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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

REPLY BRIEF OF APPELLANT

ARGUMENT

By arguing this Court's holding to be "an over-simplification of the body of case law that analyzes what constitutes a refusal", the State is really arguing that this Court's construction of *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999) in *State v. Baratka*, 2002 WI App 288, ¶ 15, 258 Wis. 2d 342, 349-350, 654 N.W.2d 875 should be modified or overruled. This Court does not have the power to modify, overrule, or withdraw language from its own prior published decisions. *Cook v. Cook*, 208 Wis. 2d 166, 169, 560 N.W.2d 246, 248 (1997).

I. THIS COURT CORRECTLY CONSTRUED *REITTER*.

In analyzing both the statutory and constitutional obligations of an officer faced with Dennis Reitter repeatedly requesting to speak with counsel when asked to submit to chemical testing, the Supreme Court held “that where a defendant exhibits no confusion, the officer is under no affirmative duty to advise the defendant that the right to counsel does not attach to the implied consent statute.” *Reitter*, 227 Wis. 2d at ___, 595 N.W.2d at 655, ¶ 28.

While seeing no harm in an officer giving the accused the common courtesy of correcting the accused’s mistaken assumptions, they did decline to superimpose a judicially imposed affirmative duty onto the legislative scheme. In so doing, however, in a footnote, they went on as follows:

We recognize officers might hesitate to state even this simple advisement, given the danger that a defendant may launch an "oversupply of information" attack on an officer's statutory compliance. There are, however, other alternatives for achieving the same result, such as posting a sign on the wall above the chemical testing equipment, or suggesting that the Department of Transportation modify the "Informing the Accused" Form to alert drivers that the right to counsel does not pertain to the chemical test setting.

Reitter, 227 Wis. 2d at ___, 595 N.W.2d at 655-656, ¶ 29, n.14

In construing the limited holding of that case in light of its facts and said footnote, as well as the State’s failure to revise the Informing the Accused form as suggested, this Court subsequently stated plainly that “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” *Baratka*, 2002 WI App 288, ¶ 15 [Emphasis added].

II. MODIFICATION OF THE COURT’S RULING IN *BARATKA* WOULD REQUIRE THE REVERSAL OF THE TRIAL COURT.

In *Cook, supra*, the Supreme Court was clear that this Court lacks the power to overrule, modify, or withdraw language from one of its published decisions. If the Court is inclined to consider the State’s argument that tension between *Reitter* and *Baratka* exists, especially in this case where the State consented to an expedited appeal, it should reverse the trial court, giving the State the opportunity to petition the Supreme Court, which does have the power to modify or withdraw language from *Baratka*.

CONCLUSION

Furlong had previously accepted all of the explanations given by the officer in response to Furlong’s other objections to testing, agreeing to submit. The failure to advise him that his right to counsel did not attach to his decision on the question being put to him under the implied consent statute precludes his request for an attorney to be from being construed as a refusal. This requires that the trial court be reversed.

Respectfully submitted this ____ day of May, 2016.

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 783 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: May ____, 2016.

Signed:

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