STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2013AP001798

IN THE MATTER OF THE REFUSAL OF CARL J. OPELT:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL J. OPELT,

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 PLAINTIFF-RESPONDENT

RICHARD R. LEWIS
Assistant District Attorney
State Bar No. 1003403

Clark County District Attorney
517 Court St., Room 404
Neillsville, WI 54456
(715) 743-5167
richard.lewis@da.wi.gov

Attorney for Plaintiff-Respondent

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CASES CITED

ISSUE PRESENTED

DID MR. OPELT "REFUSE" A BLOOD TEST UNDER THE IMPLIED CONSENT LAW?

The Circuit Court ruled "yes".

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The case involves the application of existing case law to the facts of this case.

STATEMENT OF THE CASE AND FACTS

On February 3, 2013, during the early morning hours, City of Neillsville Police Officer Aaron Bembnister arrested Carl J. Opelt for Operating While Intoxicated. (17:11) Officer Bembnister transported Carl Opelt to the Neillsville Memorial Medical Center and read the standard "Informing the Accused" form to Mr. Opelt. This was done in the squad car in the parking lot of the hospital. (17:12-13) A copy of the "Informing the Accused" form was presented and marked as Exhibit 1 at the Refusal Hearing conducted in Clark County Circuit Court on June 19, 2013. (4:1) One line of that form appears as follows:

> Will you submit to an evidentiary chemical test of your _____? □ Yes □ No
> breath/blood/urine

Officer Bembnister recorded the conversation between Mr. Opelt and himself which took place immediately after Officer Bembnister's question, "Will you submit to an evidentiary chemical test of your blood?" The recording was marked as an exhibit (5:1), as was a partial

transcript of the recording (6:1-5). The conversation between Mr. Opelt and Officer Bembnister was also taken down by the court reporter at the Refusal Hearing. (17:17-22) The portion offered to the court starts at 29 minutes and 49 seconds (17:17) into the recording and ends at 36 minutes and 7 seconds (17:22). Therefore, the conversation about taking the test lasts over 6 minutes.

The officer's first request for a chemical test of Mr. Opelt's blood (17:17) is as follows:

> Officer: Will you submit to an evidentiary chemical test of your blood?
>
> Defendant: You brought me up to the hospital.

The second request (17:17):

> Officer: Yeah. But I need you to –will you submit to an evidentiary chemical test of your blood?
>
> Defendant: You brought me up here to the hospital. You know I employ 46 people in Neillsville.

The officer continues on a third request (17:17-18):

> Officer: Uh-hum (indicating yes). But I need to know if you will submit to an evidentiary chemical test of your blood?
>
> Defendant: What – what do you want me to do?

The officer's fourth request (17:18):

> Officer: Okay. So now will you submit to an evidentiary chemical test of your blood?
>
> Defendant: I guess, no, yeah, whatever.
>
> Officer: Yes, you will; or no, you won't?
>
> Defendant: What do you want me to do?

> Officer: I can't give legal advice, I am not an attorney. All I can do is read this and then ask you if you will or not submit.

The officer then goes to a fifth request (17:18-19):

> Officer: I – I can't answer that. Okay. I need you to tell me if you are going to submit to an evidentiary chemical test of your blood?
>
> Defendant: Well, you took me to the hospital.

The sixth exchange is when the defendant does say that we can go in there and get a blood test. (17:19) It is as follows:

> Defendant: Well, we can go in there and get a blood test.
>
> Officer: So yes, you will?
>
> Defendant: If you want it, we can do it.
>
> Officer: So yes, okay. Consider that a yes, that you will –
>
> Defendant: No, not consider it a yes, if that's what you need.

At some point after the first six inquiries, the conversation does go as follows: (17:21)

> Defendant: Maybe. Just put yes.
>
> Officer: Yes. Okay.
>
> Defendant: No, just don't put no. Don't ever say yes.

The indirect answers continued for quite awhile, amounting to over six minutes. The officer finally

marked this as a refusal and the circuit court found it to be a refusal as well.

The Circuit Court indicated, "Defendant's remaining answers consist of failures to answer, equivocations, obfuscations, denials, attempts to trick the officer into making the decision for him, or thinly veiled threats/attempts at influence." (9:1)

ARGUMENT

I. MR. OPELT'S ANSWERS TO THE OFFICER'S REQUEST UNDER THE IMPLIED CONSENT LAW CONSTITUTED A REFUSAL.

In ***State v. Rydeski,*** 214 Wis.2d 101, 571 N.W.2d 417 (Ct. App. 1997), the defendant was found to have unlawfully refused a breath test. Under the Administrative Code, officers must observe a person for 20 minutes immediately prior to the test to make sure they have not vomited, regurgitated, smoked, or consumed alcohol. In ***Rydeski***, the defendant wanted to go to the bathroom, unattended. The officers told him that he could either wait until the breath test was done or go to the bathroom while attended by an officer. The defendant was told that several times and became agitated and insisted on using the bathroom immediately without supervision. The Appellate Court further stated:

> "Based on ***Neitzel*** and the language of the implied consent statute, we conclude 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." (emphasis provided) *Id.* p. 109

It is the State's position that Mr. Opelt did not PROMPTLY submit to the test. In fact, he never really submitted at all. His statements of "never say yes" continued throughout the six minute period.

The Supreme Court has also addressed the issue in ***State v. Reitter***, 227 Wis.2d 213, 595 N.W.2d 646 (1999). In ***Reitter***, the defendant was arrested and was read the Informing the Accused under the Implied Consent Law. When requested to take a breath test, the defendant would repeatedly say, "I want to call my attorney." The officer indicated that on five exchanges Reitter gave the same answer, and on five occasions the officer explained that he needed a yes or no answer to his question. At one point, the defendant said, "I'm not refusing, I just want to talk to my attorney." Due to the length of time that passed and due to the defendant's failure to answer yes or no, it was deemed to be a refusal and it was upheld by the Supreme Court. The Supreme Court stated:

> "The implied consent law does not require a verbal refusal. ***Rydeski*** 214 Wis.2d at 106, 571 N.W.2d 417. Rather, the conduct of the defendant may constitute an unlawful refusal. *Id*. Conduct that is "uncooperative" or that prevents an officer from obtaining a breath sample results in refusal. *Id*. "It is the reality of the situation that must govern, and a refusal in fact, regardless of the (p. 235) words that accompany it, can be as convincing as an express verbal refusal." ***Borzyskowski***, 123 Wis.2d at 192, 366 N.W.2d 506 (quoting ***Beck v. Cox***, 597 P.2d 1335, 1338 (Utah 1979)). Thus, where a defendant's only conduct is an insistence on using the restroom, and the officer repeats the request to administer the test "at least five times," the failure to submit constitutes a refusal. ***Rydeski***, 214 Wis.2d at 107, 571 N.W.2d 417. *Id*. p. 234-235

Later, the Supreme Court found as follows:

> "In this case, Reitter contends he never "articulated a refusal", on the contrary, he told Deputy Roscizewski "I'm not refusing." But Reitter's actions ring louder than his articulated words, and regardless of his words, he refused in fact. Like the ***Rydeski*** defendant, Reitter engaged in at least five exchanges with the deputies and prevented the officers from administering the test. Like the ***Neitzel*** defendant, Reitter listened to repeated readings of the "Informing the Accused" form and was warned that his conduct could result in a refusal. Nonetheless, Reitter refused to answer Deputy Sipher's repeated question. Reitter was uncooperative and belligerent. Both Deputy Sipher and Deputy Roscizewski correctly concluded that Reitter had no plans to take the test until he had an opportunity to speak with his attorney." *Id*. p. 237

It is an interesting comparison that in the ***Reitter*** case the defendant would not answer the "yes or no" question five times. That's the exact number of times Mr. Opelt would not give a clear yes or no answer.

Because Mr. Opelt would not give a clear answer over a six minute time period, his equivocations constituted a refusal. The main argument that Mr. Opelt makes in his brief is that if conduct can be grounds for a refusal, conduct should also be grounds for consent. The State does not agree that his comments about "let's go do it" were clear enough to constitute consent.

However, there is a significant difference between conduct constituting a refusal and conduct constituting consent. If there is consent, there is going to be a warrantless search of a person's body for blood. Further, if an officer instructs medical personnel to draw blood, and the defendant has not actually consented, there could be both civil and criminal liability. Not only could a defendant sue the police officer in civil court, the defense could also move to suppress the blood test results in the operating while intoxicated case. "Consent" is an

exception to the warrant requirement for a search. However, that consent must be "clear and convincing." If contested in court, the burden is on the State to show by clear and convincing evidence that consent to a warrantless search was "freely and voluntarily" given. See ***US v Mendenhall***, 446 U.S. 544, 100 S.Ct. 1870, 64 L. Ed. 2d 497(1980); ***St v Mazur***, 90 Wis.2d 293, 280 N.W.2d 194(1979); ***St v Fillyaw***, 104 Wis.2d 700, 312 N.W.2d 795(1981). Therefore, a well trained officer knows that if the officer is relying on "consent" as a theory of admissibility, it must be clear and convincing that the consent was freely and voluntarily given. Perhaps that is why the standard Implied Consent Form has a box for yes and a box for no, and only those two choices.

The purpose of the Implied Consent Law is to facilitate in the gathering of evidence for intoxication. As pointed out in ***Scales v State***, 64 Wis.2d 485, 219 N.W.2d 286, 292(1974):

> "The refusal to actually submit to such tests can result in revocation of the license. It was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the State to remove drunken drivers from the highway. In light of that purpose, it must be liberally construed to effectuate its policies."

CONCLUSION

As indicated in ***State v. Rydeski***, a person must PROMPTLY submit or refuse a test under the Implied Consent Law. In ***State v. Reitter***, the test was refused five times because the defendant wanted to talk to an attorney. It was found to be a refusal. Mr. Opelt would not answer yes or no at least five times and this constituted a refusal. The Implied Consent Form, which law enforcement officers use, has a box they can check

for no and a box they can check for yes. There are two boxes because the choice must be clear and convincing.

For the reasons set forth above, it is requested that the Court uphold the ruling of the Circuit Court.

Dated this ___ day of November, 2013.

Respectfully submitted,

_____
RICHARD R. LEWIS
Assistant District Attorney
State Bar No. 1003403

Clark County District Attorney
517 Court Street, Room 404
Neillsville, WI 54456
(715) 743-5167
richard.lewis@da.wi.gov

Attorney for Plaintiff-Respondent

RRL:lao

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,863 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief; excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ___ day of November, 2013.

Signed:

_____

RICHARD R. LEWIS
Assistant District Attorney
State Bar No.: 1003403

Clark County District Attorney
517 Court Street, Room 404
Neillsville, WI 54456
(715) 743-5167
richard.lewis@da.wi.gov

Attorney for Plaintiff-Respondent