STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 23AP1707

VILLAGE OF BUTLER,

Plaintiff-Respondent,

vs.

BRANDON J HERNANDEZ

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED IN CIRCUIT COURT CASE NUMBER 22TR4349 ON SEPTEMBER 7. 2023 IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HON. LLOYD V. CARTER PRESIDING

Respectfully submitted,

BRANDON J HERNANDEZ,
Defendant-Appellant

MADELINE MONIEN, SBN: 1131555
Attorney for the Defendant-Appellant
Johnen & Holevoet Law Offices, LLC
316 W. Washington Avenue, Suite 225
Madison, WI 53703
(608) 229-1630

TABLE OF AUTHORITIES

PAGE

Cases Cited

STATEMENT OF ISSUES

I. DID MR. HERNANDEZ CONSENT TO HAVING HIS BLOOD DRAWN THROUGH RELEVANT WORDS, GESTURES, OR CONDUCT?

THE COURT ANSWERED NO.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT ON PUBLICATION

Defendant-appellant 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.

STATEMENT OF THE CASE

On June 21, 2022, Mr. Hernandez was cited for Refusal to Take Test for Intoxication After Arrest by Officer Joseph Benson of the Village of Butler Police Department. Officer Benson initially conducted a traffic stop of Mr. Hernandez's vehicle for allegedly improper lane deviation, driving below the speed limit, and driving with his hazard lights on. Refusal Hr'g. at 7. Following Standardized Field Sobriety tests and a Preliminary Breath Test, Officer Benson arrested Mr. Hernandez on suspicion of Operating While Intoxicated (OWI). Id. at 8-10. Following the arrest, Officer Benson read the Informing the Accused (ITA) form to Mr. Hernandez. Id. at 10-11. Mr. Hernandez expressed confusion, so Officer Benson read the ITA to Mr. Hernandez again. Id. at 12. After the second reading, Mr. Hernandez repeatedly said "I guess, yes" to the officers, and at no point did he say he would not consent to an evidentiary test. Id. at 15. Officer Benson deemed Mr. Hernandez's responses to constitute a refusal. Id. at 11. Officer Benson determined this despite Mr. Hernandez repeatedly saying that he consented to an evidentiary test. Id. at 12.

Officer Benson marked Mr. Hernandez as refusing the evidentiary test because he felt that Mr. Hernandez was not being "sincere." Id. at 13. Officer Benson felt that Mr. Hernandez might change his mind, which he worried could create an issue with the 3-hour time limit for conducting the evidentiary test. Id. Officer Benson therefore marked that Mr. Hernandez had refused the test, despite Mr. Hernandez's repeated verbal consent. At no point was Mr. Hernandez physically resistant, belligerent, or rude to the officers. Id. at 15.

After Officer Benson marked that Mr. Hernandez had refused, Mr. Hernandez again asserted "I said 'yes.'" Id. at 15.

Mr. Hernandez filed a request for a hearing on the revocation of his driving privileges July 26, 2023. The Refusal Hearing took place on September 7, 2023. Id. at 1. The court held that by asking further questions after the Informing the Accused form had been read and by answering "I guess, yes" rather than "yes," Mr. Hernandez had refused the evidentiary test. Id. at 22-23.

ARGUMENT

I. MR. HERNANDEZ CONSENTED BOTH THROUGH WORDS AND THROUGH WISCONSIN'S IMPLIED CONSENT STATUTE.

Mr. Hernandez clearly consented to an evidentiary test under Wisconsin law. "In determining whether consent was given, we employ a two-step process. First, we examine whether relevant words, gestures, or conduct supports a finding of consent. Second, we examine whether the consent was voluntarily given." State v. Mitchell, 2018 WI 84, ¶ 20 (internal citations excluded) (reversed on other grounds).

Further, "a person who operates a motor vehicle is deemed to have given consent to one or more tests of his or her blood, breath, or urine upon the request of a law enforcement officer if the person is arrested for a drunk driving offense." State v. Faust, 2004 WI 99, ¶ 28; State v. Krajewski, 2002 WI 97, ¶ 19. Implied consent "is no less sufficient consent than consent given by other means." State v. Brar, 2017 WI 73 ¶ 20. "An individual's consent given by virtue of driving on Wisconsin's roads, often referred to as implied consent, is one incarnation of consent by conduct." Id. at ¶ 21 "We reject the notion that

implied consent is a lesser form of consent. Implied consent is not a second-tier form of consent." Id. at ¶ 23. "Any analysis of a driver's consent under Wisconsin's implied consent law must begin with [the] presumption" that any driver who avails themselves of the roads of Wisconsin consents through conduct to a blood draw. Id. at ¶ 29. In Brar, the Wisconsin Supreme Court determined that Brar had consented to an evidentiary test when he said "of course" when asked if he would submit to an evidentiary test. The Court determined that by driving on Wisconsin roads Brar had impliedly consented to an evidentiary test, and that his answer "of course" to the ITA was a reaffirmation of his consent. Id. at 34-35.

The case law in Wisconsin is clear, and affirmatively demonstrates that withdrawals of consent must be unequivocal, and that ambiguous attempts at withdrawing consent do not actually withdraw consent. "An intent to withdraw consent must be made by an unequivocal act or statement." State v. Wantland, 2014 WI 58., at ¶ 33, citing United v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (quoting United States v. Gary, 369 F. 1024, 2026 (8th Cir. 2004); See also, State v. Reed, 2018 WI 109, at ¶ 79. Further, in analyzing whether consent has been withdrawn, the court in Wantland determined that, in referring to a briefcase found in the trunk of a car which was being searched, consent to search was not withdrawn due to ambiguity when the defendant asked the officer "got a warrant for that?" State v. Wantland, at ¶ 42-43. This standard was again applied in Brar, where the Court held that consent was not withdrawn by asking whether an officer needed a warrant for a blood draw. State v. Brar, at ¶ 36-37.

In this case, Mr. Hernandez impliedly consented through his conduct by driving on Wisconsin's roads, and actively consented through his affirmative language and actions.

After listening to the Informing the Accused, Mr. Hernandez told officers that he did not understand the form and asked several follow up questions, such as "I don't understand?" "What should I do?" "Can someone explain it to me?" Refusal Hr'g. at 18 The responding officers re-read the ITA to Mr. Hernandez. When officers asked Mr. Hernandez for his final answer, Mr. Hernandez responded "I guess, yes I guess yes." Id. During the entire interaction, Mr. Hernandez never said "no" or otherwise declined to submit to an evidentiary test. Id. During their interaction, Mr. Hernandez told officers he would consent to the evidentiary test at least three times prior to them marking him as a refusal. Id. Mr. Hernandez never said he did not consent to the blood test. Additionally, at no point did Mr. Hernandez become belligerent with officers, become physically resistant, or rude with officers. Id. His words and actions clearly demonstrated Mr. Hernandez consented to the test, and at no point did he unequivocally revoke that consent.

Therefore, by law, Mr. Hernandez voluntarily consented to have his blood drawn. By driving on Wisconsin roads Mr. Hernandez impliedly consented to an evidentiary test. Once he was read the ITA, Mr. Hernandez expressed confusion but ultimately agreed to the test. He repeatedly said "yes" when asked if he consented, and when officers mistakenly believed he had refused, Mr. Hernandez attempted to correct them. Mr. Hernandez's words and actions clearly reaffirmed his implied consent, and at no point did he unequivocally revoke that consent. For the above reasons, this Court should find that Mr. Hernandez did not refuse the evidentiary test.

II. THE CASES CITED BY THE PLAINTIFF DURING THE REFUSAL HEARING ARE EASILY DISTINGUISHABLE FROM THE PRESENT CASE AND WERE WRONGLY RELIED UPON BY THE CIRCUIT COURT.

At the refusal hearing, the prosecution relied heavily upon State v. Rydeski and County of Ozaukee v. Quelle, both those cases are easily distinguishable from this case and should not have been relied upon by the Circuit Court when making its determination. 214 Wis. 2d 101; 198 Wis. 2d 269 (Wis. Ct. App. 1995).

A. State v. Rydeski is distinguishable from the present case because Mr. Hernandez never revoked consent and was cooperative with officers throughout the stop.

In Rydeski, the defendant, Rydeski, initially agreed to submit to an evidentiary test and was transported to State Patrol headquarters to submit to an Intoxilyzer breath test. 214, Wis. 2d 101, 104. Once there, Rydeski repeatedly demanded to use the restroom and then refused to submit to the breath test until he used the restroom. Id. at 105. The officer subsequently marked Rydeski as a refusal and allowed him to use the restroom. Id. After the officer had already marked Rydeski as a refusal, Rydeski attempted to agree to take the evidentiary test. Id. The Court of Appeals held that a verbal refusal is not required, and that conduct can serve as the basis for a refusal. Id. at 106. The court held once a person has properly been read the ITA, they "must promptly submit or refuse to submit to the required test," and that "a person's refusal is conclusive" and not subject to recantation. Id. at 109. The court, however, did not define what promptly meant.

The distinctions between the present case and Rydeski are obvious. In the present case, Mr. Hernandez asked a handful of follow-up questions before ultimately stating that he consented to the evidentiary test. Mr. Hernandez was not uncooperative. Nor, did Mr. Hernandez condition his consent on his ability to do something, such as use the bathroom.

Mr. Hernandez, said "I guess yes." Not, "Yes, if.." This is clearly different from Rydeski, where the defendant initially agreed to an evidentiary test but subsequently refused to submit to the test unless he got to use the bathroom. Rydeski unequivocally revoked his consent through his words and conduct. Mr. Hernandez simply tried to understand the consequences of his consent and then ultimately consented. Additionally, the court in Rydeski concerned itself extensively with recantation of a refusal, recantation is unimportant in the present case because Officer Benson did not mark Mr. Hernandez down as a refusal until after he had agreed to the evidentiary test several times.

B. County of Ozaukee v. Quelle is not relevant to the present case as the defense does not argue that the Officer's were required to cure Mr. Hernandez's confusion about the ITA.

At the refusal hearing the prosecutor explicitly cited Quelle, and another unnamed case applying Quelle, arguing that inability to understand the ITA is not a defense to refusal. Refusal Hr'g. at 21-22. While the defense does not disagree with that interpretation of Quelle, it is irrelevant to the present case. The plaintiff simply argues that after reading the ITA the first time, Mr. Hernandez expressed confusion. Officer Benson chose to re-read the ITA to him and give him the benefit of the doubt. After the second reading Mr. Hernandez then repeatedly consented to the evidentiary test, but Officer Benson did not believe it was sincere, so he marked Mr. Hernandez as a refusal. Officer Benson did not mark a refusal because Mr. Hernandez was confused, nor does the defense argue that. Additionally, the facts in Quelle support the finding that Mr. Hernadez did consent. In Quelle, the officers not only read the form to the defendant, but they allowed her to ask follow-up questions

for 45 minutes and still deemed her to have consented. Quelle attempted to challenge the voluntariness of the consent with a confusion defense. But the Court of Appeals in Quelle still found that her consent was valid and voluntary despite that confusion. Mr. Hernandez asked questions because he did not understand the form. As Quelle found there is no duty for officers to cure confusion but confusion does not make a person's consent involuntary.

By driving on Wisconsin roads, Mr. Hernandez is presumed to have consented to the blood draw. For that presumption to be negated, Wisconsin case law requires that Mr. Hernandez, through words or actions unequivocally withdraw his consent. "Unequivocal" means, "Certain. Not doubtful. Without ambiguity. Clear, sincere; plain." Ballentine's Law Dictionary (2010). A defendant's questions regarding the process of a search do not rise to the level of an unequivocal revocation of consent. Therefore, the Circuit Court's ruling to the contrary is clearly erroneous.

CONCLUSION

Based on the above, the judgment of the court should be reversed, and this action should be remanded to the Circuit Court with instructions to rescind the 12- month revocation of Mr. Hernandez's license and dismiss the refusal charge.

Dated this Tenth Day of January, 2024.

Respectfully submitted,

Electronically signed by Madeline Monien

MADELINE MONIEN, SBN: 1131555
Attorney for the Defendant-Appellant
Johnen & Holevoet Law Offices, LLC
316 W. Washington Avenue, Suite 225
Madison, WI 53703
(608) 229-1630

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2,427 words.

Dated this Tenth of January, 2024.

Signed,

Electronically signed by Madeline Monien

MADELINE MONIEN, SBN: 1131555
Attorney for the Defendant-Appellant
Johnen & Holevoet Law Offices, LLC
316 W. Washington Avenue, Suite 225
Madison, WI 53703
(608) 229-1630