STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 23AP1707

VILLAGE OF BUTLER,

Plaintiff-Respondent,

vs.

BRANDON J HERNANDEZ

Defendant-Appellant.

REPLY 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

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STATEMENT OF THE CASE

The Defendant includes this section to highlight facts that are particularly important to this Reply Brief. 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. Refusal Hr'g. at 7. Officer Benson initially conducted a traffic stop of Mr. Hernandez's vehicle for allegedly improper lane deviation and ultimately placed him under arrest for suspected OWI. Id. Following the arrest, Officer Benson read the Informing the Accused ("ITA") form to Mr. Hernandez and asked him to consent to an evidentiary blood test. Id. at 12. Mr. Hernandez asked, "What do you mean?" Officer Benson reread the ITA to Mr. Hernandez. Id. at 10-12. After the second reading, Officer Benson asked Mr. Hernandez again whether he would submit to an evidentiary blood test. Id. at 15. Mr. Hernandez repeatedly said "I guess, yes" in response. Id. Mr. Hernandez at no point said he was unwilling to submit to a blood test. Id. But Officer Benson marked Mr. Hernandez as a refusal because he felt that Mr. Hernandez's responses were not "sincere." Id. at 13. 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 a hearing on the matter, the trial court ruled that by asking further questions about the ITA after it 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. THE PLAINTIFF'S ARGUMENT THAT FAILING TO IMMEDIATELY RESPOND TO THE INFORMING THE ACCUSED FORM SHOULD BE COUNSTRUED AS A REFUSAL IS A MISTATEMENT OF THE LAW.

The Plaintiff's reliance on Neitzel in arguing that Mr. Hernandez committed a refusal by asking a handful of questions following an initial reading of the Informing the Accused form is improper because Neitzel did not create a rule of that kind.

In their brief, the Plaintiff argues in essence that upon being read the Informing the Accused form ("ITA"), a defendant can ask no questions, cannot be reread the form, and they are obligated to immediately respond "yes," else they are guilty of a refusal. This is clearly at odds with common practice and the decisions of the courts of Wisconsin.

The Plaintiff quotes Neitzel, which states that a person arrested for an OWI is obligated to take an evidentiary test "promptly or to refuse it promptly." State v. Neitzel, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980). In using this, the Plaintiff argues that by not promptly responding "yes" to the first reading of the ITA, Mr. Hernandez had committed a refusal. That argument, however, ignores the actual context of the Court's finding in Neitzel. In Neitzel, the defendant was read the ITA multiple times and had the consequences of a refusal explained to him by multiple officers. Id. at 206. The defendant then repeatedly demanded to speak to his attorney, called his attorney, and stated he refused to take the test unless he could be advised

by his attorney. Id. at 205. The Court ruled that by agreeing to take the test only on the condition that he be able to be advised by his attorney, the defendant had committed a refusal. Id. The facts of Neitzel are clearly distinguishable from the present case, where Mr. Hernandez simply asked, "What do you mean?" and at no point made a conditional refusal or any other refusal. Refusal Hr'g. at 18.

Additionally, as previously stated, the defendant in Neitzel was read the ITA multiple times and had it repeatedly explained to him. In its ruling, the Court at no point stated that the defendant had committed a refusal simply by not responding yes to the first reading. State v. Neitzel, 95 Wis. 2d 191, 206 (1980). If Neitzel had intended to announce that *any* response, other than immediate an "yes," to the first reading of the ITA was grounds to find a refusal then surely the Supreme Court would have explicitly stated that. Further, refusal hearings since 1980 would be open and shut cases in light of such a clear rule. However, we do not see that trend because no such rule was created.

For example, in State v. Reitter, the Supreme Court was asked whether a defendant, by repeatedly asking for his attorney, had committed a refusal under the Implied Consent Statute. 227 Wis. 2d 213, 595 N.W.2d 646 (1999). The defendant in Reitter was read the ITA by one officer, who then asked *five times* if he would submit to an evidentiary breath test, in response the defendant asked for his attorney. Id. at 220-221. The defendant was next asked by another officer multiple times to submit to the test and repeatedly warned about the consequences of a refusal. Id. The defendant, however, continued to demand to speak to his attorney and acted in

an uncooperative manner. Id. The Court found that the defendant's conduct, and his refusal to answer the ITA after repeated readings, constituted an unlawful refusal. Id. at 236. The Court ruled that "even when a defendant claims confusion about the provisions of the [ITA] form, repeated readings of its clear and unequivocal language trump a confusion defense." Id. at 229 (internal citations excluded). The Court decision in Reitter clearly demonstrates that it did not rule in Neitzel that any response other than an immediate "yes" to the initial reading of the ITA is a refusal. Because if it had ruled that, the Court could have simply pointed to the defendant's failure to respond to the first reading of the ITA and moved along. Instead, the Court did an extensive analysis of confusion doctrine and inquired into the defendant's conduct. Id. Additionally, in Reitter the Court explicitly noted that there may be "repeated readings" of the ITA, and no where does it mention that this fact alone would constitute a refusal. Id.

This would all imply that the Plaintiff's argument is false, and that the Supreme Court in Neitzel did not create a rule that forbade defendants from asking follow-up questions or being read the ITA multiple times or else they be guilty of a refusal. Mr. Hernandez's initial questions about what the ITA meant did not constitute a refusal. Because the facts of Neitzel do not apply to this case, and because the Court did not create the rule the Plaintiff insists it did, the Plaintiff's argument should be rejected by this Court.

II. THE PLAINTIFF'S ARGUMENT THAT MR. HERNANDEZ DID NOT CONSENT BY SAYING "YES, I GUESS" IS ERRONEOUS.

Mr. Hernandez's words and actions clearly granted the officers consent to conduct a blood draw.

In their brief, the Plaintiff repeatedly states that by saying "I guess, yes" to the ITA, Mr. Hernandez failed to give consent to the officers to conduct an evidentiary blood draw. This argument is clearly wrong. It has previously been held that verbal consent to a search is not required, and that it "may be in the form of words, gesture, or conduct." State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). The Supreme Court has also previously relied on the Federal Second Circuit's ruling that to give consent a person need not "recite the talismanic phrase: 'You have my permission to search.'" State v. Brar, 2017 WI 73, ¶18, 376 Wis. 2d 685, 898 N.W.2d 499, citing United States v. Buettner-Janusch, 646 F.2d 759, 764 (2d Cir. 1981). And driving on Wisconsin roads is an indicator of consent by conduct. State v. Brar, 2017 WI 73, ¶21.

By saying "I guess, yes," Mr. Hernandez consented through his words. And by driving on Wisconsin roads, Mr. Hernandez consented through his conduct. Additionally, there were no words or conduct that would demonstrate a refusal to consent to the blood draw. In this case the words and conduct of Mr. Hernandez combined to grant officers consent to conduct a blood draw.

For the above reasons, this Court should find that Mr. Hernandez consented to the evidentiary search of his blood.

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 Twenty-Sixth Day of March 2024.

Respectfully submitted,

Electronically signed by Madeline Monien
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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 10 pages, 1726 words.

Dated this Twenty-Sixth Day of March 2024.

Signed,

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