STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In the matter of the refusal of Stuart W. Topping;

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 18AP318
Dane County Case No. 17TR12583

STUART W. TOPPING,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE TIMOTHY T. SAMUELSON PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

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I. Did the Defendant refuse a test for intoxication?

The circuit court found that he did refuse.

Position on Oral Argument and Publication

The criteria by which the Court decides whether oral argument is necessary in light of its incredible case load are stated in Wis. Stat. § 809.22(2). As the Defendant-Appellant believes that this brief fully meets the issue on appeal, we believe oral argument is unnecessary in that regard. However, as the Court of Appeals sometimes decides cases on issues not briefed by the parties (*see, e.g.*, *State*

v. Daley, 2006 WI App 81, ¶19, 292 Wis. 2d 517, 716 N.W.2d 146; *State v. Alexander*, 2015 WI 6, ¶83, 360 Wis. 2d 292, 858 N.W.2d 662 (Gableman, J. concurring), oral argument is welcomed for the purpose of allowing the court to ask questions of counsel. *See* Wis. Stat. § 809.22, Judicial Council Committee's Note, 1978.

The criteria for publication are stated in Wis. Stat. §809.23. This is a one judge case under Wis. Stat. § 752.31, and one judge cases "should" not be published pursuant to the statutory guidelines, though those guidelines are "neither controlling nor fully measuring the court's discretion." Wis. Stat. §809.23. Notwithstanding that disinclination, two considerations mitigate in favor of publication: The relative rarity of published cases concerning this matter and the quagmire of recent decisions related to implied consent statutes. Given the topic of the appeal—whether a "refusal" occurred—the relative sparsity of cases speaking directly to the topic (compared to whether probable cause existed for the stop, which most of these types of appeals concern) leaves a lack of cases concerning "refusals" in the legal literature. Additionally, as discussed herein, the conflict of holdings between cases in this Court, the Wisconsin State Supreme Court, and the U.S. Supreme Court make this topic worthy of publication to address and harmonize those conflicts. Given these two considerations, publication would be appropriate.

Statement of the Case

After working two jobs on his feet, one as a sales person and the other as a dish washer, Stuart left his second job to find that he had a flat tire. R. 19, Jury Trial and Refusal Hearing transcript, January 23, 2018 (hereinafter Trial Transcript), at 142-147. He jacked the car up, wrestled with a spare, and eventually sealed the leak with a temporary fix. *Id.* at 144. He had a pint of beer with his co-workers at the restaurant, as was their custom. *Id.* at 143. On his way home, the tire began to go flat again, as Stuart noticed from the way the car was handling and from a PSI gauge on the dashboard of the car. *Id*. at 146. He drove more quickly in an attempt to make it home before the tire went completely flat. *Id.*

Stuart was pulled over for speeding and lane deviation. *Id.* at 68-69. The officer asked Stuart about his driving, and Stuart told him about his quickly deflating front tire. *Id.* at 63. The officer observed that the tire was in fact deflating. *Id.* The officer asked Stuart how much he had to drink, and Stuart acknowledged having one pint of beer after his shift. *Id.* at 16-17. The officer did not observe bloodshot eyes or slurred speech. *Id.* at 112. He did not characterize the odor of alcohol as strong, and did not note that the odor was coming from Stuart's mouth. *Id.* at 112. The officer asked Stu to perform a field sobriety test, saying it would take five minutes. *Id.* at 118. Stuart explained that he'd had a long day at work. R. 21, Ex. 3, Transcript of Recorded Squad Car Video at 5.

The officer administered the Horizontal Gaze Nystagmus test, but not in accordance with his training: The lights from the squad were flashing off of a

reflective street sign and Stuart's flashing turn signal, still on from when Stuart pulled over, were flashing in Stuart's eyes as the officer administered the test. R. 19, Trial Transcript at 101-103. Believing he had observed clues of intoxication, the officer believed he had probable cause to arrest Stuart at that point, but performed further tests. *Id.* at 117. The officer administered field sobriety tests and asked Stuart to perform a PBT in the field. *Id.* at 77. The test did not register a reading, and the officer did not ask to use his backup partner's kit, even though she had one. *Id.* at 113-114.

Stuart was arrested for OWI, and believed that the PBT in the field had given a result. *Id.* at 147-148; R. 28, Ex. 6 at 10. At the police station, the officer read the informing the accused and asked Stuart for another breath sample. Stuart requested a blood test, believing it would be more accurate than a breath test. *Id.* at 127-28; 153. The officer insisted that he take a breath test. See R. 26, Ex. 4, Video-Interview Room; R. 28, Ex. 6, Recorded Interview of Stuart Topping, May 16, 2017.

Stuart had several questions about the test, the possible consequences of both taking it and refusing it, and whether he could take a blood test instead. *Id.* Some conversation ensued about what conditions Stuart would need to meet to take a blood test, where it would be performed, and what would happen depending on the results. *Id*. The officer grew frustrated and wrote that Stuart had refused the test. *Id.* The officer left the room, and came back a short time later. *Id.* Stuart asked at that point if he could take the breath test, but the officer said it was too late. *Id.* at 28.

Stuart had been pulled over at 12:25 AM. The officer finished reading the Informing the Accused form at 12:57:34 AM. At 1:00 AM the officer said he wasn't going to sit there all night, and the officer marked the test at the station as a refusal at 1:04 AM. *Id.*

Stuart paid the speeding ticket, and the lane deviation was dismissed in municipal court. Stuart moved to suppress evidence of the alleged refusal, and the motion was denied. *See* R. 20, Motion to Suppress; R. 31, Motion Hearing; R. 32, Continued Motion Hearing. Stuart had a jury trial on the OWI charge. Evidence of the alleged refusal was admitted over objection. The preliminary breath test from the field which the officer had advised him was "not admissible in court" was admitted over objection. Evidence of the officer's noncompliance with his training was withheld from the jury. Despite these, the jury acquitted Stuart. *See* R. 19, Trial Transcript. On the basis of the same evidence, the judge convicted him of refusal. *Id.*

Stuart appeals.

Argument

Stuart did not refuse. Some background regarding the Statute and cases that have considered it is necessary to the argument.

Wisconsin Statute § 343.305 establishes that anyone operating a motor vehicle on Wisconsin roads

> is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer

who has arrested that person for driving while intoxicated. This "deemed to have given consent" is not actual consent, but a legal fiction. The first time most motorists learn of the required testing isn't when they're issued a license, but when a test is *actually* demanded of them for the first time after they're arrested. *See State v. Padley*, 2014 WI APP 65, 354 Wis.2d 545, 849 N.W.2d 867 (not overruled by *State v. Mitchell*, as there was no majority opinion in that case). All the same, Wisconsin Statutes and the U.S. Supreme Court have sanctioned the imposition of civil consequences for refusing to provide the statutorily required sample. *Id.*; *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2018).

While the legitimacy of pretend, fictitious, deemed, "implied" consent is hotly debated, the topic of recent U.S. Supreme Court decisions[1] and state Supreme Court decisions[2] as well as divergent opinions of this Court,[3] its legitimacy is not at issue in this case. Nonetheless, it is important to understand what this "implied" consent is before we ascertain how it might be "refused" or "revoked" or "constructively refused" or "forfeited." It is especially important given this quagmire of cases with convoluted, counter-intuitive, and conflicting accounts of what this pretend "consent" is and when, if at all, it springs into being.

In plain English, the law requires that a driver submit to a chemical test when an officer has probable cause to ask for one. If the driver does not consent, civil penalties could result. If the driver does consent, the test may be used against them.

The Court of Appeals addressed the misnomer of "implied" consent in *Padley* and aptly explained it. Some Justices have subsequently recognized the logical necessity of the common-sense observation: "It is a metaphysical impossibility for a driver to freely and voluntarily give 'consent' implied by law. This is necessarily so because 'consent' implied by law isn't given by the driver." *State. v. Brar*, 2017 WI 73, 376 Wis.2d 685, 898 N.W.2d 499 (concurrence by Justice Kelly, joined by Justice Rebecca Bradley). Likewise, some Justices have

[1] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2018).
[2] *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, *State v. Brar*, 2017 WI 73, 376 Wis.2d 685, 898 N.W.2d 499, and *State v. Mitchell*, 2018 WI 84.
[3] *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 867, and *State v. Wintland*, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745, which counsel submits—especially in the void left by the non-precedent of *Mitchell*—was resolved by the U.S. Supreme Court in *Birchfield*.

recognized that pursuant to *Padley* "a driver's actual consent occurs after the driver has heard the Informing the Accused Form, *weighed his or her options* (including the refusal penalties), and decided whether to give or decline actual consent." *Id.* at ¶116, (Justice Abrahamson, dissenting, joined by Justice Ann Walsh Bradley, emphasis added). Despite that, the "deemed to have consented" language of the statute has given rise to all sorts of mischief, such that we call a refusal to actually consent a "revocation" of "implied" consent. Of course, "revoke" is a mischaracterization, because as people who believe that words have meaning recognize, drivers have not actually consented (or refused) until actually asked.

Notably, courts have said that consent is "consent previously given knowingly and voluntarily," *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980). In *Neitzel*, the Wisconsin Supreme Court considered whether an accused is entitled to counsel before deciding to take or refuse to take a chemical test for intoxication. Neitzel had been arrested for driving drunk and had asked for a lawyer. Notwithstanding that anyone in custody is entitled to a lawyer when they ask for one, and that the accused was in custody and asked for one, the Wisconsin Supreme Court held that an accused does not have a right to counsel in that circumstance. The Court found there was no right to counsel because the accused consents to chemical testing when they apply for and receive a license and "a lawyer cannot induce his client to recant a consent previously given knowingly and voluntarily." *Id.* at 201. Neitzel did not take the test. The Court also considered Neitzel's argument that the refusal was marked within the then two hour period of

presumptive reasonableness and that Neitzel should have been asked again. The Court noted that Neitzel did speak with his attorney and neither he nor his attorney made a request to take the test after they spoke. *Id.* at 196. The Court found that "the obligation of the accused is to take the test promptly or to refuse it promptly." *Id.* at 205.

The Court addressed a similar issue in *State v. Reitter*, 227 Wis.2d 213, 218, 595 N.W.2d 646 (1999), considering whether an accused who repeatedly requested a lawyer ought to be disabused by the police of their misconception that they're entitled to one. The Court found that while nothing prohibits a nice police officer from dispelling that misunderstanding, an officer is not required to. The Court construed the accused's persistent requests for an attorney in the absence of a verbalized refusal as "constructive refusal." Particularly, they held that "where a defendant expresses no confusion about his or her understanding of the statute, a defendant *constructively refuses* to take a breathalyzer test when he or she repeatedly requests to speak with an attorney in lieu of submitting to the test." *Id.* (emphasis added).

More recently some Justices, but not a majority, supposed instead that "implied consent" was actual "consent through conduct" of driving while intoxicated. *See Mitchell* (lead opinion). In this more convoluted rationale—which did not garner enough votes to have any controlling or precedential value—motorists' consent springs into being when they drive drunk. This rationale is too convoluted to merit discussion, except inasmuch as it is necessary to demonstrate

the extent to which the fiction of "implied" consent has resulted in contentious absurdity and to underscore that *Mitchell* has no precedential value.[4]

In this case, Stuart had questions about the "informing the accused" he'd just been read pursuant to statute. The reasonable questions he asked indicate that he sought to understand the consent he was being asked for: To "weigh his options" as *Padley* and some Justices have recognized is prerequisite to actual consent. Lest we be confused by some suggestion in the aforementioned cases concerning our legal fiction of pretend or "implied consent" that this was consent that was *actually* previously given, we must be clear that this was in fact the first time Stuart was asked to consent.

I. Stuart Did Not Refuse a Chemical Test.

The application of the implied consent statute to found facts is a question of law that this Court reviews de novo. *State v. Rydeski*, 214 Wis.2d 101, 571 N.W.2d 417 (1997). When the evidence on a factual question is reflected in a video recording, the Court of Appeals is in the same position as the circuit court to determine a question of law based on the recording. *State v. Jimmie R.R.*, 2000 WI App. 5, ¶39, 232 Wis.2d 138, 606 N.W.2d 196 (1999). The video of the alleged "refusal" is included in the record, as is a transcript of the video. R. 26, Ex. 4, Video-Interview Room; R. 28, Ex. 6, Recorded Interview of Stuart Topping, May 16, 2017.

[4] The lead opinion in *Mitchell* criticizes *Padley* for injecting "knowingly" into the refusal analysis, while at the same time glowingly citing *State v. Neitzel*, 289 N.W.2d 828 (1980) in support of its contention that consent occurs by conduct. In *Neitzel*, as discussed above, our Supreme Court *itself* wrote that consent is previously given "knowingly and voluntarily."

In this case, when the officer read Stuart the "informing the accused," Stuart immediately offered to take a blood test, as he believed it would be more reliable. R. 19, Trial Transcript at 127-28; 153. The officer wanted a breath test instead, and Stuart had several reasonable questions as he attempted to understand the convoluted language of the "informing the accused" that he had been read and what tests would happen when, and where. *See Id.* After all, he had submitted to a breath test in the field, and believed it had given a reading which didn't make sense to him.

Less than seven minutes[5] into the conversation, the officer grew frustrated and marked the test as a refusal, notwithstanding that Stuart had not actually refused. R. 26, Ex. 4, Video-Interview Room; R. 28, Ex. 6, Recorded Interview of Stuart Topping, May 16, 2017. In fact, when the officer returned to the room a short time later, Stuart affirmatively requested to take the breath test, but the officer told him it was too late. *Id.* at 28. They were still well within the three hour period during which the tests are presumptively admissible and given prima facie weight under Wis. Stat. § 885.235.

Stuart did not actually refuse the test, nor is this a "constructive refusal." Constructive refusal occurs "where a defendant expresses no confusion about his or her understanding of the statute, a defendant constructively refuses to take a breathalyzer test when he or she repeatedly requests to speak with an attorney in

[5] The State repeatedly characterized this as a "nine and a half minutes." This is false. The video of the interrogation room has a time stamp which shows that the officer finished reading the Informing the Accused at 12:57:34 AM, and marking the form as a refusal at 1:04 AM, consistent with what he wrote on the form itself.

lieu of submitting to the test." *State v. Reitter*, 227 Wis.2d 213, 218, 595 N.W.2d 646 (1999).

In *Reitter*, the Court considered whether confusion about a right to an attorney was a basis for refusal. They reiterated that there was not a right to counsel, and that where there's no confusion about the statute, the officer has no duty to inform an accused that the right does not exist.

But Stuart did not constructively refuse, because his questions were indicative that his understanding of the information he was being presented needed to be complete. As soon as he had the briefest chance to begin to process the many different permutations of consequences presented in the "informing the accused," he affirmatively requested the breath test.

> Defense counsel: You were asked questions about whether you understood the English language and whether you understood the form, just now by Attorney Rice, correct?
> Stuart: Correct.
> Defense counsel: Okay. Now, you understand the form we're taking about is the Informing the Accused, right?
> Stuart: Yes.
> Defense counsel: Okay. The events of that night, did they involve an accident?
> Stuart: No.
> Defense counsel: Did they involve a death?
> Stuart: No.
> Defense counsel: Did they involve great bodily harm?
> Stuart: No.
> Defense counsel: Substantial bodily harm?
> Stuart: None.
> Defense counsel: Anything regarding your duty time with respect to a commercial motor vehicle after consuming intoxicating beverage?
> Stuart: No.
> Defense counsel: So there might have been a lot of stuff on that form that didn't apply to you?
> Stuart: Yeah, there was a lot.
> Defense counsel: Were you trying to figure it out?
> Stuart: Yes, I was.
> Defense counsel: Were you asking questions about it?
> Stuart: I did ask some questions.

R. 19, Trial Transcript at 154 to 155.

All of the questions Stuart asked the officer that night were reasonable, and questions that any reasonable person would have. What test is the alternative? Where and when would I take it? The State contended at trial that the Officer answered all of Stuart's questions, but with the officer's qualified answers and vague utterances, that's a stretch:

> Stuart: What if I don't take it?
> Officer: Then it's a refusal, and then it's marked as a refusal, and then we're pretty much done.
> Stuart: Done? Then where does that put me?
> Officer: That means you'll be getting some citations. And you'll be released to a responsible party, if you can find one. Otherwise you'll be taken to the Dane County Jail.
> Stuart: Hmm. Well, I can call a cab, right?
> Officer: No.
> Stuart: No?
> Officer: Huh-uh. I have a – I need a person that will be taking you – or taking custody of you from here more or less, and I have a form for them, and I don't allow taxi drivers so –
> Stuart: Oh, okay. Otherwise I go to jail?
> Officer: Mm-hmm.
> Stuart: And spend the night or what?
> Officer: Mm-hmm.
> Stuart: Until when?
> Officer: 12 hours at least.
> Stuart: 12?
> Officer: 12 hours or until you're completely sober.

R. 26, Ex. 4, Video-Interview Room at 7-8; R. 28, Ex. 6, Recorded Interview of Stuart Topping, May 16, 2017.

"What if I don't take it?" is a reasonable question. "Then we're pretty much done" is a vague response, causing confusion and provoking further questions. "I go to jail?" is a reasonable question. "Mm-hmm" is a vague response, that requires further questions. "I know it's in writing, but it's complicated," Stuart said. He told the officer that he was feeling threatened.

Not all of the information the officer was giving was correct, and Stuart knew it. The officer told Stuart in the interrogation room that he'd been traveling 60 miles

an hour (*Id.* at 14), when it was actually 52 (Trial Transcript at 57-58). The officer told Stuart that he had only attempted the PBT's twice (Video- Interview Room at 11), when in fact it was four times (R. 23, Squad Video of Stop). Contrary to the State's assertion at trial that the officer answered Stuart's questions, Stuart was rightly concerned with the veracity of information he was being given.

Having been told that he'd spend "12 hours at least" in jail if he didn't take the test, Stuart was quite worried about missing work, as is evident from the transcript.

> Officer: Okay. Well, I'm marking it as a refusal because I'm not going to wait any longer. I already told you that. We've already been here almost 10 minutes. And by this time, I already usually have the 20 minute observation period started and about 8 minutes into it.
> Stuart: Well, I really don't want to spend the night in jail.
> Officer: So like I said, I either need a yes or a no.
> Stuart: But then if—even if I sign it
> (Inaudible. Overlapping speakers.)
> Officer: Then I'm going to ask you—I'm going to ask you one more time, yes or no. Otherwise I'm marking it a refusal.
> Stuart: Well, I'm just—just a second here.
> Officer: No. You're a refusal.

R. 26, Ex. 4, Video-Interview Room at 17-18; R. 28, Ex. 6, Recorded Interview of Stuart Topping, May 16, 2017.

Why does the Statute require the "informing the accused" be read? The only reasonable answer is that citizens be given a choice whether to consent, and that they be given the information the legislature deems necessary to make a knowing and informed choice. The only alternative is that Stuart should have agreed without understanding what the Statutes require he be informed of. If that is the case, it would be better not to read the informing the accused at all. As noted, "implied consent" is not actual consent. If the process is to obtain actual consent, it follows

that an accused should be afforded the opportunity to understand the information the Statute requires they be presented with.

"The test results, or the fact that you refused them, can be used against you in court," the officer read from the Informing the Accused. *Id.* at 2-3. That required caution is a red flag for any sober citizen in the custody of the State who's being asked to consent to something, where there are multiple permutations that might result, with citations to obscure statutes and additional implications if one is driving for work. What's a reasonable citizen to do?

He might ask some clarifying questions while weighing his options. That's what Stuart did. He never said no. He offered what common sense dictates would be a more reliable test. Finally, after brief consideration, he affirmatively asked to take the test, and the officer refused to administer it.

Q . . .Is there a specific period of time in which you are required to get your answer to that question?
A No.
R. 19, Trial Transcript at 91.

Q …In your training and experience have you received any information or training with respect to how alcohol interacts with someone's blood?
A The science behind it?
Q Correct, have you received any scientific training?
A No.
…
Q Officer, based on what we saw in the video, why was it important to get the defendant's answer to your question about the breath test?
A So I can get things moving and push forward within the case.
Q And why, ultimately, did you mark that as a refusal?
A Because he would not give me an answer, and after several times of asking him, like I said, we need to figure things out. We can't sit there all night.
Id. at 92.

This officer was not concerned about loss of evidence. He was simply out of patience, and annoyed by Stuart's reasonable questions. A jury has found that Stuart was not driving drunk. Neither did he refuse the test. This Court should recognize that he did not.

Conclusion

This Court should find that Stuart did not refuse a chemical test and vacate the judgement of conviction against him.

Dated this 27th day of August, 2018.

Respectfully submitted,

_____
Anthony J. Jurek (SBN 1074255)
Attorney for the Defendant-Appellant

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,583 words.

Further

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or 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.

Further

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats. 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.

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