

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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

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

**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v.

**RICHARD REY MYERS,**

Defendant-Appellant.

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

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

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**Wisconsin Supreme Court**

*State v. Reitter*, 227 Wis.2d 213, 595 N.W.2d 646  
(1999). . . . . 3,4

## ARGUMENT

Both sides agree that in most instances, an officer has no affirmative duty to advise a defendant that he does not have the right to a lawyer prior to making a decision regarding chemical testing. The State citing to *State v. Reitter*, 227 Wis.2d 213, 595 N.W.2d 646 (1999) contends that where there is no confusion, an officer has no duty to advise a defendant. Brief of Plaintiff-Responded, page 3. Thus, where a suspect believes he has the right to counsel before making the decision about chemical testing, an officer is under no obligation to correct the suspect.

*Reitter*, however, recognized a situation where an officer played a role in the suspect's belief that he had the right to counsel prior to making the decision regarding chemical testing. Where an officer "actively misled" a defendant into believing that he had a right where none existed, there could be a due process violation. *Reitter* at 49. Here, Mr. Myers' initial request for an attorney came when Deputy Novotny asked Mr. Myers to perform field sobriety testing. Clearly, a defendant does not have a right to counsel at this stage in the proceeding. However, Novotny suggested to Mr. Myers that he could refuse

field sobriety testing and seek counsel. Relying on Novotny's statement, Mr. Myers indicated that is what he would do.

Subsequently, when confronted with the request for chemical testing, Myers stated that he would not consent without an attorney. Mr. Myers testified that based on Novotny's earlier statements, Myers thought he had the right to speak to an attorney prior to making the decision about chemical testing. (R.10:30 / ReplyApp 1). Mr. Myers' testimony emphasizes his confusion based on the statements made by Deputy Novotny. Had Novotny simply clarified her statement, that is, advised Mr. Myers that he did not have the right to speak to an attorney before making the decision regarding chemical testing, Mr. Myers would have consented to the test. (R.10:31/ ReplyApp 2). Thus, while Novotny had no obligation to advise Mr. Myers regarding counsel, here, even pursuant to *Reitter*, Novotny had the obligation to correct her prior statement regarding counsel. She did not do so, and Mr. Myers' subsequent refusal to perform a chemical test was based in large part on Novotny's earlier statement.

### CONCLUSION

Because the facts herein fall within the narrow exception to 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 4<sup>th</sup> day of June, 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 9 pages. The word count is 1274.

Dated this 4<sup>th</sup> day of June, 2018.

Respectfully Submitted

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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 4<sup>th</sup> day of June, 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 4<sup>th</sup> day of June, 2018.

Respectfully submitted,

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## **APPENDIX**