STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

Village of Butler
Plaintiff-Respondent

Appeal No. 12-AP-1707

vs.

Circuit Court Case No. 22-TR-4349

Brandon Hernandez
Defendants-Appellant

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE LLOYD V. CARTER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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Submitted by:

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ISSUE PRESENTED

Did the trial Court commit a reversible error by finding that the defendant, Brandon Hernandez refused to submit to an evidentiary chemical test of his blood?

Answer and brief summary:

No. The parties stipulated at the refusal hearing that the defendant was properly arrested for an OWI violation. Video of the arrest shows the arresting officer read the statutorily required Informing the Accused form, verbatim, twice and repeatedly asked for a yes or no response from the defendant. The defendant, however, responded not with an affirmative "yes" or "no" and instead responded with questions for approximately six minutes. After being told that his failure to provide a yes or no would be treated as a refusal, the defendant stated, "I guess yes". By refusing to promptly provide a response, the defendant refused to submit to the test by his conduct.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff—Respondent, Village of Butler, does not believe oral argument is necessary in this matter. The Village believes the appellate briefs as well as the record of the Circuit Court are sufficient for this Court to decide the only issue properly before this Court on appeal; namely the factual question of whether there was or was not a refusal to provide an evidentiary blood sample following a verbatim reading of the Informing the Accused form.

STATEMENT OF THE CASE

This is an appeal from a judgment entered on September 7, 2023, by the Waukesha County Circuit Court, the Lloyd V. Carter presiding determining that the defendant, Brandon Hernandez, had refused to provide an evidentiary sample of his blood following an arrest for operating while intoxicated. R. App. at 24 - 26. At the refusal hearing, the parties stipulated that Officer Benson had probable cause to stop Mr. Hernandez's vehicle and to arrest him for an OWI offense. Id. at 6. The sole contested issue was a factual question of whether or not Mr. Hernandez refused to provide a test sample. Id. Officer Benson's interactions with Mr. Hernandez on September 7, 2023, were captured by his department issued body camera and the relevant portion of that video was played at the refusal hearing and admitted into evidence by the court. Id. at 12 – 13.

Officer Benson's body camera video from September 7, 2023, showed that after the first reading of the informing the accused form, concluding with, "will you submit to an evidentiary chemical test of your blood?" Mr. Hernandez responded by stating, "what do you mean?" Mr. Hernandez asked multiple questions of the officers while failing to respond to whether or not he would submit to an evidentiary test. Id. at 12 – 13. Approximately two minutes after concluding reading the informing the accused and asking whether Mr. Hernandez would submit to the test and receiving no affirmative answer from Mr. Hernandez, the officers re-read the form. Following the second reading of the form, Mr. Hernandez again responded with questions rather than an affirmative answer.

After approximately two more minutes of questions from Mr. Hernandez and Mr. Hernandez being told repeatedly that the officers needed a "yes" or "no" response, Mr. Hernandez stated, "I guess yes." Id. at 12 – 13.

At the refusal hearing held on September 7, 2023, the court ruled that the failure to provide a distinct yes or no amounts to not being a "yes" and amounts to a refusal. Id. at 25.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT MR. HERNANDEZ REFUSED BY ACTION TO SUBMIT TO AN EVIDENTIARY CHEMICAL TEST OF HIS BLOOD.

The law in Wisconsin is clear. Upon reading the informing the accused form and asking an arrested subject whether or not they will provide an evidentiary sample of their breath, blood or urine, a person must promptly consent to or refuse the test. "The obligation of the accused is to take the test promptly or to refuse it promptly." *State v. Neitzel*, 95 Wis.2d 191, 205 (Wis. 1980). Further, "There is no obligation upon the law enforcement authorities to renew the offer to take the test, even though the time within which the test may be admissible the two-hour period after the arrest has not yet expired." *Id.* While the time period for admissibility of an evidentiary test may have changed since *Neitzel*, the obligation of person arrested for OWI and read the informing the accused form to promptly take or refuse the test has not. In the instant case, Mr. Hernandez neither promptly agreed to submit to the test nor refused with an affirmative "no".

Rather, his refusal came in the form of repeatedly peppering the officers with questions instead of an affirmative answer as to whether or not he would submit to the test.

The defendant's reliance on *State v. Brar*, 376 Wis.2d 685 (Wis. 2017), is inapposite. In *Brar*, the defendant attempted to suppress his blood test result by claiming that his response of, "of course" when asked whether he would submit to the test did not constitute consent. The court, correctly, held that his response did establish consent. Mr. Hernandez can point to no such definitive response in the record establishing his consent. Rather, he contends that by operating his motor vehicle on the roads of the state, he had impliedly consented to have his blood drawn and that he never unequivocally revoked that consent. Mr. Hernandez willfully ignores his multiple failures to respond to repeated requests for an affirmative answer.

That position has not been correct since the United States Supreme Court decided *Missouri v. McNeely*, 569 US 141 (2013) requiring a warrant for non-consensual blood draws. If Mr. Hernandez is correct that implied consent absent an unequivocal withdrawal is sufficient consent, then *McNeely* is incorrect and a warrant should not be required. If Mr. Hernandez is correct that implied consent absent an unequivocal withdrawal is sufficient, then there would be no need to read the informing the accused form prior to a test. If Mr. Hernandez is correct that implied consent absent an unequivocal withdrawal is sufficient, then any

driver arrested for OWI could simply remain silent indefinitely or ask the arresting officer unrelated question indefinitely to avoid a refusal.

The defendant's argument elides the fact that each and every time the officer asked for an affirmative response and Mr. Hernandez failed to provide one was a discrete and separate refusal. The officers were under no obligation to ask for an affirmative response multiple times or to read the informing the accused form more than once. The defendant imagines that each time the officers provided Mr. Hernandez with another opportunity to consent, they negated his prior refusal to do so. They did not. The defendant is attempting to turn the officers' patience and indulgence over the course of many minutes of equivocation and refusal to answer a simple yes or no question to his advantage. He should not be allowed to do so. Even if the officers had not deemed Mr. Hernandez's repeated refusals to provide an affirmative answer to constitute a refusal; had they transported him to the hospital and had he submitted to a blood draw, the undersigned village attorney would still have had the officers serve and file a notice of intent to revoke based upon his prior repeated refusals to promptly submit to or refuse an evidentiary test.

The Village concedes that the cases it cited at the refusal hearing, *County of Ozaukee v. Quelle*, 198 Wis.2d 269 (Wis. Ct. App. 1995) and *State v Rydeski*, 214 Wis.2d 101 (Wis. Ct. App. 1997), are factually distinguishable from the instant case. The cases were cited not necessarily for factual similarity with the instant matter but for the proposition that refusal need not be made verbally and rather can

be done through conduct or silence and that confusion over the informing the accused form is no defense to a refusal. Further, the Village also cited to *State v Rydeski*, 214 Wis.2d 101 (Wis. Ct. App. 1997) for the proposition that subsequent consent cannot cure a prior refusal because, in the instant case, Mr. Hernandez failed to respond to repeated requests for a yes or no answer for several minutes before providing an equivocal (at best) response of, "I guess yes". The *Rydeski* court stated, "[A] A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a "reasonable time," whether the recantation comes within the three-hour time period provided in § 885.235(1), Stats., or whether administering the test at a later time would inconvenience the officer or result in a loss of the test's evidentiary value. Therefore, Rydeski's willingness to submit to the test, subsequent to his earlier refusal, does not cure the refusal." *Id.* at 109. Mr. Hernandez's eventual, equivocal statement of, "I guess yes" did not cure his prior refusals to respond affirmatively to the officer's requests and his earlier refusals would have been prosecuted even if he had eventually submitted to the requested test.

CONCLUSION

The circuit court correctly determined that Mr. Hernandez's multiple minutes of questioning and equivocating constituted a refusal by action. The law is clear that anything other than a prompt yes when asked to submit to an evidentiary chemical test constitutes a refusal. This court need only review the

very brief exhibit admitted at the September 7, 2023, refusal hearing to see that for itself. The Village of Butler respectfully requests that this Court affirm the circuit court's finding of an improper refusal.

Dated this 11th day of February, 2024.

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Electronically signed by

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CERTIFICATION AS TO FORM / LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b), (bm) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9 pages, 1,572 words.

Dated this 11th day of March 2024.

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