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DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

RICHARD REY MYERS,
Defendant-Appellant.

ON APPEAL FROM THE ORDER AND JUDGMENT OF CONVICTION ENTERED
IN THE JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE
WILLIAM F. HUE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Was Mr. Myers misled about the consequences of refusing to submit to an evidentiary chemical test such that it affected his ability to make a choice whether to submit?

- The Circuit Court answered: No.

Did the Defendant unreasonably refuse a blood draw in this case when he answered, "No. Not without my attorney" in response to the question, "Will you submit to an evidentiary chemical test of your blood, yes or no?"

- The Circuit Court answered: Yes.

STATEMENT OF PUBLICATION AND ORAL ARGUMENT

Oral arguments are not necessary for this case. The decision does not need to be published.

STATEMENT OF THE CASE/FACTS

The State generally agrees with Mr. Myers's recitation of the facts in his Statement of the Case/Facts. As Plaintiff-Respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. However, the State shall, in the Argument portion of this brief, cite to the exchange between Deputy Novotny and Mr. Myers, which has been taken from a transcript from the recording admitted as evidence at the refusal hearing. This exchange was quoted in the State's

Response Brief, submitted as part of the Appendix to Mr. Myers's Brief. Brief of Defendant-Appellant, App. 20-21.

STANDARD OF REVIEW

"Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews *de novo*." *State v Reitter*, 227 Wis. 2d 213, 223, 595 N.W. 2d 646 (1999) (*citations omitted*).

Reconciling the due process clause of the Wisconsin Constitution, article I, section 8(1), with the implied consent law, Wis. Stat. § 343.305 is subject to independent review. *Id.* (*citing State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 630, 579 N.W.2d 698 (1998)).

ARGUMENT

- I. BECAUSE MR. MYERS EXHIBITED NO CONFUSION WHEN ASKED IF HE WOULD SUBMIT TO AN EVIDENTIARY CHEMICAL TEST, HIS SUBSEQUENT REQUEST FOR AN ATTORNEY WAS PROPERLY DEEMED A REFUSAL PURSUANT TO *STATE V. REITTER*.

In *State v. Reitter*, the Wisconsin Supreme Court held that, "[W]here 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." 227 Wis. 2d at 231. The Court reasoned that, "Requiring officers to address nonexistent rights undercuts the 'simple and straightforward' approach and risks confusing a potentially intoxicated defendant." *Id.*

In *Reitter*, the defendant repeatedly requested an attorney as the Deputy read the Informing the Accused Form. *Id.* at 220. The Deputy did not respond to the defendant's requests for an attorney. *Id.* The Deputy explained five times that he needed the defendant to answer 'yes' or 'no' to whether the defendant would submit to an evidentiary chemical test, and that a refusal would result in revocation of his driving privileges. *Id.* at 220-21. The defendant continued to state that he wanted to contact his attorney. *Id.* There is no mention in *Reitter* about whether the defendant performed field sobriety tests or whether he

had requested a lawyer prior to the reading of the Informing the Accused form. The case focused solely on the defendant's response to the reading of the Informing the Accused Form. The Court found that a defendant can unlawfully refuse a chemical test by repeatedly requesting a lawyer when asked if he or she will submit to the test. *Id.* at 237. In that situation, an officer is under no affirmative duty to explain to the defendant that he or she is not entitled to counsel. *Id.* at 231.

Similarly, in this case, Deputy Novotny read Mr. Myers the Informing the Accused form and asked Mr. Myers if he would submit to an evidentiary chemical test. Brief of Defendant-Appellant, pp. 4-5. Mr. Myers replied, "Not without my attorney." Brief of Defendant-Appellant, pp. 4-5. There was no ambiguity about this statement, and pursuant to *Reitter*, Deputy Novotny had no affirmative duty to emphasize the potential consequences of refusing the tests or to inform Mr. Myers he did not have a right to a lawyer.

Mr. Myers argues that because Deputy Novotny had previously advised him that he "absolutely [had] a right to do that," meaning get an attorney, Deputy Novotny actively misled Mr. Myers. Mr. Myers implies that Deputy Novotny gave the false impression there would be no consequences

for requesting an attorney instead of complying with her requests for him to perform Standard Field Sobriety tests or submit blood. It is important to recognize that the statements Deputy Novotny made to Mr. Myers about obtaining counsel were made when she was administering the Standard Field Sobriety tests. Brief of Defendant-Appellant, pp. 4-5. Mr. Myers stated he would rather get an attorney, and Deputy Novotny placed Mr. Myers under arrest and then read the Informing the Accused form. Brief of Defendant-Appellant, pp. 4-5. There is no indication that Mr. Myers was confused after Deputy Novotny advised him that a refusal could result in revocation of his operating privilege. Instead, Mr. Myers's answer when asked if he would submit to an evidentiary chemical test was unambiguous and straightforward. Given this response, Deputy Novotny had no further affirmative duty to advise Mr. Myers he was not entitled to counsel. Had she given further clarification, Deputy Novotny might have invited the same challenge before this Court, which is exactly what the *Reitter* Court was trying to prevent.

II. MR. MYERS CANNOT SHOW HE WAS INADEQUATELY INFORMED OR MISLED SUCH THAT HIS CHOICE TO SUBMIT TO CHEMICAL TESTING WAS AFFECTED.

This case is comparable but can also be distinguished from *State v. Baratka*, 2002 WI App 288, 258 Wis. 2d 342,

654 N.W.2d 875. In both cases the alleged misinformation occurred during the administration of Standard Field Sobriety tests. *Id.* at ¶2 and Brief of Defendant-Appellant, pp. 4-5. In *Baratka*, the officer told Baratka that the Implied Consent law gave the officer the right to administer field sobriety tests and take a sample of Baratka's blood, breath or urine. *Id.* at ¶2. After arresting Baratka, the officer read him the Informing the Accused form. *Id.* at ¶¶2-3. Baratka stated that he did not understand and requested an attorney. *Id.* at ¶3. The officer stated that Baratka did not have a right to an attorney at that stage. *Id.* The officer reread the form and Baratka again stated that he did not understand and wanted to speak to an attorney. *Id.* The Court of Appeals determined that in order for Baratka to prove he was not adequately informed, he must show:

1. . . . [T]he law enforcement officer [has] not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver;
 2. . . . [T]he lack or oversupply of information [was] misleading; and
 3. . . . [T]he failure to properly inform the driver affected his or her ability to make the choice about chemical testing[.]
- Id.* at ¶12 (citing *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995)).

The Court of Appeals found that the officer gave incorrect information to Baratka by telling Baratka the

implied consent law gave the officer the right to have Baratka perform standardized field sobriety tests. 2002 WI App 288, ¶14. However, the officer was correct that Baratka did not have a right to a lawyer before making a decision about whether to give an evidentiary chemical test of his blood, breath or urine. *Id.* The Court then reasoned, citing *Reitter*, that, "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." *Id.* at ¶15 (citing *Reitter*, 227 Wis. 2d at 235).

Like *Baratka*, the alleged misinformation in this case occurred during the administration of field sobriety tests. Furthermore, these cases are similar in that the officers met their duty under §§ 343.305(4) and 343.305(4m) to provide information to the defendants when they read the Informing the Accused form and requested a sample. In both cases, the defendant answered the request with their own requests for an attorney and, pursuant to *Reitter*, were properly deemed to have unlawfully refused to submit to testing.

Where this case is distinguished from *Baratka* is that unlike the officer in *Baratka*, Deputy Novotny did not misinform Mr. Myers. When Mr. Myers asked Deputy Novotny during field sobriety testing whether he could get an

attorney, her response was, "You can refuse the test but then I put you down as a refusal to do the test." Brief of Defendant-Appellant, Appendix 20-21. When Deputy Novotny then advised Mr. Myers that he was under arrest for Operating While Intoxicated, Mr. Myers stated, "That's fine, I'll get a lawyer." Brief of Defendant-Appellant, Appendix 21. Deputy Novotny then stated, "Yup, and absolutely have the right to do that. I'm not trying to be a jerk about it. I just wanted to give you every opportunity to try to pass the tests." Brief of Defendant-Appellant, Appendix 21. At no point did Deputy Novotny tell Mr. Myers there would be no consequences for requesting an attorney. In fact, the Informing the Accused form, which Deputy Novotny read to Mr. Myers, states that a refusal will result in revocation of one's operating privilege. Unlike the officer in *Baratka*, Deputy Novotny's statement to Mr. Myers that he had a right to an attorney was not incorrect or misleading.

Because Deputy Novotny gave no incorrect or misleading information to Mr. Myers, unlike the Deputy in *Baratka*, she was under no obligation to supplement the Informing the Accused form with additional information like the Deputy did in *Baratka*. *Reitter*, 227 Wis. 2d at 231. Furthermore, unlike *Baratka*, Mr. Myers did not claim to be confused when

asked if he would submit to the test. Because no misinformation was given to Mr. Myers, and Mr. Myers did not indicate any confusion, there was no reason for Deputy Novotny to inform Mr. Myers he did not have a right to a lawyer before his statement, "Not without my attorney."

CONCLUSION

Mr. Myers's statement that he wanted an attorney in response to Deputy Novotny's request for a chemical sample was properly ruled an unlawful refusal under *Reitter*. Furthermore, Mr. Myers cannot show that he was misled about the consequences for refusing to take a chemical test such that his choice to refuse the test was affected because Deputy Novotny gave Mr. Myers no incorrect or misleading information and met the requirements under §§343.305(4) and 343.305(4m) to provide information to Mr. Myers. As such, this Court should affirm the decision of the Circuit Court that Mr. Myers unreasonably refused to submit a chemical sample.


FORM AND LENGTH CERTIFICATION AND CERTIFICATION OF
COMPLIANCE WITH RULE 809.19(12)

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 serif font. The length of this brief is 9 pages with 1,779 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 14th day of May, 2018.

Respectfully submitted,


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