

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

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**Appeal No. 2017AP002499
Jefferson County Circuit Court Case No. 2017TR005218**

**IN THE MATTER OF THE REFUSAL OF RICHARD
REY MYERS:**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD REY MYERS,

Defendant-Appellant.

**AN APPEAL FROM THE ORDER AND JUDGMENT OF
CONVICTION BEFORE THE HONORABLE WILLIAM
F. HUE, JUDGE JEFFERSON COUNTY CIRCUIT
COURT**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT RICHARD REY MYERS**

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STATEMENT OF THE ISSUES

Did Mr. Myers unlawfully refuse to submit to chemical testing?

Answer: The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Richard Rey Myers, (Mr. Myers) was charged with operating a motor vehicle while under the influence of an intoxicant a violation of Wis. Stat. § 346.63 (1)(a) and refusing to submit to a chemical test a violation of Wis. Stat. §343.305(9) stemming from an offense allegedly occurring on July 22, 2017. Mr. Myers timely filed a written request for refusal hearing on August 2, 2017. A refusal hearing was held in the Jefferson County Circuit Court on September 11, 2017, the Honorable William F. Hue, Judge, presiding.

At the conclusion of the evidence, the Court allowed both sides to file briefs on the argued issue. The defendant by counsel filed its brief on September 25, 2017, and the State filed its brief on October 9, 2017, with the defense filing a reply on October 20, 2017. On October 23, 2017, the Court filed a written Memorandum Decision. In the Decision, the trial court found that Mr. Myers refused, and denied Mr. Myers' motion on the refusal. An Order finding that the defendant unlawfully refused chemical testing was signed on December 19, 2017.

Mr. Myers by counsel timely filed a Notice of Appeal on December 20, 2017.

The appeal herein stems from the trial court finding that Mr. Myers improperly refused to submit to a chemical test under Wis. Stat. §343.305(9). Specifically, Mr. Myers argued that the officer erroneously advised Mr. Myers that he had the right to an attorney, and this advisement came prior to the officer reading the informing the accused form. Furthermore, when asked to submit to chemical testing, Mr. Myers specifically requested an attorney. The officer did nothing to dispel Mr. Myers erroneous belief that he had the right to consult with counsel prior to making the decision regarding chemical testing.

The facts that are pertinent to this appeal were received through the testimony of Jefferson County Deputy Heather Novotny and Richard Myers at the refusal hearing on September 11, 2017.

Deputy Novotny testified that she was a seventeen year veteran of the Jefferson County Sheriff Department. Novotny testified that on July 22, 2017, she was dispatched to investigate a crash in the Town of Rome, Wisconsin. When she arrived on the scene she saw a blue vehicle with the air bags deployed and no occupants in the vehicle. She observed seven to ten people standing outside, and some of the people yelled “they ran that way” pointing down Rome Oak Hill Road. (R.19:5-6/A.App. 4-

5). Several witnesses told her that there were “three of them”. When a second officer arrived on scene, Deputy Novotny went to look for the suspects. As she was looking for the suspects, she was advised that the plates of the vehicle came back to Richard Myers. (R.19:5/A.App.6). Novotny went to the address, where another officer had already arrived. At the residence, Novotny spoke with Mr. Myers’ wife. As she was at the residence, she was notified that firefighter personnel had found individuals walking near the scene of the accident. Novotny responded back to the area and spoke with James Myers the brother of Richard. (R.19:17/A.App.7). As she was speaking to James, she was notified by Sergeant Schoeneck that the driver had returned to the scene. (R.19:21/A.App.8).

Novotny then transported James back to the scene. (R.19:21/A.App.9). At the scene, Sergeant Schoeneck advised Novotny that Richard Myers indicated that he was the driver, and indicated that Mr. Myers smelled of intoxicants, had glassy and bloodshot eyes. (R.19:21/A.App.9). Deputy Novotny made the same observations when she had contact with Mr. Myers, and testified that based on Mr. Myers’ wet clothing, it appeared that Mr. Myers was walking through an area that was wet. (R.19:22/A.App.10). Novotny estimated less than an hour

passed from the initial dispatch of the crash and her contact with Mr. Myers. (R.19:22/A.App.10).

Mr. Myers did not tell Deputy Novotny that he had been driving the vehicle, however, because Sergeant Schoeneck advised her that Mr. Myers admitted to driving, Novotny decided to perform field sobriety tests on Mr. Myers. (R.19:23/A.App.11). Novotny testified that Mr. Myers refused to perform field sobriety tests, and eventually refused to perform a chemical test for intoxication.

When Deputy Novotny requested that Mr. Myers perform field sobriety tests, Mr. Myers asked if he could refuse testing and get a lawyer. (R.10:1-3/A.App.20-22 and DVD). Novotny advised Mr. Myers that he could refuse field sobriety tests and get a lawyer. Novotny then arrested Mr. Myers for driving while intoxicated. She then read Mr. Myers the informing the accused form. Novotny testified that Mr. Myers refused testing. (R.19:24/A.App.12).

On cross examination, Deputy Novotny acknowledges that she and Mr. Myers had a conversation regarding an attorney. In fact Novotny acknowledges that Mr. Myers asked for an attorney initially. (R.19:26/A.App.13). Novotny further admitted on cross that it was possible that Mr. Myers asked if he

could refuse testing and get an attorney. Novotny further admitted that it was possible that she said you can absolutely do that. (R.19:27/A.App.14).

Mr. Myers testified that in regards to the request for field sobriety testing, he specifically asked Novotny if he could refuse testing and get a lawyer. (R.19:29/A.App.15). Novotny told him he could. Mr. Myers testified that based on that conversation, he was under the impression that he had the right to an attorney at that point. (R.19:29/A.App.15). Mr. Myers further testified that he was in the back of the squad car when Novotny read the informing the accused form and requested that he submit to chemical testing. (R.19:30/A.App.16). When asked to provide a chemical test, Mr. Myers said “not without my attorney.” (R.19:30/A.App.16). Mr. Myers testified that he thought he had the opportunity to speak to an attorney prior to chemical testing based on the information that Deputy Novotny conveyed to him earlier. (R.19:30/A.App.16). Novotny acknowledged, that at no point did she advised Mr. Myers that he did not have a right to speak to an attorney prior to making the decision about chemical testing. (R.19:27/A.App.14). Mr. Myers also testified that had he known that he did not have the right to speak to an attorney, he would have provided a chemical test sample.

(R.19:31/A.App.17). The State introduced and the Court received the video disk of the conversations that occurred between Mr. Myers and Deputy Novotny. The disk shows the conversation had between Mr. Myers and Deputy Novotny. Mr. Myers clearly asked Novotny if he could refuse testing, and obtain counsel, and Novotny says he absolutely has that right.

Mr. Myers argued in his Brief that he was led to believe that he had the right to an attorney, and had he known that he did not have the right to an attorney, he would have submitted to testing. (R.9:1-2/A.App.18-19). The State argued that his refusal was improper and that Mr. Myers “did not make” repeated requests for an attorney. (R.10:1-3/A.App.20-22) In its Memorandum Decision, the Court found that Mr. Myers throughout the contact, had requested an attorney. The Court also found that Deputy Novotny did not advise Mr. Myers that he did not have a right to an attorney. However, the court found that Mr. Myers refused chemical testing. (R.19/A.App.1). An Order was signed on December 19, 2017. The defendant timely filed a Notice of Appeal on December 20, 2017.

STANDARD OF REVIEW

“The circuit court’s decision that a refusal is improper is a question of law,” and an appellate court reviews questions of

law “independently without deference to the decision of the circuit court.” *State v. Ludwigson*, 212 Wis.2d 871, 875, 569 N.W.2d 762 (Ct.App. 1997).

ARGUMENT

THE COURT ERRED IN FINDING THAT THE MR. MYERS REFUSED CHEMICAL TESTING WHERE HE WAS LED TO BELIEVE THAT HE HAD THE RIGHT TO COUNSEL PRIOR TO MAKING THE DECISION, WHERE THE ARRESTING OFFICER FAILED TO DISPEL SAID BELIEF AND WHERE MR. MYERS ACKNOWLEDGED THAT HE WOULD HAVE SUBMITTED TO TESTING BUT FOR HIS ERRONEOUS BELIEF

Wisconsin law is clear that the right to counsel does not attach prior to making a decision about chemical testing. *State v. Baratka*, 2002 WI App 288 ¶15, 258 Wis.2d 342, 654 N.W.2d 875 and *State v. Reitter*, 227 Wis.2d 213, 595 N.W.2d 646 (1999). Furthermore, a defendant who conditions his consent to chemical testing on his ability to confer with counsel refuses testing. see *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980).

In *Baratka*, the court held that “repeated requests for an attorney can amount to a refusal so long as the officer informs the driver that there is no right to an attorney at that point.” *Baratka* at ¶15. Additionally, in *Reitter*, the court stated that

“where a defendant exhibits no confusion, an 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 231.

However, ***Reitter*** acknowledged that where an officer “actively misled” a defendant into believing that he had a right where none existed, there could be a due process violations. ***Reitter*** at 49. Mr. Myers case is easily distinguishable from both ***Reitter*** and ***Baratka***. In ***Reitter***, when the officer read the defendant the informing the accused form, and the defendant repeatedly requested counsel, the arresting officer refrained from commenting on the right to counsel and advised the defendant that if he refused, his license would be revoked. The key difference between ***Reitter*** and Mr. Myers case is that in ***Reitter*** the officer did not respond to the defendant’s request for counsel. ***Reitter***, at 221.

In ***Baratka***, the officer actually dispelled any belief that the right to counsel attached at the pre-testing phase. After being read the informing the accused form, Baratka said he did not understand and requested counsel. Rather than not responding, the officer accurately advised the defendant that he did not have the right to counsel. The officer dispelled any

mistaken belief that Baratka had the right to counsel. *Baratka*, at ¶3. Novotny did not do so herein.

Additionally, the court has recognized a narrow exception to the rule in *Neitzel*. In *State v. Verkler*, 2003 WI App 37, 260 Wis.2d 391, 659 N.W.2d 137, the court concluded:

...there now exist a narrow exception to the rule announced by the supreme court in *State v. Neitzel*, 95 Wis.2d 191, 204, 289 N.W.2d 828 (1980). The *Neitzel* rule is that wanting to first consult with counsel before deciding whether to submit to a breath test is not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not immediately agreeing to take the breath test. See *id.* at 205, 289 N.W.2d 828. The narrow exception is the *Reitter* rule: If the officer explicitly assures or implicitly suggests that a defendant has a right to consult counsel, that officer may not thereafter pull the rug out from under the defendant if he or she thereafter reasonable relies on this assurance or suggestion. See *Reitter*, 227 Wis.2d at 240-42, 595 N.W.2d 646.

Here, Deputy Novotny at a minimum implicitly suggested that Mr. Myers had the right to a lawyer. This suggestion manifested when Mr. Myers initially asked the deputy during the field sobriety testing portion of the encounter whether he had the right to get a lawyer and refuse testing. Novotny assured Mr. Myers that he could. Subsequently, after reading the informing the accused form Mr. Myers again indicated that he wanted a lawyer before he would submit to testing. In fact, the court found that Mr. Myers requested an

attorney throughout the process. (R.14:A.App.2-3). Mr. Myers case falls into the narrow exception recognized by the court in *Verkler*. Mr. Myers requested counsel, Deputy Novotny implicitly suggested that Mr. Myers had the right to counsel (Novotny advised Mr. Myer that that is his absolute right), and Mr. Myers relied on this (his testimony was that he refused testing based specifically on his belief that he had the ability to speak with counsel.) (R.19:31/A.App.17)

Here, Deputy Novotny specifically told Mr. Myers he had the right to counsel during the field sobriety testing portion of the encounter. Because of this statement, Mr. Myers was under the impression that he also had the right to counsel before chemical testing. In fact, after Novotny read the informing the accused form, Mr. Myers specifically said he would not do anything without a lawyer. This would have been the ideal moment for Deputy Novotny to advise Mr. Myers that he did not have the ability to confer with counsel prior to submitting to the chemical test. Novotny did not do so. Rather, Deputy Novotny pulled the rug out from under Mr. Myers and marked him as a refusal.

CONCLUSION

Because the facts herein fall within the narrow exception of the *Reitter* case, the trial court erred in finding that Mr. Myers refused chemical testing. The court should vacate the judgment of conviction and dismiss the refusal.

Dated this 24th day of April, 2018.

Respectfully Submitted
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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 3507.

Dated this 24th day of April, 2018.

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**CERTIFICATION 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 s. 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 this 24th day of April, 2018.

Respectfully submitted,

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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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 this 24th day of April, 2018.

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APPENDIX