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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2016AP000445-FT

In the Matter of the Refusal of William J. Furlong:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-VS-

WILLIAM J. FURLONG,

Defendant-Appellant.

ON APPEAL FROM ORDER ENTERED IN THE
CIRCUIT COURT FOR JEFFERSON COUNTY
THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

STATEMENT OF THE ISSUE

On the facts of this case, can Furlong's request for attorney be properly deemed a conduct refusal when he was never advised or otherwise notified that he did not have that right?

Trial Court Answered: Yes.

STATEMENT OF THE CASE AND FACTS

Officers investigating a vehicle run-off went to the home of the registered owner. The registered owner advised officers that his mother had the keys last. Another individual at the residence told officers that when the mother, and her

boyfriend, William J. Furlong had returned home, she had confronted the mother about driving drunk, and the mother had denied driving. The mother was unable to be roused, but William J. Furlong was awakened, and denied driving. Based on his inconsistent statements, as well as mud on his boots consistent with the scene of the run-off, Furlong was arrested for operating under the influence. Exh. 2 (Search Warrant Application Transcript); R. 11, Transcript, p. 6.

The Informing the Accused (Exh. 3) was read to Mr. Furlong at the station. That reading was recorded, and is part of the record (Exh. 1); R. 11, p. 13.

After reading the first paragraph, the officer asked Furlong if he understood. Furlong responded that he did not as it pertained to this arrest. The officer tried to explain,¹ eventually re-reading the paragraph.

The officer then read the second paragraph, again asking if Furlong understood. Furlong responded in the affirmative, agreeing to take any requested tests. After the officer read the third paragraph, he asked Furlong again if he understood. Furlong responded by indicating a desire to have his own test done. The officer then read the two remaining paragraphs on the form without further interruption from Furlong.

In response to the question of whether he would submit to an evidentiary chemical test of his blood, Furlong said yes, with his own doctor. The officer again responded to Furlong by providing additional accurate information beyond that

¹ While Furlong's questions caused the officer to go off script more than once, there is no claim that any of the additional information the officer provided was incorrect, or misleading.

provided by the form. Expressing a continued desire to have his own doctor, Furlong agreed to submit to the requested test if that was his only option. The officer then once again read the second paragraph, causing Furlong to correctly conclude and state that he would need to submit to the officer's requested test to avoid refusal consequences.

As the officer prepared the other paperwork required before leaving to have the blood drawn, Furlong continued to complain about the circumstances of the arrest. Furlong eventually indicated a desire to have a lawyer before the blood test. When asked by the officer if he was changing his previous "yes" to a "no", Furlong responded by indicating that he wanted a lawyer. The officer treated that request as a refusal without ever informing Furlong he did not have a right to consult an attorney at that stage of the process.

The trial court held this to be a conduct refusal. R. 11, pp. 23-25. A written order was submitted, signed, and filed. R. 8. From that order, this appeal is taken. R. 10.

ARGUMENT

This Court has previously addressed the question raised here. "Repeated requests for an attorney can amount to a refusal **as long as the officer informs the driver that there is no right to an attorney at that point.** *State v. Reitter*, 227 Wis. 2d 213, 235, 595 N.W.2d 646 (1999)." *State v. Baratka*, 2002 WI App 288,

¶ 15, 258 Wis. 2d 342, 349-350, 654 N.W.2d 875, ____ [Emphasis Added]. In Baratka's case, the officer did so inform him. 2002 WI App, ¶ 3.

In the instant case, Furlong had twice accepted the officer's explanations in response to questions raised about the applicability of the Implied Consent law to his circumstances, as well as Furlong's contingent ability to obtain an alternate test if he so chose. The officer never advised Furlong, however, that he had no right to an attorney at that stage of the process. If that explanation had been given, Furlong may have acquiesced, as he had done twice previously, or he may have maintained his insistence on having a lawyer present, at which point, his conduct may have been properly construed as a refusal. In the absence of that required explanation, it can not be.

CONCLUSION

As Furlong was never advised that he did not have the right to an attorney at the pre-test stage, his request for a lawyer cannot be construed as a refusal. The Trial Court must be reversed.

Dated at Jefferson, Wisconsin this ____ day of April, 2016.

Respectfully submitted,

WILLIAM J. FURLONG,
Defendant-Appellant

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced using a proportional serif font, as modified by the Court's Order. The length of this brief is 1,220 words.

I further 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 as of 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: April _____, 2016.

Signed:

MICHAEL C. WITT
State Bar No. 1013758

APPENDIX

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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: April ____, 2016.

Signed:

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