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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

CLERK OF COURT OF APPEALS

Appeal No. 2016AP000445

OF WISCONSIN

Jefferson County Case 2015TR006975

In the Matter of the Refusal of William J. Furlong:
State of Wisconsin,

Plaintiff-Respondent,

Vs.

William J. Furlong
Defendant-Appellant

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE AND FACTS	2
STANDARD OF REVIEW	8
ARGUMENT	9
CERTIFICATION	13

TABLE OF AUTHORITIES

Cases

<i>State v. Baratka</i> , 2002 WI App 288, 258 Wis. 2d 342, 654 N.W.2d 875.	8, 10, 11
<i>State v. Reitter</i> , 227 Wis.2d 213, 595 N.W.2d 646 (1999)	9, 10, 11, 12
<i>State v. Rydeski</i> , 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997).	9
<i>Village of Elkhart Lake v. Borzyskowski</i> , 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985)	9, 12

Statutes

Wis. Stat. §343.305(9)	2
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STATEMENT OF THE ISSUE

Did the Defendant refuse to give an evidentiary sample of his blood through his words and actions in this case?

STATEMENT OF THE CASE AND FACTS

On February 8, 2016, Jefferson County Circuit Court Judge David Wambach found that Furlong unlawfully refused to submit to a chemical test, in violation of Wis. Stat. §343.305(9). The written order was signed on February 24, 2016. The circuit court found that the officer had probable cause to arrest Furlong based on the transcript of the telephonic search warrant and stipulation of the parties. The court further found that Furlong was lawfully placed under arrest based on the transcript of the telephonic search warrant and stipulation of the parties.

In support of these findings, the court noted that the officer came upon an unattended vehicle that had run off the road, a fact which is consistent with the driver being intoxicated. (Trans 11:4-10.) The investigating officer learned from a witness at the residence that Furlong and the registered owner's mother arrived together at the residence. (Trans 12:10-15) This witness advised that the registered owner's mother stated she was not the driver of the motor vehicle. (Trans 11:14-17.) The witness further advised that the registered owner's mother stated that the vehicle was in a ditch. (Trans 12:15-17.)

The court noted, "The officer encounters Mr. Furlong in a condition that would be consistent with one who would be impaired such that they were unable to keep the vehicle on the road" (Trans 11:17-20) The officer observed that Furlong smelled of alcohol, had bloodshot and glassy eyes, slurred speech and had difficulty maintaining his balance. (Trans 11:20-23.) Further, the arrest occurred at 3:19 a.m. (Trans 11:10-11.) The court found that these observations were sufficient to give the officer probable cause to believe Furlong was operating while intoxicated. (Trans 11:23-25.)

The court found that Furlong's denials of any connection to the vehicle were countered by the evidence. (Trans 12:5-17.) Furlong had mud on his boots, which was consistent with the mud from the run-off. (Trans 12:7-9.) Further, Furlong came home with the mother of the registered owner. (Trans 12:10-15.)

After finding that the officer had probable cause to arrest Furlong, the Court observed the audio/visual recording of the officer reading of the Informing the Accused form. (Trans 13:5-15.) After viewing the recording, the court made the following findings of fact: The Informing the Accused form was read in its entirety. (Trans 15:5-6.) The officer confirmed with Furlong that Furlong

understood what the officer was reading. (Trans 15:12-14.) The officer explained and clarified procedure with Furlong and answered his questions. (Trans 15:15-18.) Furlong demonstrated an understanding of the Informing the Accused form through his questions including the observation that part of the Informing the Accused did not apply his situation. (Trans 15:19-25; 16:1.)

After some time passed, during which the officer finished paperwork and confirmed Furlong's prior convictions, the officer started to prepare to take Furlong to the hospital for the blood draw. (Trans 16:10-25, 17:1-4.) At that time, Furlong began to demonstrate an unwillingness to provide an evidentiary sample of his blood. (Trans 17:5-25.) After some discussion, Furlong stated, "'I'm changing it to a no.'" (Trans 22:20-24). The Court found that when Furlong made this comment, he refused to submit to an evidentiary test of his blood. (Trans 22:25; 23:1.) The defense attorney heard, "'I'm going to change that to 'I want a lawyer.'" (Trans 23:17-19.) The court found that both statements would constitute a refusal. (Trans 23:22-25.)

When Furlong was first asked if he would submit to an evidentiary test of his blood, Furlong responded, "No, well, with my own doctor." (Video 7:27:06-7:27:15.) Officer

Cullen began to explain the process, and Furlong reiterated that he was cooperating with his own doctor. (Video 7:27:15-7:25:30.) After further clarification, Furlong stated that he was willing to have the blood draw at Watertown Hospital if that was the only option. (Video 7:28:00-7:28:08.) Then Furlong asked the officer to re-read part of the form. (Video 7:28:08-7:28:20) After the officer re-read part of the form, Furlong stated, "I gotta take a blood test, yeah." (Video 7:28:20-7:28:48.) The officer then repeated the question at the end of the form asking if Furlong will give a sample, and Furlong replied, "Of my blood, yes sir, I will." (Video 7:28:48-7:28:58.)

After that, Furlong continued to discuss the problems with the case against him and denied that he did anything wrong. (Video 7:28:58-7:33:32.) Furlong made comments about this being a false arrest. (Video 7:33:40-7:34:07.) Furlong continued to criticize his arrest and proposed that the officer just let it go. (Video 7:34:08-7:34:38.) Furlong then stated, "Cause I'm gonna make this difficult as I can, I'm sorry. This is bullshit." (Video 7:34:38-7:34:47.) When Furlong told the officer to make sure his report reflects how cooperative he has been, the officer informed Furlong that the report would accurately reflect what happened. (Video 7:35:01-7:35:25.)

Officer Cullen started to tell Furlong what was going to happen next, and at that point Furlong demanded to see the blood sample so that he could prevent possible tampering. (Video 7:35:41-7:36:25.) While Officer Cullen was on the phone checking Furlong's prior convictions, Furlong correctly identified the year of his last prior. (Video 7:36:40-7:37:10.) Officer Cullen was still on the phone when Furlong stated, "As a matter of fact, any blood test I take, I think I'll lawyer up. I'll wait for a lawyer, 'till I talk to a lawyer before you give me a blood test. Okay. I'm sure that's my right." (Video 7:37:33-7:37:49.) To clarify, Officer Cullen asked, "So you're changing your mind, you don't . . . You're saying you don't want to provide a breath sample?" (Video 7:37:51-7:35:57.) Furlong responded, "I want a lawyer, is what I'm saying, is that I want a lawyer. Before we go any further with any of this B.S." (Video 7:35:57-7:38:06.) Officer Cullen acknowledged Furlong's request. (Video 7:38:06.) As Officer Cullen was still waiting to confirm Furlong's priors, Furlong again told Officer Cullen when his prior conviction occurred. (Video 7:38:09-7:38:30.) Furlong then proceeded to instruct Officer Cullen on how he should have investigated this matter. (Video 7:38:30-7:38:40)

Once off the phone, Officer Cullen again tried to clarify whether Furlong would submit to an evidentiary sample. (7:38:55-7:39:03.) At this point, Furlong made the comment analyzed at the refusal hearing. (Trans. 22:1-25, 23:1-25.) Furlong was then taken into custody, and Officer Cullen applied for the warrant. (Video 7:39:14-7:39:23.) After viewing the recording, the Court held that the Informing the Accused was read appropriately, that Furlong refused the test, and that the refusal was unreasonable. (Trans 15:4-11, 18:3-7, 23:22-25, 24:1-25, 25:1-5.)

STANDARD OF REVIEW

Because the parties are asking that this Court review the application of the implied consent statute to the stipulated facts, it is appropriate for this Court engage in an independent review. *State v. Baratka*, 2002 WI App 288, ¶ 7, 258 Wis. 2d 342, 654 N.W.2d 875.

ARGUMENT

A court can find that a defendant inappropriately refused a test even if the defendant does not reply "no" when asked if the defendant will provide an evidentiary sample of blood, breath or urine. *State v. Reitter*, 227 Wis.2d 213, 234, 595 N.W.2d 646 (1999). "'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.'" *Id.* at 234-35 (citing *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 192, 366 N.W.2d 506 (Ct. App. 1985) (citation omitted). "Conduct that is 'uncooperative' or that prevents an officer from obtaining a breath sample results in refusal." *Id.* (citing *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). Although *Baratka* does state, "Repeated requests for an attorney can amount to a refusal as long as the officer informed the driver that there is no right to an attorney at that point," 2002 WI App 288, ¶ 15, that statement is an over-simplification of the body of case law that analyzes what constitutes a refusal and misstates the holdings in *Reitter*."

In *Reitter*, after the defendant was read the Informing the Accused, he repeatedly said that he wished to call his

attorney. *Reitter*, 227 Wis.2d at 220. The deputy did not respond to the defendant's requests for an attorney and instead explained that if the defendant refused to take the test, his driving privileges would be revoked. *Id.* As another deputy prepared the Intoxylizer and encouraged the defendant to take the test, the consequences of refusal were again explained to the defendant. *Id.* at 221. The defendant told the deputies, "I'm not refusing, I just want to talk to my attorney." *Id.* The defendant became belligerent and uncooperative. *Id.* The deputies warned the defendant that his repeated requests for a lawyer would be considered a refusal. *Id.* at 221-22. The defendant was then taken to the jail and allowed to consult with an attorney. *Id.* at 222. At no point do the facts of *Reitter* indicate that the deputies told the defendant that he did not have a right to an attorney. See *id.* at 220-22.

The State believes that Furlong's reliance on *Baratka* is misplaced. In *Baratka*, the defendant was read the Informing the Accused form twice. *Baratka*, 2002 WI App 288, ¶ 3. After both readings, the defendant responded that he did not understand, and that he wanted to speak to an attorney. *Id.* In between the two readings, the officer told the defendant that he did not have a right to a lawyer at that stage. *Id.* Relying on *Reitter*, the Court held,

"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." 2002 WI App 288, ¶ 15 (citing *Reitter*, 227 Wis. 2d at 213, 235). The *Baratka* holding does not comport with the holding in *Reitter* in which the Court stated, ". . . [B]ecause the implied consent law creates statutory privileges, not constitutional rights, no due process violation occurs when an officer does not inform a defendant that the right to counsel does not attach to the stages preceding administration of a chemical test." *Reitter*, 227 Wis. 2d at 218. While the *Reitter* Court considered that it would be polite for law enforcement to inform defendants that they do not have a right to consult with an attorney before deciding whether or not to submit to a test, the Court declined to require officers to do so. *Id.* at 231-32.

Like the defendants in *Reiter* and *Baratka*, Furlong made repeated requests to speak to a lawyer before he would submit to a blood test. Like *Reitter*, Officer Cullen did not inform Furlong that he was not entitled to a lawyer. However, pursuant to *Reitter*, a defendant's refusal is not determined by whether or not the investigating officer advised the defendant he is not entitled to an attorney. Rather, in determining whether a defendant refused to

submit to the test, "'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. 2d at 234-35 (citing *Borzyskowski*, 123 Wis. 2d 185, 192) (citation omitted). Furlong's comments and demeanor clearly indicated that he was not going to consent. This was demonstrated by the statement Furlong made before requesting a lawyer, which was, "'Cause I'm gonna make this difficult as I can, I'm sorry. This is bullshit." (Video 7:34:38-7:34:47.) That comment, in conjunction with Furlong's comments that he was changing his answer and his repeated requests for a lawyer all support the Circuit Court's finding that Furlong refused.

Dated this ____ day of ____, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 12 pages with 1,957 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this ____ day of ____, 2016.

Respectfully submitted,

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