RECEIVED
11-16-2020
CLERK OF WISCONSIN
SUPREME COURT

**STATE OF WISCONSIN**
**IN SUPREME COURT**

---

**Appellate Case No. 2020AP491**

---

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

**WASHINGTON COUNTY,**

Plaintiff-Respondent,

-vs-

**KELLY L. SPRINGER,**

Defendant-Appellant-Petitioner.

---

# PETITION FOR REVIEW

---

**APPEALED FROM A DECISION OF THE COURT OF APPEALS DATED OCTOBER 21, 2020, AFFIRMING 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**

---

**MELOWSKI & ASSOCIATES, LLC**

Matthew M. Murray
State Bar No. 1070827

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
matt@melowskilaw.com

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .ii

STATEMENT OF THE ISSUE . . . . . . . . . . . . . . . . . . . . . . . . . . .1

STATEMENT OF THE CASE . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF FACTS . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2

STATEMENT OF REVIEW ON APPEAL . . . . . . . . . . . . . . . . . . .3

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW UNDER WIS. STATS. § 809.62(1r)(c)1. & (c)2. . . . . . 4

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

I. DEPUTY BOISVERT FAILED TO PROVIDE MR. SPRINGER WITH AN ADEQUATE AMOUNT OF TIME TO MAKE A "PROMPT" DECISION ABOUT WHETHER TO SUBMIT TO AN IMPLIED CONSENT TEST. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

*A. Statement of the Law As It Relates to a Subject Responding to a Request for an Implied Consent Test.* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

*B. The Facts of the Instant Case Establish That Mr. Springer Was Not Given a Sufficient Amount of Time Within Which to Make an Election to Submit, or to Refuse to Submit, to Testing.* . . . . . . . . . . . . . . . . . . . .6

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

## TABLE OF AUTHORITIES

**Wisconsin Statutes**

Wisconsin Statute § 341.315(2)........................................................ 7

Wisconsin Statute § 343.305(2)........................................................ 5

Wisconsin Statute § 343.305(3)(a) .................................................. 5

Wisconsin Statute § 343.305(4)........................................................ 5

Wisconsin Statute § 343.305(9)(a) .................................................. 1

Wisconsin Statute § 346.63(1)(a) ................................................ 1, 3

**Wisconsin Supreme Court Cases**

*State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)...............6

**Wisconsin Court of Appeals Cases**

*Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985) ..........................................................................6

*State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997) ..........................................................................................6

*State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989) ..3

**Extrajurisdictional Authority**

*Beck v. Cox*, 597 P.2d 1335, 1338 (Utah 1979)...............................6

## STATEMENT OF THE ISSUE

WHETHER MR. SPRINGER WAS ALLOWED SUFFICIENT TIME TO MAKE A "PROMPT" DECISION TO SUBMIT TO OR REFUSE AN IMPLIED CONSENT TEST?

> Trial Court Answered: YES. A sufficient "pause" existed in between the arresting deputy's asking Mr. Springer to submit to an implied consent test and Mr. Springer's failure to respond in the affirmative. R23 at 29:1-12; P-App. at 105.
>
> Court of Appeals Answered: YES. P-App. at 113-16. The court of appeals focused its decision on the above-identified issue based upon the fact that the arresting officer in this case "repeated the question asking [Mr. Springer] to submit to an evidentiary chemical test six to seven times." P-App. at 115.

## STATEMENT OF THE CASE

Mr. Springer was charged in Washington County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on January 30, 2020. R23 at 4:5-7.

Mr. Springer subsequently filed a request for a refusal hearing. R4. A hearing on the lawfulness of Mr. Springer's refusal was held on March 2, 2020, before the Circuit Court for Washington County, the Honorable James K. Muehlbauer presiding. R23.

Deputy Thomas Boisvert, the arresting officer in the instant matter, was the single witness called to testify on behalf of the County. R23 at pp. 3-21. At the conclusion of the evidentiary portion of the hearing, counsel for Mr. Springer made several legal arguments, including, *inter alia*: (1) the arresting officer failed to provide an adequate opportunity for Mr. Springer to render his decision regarding whether to submit to an implied consent test; and (2) Mr. Springer should have been informed by the arresting officer

that his belief that he had already submitted to an implied consent test by providing a breath sample at roadside during preliminary breath testing was erroneous. R23 at 23:1 to 26:8.

The circuit court rejected both of Mr. Springer's arguments, and by Conviction Status Report dated March 3, 2020, ordered Mr. Springer's operating privilege revoked for a period of one (1) year. R9; P-App. at 101. Thereafter, Mr. Springer appealed his conviction to the Court of Appeals which, after briefing, affirmed the judgment of the lower court by a one-judge panel on October 20, 2020. P-App. at 108-16.

## STATEMENT OF FACTS

On January 30, 2020, the above-named Appellant, Kelly Springer, was operating his motor vehicle in Washington County, when Deputy Thomas Boisvert of the Washington County Sheriff's Office observed Mr. Springer make multiple lane changes on US 45 without signaling. R23 at 4:10-12. Deputy Boisvert caught up to Mr. Springer's vehicle and initiated a traffic stop. R23 at 5:18-22.

After making contact with Mr. Springer, Deputy Boisvert ostensibly observed that he had difficulty finding his proof of insurance, and when asked whether he had consumed any intoxicants, stated that he had "several beers." R23 at 7:23 to 8:6. Based upon this information, Deputy Boisvert asked Mr. Springer to perform field sobriety tests, to which request Mr. Springer consented. R23 at 8:20-24. Mr. Springer allegedly failed the standardized battery of field sobriety tests. R23 at 8:25 to 11:4.

Upon completing the field sobriety tests, Deputy Boisvert administered a preliminary breath test [hereinafter "PBT"] to Mr. Springer which yielded a result above the prohibited limit. R23 at 11:5-19. After the PBT, Deputy Boisvert placed Mr. Springer under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R23 at 12:18-23.

Once seated in the rear of the deputy's squad, Deputy Boisvert read the Informing the Accused form [hereinafter "ITAF"] to Mr. Springer and asked him whether he would be willing to submit to an evidentiary chemical test of his breath. R23 at 13:5 to 14:4. Mr. Springer initially remained silent in response to the deputy's question, and the deputy reread the question "about six times." R23 at 14:5-17. After re-reading the question to Mr. Springer for the sixth time, Mr. Springer replied "I already gave you my test." R23 at 15:3-4; 18:19-22. Whereupon, Deputy Boisvert, immediately and without further comment, marked Mr. Springer as having refused to submit to an implied consent test. R23 at 15:5-7; 19:1-4.

At the refusal hearing, Deputy Boisvert testified that in between each reading of the question, he allowed anywhere from five to ten seconds to pass before he read the question to Mr. Springer again for a total of "five or six more times" after the initial reading. R23 at 18:7-22. Given this testimony, this would equate to a total time of twenty-five seconds on the lower end of the range to sixty seconds on the high end of the range of time given that there was no additional waiting after the last reading of the question, but rather an immediate marking of Mr. Springer as having refused testing.[1]

## STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to the application of the implied consent law to an undisputed set of facts. As such, this Court reviews the matter as a question of law *de novo*. *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

[1]The lower end is given by the elapsing of 5 seconds for 5 times after the initial reading, for a total 25 seconds; and the high end is given by the elapsing of 10 seconds for 6 times after the initial reading, for a total of 60 seconds.

## STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW UNDER WIS. STATS. § 809.62(1r)(c)1. & (c)2.

### *1. This Case Calls for the Application of a New Doctrine.*

Review should be granted in the instant case because there are no published decisions of this Court or the court of appeals which address the issue presented herein, namely: What constitutes a "prompt" response to the implied-consent inquiry "Will you submit to an evidentiary chemical test of your [blood, breath, or urine]"? Similarly, there are no decisions of any court of supervisory jurisdiction which provide guidance on how to approach this question, establish a standard for determining the same, or describe the elements which should be considered when making an assessment of whether a response was "prompt."

The court of appeals elected to approach the foregoing question not by looking at the fact that Mr. Springer was afforded a mere twenty-five seconds to answer the same, but instead, only choose to approach it from the perspective of the *number of times* the officer asked him to submit. It is Mr. Springer's position, for the reasons set forth *infra*, that it should not be the number of times the question is asked of the accused, but rather should be the *amount of time* the accused is afforded to make his or her decision which controls.

The question presented herein is likely to recur with some frequency as the extent, manner, and nature of exactly what limits are to be set, if any, upon how "prompt" is to be defined. Unless this Court intervenes to establish a clear boundary for the definition of "prompt," or alternatively, at least provide some guidance to the lower courts, courts throughout Wisconsin will interpose their own local interpretations which is not conducive to harmonizing the law as discussed below. Moreover, disparate treatment of similarly situated defendants will continue to occur throughout the State as some circuit courts will require a response *immediately* to the question regarding submission to an implied-consent test while others will tolerate several minutes passing. It is patently unfair for

a defendant in the first type of jurisdiction to be treated so differently from a person in the latter type of jurisdiction.

#### *2. A Decision by This Court Will Develop, Clarify, and Harmonize the Law Because the Question Presented Is a Novel One Which Will Have Statewide Impact.*

Another reason for granting review in this matter is that the absence of any clear direction regarding what constitutes a "prompt" response to the implied-consent inquiry does not have a harmonizing effect on the law as it is employed throughout the State. By permitting decisions like that of the court of appeals to stand, a message is sent that it is only the number of times a person is asked to submit to an implied-consent test which matters and not the total time the accused is afforded to consider his or her options. If this Court accepts this matter, it will have the opportunity to "settle the score" between these two competing schools, and thereby harmonize the law statewide regarding this novel question.

## ARGUMENT

### I. DEPUTY BOISVERT FAILED TO PROVIDE MR. SPRINGER WITH AN ADEQUATE AMOUNT OF TIME TO MAKE A "PROMPT" DECISION ABOUT WHETHER TO SUBMIT TO AN IMPLIED CONSENT TEST.

#### *A. Statement of the Law As It Relates to a Subject Responding to a Request for an Implied Consent Test.*

Pursuant to Wis. Stat. § 343.305(2), a law enforcement officer who suspects an individual of operating a motor vehicle while intoxicated may request that the individual submit to a chemical test of their blood, breath, or urine under § 343.305(3)(a). This goal is accomplished *vis a vis* the reading of the "Informing the Accused" form to the suspect. Wis. Stat. § 343.305(4); R7. At the end of the ITAF, a question is asked of the suspect, "Will you submit to an evidentiary chemical test of your [breath, blood, or urine]," with the

law enforcement officer designating which test it is that the law enforcement agency is seeking. *Id*.

It is incumbent upon the accused to "promptly" elect to submit, or to refuse to submit, to the requested test. *State v. Neitzel*, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980); *State v. Rydeski*, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997). The implied consent law, however, does not require a verbal refusal to submit to testing. *Rydeski*, 214 Wis. 2d at 106-07. While it remains true that "**[i]t is the reality of the situation** that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal,"[2] including a suspect's remaining silent when asked to submit to an implied consent test, it is also true that no decision of any court of supervisory jurisdiction has defined what constitutes a "prompt" reply to the officer's request.

### ***B. The Facts of the Instant Case Establish That Mr. Springer Was Not Given a Sufficient Amount of Time Within Which to Make an Election to Submit, or to Refuse to Submit, to Testing.***

Mr. Springer acknowledges from the start that a person's silence, when asked to submit to a chemical test for intoxication, can certainly be construed as a *de facto* refusal to submit to an implied consent test. That issue is not, however, the issue Mr. Springer raises before this Court. Mr. Springer proffers that it is unreasonable to conclude that a person who is given only twenty-five seconds to respond to the request for testing has refused such testing if he has not delivered a response within that time.[3] This is especially true in a circumstance in which the person who is being asked to submit to

---

[2]*Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 192, 366 N.W.2d 506 (Ct. App. 1985), quoting *Beck v. Cox*, 597 P.2d 1335, 1338 (Utah 1979)(emphasis added). The "reality" of this situation is that, at the lower end, Mr. Springer was afforded *less than* thirty seconds to make a decision. *See* n.3, *infra*.

[3]Given Deputy Boisvert's admission that it is possible he only asked Mr. Springer to submit to a test five times, and waited only five seconds in between each attempt, Mr. Springer will, throughout the remainder of his argument on this point, construe the facts in a light most favorable to him since there is a basis in the record to assume the same.

testing has more at stake than a "typical" suspect who, unlike Mr. Springer, is not a commercially licensed driver.[4] Commercially licensed drivers are subject to more severe penalties, such as disqualification from operating a commercial motor vehicle, which affect their livelihoods and ability to maintain employment more acutely than the average person. *See*, *e.g.*, Wis. Stat. § 341.315(2).

Mr. Springer acknowledges that establishing a "bright-line" rule of any period of time, *e.g.*, thirty seconds, one minute, two minutes, *etc*., is likely unworkable no matter how desirable. This is not to say, however, that there should not be a *minimum* period of time in which the person is permitted an opportunity to "think it over." This point is perhaps best made by hypothetical.

Assume, *arguendo*, that an officer reads the ITAF to a suspect, asks him to submit to a breath test, and when the individual does not respond within one second's time, considers him to have refused testing. 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. Moreover, interrupting someone's thought process every five seconds renders the twenty-five seconds even more unreasonable.

It takes longer than one minute to carefully and fully read the ITAF to a suspect. *See* R7. It is Mr. Springer's position that asking a person to make a decision in less time than it takes to provide him

---

[4]Deputy Boisvert testified that he was unaware that Mr. Springer was commercially licensed. R23 at 20:23 to 21:5.

with all of the information regarding that decision is patently unfair and unreasonable. Perhaps the standard which this Court should consider is one in which both sides are treated equally. That is, a person who is asked to submit to an implied consent test should be afforded as long a time to make his decision regarding testing as it takes to relay the information to him.

Should this Court not elect to consider the foregoing a reasonable alternative, at least in the instant case Mr. Springer believes twenty-five seconds while being interrupted was too little time in which he could make a decision *regardless* of how many times the deputy could reinsert the question into his silence. It should be emphasized that the decisions a person is asked to make relating to providing the government with either chemical test evidence or proof of consciousness of guilt evidence in the form of a refusal would likely not be easy to make "promptly" even for individuals who are trained in the law if "promptly" means in less than twenty-five seconds. Some consideration must be given to the fact that the typical accused drunk driver is a lay person.

It is not unreasonable to conclude that there should 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, Mr. Springer was afforded a mere twenty-five seconds to make his 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.

## CONCLUSION

Because Mr. Springer was not afforded sufficient time within which to make his decision to submit to an implied consent test, 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 13th day of November, 2020.

Respectfully submitted:

**MELOWSKI & ASSOCIATES, LLC**

By:________________________________
**Matthew M. Murray**
State Bar No. 1070827
Attorneys for Defendant-Appellant-Petitioner

## 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 2,993 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; (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; and (5) the decision of the court of appeals. 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, 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 and appendix was deposited in the United States mail for delivery to the Clerk of the Supreme Court and Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on November 13, 2020. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 13th day of November, 2020.

**MELOWSKI & ASSOCIATES, LLC**

______________________________

**Matthew M. Murray**
State Bar No. 1070827
Attorneys for Defendant-Appellant-Petitioner

**STATE OF WISCONSIN**
**IN SUPREME COURT**

---

**Appellate Case No. 2020AP491**

---

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

**WASHINGTON COUNTY,**

Plaintiff-Respondent,

-vs-

**KELLY L. SPRINGER,**

Defendant-Appellant.

---

## APPENDIX

---

Table of Contents

Conviction Status Report. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 101

Decision of the Circuit Court . . . . . . . . . . . . . . . . . . . . . . . . .102-107

Decision of the Court of Appeals. . . . . . . . . . . . . . . . . . . . . . 108-116

Order of Circuit Court Finding Refusal Unreasonable . . . . . . . . . 117