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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP491

In the Matter of the Refusal of Kelly L. Springer:

WASHINGTON COUNTY,

Plaintiff-Respondent,

-vs-

KELLY L. SPRINGER,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING, TRIAL COURT CASE NO. 20-TR-439

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. THE ISSUE IN THE INSTANT CASE IS MORE NUANCED THAN THE COUNTY RECOGNIZES IN ITS BRIEF.

The County expends a significant amount of effort in its Brief making an implied, if not express, conclusion that Mr. Springer did not "promptly" reply to the arresting officer's request for an implied consent test of his breath and therefore, from an exclusively factual point of view, his alleged "non-responsiveness" constituted a refusal to submit to testing. County's Brief at pp. 9-10. As Mr. Springer posited in his Initial Brief, however, this was *not* the question he was posing to this Court. Appellant's Initial Brief at pp. 6-7.

In a *reductio ad absurdum* argument, Mr. Springer acknowledged that while the issue of "promptness" is generally a factual inquiry which must be assessed in the circumstances of each case, there must exist a "floor" or "threshold" below which it is patently absurd and unreasonable for a law enforcement officer to consider a refusal has occurred. The example Mr. Springer proffered was as follows:

> It is highly unlikely that any fact finder acting reasonably would conclude that the failure to respond within one second constituted a refusal by silence. Extend this example to two seconds. Again, the conclusion would very likely be the same. Mr. Springer would even go as far as to postulate that three, four, five, on up to ten seconds would all remain unreasonable amounts of time within which a person facing a life-changing decision must answer whether he will submit to testing. Mr. Springer's hypothetical would similarly not change regardless of the number of times the officer could repeat the question in those periods. It is not the frequency of the "asking" that matters here. It is the period of time in which the intellect of the accused is afforded the opportunity to weigh the options regarding the consequences of submitting to an implied consent test versus those of refusing the same that matters.

Appellant's Initial Brief at pp. 6-7. Despite the County's protestations to the contrary, it would seem there must exist some *minimum* threshold below which it is *per se* unreasonable to fall. This is especially true when one considers the common sense factors that:

(1) the information being provided to the accused is of a technical legal nature not normally found in the ebb and flow of common parlance; (2) the decision being made by the accused is one of monumental consequence, *i.e.*, will the accused accept the consequences of refusing a test (and even of exposing themselves to the possibility of the blood test evidence being gathered regardless of their refusal pursuant to a warrant) versus those of submitting to a test and fighting an additional charge of operating a motor vehicle with a prohibited alcohol concentration; and (3) how will their decision affect other aspects of their lives, such as their ability to maintain gainful employment? This latter factor weighs even more heavily in a case such as Mr. Springer's wherein the accused is a commercially licensed driver and will not be able to work in his or her chosen profession depending upon the choice made when asked to submit to an implied consent test.

In the instant case, as Mr. Springer identified in his Initial Brief, he was afforded a mere twenty-five (25) seconds to make this decision. Depending upon how quickly a law enforcement officer reads the Informing the Accused form to a suspect, this is less than one-third to one-quarter of the time it takes to recite the form. Asking a person—especially a commercial driver for whom there are additional consequences—to make his or her decision in that amount of time is patently unreasonable. Perhaps this point is best made by reference to a hypothetical: if a person with cancer is told they can choose to treat the same with either radiation or chemotherapy, who would ever consider it reasonable for a doctor to expect such a life-changing decision to be made within twenty-five seconds when each form of treatment has very different consequences? Certainly, Mr. Springer is not trying to equate cancer with a decision about submitting to chemical testing, but to the extent that both have life-altering consequences (especially for commercial drivers), the analogy holds.

It is not Mr. Springer's position, as the County attempts to color it, that this Court should "reweigh" the facts adduced below and find that the lower court erred. Rather, it is his position that if the common law requirement of "promptness" remains unrefined, unfair and unjust results will occur. Without a lower limit on response time

being afforded a suspect, there is nothing prohibiting a lower court from finding that a failure to respond to an officer's inquiry regarding testing within five seconds, for example, is sufficient *even though* the person is trying to digest the complex information which will affect every part of their life thereafter. Forcing decisions in such hurried circumstances violates notions of fair play and fundamental fairness, yet it is perfectly permissible under the current incarnation of the common law.

II. INFORMING A SUSPECT THAT A PRELIMINARY BREATH TEST IS NOT AN IMPLIED CONSENT TEST FURTHERS THE PURPOSE OF THE LAW.

The County argues that the law enforcement officer in this case was not obligated to inform Mr. Springer that the preliminary breath test [hereinafter "PBT"] to which he previously submitted did not count as an "implied consent" test. County's Brief at pp. 12-13. This is entirely true—there is no statutory or common law requirement that a suspect be so informed. Even if this is the case, Mr. Springer must ask to what end or to what purpose does this serve? Mr. Springer believes that it not only serves *no* end, but is actually *contrary* to the stated purpose of the Implied Consent Law.

The implied consent statute was designed to *facilitate the gathering of chemical test evidence* against suspected drunk drivers. *See generally*, *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980); *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). The law was *not* intended to gather "refusal evidence" from suspected drunk drivers. If the ends of the law are to be served, does not common sense dictate that when a suspect believes they have already submitted to an implied consent test at roadside by taking a PBT, a law enforcement officer should inform the suspect that their belief is erroneous? Not only is there no harm in this, not only is it not prohibited by the implied consent statute itself, and not only is it not prohibited by any common law decision of a court of supervisory jurisdiction, but requiring an officer to do so would further the purpose underlying the implied consent statute itself. Mr. Springer believes that serving the purpose of the law is the better approach and asks this Court to reject the County's approach.

CONCLUSION

Mr. Springer respectfully requests that this Court reverse the lower court's finding regarding the propriety of his alleged refusal to submit to an implied consent test under Wis. Stat. § 343.305 and reinstate his operating privilege.

Dated this 1st day of September, 2020.

Respectfully submitted:

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By:_____

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 1184 words. I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 1, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 1st day of September, 2020.

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