

RECEIVED
08-14-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2020AP000888

IN THE MATTER OF THE REFUSAL OF JAMES MICHAEL CONIGLIARO:

COUNTY OF WASHINGTON,

Plaintiff-Respondent,

vs.

JAMES MICHAEL CONGILIARO,

Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY,
THE HONORABLE ANDREW T. GONRING AND THE HONORABLE SANDRA
J. GIERNOTH, PRESIDING

Respectfully submitted,

COUNTY OF WASHINGTON,
Plaintiff-Respondent

BY: Mandy A. Schepper
Assistant District Attorney
State Bar No. 1052580

Washington County
484 Rolfs Avenue
West Bend, WI 53090
(262) 335-4311

TABLE OF CONTENTS

Table of

Authorities.....	4
Statement of the Issues	5
Statement on Publication	5
Statement on Oral Argument.....	5
Statement of the Case and the Facts.....	5-6
Argument.....	7-11
I. MR.CONIGLIARO'S REFUSAL WAS UNREASONABLE AS WAS FOUND BY THE CIRCUIT COURT	
Conclusion	12

TABLE OF AUTHORITIES**Wisconsin Supreme Court**

<i>State v. Neitzel</i> , 95 Wis.2d 191, 205-06, 289 N.W.2d 828, 836 (1980).....	7
<i>State v. Reitter</i> , 227 Wis.2d 213, 595 N.W.2d 646 (1999).....	7, 8 11

Wisconsin Court of Appeals

<i>In re Verkler</i> , 2003 WI App 37, 260 Wis. 2d 391, 659 N.W. 2d 137.....	7, 10
<i>Noble v. Noble</i> , 2005 WI App 227, 287 Wis. 2d 699, 706 N.W.2d 166.....	6
<i>State v. Coffee</i> , 2019 WI App 25, 387 Wis. 2d 673, 929 N.W.2d 245	6
<i>State v. Kliss</i> , 2007 WI App 13, 298 Wis. 2d 275, 728 N.W.2d 9(2006).....	8

STATEMENT OF THE ISSUES

Did Mr. Conigliaro unlawfully refuse to submit to an evidentiary chemical test of his blood?

Answer: The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought. Plaintiff-Respondent does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF THE FACTS AND THE CASE

Plaintiff-respondent Washington County ("the County") generally agrees with Mr. Conigliaro's recitation of the facts in his Statement of the Case/Facts. However, a portion of the cross-examination of Mr. Conigliaro was not described in the Brief of the Defendant-Appellant. As such, the County is providing the entirety of the transcript of the Refusal Hearing as its Appendix.

As described in the Defendant-Appellant Statement of the Facts and Case, Mr. Conigliaro took the stand to testify. During cross examination by the County, Mr.

Conigliaro admitted taking his opiate medication earlier that morning, which he referred to as Oxycodone. (R.23:46/ App. 42). Mr. Conigliaro indicated he took it at 6:00 a.m., and he denied any other medications or substances were ingested. (R.23:47/ App. 43). Mr. Conigliaro also specifically claimed that the deputy told him he had the right to an attorney and believed this occurred in the ambulance. (R.23:47-48/ App. 43-44). Mr. Conigliaro then backtracked, and indicated that he was read his rights and was told he had the right to have an attorney. (R.23:50/ App. 46). He also conceded that he "was not all there when this was all going on either." (*Id.*).

STANDARD OF REVIEW

In reviewing a circuit court's order granting or denying a suppression motion, the appellate court has stated "[w]e will uphold the court's factual findings unless they are clearly erroneous, but we independently apply constitutional principles to those facts." ***State v. Coffee***, 2019 WI App 25, ¶6, 387 Wis. 2d 673, 929 N.W.2d 245. Further, the "credibility to be given to testimony is uniquely within the province of the trial court." ***Noble v. Noble***, 2005 WI App 227, ¶16, 287 Wis. 2d 699, 706 N.W.2d 166.

ARGUMENT

I. MR.CONIGLIARO'S REFUSAL WAS UNREASONABLE AS WAS
FOUND BY THE CIRCUIT COURT.

The trial court found that Mr. Conigliaro's refused based upon his initial non-response to Deputy Joseph LaGosh's initial request for him to submit to an evidentiary chemical test of his blood. (R.15:5/Defendant-Appellant App.5). This finding is predicated on the rationale of **State v. Neitzel**, 95 Wis.2d 191, 205-06, 289 N.W.2d 828, 836 (1980). The trial court also deemed Mr. Conigliaro's second non-response to the question as a refusal. (R.15:5/Defendant-Appellant App.5).

Mr. Conigliaro argues that his refusal was predicated upon the deputy's implication that Mr. Conigliaro had a right to an attorney," thus, there should not have been a finding of improper refusal. Mr. Conigliaro points to **In re Verkler**, 2003 WI App 37, 260 Wis. 2d 391, 659 N.W. 2d 137 and **State v. Reitter**, 227 Wis.2d 213, 595 N.W.2d 646 (1999), as the basis for his argument that no refusal occurred because Mr. Conigliaro believed he had a right to counsel. Mr. Conigliaro alleges that because the deputy here "did nothing to assure Mr. Conigliaro knew he was not entitled to the advice of counsel prior to deciding about

chemical testing," the narrow exception from **Reitter** was triggered. (Brief of Defendant-Appellant, p. 14). The "narrow exception" which is explained in **Reitter** as the three-pronged test, placing the burden on the defendant to show that: (1) the officer either failed to meet or exceeded his or her duty to inform the accused driver; (2) the lack or oversupply of information misled the accused driver; and (3) the officer's failure to inform the driver affected the driver's ability to make a choice about submitting to the chemical, test. **Reitter**, 227 Wis. 2d at 233. Here, Mr. Conigliaro fails at each prong of the test.

The first inquiry is whether the defendant was "told he has the right to consult with counsel before deciding to submit to chemical testing." **State v. Kliss**, 2007 WI App 13, ¶13, 298 Wis. 2d 275, 728 N.W.2d 9 (2006). There is no indication in the record testified to by the deputy that he expressly informed the defendant of his right to counsel or that he failed to meet or exceeded his duty to inform. Mr. Conigliaro ignores in his brief his own testimony claiming the deputy informed him of his right to counsel while they were in the ambulance. (R.23:47-48/App.43-44).

Instead, Mr. Conigliaro argues in his brief that there was an oversupply of information to him, which was confusing. (Brief of Defendant-Appellant, p. 16.). There

was no oversupply of information to misled the accused driver in such a manner that the ability to choose to submit was affected. The deputy responded to Mr. Conigliaro's two requests to speak to an attorney as best he could without specifically saying there was no right to an attorney at this stage. The deputy told Mr. Conigliaro after the first non-response/question regarding obtaining an attorney by stating that he "could not give him legal advice, and [he] needed a yes or no answer to the question, and asked [Mr. Conigliaro] if he would submit to an evidentiary chemical test." (R.23:16/App.12). The deputy did not misstate any facts, and he clarified that he needed a yes or no response to his question, which was repeated. None of the information provided by the deputy implies Mr. Conigliaro has right to counsel at this stage.

This was the second request by the deputy, to which Mr. Conigliaro replied, "I think I need to consult with an attorney." (R.23:16/App.12). At this point, the deputy told Mr. Conigliaro that he could speak to an attorney "when all of this was done"; however, a yes or no response was needed to the deputy's question. (*Id.*). Again, the deputy's statement regarding "when all this is done" is not an implicit suggestion of the right to counsel. Mr. Conigliaro then responded no, and again stated that he

believed he needed to consult with an attorney. (*Id.*). At this point, the deputy proceeded with the refusal procedure, and Mr. Conigliaro was transported for medical treatment. (*Id.*).

Mr. Conigliaro was asked on three occasions to submit to an evidentiary chemical test to his blood, and, ultimately, he responded "no" to the deputy's request. Mr. Conigliaro attempts to oversell his confusion regarding a response to submit to an evidentiary test. As in *Verkler*, the deputy never "expressly assured or implicitly suggested a right to counsel." 260 Wis. 2d 391, ¶ 19, 659 N.W. 2d 137. Mr. Conigliaro argues that this must be the case, as the deputy attempts to dispel Mr. Conigliaro's belief by indicating Mr. Conigliaro could speak to one later after the task at hand was complete. (R.23:20/App.16).

The troubling part is that Mr. Conigliaro cannot even be certain if it was him or the deputy who brought up anything with regard to an attorney. (R.23:47-48/ App. 43-44). It is legal sleight of hand, asking a court to believe one version of events as described by Mr. Conigliaro and his level of belief that he had the right to counsel, when he himself indicates that he was "not all there when this was all going on either, you know." (R.23:50/App.46). The trial court specifically found the

testimony of the deputy to be more credible than that of Mr. Conigliaro. (R.15:2-3/Defendant-Appellant App.2-3).

Mr. Conigliaro also argues that the deputy construed his repeated requests for counsel as the basis for the refusal. (Brief of Defendant-Appellant, p. 13). It is clear that that there is an additional burden upon law enforcement to inform a driver that repeated requests for an attorney can amount to a refusal. **State v. Reitter**, 227 Wis.2d at 235. It is also apparent from the record that the deputy did not make this express statement. However, the deputy did not recognize Mr. Conigliaro's refusal as such until Mr. Conigliaro answered the question of submitting to an evidentiary chemical test with a "no" response. (R.23:33/ App.29).

CONCLUSION

For the reasons given, the County respectfully requests this Court affirm the trial court's finding that Mr. Conigliaro unreasonably refused a request under Wisconsin's Implied Consent Law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mandy A. Schepper", with a long horizontal flourish extending to the right.

Mandy A. Schepper
Assistant District Attorney
Washington County, Wisconsin
State Bar No. 1052580

Mailing Address:


484 Rolfs Avenue
West Bend, WI 53090
(262) 335-4311
(262) 335 - 4317 (FAX)

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 16 pages. The word count is 1,990 words.

Dated this 13th day of August, 2020.

Respectfully submitted,


Mandy A. Schepper
Assistant District Attorney
Washington County, Wisconsin
State Bar No. 1052580

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I further certify pursuant to § 809.19(b)(12)(f), Wis. Stat., that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Pursuant to § 809.80(3)(b), Wis. Stats., I hereby certify that on the 13th day of August, 2020, in the City of West Bend, Washington County, Wisconsin, I routed this brief to our office station in a properly enclosed postage-paid boxes the original and required copies of the Plaintiff-Respondent's Brief addressed to the court and the opposing party.

Dated this 13th day of August, 2020.

A handwritten signature in black ink, reading "Mandy A. Schepper", with a horizontal line drawn through the end of the signature.


Mandy A. Schepper
Assistant District Attorney
State Bar No. 1052580

APPENDIX CERTIFICATION

I hereby certified that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with sec. 809.19(2)(1) and that contains: (1) a table of contents; (2) relevant trial court record entries; (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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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 13th day of August, 2020.


Mandy A. Schepper
Assistant District Attorney
State Bar No. 1052580

APPENDIX