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STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
D I S T R I C T I V

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Case No. 2025AP000392  
Circuit Court Case No. 2022TR000292

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

JEFFREY LEE BUSS,  
Defendant-Appellant.

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**BRIEF OF THE PLAINTIFF-RESPONDENT**

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ON APPEAL FROM THE CIRCUIT COURT  
FOR DODGE COUNTY, BRANCH 3,  
THE HONORABLE JOSEPH G. SCIASCIA PRESIDING

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### **ISSUE PRESENTED**

Whether Jeffrey Buss refused an evidentiary chemical test of his breath by his conduct and through his silence?

This Court should answer: Yes.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State neither requests oral argument nor publication. The parties have fully developed the arguments in their briefs and the issue presented involves the application of well-settled legal principles to the facts.

### **STATEMENT OF THE CASE**

Jeffrey Buss was cited for Refusal, in violation of Wisconsin Statute section 343.305(9)(a), after his arrest for operating a motor vehicle while under the influence of an intoxicant (OWI) on January 14, 2022 in the Town of Oak Grove, Dodge County, Wisconsin.

On January 14, 2022, at approximately 11:30 PM, Sergeant Jermey Wolfe of the Dodge County Sheriff's Office was driving northbound on State Highway 26 nearing County Road S, south of Juneau in the Town of Oak Grove, when he observed a pickup truck turn north in front of his squad from County Road S. As he

was following the truck, he observed the driver-side tires ride on the centerline as the road curved to the right. When the truck got to the left turn lane for Western Avenue, the truck straddled the lane divider. After the truck drove through the intersection, the driver-side tires were entirely in the left turn lane for traffic that was turning left on to Western Avenue from southbound State Highway 26. Sgt. Wolfe initiated a traffic stop on the truck.

Sgt. Wolfe identified the driver verbally as Jeffrey L. Buss and later confirmed his identity with a Wisconsin Department of Transportation (WI DOT) photo. While speaking with him, Sgt. Wolfe observed that Buss' pupils were bloodshot, that his speech was slurred, and that the odor of alcoholic beverages was coming from his breath.

Sgt. Wolfe asked Buss to perform Standardized Field Sobriety Tests (SFSTs). Buss was somewhat uncooperative during the SFSTs. Buss was able to follow directions during the Horizontal Gaze Nystagmus (HGN) test and showed 6/6 indicators of impairment. However, during the HGN test, Buss asked "Why do I have to do this?" (R. 13) Buss further stated, "You wanna gimme a blood test and sobriety or a blow in the thing. That's all I'm

supposed to do.” (R. 13) Buss continued on saying, “This is bull shit. You guys can’t even do it.” (R. 13) Sgt. Wolfe then asked Buss to perform the divided attention skills tests. Buss declined to perform the Walk and Turn and One Leg Stand tests, indicating, “I told you I don’t have to do this. You give me a blood test,” “I ain’t gonna do that,” and “What the hell? What did I do wrong?” (R. 13)

Subsequently, Buss provided a preliminary breath test (PBT) sample of .139. Based on Sgt. Wolfe’s observations of Buss’ driving, his person, the results of HGN test, and his refusal to perform the remaining SFSTs, Sgt. Wolfe opined Buss’ ability to operate a motor vehicle was substantially impaired. Sgt. Wolfe arrested Buss and issued him a citation for OWI 3<sup>rd</sup>.

In accordance with the Implied Consent Law, Sgt. Wolfe read Buss the Informing the Accused Form (ITAF) verbatim. Wis. Stat. § 343.305(4). (R. 12) Sgt. Wolfe asked Buss, “Will you submit to an evidentiary chemical test of your breath?” (R. 12, 13) Buss did not respond. (R. 13) Sgt. Wolfe inquired again, “Yes or no? Jeff? Yes or no? Jeff, if you don't say yes or no, I'm gonna mark you as a refusal. You understand that?” Buss quietly mumbled, "I don't give a fuck what you do." (R. 13) Sgt. Wolfe yet again attempts to

elicit a verbal yes or no response from Buss, “Okay. So you’re not gonna say yes or no.” (R. 13) After approximately 30 seconds of Buss remaining silent, Sgt. Wolfe inquires a final time, “So is that a yes? You’ll take the test or no, you’re not gonna answer?” (R. 13) Buss remained silent. (R. 13) Sgt. Wolfe next completed an affidavit (Ex. 3, R. 14) for a search warrant (R. 16) for a sample of Buss’ blood, which was granted by Court Commissioner Seim. (R. 14, 15, 16)

### ARGUMENT

**Buss refused an evidentiary chemical test of his breath by his conduct and through his silence.**

Buss was adequately informed of his rights and consequences under the Implied Consent Law, and refused to submit to an evidentiary chemical testing of his breath, where a search warrant was then sought in compliance with the Fourth Amendment.

Under Wisconsin law, a law enforcement officer has the authority to conduct an OWI investigation. Wis. Stat. § 346.63. A law enforcement officer is required to read the ITAF to an arrestee prior to a blood draw. Wis. Stat. § 343.305(4); see also *State v. Padley*, 2014 WI App 65, ¶ 30, 354 Wis. 2d 545, 849 N.W.2d 867

(“...when an officer requests that a driver submit to a test...the officer is statutorily required to read to the driver a corresponding “Informing the Accused” form”); see also *State v. Prado*, 2021 WI 64, ¶ 22, 397 Wis. 2d 719, 960 N.W.2d 869 (“[t]he [informing the accused] form is designed to inform drivers of the rights and penalties applicable to them”). An officer is required to follow Wisconsin Statute section 343.305(9) for blood draw refusals. Wis. Stat. § 343.305(9). If an arrestee refuses a blood draw, an officer is required to follow search warrant procedure for OWI crimes. Wis. Stat. § 968.13(b).

The Implied Consent Law “...gives those who are capable of responding a choice: submit to the test and risk that the results are presented in court, or refuse the test and face license revocation and other civil penalties.” *State v. Prado*, 2021 WI 64, ¶ 23. In other words, the Implied Consent Law requires “actual consent” in order to comply with the Fourth Amendment. *State v. Prado*, 2021 WI 64, ¶¶ 44, 46; see also *Id.* ¶ 46 (“[t]he constitution requires actual consent, not ‘deemed’ consent. Indeed, consent for purposes of a Fourth Amendment search must be ‘unequivocal and specific.’”).



There is a clear distinction between “actual” consent and consent “deemed” by the statute, as the latter does not comply with the Fourth Amendment. *Id.* ¶ 53 (“[t]o the extent *Wintlend* rested on a premise that a driver consents to a search through the simple act of applying for a driver’s license, **it must be overruled. Such a conclusion does not take into account the constitutionally significant difference between ‘deemed’ and actual consent...**”) (emphasis added). In considering whether constitutionally sufficient consent is present, a court can consider the defendant’s words, gestures, or conduct. *Id.* ¶ 44. A person who **does not want to consent** to an evidentiary chemical test of his blood **has the constitutional right to refuse** the “search absent a warrant or an applicable exception to the warrant requirement”. *Id.* ¶ 47 (emphasis added).

In *State v. Prado*, the court held that a specific provision of the Implied Consent Law which allowed law enforcement to conduct a warrantless blood draw of an incapacitated individual, was unconstitutional beyond a reasonable doubt because of the lack of “actual consent”. *Id.* ¶¶ 3, 41. The court emphasized that an

incapacitated individual cannot give the “actual consent” required by the Fourth Amendment. *Id.* ¶ 46.

The court of appeals has confirmed that a person is not subject to a mandatory blood draw and thus relinquishing their Fourth Amendment protection, simply because they have chosen to get a driver’s license:

There are two consent issues in play when an officer relies on the implied consent law. The first begins with the “implied consent” to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. **The existence of this “implied consent” does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized.**

*State v. Padley*, 2014 WI App 65 ¶ 26, 354 Wis. 2d 545, 849 N.W.2d 867 (emphasis added).

Here, Buss only emphasizes one level of consent of the Implied Consent Law and misconstrues it. Buss ignores that, like every other person who has been issued a license to drive on a public highway, **he had the choice to refuse or consent to an** evidentiary chemical testing of his blood, breath, or urine following

being informed of his rights and the consequences outlined in the ITAF. Unlike Prado, who was **incapacitated** and **could not give “actual consent,”** Buss was completely conscious and could give actual consent. However, Buss chose to not answer Sgt. Wolfe’s questions by refusing to reply with a “yes” or “no.”

An operator is obliged to promptly take or refuse an evidentiary chemical test. *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). However, a verbal refusal to submit to a blood alcohol test is not required to find a refusal, as conduct may also serve as the basis for finding a refusal. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997); see also *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 366 N.W.2d 506 (Ct. App. 1985). “Conduct that is ‘uncooperative’ or that prevents an officer from obtaining a breath sample results in refusal.” *State v. Reitter*, 227 Wis. 2d 213, 234, 595 N.W.2d 646, 657 (1999).

In *State v. Rydeski*, the defendant was arrested for OWI and was transported to the police station for an evidentiary chemical testing of his breath. *State v. Rydeski*, 214 Wis. 2d at 104. The defendant initially provided verbal consent to submit to the breath test. *Id.* The defendant then continued to ask to use the restroom

during the 20-minute observational period despite the officer advising that he can go after the testing was done. *Id.* at 104-105. Because of the defendant's continued insistence on needing to use the bathroom and leaving the test to do so, the officer determined that the defendant refused testing. *Id.* at 105. The Wisconsin Court of Appeals agreed, concluding the defendant's "uncooperative conduct constituted a refusal." *Id.* at 106.

Similarly, in *Village of Elkhart Lake v. Borzyskowski*, the defendant was arrested for OWI and transported to the police station for an evidentiary chemical testing of his breath. *Vill. of Elkhart Lake v. Borzyskowski* at 188, 190. This defendant also initially provided consent for testing. *Id.* The officer attempted multiple times to obtain a breath sample but was unsuccessful because the defendant did not take proper deep breaths, was allowing air escape from the mouthpiece, and broke the mouthpiece. *Id.* at 190-191. The officer determined that the defendant refused testing. *Id.* at 191. Again, the Wisconsin Court of Appeals agreed, concluding that the defendant's uncooperative conduct was a refusal, stating "[w]hile it is true that Borzyskowski did not verbally refuse to take the test, his conduct effectively

prevented Officer Sertich from obtaining an accurate breath sample and therefore demonstrated a refusal to take the test.” *Id.* at 191.

Here, Buss’ silence **cannot** reasonably be construed as consent. Just as the *Rydeski* and *Borzyskowski* defendants’ uncooperative actions were determined to be refusals by this Court, Buss’ silence and uncooperative conduct was also a refusal. The law requires Buss to promptly accept or refuse evidentiary chemical testing and he refused by choosing to remain silent after being repeatedly asked for his answer. There is no existing statute or case law that creates an obligation for the officers to continue to asking an arrested operator multiple times for an explicit verbal response. Yet, Sgt. Wolfe did ask Buss multiple times. In fact, Sgt. Wolfe asked Buss 4-5 times whether he would submit to evidentiary testing; however, Buss refused to provide a response. The only words that Buss spoke after he was asked whether he would submit to testing was practically inaudible. Buss muttered, “I don’t give a fuck what you do.” No reasonable law enforcement officer would have interpreted that statement as consent, especially when combined with Buss’ silent periods after being

asked multiple times and his off-putting behavior during the SFSTs.

Lest we forget, Buss was uncooperative with Sgt. Wolfe during the SFSTs. When asked to perform the divided attention skills tests, Buss refused. Any time Sgt. Wolfe requested something of Buss, Buss offered his own suggestion or declaration that he did not have to do anything. Buss tried to control the situation. Accordingly, when Sgt. Wolfe asked whether he would submit to an evidentiary chemical test of his breath, Buss declined to respond. Based on the totality of the circumstances, Buss refused to consent to an evidentiary chemical test of his breath by choosing not to respond.

Buss' Fourth Amendment rights were not violated. Buss was adequately informed of his rights and consequences under the Implied Consent Law at the time the officer read him the ITAF in compliance with Wisconsin law. In fact, just as mentioned above, Buss was asked multiple times whether he would submit to evidentiary testing of his breath in which he refused to answer every single time.

Interestingly enough, Buss previously filed the same Motion to Dismiss Refusal Charge in his other open Dodge County Circuit Court Case no. 2022CT000140. The Honorable Judge Joseph G. Sciascia, Dodge County Circuit Court Branch 3, denied Buss' motion in a written decision dated May 9, 2023. (R. 25) Judge Sciascia highlighted the Wisconsin Supreme Court decision in *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), holding that a verbal refusal is not necessary and the defendant's conduct may constitute an unlawful refusal.

### CONCLUSION

For the above reasons, this Court should affirm the circuit court's finding that the Refusal was unjustified.

Dated this 24th day of July, 2025.

Respectfully submitted,



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### CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2,280 words.

Dated this 24<sup>th</sup> day of July, 2025.

  

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