissions were inadequate.

This case is not like *Rydeski*, where the Court of Appeals found the accused had unlawfully refused chemical testing. *Rydeski*, 214 Wis. 2d at 109. In that case, the accused initially agreed to perform a breath test, but during the 20-miunte observation period, he requested to use the restroom. *Id.* at 104. He then agreed to wait until the testing was completed. *Id.* After the 20-minute observation period, the officer asked Rydeski to submit to the test at least five times, "but Rydeski continued to refuse." *Id.* The officer began to fill out the Notice of Intent to Revoke form. Rydeski protested that he had not refused, and said he would complete the test. *Id.* The trial court found that although Rydeski did not say he would not take the test, the officer asked him to take it on at least five occasions, but Rydeski "refused to approach the machine." *Id.* The trial court found that Rydeski did request to take the test after his initial refusal, but there was no obligation of the officer to allow him to do so. *Id.* The Court of Appeals

affirmed. The Court held that an accused's willingness to submit subsequent to an earlier refusal, does not cure the refusal. *Id.* at 109.

The difference between *Rydeski* and the present case is that Mr. Opelt never refused, either constructively in fact. There were a few moments of equivocating, but there was nothing to cure. This case is therefore not analogous to *Rydeski*.

Nor is this case analogous to *Reitter*. In that case, the defendant stated, "I'm not refusing, I just want to talk to my attorney." *Reitter*, at 221. After repeated requests to submit to testing, the defendant became "very uncooperative," "grew belligerent," and accused the officer of "violating his rights." *Id.* The deputy concluded, "regardless of what I asked him and what I said to him he was not going to take the test." *Id.* The Wisconsin Supreme Court affirmed that this was a "constructive refusal." *Id.* at 237. The court explained that the defendant's words and conduct, "prevented the officers from administering the test." *Id.*

The facts here are significantly different. Mr. Opelt did not prevent the officer from administering the test; Mr. Opelt repeatedly offered to take the test. The repeated questioning that occurred here was not the result of attempts to obstruct; the repeated questioning that occurred here was the

result of a disagreement over word choice. Mr. Opelt wanted to consent by offering to "go do the test," whereas the officer wanted Mr. Opelt to use the word, "yes."

One of the purposes of the Implied Consent/Refusal statute is to facilitate the efficient administration of chemical testing procedures. The purpose of the law can be achieved if suspects provide a prompt, objective submission to the process, whether the word "yes" is used or not. Officers are able to efficiently conduct law enforcement duties based on objective criteria in many different areas, such as whether to stop, arrest, search, seize, interrogate, etc. An objective consent should be all that is needed here. In this case, under an objective view of the evidence, Mr. Opelt promptly agreed to do the test. His word choices might have been considered imperfect or unsatisfactory to the arresting officer, but from an objective perspective, Mr. Opelt consented to do the test when he repeatedly said, "let's go do it." Mr. Opelt submitted, and he should not, in fairness, be punished for refusing to do what he repeatedly said he would do.

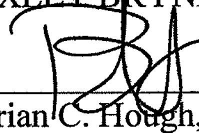
CONCLUSION

It is respectfully submitted that the Court of Appeals should vacate the finding of refusal. The court should find that Mr. Opelt submitted to the chemical test when he stated repeatedly, "let's go do it."

Dated: October 14, 2013.

Respectfully submitted,

AXLEY BRYNELSON, LLP



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a Times New Roman font. The length of this brief is 2,823words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: October 14, 2013.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October 14, 2013.

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