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

REPLY BRIEF OF DEFENDANT-APPELLANT

Axley Brynelson, LLP
Brian C. Hough, SBN 1025056
Attorneys for Carl J. Opelt,
Defendant-Appellant

2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Phone: (608) 257-5661
Fax: (608) 257-5444

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ARGUMENT

I. There is nothing equivocal about, "if that's what you need, let's go do it," repeated over and over again.

The State argues that Mr. Opelt failed to promptly submit to a chemical test. (*See* Response Brief, at 6-7.) In support of this argument, the State argues that "the indirect answers continued for quite a while, amounting to over six minutes," and "Mr. Opelt would not give a clear answer over a six-minute period." (*Id.* at 3, 6.) But that ignores the facts. The fact is that Mr. Opelt clearly submitted within one minute forty-nine seconds, when he said, "*Well, we can go in there and get a blood test.*" (R.5; 6:1-2.) In fact, Mr. Opelt strung together numerous consecutive submissive responses (other than yes):

(1) "Well, we can go in there and get a blood test,"
(2) "If you want it, we can do it."
(3) "No, not consider it a yes, if that's what you need."
(4) "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."
(5) "No, I'm not refusing. I said if that's what you need, we'll go do it."
(6) "I am not playing your game. I am just saying if that's what you need, let's go do it."
(7) "If that's what you need, let's go do it."
(8) "Make sure you put that on your paper. If that's what you need, let's go do it."
(9) "I am answering if that's what has to be done, let's go do it."

(10) "I'm saying...Put in there if that's what you need, let's go do it."

(A. App. 29-31.)

The State proclaims that "let's go do it" does not demonstrate consent. (Response Brief, at 6.) But the State does not even attempt to explain what is non-consensual about "let's go do it," or what would make that phrase any less consensual than "sure," "okay," or "you bet." The State just declares "let's go do it" insufficient, completely ignoring the import of that phrase and the fact that it was repeated many times in a row.

"Let's go do it" is not equivocal. Quite to the contrary, it is an unqualified offer to "go do it." Repeated over and over again, it is the essence of submission. To "submit," means: "to commit to the discretion or decision of another or of others. Yield. Surrender." *See Merriam-Webster Dictionary*, 2005 Ed. Indeed, the State made no effort to explain how, repeating the phrase, "let's go do it," could possibly be construed as anything other than an unabashed surrender.

The State avoids addressing the repeated submissions by declaring the answers to be generally equivocal over a six-minute time period. (Response Brief, at 6.) But the answers cannot be pooled together and averaged. That would arbitrarily dilute the significance of the consecutive,

"let's go do it" responses. This is not a case in which the officer declared a refusal, and then the driver eventually changed his mind when he realized what he had done. This is a case in which the officer was looking for a meaningful response, which he got, but kept probing for a better response, which he did not get. But there was no reason for the officer to repeatedly reject Mr. Opelt's offers to go do the test. It seems the officer was more concerned about verbage than getting the test done. When Mr. Opelt repeated that he would go do the test, over and over, the officer could have and should have done the test without wasting time debating word choice with a person believed to be drunk. This is especially true considering there is no opportunity to consult with an attorney over how to answer the question. He said he would do the test. Nothing more was needed. Because the officer repeatedly rejected offer after offer to do the test, the State's complaints of delay are not well-founded.

II. There is no evidence in this case that the officer was concerned about civil or criminal liability.

The State argues that a "well-trained officer" would have insisted on a "yes" in order to proceed with a blood test because he could otherwise be subject to civil or criminal liability for violating the driver's Fourth Amendment right to be free from unreasonable searches and seizures. (See

Response Brief, at 6-7.) This argument is flawed on different levels. First, there is no evidence in the record that the officer was concerned about civil or criminal liability. Second, the State's Fourth Amendment concerns are ill-founded because a consent search can be based on words other than "yes." *See State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 412, 786 N.W. 2d 430 (Ruling that "[t]o determine if the consent exception is satisfied, we review, first, whether consent was given in fact by words, gestures, or conduct."); *Kelly v. State*, 75 Wis. 2d 303, 313, 249 N.W. 2d 800 (1977)(finding that an "implied" consent justified a warrantless search); *see also*, *State v. Williamson*, 58 Wis. 2d 514, 521, 206 N.W.2d 613 (1973)(finding that the defendant consented to the police search of his vehicle because when the police asked for his permission, he responded, "I don't care.") Indeed, under the Fourth Amendment, the State is not known to protest about a lack of consent to warrantless searches where the suspect has repeatedly offered, "let's go do it."

Third, at the time of this February 3, 2013, arrest, Wisconsin case law supported non-consensual, warrantless blood draws without a showing of exigent circumstances. *State v. Bohling*, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993). This was the law and the practice in Wisconsin

until the April 2013 opinion by the United States Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552, 1556 (2013)(ruling that the metabolization of alcohol does not present a *per se* exigency exception to the warrant requirement in all drunk driving cases). Because at the time of the arrest, Wisconsin law purported to authorize non-consensual, warrantless blood draws of OWI suspects, the concerns of the State are without merit.

III. The State's reliance on the "yes or no" boxes is not supported by law.

In its Response Brief, the State argues that the standard Wisconsin Department of Transportation form requires a "yes" or "no" answer. However, the Implied Consent law, Wis. Stat. § 343.305(4), does not. The law provides what information the law enforcement officer must communicate, but does not mention a "yes" or "no" question or answer. That is not to say that the question is improper, but rather the operative language of the implied consent law does not require it. The legal issue is whether the person "refused" to "take," "permit" or "submit to" the test. *See* Wis. Stat. § 343.305(9). "The law requires no more than what the implied consent statute sets forth." *State v. Reitter*, 227 Wis. 2d 213, 225, 595 N.W. 2d 646 (1999) citing *State v. Crandall*, 133 Wis. 2d 251, 260,

394 N.W. 2d 905 (1986). Under the Implied Consent law, the word "yes" was not required. "The statute...only requires arresting officers to inform defendants orally about the law; it does not mandate written completion of the form, and it does not obligate officers to fill out the form in any particular manner." *Reitter,* at 233.

While the State wants the court to write new language into the law so that people believed to be drunk would be compelled to utter the word "yes," as opposed to the universe of other possible affirmative answers, that would be for the legislature to do. "[I]t is for the legislature, not this court, to add to the statutory scheme." *Id.* at 230, citing *Crandall,* at 259. Furthermore, the State's request that the Court of Appeals add words to the implied consent law would run directly contrary to the Wisconsin Supreme Court's pronouncement that the refusal determination can be made "regardless of the words" since it is "the reality of the situation that must govern." *Reitter*, 227 Wis. 2d at 234-35.

Here, unlike the defendant in *Reitter*, "the reality of the situation" was that Mr. Opelt repeatedly offered to "go do it"; not to go to the restroom, not to go call his attorney, *but to go do the test.* That was not a refusal.

People suspected of impairment may submit to the test with conduct or words other than "yes," just as they may refuse by conduct or words other than "no." Here, Mr. Opelt submitted when he repeatedly said, "let's go do it" without once saying, "no." The Court should find that he did not refuse.

CONCLUSION

For the reasons stated herein, the Court should vacate the Refusal finding and dismiss the charge.

Dated: November 18, 2013.

Respectfully submitted,

AXLEY BRYNELSON, LLP

s/Brian C. Hough
Brian C. Hough, SBN 1025056
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Phone: (608) 257-5661
Fax: (608) 257-5444
Attorney for Defendant-Appellant
Carl Opelt

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 1,460 words.

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: November 18, 2013.

AXLEY BRYNELSON, LLP

s/Brian C. Hough
Brian C. Hough, SBN 1025056
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Phone: (608) 257-5661
Fax: (608) 257-5444
Attorney for Defendant-Appellant
bhough@axley.com